

THE DISSONANCE BETWEEN LAW SCHOOL ACADEMICS AND PRACTITIONERS – THE WHY THE HOW THE WHERE TO NOW

by

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Any survey of the literature on legal education will soon reveal the depth of the divide which separates legal academics and legal practitioners. This division has been described as “the most significant division within the profession and surpassing the division between barristers and solicitors.”¹ This perception can be based also on my experiences in both worlds as a solicitor for ten years and more recently as an academic. My former occupation will be reflected somewhat in this article as my view of practitioners will focus especially on the views and experiences of solicitors but not to the exclusion of barristers.

This discussion does not assume that both sides of this divide are homogenous seamless monoliths. Amongst law schools you will witness considerable variety in orientation, from law schools that have an outlook which is substantially theoretical, to law schools whose outlook emphasise practical concerns and professional issues. Diversity exists in regard to many matters but includes diversity in teaching methods, status, student profiles and class sizes. Legal academics themselves have been categorised as falling into a number of types demonstrating a diversity in approach including categories such as traditional legal scholar, practitioner scholar and activist.² Within the body of legal practitioners there is also considerable diversity in approach and orientation between large, medium, small and boutique firms, city and country firms, barristers and solicitors.³ It would seem that the tension between both sides of the divide may differ depending on which category is being considered but generally, despite this diversity, a divide does exist and my intention in this article is to identify major factors contributing to this gulf. My discussion will traverse four spheres of influence: Historical, Sociological, Psychological and Experimental. On occasions some of those categories will overlap as is the nature of human endeavour. This article will also include a discussion of the means by which the divide can be overcome so as to create an atmosphere where the profession and academics can relate in a manner that encourages a cross pollination of ideas and knowledge to the benefit of all “lawyers”.

Is the Divide Inevitable?

Clearly both academics and practitioners are both within the subset of “lawyers” as each have legal training and profess to apply legal principles in their work.⁴ However, a scrutiny of what both groups actually do reveals that each have a distinctive role, doing different things directed to divergent goals. Thus, there may be some merit in the view that if law schools and the practising profession are in perfect accord it may be that one party has abdicated its proper function.⁵

An academic is primarily concerned with three major areas of activity, namely, teaching, research, and administration, though they are perceived by practitioners as primarily professional teachers not lawyers.⁶ A practitioner’s role is more difficult to define but could be categorised as

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1 T Halliday quoted in D Weisbrot *Lawyers Sydney*, Longman Cheshire (1990) at 146.

HT Edwards ‘The Growing Disjunction Between Legal Education and the Legal Profession’ (1992) 91 *Mich Law Rev* 34.

2 J Wade ‘Reasons for Tension Between the Cultures of Law School and Law Office’, (Unpublished).

3 *Ibid.*

4 Weisbrot *supra* n.1 at 57 and 58 considers a definition of “lawyers” that excludes academics as “unduly restrictive”.

5 F Allen ‘The Causes of Popular Dissatisfaction with Legal Education’ (1976) 62 *ABAJ* 447 at 449.

6 *Supra* n.1 at 6.

encompassing client servicing (which includes the myriad of tasks involved in attending to matters on behalf of a client), marketing, CLE, professional and ethical matters, and, in the case of partners, attendance to the business of the running of a practice.

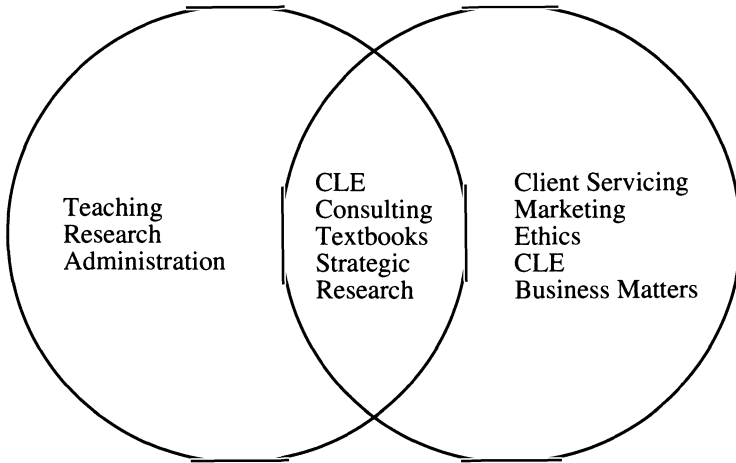


Figure No. 1

Set out in figure no. 1 is a diagrammatic representation of the different roles of practitioners and academics in the form of two circles intersecting giving what the author perceives as the relationship between academics and practitioners. It is clear that there is limited overlap between these two branches of the profession and it is hardly surprising that a divide in some form does exist. It perhaps is of greater interest that both academics and practitioners easily fall into the habit of criticising each other manifested with sniping about “ivory tower” academics and “paper shuffler practitioners”. Perhaps the most important element of the divide is not that it exists at all, but that because of mutual disrespect crosspollination does not often occur, except in areas where the circles of interest intersect such as in consulting, strategic research, textbooks and CLE.

