OBSERVATIONS ON LEGAL EDUCATION IN AUSTRALIA

Two years ago Professor Geoffrey Sawer of the Australian National University contributed to these pages an article on "Legal Education in the United States."[1]. Turn about is said to be fair play. Moreover, the great kindness and hospitality recently extended to me in Australia have placed me under very heavy obligation. Accordingly, in response to the invitation of the Editorial Committee[2] of the *Annual Law Review,* I venture to offer these observations on legal education in Australia.

At the outset, I must affirm my clear and undoubted disqualifications from having any views of any consequence on this subject. I have been in Australia for only five weeks. During that time I visited law schools in Brisbane, Sydney, Melbourne and Hobart, and attended a seminar at the National University in Canberra. I was in Hobart only very briefly. I was not able to go to Adelaide or Perth. During much of the time I was in Australia, the schools were in their short (August) recess. I did not attend a single class or lecture in any law school, although I spoke to students in Brisbane and in Sydney. It would be a little hard to find a person who had been to Australia who had had less opportunity to see Australian legal education actually in action. In many ways it seems most presumptuous for me to venture any views. It is quite clear that whatever I may say must be regarded as most tentative, and entitled to weight only as the reader himself may regard it as significant.

One more point should be made clear. Every country has its own history, its own traditions, its own situation, its own problems, its own means and objectives. There is no reason why an approach or a method which is good for one country should necessarily be good for another. Each country will of course have to work out its own solutions, for reasons which seem to it to be satisfactory. But it is

1 (1950) 1 Ann. L. Rev. U. of West. Aust. 398, reprinted (slightly abbreviated) in (1951) 56 Case and Comment 3. See also Braybrooke, *A New Zealander Looks at American Legal Education,* (1949) 1 J. of Legal Ed. 563; Morris, *Legal Education in England and America,* (1952) 39 American Oxonian 12. For earlier views through English eyes, see Pollock, *The Vocation of the Common Law,* (1895) 11 L.Q. Rev. 323; Dicey, *The Teaching of English Law at Harvard,* (1899) 76 Contemporary Review 742, reprinted in (1900) 13 Harv. L. Rev. 422.

2 Whose chairman chanced to be president of the Australian Universities Law Schools Association at the time of Dean Griswold's visit to Australia—Editorial note.

also true that no country today lives by itself alone. There are close ties throughout the Anglo-American legal world, great similarity in method and tradition, large interchange of written materials, and frequent contact of individuals. We need not be all alike, but we may all profit from one another's experience.

Although my visit was far too brief, it should be said that I had the opportunity to meet many of the full-time law teachers in Australia; and I attended most of the sessions in Sydney of the Australian Universities Law Schools Association, to which I was indebted for my invitation to visit Australia in its Jubilee Year.

* * * *

With this background, I may venture some observations, emphasizing once again that they are offered in merely tentative form and with really humble spirit.

It was natural that I should note the lack in Australia of a really *national* law school, that is, a law school which is attended by students from all parts of the country, where they may come together, rub elbows and minds, and make contacts and friendships which they will carry with them when they go back to their several states. As I understand the situation, the law school at Sydney has students who are nearly all from New South Wales; at Brisbane the students are nearly all Queenslanders, and so on. There is a National University at Canberra, with a law professor. But it is curiously proud of the fact that it wants few, if any, students, even on an advanced level; and great as its potentialities undoubtedly are, it hardly performs, on its present basis, the unifying function I have in mind when I speak of a national law school.

Closely related to the lack of any truly national law schools is the fact that all of the law schools of Australia are publicly supported, by the several states. There are no great privately endowed universities. In the United States, the friendly competition between the private institutions and the state universities has been mutually advantageous. And in many of the law schools, even those in the state universities, the student body is drawn from a wide area. Such law schools as those at the Universities of Pennsylvania, Virginia, Michigan, Colorado, and California are much more than merely local institutions. A large proportion of their students come from other states, and their influence is widely felt.

Closely related to this point is the apparent fact of the lack of any established tradition in Australia of wide-scale private support of educational institutions. Recently, Dean Cowen of the University

of Melbourne Law School has obtained from private sources an endowment for the establishment of a chair of commercial law. This is a fine achievement, but it is unusual enough to be especially noteworthy. And the fact that the chair is in the field of commercial law may perhaps show the influence of the fact that funds had to be sought through commercial institutions. There is very little unrestricted endowment income available to Australian universities, and almost none at all for Australian law schools. Many American colleges and universities have been quite successful in establishing funds supported by their graduates through large numbers of small annual gifts. The development of a custom of widespread annual giving could do much for Australian education, including legal education.

