

## Legal Education — Past and Future

One of the useful things about anniversaries is that they prompt people to look backward and forward simultaneously. This article is written, on the 60th anniversary of formal legal education in Manitoba, in the hope that if those who are planning for the future of legal education were to pay some heed to the past they might avoid some of the problems that have befallen their predecessors.

It would be unwise to be overly sanguine about the prospect of learning from experience, however; the history of legal education abounds with lessons ignored. Consider, for example, the long and troubled story of efforts to make the education of lawyers "practical".

In every field of education there exists a tension, if not outright hostility, between "practical" and "academic" concerns. It finds frequent expression, for example, in the cynical aphorism: "Those who can, do, and those who can't, teach." Nowhere has this tension been more evident than in legal education. Indeed, the entire history of Anglo-American legal education can be viewed as a succession of attempts to reconcile the "practical" and "academic" approaches. Even now, after eight centuries of experiment, a thoroughly satisfactory resolution of the problem eludes legal educators.

### THE PAST

#### ENGLAND

From the moment a distinct class of professional lawyers emerged in England in the 12th Century, two very different and mutually isolated forms of legal training existed. The revival of interest in Roman Law stimulated by the great Italian Renaissance universities at Bologna and Ravenna had led to the teaching of that subject at Canterbury, and then to the establishment of Roman Law chairs at Oxford and Cambridge. Before long, the universities also offered instruction in Canon Law, which governed the many matters falling within the jurisdiction of the ecclesiastical courts at that time. These legal studies in the universities were methodical and intense, but they ignored altogether the customary common law that was applied in most English courts. Unless he intended to practise in the ecclesiastical or civil courts, a lawyer could not equip himself for the pursuit of his profession by studying law in a university. Those who planned to engage in general practice chose, instead, a very different mode of education: apprenticeship to experienced lawyers and observation of the courts in action.

There can be little doubt that this practical approach to legal education was favoured by the courts and by government officials. In 1234 a Royal Edict ordered the closing of law schools in London,

presumably because it was feared that teaching of Roman legal theory so close to the seat of the Royal courts might somehow contaminate the common law. In 1292 another Royal order was issued sanctioning the training of law students by observation in the courts, and authorizing the judges to restrict this privilege to "a certain number, from every county, of the better, worthier and more promising students". Shortly thereafter the courts designated a certain enclosure, known as the "crib", for the exclusive use of students.

Apprenticeship and random observation failed to provide sufficient learning opportunities, however. Some more methodical form of instruction was also required. This missing component was eventually furnished, in admirable fashion, by the education programs of the Inns of Court. Little is known about the origins of the Inns of Court. They probably began as places where lawyers could obtain food and lodging near the courts, and where they could come into social contact with their professional brethren. They soon developed into very complex organizations, charged with the training of those who aspired to enter the profession.

Legal education in the Inns of Court during their most influential period was marked by a happy marriage of the practical and the theoretical. While students continued to learn by observing the courts and senior practitioners, they were also required to attend and participate in frequent lectures, readings and moots throughout their eight years as student members of the Inns. Supervision of these studies was the responsibility of senior lawyers, who took their duties very seriously. Instruction was also offered in history, music, dancing and other leavening subjects. The Inns became, in fact, secular universities, in which many young men enrolled for a general education, some with no intention of practising law.

The regular universities continued to teach only Civil and Canon Law during this period. Even this instruction had considerable practical significance, since there was by then a sizable group of civilians practising in the ecclesiastical and other special courts who, although they had formed an Inn-like organization called Doctors' Commons, relied entirely on the universities to train those who entered their profession. Some contact existed between the universities and the Inns of Court, by reason of the fact that many students spent some time at a university before enrolling at their Inn, although more often than not this preliminary study was in non-legal subjects.

The success of legal education during the hey-day of the Inns lay in a recognition of the inter-dependence of practical and theoretical considerations. Perhaps this was a legacy of the Renaissance spirit, which drove men to pursue both knowledge and worldly attainments

with equal vigor. Whatever the cause, the result was a legal profession of unparalleled sophistication, and an eclectic legal system that was willing to borrow from Roman or other sources when it seemed appropriate to do so.

