A LEARNED PROFESSION?

By WILLARD H. PEDRICK*

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Legal education in Australia is full of surprises, a proposition which will surprise no one. Nevertheless, a comparison of the position of legal education in the United States with the position in Australia may provoke at least a gentle wonder. In the United States the legal profession enjoys moderate success—less than it desires naturally, but success adequate at least to sustain a profession numbering some 225,000 practitioners. This in a country of 180 million means that the American system supports one lawyer for approximately every 800 living people. In my own state of Illinois with a population of 10,000,000, very close to that of Australia, we have a total of some 15,000 lawyers providing a ratio of one lawyer for every $666\frac{2}{3}$ persons.

To supply a profession of these dimensions in the United States there are currently engaged in law study some 45,000 hardy students engaged in pursuing a three year post-graduate-profession-oriented course. From these ranks each year about 10,000 are awarded degrees in law. Since there are altogether in the United States about three and a half million students enrolled in some 2,000 universities and comparable institutions the law students are a small group making up less than one and a half *per centum* of the total. Law students do persevere with more success than university students at large in the United States, however, and their 10,000 degrees in law in 1960 accounted for about three *per centum* of all degrees granted that year.

The result is that law schools in the United States annually supply substantially more by way of law graduates than the practising profession would appear to need. No one seems to have undertaken a scientific study to measure the real personnel needs of the practising profession. Such a study would present formidable difficulties. Nonethe-less, it is doubtful whether private practice absorbs more than half of the annual crop of fledgling lawyers in the United States.

Lawyers as a class are reluctant to die. Perhaps their relatively intimate acquaintance with probate costs and death duties prejudices them against man's second universal experience. In any case an

* Professor of Law, Northwestern University, Visiting George Turner Professor of Law, University of Melbourne, 1962.

amateur actuary would expect less than 1 *per centum* of the profession or less than 2,000 lawyers to die each year in the United States. For so many surely some must grieve—somewhere. Perhaps an equal number retire or go into business activity. On almost any assumption, it must be that half or more of the 10,000 graduates in law in the United States find berths outside the private practice of law, in corporation law departments, with insurance companies, in banking, in government service and even in law teaching.

Whether we need more students in law schools in the United States is a question easily asked and difficult to answer. It is probably true that other studies—commerce, engineering and science—generally have attracted relatively more of our young people than used to be the case and there is some concern that the law may not attract as many of the able young men and women as in former days. One thing does seem clear and that is that the demand for law graduates in the United States is relatively strong. Those who take degrees do find satisfactory places—within or without the practising profession.

I. How Many Should Study Law in this Country?

The position of the legal profession and legal education in Australia is significantly different. In the whole of the country there are approximately 6,000 members of the legal profession, of whom more than 90 *per centum* practise as solicitors. The 1962 figures for Victoria list 1,658 solicitors and 230 barristers. With a population now of some ten and a half million this means that for the whole of Australia there is approximately one member of the legal profession for every 1,750 persons. In Victoria the ratio is one to every 1,600 persons. In some fashion this country manages to get along with less than half as many lawyers proportionately as does the United States, while Victoria has just half as many lawyers as the American ratio would call for. Perhaps this is not particularly surprising, for the situation in England is much the same.

What is surprising to some extent is the fact that to supply a legal profession in Australia numbering about 6,000 over the country there are roughly 3,000 students engaged in pursuing law as an undergraduate university course. The pursuit is at varying speeds and meets with varying success. But it is of some interest that where in the United States there is one law student for every five practitioners, in Australia there are only two practitioners for every enrolled law student. In short, relative to the size of the respective legal professions there are proportionately two and one half times as many law students in Australia as in the United States.

The number of those presently engaged in studying law in Aus-

tralia is formidable. The number is even more formidable viewed in relationship not to the practising profession but in relationship to the numbers of students engaged in all university courses. In the whole of Australia in 1962 there are less than 60,000 students enrolled in the universities. Law students comprise more than 5 *per centum* of that body. In the University of Melbourne law students comprise more than 10 *per centum* of the entire University student body. If 5 *per centum* of the university population in the United States was enrolled in law we would have 175,000 law students or nearly four times as many as we have now—a prospect to be classed not as a vision but more in the nature of a nightmare.

