LAW AND SOCIETY: A DIFFERENT APPROACH TO LEGAL EDUCATION

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"This profession, more than any other, requires an enlarged acquaintance with human nature—a knowledge not to be gained but by philosophical study. It also demands an extensive knowledge of the various arts which constitute the occupations of mankind, and, of course, give rise to a great proportion of those legal questions which occupy Courts of Justice."[1]

"If your subject is law the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and this by several paths to your final view of life."[2]

Edmund Burke once said that law sharpened the mind by narrowing it. It is my contention that much legal education in Australia has this outcome, and that consequently what is needed is a different approach: one that combines a basic training in legal skills with an appreciation of the role of law and of lawyers in society. In the first part of the paper, I briefly analyse the origin and nature of the two dominant strands of legal education which have taken root in Australia. Following this, I consider the suggestion that legal education should be more skills-oriented, and here reference is made to the role of clinical legal education. The final part of the paper examines an alternative approach to legal education which places the law in the context of its operation.

THE DOMINANT STRANDS

The Expository Tradition

Law in England was always regarded as a practical subject, to be picked up while actually working at it. Blackstone challenged the idea with his *Commentaries on the Laws of England* (1765-1769), but it was not until the second part of the nineteenth century that modern law became a separate university subject.[3] Until very recently, many English lawyers

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1 *Report of the Committee of the Faculty of Advocates on Qualification of Intrants* (Scotland 1854) p. 51.

2 O. W. Holmes, *Speeches* (1896) p. 23.

3 *Report of the Committee on Legal Education* (1971) Cmnd. 4595, pp. 3-5 [hereafter *Ormrod Report*].

were trained wholly outside the universities through courses given by the professional bodies and private crammers.[4] It is still the case that a law degree is only the first step to qualification in England, for prospective lawyers must spend a further period completing professional examinations before they can be admitted to practice. The dominant method of legal education in England, which I call the expository tradition, involves a close analysis of the rules developed by the courts. Students are given lectures, supplemented by tutorials (to plug some of the gaps), introducing them to the broad principles of a particular subject with potted versions of the leading cases, which they are then expected to follow up themselves.[5] English textbooks evolved reflecting the approach: early examples are Anson on Contract and Salmond on Tort.[6] Lecturing, note-taking, memorizing and regurgitation in written examinations are the hallmark of the expository approach.

The expository tradition is not as unintellectual as suggested, although learning tends to take precedence over thinking. The better institutions teach students the tools of legal analysis—thought, reasoning and the application of principles to new situations. Overall, however, the expository tradition leads to a form of legal training where teachers and students are mainly concerned with "chopping logic with judges and parsing their opinions".[7] The boundary between legal and non-legal matters is strictly drawn, and lawyers trained in the expository tradition profess a strict celibacy when it comes to temptations such as policy.

The expository tradition was transplanted to Australia with English legal academics to expound it, when Sydney and Melbourne established law schools in the later part of the nineteenth century.[8] An important difference compared with England, however, has been that the profession has never been able to establish its own training on a firm basis because of its small size and the fragmentation among the different states. Australian law schools have thus been obliged to fuse academic and practical training, with the latter often setting the tone for the whole institution.[9] Law

[4] See R. H. Kersley, *Gibson's 1876-1962* (1973) (on the Crammers Gibson and Weldon).

[5] Of course, there are variations: Oxbridge has always emphasized college tutorials: F. H. Lawson, *The Oxford Law School 1850-1965* (Oxford: Clarendon Press, 1968) pp. 6-7, 46.

[6] First editions 1879 and 1907 respectively. An earlier work on Torts, C. S. Kenny, *A Selection of Cases Illustrative of the English Law of Tort* (Cambridge, 1904) is now forgotten. Paul Finn has drawn my attention to C. G. Addison, *Wrongs and their Remedies, Being a Treatise on the Law of Torts* 1st ed. 1860, also forgotten.

[7] To adopt Miller's colorful language: A. S. Miller, "Public Confidence in the Judiciary: Some Notes and Reflections" (1970) 35 *L. and Contemp. Prob.* 69, 77.

[8] On Sydney: University of Sydney, *Law Handbook* (1976) pp. 4-5. On Melbourne: R. Campbell, *A History of the Melbourne Law School 1857 to 1973* (Melbourne: Faculty of Law, University of Melbourne, 1977) pp. 6, 108, 126.

[9] Especially since articled clerks could attain their professional qualification by passing a number of university subjects.

teachers claim to combine the two, but in fact have much less room for manoeuvre than their English counterparts.

The Martin Report advocated that Australian universities should be more concerned wth legal scholarship than legal practice,[10] but it is clear that Australian legal academics have seen their primary aim as teaching practitioners.[11] Certainly this is still true of the long established schools, but less true of places like A.N.U. with its large public servant component, and of some of the newer law schools which seem to strive for a wider perspective. With the over-supply of law graduates, no doubt a greater number of graduates will enter business and government, and for these people the traditional law school approaches and curricula provide an inadequate training.

