THE AMERICAN CONTRAST: A HISTORY OF AMERICAN LEGAL EDUCATION FROM AN AUSTRALIAN VIEWPOINT

by

JOHN FIOCCO* and JUDE WALLACE**

The development of American legal education is a complex and dramatic chapter of American legal history. Unfortunately, despite some recent attempts,[1] it is a story which has been largely neglected, and its reconstruction awaits a suitably accomplished historian.[2] This is a task beyond the scope of this article; rather we will chronicle how American legal education and theory has overcome the threat of formalism. It is our view that formalism is entrenched in Australian legal education and that its impact is destructive and narrowing. In presenting the American story from an Australian viewpoint we hope to draw attention to the problems of formalism in Australia and to some of the American solutions.

1. *THE FORMATIVE EXPERIENCES*

While it is difficult to give the term *formalism* within a legal context a precise meaning, for our purposes it is initially used to describe developments which took shape within America in the late nineteenth century. It is the recurrent thesis of recent scholarship of this period that, from the post-Revolutionary era up until the Civil War, the common law was being recast within an American mould, reflecting the rise

* LL.B. (*W.A.*), LL.M. (*Va.*), Lecturer in Law, University of Western Australia.

** LL.B. (*Melb.*), LL.M. (*Va.*), Senior Lecturer in Law, Monash University. This article was originally part of a larger work submitted by the authors to the Seminar on Legal Education at the University of Virginia School of Law conducted by Professors Calvin Woodard and John Norton Moore. We gratefully acknowledge their advice and encouragement. The opinions expressed are solely our own.

1 The most important contemporary exposition is Robert Stevens, 'Two Cheers for 1870: The American Law School', *Law in American History*, ed. Fleming and Bailyn (Boston, 1971) at p. 405. Other important contributions are duscussed by Stevens.

2 The story is indeed complex. It requires a historian sensitive to the disparate experiences of the American colonies, the post-revolutionary ambivalence towards lawyers in a new society, the egalitarian forces of Jacksonian democracy and the frontier experience, the growth of *laissez faire*, the social scientific mentality in the nineteenth century and the liberalist impulses of early twentieth century.

and interests of a new merchant and entrepreneurial class.[3] This class shared the same values as the legal profession and through its assistance they were able to achieve a transformation of the legal system. This transformation in turn effected, 'the overthrow of eighteenth century pre-commercial and anti-developmental common law values' and, 'both aided and ratified a major shift in power in an increasingly market-orientated society'.[4] Once this process was completed, it is argued, the new legal doctrine needed to be consolidated into a, 'fixed . . . system of logically deducible rules'.[5] This was ultimately achieved by the rise of 'legal formalism . . . an intellectual system which gave common law rules the appearance of being self-contained, apolitical and inexorable . . .'[6] This approach manifested itself in judicial reasoning styles of the period 'in which judges asked whether a proposed rule was consistent with an existing body of doctrine'.[7] The development of this approach within the legal milieu of the nineteenth century is reflected in the progress that legal education was making at this time. It is more than coincidental that scholars of this period point to the establishment of the 'treatise tradition' and the great treatise writers, such as Joseph Story and James Kent, as instrumental influences in the rise of legal formalism. Both these men were to occupy two of the earliest professorships of law in universities which became legendary institutions in American legal education. Story's was possibly the most significant of the two appointments and it is that which we shall now briefly discuss.

When Joseph Story was elected to the foundation professorship of American law at Harvard University in 1829, legal education had predominately taken place within an apprenticeship system outside the universities and under the tutelage of practising lawyers.[8] While the American experience was by no means uniform, legal education was often part of a great liberal tradition towards education which encompassed 'intellectual exposure to history and the classics'.[9] Story was very much a product of this great tradition which had before him spawned men such as Mr. Justice Blackstone and Lord Mansfield. However, it was not this background that infused itself into his program of studies but rather, 'the study of established legal doctrines'. 'What we

3 M. J. Horwitz, 'The Rise of Legal Formalism' (1975) 19 *American Journal of Legal History* 251; W. E. Nelson, 'The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America' (1974) 87 *Harvard L.R.* 513; H. N. Scheiber, 'Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the Nineteenth Century' [1975] *Wisc. L.R.* 1; D. Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard L.R.* 1728-; R. M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975).