This great disparity in the relative numbers of law students in the two countries is to be explained on a number of grounds. Law in Australia is offered as one of the undergraduate courses by the universities. But law has the appearance at least of offering both general and vocational education—in a medium sized economy package. Consequently, enrolments in law bear a relationship to the number of enrolments in liberal art, for example, that can only be described as fantastic from the American point of view. There are in the University of Melbourne nearly half as many law students as are studying liberal arts. Whether this is an altogether happy state of affairs is at least subject to question.

Three thousand students presently enrolled in law ought to be more than a profession of 6,000 needs even if the requirements of law related employments are taken into account. It is true that the academic casualty rate in law as in other undergraduate disciplines is high. Perhaps on the basis of present experience only about 10 *per centum* of those enrolled in law will graduate in any one year and the resulting 300 might well be needed for the profession and related assignments. With the advent of the quota system and restriction of the entering law classes to the most promising applicants the success rate ought, however, to rise significantly. Some American law schools with selective admission procedures graduate as many as 70 to 75 *per centum* of those who enter. The Harvard Law School currently graduates about 90 *per centum* of those who are permitted to enter. It does not seem beyond the realm of the reasonable to expect that Australian universities in years to come will be graduating 50 *per centum* or more of their entering undergraduate law students.

With at least one new university law school in prospect and with the capacities of the existing law schools strained to the utmost it is surely not unreasonable to expect the system to produce in the whole of Australia from 500 to 600 graduates in law within the course of the next few years. An assessment of the needs of the practising profession ought to be undertaken, but there is surely a very real possi-

bility that in Australia many more will be educated in the law than the law will have need for. To continue the present apprenticeship system of articles in the face of such numbers will surely pose impressive difficulties. On the score of the needs of the profession it may be doubted whether the present balance as between law and such other courses as liberal arts and commerce is a satisfactory one.

It may be questioned as well whether law as an undergraduate course is by itself a satisfactory university education for the many who will not enter the legal profession or related callings. Though the law may be a window through which most of life can be seen, the view of many of its parts will commonly be a distant, limited and mayhap a distorted one. Indeed it may be doubted whether one can even learn law by studying law alone and surely for those who will live and work outside the legal profession it is a sad thing to sacrifice a great part of a liberal university education.

But life in our affluent societies is hard. There are no other places for many university students to go and the tradition of law study in Australia is strong. Beyond all of this the law as a profession offers a role in our society challenging and attractive to young men and women of ability. For a complex of reasons we must expect in the future more university students in law than a cold assessment of the needs of the profession would justify—students whose intellectual training in the university will be the responsibility of the faculty of law. Concerning the nature of the intellectual exercises to be provided these students there has long been and doubtless there will long be some areas of disagreement.

II. What of the 'Practical' in Legal Education?

On the subject of legal education the practising profession often speaks. Happily it speaks, as on most topics, with many voices. There are some in the practising profession, who tend to deprecate what might, for want of a better term, be described as the intellectual side of legal education. It is sometimes said by these, who assuredly do not speak for the profession at large, that legal education ought to be more 'practical' and less 'academic' or 'theoretical'—as though such a line could be drawn in law with more success than in medicine or generally in science. In more concrete terms the suggestions range from shaping a curriculum to faithfully mirror the nature of the legal work done in a hypothetically typical law office, to suggestions for a shift to a kind of mass apprentice system to be administered by the university law schools, or more mildly to suggestions that law should be taught by some method that will not unduly disturb or agitate the student's mind—a simple approach for a simple subject.

Of course, so to describe the 'practical approach' is not calculated to win for it many friends not already in the fold.

It is probably inevitable that there should be some friction and tension between a segment of the practising profession and the universities on the subject of legal education. Some practititioners may look on the recent graduate, not as one they are bound professionally to instruct in the skills of the practice but as one who ought on graduation to be 'worth his salt' in terms of doing what needs to be done immediately in the law office. What needs to be done, of course, is what needs to be done now— or perhaps it is something that ought to have been done a month ago. So the focus of the busy practitioner may be limited to the particular task at hand—for him that is the legal world of the moment and if the law graduate does not have a sure and certain grip not only on the legal background for the particular problem but on the minutiae of procedural steps to be taken and in the proper sequence—clearly the university has fallen short.