One of the few concessions to the notion of scholarship was the requirement, now being abandoned, that law students should complete several Arts subjects in their law degree, and should undertake compulsory courses in legal history and jurisprudence.[12] Combined degree courses, which have been very common in Australian law schools, have some merit in giving a student a broader background, but in so few cases is there an inter-disciplinary emphasis that the techniques of thinking about law remain largely uninfluenced by the study of another discipline.

The Case Method

The case method of legal education was developed to the height of sophistication by Christopher Columbus Langdell, who was Dean of the Harvard Law School at the turn of the present century. Langdell took the view that law was a matter of studying the cases; just as scientists proceeded from the particular to the general, so the law student had to start with the cases and then proceed to formulate principles.[13] Quite apart from a misunderstanding of the scientific process the Langdellian method,[14] like the expository tradition, focusses largely on only one aspect of law—the decisions of mainly appellate courts. However, the case method took root as Harvard graduates multiplied and went out to populate American law schools. When, after World War II, Australian law graduates and teachers began visiting and studying at United States law schools, rather than British universites, they brought back to Australia the case method

[10] *Report of the Committee on the Future of Tertiary Education in Australia* (1964) vol. 2, p. 56.

[11] E.g., J. Peden, "The Role of Practical Training in Legal Education: American and Australian Experience" (1972) 24 *J. of Legal Ed.* 503.

[12] See O. M. Roe, "Jethro Brown: The First Teacher of Law and History in the University of Tasmania" (1977) 5 *U. Tasmania L. Rev.* 209, 223.

[13] See A. J. Harno, *Legal Education in the United States* (1953) pp. 51-70; A. E. Sutherland, *The Law at Harvard* (Cambridge: Harvard University Press, 1967) pp. 162-205.

[14] Science proceeds by a constant interaction of theory and empirical research: induction *and* deduction. Note also that when Langdell spoke of research he meant library research not empirical research.

and the so-called Socratic technique of teaching it. Legal academics in Australia began producing "Cases and Materials", and new law school buildings adopted the Harvard architecture of rounded lecture theatres for the purposes of Socratic dialogue.[15] Adherents to the case method expect students to study judgments beforehand for discussion in class, instead of relying on them to provide a framework and a summary of the cases.[16] In 1971, Professor Zines explained the case method to new law students of the Australian National University in these terms

> "[It] will irritate those who are interested in discussing and arguing problems without having first made a close, and at times tedious, study of many actual cases, which are the raw material of legal research and legal principles."[17]

At some stage in their course law students should be faced with the problem of making "a close, and at times tedious, study of many actual cases" but, as I argue below, if this is all that they do their time is ill-spent.

The case method has been justified on various grounds. Cases have always featured prominently in Anglo-American Law, in contrast to the Franco-German system where Codes are pivotal. The expanding body of case-law, particularly in the United States, necessitates an emphasis on learning technique, rather than on substantive knowledge which is constantly changing. Case technique is what law teachers usually mean when they speak of teaching students to "think like lawyers". The Socratic method of case-teaching, whereby teacher and students engage in a joint examination of the principles of cases, is supposedly more satisfying and provides a greater intellectual challenge than situations where students sit passively scribbling down lecture notes which must then be rote learnt. In practical terms, the case method is a more economical method of staff-student contact than through tutorials.

An Evaluation

The expository tradition and the case method are both deficient in that they focus largely on case-law. Not only are cases but one aspect of law,

[15] W. L. Morison (Senior Fellow at Yale in the fifties) *Cases on Torts* (1st ed., Sydney: Law Book Co., 1955); H. A. J. Ford (S.J.D. Harvard 1957) *Cases on Trusts* (1st ed., Sydney: Law Book Co., 1959); R. Sackville (LL.M. Yale 1966) *Property Law Cases and Materials* (1st ed., Sydney: Butterworths, 1971); E. J. Edwards (S.J.D. Northwestern 1964) *Cases on Evidence* (1st ed., Sydney: Law Book Co., 1968); David Hambly (LL.M. Harvard 1964) and J. Neville Turner, *Cases and Materials on Australian Family Law* (Sydney: Law Book Co., 1971). But there seems no direct American influence on works such as G. Sawer, *Cases on the Constitution of the Commonwealth of Australia* (1st ed., Sydney: Law Book Co., 1947) and W. N. L. Harrison, *Cases on Land Law* (1st ed., Sydney: Law Book Co., 1958). It is also important to note that case-books have been produced in Australia for the very practical reason of reducing wear and tear on the law reports.

[16] F. K. H. Maher *et al., Cases and Materials on the Legal Process* (2nd ed., Sydney: Law Book Co., 1971) p. 3.