4 Horwitz, ibid, 251.

5 Ibid, 256.

6 Ibid, 252.

7 Nelson, *supra* n. 3, at p. 516.

8 Stevens, 'The American Law School', *supra* n. 1. *passim*; Twining, 'Pericles, and the Plumber' (1967) 83 *Law Quarterly Review* 396.

9 G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (1976) at p. 45.

propose', he said, 'is no more than plain, direct, familiar instruction.'[10] Story, who had been attracted to the professorship partly on the basis that his lectures would be published,[11] approached his subjects, 'not primarily [as] a philosopher but [as] a practical man'.[12] His ultimate publications, some of which could be described as technical,[13] reflected this commitment to practicality and a need for a systematic and authoritative, 'body of established authorities from which judges could derive rules for the resolution of cases . . .'.[14] A burgeoning American economy needed a sense of order and a direction of purpose and this was to be provided by his scholarship, largely the 'fruits of his teaching'.[15]

Story's own education and intellectual background provides a seemingly paradoxical scenario for his approach to legal education, but his approach can be viewed as a true product of his time where, gradually but surely, formalistic attitudes to law were translating themselves into articulated philosophies of legal education. His contribution to legal education was the greatest of its time and had a lasting effect on the Harvard Law School.[16] He joined the school at a time when it was struggling for recognition;[17] by the time of his untimely death it had gained enormously in stature, attracted a large body of students and built up a library in which in 'the departments of English and American law, little perhaps is wanting'.[18] Harvard's reputation as an educational institution continued to grow.[19] Its pre-eminence as a law school was established after the appointment of a man whose enduring contributions and innovations were to be as impressive as his name, Christopher Columbus Langdell.

Langdell had been brought from obscurity by Charles Eliot,[20] the President of Harvard, to fill the Dane Professorship of Law. Langdell's appointment in January 1870[21] was made when characteristics of formalism were established in the legal system.[22] It was also a period of a growing commitment to scientism among various American intellectual

10 Twining, *supra* n. 8, at p. 403.

11 The letter written by Joseph Story to the Harvard Corporation accepting the Dane Professorship confirms this; it is quoted by Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men 1817-1967* (1967) at p. 97.

12 Ibid, at p. 136.

13 Ibid, at p. 110. Story himself remarked '... the present work is confessedly one of a purely technical character ...' in the preface to *Equity Jurisprudence* (1835).

14 G. E. White, *The American Judicial Tradition supra* n. 9, at p. 44.

15 *The Centennial History of the Harvard Law School* (1918), at p. 260.

16 Twining, *supra* n. 8, at p. 403.

17 Sutherland, *The Law at Harvard, supra* n. 11, at p. 92.

18 Ibid, at p. 138.

19 Stevens, *supra* n. 1, at pp. 424-435.

20 C. Woodard, 'The Limits of Legal Realism: An Historical Perspective', (1968) 54 *Virginia L.R.* 689, at p. 714.

21 L. R. Rawle, 'A Hundred Years of the Harvard Law School' (1917) XXVI *Harvard Graduates Magazine* 179.

22 Horwitz, *supra* n. 3, at p. 251.

movements.[23] Formalism found new reinforcement in this commitment and Langdell was to make it the principal focus for his innovations in legal education. His theory of law which he was to apply with characteristic determination, courage and force[24] is expressed in a passage which has become the locus classicus:

> Law, considered as a science, consists of certain principles or doctrines . . . To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases...[25]