The lack of any independent financing, and the lack of any external yardstick through the existence of privately supported schools, may make itself felt in other ways. When an institution depends absolutely on periodic government grants for its existence, when members of the government sit on the faculty, as I understand is the case in at least some instances, governmental influence, control, or pressure may be felt no matter how carefully and conscientiously it may be guarded against. Apparently the actual situation varies considerably from State to State. I was told that there is little or no governmental interference in Melbourne. On the other hand, it was rumoured to me that efforts to increase entrance standards at Sydney had long been unsuccessful because of governmental influence. If there is anything of this sort it is especially serious when there is only a single publicly supported law school in each state.

This leads me to another observation, not directly connected with the law schools. This is a little hard to put, and I do not want to overstate it. Externally, Australia is clearly a nation. But internally, the influence of the states, and their separation, is greater than I had anticipated. In some ways, Australia gives the appearance of being still an affiliation of six more or less independent states and not that of a single federated nation. This is perhaps a natural consequence where there are only six states, with three of them having a large portion of the total population and wealth. One state out of six (or three) is in a far stronger position than one state out of forty-eight. But Australia seems to have leaned over backwards—for a federated nation—to fend off real national economic integration. This is evidenced in various ways—the one most often mentioned being, of course, the variations in railway gauges, which make interstate rail transit slow and inefficient. One very little point may be mentioned as perhaps symptomatic—the exchange which is charged

by the banks on handling all but local cheques, including, of course, interstate cheques. It is a small barrier, but it tends to a local focus. It contrasts with nation-wide par clearance of cheques which is generally effective in the United States. Turning to a more serious matter, the difficulties in the way of trying to control prices through state action alone were plainly evident in New South Wales. Apparently much of this problem goes back to section 92 of the Australian constitution which has made interstate commerce so absolutely free that any control of it is difficult. This is obviously Australia's problem, to be resolved only by Australians. It may be pointed out, though, that an effective national power to regulate interstate commerce can be a great unifying factor in a federated nation.

There are other sides to the picture, of course. Australia has no racial divisions. It has never had anything like our civil war. Sectional differences and antagonisms are relatively minor. Although a Queenslander may think a Victorian rather effete, and the Victorian may regard the Queenslander as a bit of a roughneck, this is very superficial, and is known to be so. On all essentials, Australians look and think and talk very much alike. Socially and culturally, the people of Australia are very closely unified, even though economically they may have yet to experience all of the benefits which can come from a truly federated, rather than affiliated, nation.

What is the bearing of this on legal education? It seems probable that the separateness of the six law schools is largely a function of the separateness of the six states, and in particular, of the fact that each school qualifies for admission to the profession in its own state. Yet this professional separation of the states is somewhat striking when it is recalled that the law of Australia is largely unified through the general appellate jurisdiction of the High Court over all cases. Its authority is not limited to cases involving federal questions. Thus there is in fact an "Australian law" in a sense in which there is no single "American law" in the United States. We have a great similarity in background, tradition, and method in the legal systems of our many states. But we have wide divergence of result because each state is a law unto itself on all local matters, common law as well as statute. There are not merely variations in legislation among the several states. There are sharp differences in the view of the common law which it takes from state to state. This introduces a great complexity into the study of our law on a national basis, from which Australia is fortunately free. It should be feasible, therefore, for students from one state in Australia to go to law school in another,

and then go perhaps to a third state to enter into practice. There might be an increase in national viewpoint if such progressions became commonplace instead of rare and unusual as they apparently are today.

Even though the development of a national student body at the state schools may not be feasible, it would seem that this function might be performed in a smaller but very useful way by the National University at Canberra, on a graduate basis. There would seem to be room for a graduate school of law which, at Canberra, could be a national school; it would not compete with existing schools; and it could open up some fields of the law, and consider problems of legal education, which are not now dealt with by the state schools. Such a plan for the National University's work in the field of law might be more productive than the presently contemplated limitation to research alone.