[17] L. Zines, *The Study of Law* (1971) p. 23.

but the cases studied are unrepresentative of those which go to trial. Albie Sachs puts the matter thus

> "Discussion centres principally on rules derived from reported cases, which by definition are precisely those cases that centre on borderline or peripheral matters. The law reports contain an unrepresentative sample . . . (particularly in civil matters) of cases initiated; and the cases actually initiated are few in comparison with the disputes settled informally. Law students thus become expert on the largely irrelevant and unusual penumbra areas of legal disputation without having much knowledge of the core of everyday legal activity."[18]

Legislation is now assuming a central place in law as we move towards what Tay and Kamenka call bureaucratic-administrative regulation.[19] Whether it be in contract, torts, commercial law or other areas, legislation is now tending to set the broad principles, with the courts frequently confined to a marginal role. In these circumstances, to concentrate on cases, or to study legislation simply through the cases, is adopting a perspective out of keeping with reality. A corollary of this development is that the requisite technique for lawyers is changing; interpreting legislation is as important as extracting the principle of a case.

The expository tradition and the case method also have a narrowing effect on legal studies, for although they involve criticism of judicial decisions, this tends to proceed on legal grounds. A case may be criticized as badly decided because its reasoning is inconsistent or it ignores an authority or an important argument, but is less likely to be criticized because it is unjust or because it conflicts with some social, commercial or other public policy.[20] Furthermore, criticism contains the defect referred to in the previous paragraph—the supposition that what the judges say is crucial. In other words, the expository tradition and the case method confine students within the existing system and discourage them from a broader and more critical stance. Not only would the latter be regarded as "unlawyer-like", but it would involve the introduction of non-legal materials.[21]

A closely related point is that cases can distort the student's vision by positing a world where lawyers are mainly serving government and business. (It may be pointed out to students that even disputes which ostensibly involve an individual, e.g. a negligence action is such that s/he is really a surrogate for a business like an insurance company.) In other words, because the parties in case-law are mainly those who can afford

[18] "The Myth of Judicial Neutrality", in Pat Carlen (ed.) *The Sociology of Law* (Keele: University of Keele, 1976) p. 116.
[19] "Beyond Bourgeois Individualism: The Contemporary Crisis in Law and Legal Ideology", in E. Kamenka and R. S. Neale (eds.) *Feudalism, Capitalism and Beyond* (Canberra: A.N.U. Press, 1975) p. 138.
[20] L. A. Sheridan, *Legal Education in the Seventies* (1967) p. 6.
[21] J. W. Bridge, *The Academic Lecture: Mere Working Mason or Architect* (1975) p. 15.

litigation, the problems of others such as the poor are stamped as non-legal. Perhaps the strongest reason that traditionalists deny poverty law the status of a "real" law subject is the absence of case-law.

Another consequnce of the expository tradition and the case method has been their adverse effect on legal scholarship. The expository tradition has resulted in the production of a number of fine textbooks. Many of these are necessary, although there is much wasted effort as academics duplicate basic textbooks for the student market instead of undertaking more scholarly projects.[22] My main concern, however, is that Anglo-Australian textbooks adopt the limited view of criticism just described. The case method has had an even more detrimental affect on scholarship. Law teachers, particularly in the United States, have devoted lavish attention to their "Cases and Materials", a worthy and often difficult task to be sure, but one which has greatly detracted from the production of works of a more original and lasting nature.[23] American "Cases and Materials" have an advantage over texts and case-books produced in Australia in that they frequently introduce non-legal materials.[24]

Finally, there must be doubts about the teaching methods associated with the expository tradition and the case method. Mention has already been made of the defects of note-taking, memorization and regurgitation. Socratic case-teaching may be stimulating, but it suffers disadvantages. In many ways it is fragmentary and fails to give students a comprehensive overview of a subject. More importantly, it does not train students in researching the law; cases are served up to the student, so that there is never really the need to find the law oneself. Socratic case-teaching can also be wasteful of class time as a marginal subtlety in a case is pursued. Sometimes the Socratic method is not a joint quest for knowledge by teacher and student, but rather an ego trip for the teacher in which he directs students to a predetermined position and in the process humiliates them in front of their colleagues and destroys class cohesion by promoting excessive competitiveness.[25]

THE SKILLS ARGUMENT

Perhaps the most devastating criticism of the expository tradition and the case method is that they are largely irrelevant to what the great majority of law students will eventually do. They might be of use to the prospective barrister, who practises before appellate courts, but they are an inadequate

[22] On the economic reasons for this: Society of Public Teachers of Law, Working Party on Law Publishing, Final Report on Law Publishing and Legal Scholarship (1977) pp. 2-4, 11.
[23] W. Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld & Nicolson, 1973) p. 57.
[24] But see, e.g., L. A. Stein, *Urban Legal Problems* (Sydney: Law Book Co., 1974).
[25] A. A. Stone, "Legal Education on the Couch" (1971) 85 *Harv. L. Rev.* 392, 407-18.

preparation for the average barrister or the ordinary solicitor. Most lawyers spend a great deal of time in interviewing clients and negotiating with other professionals and, although disciplines like psychology have built up a considerable body of knowledge on these matters, the law student goes into the world as a novice to pick them up by intuition and experience. Training is also absent in other essential skills like investigating facts, drafting documents, conducting a trial and legal research.