In this not unnatural concern about the immediate demands of the practice the busy practitioner is likely to see the entire profession as a faithful replica of his own practice complete to the problem of the secretary who spends too much time on the telephone talking to someone who is obviously not a client. With equal ease he can easily project his own practice as the pattern for the profession for generations to come. The things that will concern the legal profession a generation hence are obviously precisely the same things that concern it now. If his practice is largely concerned with conveyancing, probate and accident litigation then so will it be for the ages and the role of the legal profession can be no broader. He sees the profession as a technical trade with lawyers serving not in any sense as architects of the social order but rather as its mechanics. For mechanics a technical education ought to be enough. That there are many in a university law school who will not practise is simply inexplicable but good for the practice.

Finally our hard-headed, practical man of the law quite naturally assumes that the university graduate in law ought to be happy in his trade and consequently ought to think of nothing else. The idea that a university education may have something to offer in terms of developing the individual's capacity to appreciate and to contribute to the culture of our time is simply frivolous. Above all life is real, earnest, practical and hard. It is not for the legal profession to know anything of literature, art, philosophy or even scientific method. The affluent society is for others to enjoy.

This is, of course, an overdrawn and exaggerated statement of the viewpoint of one segment of criticism of legal education. Because it is overdrawn and exaggerated the essential inadequacy of the ap-

proach ought to be more easily seen. It is not that all criticisms of legal education from the practical side are wholly without merit, it is just that the immediately practical approach is not by itself an adequate base from which to construct a moderately acceptable system of legal education.

What is the real goal of western civilization? Is it not that each man shall be free to develop his individual capabilities in so far as he has the will? To serve this end is surely one of the prime functions of the university.

When law is studied in the university, and particularly when it is offered as an undergraduate course of study, the obligation to make it serve its function as a university education is insistent and inescapable. Happily there is no incompatibility between law and learning. On the contrary, it was the recognition that law has a close and indeed essential kinship with other branches of learning that moved the university world to first embrace the discipline.

That kinship has become critical in our time. Today the lawyer who knows law alone must surely be consigned to a limited and lower berth in the law. Any reflection ought to persuade that the law is not just a caretaker of the past, charged with the preservation of a static system. The law is in fact a major instrument of social change. As science, as business, as political forces demand new frameworks within which to serve society it is the law, not court-house, litigation-based common law it is true, but law, statutory and administrative law, that provides the framework. In our dynamic, ever changing society law touches every phase of activity and, if he is trained to serve so dynamic a society with ever changing needs, it is the lawyer who can help chart the course so as to hold on to that worth keeping while embracing the future.

If the lawyer serves a changing world so must the tasks of the profession change. Litigation has declined and will further decline. It is difficult to believe that society will continue to view with satisfaction our present system for dealing with the staggering toll of personal injuries inflicted by our insatiable machines. If the rôle of accident litigation declines, to what function will the profession turn? Surely it is with governmental regulation, business, property and finance that the future of the profession lies. Here the profession deals with an increasingly sophisticated, and increasingly educated clientele about increasingly complex subject matters.

It was Sir Owen Dixon who said of the accounting profession that its great modern development was

> that it has come to supply not only information as to what has been done but as to what is presently happening today and what will happen tomorrow in the finances of trade, industry and the administration of

government, and above all of providing the soundest guidance as to the course to be taken with an eye to the future.

Any profession that undertakes to discharge such responsibilities must insist that its members be broadly educated as well as trained in professional skills. If the law does not supply such counsellors other professions will. Nor can professional education cease with the completion of a university course. It has then in fact only begun.