Closely related to the local character of the law schools is the close relation between the schools in Australia and the local practitioners. Apparently the schools are not in any instance regarded as the private property of the practising profession as is the case in Ontario.[3] This is fortunate. The absence of any such development may have been assisted by the separation of the profession in the three largest states, between those practising at the bar and the solicitors. This is effective legally in Queensland and New South Wales, and practically in Victoria. With two branches of the profession, it is perhaps harder for one of them to assert a dominating control over the law schools, although the great numerical superiority of the solicitors has occasionally led them to seek to turn one or more of the schools into a trade shop. In most of the states, and perhaps in all, it appeared to me that the relation between the schools and the practising profession was fairly good, although there are places where it is apparently the influence of the profession which has prevented needed development. It should be observed, though, that the presence of practitioners on the faculties may give a point of contact which is a definite advantage for many purposes, both in teaching and in relations with the profession.

A good relation between practitioners and the law schools is obviously desirable. The law is a practical profession. But it is more than that. It is also, and perhaps foremost, a learned profession. The law school is the place where the prospective lawyer has the

[3] For a description of the Ontario situation, see Wright, *Should The Profession Control Legal Education?* (1950) 3 J. of Legal Ed. 1.

best opportunity to begin to acquire the learning which will be the background and essence of his professional life. He will have a lifetime with the ins and outs of practice. Rarely after he leaves law school will he have connected systematic opportunity to study and absorb the materials which he will encounter in law school.

In Australia, legal education generally has followed the pattern of apprentice education. The situation varies from state to state. That at Melbourne appears to be the most satisfactory. There the majority of the law students are full-time degree students, and are in the University full time for a period of four years; then they go out and spend a year in articles as clerks to a firm of solicitors, or read with a barrister, before admission to practice or to the bar.[4] Even at Melbourne, though, some students may be apprenticed throughout their studies, with only part-time attendance at the University classes. Such students are now required to have one year of full-time studies before commencing their articles.

With respect to these last students at Melbourne, and in most other states apparently for a large part of the students, legal education is generally on a part-time basis, and only, it may be said, at relatively odd hours of the day. Classes are held at the law school in the early morning and the late afternoon. The rest of the day the students are in offices. It may well be that a law student, as more than one practitioner has said, is not worth half as much as a good secretary. It should not be surprising. Why should a law student at the beginning of his legal studies be expected to be of any use in an office? On the other hand, how can it be expected that he will be able to get much out of office work? Many practitioners undoubtedly spend much time with their neophytes, and teach them much about the ways of the law. In many cases, though, the students must for some time be little more than office boys, hanging around for a crumb of practical experience which may be found in a potpourri of errands and odd jobs.

If a period of purely practical experience is thought requisite, why should it not come at the end, or nearly at the end, of law school studies? In this connection, reference may be made to the compulsory fourth year which has recently been instituted in the law schools of Quebec. Under this plan, the law students go to law school on a full-time basis for three years. Then, in their fourth year, they make a connection with an office. During that year, they

[4] This is also the position in Western Australia, except that two years' service in articles is required *after* graduation—Editorial note.

work a substantial part of the time in the office. But they also have periods of instruction each day in law school. Most of this instruction is provided by members of the local bar who are retained by the law school to come to the school to handle the various aspects of practical instruction.

By the fourth year the students are well qualified to be really useful in the offices. They are also in a position to profit rapidly and systematically from the practical instruction. My chief objection to the plan would be that at that stage it might well be that they would be better occupied if they were spending full time in an office. The plan followed by many students at Melbourne[5] would seem to be the most satisfactory of the several arrangements from both the educational and practical points of view.

Apparently the pressure for a part-time system of legal education comes primarily from the practising profession, and its concern for practical instruction. It may also be based in part on economic factors (specifically the belief that many law students would not be able to finance a long period, perhaps four years, of full-time law school attendance). On both points, however, the weight of tradition may be unduly heavy. Particularly when it is recalled that a large part of the law students will be studying in their own home city, it should be possible to provide a workable scheme for a substantial period of full-time law school education. In many cases the practitioners are apparently making a substantial contribution in finding places in their offices for the younger law students. I did not note in Australia the attitude which was frankly expressed to me in New Zealand, when I ventured a question there about the system which had the law student spend so much time in law offices and so little in systematic, continuous law school study. "How do your offices get their chores done?" I was asked. "Who tends to getting the deeds stamped? With secretaries so hard to get, we don't know how we would get along without the law students to tend to a lot of the details." Such an approach may be helpful to the law offices. It hardly seems to be the basis upon which methods and standards of legal education should be determined.