Skills Courses

Several criticisms have concluded that law schools must be more skills-oriented. Instead of an academic approach producing lawyers who may become legislators, judges or academics, law schools should realize that most of their graduates will practise as solicitors. To use William Twining's striking terminology, the skills advocate wants to produce a practically oriented "plumber", a "master of certain specialized knowledge 'the law', and certain technical skills".[26]

Three main changes seem to be identified by the skills advocate to correct the present orientation of law schools.[27] Firstly, law academics must have greater experience in practice so that they can teach courses designed for the needs of practice. Secondly, students must be compelled to study a wide range of subjects, additional to the basic subjects (torts, contract, property, criminal law, and so on), such as conveyancing, company law, trusts, procedure, evidence and taxation. As Professor Nash—a skills advocate—remarked on one occasion

> "It is alarming to think that a student who in qualifying for an LL.B. has not studied Conveyancing, Company Law, Trusts, Procedure or Evidence may instead have studied Papua New Guinea Legal System, Introduction to Japanese Law, Wealth, Legal Aid, Poverty and Social Security Law, American Legal System, Introduction to Modern Civil Law, and Comparative Constitutional Law."[28]

Thirdly, students should receive instruction in skills like drafting, interviewing and negotiation; it is here that clinical legal education assumes an importance. Presumably a combination of points two and three means a longer degree; the elimination of "non-practical" courses (for example, jurisprudence); or shorter and more basic courses. In the United States, a suggestion increasingly favoured is to abandon teaching basic skills of legal reasoning and analysis after the first part of the degree, and to substitute other skills such as those just mentioned.[29]

[26] "Pericles and the Plumber" (1967) 83 *L.Q.R.* 396, 397.
[27] See G. Nash, "Planning a Law School Curriculum", in *Legal Education in Australia. Discussion Papers* (Vol. 1, Melbourne: Australian Law Council Foundation, 1978) p. 245.
[28] Quoted in H. K. Lücke, "University Training of Lawyers: Contents of Curriculum, Number of Courses, Electives and Non-Law Subjects", in ibid., p. 223, fn. 76.
[29] Initially suggested by Karl Llewellyn "The Place of Skills in Legal Education" (1945) 45 *Colum. L. Rev.* 345, 354.

The skills approach outlined conflicts with the modern trend of reducing the number of compulsory subjects and broadening the choice of options available to students. Reasons behind this trend are the desire to give students a greater choice and hence interest in what is being studied; a recognition that lawyers are increasingly specialized once qualified; and empire building by academics keen to have their own speciality receive the imprimatur of the Faculty. The skills approach largely negates the idea of law having an element of a liberal education, and seems to breathe new life into the sterile dichotomy drawn between an academic and practical approach.[30] Moreover, the skills approach seems to assume that lawyers should learn everything that may be of use for practice when they are in law school whereas, as the Ormrod Report pointed out, it is clear from the rapid change in legal knowledge that every practitioner will have to undergo a continuing re-education through his/her professional life.[31] Finally, the skills advocate fails satisfactorily to resolve the issue: whose law and skills are being taught? The sort of curriculum outlined by Professor Nash presupposes a lawyer catering mainly for the wealthier in society; certainly the quotation above downgrades the poverty lawyer and the government lawyer with a policy role.

What has been said does not mean that skills should be excluded from the law student's education. Moots have a long history in law schools, although they suffer greatly from the "upper court myth". Students would clearly benefit from courses on interview technique, drafting and trial practice which would also ensure some exposure to other disciplines, like psychology. The caveat I have about the skills approach is that it could easily degenerate into a trade school mentality, where law schools are evaluated solely in terms of whether they produce persons capable on graduation day of becoming fully-fledged functionaries in places like Sue, Grabitt & Runne, Solicitors.

Clinical Legal Education

An argument against the skills approach is that skills cannot be taught in the abstract by academics. It is to overcome this objection that some skills advocates in the universities have turned with enthusiasm to clinical legal education.[32] Clinical law is well-established in the United States, with the great majority of accredited law schools having clinical programmes of one type or the other. For example, a middle ranking law

[30] See R. Yorke Hedges, *An Inaugural Address on Legal Education* (University of Queensland, 1937) p. 8; C. A. Reich, "Toward the Humanistic Study of Law" (1965) 74 *Yale L.J.* 1402.

[31] P. 41. Cf. H. Whitmore, "Are the Needs of the Community for Legal Services Being Met by Our Universities?" (1975) 49 *A.L.J.* 315, 318.

