COMMON SENSE IN THE LAW SCHOOL*

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An acquaintance of mine recently promoted to the chair of law in a far distant university has reminded his audience that, although according to legal historians trial by ordeal disappeared from England in the thirteenth century, those worthies have quite obviously overlooked the institution of the inaugural lecture.[1]

It is a common observation that lawyers — and English lawyers in particular — have a great regard for precedent. Indeed, it has been said to be a cardinal doctrine of the common law that nothing must ever be done for the first time. Well, my only claim to distinction at this moment is that of being, so I understand, the first occupant of the chair who has yet been called upon to violate this rule in the matter of an inaugural lecture. I trust that you may not soon have cause to regret that innovation.

It is something of a coincidence that your first professor of law, Jethro Brown, subsequently attained the same distinction in the university which before coming here I had the honour to serve for eight years. It seems that if Tasmania did not require of him an inaugural lecture, the University of Wales was not so indulgent. And I must say that he responded in full measure to the Welsh appetite for verbosity since his address entitled *The Purpose and Method of a Law School*, which was later published in two parts in that august journal, the *Law Quarterly Review*,[2] must have taken all of two hours, if not longer, to deliver. Such, however, was his high reputation, and so felicitous the language and style of which he was master, that I feel sure no criticism was to be heard on the occasion in question.

Alas, since I am no Jethro Brown, I must be ever mindful of the precept of the great American judge, Oliver Wendell Holmes, that 'a man who takes half a page to say what can be said in a sentence will be damned'. For that reason, I earnestly hope that the next forty-five minutes or so will not kindle in your minds a justifiable concern for my ultimate salvation.

A great deal of literature exists on the subject of legal education for which the United States is mainly responsible. It would accordingly have been a fairly simple task to compile an anthology of the wisdom to be

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*An inaugural lecture delivered in the University of Tasmania, March 13, 1961.

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1 J. C. Smith in *L.Q.R.*, 76 (1960), 78.

2 *L.Q.R.*, 18 (1902), 78, 192.

found on those pages. But, although no doubt edifying to us all, such a course I am sure would not have been regarded as playing the game. Nor, on reflection, is it perhaps wise to apply without proper diagnosis the remedies which so often lie too conveniently at hand.

It is most important at the outset to remember that this Law School has no rival in Tasmania and is therefore in practice almost solely responsible for the academic training and examination of prospective barristers and solicitors. The conferment of the LL.B. degree entitles its recipient to seek admission in the Supreme Court as a duly qualified legal practitioner.

To the best of my knowledge, this situation has no parallel either in England or in the United States. In fact, only one other law school in Australia appears to have been entrusted with quite such a wide and discretionary power of controlling the destiny of its law students.

In England and in the United States a law degree is not regarded as sufficient qualification for any form of legal practice and, in consequence, the student must submit to further examination at the hands of various professional bodies. Indeed, no law degree whatsoever is required in order to qualify in England as a barrister or as a solicitor.

It is clear that the situation here in the matter of legal education places upon our shoulders a heavy burden of responsibility. The Law School, although a component part of the University, must for all intents and purposes be regarded as a professional institution. Refusal to acknowledge that fact and to insist on treating the school as if it were an ordinary university department, or even to view it in the light of its English and American counterparts, would in my opinion be detrimental to the welfare of all those concerned.

I think there is much to be said for a university law school which is in a position to confer degrees regardless of professional requirements, and which is content to leave that aspect of legal education to some independent body of practitioners. But as the trend in most common law jurisdictions now seems to be in the opposite direction, it is unlikely that the long-established precedents elsewhere will be adopted locally in the foreseeable future.

Two consequences of considerable significance result from the role which our Law School is called upon to play. In the first place, the period of study must of necessity exceed in length that of any other faculty, the curriculum of seventeen subjects being spread over five years —in contrast with the normal three-year law degree course in English and American universities.

Secondly, it is obvious that because of its length few, if any, students will be encouraged to enrol for the law course if they do not intend to become practitioners. A student is unlikely to undergo the rigorous five-year training merely as an intellectual discipline or in order to become a law-abiding citizen. I hope that it may some day become possible to institute a modified three-year course for those who do not wish to make a

vocation of the law. In order not to debase the currency of the existing LL.B. degree, I suppose there would be no objection to labelling the new course B.A., as is the case in the Universities of Oxford and Cambridge.