Law had been caught up in the scientism movement;[26] it was conceptualised as consisting of 'certain principles or doctrines'. The 'true lawyer' was the one who was able to master them and the best way to accomplish this was to concentrate on their sources, namely, the cases. The case method was born of an almost inexorable logic and established its destiny of dominance of American legal education for ensuing decades. This approach to law had a number of lasting consequences which were to become objects of criticism in later years by people such as Holmes[27] and Llewellyn. Firstly, it was built on a conception of law as a self-contained, autonomous body of immutable rules from which principles or doctrine could be developed in a logically coherent manner. Secondly, it eschewed from the law school curriculum anything that did not enhance the mastery of legal doctrine.[28] Law school meant law subjects and not extraneous material which might taint the purity of doctrine. Thirdly, it bred a method of instruction which was designed to teach these principles, a scientific method not based upon rote learning but upon discovery by induction.[29] It followed that the people who were best qualified to teach this process of discovery were those who had thoroughly researched the sources themselves. As Langdell so poignantly stated in his defence of the appointment of the first teacher of law who had never practised:

> I wish to emphasize the fact that a teacher of law should be a person who accompanies his pupils on the road which is new to them, but with which he is well acquainted from having travelled

23 G. E. White, 'The Intellectual Origins of Torts in America' (1977) 86 *Yale L.J.* 671, and Sutherland, *supra* n. 11 at p. 166, notes that Eliot and Langdell shared the 'common intellectual commitment to the scientism of the day'.

24 Sutherland, *supra* n. 9, at p. 162.

25 C. C. Langdell, *A Selection of Cases of the Law of Contracts* (1871), Preface, at p. viii, quoted by Twining, *Karl Llewellyn and the Realist Movement* (1971) at p. 11.

26 Woodard, *supra* n. 20 at pp. 709-728, sees the nineteenth century scientific mentality as instrumental in a 'secularization' of legal education.

27 Holmes reviewed Langdell's casebook on contract referred to in n. 112 in (1880) 14 *American Law Review* 233.

28 Twining, n. 8, at p. 713.

29 Woodard, 'The Limits of Legal Realism' *supra* n. 20, at p. 713.

> it before. What qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, nor experience in dealing with men, nor experience in the trial or argument of causes, — not experience, in short, in using law, but experience in learning law . . .[30]

Case method and the appointment of full-time law teachers are easily separated from the narrow conception of law from which they came; later, they were the least controversial of Langdell's innovations. Indeed, the case method has been described by one recent scholar as, 'the most creative single contribution that America has made to educational theory'.[31] The appointment of full-time law teachers has been an important factor contributing to American pre-eminence in teaching, administration and research in legal matters. Another scholar has argued that the American experience in this area has, 'promoted a much healthier relationship between theory and practice than has been the case with English jurisprudence'.[32] Fourthly, Langdell's approach centred exclusively on the sources of law emanating from court decisions. The cases were the sources of the law as 'doctrine' and he argued that, 'the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied'.[33] The narrowness of the sources used in the study of law was to become a principal target of Langdell's critics. Finally, Langdell's conception of law avoided questions of social policy and justice.[34] Law consisted of a body of principles which were discovered by amoral scientific methodologies, a process which supposedly ignored or underscored normative considerations.

Nevertheless the judgment of history must see men within their own time and by the date of his resignation in 1895, Langdell had made Harvard, 'the pre-eminent law school in this country [America], and institutionalized legal training was clearly established as *de rigueur* for leaders of the profession'.[35] Langdell's methods and attitudes spread quickly throughout America and by 1912 they were embraced by all the major law schools.[36] Langdell was succeeded at Harvard by a group of scholars who carried on his conceptions and devoted their principal research energies to systematizing the law in rigorously analytical treatises which became the staple literature of legal education until the realist movement later in the twentieth century.[37] Despite the spectacular success of Langdell's conception of law, almost from its very inception