At first glance the attendance by academics to the teaching of undergraduate law may appear to be a task of great interest to a practitioner. However, the primary focus of an academic in undergraduate teaching is towards providing coverage of a large area of law to students who at the commencement of the course have very little knowledge of the area. This means that basic concepts such as “what are the elements of murder” or the premise “what is a lease” must be dealt with with some detail. This means that much of an academic’s effort involves inculcation of students with basic concepts, which most practitioners will already have assigned to background knowledge. As a result this aspect of an academic’s role does not, as may be expected, direct itself clearly in a practical sense to what a practitioner may require. In addition the emphasis by academics on research, which is often centred on narrow areas of academic interest, rather than practical concerns, counts against development of common interest. This aspect will be discussed further below.

Do We Need to be Concerned with the Existence of the Divide?

It seems the answer to this question is **yes** as the divide results in the following consequences:

1. The lack of relationship between the educational experience at the University and the experience in practice, exacerbated by the divide, creates confusion and stress in students when they embark upon their chosen career thereby potentially blighting their future happiness.⁷

2. There is limited flow between both sides of the divide which means the enriching process for both the practitioner and academic inherent in such a structure does not occur. Practitioners are not exposed to insights into the law that can be provided by academics who have the time to ponder relevant issues. This could allow access by practitioners to considerations on ethics and moral issues which are increasingly being seen by the public as an aspect of the law which requires attention. Access to the reflective thoughts of an academic can assist in addressing these concerns. Practitioners can in turn provide a concrete base to the theoretical yearning of academics, to assist in relevant research and preparation of law students.

It is clear that the focus of academics and practitioners is very different and it appears that the contemporary underlying inertia is to pull both sides in contrary directions rather than towards similar goals. This is reflected in the historical genesis of the academic profession and in some more recent influences on the role of the practitioner.

Historical

A person who argues that the divide is inherent in the structure of the legal profession would find ample evidence in the historical records to demonstrate this thesis. In fact, there is evidence to the effect that the divide existed in ancient Rome. Chroust describes the birth of the legal profession in Rome in fourth century BC based mainly around aristocratic practitioners of the patrician class (to a social scientist of the twentieth century this description has a familiar ring to it) who learnt their trade by attendance at public court hearings and received tutelage under a master or preceptor.⁸ This reflects the predominant style of legal education in Australia up until the 1960's which emphasised practical training and intellectual input primarily by part time lecturers who were practitioners.⁹ Subsequently, this arrangement was varied in the second century BC by the introduction in Rome of Hellenistic ideas of education and the establishment of law schools. Law schools were first established in the middle of the first century AD and attracted teachers among:

“... the most outstanding Jurists and Jurisconsults of that time especially lawyers who wished neither to become involved in politics nor to continue to practice law under the restrictive policies of the new imperial resume and, hence, preferred to teach law or write legal treatises.”¹⁰

This may be seen to have established the early signs of what may be an inherent division between those persons who prefer a lifestyle centred on teaching and research rather than the hurly burly of practice steeped in the politics of the world, the office and in harsh commercial realities.

The establishment of law schools was criticised in Ancient Rome by the established profession who saw these law schools as producing “acrobats of oratory and despoilers of the law.”¹¹ This historical evidence suggests that an important element in the divide relates to the tendency of any dominant group to look askance at those members of the same profession whose role, goals and training are of a different nature. This Roman experience continues to have its echo in modern times where until recently a generally non-university educated profession, considered

7 AM Johnson ‘Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice’ (1991) 64 *S Calif L Rev* 1231 at 1233.

8 A Chroust ‘Legal Education in Ancient Rome’ (1955) 7 *J Legal Educ* 509 at 512.

9 D Pearce ‘Legal Education: The Role of the Profession - Is the Pendulum Swinging?’ (1992) 66 *ALJ* 413 at 413.

10 *Supra* n.8 at 516.

11 *Ibid* at 515.

that practical training was the preferred legal education model and that the method of entry to the profession, ie, the university law school, should be influenced substantially by the vanguard of that profession.

As an example of the influence of history it may be helpful to compare the development of the legal profession in the USA with that of the UK and Australia to ascertain any common or disparate influences. It is interesting to note that in the USA the divide does not present itself as such a wide chasm but rather academics are held in higher esteem by both the profession and judiciary and their opinions are often sought and quoted in judgments to an extent not normally experienced in the UK and Australia.¹²

It appears that legal academics have suffered as a result of three historical factors that have hampered their influence in the UK and Australia and thereby widened the divide between the profession and academia:

1. Law schools developed fairly late in the UK and Australia and as a result there was no organic connection with the university at the beginning of the professionalisation process which occurred in the 19th century.¹³ In Australia this meant that in the divided profession, the Bar, and not any professional body of academics, was seen as the intellectual standard bearers for the profession and this influence has continued.¹⁴ The first law faculty was established in Melbourne in 1879 while in Sydney a law faculty was not established until 1890 although the University was established in 1850.¹⁵ Queensland and Western Australia did not begin to teach law until 1926 and 1928 respectively.¹⁶ In the early years Australian university law schools were staffed by few full time academics with emphasis upon part time legal practitioners to provide much of the teaching.¹⁷ As a result there was a meekly developed legal academic profession which did not assist in the development of any high profile and prestigious influence on the legal profession. The historical background to early law schools is as a result clearly shown to be dominated by the profession with the curriculum emphasising the requirements of practice and thereby hampering the development of any sophisticated jurisprudence. This is to some extent reflected in the UK where the development of the secular law profession in the middle ages was centred around the "inns of court" which were four independent law schools not connected to the intellectual environment of the universities. These inns of court provided the socialisation for intending lawyers and commenced the apparent separation between universities and the legal profession which has continued to date.¹⁸