[32] V. New, "Clinical Legal Education at Monash" (1977) 51 *Law Institute J.* 404, 404-5. Compare the director of the St. Leonards College of Law: *Bulletin*, May 30, 1978, p. 80.

school like Toledo (Ohio) currently has fulltime staff to operate a civil law clinic, a consumer protection clinic, two criminal law practice programmes (one for prosecution; the other for defendants), and a mental health law clinic.[33] Clearly, with such a size and variety of clinical courses most students have an opportunity to obtain first-hand experience and responsibility representing clients and appearing in administrative and judicial hearings.[34] In Britain, clinical law has taken root with at least two law schools, Warwick and Kent, offering clinical law as a subject for which students gain credit in the ordinary way, and many students at other law schools in Britain perform functions on a voluntary basis in law centres and legal advice centres throughout the country.[35]

In the United States, which for present purposes can be regarded as the home of clinical law,[36] clinical law was a direct result of the Realist movement in jurisprudence. Law schools, it was felt, were simply inadequate in so far as they taught through the case method because it was removed from the reality of what most lawyers were doing. Students, the Realists said, can only truly appreciate law if they carefully observe what goes on in court rooms and law offices. Judicial decisions are the final products, the rationalizations, of a whole series of matters which have gone before: the disposition of the witnesses at the trial, the social and economic values of the judges, and so on.[37]

Clinical law was a method of getting students out in the real world, *via* clinics, to see and learn how lawyers actually operated. They were to be taught to see the interaction of the conduct of society and the work of its courts and lawyers. On this basis, and particularly from the sixties, law clinics were actively encouraged in the United States. The Council on Legal Education for Professional Responsibility (C.L.E.P.R.) made grants of millions of dollars to ensure law schools would establish clinical legal education, moving beyond merely having a relatively small number of students doing clinical work a few hours a week, to a situation where students might spend several days a week or whole terms engaged in clinical work.[38] In funding clinical law, C.L.E.P.R. argued that it corrected certain undesirable tendencies in contemporary legal education.

[33] R. M. Kennedy and D. R. Lowry, "Clinical Law in the Area of Mental Health" *U. Mich. J.L. Reform* (forthcoming).

[34] A list of clinical courses is in: Council on Legal Education for Professional Responsibility, *Survey and Directory of Clinical Legal Education*, 1976-1977 (1977).

[35] W. M. Rees, "Clinical Legal Education: An Analysis of the University of Kent Model" (1975) 9 *Law Teacher (The Journal of the Association of Law Teachers)* 125. Brunel (London) operates a sandwich program: some of the students work in law centres during their practical time.

[36] The University of Copenhagen utilized law students in a legal aid clinic as early as 1907.

[37] J. Frank, "Why Not a Clinical Lawyer—School?" (1933) 81 *U. Penn. L.R.* 907.

[38] W. Pincus, "The President's Report", in Council on Legal Education for Professional Responsibility, *Selected Readings in Clinical Legal Education* (1971) pp. 39-41.

"(a) it serves as a half-way house between prolonged isolation in the classroom and the outside world, (b) it makes educators consider the student as a whole person rather than as an intellect alone, (c) it offsets self-satisfied intellectual elitism and focuses attention on the inherent value of the people served by the profession, (d) it teaches the persistence and application necessary to effective client service, (e) it lessens the concentration on credentialism in higher education, and (f) it contributes to the development of realistic values."[39]

What distinguishes clinical legal education, however, from the old articled-clerk system? Will not a law school revert to a "trade school" in the event of it adopting a clinical programme? The Realists never really grappled with the issue. They could point to the failure of the old apprenticeship system—masters never had time to supervise pupils, they interviewed and negotiated with clients, not the pupils, and so on—and they could also point to the virtue of a "halfway house" where students could come into contact with the real world within the context of an academic environment and all that entails in terms of a critical appreciation. Nevertheless, it seems reasonable to argue that a great many of the advantages attributed to clinic law could flow from properly organized training by the profession. In other words, the skills advocate in Australia has not really demonstrated that clinical legal education is a better way of imparting skills to potential practitioners than an articled clerk's course or post-degree law college training, except to say that it opens students' eyes to what the practice of law is like.

If clinical law is to be justified, then I believe we must go beyond the skills argument to the deficiency in legal services in the community. It is in meeting the legal needs of the poor that clinical legal education has its vocation.[40] Despite recent efforts to develop legal services for the poor, the demand is still largely unfulfilled, and it is here that clinical law has a limited role. More fundamentally, it encourages students to contemplate a career in poverty law and provides some training once they have made the choice. Clinical legal education oriented to the poor means that students concentrate on certain aspects of law and develop legal skills hitherto neglected in most Australian law schools.[41] Poor people do not want to establish family trusts to avoid taxation; rather, their legal problems, which the wealthy will not experience, will revolve around family, housing, consumer, criminal and welfare law.[42] Thus the poor buy

[39] Ibid. See also W. Pincus, "The Clinical Component in University Professional Education" (1971) 32 *Ohio State L.J.* 283, 290.

[40] See R. de Friend, The Role of Clinical Legal Education (Haldane Society Conference paper, 1976) p. 4; D. R. Lowry, "A Plea for Clinical Law" (1972) 50 *Can Bar. R.* 275. For this reason campus services are inadequate.

[41] G. S. Grossman, "Clinical Legal Education: History and Diagnosis" (1974) 26 *J. of Legal Ed.* 162, 176. Thus students in a law clinic need have no fear of a confrontation with an ordinary practitioner; in most cases they will be better equipped.