Good things are seldom permanent, however. The pendulum eventually swung back toward a greater distinction between the real and the theoretical. The solicitors (most of whom were known as "attornies" at that time) were the first to feel the effect of the change. Although always regarded by the barristers as inferior members of the profession, attornies had been admitted to the Inns of Court in the early years. They were banished from them about the middle of the 16th Century, however, and although they were permitted to remain in the less prestigious Inns of Chancery, their education suffered. Before very long the quality of the training offered to barristers by the Inns of Court began to deteriorate also. By the end of the 17th Century most instruction at the Inns had ceased, and examinations had become quite perfunctory. In time the examinations were dispensed with altogether, and the Inns became primarily social and disciplinary bodies rather than educational institutions. The education of common law lawyers was once more left to apprenticeship, observation of the courts, and private study. Although it would be very difficult to prove, it is interesting to speculate whether this trend in legal education was not largely responsible for the common laws subsequent reluctance to generalize or to borrow as freely as in the past from other legal systems. I suspect that if the open minded blending of theory and practice that marked the best years of the Inns of Court had been maintained, the common law would not have become nearly as inbred as it eventually became.

The solicitors took an important step toward regulating the standards of their profession in 1729, by requiring a five year apprenticeship period, and by establishing the forerunner of the Law Society to administer examinations to candidates for admission to practise. The barristers were free from these regulations, however, and for both branches of the common-law profession the educational process remained a self-help affair. The universities continued to provide instruction in Civil Laws but demand for such training diminished as the special courts decreased in significance, and the civilian bar shrivelled.

The first major attempt to involve universities in the study of English law was the establishment of a chair of English law at Oxford in 1758. William Blackstone became the first holder of the chair. Blackstone was an outspoken critic of the haphazard methods by which practising lawyers were trained at that time. He argued in his inaugural lecture that while apprenticeship instills the ability to be "more dextrous in the mechanical part of the business", it ignores "first principles upon which a rule of practise is based", with the result that "the least

variation from established precedents will totally distract and bewilder" a lawyer trained in that matter.<sup>1</sup> In his opinion systematic study of law in a university should be a prerequisite for entitlement to practise law. Although Blackstone failed to persuade the authorities to make such a change, his work at Oxford was very influential. His lectures became popular with those who were planning a career in the law, and when they were published in the famous *Commentaries* they eventually became part of the standard educational equipment of most lawyers, not only in England, but in the British North American colonies as well.

Oxford's lead in providing common-law instruction was followed by Cambridge in 1800 and by London University in 1829. Classes at the latter institution under Professor Andrew Amos were especially popular, because they were held in the evenings, when articled clerks and bar students could attend, and because they attempted to blend practical and academic matters. In fact, the Amos lectures were so successful that they inspired both the Law Society and the Inns of Court to re-institute educational programs of their own. Paradoxically, that development removed much of the impetus for further advance in common-law instruction by English universities for many years to come. The quality of English legal education during the 19th Century has been described as a "scandal",<sup>2</sup> and although there have been gradual improvements since then, the training of English lawyers still lags behind North American standards. A committee chaired by Mr. Justice Armrod made several very sweeping proposals for reform in 1973,<sup>3</sup> but it is as yet too early to know what their fate will be.

## UNITED STATES

In the United States, by contrast, the 19th Century brought radical changes. Law schools were established at many American universities during the first two or three decades of the 1800's. While apprenticeship remained important for a long time, study in a university law faculty had become the standard method of legal education in the United States before the end of the century. Many law schools were criticized — justifiably — during that period for taking an overly theoretical approach. There was too much emphasis on abstract principles, and not enough consideration of the courts' behavior in real cases. The "case method" of instruction, introduced at Harvard in the 1870's by Dean C. C. Langdell, and ultimately adopted by most American law schools, did much to remedy this shortcoming. By requiring law students to study, and to analyse by means of Socratic discussion, the actual decisions of the courts, rather than some test-written generalized observations about

1. *Commentaries*, 2nd Ed., Vol. I., p. 31-32.

2. H. W. Arthurs, "The Ormrod Report: A Canadian reaction" (1971) 34 M.L.R. 642.

3. *Report of the Committee on Legal Education* (Cmmd. 4595, 1971). See Arthurs, note 2 above, and G. P. Wilson, "Reflections on the Ormrod committee Report", (1971) 34 M.L.R. 635.

them, the case method put students in touch with realities of judicial decision-making and encouraged them to develop the critical abilities that resulted in American legal thought leaping so far in advance of British thought during the 20th Century. It was not a universal panacea, however, and pleas are still heard, even at the best American law schools, for a more practical approach to legal education. The transition from law school to the harsh realities of bar examination commonly proves too traumatic for law students south of the border.

## CANADA

In the common-law provinces of Canada, as in England, the trend to entrust basic legal education to the universities was much slower and more grudging than in the United States, though a little more rapid than in England. Although law was taught at Dalhousie after 1883, and at the University of Toronto after 1889, apprenticeship was regarded as the heart of legal education until the late 1950's. Both the strengths and the weaknesses of this approach are evident in Manitoba experience.<sup>4</sup>

Legal education in Manitoba did not begin until the early 1870's — about the time that Langdell was introducing the case method at Harvard. Nothing resembling Langdell's sophisticated teaching experiments were attempted in Manitoba at that time, however. In fact, very little formal teaching of any kind was offered. When the profession was first organized in this province in 1872, the regulations for students simply imposed a five year apprenticeship requirement, and specified certain subjects and textbooks upon which the students would be intermittently examined.