By contrast after the American revolution there was a clear sentiment against anything British including the British system of law.¹⁹

In the United States law schools developed comparatively early in the 1870's and in 1873 James Ames without any experience in legal practice was appointed as a full time assistant professor at Harvard Law School.²⁰ With the development of the professionalisation of legal teaching in the USA enmity between practitioners and academics became more clear-cut.²¹ Legal academics in the USA then sought to obtain a distinctive identity by championing national public issues which had begun to emerge at the end of the last century and thereby developed their role

12 *Supra* n.1 at 147.

13 JH Schegel 'Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor' (1985) 33 *J Legal Educ* 311.

14 *Supra* n.4 at 148.

15 PG Gardiner 'Lawyer Competence - The Role of the Law School' 20 *QLSJ* 349. Until 1930's in Australia academics were almost without exception practitioners teaching part time. In 1950 there were 21 full time and 93 part time law teachers. *Supra* n.1 at 61 and 122.

16 *Supra* n.9 at 413.

17 *Supra* n.15.

18 EA Krause *Sociology of Occupations* Little Brown and Company Boston at 148.

19 *Ibid* at 150.

20 MS Larson *The Rise of Professionalism: A Sociological Analysis* University of California Press at 172.

21 *Ibid*.

such that they were described as being “the keepers of the professional conscience” and thereby if not the standard bearer of the profession with one hand on the standard.²²

2. Allied to the above is the fact that many leaders of the profession in early times in Australia were not university trained. In Australia generally it was not until the 1970’s that a majority of practitioners had university degrees.²³ It has only been in recent years that university degrees have become the primary source of the qualification for legal practice. One would assume that any tension created between the profession and academics caused as a result of any inherent mistrust of universities will no doubt subside as the proportion of university educated leaders of the profession increases.²⁴ This tendency however will depend upon whether the graduates see the university experience as relevant to their role as practitioners and their perception after graduation of the professional relevance of works produced by academics.

3. Also important is the fact that legal academics have had a history of struggling to clearly designate themselves as scholars and academics within the university community which has pulled them in a direction away from accommodating the requirements of practitioners. From an early date the established disciplines have doubted if law schools belong at university. This is despite the fact that the trinity of medieval university was constituted by Law, Medicine and Theology.²⁵ Lawyers are often disdainfully criticised as purveyors of a discipline more at home in a “trade school” preaching the legal gospel to a patrician class of technicians who parasitically serve the wishes of the powerful in society.²⁶ A lawyer’s predisposition to practical issues, forged by its relationship to the profession, does not accord easily with academics from other disciplines who see law academics as overly practical and with insufficient training in theory. The non-academic basis of legal academia can also be demonstrated by the substantially lower percentage of Ph.D.’s held by legal academics as compared with academics in most other university disciplines.²⁷ One critic once stated “law schools belong to the modern university no more than a school of fencing or dancing.”²⁸ Even the reforms of Langdell who attempted to systematise the law as a science could be said to have been somewhat motivated by this intellectual snub. He once wrote:

“If law is not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of craft, and may best be learned by serving an apprenticeship to one who practices.”²⁹

This background had the effect of propelling legal academics towards a greater regard for intellectual respectability which could be found in academic writings to thereby secure a place in the university culture as scholars rather than towards writings which might be considered relevant for practitioners.³⁰ This still has its influence in modern times, as generally law schools like other university disciplines, direct attention in academic promotion and hiring to the level of publication by an individual of “scholarly” work rather than practical experience.³¹ Although the definition of “scholarly work” would not exclude works of relevance to practitioners, in general this description is normally of theoretical works that would generally hold little interest other than to other academics. This trend is accentuated by in more recent times “law and” courses, critical legal studies courses etc that reject the importance of education for professional purposes and embrace the need to integrate into the syllabus issues of politics, economics and sociology.³²

22 *Ibid.*

23 H Gregory *The Queensland Law Society Inc 1928-1988 A History* The Queensland Law Society (1988) at 152.

24 *Supra* n.1 at 148.

25 JE Cribbet ‘The Changeless, Ever Changing University: The Role of the Law School’ (1984) *Ariz L Rev* 249 at 250.

26 *Ibid.*

27 *Supra* n.1 at 151.

28 *Ibid* quote by T Veblen.

29 *Ibid* from (1886) 3 *LQ Rev* at 123.

30 *Supra* n.7 at 1236.

31 *Supra* n.1 at 147. This is also reflected in the U.S.A. Edwards *supra* n.1 at 37.