I have always felt that in both medicine and law more could be done to acquaint the public—or, as the lawyers put it, the man on the Clapham omnibus — with information concerning the structure of and the elementary principles underlying the two subjects, if not to encourage self-help in circumstances when a little learning might be a dangerous thing, then to dispel some of the fear or suspicion which the untutored mind is known to entertain for the two professions. There is much truth in Lord Atkin's observation that 'the general impression of law is too often that it is the product of a black art administered as a mystery which none but the initiates need hope to understand'. Two hundred years ago a little-known Irish dramatist wrote: 'The law is a sort of hocus-pocus science, that smiles in yer face while it picks yer pocket; and the glorious uncertainty of it is of mair use to the professors than the justice of it'.[3] And many will agree with that acute commentator on the United States legal system, James Finley Dunne's Mr. Dooley, that 'a statute which reads like a stone wall to a layman becomes, for the corporation lawyer, a triumphal arch'.

It is not unusual in England to find that of those students who are studying for a law degree, a high proportion—sometimes as much as 50 *per cent.* — do not intend to become practitioners. In addition, aspirants to the law as a career will after leaving university be required to sit for professional examinations and to gain practical experience either by serving articles of clerkship with a practising solicitor or by becoming a pupil in the chambers of a barrister. This enables the university law school, without any qualms of conscience, not only to include in its curriculum subjects which have little or no place in the daily work of a practising lawyer but also to adopt, even in relation to the basic legal subjects, a more theoretical and perhaps scholarly approach than is expedient in a professional school.

The situation in the United States is somewhat similar save that most university law schools bear the characteristic marks of a professional institution. One reason is to be found in the reluctance of all but five of the fifty States of the Union to require the serving of articles of clerkship or other kind of apprenticeship. Thus, the onus of providing some kind of practical training for the student is shifted to the university law school. Secondly, although most of the States require a student to sit for professional examinations after leaving the law school, such examinations do not seem on the whole to be so exacting and comprehensive as those prescribed for solicitors, if not for barristers, in England. The American law student, for example, not infrequently sits for his professional examination within a few weeks after leaving the law school.

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3 Charles Macklin, *Love a la Mode.*

Australian law schools seem to have modelled themselves more on the pattern of the United States rather than imitate their opposite numbers in England — although it is true that before admission as a legal practitioner the student must serve articles of clerkship, the duration of which varies from one State to another of the Commonwealth.

Having set the stage, so to speak, I would now like to bring to your attention two or three matters which, it is suggested, should be viewed in the light of my introductory remarks.

A great deal is made of the relationship within the university between the humanities and the sciences. The debate has likewise invaded the province of the law — a subject which, in a sense, can be said to lie midway between the two. A professional law school is not really concerned with humanizing the lawyer, even if it were possible. University law schools, on the other hand, have traditionally assumed a more exalted mission. Did not the first Vinerian Professor at Oxford, the great William Blackstone, in the course of his inaugural lecture in 1758, make such a bold claim? 'I think it is an undeniable position that a competent knowledge of the laws of that society in which we live is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education'. For some centuries previously the teaching of English law had been the almost exclusive preserve of the Inns of Court and of Chancery, those remarkable institutions which, in the words of Professor Plucknett, had an 'outlook so radically different from that of the universities', and a tradition which 'rapidly became nationalistic, anti-academic and fiercely opposed to the civilians and canonists'.[4] As a true academic discipline law was a new venture. Nor was it destined to become firmly established until long after the days of Blackstone. As late as 1883, Dicey (one of the best known of Blackstone's successors in the Vinerian Chair) gave an inaugural lecture entitled 'Can English Law be taught at the Universities?' The evolution of the common law seems to have been almost solely the work of lawyers and judges. English courts tended to look upon the common law as their private preserve, an area which they jealously guarded against the encroachments of both the Crown and the academic writers. This case law system has developed in a spirit of high respect for judicial precedents and with what Lord MacMillan has called a 'strong aversion and distrust of theory and principle'. Bentham once described it in this way: 'The judges of England have made the Common Law as a man makes law for his dog—by waiting until he has done something wrong and then beating him for it.' And within our day Professor Glanville Williams has said that 'common law judges tend to read the works of authors with a sort of healthy irreverence.'