Occasionally, the Bar Society, or its successor the Law Society, sponsored lectures on miscellaneous topics, but these were quite infrequent. The students themselves also organized special classes from time to time, but they too were very sporadic. Commencing in 1884, the University of Manitoba offered a three year course of studies leading to the LL.B degree, but there was no instruction involved; it was simply a supplementary reading program which the ambitious law student or lawyer could pursue in his spare time. This pattern of legal education prevailed for forty years. During that period Manitoba law students had only two sources of guidance: their busy and sometimes indifferently qualified principals, and the law books in which they were required to delve after a weary day of often menial office chores.

An improved pattern of legal education came into effect for Ontario in 1889, when the Law Society of Upper Canada established a

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<sup>4</sup> The history of legal education in Manitoba is discussed more fully in *Legal Education in Manitoba*, a pamphlet by the writer published on the occasion of the official opening of Robson Hall in September, 1969, and in D. Gibson and L. Gibson, *Substantial Justice*.

permanent law school at Osgoode Hall, where articled law students received instruction on a regular basis. Manitoba finally adopted the Ontario pattern when, in 1914, at the instigation of former Kings Bench judge H. A. Robson, the Law Society of Manitoba and the University of Manitoba jointly established the Manitoba Law School, based on the Osgoode Hall model.

The educational scheme formulated in 1914 remained in effect, with the exception of one short period, for more than 50 years. It had many virtues, and was certainly a great advance over the system that preceded it. The stimulus of well-organized daily classes and the opportunity to come into contact with lawyers practising in fields other than those of their own principals went a considerable distance toward overcoming the defects of the earlier system. Problems remained, however. The bulk of the teaching staff were practising lawyers, many of whose pedagogical prowess left much to be desired. Not even the members of the tiny full-time staff fully understood the revolution in teaching methods that had taken place in the major American law schools. Time constraints plagued both teachers and students. It was not easy for part-time teachers to prepare adequately for classes in face of the pressures of practise, and conscientious students found it very difficult to cope with the greatly increased study load while still fulfilling their articling obligations. The law students working day, which included a class at 9:00 A.M., office duties from 10:00 until 4:30, and then another class until 5:15, followed by an evening of study, was an exhausting affair, more conducive to rote learning than to deep understanding.

When J. T. Thorson was appointed Dean of the Manitoba Law School in 1921 he attempted to overcome these difficulties by a program of full-time study. Commencing that year the articling period was reduced to twelve months, to be served concurrently with the final year of law school in the case of university graduates, and in the following year in the case of non-graduates. The Canadian Bar Association's new model law school curriculum was adopted in 1922, and the full-time teaching staff was increased at the same time. Lawyers throughout the country looked with interest at what was regarded as Canada's most advanced experiment in legal education.

The experiment did not last very long, however. In 1927, the year after Thorson left the school to enter politics, the course was lengthened from three years to four, with concurrent articling in the latter two, and in 1931 concurrent articling was extended to all four years (in addition to a fifth year of full-time articling for students with no prior university degree.)

The reason given for terminating the program of full-time law school study was that it had been too theoretical in nature. It is difficult

to determine, at this distance in time, whether that criticism was fully justified. It is possible that the profession, imbued as it was with the virtues of "practical" legal education, failed to appreciate the significance and value of the changes Thorson introduced. It is more probable, though, that the law school had failed to exploit adequately the opportunities that a full-time program afforded. The full-time teaching staff numbered only three, including the Dean, and the remainder of the staff could hardly be expected to devote any more time to their courses than they had when the students were also part-time. The failure of the experiment probably proved nothing more than that a full-time school cannot be operated successfully by a part-time staff. It would be interesting, though idle, to speculate about the subsequent history of legal education in Manitoba, and in Canada, if adequate resources had been available to give the experiment a fair chance.

Manitoba retained the scheme of concurrent articling and law school training to which it had retreated for the next 32 years. Ontario was somewhat less complacent. At Osgoode Hall Law School, Dean C. A. Wright and his full-time colleagues began, in the late 1940's, to express strong dissatisfaction with the form of training, and to laud the virtue of full-time study. They encountered determined opposition from the profession. During the extended controversy which then ensued, Dean Wright and several of his colleagues resigned en masse to join the law faculty at the University of Toronto, where, despite lack of professional recognition, a good academic program of legal studies still attracted a small enrollment. The impasse was finally broken, in the late 1950's, by Law Society approval of an innovative scheme involving three years' full-time university study, followed by a year's service under articles and a further 15 months' study in a "Bar Admission Course" operated by the Law Society. Although a similar pattern of legal education was soon in effect in most other common-law provinces, Manitoba resisted the change until 1964.