32 HT Edwards *supra* n.1 at 35.

Accordingly academic lawyers, are pulled between two worlds, one as a university academic and the other as a purveyor of principles used to prepare students for the practical issues that arise in practice. Recently, a High Court judge, has expressed frustration with academics who reject the values of practitioners and their opinions on the role of legal education while insulating themselves from the practitioner and presenting themselves as members of the academic community.³³ This view it seems reveals two things: (a) the conflict inherent in the position of Australian academics and (b) one practitioners view that academics should primarily reflect the concerns of practice and not behave as humanities academics. In this struggle, it seems neither world is properly satisfied but certainly from a practitioner's point of view the works of an academic are seen as irrelevant and esoteric thereby widening the gulf between the two sides.

As a microcosm of the legal profession Queensland provides an example of the historical roots of the divide. An analysis of the Queensland historical background reveals the following features:

1. The late development of a law school and the influence of non university trained professionals.

2. A distinct tension between academics and practitioners caused by a perceived differing set of goals.

3. A tendency for practitioners to see themselves as having an entitlement to influence university academics on the basis the university law school was the gateway to the profession.

Queensland reflects experience elsewhere which saw the late establishment of a law school, delayed until the mid 1930's.³⁴ This resulted in the profession showing until the 1960's a profile dominated by lawyers without university education.³⁵ This hampered liaison between the profession and academics as neither had full appreciation of each other's point of view. This is reflected in the friction between the Law Society and the University of Queensland Law School exemplified by the comment by the then Dean Professor Sykes in the 1960's "that many solicitors treated their articled clerks like office boys."³⁶ Subsequently, Professor Tarlo accused the Law Society of a general lack of interest in academic standards.³⁷ In addition to this sniping there was a constant conflict over lecture timetabling as the profession sought to influence times to fit in with the requirements of their practice. The obvious concerns that the profession had for education based upon theoretical learning was shown when Professor Tarlo suggested as part of a review of the LLB course that articles be reduced from three years to two years. The Law Society agreed only on the basis the admission of solicitors after that period would be only conditional while the Solicitors Board refused that reform.³⁸ This may be perceived not so much as a standards debate but as a debate as to the availability of cheap labour in the form of unqualified articled clerks.

The conflict between universities and the profession is symptomatic of the idea that an LLB was a gateway to the profession. Any concerns that the profession may have on the standard of tuition or the numbers of persons eligible for admission must inevitably create a tension between universities and the profession. These actions reflect the desire of practitioners to preserve the monopoly in relation to legal services they have enjoyed for a long period.³⁹ If scarcity of expertise is able to assist in the development of a monopoly then practitioners will always see as a threat any attempt to loosen the rusty gates to the profession. This inevitably encourages conflict with universities who increasingly see law schools as an efficient means to raise revenue to fund more expensive medical and science schools.⁴⁰

33 Justice Dawson quoted in Weisbrot *supra* n.1 at 147.

34 *Supra* n.23 at 152.

35 *Ibid.* In England in 1949 university graduates constituted only 1/4 of new solicitors; in NSW not until 1968 a majority of new solicitors were university graduates (*supra* n.1 at 72).

36 *Ibid* at 156.

37 *Ibid.*

38 *Ibid* at 158.

39 *Supra* n.1 at 6.

40 *Supra* n.9 at 417. A recent example were comments to that effect by Qld Law Society President George Fox, Courier Mail 10.11.92.

Sociology

There appears to be a number of sociological influences which engender the development of the divide.

Certainly legal practitioners are not alone in identifying themselves as a group “linked by common values and interest” as they share this attribute with most professions.⁴¹ This creates a situation where lawyers, buttressed by the other aspects discussed in this article are influenced by group mentality to recognise their own “specialness” which has one manifestation in the academic/practitioner divide. Academics are perceived as just another separate group not linked to them in any substantial way other than to provide initial theoretical education to prospective lawyers.

This “specialness” and separation is accentuated by the differing economic situation of academics and practitioners. It is clear that we live in a materialist society. The legal profession has in recent years developed that theme such that the pursuit of monetary reward is now the primary focus of most legal effort.⁴² Tomasic perceives this trend as actually providing some measure of “ideological unity” maintained by a conformity to materialist ideals⁴³ which can only provide a stark comparison to academics whose primary focus is not upon monetary reward. The same influence that fosters the development of legal practice, not so much as a **profession** but rather as a **business** has fostered the trend towards greater concern with profitability, billable hours and economic efficiency. In that societal and professional environment often one’s own **self** worth is measured by one’s own **nett worth**.⁴⁴ It is a small step for a practitioner when considering his or her academic brethren, to consider the question: Why would a person choose to earn substantially less as a legal academic? It is then a logical step to conjure a vision of superiority, ie, the view that academics (who are less powerful economically) are beings of lesser value and whose opinions are of marginal interest. Although this argument may appear to be simplistic it is suggested that it does contact an important factor in the divide. The typical abusive comment about academics being irrelevant, lazy and examples of people not able to succeed in practice, has at its basis the thought process that someone would only forego a substantially more lucrative profession if one was incompetent or lacking in the required moral fortitude. In addition practitioners often view an academic life as characterised by short hours and long sabbaticals. This is of course now in general an out of date concept, but it is suggested that the pervasive attitudes of yesterday still to some extent control debate in the profession.