The gulf separating the practitioner from the scholar exemplifies the familiar distinction between the theoretical and the practical mind, between the study and the laboratory, between the Aristotelian and the Baconian, between deduction and induction. It has persisted in the field

[4] *Edward I and Criminal Law* (1960), 93.

of law to this day, not least in connection with the value of law degree courses for undergraduates — a question which is still highly controversial.

I have never quite understood this lack of reconciliation. University law schools seem to have taken the position that their main concern is not with the mere letter of the law, the teaching of rules and technique, but with something deeper and perhaps more mystical, the reason and spirit of the law, its history and philosophy.

Legal historians, for example, seldom fail to remind their readers of the well-known aphorism of Scott, in his novel *Guy Mannering*, that 'a lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect'. Oliver Wendell Holmes called it 'teaching law in the grand manner',[5] a rhetorical affirmation which it has become almost heresy to question.

But presumably the main purpose of teaching law — at least in this Law School — is to help produce enough lawyers who are reasonably competent for general practice. The period which the student can spend in the Law School is limited and he is required to devote only the first two years to what is called full-time study. He is then entitled, during the next three years, to serve his articles of clerkship with a practitioner and to attend the Law School solely for lectures and tutorials. The volume of substantive law has for long been so large as to render it impossible for the student to do more than scratch the surface while he is at Law School. Gone are the days when the whole law library of the attorney was contained within the squat volumes of Blackstone, often packed into his saddle-bag, and upon which he rested all his cases — as well as his haunches. The number of reported cases alone is alarming. It has led Lord Shawcross to suggest that some day we shall have to consider whether it would not be wise in England to report only the decisions of the Court of Appeal and of the House of Lords. He recounts his early experience before Mr. Justice Swift when the latter saw Mr. Shawcross (as he then was) arrive in court, armed with a large number of law reports, and said: 'Mr. Shawcross, which of those twenty-five volumes contains your best case? Read it to me, for I shall not listen to any other.' [6] It seems clear, therefore, that the space made available in the curriculum for the teaching of subjects which serve no useful purpose in the practice of law should be carefully scrutinised.

What then is the value of those subjects which must be regarded as essentially non-practical? Legal history may inculcate in the student a feeling for perspective and perhaps a sense of destiny. But its main justification is that the existing rules of law cannot be properly understood without some knowledge of their origin and development. A substantial portion of the legal history recorded in the textbooks is, however,

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[5] *Collected Legal Papers* (1921), 37.

[6] *M.L.R.*, 11 (1948) 1.

redundant for that purpose and except in the case of a handful of connoisseur students — for whose presence in the Law School we should be eternally grateful — its teaching would leave no mark whatsoever. On the contrary, it would be effective only to dull the senses and to divest the student of what little appetite for the law he already possessed. The merits of jurisprudence in this connection are even more tenuous. The many theories of law, to comprehend any one of which would take a first-rate student months of intensive reading, seem only to confuse and irritate the average student who at best merely succeeds in learning by rote a collection of maxims without acquiring any real understanding of their significance. 'All who have written of laws,' said Bacon, 'have treated that subject either as philosophers or as lawyers. And the philosophers propound many things beautiful in speech but remote from use.' Roman law, to take another example, will provide a basis for a comparative study of the common law, and public international law may help to extend the student's vision beyond the horizons of his own country.

These subjects and others of like nature have undoubted value in a law course which is not designed primarily for practitioners. It is more difficult to support their claim to a place in the curriculum of a professional school.