Manitoba's resistance would undoubtedly have been even longer-lived if it had not been for pressure exerted by the Law Society of Upper Canada. Although until recently that organization had officially shared the preference of most Manitoba lawyers for the practical approach, it now displayed the intolerance of the converted for schemes that involved less than three years of full-time academic study. When Manitoba graduates sought to enroll in the Ontario Bar Admission Course in order to qualify for practise in that province they were prevented from doing so by Ontario's refusal to recognize a Manitoba LL.B. Only graduates of law schools offering the now standard three-year full-time curriculum were regarded as sufficiently well qualified to enter the Ontario Bar Admission Course. This development prompted the Manitoba Law Society to set up a committee to consider the possibility of educational reforms. The only major chance recommended by that committee was the abolition of articling in the

first year. This was implemented in the 1963-64 academic session. However, when it was learned that the Law Society of Upper Canada still refused to accept the Manitoba course as adequate, it was reluctantly decided to adopt a scheme similar to that of Ontario. Students enrolling in September, 1964 faced the prospect of three years' uninterrupted study, followed by a year in which articling experience and a Bar Admission Course would be combined.

This time it was understood that a program of full-time instruction could not be effectively implemented without a massive increase in the school's financial resources. Since it was believed that only a university could provide funding on an adequate scale, the school was made a faculty of the University of Manitoba. This made it possible to increase the size of the full-time teaching staff, to expand the library, and eventually to construct Robson Hall on the university campus. Thanks largely to the leadership of Dean C. H.C. Edwards, these material changes were accompanied by a very marked improvement in the quality of the instruction offered. The result, in the writer's opinion, is that the University of Manitoba is now one of the two or three best places in Canada to study law.

Yet, not even the best law school in Canada, or anywhere else in the Anglo-American legal world for that matter, provides the quality of instruction that ought to be expected of an institution that has had eight centuries to perfect its techniques. In some respects, legal education is less satisfactory today than it was at the apogee of the Inns of Court.

The chief weakness of contemporary legal education is the same that had plagued most of its history: failure to resolve the practice — theory dilemma satisfactorily. Symptoms of this failure are the demands by students for more "relevant" courses, "second year boredom", widespread criticism of bar admission courses, and the popularity of the limited opportunities that exist to take part in student legal aid clinics, "clinical style" courses, and summertime employment with law firms. Modern law students thirst to relate their legal knowledge to real life.

Of the many causes to which this failure can be attributed, the most fundamental, in my opinion, is the notion that practice and theory are distinct, even competing, regimes that are best studied — considered in isolation from each other. In truth, theory and practice are complementary; they cannot be usefully separated. Theory exists for the sole purpose of explaining practice. Theory that is not based on practice is not only useless; it is dangerous. To teach theory without reference to the realities on which it is based runs the risk that it will not be understood, or that it will be rejected by the student as valueless. To teach practice without reference to the reasons that underlie it deprives the student of guidance in the many situations which are not identical to



those studied. As Professor Harry Authurs has stated: "The nexus between the academic and the vocational, between the philosophical and the practical, must therefore be constantly demonstrated by simultaneously considering both."<sup>5</sup> Yet in modern legal education the separation of the practical and the theoretical is just about as widely accepted as is the separation of Church and State in the political realm.

This separation has not only institutional consequences, such as lack of communication between law school and bar admission courses, with resultant gaps and overlaps; it also derogates from the quality of all the instruction provided. For three years the professors discuss generalities, with insufficient reference to the real world; then for another year or so, principals and bar admission instructors deluge the student with arbitrary rules of thumb, check lists and precedent books designed to permit mindless practise in several hundred precise situations. Too often the law professor lacks a knowledge of the manner in which the laws he teaches actually operate in the real world. Too often the students practical advisors lack an awareness of recent judicial and legislative developments or an appreciation of the long-range significance of the practises they counsel.

Another reason we have not succeeded in effectively integrating theoretical and practical training is that we have decided only the former merits the attention of full-time professional teachers. Practical instruction is still left, for the most part, to busy practising lawyers. Many lack an aptitude for teaching, and none has sufficient time to prepare his material effectively, much less to develop effective teaching techniques. Teaching is a difficult art. Amateurs occasionally do it well, but if consistently high quality is desired it is necessary to rely chiefly on those who have undertaken to make a full-time career of education. If there is truth in the epigram "Those who can, do", there is equal truth in the corollary "but they can't usually teach".