30 Quoted in James Barr Ames, 'Christopher Columbus Langdell' in *Lectures on Legal History and Miscellaneous Essays* (1913) 466, at p. 477.
31 Woodard, *supra* n. 20, at p. 712.
32 Twining, *supra* n. 8, at p. 406.
33 Langdell, *supra* n. 25, at p. viii.
34 S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976).
35 Stevens, *supra* n. 1, at pp. 426-427; Twining, *supra* n. 25, at p. 14; K. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (1962) at p. 377; Twining, *supra* n. 8, at p. 406.
36 Stevens, *supra* n. 1, at pp. 435-441.
37 The principal ones were Williston, Beale, Gray and Thayer: see Twining, *supra* n. 25, at p. 14.

it generated significant criticism which spawned the movements of sociological jurisprudence and realism.[38]

The first such criticism or 'revolt' against Langdellian formalism was to come from no less a figure than Oliver Wendell Holmes Jr.[39] Characteristically, he was to capture the essence of his criticism in the now clichéd aphorism, 'the life of law has not been logic, it has been experience', which, significantly, was first used by Holmes in a review of Langdell's case book on contracts.[40] His most comprehensive attack was to be made some years later at the occasion of the dedication of a new hall at the Boston University School of Law, where he delivered possibly his most famous and enduring contribution to legal thought, *The Path of the Law.*[41]

This paper has been approached at multifarious levels by scholars, but as one has recently stated, '[The Path of the Law] was intended first and foremost as a discussion of legal education'.[42] Indeed, the evidence that it was so intended is impressive,[43] and for our purposes we intend to view the paper from this perspective while accepting it may be capable of other interpretations.[44]

At the time Holmes delivered the address he was a Justice of the Supreme Court of Massachusetts and his opening remarks reflect those of a practitioner concerned with the mystification of law by academics. He stated:

> When we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgements and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this

38 G.E. White, 'From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America' (1972) 58 *Virginia L.R.* 999.

39 Holmes was one of a number of important American figures, including Charles A. Beard, John Dewey, James Harvey Robinson and Thorstein Veblen who found themselves reacting against the excesses of nineteenth century scientism which had such a dramatic influence on many disciplines apart from law: see M. G. White, *Social Thought in America: The Revolt against Formalism* (1964, first published 1949). For an account of some of the other criticisms which were made at this time, see Stevens, *supra* n. 1, at pp. 441-464.

40 (1880) 14 *American Law Review* 233, 234; Woodard, *supra* n. 20, at p. 717.

41 (1897) 10 *Harvard L.R.* 457.

42 Twining, 'The Bad Man Revisited' (1973) 58 *Cornell Law Review* 275, at p. 276.

43 Ibid, at pp. 275-277.

44 One predominant interpretation is that it was concerned with what has become known as the 'prediction theory of law': Edwin W. Patterson, *Jurisprudence: Men and Ideas of the Law* (1953) at pp. 118-222; Wilfred E. Rumble, *American Legal Realism,* (1968) at pp. 41-44. For other possible interpretations which reflect the rather diffuse nature of Holmes' address, see Morton G. White, *supra* n. 39, at pp. 59-75.

> danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.[45]

Langdell's approach clearly caused students not to look at law as they would in practice. Holmes on the other hand was anxious to emphasize that law was not simply a body of logically deducible rules and knew that the students would indeed discover this on entering into the practice of law. He attempted to show this by attacking two fallacies which he believed were inimical to, 'learning and understanding the law'.[46] The first was the tendency of students to confuse the distinction between law and morality. In order to dispel this confusion Holmes introduced the dramatic character of the 'bad man'; 'If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct whether inside the law or outside of it, in the vaguer sanctions of conscience.'[47] This passage has raised controversy for obvious reasons, but Holmes is not advocating immorality; on the contrary, he is advising the students to be cold, detached, realistic and amoral practitioners of law.[48] However, it is the second fallacy which is more pertinent in the context of Langdellian formalism. This fallacy, Holmes argued, 'is the notion that the only force at work in the development of law is logic'.[49] This was the fallacy that was being entrenched by Langdell and his colleagues. Holmes recognised that logic was indeed a strong force in thinking about law and judicial decision making, but it was equally important, as the later realists were intent on showing, that '[b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment . . . the very root and nerve of the whole proceeding'.[50] It is this judgment or the factors that influenced the judgment that needed to be exposed and appreciated. Conclusions of law are matters of judgment, but why are these conclusions made? Holmes answers, 'It is because of some belief as to the practice of the community or of a class, or because of some opinion as to the policy or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions'.[51] Clearly, the approach of nineteenth century legal formalism was the antithesis of considerations of this nature. Unfortunately, for all the insights that 'The Path of the Law' provided, it failed to present a sufficiently viable