I fully appreciate and respect the plea of many academic lawyers that it is not fitting for the energy and skill of the practitioner to be entirely consumed by the affairs of his clients and that he should not be content to spend his whole life within the private world of his office. It is often said that the lawyer has in addition an important role to play in the general life of the community and that he should, by reason of his training and experience, occupy a prominent position in society as leader and policy-maker; one who is entrusted by the less well-informed or less public-spirited layman with a large measure of control in the conduct of public affairs. All this sounds most impressive, and I certainly do not wish to commend the example of Chief Baron Palles whose dedication to the law was such that he is said to have taken with him a formidable treatise, *Fearne on Contingent Remainders*, for reading on his honeymoon. But I have yet to be convinced that the lawyer is in truth any better equipped than a host of his fellow citizens to become leading counsel either in the halls of parliament or in the heated actions of the market place. An anonymous English barrister has lately written that 'there is commonly at the Bar, and it may be allied with a powerful intelligence in legal matters, a childishness of thinking on social and political matters.' If the practitioner is elevated to the bench he may be imbued with some philanthropic zeal, but if he is satisfied with the directorship of a company or the office of town councillor it is most unlikely that his fragmentary knowledge of legal history, jurisprudence or Roman Law will ever be of practical use or even subconsciously influence his behaviour.

I would like to re-emphasize that it is not my purpose to decry the value of cultural subjects in general university education, having long

been a convert to the belief that a man requires for his own happiness and spiritual health some knowledge of the great works of the human mind. We all need, for our own salvation, to meet good people, to read great books, and to see and hear great works of art. But how far indulgence in any of those activities will make for better lawyers is quite a different matter. Good students will find the law a hard and unrelenting taskmaster whose demands admit of little time for leisure, and that five years is none too long for them to become acquainted with some of its manifold pitfalls and uncertainties. My experience has been that it is often in later life, with student days well behind us, that the thirst born of maturity for a deeper understanding of the cultural heritage of the law is best satisfied.

I am sure you will feel that the time has now come for me to contribute something positive to the discussion. What I suggest is important, therefore — if only because it is so often taken for granted — is that in addition to acquiring the professional skill necessary for the proper discharge of his calling, the law student should be urged to cultivate in himself a deep and abiding respect for the highest standards of personal and professional integrity. It is upon the attainment of this goal that the health and morals of the legal profession, and, what is even more vital, the well-being of society ultimately depend. Dean Rostow of Yale has recently emphasized the responsibility which law schools share with other legal institutions in seeking to preserve, fortify and transmit the ideal of the lawyer's duty. 'For,' he says, 'the law can never be stronger than the bar. No system of law can assert and develop its values, or perfect its metaphysic, unless its daily work is led by men of vigour and learning, of courage and high purpose.'[7] A Canadian judge has put it this way: 'A lawyer who regulates his effort by his fees is a traitor to his profession and his oath. This is . . . our distinction from tradesmen —a merchant may properly sell a second-best article for a lesser price, but a lawyer must, whatever the fee, throw his whole abilities into any case, regardless of pay. He has no second-best talents for sale.'[8]

The student must learn, until it becomes almost instinctive, the fundamental canons of professional etiquette, and then be prepared to observe them in practice. Doubtless on numerous occasions during his career he will find this counsel of perfection difficult to fulfil, as when he is confronted with border-line cases or with those temptations which constantly beset the ambitious practitioner. Thus, it is fair to expect of the Law School that it will not only teach the rules of the craft, but also do more to acquaint its students with that code of honour to which the profession of the law requires its members to be obedient.

Academics sometimes assert that the foregoing forms part and parcel of those so-called cultural subjects whose inclusion in the professional law curriculum has been called in question. But is this really so? The

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[7] *Report on the affairs of the Yale Law School*, 1957-1959.

[8] *Address* to the Vancouver Bar Association by Wilson J. of the Supreme Court of British Columbia.

student will certainly be dull if he does not glean from those subjects something of the meaning of 'natural justice,' 'fair trial,' 'the rule of law,' 'independent judiciary,' 'freedom of speech,' '*habeas corpus*,' and a multitude of other concepts which are commonly reckoned the lawyer's stock-in-trade. But democracy would be in peril if those same concepts were to become the prerogative of the legal profession or, indeed, of any other special class. For they should be regarded as the common heritage of every citizen. In the words of the Duke of Edinburgh: 'Science is important, humanism is important, making a living is important, but nothing is quite so important and no community can aspire to anything higher than an efficient, fair and humane system of self-government. The thing we ought to worry about is the education of people as citizens, because it is people as citizens and not as specialists, humanists or scientists, who are going to decide the fate of the world.'[9] In the 1959 Maccabaean Lecture of the British Academy entitled *The Enforcement of Morals*, Lord Justice Devlin voiced a similar proposition. 'I say that the morals which underlie the law must be derived from the sense of right and wrong which resides in the community as a whole; it does not matter whence the community of thought comes, whether from one body of doctrine or another or from the knowledge of good and evil which no man is without. If the reasonable man believes that a practice is immoral and believes also — no matter whether the belief is right or wrong, so be it that it is honest and dispassionate — that no right-minded member of his society could think otherwise, then for the purpose of the law it is immoral.'[10]