Psychological

One of the prime reasons for the divide is reflected in the curriculum favoured by law schools which impacts on students such that the mental processes encouraged thereby promote a retreat from academics as law school does “serve to alter legal orientations, legal ideologies and legal values.”⁴⁵

Even before a student fearfully sits down to her first turgid discourse on the meaning of law you are dealing with a person who often will be in her late teens. This is often not an individual who has already formed a clear vision of her moral stance as she juggles with the many issues that beset a person of that age in our society. Thus often the potent influences inherent in the study of law is directed towards a malleable child/adult.

Bok has criticised the content of legal curriculums which he considers seeks to engender the skill to “think like a lawyer” which he sees as exacerbating the tendency towards developing

41 *Supra* n.1 at 6.

42 R McCrate ‘Paradigm Lost or Revised and Regained’ (1988) 38 *J Legal Educ* 296. Edwards *supra* n.1 at 34.

43 R Tomasic *The Sociology of Law* Sage Publications London at 464.

44 *Supra* n.1 at 140.

45 GJ Rathgen quoted in Weisbrot *supra* n.1 at 136.

conflict approaches to problems rather than co-operation.⁴⁶ Bok favours greater emphasis on training in dispute resolution techniques and other similar styles of problem solving.⁴⁷ It is suggested that this tendency towards training students for conflict can only create an atmosphere where side taking and lack of co-operation with others, such as academics, is likely to develop.

Cramton argues that the ordinary religion of the legal classroom can be characterised by a number of ingredients three of which help engender an attitude that promotes the development of the divide:⁴⁸

1. A sceptical attitude to generalisations. This is based upon the concept that a good lawyer should test and be suspicious.⁴⁹ This is seen as a reaction from the pre-19th century view that the law was a body of rules to be learned by rote and administered in a semi-religious way.⁵⁰ During the 19th century the influence of Holmes and Langdell forged the concept that the law could be taught as a science which could be “best learned through the development of analytical cognitive skills of reasoning”.⁵¹

Cramton sees this sceptical attitude as being a desirable attribute of a lawyer but that this attitude “deepens into a belief in the meaninglessness of principles, the relativism of values or the non-existence of an ultimate reality”.⁵² Cramton sees this tendency as being fed by a steady diet of borderline cases encountered in legal training where there are no right answers only winning arguments, thus contributing to value scepticism.⁵³ This may be one source of the apparent cynicism which is perceived as a feature of the practitioners view of the world. This same cynicism is also directed to academics whose more diffuse goals can quickly be seen as a resort to a non essential activity.⁵⁴

2. The second ingredient of the ordinary religion of the law school identified by Cramton is an instrumental approach to law and lawyering.⁵⁵ This is based on the concept that the law is: “... an instrument for achieving social goals and nothing else; law is instrumental only, a means to an end, and is to be appraised only in the light of the ends it achieves.”⁵⁶

Cramton sees the negative aspect of this concept is that it fails to recognise that legal concepts should have at their basis moral principles.⁵⁷ This concept is identified also by Elkins who saw that historically legal education rested on a fundamental belief in the separation of law and morality.⁵⁸ Weisbrot sees this tendency as an example of Australia’s acceptance of British empiricism whereby law is not seen in its social context but as part of a separate reality.⁵⁹ Elkins saw this as tending towards legalism which he sees is legal thinking “invested with too much meaning.”⁶⁰ He sees this as creating a belief that legal skills are synonymous with analytical power and with problem solving viewed in a vacuum divorced from economic, political and sociological concepts. This attitude then creates an intellectual hubris and creates an atmosphere where superiority over other disciplines is fostered.⁶¹ For a practitioner the academic world is just another discipline seen as less important and inferior.

46 DC Bok ‘A Flawed System of Law Practice and Training’ (1983) 33 *J Legal Educ* 570 at 582 and 583.

47 *Ibid.*

48 RC Cramton ‘The Ordinary Religion of the Law School Classroom’ (1978) 29 *J Legal Educ* 247.

49 *Ibid* at 253.

50 *Ibid* at 254.

51 JR Elkins ‘Moral Discourse and Legalism in Legal Education’ (1978) 32 *J Legal Educ* 11 at 32.

52 *Supra* n.48 at 253.

53 *Ibid* at 254.

54 *Supra* n.2 at 4-5.

55 *Supra* n.48 at 250.

56 *Ibid.*

57 *Ibid* at 257.

58 *Supra* n.51 at 12.

59 *Supra* n.1 at 9.

60 *Supra* n.51 at 16.

61 *Ibid.* Note the comments by Weisbrot in relation to attempts to introduce sociology into Law courses in some universities and the lack of support by profession. *Supra* n.1 at 10.