A further reason for inadequacy of current practical training is that it is frequently too detailed and specialized to have much practical value for the student. One of the fundamentals of good pedagogy is that information should not be provided until it is needed. Bar admission courses, however, commonly concern themselves with the minutia of such matters as tax sale proceedings and mortgage foreclosures years before they will ever be encountered in reality. For most students, by the time such information is needed (if ever) it will probably be both forgotten and outdated.

Teaching methods must also take some of the blame for the shortcomings of legal education. While the lecture and discussion

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5. See note 2, above, at p. 647.

methods are well suited to the transmission of data and the examination of ideas, the best way to instill an understanding of particular legal concepts and their practical ramifications is to employ the problem method, by which the student is called upon to apply his knowledge to real or simulated fact situations.<sup>6</sup> This is already done to a certain extent in both law schools and bar admission courses, but the technique has never been exploited fully enough to achieve the marriage of theory and practise that should be the aim of legal education. The reason is not difficult to understand: problem methods are very expensive and time consuming. Teachers must deal with students on an individual or small group basis, which means that a move to increase problem-type instruction would require very substantial increases in the teaching staff. Moreover, students with heavy daily reading and class commitments lack the time to undertake much more problem work than at present.

### THE FUTURE

It is easy, I know, to criticize an institution for falling short of perfection, without offering practical suggestions for improvement. I intend, therefore, to advance a few proposals for change. Before doing so, I wish to stress that only radical measures can bring about a significant improvement. While Manitoba has finally come up to the level of the better North American law schools, it is partly because those schools have not improved very much lately; legal education has reached a plateau. The case method and associated reforms have taken us about as far as they can. If there are to be marked advances in the future, there will have to be basic changes in the structure of legal education. In some respects the reforms to be suggested here involve a return to techniques employed in the past, and an abandonment of certain currently popular trends. They are no less radical for that.

First, it is submitted, the Bar Admission Course should be scrapped. All legal education should be placed in the hands of professional educators. Second, these educators must accept responsibility for teaching the whole law, from the grandest generalizations to the procedures by which the law is applied and the manner in which its application affects society. Theory and practise should not be taught in isolated packages, but as a part of an integrated whole. Law professors should be generally expected to have had some contact with the practise of law, and to make use of that experience in the classroom. Where their own experience is limited, they should call heavily upon practitioners as guest lecturers, interviewers, and "resource people". No attempt should be made, however, to instruct the students in the detailed "how-to-do-it" aspects of every conceivable procedure; only those which are

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6. See W. H. Charles, "What is the Problem Method?", (1962) 40 Can. Bar Rev. 200

common, or which provide good illustrations of a general category of situations should be dealt with, and even then the explanations should be no more detailed than a student could reasonably be expected to retain.

There will have to be a much heavier reliance on problem methods than ever before. The best problems, where available and suitable for instruction, are actual cases. For this reason the law schools should emulate dental schools in establishing clinics in which students can learn from working with real problems in a closely supervised setting. The legal aid clinic that most law schools now sponsor constitute a first step in that direction, but it is not good enough to provide a few students a little experience with a small group of minor criminal cases for indigent clients; they will not be satisfactory until they offer every student extensive experience in a representative range of civil and criminal cases. "Fee generating cases" should not be excluded. There would be many difficulties involved in setting up such clinics, of course. The necessary supervision and space would be expensive. Integrating a large-scale clinic with an effective instructional program would be very difficult; it might call for rotating periods of full-time experience in the clinic. The legal profession would be difficult to convince of the virtue of a scheme that might take fee-generating work away from its members. These are all problems that can be overcome with effort, good-will and money, however.

Some readers might be tempted to ask: if instruction by association with actual cases is so beneficial that periods of full-time clinical exposure would seem useful, why not revert to the old institution of articling? There are several drawbacks to using articling as the primary source of problem training. A single-firm often lacks a sufficiently varied range of work. There are great discrepancies between abilities of various practising lawyers, and students are not always able to discern these differences, with the result that there is as much chance of learning bad habits as good. Above all, few practitioners are able or willing to devote the time to their students that good instruction requires. Nevertheless, there will probably always be a role in legal education for apprenticeship with practising lawyers — if only on an informal basis after call to the bar. It is possible that the law school clinics referred to above might evolve into confederations of fairly small, relatively autonomous "training firms", functioning much like ordinary law firms, but operated by salaried staffs, whose primary aim would be instruction. The experience of every student associated with this new firm of articling would be at least as good, and probably better, than the best articling of any student in the past.

No clinic could always be counted on to produce timely problem material. There will always be room for hypothetical problems, ranging

from the traditional moots, pioneered by the Inns of Court, to computer-monitored negotiation and strategy games. Even a clinic with which students were associated on a full-time basis might for variety employ hypothetical problems as supplements to its regular caseload. Fabricated problems should also be used extensively in connection with many of the standard law school courses.