Constitutional and legal history teach us that men and women have gone to the stake for principles of justice which they held to be fundamental. Their example should serve to temper the conceit of any student and to convince him that little remains to be invented in the fundamental structure of the law.

Again, no lawyer worthy of the name will require to be told what is right and proper in the administration of justice, but he must not arrogate to himself an exclusive monopoly in the matter for a similar instinct is present in the majority of intelligent laymen, whether it is a question concerning the Crimes Act, apartheid, or the execution for murder of a youth of eighteen. Mr. Justice Byrne, in the course of his summing up in the *Lady Chatterley's Lover* case, said that in these days the world seemed to be full of experts. 'There is not a subject you could think of where there is not to be found an expert who will be able to deal, or says he will be able to deal, with the situation. But the criminal law is based on the view that a jury is responsible for the facts, and not the experts.'[11] The tragedy of Hitler's Nazi judges and prosecutors was not due to ignorance of the law or to the omission of legal history and jurisprudence from their professional curriculum. On the contrary, they could

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9 Unesco Conference on Humanism and Technology, London, 1960.

10 Maccabaean Lecture in Jurisprudence of the British Academy (1959), 23.

11 *The Times*, November, 1960.

boast of more rigorous instruction, at least in those two subjects, than is the case in most common law countries. What shocked the conscience of the free world was their wanton disregard for the elementary principles of justice and the unscrupulous violation of a code of ethics, which they should have regarded as a sacred trust, in order to serve ends which were patently evil. Nor must we allow ourselves to forget that grim travesty which, far from being unique, is still frequently re-enacted in other parts of the world.

Student morals are scarcely the concern of the Law School—the home and the Church are much better equipped to cope with that problem. But we must be responsible for the teaching of professional ethics, an aspect of the lawyer's education which is so often almost wholly neglected. Professor Jethro Brown, in his inaugural lecture at Aberystwyth, declared that 'the function of a law school is not to make men moral, but to make men capable. Yet the study of the law has a moral as well as an intellectual aspect.' And he quoted Milton to the effect that 'some are allured to the trade of the law, grounding their purpose not on the contemplation of justice and equity, but on the thoughts of litigious terms, fat contentions, and flowing fees.'

The United States is almost always in the vanguard when new ideas are being canvassed, not least in the field of legal education. They have recently become so disturbed about the lawyer's professional responsibility that a National Council on Legal Ethics has been established to formulate plans for a different approach to the problem of education in the law schools. According to Professor Sacks, the Administrator of the Council, 'there appears to be substantial agreement that all is not well in the legal profession, and that more should be done in the law schools to impress the oncoming generation of lawyers with their responsibilities as members of a profession. There likewise appears to be a large measure of agreement that existing methods of education in this area are inadequate, and that there is need for wide experimentation with new methods. . . . The National Council on Legal Ethics, armed with a grant of $800,000 from the Ford Foundation, is embarking on a seven-year project designed to discover and try out new and better methods of educating law students about their future role as members of a profession.' Unfortunately, I have no time to discuss the interesting experiments which are to form part of this ambitious scheme, save to mention that one idea is to integrate into and distribute among the regular law courses, such as criminal law, taxation, company law and the like, material on issues of professional responsibility instead of it being isolated in special courses on legal ethics. By doing so it is hoped that '(1) the significance and pervasiveness of ethical issues might become more apparent, (2) the resistance of students to considering ethical issues, on the ground that it represents an attempt to "teach us to be good" or is an annoying deviation from the "real work" of a professional school, might be lowered, (3) the fact that instructors in regular courses took time to deal with professional responsibility issues might demonstrate to

students that the faculty as a whole, and not just the instructor in legal ethics, are vitally concerned about such matters, and (4) students would be exposed to a range of faculty reactions to what are often very complex problems of professionalism.'[12]