3. Rodger Cramton identified the third ingredient as a retreat towards tough mindedness and an “analytical attitude towards lawyer tasks and professional roles.”⁶² In this concept
“... emotion imagination, sentiments of affection and trust, a sense of wonder or awe at the inexplicable - these soft and mushy domains of the ‘tender minded’ are off limits for law students and lawyers.”⁶³

Cramton argues that legal education concentrates too much on the consistency of the legal system and is too little concerned with the effect of that system on people. Legal education is said to focus the mind on a narrow set of issues where imagination is stifled not encouraged. This criticism reflects the lament of Spiegelman who states that what we should provide in law school is an explanation of the values that underline the legal system and an appreciation of the emotional context in which law operates.⁶⁴ Spiegelman compares two theoretical students, one centred on rules, principles and logic with the other centred upon interdependence, co-operation and the ethic of care. Spiegelman sees current legal curricula as supporting only the former with the reliance upon dry analysis of case law and emphasis on legalist black letter law.⁶⁵

This environment creates a practitioner, who, when placed in the hard nosed environment of practice, sees as quaintly irrelevant and “soft” those who choose a path of legal academia. In addition students are able in this state to quickly align themselves with the goals of the profession and the firm in which they find employment, goals which see academia as a limited but necessary experience.⁶⁶ Thus the divide only expands.

A practitioner with the abovementioned intellectual diet at law school easily slips into a life where black and white rule the intellectual processes. The psyche of a practitioner is bombarded by many external influences such as the quest for profits, servicing of clients, ethical dilemmas, the constant concerns to guard against negligence and family pressures. This tends to focus the mind of the practitioner on only the essential aspects of practice and life that can battle these external threats. In one sense a practitioner could be said to be subject to a process of dichotomisation.⁶⁷ Practitioners often think in terms of dichotomies -

guilty/not guilty
right/wrong
assessable/non-assessable
within time/outside time
lawyer/non-lawyer
client/non-client
paid/not paid

To such an individual, resort to concepts, as theoretical as is on occasions the hobnob of an academic, is a resort to irrelevancy. Thus the practitioner may quickly recognise another dichotomy - academic/practitioner.

Experiential

It is clear that many legal practitioners look back upon their years of legal education as being a less than stimulating period on their life. Wade identifies the concerns of practitioners in that their educational experiences in law school were characterised by:

“Educational goals vague, methods antiquated, resources poor, feedback slow, imagination rare, risk taking infrequent.”⁶⁸

62 *Supra* n.48 at 250.

63 *Ibid.*

64 *Ibid* at 260 and *supra* n.1.

65 *Supra* n.1 at 251.

66 *Ibid* at 137.

67 Weisbrot described lawyers as a profession with a fondness for dichotomous categories at 59.

68 *Supra* n.2 at 11.

This environment breeds a disgust for the perceived blandness and irrelevance of the university education experience.

In a practical sense it is of course of relevance that many academics are persons who have forsaken the profession that the law student plans to enter. Often the attitude of academics towards practitioners is one of disdain and tinged with an air of superiority.⁶⁹ As a result there is a “do as I say, not as I do” concern for law students if they wish to use the law teacher as a model. Undoubtedly this can foster a negative reaction to academics when they finally come into practice in the professional culture.

Clearly law students enter the study of law with a very warped view of what legal practice entails. Filled with visions of Perry Mason, L.A. Law and court room conquests the law student is ill prepared for the pressures and concerns of practice. Although the early years of practice may appear exciting:

“... the prestige, the comfort, the money - but the new lawyer may find that the content can be demeaning, nasty, narrow, unchallenging, or relentlessly repetitive, and strangely unconnected to a now dimly recollected purpose in choosing law.”⁷⁰

This is the reality which a student greets on entering practice along with the constant pressure of time and ethical considerations. The public vision of lawyering tends to emphasis the extraordinary and remarkable while clouding the true vision of legal practice as involved in generally a mundane existence far removed from media headlines.⁷¹

This pre-existing student viewpoint of the reality of practice becomes even more warped as a result of rapid changes in the development of the profession that is propelling it in a direction which will serve to emphasise the seeming carefree repose of student life and academia. Since the Second World War the profession of the law has developed from being a profession or calling to being a “business”.⁷² Whereas lawyers, once at least to some extent, saw themselves as practising a profession which had an intrinsic public service quality, the profession has now clearly developed an appetite based primarily on profit, efficiency and ‘the bottom line’. This is reflected in a number of relevant dynamics of the legal profession categorised by Fitzpatrick:⁷³

1. Size
2. Fluidity
3. Riskiness
4. Diversification and commercial aggressiveness.

1. The trend throughout the Western world is towards increasing the size of firms with the trend to mega firms in an effort to secure national work of sufficiently high quality and to take advantage of the economies of scale.⁷⁴ This can only create a feeling of disorientation and alienation to an individual as lines of communication are stretched and the goals of an organisation are lost amongst the variant view points and ambitions of a myriad of partners and managers. This is in contradistinction to the former position where the profession was comprised of numerous small and medium sized firms, and in the divided professions of the large eastern states, a small separate bar.⁷⁵

2. One feature of the law as a profession was a considerable loyalty or family like orientation (sometimes based on actual family ties) in law firms. Often a lawyer could expect to work at no more than one or two firms in her working life and any more movement could be seen as showing

69 *Supra* n.48 at 259. Edwards *supra* n.1 at 35. This trend may become greater as practitioners are used more sparingly by law schools. *Supra* n.9 at 415.