It may be that the profession in Australia is too much concerned with practical instruction, and that it would make an important contribution to legal education if it would give the universities a considerably freer hand in the development of their programmes. Certainly there could be more and better instruction in newer

[5] And by nearly all students in Western Australia—Editorial note.

fields of the law such as Administrative Law and Taxation. If the newer generations of lawyers are not adequately prepared in these subjects they will not be able to meet their clients' needs, and there will be a real tendency for the legal profession to lose out to other professions and practitioners. This same thought was advanced in a recent issue of the Australian Law Journal.[6] It was there observed that "Universities have not interested themselves much in the newer fields of law, but this is in part due to the need for devoting their instructional time to fulfilling established needs, and if they were free from this, they might show more initiative." It was also pointed out that "The profession's assumption that the business of Law Faculties is to train practitioners results in legal education being dominated by practical rather than intellectual interests." To me some reduction in the so-called practical demands on Australian law schools would bring distinct gain in Australian legal education.

On the whole, it appeared to me that theoretical legal education in Australia was considerably more theoretical than in the United States, and practical legal education was more narrowly practical than with us. Whether this is good or bad would be hard to demonstrate. Since full-time law teachers devote themselves largely to the theoretical subjects, there is perhaps a tendency for law teachers in Australia to appear to be more interested in the theoretical or less directly practical subjects than would be the case in the United States. With more of the legal education concentrated in the law schools, we have perhaps tended to give a more practical legal education than would otherwise have been the case, more practical in many instances than our own practitioners sometimes fully realize. Although our law teachers are nearly all on a full-time basis, we have in recent years placed greater stress on a law teacher's having had a fair amount of active practical experience, and a number of law teachers have turned to full-time law teaching after five to ten years or more of vigorous private practice. This of course requires a salary scale which makes it possible for a moderately successful practitioner to turn to teaching for his ultimate career.

Australian law teachers whom I met seemed to me to measure up fully to those of the rest of the Anglo-American world in terms of scholarly ability and capacity. A number of them have reputations reaching far beyond Australia. To mention only two, I may observe that of all the commentaries I heard on the papers at the Legal Convention in Sydney it appeared to me that the two best were by

[6] *The Legal Profession and Legal Education*, (1951) 25 Aust. L.J. 441.

law teachers, Vice-Chancellor G. W. Paton[7] of Melbourne and Professor F. R. Beasley of Western Australia. Both were excellent not only in substance and thought, but also in effective delivery. I thought at the time what a remarkable opportunity it must be to be able to study under such teachers. But ability among Australian law teachers is not confined to a few bright stars. A number of the young men are obviously going to measure up to the same high standards.

Apart from high average calibre, another thing that impressed me about Australian law teachers was their very small number. In common with law schools in other British countries, it has in most places been the practice to operate a law school, even one with a relatively large number of students, with scarcely more than a nucleus of a full-time staff. To me it seems odd that the law school at Sydney with seven or eight hundred students should have only four persons on its full-time staff. The law school at Melbourne with nearly as many students has a larger full-time staff. But relatively small full-time staffs are found at most Australian law schools. In part, this is a reflection of the apprentice tradition which still pervades legal education in Australia. In part it goes back to financial considerations, to which I have already referred. The situation is not easy to change. But from my point of view, law schools in Australia would be greatly improved and would be better enabled to serve their nation if a way could be found to give them a considerable increase in their full-time staffs, and with a corresponding decrease in the proportion of the work which is handled by practitioners giving instruction on a part-time basis. I would not eliminate the practitioner-instructors entirely. That would not fit the Australian situation, either its traditions, or very likely, its needs. But I venture the thought that the contribution of the part-time practitioners might be more significant if it was given in a setting of more extensive teaching by an enlarged full-time staff, particularly if a substantial portion of the time spent by the student in law school could be on a full-time basis.

The small number of full-time teaching places available in the Australian law schools means that Australia is inevitably losing some of her best potential law teachers. With only a few places, there are only a few openings. If a young Australian hopes eventually to get one of the relatively few chairs available at an Australian law school, he may well find that his best course is to leave Australia and find a place in a law school in some other British country. If he can make a reputation for himself there, he may receive favourable considera-

[7] Professor of Jurisprudence, 1931-51; Vice-Chancellor, 1951-.

tion in Australia on one of the relatively rare occasions when there is an election to a chair there. Of course this is broadening experience. But it also has other effects. Many will not have the courage or the means to venture this course, and may be lost to law teaching altogether. Others will go away and will do well where they go, and may find that they will stay permanently outside Australia. The country might be able to retain a greater proportion of the brains it produces if it provided greater opportunity for young men to show themselves at home. This would follow automatically from a substantial increase in the number of full-time teaching positions available. To double the number of those positions would not seem too much to seek. This obviously could not be done all at once, and probably could not be done at all unless horizons are raised. But a firm desire and a steady pressure to provide better financing for the universities will yield results in time. Through increased tuitions, and gifts, as well as government grants, the law schools could be given increased strength. This is not an impossible objective over a period of time.