The President of the American Bar Association has also raised a significant proposal. 'The organized Bar,' he says, 'ought to link arms among themselves and with the courts to ensure admission ceremonies in every State. They serve two important functions: to lift the hearts and eyes of the new lawyers so that they embark upon our great profession with a sense of pride and dedication and to emphasize the importance of the spirit of professional brotherhood. . . . Courts and bar associations concerned with disciplinary problems would, I believe, agree that those who participate in the organized Bar and feel a responsibility to the public and for the good name of the Bar are far less likely to disregard their professional obligations than are others. Therefore, by adopting admission ceremonies, the courts can underline for the young lawyer the noble profession on which he is entering and also administer a good tonic for ensuring loyalty to high professional standards.'[13]

I would now like to refer to the question of the supposed superiority of university law schools even in regard to the teaching of substantive law itself — commonly known as the 'bread and butter' subjects. It is often said that in the university we are not satisfied with teaching only the bare rules of law but that, in addition, we search for the reason behind them. It is important for the student to consider the social background of the law, the various forces which helped to give it shape, its present validity for the community, and the possibility of reform or future development. No sensible person would quarrel with that kind of programme. Indeed, it should properly be part and parcel of the teaching of law. But I have never been able to understand why it could not equally well be carried out in the professional school, always provided that there exists a decent library which the lecturers have time to use. Professor Zelman Cowen has recently said that 'it is the living law, the law that has meaning in this day and age, that should be taught in the law school; though we join issue with those who make war on the faculty of law on the point that there is a difference between teaching the living law and trying to equip mechanics for office practice.'

The spirit of the law is a fine thing if kept in perspective, but I am afraid that we academic lawyers sometimes imbibe it undiluted and become so intoxicated as to forget what we are about. The trees get in the way of the wood, and the substantive rules of law are either ignored altogether or dismissed by the lecturer as sufficiently mundane or simple for any fool to learn by himself. When the course is labelled 'scientific' it usually begins to submerge in a sea of abstraction or of extravagant legal jargon. Those who have read Mr. Jacques Barzun's *The House of Intellect* will remember him as a vigorous opponent of the intellectual

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12 *A.B.A.J.*, 46 (1960), 1111.
13 *A.B.A.J.*, 46 (1960), 1265.

world as it has grown to be; a world in which great institutions of philanthropy promote whatever seems right at the moment without much regard for any ultimate purpose and where a good deal of charlatanry, based on current fashion, passes for imagination and scholarship. The lecturer who has succumbed to the temptation of linguistic hair-splitting is in danger of reducing his subject to the technical triviality of a secular scholasticism. And, what is worse, he may not resist the temptation to fashion the student in his own image. The unfortunate student may not regain his senses until confronted by his first client, on which salutary occasion it is brought home to him with embarrassing rapidity that the law in action is somehow a far cry from the cloistered tranquillity of the study. Having made this startling discovery his first act will probably be to consign his notebooks to the nearest receptacle — after which he will lose no time in acquainting himself, doubtless at the expense of his early clients, with the real stuff of day-to-day legal practice.

In this connection, I am reminded of a passage in the lectures of Lord McNair, former President of the International Court of Justice, which he delivered in 1955 at New York University. He said: 'If I may give my own testimony both as a teacher of law and as a practitioner, I can say that I have constantly had the following experience. Whereas I may have thought, as a teacher or as the author of a book or an article, that I had adequately examined some particular rule of law, I have constantly found that, when I have been confronted with the same rule of law in the course of writing a professional opinion or of contributing to a judgment, I have been struck by the different appearance that the rule of law may assume when it is being examined for the purpose of its application in practice to a set of ascertained facts. As stated in a textbook it may sound the quintessence of wisdom, but when you come to apply it many necessary qualifications or modifications are apt to arise in your mind. I am not for a moment suggesting that the academic approach is more superficial than the practical one. The two approaches are entirely necessary for the proper development of a healthy legal system. . . . But, in my opinion, when counsel and judge are confronted with the need of applying a rule of law, or an alleged rule of law, to certain facts established by the evidence, it is probable that the legal element in the resulting solution will be a more useful and more practical rule of law than a rule elaborated by a teacher or writer in his study working alone and in the abstract.'