70 S Gillers ‘Great Expectations: Conceptions of Lawyers at the Angle of Entry’ (1983) 33 *J Legal Educ* 662 at 669.

71 *Supra* n.70 at 665.

72 *Supra* n.7 at 1240 and WH Rehnquist ‘The Legal Profession Today’ (1987) 62 *Ind LJ* 151 at 157.

73 JF Fitzpatrick ‘Legal Future Shock: The Role of Large Law Firms by the End of the Century’ (1989) 64 *Ind LJ* 461.

74 *Supra* n.1 at 257-266.

75 *Ibid* at 2.

an unfortunate instability. This also reflected in stable partnership membership where frequent changes in personnel were rare based upon a collegiate mutual respect for each partner's unique though perhaps different role. These historical trends have greatly crumbled to the extent that a lawyer could, without too much criticism switch four or five times during a career. Partnerships are now more fluid to encompass mergers, to comply with market demands for size, and as a result of an increasing "you eat what you kill" mentality, where billable hours and profit margins are increasingly the binding between partners, not years of mutual respect and support.

3. Pressures on profit margins and increasing overheads caused by technology changes, labour costs and public pressure for reduction in lawyer's fees, will increase the commercial risk involved in the practice of law. This trend has been exacerbated by the serious contraction in most types of legal services caused by economic recession and the loss of some areas of practice by statutory initiative eg personal injuries. This influence in light of the trend towards fluidity will increase the risk involved in practise and help exacerbate any trend to the "bottom line" practice of law.

4. The recent trend in Australia is towards substantial commercial aggressiveness in the approach of firms. From cocktail parties, lunches, glossy brochures, advertisements, seminars, CLE, newspaper articles, periodical firm leaflets and radio and T.V. appearances, the role of a lawyer now will often involve hawking his or her wares to the public and current and prospective clients. In the light of recent liberalisation of advertising rules, an atmosphere is created where image and presentation are seen as all important skills.⁷⁶ In this environment interpersonal extrovert skills will be greatly prized as an essential addition to any intellectual skills of a lawyer (already apparent self confidence is a necessary attribute for a successful practitioner to engender confidence, push through results and to cover mistakes). This can only increase the contrast between what is probably the more reserved introverted life of an academic, where image is not a primary focus of life, and whose crumpled tweed jacket will seem even more forlorn against the blue suited floral tied practitioner.

These trends will mean that reference by academics to questions of philosophy and jurisprudence can only seem to be irrelevant and not providing the answers that a practising lawyer needs answered. While an academic asks in relation to a particular legal issue such as a new statutory provision:

- What is the mischief this statute seeks to overcome?
- Has the statute achieved its purpose?
- What has changed?
- Why has it changed?
- Should it have changed?
- How should it now develop?

The practitioner asks in relation to the same issue:

- How does my practice need to change?
- What does it say?
- What do I need to do to comply?
- Where do I lodge it?
- What does it cost?
- What do I need to know to keep out of trouble?

Into this environment comes a fledgling lawyer who has little preparation for the culture shock inherent in the transition. It is this shock which greatly impacts on lawyers to the extent that they may view law school experience as an irrelevancy.

In law school academics feed students a constant ream of appellat decisions (removed from

76 *Supra* n.1 at 252 where Weisbrot relates widespread liberalization in advertising rules.

the reality of the paper war inherent in most litigation) and analyse the reasoning and relevance to previous decisions. In the class room a student is omnipotent, able to distinguish criticise and analyse like a Law Lord. Statutes are discussed but often interpretation of statute is but an annoying interlude to the languid flow of appeal court decisions. In practice, the student is faced with the reality that practice is not about sitting around a board room and waxing lyrical about legal principles but is a world dominated by time limits, drafting documents, billable hours, pressure and responsibility. Authorities are relevant, but a practitioner looks for a two line discussion of the "guts" of the case and then moves on. Statutory interpretation of important provisions and intricate consideration of notice provisions are the stuff of a practitioner, not an area the law student has developed to any great extent other than as a footnote to a class assignment.

Perhaps the greatest concern for a new lawyer is the emotional context in which he must now trade his wares in a law practice. Replacing the desultory pressures of assignments and examinations is now the constant demands of clients and the decision making process which will impact on lives other than the decision maker. In law school, it was easy to conclude an offence was committed, or that a breach of a lease had occurred in the sanitised class room problem solving situation. Now that same decision is couched in an environment where peoples lives or their property may be impacted by a wrong or even a reasonable decision. At the back of each practitioners mind is the ever present concern for negligence and ethical requirements. Klare considers that the law school curriculum teaches students to distrust their own moral sensibilities and that they ought to avoid moral and political enquiry because it is dangerous, soft and unlawyer like.⁷⁷ This does not arm the student with a world view to easily deal with these pressures.

Probably most importantly, a law school curriculum generally does not greatly assist in the difficult role of juggling competing interests that a lawyer must perform. A lawyer must consider his or her client's interest, his or her position as an officer of the court, his or her duty to the ethics of his profession and to his or her own family. This concern is multiplied especially in law practice for large corporate clients where the degree of autonomy (to refuse instructions or to dictate the way in which work is done) may be limited.⁷⁸ This creates difficult conflict of interest situations (in the broad sense of that word) and without proper training a lawyer is ill equipped to handle these conflicts. Watson considers that many lawyers react to this conflict by becoming "cynical" and acting as if they have no concern.⁷⁹ A lawyer has few areas to which he or she can seek solace. This results in a cynical attitude to ones own legal education as it did not help one to deal with the difficult moral concerns that one meets on a day to day basis in practice.