If the legal profession is to measure up to its opportunities to serve the business and financial communities it must be adequately educated and adequately trained for the responsibility. This means that lawyers must be knowledgeable about business, about economics, about governmental controls, about political forces to be reckoned with, the international framework within which business activity to an increasing extent will be carried on, about statistical and psychological techniques and their application to such matters as business management and labour relations, and since the lawyer is above all a communicator, he must be a specialist in the art of communication, as well educated in the use of language as his capabilities permit. All of this to serve the business community and there will be other clients as well—government agencies, individuals afoul of the criminal law (some with psychic disorders and some who are merely hopeful), group organizations of all sorts who play an increasing role in our pluralistic society and who will need, seek and pay for representation so as to make themselves felt with Parliament and with other law making agencies. If education for the law is to be really practical it must face forward and try to prepare men and women to live and serve in a legal world more different from ours than our world has assuredly differed from that of our fathers.

The responsibilities facing those who train members of the legal profession not for the demands of today alone but necessarily for tomorrow as well, are formidable in every society. These difficulties are certainly felt in the United States where legal education is a postgraduate affair. Without doubt we must shift some of our emphasis away from the adversary litigation process and embrace some of the teachings of other disciplines to more adequately fit our graduates to serve our changing society. This felt need to improve our response to the challenge of our complex society produces in the legal academic a chronic guilt complex accompanied by some very modest attempts to broaden the horizon of legal education.

If we in the United States feel that our responsibilities weigh heavily, how much more awesome are those facing law teachers in Australia who must as things stand now do most of the job providing a general university education and do it within the framework of legal education. Would that more Australian law students would heed

the advice that a combined arts-law course is well worth the time and effort! Whatever may be an adequate prescription for legal education as a postgraduate course in the United States will not be an adequate prescription in Australia. What we do in the United States may be studied with interest and sometimes with profit but legal education in Australia has a special function and it ought to have a special destiny. That so much has been accomplished in the period following World War II here in Australia must be described as a triumph over some serious handicaps.

III. Restrains of Legal Education

(a) *Inertia in the Profession*

The first and perhaps the most serious handicap is that factor that so burdens human progress, the force of inertia. It was Professor Cornford, I believe, who said that of all the arguments, the argument in favour of doing nothing is most compelling. As regards legal education inertia manifests itself as a nostalgic longing for the past when instruction in law was offered in the form of straight lectures. These lectures were delivered in considerable part by busy practitioners whose object was to dispense in oral form a straightforward and necessarily condensed and simplified version of a text on the particular subject. Recital of personal experience in the practice was classed as permissible frolic and detour. The system had some merit. It was relatively inexpensive. It did not make very large demands on the students. It did produce some able and indeed distinguished practitioners but that was not particularly to its credit, for any system or no system of legal education will produce some distinguished practitioners. The real question was whether that older system of legal education, employed at one stage in the United States as here in Australia, used the student's time and energy to the best advantage. Did it challenge and stimulate him to develop powers of analysis and communication to the limits of his capabilities at that stage of life?

The verdict in legal education, in professional education generally and in the whole of education for that matter has been that given men of ability and dedication more can be expected from teachers and students on a full-time than on a part-time basis. If the teacher of ability gives most of his time not only to the mastery of the subject but as well to the challenge of how to make his course a voyage of intellectual discovery and growth for the student, a more fruitful educational experience should result than if the same man were to spend most of his time in practice and visit the school to simply share his knowledge of one subject with which he deals in his busy practice.

In fact since World War II there have been some very significant developments in legal education in Australia. Thanks to the recruit-

ment to full-time law teaching in Australia of a most impressive group of lawyers, at considerable financial sacrifice for many if not most of their number, legal education in Australia is moving forward. Teaching methods have shifted away from straight exposition to the development of a variety of discussion-based problem-solving techniques. The emphasis is not simply on the assimilation of a body of knowledge but on the development of analytical powers, of the power to discriminate, to articulate, to deal with the law in imaginative and constructive fashion.

The law is seen not as an immutable body of inexplicable propositions but as a process, a growing, developing response to an ever changing society. The common law itself does move and change—even in England! Down with *Polemis*! Long Live *Wagon Mound*—until another hard case comes along! It may be that the common law, that even litigation, is not properly to be classed as the supreme product of the law. In fact litigation may better be viewed as signalling the failure of some of the other legal processes of planning, of negotiation of conciliation. To develop capabilities to administer this broader conception of law in new and partially unfamiliar settings calls for imagination and the willingness to try new things—with no guarantee that all that is new will prove to be good.