I think it is this anomaly which has made the practitioner in England, if not in Australia, so often mistrust the university law school. An illustration occurred only the other day in the correspondence columns of *The Times*. It concerned the case of *D.P.P.* v. *Smith*, a recent highly controversial decision of the House of Lords on the law of murder. Dr. Glanville Williams — perhaps England's foremost theoretical jurist — had been speculating whether Smith really intended to do the police constable serious harm by swerving sharply in order apparently to dislodge the latter from Smith's motor-car to which he was clinging. Dr.

Williams's article provoked a leading Queen's Counsel to conclude his reply in the following terms: 'Professor Williams is concerned as an academic lawyer with what he considers to be injustices. In professional practice—I venture to suggest—he would swiftly realize that no cause can be advanced by ignoring the record.' It is only fair to add, however, that another practising barrister who strongly supported Dr. Williams's views went so far as to suggest that 'the better development of the law would be greatly assisted by the presence of a small leaven of distinguished academic lawyers among the judges in our appellate courts.' Let me hasten to assure you that I would be the last to advocate such a step in Tasmania.

However unjustified it may be, the practitioner is inclined to regard the academic as something of a liability, as one inhabiting a small ivory tower secluded from the hard facts of life, and who is likely to have at best mildly amusing and at worst positively wrong-headed or impracticable opinions on matters of substantive law. In addition, the latter is held responsible for sending out into the world students who must quickly be purged of all the theoretical nonsense they have had the misfortune to pick up in the law school — the kind of student who wins all the arguments but loses the case. Hence the verses:

> In the cloistered calm of Cambridge
> I write books about the law,
> Criticising Oxford colleagues,
> Making points they never saw.
> In a peaceful Cambridge college,
> Far remote from active law,
> I dissect the courts' decisions—
> I of course detect the flaw . . .[14]

Having seen the red light, our American colleagues now realize that those lecturers who have already become case hardened from exposure to the cross-fire of professional experience are most likely to provide the best guarantee of common sense in the teaching of law. It is also for the same reason that I value so highly the articles of clerkship which a student must serve before he can be admitted as a legal practitioner. Nor do I consider it anathema for this indispensable period of practical training to coincide with part-time attendance at the Law School, particularly in Tasmania where the LL.B. degree itself constitutes a sufficient professional qualification. I often wish that our law schools could do more to emulate the laboratory. Many scientists fail to understand how there can possibly be opportunities for educational contacts comparable with those that spontaneously offer themselves all the time inside a laboratory. How, they assert, with just a lecture hour or so at his disposal and an odd hour or two in more informal discussions can, say, an arts professor really get to know his students? How can the undergraduate receive from the lecturers, from the department, or from the university, any special mark or vocation? In comparison, the sciences

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14 J.P.C. *Poetic Justice* (1947), 15; cited by Megarry, *Miscellany-at-Law*, 52.

have the young pupil in the laboratory for many hours each day living the actual life of the scientist, not merely memorising a collection of facts or learning to repeat a certain number of tricks but becoming conversant with scientific method and developing his powers of scientific investigation. All this time he is working alongside others similarly equipped with the fullest opportunity and stimulus to help his fellow students and to get help from them, and with the great privilege of guidance and encouragement from men who are not merely teachers but who are themselves engaged in original inquiry of their own.

While I do not agree with those who assert that it is no more possible to teach law in an academic atmosphere than it is to teach surgery in a medical school unattached to any hospital, I am convinced that to allow a person to practise law without having spent some time in chambers or in a solicitor's office is the height of professional irresponsibility. Until recently it was possible in England to practise as a barrister without having served any pupilage in chambers. It is true that most barristers appreciated the unwisdom of this and it became customary therefore to spend six or twelve months as a pupil before regarding oneself as fully fledged. The Inns of Court have now belatedly adopted a regulation designed to secure that every barrister intending to practise shall serve a period of twelve months pupilage.