[42] Redfern Legal Centre, *Report on the First Year of Operation* (1978) p. 2. See S. Wexler, "Practising Law for Poor People" (1970) 79 *Yale L.J.* 1049.

the older and more troublesome second-hand cars, and they are the main users of social services, particularly now during the most serious recession since the Great Depression.

Practising law for poor people raises other issues not faced by other lawyers. For example, there is the potential conflict between allocating resources to assist a particular client when it may be more effective to concentrate on community groups. Another factor is that practising law for poor people involves tools which ordinary practitioners eschew, indeed which the legal profession regards as unethical, for example, advertising. Clinical lawyers find that existing legal institutions are often unsatisfactory and thus look to new mechanisms, for example, organizing pressure groups of poor people to lobby for change in the law rather than expecting the courts to show any sympathy.[43] Meeting the unmet legal need in the community has been the main thrust of clinical law in the United States and Britain: law schools harnessing the enthusiasm and idealism and desire for relevance on the part of law students to the valid social purpose of ensuring adequate legal services for those who cannot obtain them.

LAW AND SOCIETY

Law and society is a viable alternative to the approaches to legal education already considered, and at the same time goes part of the way to overcoming their defects. By law and society I mean an approach which recognizes that law and the personnel of the legal system operate not *in vacuo* but within a social, political and economic environment, and can only be understood as such. Law is both a product of these forces and a force in its own right affecting their development. Law and society has been advocated by persons of great prestige in the academic world.[44] Over the years a number of law teachers have attempted to teach traditional subjects with a law and society approach, but in few cases has it been implemented in a thorough-going manner.

Some illustrations will clarify the nature of law and society.[45] Company law is not simply a set of rules regulating a company mainly as to its internal workings. A true appreciation of company law demands a knowledge of matters like finance (the role of the stock market, the internal generation of funds, the taxation system), extra-legal concepts like social responsibility, market phenomena such as mergers and monopoly power, and government policy such as that relating to foreign takeovers and

[43] M. Meltsner and P. G. Schrag, *Public Interest Advocacy: Materials for Clinical Legal Education* (1974) p. 16.

[44] E.g. K. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962) p. 375; O. Kahn-Freund, "Comparative Law as an Academic Subject" (1966) 82 *L.Q.R.* 40, 61.

[45] Further examples are in The School of Law at the University of Warwick, *Prospectus 1977-1978* (1977); see also R. Folsom and N. Roberts, "The Warwick Story" (unpublished) pp. 35-6.

industrial democratization. Trusts law can never be fully comprehended unless emphasis is given to how trusts have been utilized for intergenerational capital preservation, and more recently for tax avoidance. Industrial law must be viewed against background factors such as history (the employer-worker conflict), the economy (as it affects capital substitution, job security etc.), and the mechanics of dispute resolution. Similarly, Australian constitutional law: its evolution can never be fully explained in conceptual terms, and reference must be made to political factors. For instance, the High Court has always been dominated by judges with conservative political beliefs deriving from their social background and their many years at the bar working mainly in the commercial area. Appreciating this background enables a better understanding of aspects of constitutional law, such as the interpretation of section 92.

Each of these examples highlights that in addition to the rules themselves, law and society is concerned with issues such as why legal rules evolve; how they operate in particular circumstances; and what non-legal factors are present. Clearly one of the implications of law and society is that reference must be made to the works of social scientists. The data ranges from psychology/sociology for family lawyers, through economics for the trade practices lawyer, to political science for the constitutional lawyer. The standpoint from which a subject is taught also varies depending on the nature of the problem: thus the context of consumer law is the ordinary person in the street; that for constitutional law, the political system; and that for international law, the world order. Much relevant research has already been done by psychologists, sociologists, political scientists and economists and only needs to be integrated with the legal rules.[45] In some fields, however, research of both an empirical and theoretical nature has yet to be done, and because of a disinclination on the part of others lawyers must do it.

Examples of books reflecting a law and society approach are those published in the Law and Context series in Britain, including P. S. Atiyah, *Accidents, Compensation and the Law* (2nd ed., 1976); T. Hadden, *Company Law and Capitalism* (2nd ed., 1977); P. McAuslan, *Land, Law and Planning* (1976); R. Cranston, *Consumers and the Law* (1978); J. Eckelaar, *Family Law and Social Policy* (1978) and R. Eggleston, *Evidence, Proof and Probability* (1978).[46] All these works focus on a problem and then, to a varying extent, examine it in its political, social and economic content, as well as in legal terms. Traditional subjects have been reclassified to reflect important social phenomena (personal injury, land use, consumers), while some of the works cover hitherto neglected areas.[47] In Australia, the best examples of law and society writing are the

[46] Published by Weidenfeld and Nicolson. See also N. A. Roberts, *The Reform of Planning Law* (1976).