What was good enough or what had to be tolerated in the past is simply not good enough today and a great effort is being made to better the offering. The probable impact of new teaching methods, and of newly emerging areas of law on the curriculum and the calendar are only now beginning to be appreciated. Surely no one would seriously argue that the best possible legal education was that offered a generation ago. It must be possible here as in most fields of human endeavour to improve on the past. But there are always those who moan the passing of yester-year, who see the good old days as the high tide in human affairs.

This desire to live in and enjoy the comforts of our mid-twentieth century while leaving the lawyer's head cradled in the nineteenth can be a serious obstacle to the ongoing of legal education in terms of resistance to introduction of innovation and to any enlargement on the expenditures in this area of education.

(b) *Inertia and Some Law Students*

The power of inertia is even more damaging when it affects the very students who represent the targets of the effort to improve, to upgrade legal education. Perhaps one ought not to be surprised that of those resistant to education it is the student who is most resistant of all. Distressed by a suspicion that perhaps more is demanded by way of continuous study and of participation in the educative process

than used to be the case, there is a substantial group in the Australian university law school student body who simply do not choose to participate. A minority, but a substantial minority, these mental sit-down strikers burden and impede the whole operation and in the process invite their own academic disaster. No school can rise above the quality of its students' performance. Indeed it is the students who make the school. No talents on the teaching staff, and they are very considerable here, no facilities can do for a school what an aroused, interested, high spirited student body can do. Of all the others, their stake in legal education is the greatest. Of all others by a display of initiative they can make the greatest contribution to its progress. When entry into the law school is limited by a quota system it is a sad state that some of those admitted give not their best but very little indeed.

(c) *The Need for Enlarged Staff*

This inertia, this longing for the golden days when not as much was demanded, is a powerful force and a serious encumbrance on legal education in this country.

Because of the long tradition in this country of legal education in the economy, austerity model, Australian university law schools are seriously understaffed in light of their responsibilities. Several would barely satisfy the minimum standards of the Association of American Law Schools that there be one full-time teacher for every seventy-five students. With the shift away from the old fashioned and bargain priced lecture method of teaching in favour of discussion based teaching methods, and more supervised writing and drafting, more teaching manpower is required. If students are to be prodded and stimulated into continuous study and independent analysis then they must be prodded and stimulated in smaller teaching units. If research beyond analysis of appellate court decisions to assist in the forward movement of the law and to relate academic and professional experience is to be undertaken then manpower is needed. Surely, if Australian law schools are to discharge their responsibilities for general education reinforcement of the ranks by some whose primary interest may be outside the law is in order. American law schools of comparable size commonly have full-time teaching staffs two or three times the size of Australian law schools. When demands for new courses in newly emerging fields of practice are heard, from the practising profession, the question may well be asked whose back will bear the load.

(d) *Inadequate Physical Plants*

The physical facilities provided Australian law students are distressingly inadequate and ought to be a reproach to the profession

and to the community. Of course some very great improvements have been made in the past few years but at their present level they are still sadly inadequate. Perhaps the most critical deficiency is the library, the heart of any modern law school. The minimum standard for law libraries prescribed by the Association of American Law Schools calls, among other things, for library seating capacity adequate at least for 40 *per centum* of the student body. To provide substantially less than that seating capacity and to compound the evil by making no apparently adequate provision for law student fraternizing and socializing is to supply the ingredients for a man made beehive complete with sound effects. To expect students to rise to the challenge and maintain sound in the law library at something below jet engine noise levels is apparently to be classed as a large expectation.

(e) *Money: The Root of Considerable Evil*

The fact is that legal education in this country feels the financial pinch that comes when a community is not willing to do as much for its young people as they deserve. That statement is true to some extent of the United States and it is surely true of this country. Of automobiles and television sets there is no end but the universities have no places for apparently qualified and eager applicants. There are not enough class rooms, not enough staff, not enough library facilities. If I were a young Australian of university age who had passed my matriculation examination could you explain to me why this country cannot afford to give me a chance, a fair go?