Knowledge and wisdom are essentially different, and whereas the former can be acquired from books or teaching, wisdom is the fruit of practical experience that is not to be had in the library or classroom but only by direct and prolonged contact with the world. In the words of Roscoe Pound: 'The intuitions of courts derived from experience are sometimes better than their reasoning.' The library or classroom will provide theories in plenty, but at the same time they encourage mental habits singularly insensitive to human problems. To discover the needs which drive the public to a solicitor's office the articled clerk must look through the eyes of his principal. He must probe for facts and not for doctrines or fictions of the law. Solid reality engages most of the practitioner's attention. Although the range of a solicitor's practice will vary to a large extent, between one and another, a characteristic common to all is their concern with the collection and arrangement of a multitude of facts. It makes no great difference whether the business mainly transacted is common law, conveyancing, local government or criminal—only a small amount of the solicitor's thought is devoted to such doctrines of law or theories as might be enunciated in a textbook. The task of the solicitor is to make the law work, and it is the situations in which the law is to be applied that figure most prominently in his daily routine. In ninety-nine cases out of a hundred, once the facts are ascertained and marshalled the appropriate rule of law turns out to be so simple and straightforward that the practitioner is not conscious of forming any opinion about a question of law at all. Even on the few occasions when the practitioner has to give time and thought to purely legal questions he cannot always reach the same solution as that at which the professor

would arrive in the safe refuge of his study. For the solicitor is concerned not merely with law but also with policy and tactics, ways and means. Can his client afford to assert his rights? Is it wise from other points of view that he should fight? There may be adequate reasons of a moral, business or economic nature for the client to remain legally on the wrong side of the fence, provided he fully understands the consequences of so doing. As that supreme enthusiast and outstanding American law teacher, Karl Llewellyn, puts it in his remarkable book, *The Bramble Bush*: ' "What these officials do about disputes is, to my mind, the law itself".' 'These words,' he says,'express a deep and often sad truth for any counsellor: he can get for his client what he can actually get, and no more. They express a deeper and often even sadder truth for any litigant: "rights" which cannot be realized are worse than useless; they are traps of delay, expense and heartache.'[15]

The study of abstract principles is not in itself objectionable, but too much absorption in that pastime often produces a frame of mind which tries to crush stubborn facts and the living tissues of humanity within a rigid frame of preconceived ideas. A well-known professional law coach in England used to say that 'the pursuit of learning which is not put to some practical use is simply a form of personal entertainment or amusement comparable with the collection of postage stamps or of antique furniture.'

Happy indeed is the student who at the end of his articles of clerkship can boast that his experience justifies him in thinking that he could take over the work of anyone in the firm from the office boy up to the senior partner—always excepting, of course, the stenographer.

Before concluding, may I be allowed to enter a plea in mitigation for the defence. I fully realize that the few problems which I have raised cannot possibly be resolved in the time at my disposal. They are certainly not susceptible of simple generalizations or of such peremptory treatment as has been their misfortune tonight. Moreover, unanimity on these matters—least of all among lawyers—is neither possible nor desirable. At any rate, I should be grateful if you will allow me to derive some comfort from Professor Parkinson's thesis that 'a perfection of planned layout is achieved only by institutions on the point of collapse.' There are two sides to almost every legal question. And it is—ironically enough—a legal history book written by a distinguished Australian judge which recalls that in 1811 the Deputy Judge Advocate for New South Wales, Ellis Bent, in his proposals to England for the reform of the judicial system, pointed out the difficulties which resulted from the absence of a legal profession and suggested that two barristers and two solicitors might be encouraged by promises of 'moderate grants of land and cattle' to emigrate and to settle in the colony.[16] So much for lawyers!

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15 1951 edition, 8.

16 Windeyer, *Lectures on Legal History* (1957), 307.

Finally, I have considerable misgivings about the reactions of mainland colleagues if some of my remarks reach their ears and I am afraid that not even Bass Strait, wide as it is, can prevent the danger of my being—I think the fashionable word is, censured. If for once, however, I am not on the side of the angels I hope they will at least acquit me of the kind of advocacy that has been defined as 'the art of misleading a jury without actually telling lies.'