[47] Cf. Foreword by editors, P. Atiyah, *Accidents, Compensation and the Law* (1st ed., Weidenfeld & Nicolson, 1970).

reports prepared for the Australian Government Commission of Inquiry into Poverty, which examine the problems faced by the poor or different groups of the poor, and then bring to bear the relevant social survey and legal data.[48]

Because law and society eschews narrow conceptualism, it replaces the old subject categories by what can be called a functional approach: subjects reflect societal phenomena rather than legal phenomena. A functional approach brings law into line with the real world, underlines the purposes of different legal rules, and at the same time allows greater use of contextual materials. Certain subjects remain such as criminal law, family law, labour law and company law, although they are taught with the infusion of contextual matter. But an important number of existing subjects whose genesis is conceptual or historical disappear, to be replaced by ones corresponding more with reality. Torts, for example, is split into a basic subject on personal injury with nuisance transferred into one revolving around land use or the environment and defamation into one dealing with communications or the mass media. Subjects like consumer law, commercial transactions, housing, land use, state and citizen, government, and wealth replace in the curriculum commercial law, property (I and II!), constitutional law (I and II), trusts and taxation. New subjects cover areas like poverty, regulation of the economy, human rights, the environment, mental health, discrimination, and urban legal problems which have been neglected in traditional Australian law degrees.

Columbia Law School in the twenties undertook a lengthy consideration of a functional approach to law teaching, but found difficulty in concretizing it because legal rules have various functions, not simply one.[49] New Australian law schools like Monash, New South Wales, and Macquarie have adopted a functional approach without major problems, and a perusal of their handbooks reveals subjects like those mentioned above. From the Australian experience, it is clear that changing the subject framework is not difficult. Even the most traditional law schools reclassify and teach new subjects as pressures demand. The crucial factor is to move away from the conceptual approach to law and to introduce a societal dimension.[50] For example, poverty law can be taught as an analysis of mainly statutory rules but to ignore matters like the nature of poverty, the historical emergence of the poor law, the actual administration of

[48] R. Sackville, *Legal Aid in Australia* (1975); A. Jakubowicz and B. Buckley, *Migrants and the Legal System* (1975); A. J. Bradbrook, *Poverty and the Residential Landlord Tenant Relationship* (1975); *Homeless People and the Poor* (1976); *Debt Recovery in Australia* (1977); S. Armstrong *et al.*, *Essays on Law and Poverty: Bail and Social Security* (1977). See also G. K. Widmer, *Restrictive Trade Practices and Mergers* (Sydney: Law Book Co., 1977).

[49] W. Twining, *Karl Llewellyn and the Realist Movement*, op. cit. pp. 48-51.

[50] Similarly, the practice at Yale and Chicago of appointing social scientists (sociologists and economists respectively) to the law faculty is no guarantee of a law and society orientation for the law school as a whole; what is crucial is the actual content of each course.

social security law, and the possibility of the poor using law to improve their situation, is the worst type of academic exercise.[51]

Law and society re-evaluates context. The traditional, if unstated, context of most legal subjects is that of the lawyer (private practitioner, judge) who in many cases is dealing with a well-heeled John Doe. No more so is this than in property law where successive generations of law students have learnt how to tie up family property taking into account the rule against perpetuities and the *Settled Land Acts*. Law and society replaces the owner of Blackacre with the resident of Moonee Ponds, and thus property law becomes housing law with an emphasis on landlord and tenant, mortgages, and building society transactions. For this reason, law and society is not simply a matter of examining the operation of the legal system from the point of view of the practitioner; such a perspective would never have detected the so-called unmet need for legal services.[52]

For the re-evaluation of context legal history, now largely abandoned in Australian law schools, is revived though in different form. Legal history of the old type—antiquarianism, legal biography (legal eulogy is a better description) and institutional and conceptual history—is largely abandoned for an historical examination of the evolution of the legal profession and of legal doctrine in the light of the social, economic and political background of lawyers (especially judges) and their clients (using that in its widest sense to encompass law-makers).[53] Likewise, legal ethics is revived, but as a matter of centrality its role in perpetuating the profession, for example, through monopoly practices.

Policy is also an element in law and society, in part an answer to the challenge thrown out by Lasswell and McDougal in 1943 for lawyers to develop such an interest.[54] In part this is a recognition that a small but significant number of law graduates later occupy policy-making positions as Parliamentarians, public servants or judges. In addition, it reflects the fact that a torts lawyer in Australia is incompletely educated if s/he does not know of the New Zealand National Compensation Scheme; that a contracts lawyer must be cognizant of policy underlying recent legislation to protect consumers such as the *Trade Practices Act* 1974; and that a criminal lawyer should know something of the relationship between law and morality, the debate about victimless crimes, and the literature on responsibility. A policy orientation raises questions of an intellectually stimulating nature which in many cases have not previously been considered. For example, in intellectual property students turn their mind to

[51] B. B. Boyer and R. C. Cramton, "American Legal Education: An Agenda for Research and Reform" (1974) 59 *Cornell L.R.* 221, 230.

[52] Cf. C. J. H. Thomson, "Objectives of Legal Education—An Alternative Approach" (1978) 52 *A.L.J.* 83, 89.