It was Professor Karmel of Adelaide, in his Buntine Oration here in May, who pointed out that in Australia of the age group from 15 to 19 only 20·3 *per centum* are in school while of those from 20 to 24 years of age only 1·9 *per centum* are enrolled. Of the latter age group in the United Kingdom 2·4 *per centum* are in school while in the United States 66 *per centum* of the younger group and 12 *per centum* of the older group are enrolled. The Russian figures are 48 and 8 *per centum* respectively. It is not only that the numbers on Australian universities are relatively small. There is as well a relative unwillingness to spend on education.

Economic comparisons as between countries are difficult. None the less Professor Karmel's findings ought to alarm and distress anyone who is concerned about Australia's future. In the United Kingdom for the year studied (1958) 3·7 *per centum* of the gross national product was expended on education. The figure was the same for Russia. In the United States 4·5 *per centum* of the gross national product went into education. For Australia the figure was 2·9 *per centum*. In Professor Karmel's words:

> If we take account of all the qualifications, the fact remains that . . . Australia spends a relatively low proportion of gross national product on education. In current expenditures Australia ranks 15th on the list and in total expenditures 11th . . . On a proportionate basis we spend appreciably less than Sweden or the United Kingdom or the United States or Canada or the Soviet Union or Italy or the Netherlands . . . .

If it is pleaded that all is being expended on education that the country can afford, how is it that these other countries spend more proportionately? How is it that their citizens are willing to pay taxes extracting a larger proportion of the gross national product than here? Professor Karmel is my authority for the proposition that taxes take 31 *per centum* of gross national product in Sweden, 29 *per centum* in the United Kingdom, 28 *per centum* in Italy, 26 *per centum* in the United States and just 22 *per centum* in Australia. Can Australia afford to enlarge and improve education, university education generally and education in law in particular?

Though it is undiplomatic in the extreme, I cannot forbear a comment on the recent organization of a new law course by the Council on Legal Education of the practising professions. Conceived in compassion, this course was provided by the profession for those who had passed their matriculation examination but for whom the University had no place. As a humanitarian emergency measure the action taken, and taken with relative dispatch, was magnificent. I do not intend to derogate in any way from what I regard as a wholly praiseworthy undertaking when I ask how long it ought to continue.

With educational institutions of all kinds there is a very great risk that interests will vest well within the period of lives in being. When Monash University offers a law course the two Universities together can surely supply a surplus of law trained graduates for the profession and for allied callings. At that stage will it be in the interest of the profession, in the public interest to provide still another avenue into the profession and one that almost necessarily cannot afford to offer the facilities that a university setting should offer?

Ought not the next step to be for the profession to take the lead in arousing the community to the need to expand university facilities for all who pass the matriculation examination? Then if more are interested in law than an adequate university system ought to provide will it be against the public interest or against the interest of the profession to have those studying law selected from among the best? If there are other suitable university courses available in liberal arts, in commerce and in other fields will not the common good be better served by channelling many students into those areas?

At this point I must appear as one goaded by an ambition to ride out of town on a rail. As a Lincoln story has it a fellow who was

reporting on such an experience later said that if it had not been for the honour of the thing he would have been inclined to refuse. I have been speaking more bluntly to you than I might speak to my own countrymen because in my experience Australians have an amazing tolerance for advice—even when offered by officious foreigners. What you do with the advice, is, of course, something else again. But however critical I may sound I envy your opportunities.

IV. The Prospect to be Won

Many of us live a great portion of our lives vaguely grateful for the way of life in which fortune has placed us, with some awareness that in fact we were brought to this position by others but with no clear conception of what we can do to advance the framework for those others still to come. Your opportunities to make major contributions to legal education in your own time are obvious and numerous. As students you have it within your own power to bring a very good law school to the level of greatness and only you as students establishing a tradition that law students do work harder as well as play harder than other students in the University can bring that to pass. By the simple though difficult expedient of establishing a tradition of hard, regular and continuous study, of being prepared, you can do for this law school what no one, no one else in this world can do.

As students now and as graduates later you can become an active force in the community to insist that higher education be decently treated. You have parents. You even have friends. What the people of a democracy really want they will secure if they persist and if they are willing to pay the price. What better way to meet your obligation than to work to see that expenditures on university education become not an embarrassment but a source of pride. If you sit who will do the job? If you move what can stand against you?