In this connection, reference might be made to libraries. It may be hoped that more financial support can be found for the libraries at the several law schools. Although these are in general adequate for local practice, it would appear that they suffer, in general, from the fact that they have been built with local practice primarily in view. Sometimes even important works from other States in Australia are unavailable, and for the most part they are not adequate for any extensive research. Any increase in financial strength for the law schools should not overlook the need for better support for the libraries.

Before leaving the subject of law teachers, and the related matter of practitioners' influence and control on the schools, a further observation may be hazarded. Perhaps very wrongly, the impression came to me that, in some places, at least, a young law teacher who had some tendency to be unorthodox, or unconventional, who was perhaps a bit ahead of his time, would find his path to professional advancement and progress likely to be a difficult one. I am not making an argument for crackpots or mere iconoclasts. But the universities should be centres of progressive thought, of stimulation of new ideas, not only with respect to legal education, but, even more important, with respect to the law. Many Australian law teachers recognize this, I know, and seek to perform this important function. But I had the feeling that they almost instinctively knew that they must proceed in an extremely guarded way, often by indirection and

suggestion, rather than by direct action and argument on the merits of novel propositions or ways of proceeding. A fair amount of constraint is no doubt in order. If the atmosphere is really one of restraint against novel thinking or suggestions, there may be a great loss to thought and to education.

Some reference may be made to the methods of instruction used in Australian law schools. Much of the teaching appears to be by what we would call the "lecture method," that is, by direct authoritative laying-down by the instructor, with the student dutifully copying and committing. It is clear that some instructors encourage class participation and discussion. But much of the teaching, particularly that of the part-time practitioners, seems to be based upon last year's lecture notes, which, I gather, have sometimes not been materially revised over a long period of many years. This method may be conducive to the learning of "the law" in the sense of a system of rigid rules, to be memorized more or less mechanically. It may not be so conducive to an understanding of the law as a basis for social control, full of nuances and shades, and capable of growth and adjustment to meet varying facts and new conditions. The prevailing lecture method may have some tendency to produce students who accept an uncritical view of the law as it is, who are too ready to accept precedents as standing for propositions broader than anything that was actually involved or decided in the precedents themselves. The lecture method may give too much effective weight to generalizations, and may miss much of the light which comes from the interplay of generalization and specific instances. I felt, perhaps wrongly, that I saw some evidences of such an approach in some of my discussions with Australian lawyers. Whether this is a consequence of the methods of law teaching or of something else is of course another question.

One of the difficulties in the development of a more objective method of teaching is the absence of satisfactory teaching materials in many fields. This lack goes back to many reasons. One is the absence, to some extent, of a generally felt need for such materials. At the meetings of the Australian Universities Law Schools Association in Sydney I heard an extensive discussion of the desirability of preparing casebooks for use in Australian law schools. On the whole, it seemed that the advocates of such teaching materials were in the minority. I heard many arguments, some phrased in rather strong terms, against the development and introduction of casebooks. Much of this discussion appeared to me to be almost identical with that which was heard, with equal feeling, in the United States, not a

generation ago, but fifty to seventy years ago.[8] Indeed, the Boston University Law School was founded, in 1872, as a protest against the use of the case method at the Harvard Law School.[9] But the Boston University Law School has long since accepted the case method in its work.

Of course there are many variations of the case method. It is used differently by different teachers. With the growing complexity of the law, the old leisurely, almost completely Socratic, method of interchange between instructor and student has been modified—in various ways by different teachers. Often, the case method as utilized today can perhaps be more accurately described as the problem method. It should be observed, too, that in important respects, the case method is more a method of studying than a method of teaching. Its importance consists in its contribution to study and teaching through the mutual consideration and evaluation of actual concrete problems put before all of the students in advance of class consideration and discussion. The student learns the law in terms of facts and problems rather than in terms of doctrine. The doctrine comes, if at all, only after full evaluation and consideration of actual problems. The problems may be, and perhaps usually are, the sort that have been dealt with in published judgments of appellate courts. But they need not be. They may be the kind of problems that are considered in offices, and which never get into court, at least if they are handled correctly. They may include matters of negotiation and draftsmanship, of client serving or of public service, as well as the kind of matter which the barrister presents before an appellate court.