In other words, law students should be encouraged, at all stages of their training, to "take the law into their own hands". It must be understood, however, that the emphasis I am urging to be put on problem solving is not aimed at inculcating "how-to-do-it" skills; these will come quickly enough from on-the-job experience. The purpose of inducing students to put their knowledge to work at every opportunity is two fold: to strengthen their motivation to learn, and to deepen their understanding of the legal system.

Problem-type training is very time-consuming. Where would law students, whose schedules are already quite crowded, find the necessary additional time to permit a substantial increase in problem solving? Abandonment of the Bar Admission Course would provide some extra time, but not enough. Probably the best way to make room for clinical experience would be to do away also with the formal post-graduation articling period, and substitute three four-month full-time clinical internships — one after each law school year. This would be fairly easy to reconcile with the current law school time-table if the clinical period were restricted to the summer months, but to do so would hamper the clinic's ability to undertake long-term problems, and it would also place a difficult financial burden on the students. It would, therefore, probably be necessary to adopt a "tri-mester" system, under which both the school and the clinic would operate on a year-round basis, with staggered vacation and clinic periods. Such an arrangement would not necessarily mean the end of traditional apprenticeship to practising lawyers. It may be thought desirable (though I have considerable doubt, to permit a student to substitute law-office experience for some or all of the clinical program. Moreover, the Law Society would probably pass a regulation preventing graduates from practising independently until they had first worked for a specified period in association with one or more fully-qualified lawyers.

Additional time could be made available for problem approaches to regular law school courses by reducing the time allocated to case-method teaching. Effectively used, the case method is unequalled in its ability to explain judicial reasoning and the common-law approach, as well as to develop one's analytical powers. As means of transmitting information, it is hopelessly inefficient, however, and its extensive use after first year is very difficult to justify. While problem methods are equally time-consuming, they pay much higher dividends than the case method after the student has acquired a basic understanding of the legal

process. Motivation would be greatly magnified if after reaching that stage students were given more opportunities to learn by doing, instead of being required to continue their search for unspecified needles in haystacks of judicial chaff. A combination of lectures, occasional Socratic probing, and regular problem assignments would in my opinion prove much more effective, at least in the second and third years of the course, than plodding through casebook after dreary casebook.

Up to this point I have been dealing with methods of achieving a better blend of the practical and the theoretical. There are several other concerns that must also be taken into account when considering the future of legal education. One of the most important of these is the curriculum.

Until quite recently, law school curricula were largely compulsory and fairly standard. Each student who attended a particular law school studied the same things as every other student and the differences from one law school to another were not very great. During the past few years there has been a marked change. Every law school curriculum now includes a large selection of optional courses. In most schools the complete third year program and part of the second year program are elective. Even the first year curriculum has become partly optional in some places. The options include many of the old general courses, such as Jurisprudence, History of Law, International Law, Conflict of Laws, etc., as well as many "deepening" courses like Criminal Law II, Commercial Law II, and a plethora of chrome-plated new ones, such as Environmental Law, Consumer Law, Law and Society, Space Law, and so on.

The impetus for this trend to electives has several sources. In part, I think, it stems from the modern distrust of everything compulsory. It also owes a lot to narrowness of the coverage offered by standard courses taught by the case method, and to the desire of theory-stuffed law students to get away from generalities and to deal with more specific matters. No doubt the increasing specialization of the legal profession has also stimulated the appetite for options.

I think this trend is highly undesirable for several reasons. First, it is extremely expensive in a small school to offer many more courses than any one student can possibly benefit from. The expense would be justified if the wide range of options improved the overall quality of legal education, but I am persuaded that the converse is true. The legal system is in a state of very rapid flux — more rapid than at any time in its history. No one can confidently predict the state it will be in even a few years hence. Nor can any individual safely predict what fate the vagaries of life hold in store for him. The only sensible way to prepare for a future legal career, therefore, is to equip oneself with as broad an assortment

as possible of legal notions and approaches from all areas of law, so that no matter what future situation one finds himself in, he will have at least some prior familiarity with the field, or at any rate, a wide range of analogies that he can adapt to the situation. To restrict your legal education to the current provisions of the narrow field within which you hope to practise is like taking on a journey only the clothing that would be suitable for the type of weather you hope to encounter. Even if a person could predict his future career accurately, his preparation for that narrow specialty would be greatly enhanced by acquaintance with other fields, from which he can draw inspiration for new approaches to his subject. Since law schools are asked by society (which, after all, pays most of the cost of legal education) to certify that their graduates are capable of meeting its future legal needs, I think they have an obligation to ensure that their students' focus does not become too narrow. To the extent that it is the task of law schools to produce lawyers, as opposed to persons who have dabbled in this or that field of law, they must provide each student with a more wide-ranging view of the legal system than the current trend to options permits.