Other commentators have also commented upon the apparent disconnection between legal concepts and the way in which law is taught in universities and morality. It has been suggested that legal education may actually stunt a person's moral development to a base level where morality is based purely on a fear of punishment and where action is motivated by a desire for reward or benefit. This is said to be created by an environment where students are invited or required to separate intellect from emotion with the result being an immoral attitude.⁸⁰ Where responsibility is defined by one's ethical principles which have been shaped by a neglect of one's own feelings and concepts an individual like a lawyer is likely to feel little concern for his or her client's fellow practitioners and academics.⁸¹ This can generally be described as a tendency of practitioners to shun self reflection perhaps as a defence to a fear of what may be found lurking in those dark recesses. Perhaps this may explain the fact that until recent times very little research

77 KE Klare 'The Law School Curriculum in the 1980's: What's Left?' (1982) 32 *J Legal Educ* 336.

78 *Supra* n.1 at 7.

79 AS Watson 'The Quest for Professional Competence: Psychological Aspects of Legal Education' (1968) 37 *Crim L Rev* 93.

80 HM Weinstein 'The Integration of Intellect and Feeling in the Study of Law' (1982) 32 *J Legal Educ* 87 at 92.

81 *Supra* n.53.

on the profession in Australia had been completed.⁸²

One factor which should be considered is that in general terms most practitioners do not enjoy the practise of the law. A number of studies have indicated⁸³ that there is a considerable percentage of lawyers who would much rather be doing something else. How does this impact on the divide? For a person carrying on a profession that she or he loathes, and who continues with that role, a decision must have been made by that person that because of money, family, social standing or age, it is not possible to change or it is not worth the effort of changing one's role in life. If confronted with a person with a similar background, like an academic, who makes that switch, or a person who has never practised, then it is possible that such a person could be seen as a threat, as the freedom from the drudgery and or stress that they may see as represented by the academic can only confirm in them the binds that tie them to the practitioner's desk. For a practitioner, in his opinion of academics the pain of practice may be seen as badge of courage worn proudly like a battle-scarred veteran, who looks with a mixture of disdain and condescension upon a deskbound army clerk, who, although a soldier has had not smelt the stench of war. This argument could also assist in the interpretation of why monetary reward is a primary focus of lawyers. Perhaps because of the dislike for the job, it is seen as essential that there be a substantial reward, as this is the only proper compensation for working in a difficult environment.

Solutions

There are a number of steps that can be taken so as to avoid so far as possible the divide which keeps apart academics and practitioners. It is inherent in this topic there needs to be better education of practitioners and academics to be aware of the divide and the reasons for that divide. Certainly both sides need to be aware of what each other does as often suspicion is fed by ignorance. Many practitioners are unaware of the modern legal academic who may actually work many more hours than legal practitioners and the concept of a lazy academic is probably a dying concept. Cooperation by practitioners and academics on law reform activities, CLE and Law Society committees will assist in this process of education.

So as to avoid some of that culture shock which comes with the transition from law school to practice more comprehensive pre-law school training is needed so that a student is better aware of the type of work which a lawyer does after completion of the law degree. This will be assisted by the now increasing trend towards introducing practical experiences during the course and by allowing students to have access to summer clerkships during vacation periods. This will hopefully allow them to become aware of the emotional context in which they will be applying their trade and if possible to choose that area of practice which best suits their personality and world view. In this regard use of role playing as part of the curriculum could provide students with the tools required to deal with issues encountered in practice with emphasis on some of the ethical and moral dilemmas that are common in practice.

If practitioners and academics could more easily pass between both sides of the divide then the divide would decrease in size as both sides become better schooled in each others skills and needs. This would involve attention to increasing salaries currently paid to academics so that competent persons are able to be attracted to academia. It may be difficult to convince practitioners that academics are of much moment unless some academics are former practitioners who were seen as competent and academia is not seen merely the resort of unsuccessful practitioners.

It is clear that part of the problem of the divide is the apparent inability of some academics to appreciate the need for at least some practical training to be part of the LLB. There is no need to sacrifice academic excellence merely by being aware of practical issues relevant to any given

⁸² *Supra* n.1 at 10.

⁸³ In California Lawyer March 1992 survey revealed 52% were unhappy with practice of law and 70% would choose new career if opportunity given. Also refer to Johnson *supra* n.7 at 1249, Rehnquist *supra* n.72 at 154.

topic. Only when this realisation results in some changes to the LLB program will there be possibility of change.

Conclusion

There is clearly no single cause to the divide as it appears it is based on many causes some of which tap deep psychological concerns. Change will occur when the passing of time heals some of the past conflicts and we understand that the seeds of the divide are contained in the nature of what is taught in law schools. In addition, academics and practitioners need to respect each other's contribution as both have the capability to contribute to each other's role in important ways.

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