8 Numerous references could be given. See, for example, a report by a Committee on Legal Education of the American Bar Association, in (1879) 2 Am. Bar Assn. Rep. 209; a review of Langdell's *Cases on Contracts* (2d ed. 1879), in (1880) 5 So. L. Rev. 872; Bishop, *The Common Law as a System of Reasoning,* (1888) 22 Am. L. Rev. 1; Schouler, *Cases Without Treatises,* (1889) 23 Am. L. Rev. 1. Approval of the case method was voiced in: Keener, *Preface to A Collection of Cases on the Law of Quasi-Contracts* (1888); Gray, *Cases and Treatises,* (1888) 22 Am. L. Rev. 756; Fisher, *The Teaching of Law by the Case System,* (1888) 27 Am. L. Reg. (n.s.) 416; Keener, *Methods of Legal Education,* (1892) 1 Yale L.J. 143. As early as 1890, a Committee of the American Bar Association described the defects of traditional methods of legal education by saying that "They do not educate, they only instruct."—(1890) 13 Am. Bar Assn. Rep. 327, 330. For a summary of the controversy, see 2 Warren, *History of the Harvard Law School* 496-514 (1908). For a recent authoritative statement of the situation today see Morgan, *The Case Method,* (1952) 4 J. of Legal Ed. 379.

9 See 2 Warren, *History of the Harvard Law School* 502-503 (1908); Swasey, *Boston University Law School,* (1889) 1 Green Bag 54.

There is probably a considerable amount of misunderstanding in some quarters as to just what a casebook is.[10] Perhaps it would be more accurate to call it a course book. In this connection, it may be helpful to quote from a letter which I recently received from a law teacher in New Zealand to whom I had sent a copy of "Cases on the Conflict of Laws." He wrote me as follows: "Yours was the first casebook I had seriously studied. I was under the erroneous impression that a casebook was merely a collection of cases through which the student had to plough his way. But I realize now that the student has much valuable guidance from the additional notes appended to some of the cases; for example, the questions posed as to what the situation would have been had the facts been somewhat different. I found those notes most stimulating and a very useful corrective to one's preconceived ideas. It is, of course, not a work for the idle student or the mere crammer, but, as you doubtless intended it—and all the casebooks—to be, a basis of study for the student who has been taught to think for himself." This states the situation very concisely. A good deal of experience has shown that a properly planned casebook can be an extremely valuable aid in the thoughtful study of law.

One of the difficulties in the way of preparing adequate casebooks in Australia is obviously financial. No casebook could pay its costs unless it was used in all the law schools of the country or at least in all the larger law schools. Naturally, law teachers do not want to commit themselves in advance to use such a book before it has been prepared. Consequently, it is difficult for a budding casebook editor in Australia ever to get started. It seems very likely that if six casebooks could be produced in Australia at least four or five of them would sell enough copies to cover their costs. But who would meet the deficit for the one or two that might not be successful? Few law teachers are in a position to underwrite such a loss, and there do not appear to be other agencies which as yet recognize the very considerable opportunity in this field. If the universities or the law schools themselves do not feel that they can underwrite a reasonable number of casebooks, it would be hoped that some foundation, or book publisher, or the legal profession would see that it could make a very great contribution to legal education in Australia, at

[10] This seems to me to be evidenced—from my point of view—in Professor Graveson's review of Morris, *Cases on Private International Law* (2nd ed., 1951), in (1952) 68 L. Q. Rev. 267. Professor Graveson seems to think of the casebook as simply a convenient compilation, designed to avoid the necessity of taking the reports themselves off the library shelves. Properly planned and executed, a casebook can be much more than that.

a probably very low cost, by the simple matter of underwriting the costs of a reasonable number of casebooks to be produced by Australian law teachers for use in Australian law schools. Incidentally, some such books might well find a use in New Zealand, and thus make a substantial contribution to legal education in that country, too, as well as finding a market there which would help to cover costs.

In a few instances in the United States, casebooks have been a co-operative enterprise, produced by several law teachers working together. It might be possible to follow this plan in some fields in Australia. If several teachers in different schools could share the task, it might help to overcome a certain shyness which may militate against experimentation, and also help with the problem of economic limitations.