There are several types of elective courses offered at the moment by most law schools. Many involve the application of known principles to new situations: Environmental Law, Medical Law, Consumer Law, etc. While these can be useful exercises, they are not as valuable as courses with new conceptual content, and should in my opinion be severely limited in number. It does not really matter which particular subjects are retained or abolished, since they all accomplish roughly the same educational objectives. The same purpose would be served, in fact, by simply requiring each student to undertake a supervised research paper on a topic of his own choice.

Another type of optional course is the one which delves more deeply into a subject previously studied: Criminal Law II, for example. These courses should be given a very low priority in the LL.B. program; they should not be available until the student has been exposed to the fundamentals of most important areas of the law. They would be much more appropriate for a post-graduate refresher program, about which more will be said below.

A third type of elective is the subject which, although not of major consequence, involves concepts unlike those encountered in any other field: Patents and Copyrights or International Law, for example. Because it is important to equip prospective lawyers with as extensive a set of conceptual tools as possible — tools that can be put to use in situations not yet foreseeable — it is desirable that students should be made aware of these unique notions. This does not mean that full courses should be provided in matters like Copyright Law, however; what is needed is one or more pot-pourri courses which introduce the student, very briefly, to useful legal concepts he does not encounter in the standard courses.

In many law schools courses in quite basic subjects like Taxation, Commercial Law, Family Law, and Insurance are optional. In my opinion, these should all be compulsory; it is hard to understand how anyone can call himself a lawyer who does not have some rudimentary familiarity with these important areas of the law.

The final type of course commonly classified as elective is the general or overview course, such as History of Law, Jurisprudence or Comparative Law. Since the aim of these courses is to instill a fuller understanding of the nature of the legal system and the dynamics of its evolution, they are of cardinal importance to anyone who must deal with the changes that time will bring. The law, like a complex cloud system, is constantly moving and changing shape. Most courses, like still photographs, can provide only glimpses of the subject at an instant in time, and without reference to other parts of the system. Courses like History and Jurisprudence, if well taught, provide a motion-picture account of the entire system in operation over time. If any courses should be compulsory, these should.

It will be apparent by now that in the writer's view breadth should take priority over depth in curriculum planning. Generally speaking, the same approach should be followed in determining the content of particular courses, but there are some competing considerations in that situation. It is necessary in every course, and particularly so in the basic first year subjects, to pause from time to time and probe some aspect of the topic in considerable depth. The purpose of doing so is to remind the students that there is a third dimension to all material dealt with, and to show them by illustration how to explore that dimension when the occasion demands. Moreover, use of the case and problem methods, which are very valuable in appropriate circumstances, encroach heavily on the time available for broad coverage of a particular subject. Breadth cannot be the only goal, therefore. It is important, however, to arrest the current fad to teach more and more about less and less.

The question of examinations is one of perennial controversy. Some say that exams should be abolished altogether. They point out, correctly, that no form of examination is an infallible predictor of future ability, and conclude that no attempt should be made to assess and grade student understanding. This conclusion is a *non-sequitur*. While far from perfect, existing examination techniques have a reasonably high predictive capability, and so long as students continue to use law school enrollment as a means of access to the positions of privilege and trust that society accords to members of the legal profession, it will be the duty of the schools to examine and report on their suitability for that role.

A growing number of students assert that although some report of suitability to be a lawyer is necessary, it should be restricted to a simple

indication of whether the student has passed or failed. No attempt should be made, they say, to indicate the quality of performance by acceptable students. I agree that if a passing student does not wish to know the level of his performance there is no reason to tell him. However, there will always be students who do wish to know how well they are performing, either because they are the types of people whose motivation to learn is increased by competition, or because they believe that if they have equipped themselves for practise better than their colleagues they should be entitled to make use of that fact in seeking employment. Since it would be unfair to deprive those persons of a knowledge of their performance level, the best approach would be to leave the disclosure of passing grades to the option of the student in question.

Examination techniques are a subject of frequent discussion. It is currently fashionable to decry the traditional "sit-down" examination, and to call instead for "take-home" essays, problems and exams, "open-book" exams, oral exams, and so on. These techniques all have considerable merit, and should be widely employed. They should, however, be treated as supplements to the standard exam rather than as substitutes for it. In my opinion the traditional timed examination, by requiring students to demonstrate their understanding of the legal system briefly and under conditions of stress, simulates a type of situation in which practising lawyers must frequently function, whether in the court-room, or dealing with clients' unexpected queries in the office. Ability to perform well in those conditions is, in my view, indicative of a quality that is very important to success as a lawyer.