[53] Cf. B. Abel-Smith and R. Stevens, *Lawyers and the Courts* (London: Heinemann, 1967).

[54] H. D. Lasswell and M. S. McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest" (1943) 52 *Yale L.J.* 203.

whether copyright and patent laws can still be justified when the day of the small inventor is over, and when the main users, the large corporations, entrench their monopoly position by invoking the law. Clearly students are not in a position to solve the world's problems on completing a law and society degree, but they are aware at least of the policy issues behind statutory and judicial language.

An almost inevitable concomitant of law and society is that legal doctrine and the legal profession are viewed critically. The infusion of non-legal materials tests the often unfounded assumptions of the legal system. For example, sociological evidence that ordinary people are ignorant of their rights and reluctant to enforce those they know about demonstrates that the Mr Haddocks of this world, prepared readily to vindicate their rights by legal processes, are quite atypical.[55] Legal doctrine also take a battering from the social sciences. Just one example: studies by psychologists show that many of the rules of evidence are sadly misconceived.[56]

Despite what has been said, law and society is law-centred and is not the substitution of some other discipline for the study of law. In the United States, Manning has remarked that the first class lawyer needs an

> "ability to comprehend the non-legal environment of the problem at hand, to evaluate the impact that non-legal considerations will have upon the outcome, and to perceive the ways in which the knowledge and insight of non-lawyers can be mobilized and brought to bear. . . . The legal process is a part of a vast surrounding social process; the first-class lawyer never loses sight of the larger picture, and he knows when and how to call upon accountants, psychiatrists, doctors, economists, market analysts, sociologists, statisticians, or others whose expertise can help him and his client."[57]

Advocates of law and society would claim that it provides a more thorough grounding for future lawyers than the existing approach.[58] First, it sensitizes students to the fact that problems sometimes have non-legal solutions and that other professionals like social workers may have a role to play. Secondly, students discover the gap between law in the books and the law in action. Thirdly, policy issues are increasingly to the fore in Anglo-Australian judicial decisions—although still not to the extent as in the United States—and clearly lawyers aware of the issues are in a better position to advise. Next, law and society, in so far as it is coupled with training students to discover knowledge themselves, is excellent training for professional life. Finally, law and society better equips students to cope with the new challenges which will face them over their professional life.

[55] E.g., M. Cass and R. Sackville, *Legal Needs of the Poor* (Australian Government Commission of Inquiry into Poverty, 1975).
[56] E.g., E. H. Sutherland and D. R. Cressey, *Criminology* (8th ed., Philadelphia: Lippincort, 1970) p. 432.
[57] Quoted in *Legal Education in Australia*, op. cit. p. 228.
[58] Evidence to the Royal Commission on Legal Services from the School of Law, University of Warwick (1977) pp. 6-8.

Skills training may produce a better practitioner for the here and now, and some "skills" are absolutely essential even within a law and society approach. For example, a real appreciation of company law "in context" demands the marshalling of accounting and share market information—a skill to be sure. But practitioners are deficient without an adaptability to a changing legal system, and that comes from a knowledge of the history, philosophy and social factors underlying law.

CONCLUSION

Those advocating law and society do not have an easy task. Their endeavours are likely to be misbranded as a combination of youthful idealism and unprofessional dilettantism. Typical in this regard is the comment of Professor Nash

> "Many of these [subjects] are designed to widen the lawyer's horizons—to put his technical expertise into its economic and social context. Too often, however, these subjects are taught not by persons well qualified in sociology or economic philosophy but by enthusiastic young lawyers filled with reforming zeal, who find it easier to ride the hobby horse of social reform than walk behind the plough of disciplined legal reasoning."[59]

Nash begs the question of where one can find people other than "enthusiastic young lawyers" who can teach law and society courses: very few people in other disciplines—e.g. political science, sociology, economics, economic history and philosophy—understand sufficiently the techniques of the law to be able to teach adequately. What has been said does not deny that personnel capable of teaching a law and society approach are initially extremely difficult to recruit.

Those wedded to the existing order of things are not easily persuaded that law and society is as worthwhile and rigorous as a traditional legal education.[60] Nor is it an easy task for law teachers who have an interest to master the other disciplines vital to the law and society approach. Pressure from students is another factor militating against law and society, especially at a time when jobs are scarce, for students are likely to demand a technical training which will equip them to enter well-paid professional employment. All that can be done in these circumstances is to attempt to strike some sort of balance—a balance between imparting legal skills and raising law and society issues, and a balance between giving students what they want (or think they want) and the rudiments of a law and society education.

[59] Quoted in *Legal Education in Australia,* op. cit. p. 223.

[60] My favourite story in this regard is of the metamorphis of Underhill Moore, a commercial lawyer at Yale whose speciality was negotiable instruments. One day a student found him "cursing most frightfully" as he threw out his files. Thereafter Moore spent his days studying the effect of law on human behaviour and was to be seen in bermuda shorts around the streets of New Haven carrying out empirical research to this end.