The case method, as now developed, is not the answer to all problems of legal education. Even at its best it has its drawbacks. But, with suitable variations to meet the Australian situation, I believe it could make a significant contribution to legal education in Australia. At any rate, the contrary can never be known unless the possibilities of the case method are fully understood, and the method itself is given an adequate and fair trial.

In this connection reference may be made to one point which was raised in the discussions of the Australian law teachers. It was said that the compiler of a casebook in Australia would encounter copyright difficulties which might make the production of a satisfactory casebook very difficult. Reference was made to the fact that there are decisions holding that law reports are subject to copyright and cannot be used without permission.[11] This is a problem that has never confronted an American casebook compiler, as far as cases are concerned. We consider all judicial pronouncements to be public property, which are freely utilizable by any one. Of course if a publisher puts in editorial matter, such as headnotes or comments, that is subject to copyright,[12] but the judgments themselves are in the public domain. Certainly that must be the case to some extent even in Great Britain. For example, does a barrister get permission from the copyright owner before he is free to read a passage from a judgment in presenting his argument in court? Does a judge who wants to include a quotation from a previous judgment in his own have to seek permission

11 See *Butterworth v. Robinson,* (1801) 5 Ves. Jr. 709; *Sweet v. Maugham,* (1840) 11 Sim. 51; *Walter v. Lane,* [1899] 2 Ch. 749, 772 (C.A.); *Incorporated Council of Law Reporting v. William Green & Sons,* [1912] W.N. 243, also in MacGillivray, *Copyright Cases* 54 (1917).

12 This was the decision in *Sweet v. Benning,* (1853) 16 C.B. 459, 491.

of the copyright owner? Of course not. But, if not, why not? It must be because there is a necessary privilege for such use of this material, even though it is subject to copyright. If there is such a privilege, why should it not be broad enough to extend to the legitimate use of judgments in the instruction of law students, on whom the legal profession depends for its survival just as much as it does on the use of former judgments as precedents?[13] If there should be any question about this, is this not an area in which the legal profession itself can well proceed to the aid of legal education by obtaining a suitable permission from the copyright owners broad enough to cover all use of judgments in casebooks,[14] or if necessary a properly guarded change in the law? Certainly the legal profession itself should not be the agency which presents the chief barrier to a great and potentially significant development in legal education.

There are some differences between the nature and customs of law practice in Australia and in the United States, which may have some bearing on the practices in legal education in the two countries. For instance, the word "brief" has an entirely different connotation with us than it has in Australia or in England. In the United States, the oral argument before an appellate court is relatively short. In the Supreme Court of the United States, for example, argument is limited to one hour on a side, unless the time is extended by special order of the Court. Some time prior to the argument, however, counsel on each side prepare and file with the Court fairly elaborate and detailed written arguments. In the Supreme Court, these are usually printed. In other courts, they may be reproduced by photo-offset, or mimeographed, or even typewritten. This written argument is the "brief." It deals thoroughly and carefully with the facts and the law of the case. It sets out the authorities upon which reliance is placed, distinguishes other decisions, and so on. Although oral argument before the court is not unimportant, a very large amount of solid work is done on the "brief." Even in trial courts, in an important case, it is often the practice to prepare a trial brief, and to present written arguments to the court both with respect to the facts and on questions of law.

13 It may be observed that none of the cases cited in note 11 above involved the use of the reports for instructional purposes in a law school.

14 It is pleasant to record that such permission is apparently freely granted. See, *for example*, Miles and Brierly, *Cases on the Law of Contract* vi (2nd ed., 1937); Morris, *Cases on Private International Law* vii (2nd ed., 1951); Graveson, *Cases on Conflict of Laws* vi (1949). See also Sawer, *Australian Constitutional Cases* viii (1948).

The importance of the brief in our practice provides a large area for the work of the young lawyer. When he goes into a law office—which does the work both of solicitor and barrister, since we have no separation of the profession—he will often be assigned first to work up written memoranda on questions of law. Then he will progress to the task of making the first drafts of briefs, which will then be reviewed and revised by senior lawyers in the office. Later on, when he has shown his calibre, he will take over entire responsibility for some briefs, and will gradually move into a position where he takes charge of the entire case.