So far, the discussion has concerned the LL.B. course only. Should law schools also offer other programs? They should certainly make available a course of post-graduate study for those who wish to pursue a more advanced degree. Such courses will probably continue to be based primarily on research by the individual student, and should not place a very significant strain on a school's resources. A current demand on law schools that would be impossible to meet fully without greatly increased resources is for legal courses to form part of general Arts programs, or to supplement professional courses such as Engineering, Commerce, Medicine and Dentistry. The general public is keenly interested, also, in taking part in non-credit evening courses about various aspects of the law. Law facilities are well equipped to do all these things, but they cannot do so without great detriment to the LL.B. program unless considerable staff increases are permitted. The best solution is probably to create a special department within the school to perform these service functions. Another function that law schools should perform is to take responsibility for the continuing education of law graduates by means of periodic refresher courses. Some work of this type is now done by the law societies and bar associations, but much more is



needed. This work would, it seems to me, be better co-ordinated by professional educators. Again, however, law schools would require increased staff and facilities if this function were added to their duties.

A function that law schools must continue to perform in addition to all the teaching they do, but which is sometimes lost sight of by both those inside and outside the universities, is research. Effective research into the state and adequacy of Canadian law, and into ways in which it can be improved, cannot be carried out on a large scale by anyone other than full-time academics. While the quality of Canadian legal research has been generally quite high, the quantity has been much less than desirable. The lack of good up-to-date Canadian textbooks on even basic legal subjects is lamentable. When planning additional teaching responsibilities for the law schools, we must not allow them to encroach upon the time and resources available for scholarship and writing, which, after all, are the most fundamental of all forms of legal education. On the contrary, the schools must do much more than they are now doing to stimulate research by their faculty members. This does not mean that every professor should be required, on pain of dismissal, to produce research if he does not wish to do so. Some people are not suited to that type of work. It does mean that those who wish to engage in research should be given sufficient relief from teaching and administrative responsibilities to enable them to do so effectively.

What should be done with respect to future enrollments in law schools? Most Canadian schools are rejecting four or five applicants for every one they accept. Should the facilities for legal education in Canada therefore be greatly expanded? The legal profession in most provinces would answer the question in the negative, on the ground that the law schools are already graduating more lawyers than society can absorb. I think they are mistaken. It is true that the number of law graduates has increased disproportionately to the general population, but it is also true that society's perceived need for legally trained personnel is increasing at a very rapid rate. While there may be a certain faddiness in the current popularity of law schools, I believe that there will be a continuing demand into the foreseeable future for considerably more lawyers than Canadian law schools are now capable of training.

The question then arises: Should existing schools be expanded, or new ones built? In my mind there is little doubt that it would be better to create new law schools than to enlarge the old ones. Osgoode Hall's experiment in mass-production legal education has, despite extravagant funding and the most highly qualified staff, failed to provide its undergraduate students with as satisfactory an educational experience as several of its smaller counterparts. The personal rapport between faculty and students that is so important to effective teaching is inevitably lost in any school much larger than Manitoba is now. If, as

has been suggested, problem and clinical methods are to be heavily employed, the need for a relatively small student body will become even more important. The institution of a year-round teaching operation at Manitoba would enable us to increase our student body by about 100 students. However, when the time comes that a substantially greater increase than that is required, it would be wise to establish a second law faculty, presumably at the University of Winnipeg. Some might argue that the establishment of another large law library in Winnipeg would be wasteful, but the fact is that so far as basic working materials are concerned, Manitoba's library would not be adequate even if the new students were enrolled there. The only real overlap between two university libraries would be with respect to material that is frequently used, and a sharing arrangement could undoubtedly be worked out to meet that problem. If there were two law schools in the province it is likely that competitiveness between them would be very beneficial for legal education.

The conclusion has been stated at several stages of the foregoing discussion that if legal education is to rise above the plateau on which it now rests, substantial increases in financial support will be needed. Some may feel that society should make no further contribution to an already privileged profession. Before jumping to that glib conclusion, one should consider how much society has been willing to pay for the education of a highly qualified medical profession. The cost of educating a lawyer is many times less than the cost of educating a doctor. Even if the improvements suggested herein were to double the cost of legal education, it would be nowhere near that of medical education. Is a healthy social order less valuable than physical well-being? In the past we seem to have thought so, with the result that we now have a legal system that is largely unsuited for the times. The future consequences of that attitude can already be glimpsed in the streets of Detroit, New York and Chicago, where lawlessness frightfully similar to that which prevailed in England at the dawn of legal education seems to be totally beyond the reach of the legal system.

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