This system provides a substantial amount of useful work which the young lawyer can do immediately out of law school. In many cases, the young lawyer may be better qualified for certain parts of the task of brief writing than the senior in the office. He may have closer familiarity with the details of recent decisions. He will ordinarily have more freedom to spend long hours in the library hunting down cases, organizing them, systematizing his materials, checking carefully for over-ruling or qualifying decisions, and so on. And from this work on the briefs, and his contacts with the lawyers with whom he is associated, he is constantly learning and preparing himself for an eventual position as a senior in the office.

This practice has some natural effects on legal education. It inevitably puts a certain importance on learning to write law. It means that our moot court work can be focused in the first place on the preparation of a written brief, followed by experience in concise oral argument. This makes the transition from law school to law practice less sharp than it might otherwise seem to be in view of the fact that we have rather a complete separation between law school and law practice.

Indeed, I sometimes found myself wondering in Australia what the young lawyer just out of law school does, in ordinary times, unless he is extraordinarily brilliant. Under present conditions, I understand that, in some States, at least, there is great demand for young lawyers. But when the number of active barristers is great, it must take a large amount of courage in many cases for a young man to become a member of the bar, unless he has independent means.

There is perhaps another difference, to be found in the subject matter of law practice. A little while ago, a copy of the catalogue of the Harvard Law School came into the hands of one of our graduates, who wrote me: "The curriculum is a far cry today from what it was in 1922-25, but for that matter, so is the practice of law!" Although these changes have been reflected in law practice in

Australia, they are perhaps less marked than in the United States. The reasons for this are by no means clear. The separation of the profession may have some tendency to restrict the type of work which is done by lawyers. At any rate, much of the activity in an American urban law office, in dealing with the Government and its numerous agencies, in matters of taxation, including many hearings before administrative offices, securities regulation, trade, commerce, anti-trust, communications, and so on, is apparently less frequently encountered in Australia than with us. In looking for what we would call administrative law practice in Australia, I finally asked a lawyer in Canberra what was the nature of his work. He replied: "Wills, land transfers—just what you would expect to find in any small town."

Of course I recognize that the situation is different in such cities as Sydney and Melbourne, and that there is tax and other administrative practice there. Nevertheless, I suspect that the proportion of lawyers' time spent on such governmental and administrative matters is considerably less there than it is in law offices in New York, Boston, Chicago, San Francisco, and many other cities in the United States, including, of course, Washington, where such practice is very extensive, and occupies substantially all the time in many law offices.

Just why there is such a difference, I am by no means sure. It is true that the United States is a larger country, in population. But there are also proportionately more lawyers. It would seem that the nature of law practice, on average, should be much the same in both countries. Yet, there is clearly a substantial difference as far as this governmental and administrative practice is concerned.

Is it possible that this is, in some small part, due to the relatively restricted and traditional nature and scope of the instruction in Australian law schools? In the United States, law schools for a long time lagged in teaching the newer subjects, particularly taxation. One result was that older practitioners without any academic background in the area were reluctant to enter it, and much work that might have been handled by lawyers, and often handled the better, was left for others to tend to. Now courses in taxation and administrative law, and many other related topics are standard in virtually all American law schools. It is possible that we have even gone too far in this development.

Nevertheless, "a strong tradition against change or innovation,"[15] activating the profession, and reflected in the law schools, may actually be doing harm to the profession, and restricting its potential

[15] The phrase comes from Dean Wright's article cited in note 3 above, at p. 1.

service to the country. Some change in outlook, some broadening to meet newer governmental and economic trends might be desirable, and the law schools might be one of the best places for these things to begin.

Australian legal education is strong and healthy. Its difficulties, so far as they exist, stem in considerable measure from the relatively restricted place which the legal profession has so far accepted in Australia. The law schools are doing good work. With larger staffs, with more support, with greater freedom at the joints, they could do better work, and make an even more significant contribution to Australia.

ERWIN N. GRISWOLD.*

* *A.B., A.M. (Oberlin College), 1925; LL.B. (Harvard), 1928; S.J.D. (Harvard), 1929. Member of the office of the Solicitor-General, Washington, D.C., 1929-1934. Harvard Law School: Assistant Professor, 1934; Professor, 1935; Dean, 1946-; Langdell Professor of Law, 1950-. Author of* Spendthrift Trusts *(2nd edn., 1947),* Casebook on Federal Taxation *(3rd edn., 1950), and (with Elliot E. Cheatham, Herbert F. Goodrich, and Willis L. M. Reese)* Cases and Materials on Conflict of Laws *(3rd edn., 1951).*