45 (1897) 10 *Harvard L.R.* 457, quoted by Twining, *supra* n. 25, at p. 18 and *supra* n. 42, at p. 276.

46 (1897) 10 *Harvard* L.R. 457, at p. 459.

47 Ibid, at p.459.

48 Twining, *supra* n. 25, at p. 18.

49 (1897) 10 *Harvard L.R.* 457, at p. 465.

50 Ibid, at p. 466.

51 Ibid.

alternative to the already ensconsed Langdellian model.[52] Nevertheless, Holmes had made the first dent and as an eminent alumnus of the pre-Langdellian era his words had the special ring of an attack from among the ranks.[53] Harvard and Langdell would remain the paradigms of the formalism of this era, but curiously enough the next most important reaction against this orthodoxy came again from within.

In 1907, echoing Holmes and calling for a 'sociological jurisprudence' Roscoe Pound announced that, 'Law is no longer anything sacred or mysterious.... We must seek the basis of doctrines, not in Blackstone's wisdom of our ancestors, not in the apocryphal reasons of the beginnings of legal science, not in their history... but in a scientific apprehension of the relations of law to society and of the needs and interests and opinions of society of to-day.'[54] His statement heralded the coming of the first alternative that was to seriously challenge the Langdellian formalism. Pound was arguing, as one scholar has articulately stated, for a switch of 'the focus of juristic analysis from mere doctrine to the social effects of legal rules and practices'.[55] The revolt against formalism in America had already changed the perspectives of many disciplines but as Pound pointed out shortly after he called for this new science of law:

> Jurisprudence is the last in the march of the sciences away from the method of deduction from predetermined conceptions. The sociological movement in jurisprudence, the movement for pragmatism as a philosophy of law, the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles, the movement for putting the human factor in the central place and relegating logic to its true position as an instrument, has scarcely shown itself as yet in America.[56]

One of the ways in which law could take part in this movement was to undertake a greater integration with the social sciences. This was one of Pound's recurrent themes. As Langdell's conception of law had been congenial to the scientism of the nineteenth century, Pound's call for interdisciplinary approach to the study of law was, 'in perfect harmony with the spirit of the Progressive Era . . .'[57] However, as much as Pound understood the need for greater research reflecting this new approach to law, he had underestimated the immense difficulties that this approach would encounter in practice. Pound's position itself, recent scholarship

52 As to the weaknesses (as well as the strengths) of Holmes' discussions of legal education, see Twining, *supra* n. 42 at p. 298.

53 A similar phenomenon was to take place in the sixties with Ralph Nader.

54 'The Need of a Sociological Jurisprudence' (1907) 19 *Green Bag* 607.

55 Rumble, *supra* n. 44 at p. 9.

56 Pound, 'Liberty of Contract' (1909) 18 *Yale Law Journal* 454.

57 Rumble, *supra* n. 44 at p. 12. This idea has recently been reiterated by G. Edward White, *supra* n. 125, at p. 1005 who says: 'Pound's emphasis on understanding changing social phenomena rather than static universal rules, his belief in social planning through scientific expertise, and his commitment to "equity" and "justice" were congenial to progressives.'

has argued, was enigmatic.[58] While advocating a new jurisprudence, he sat at the helm of an institution which was identified as the model of formalism. His approach to jurisprudence was to treat it as a subject apart and consequently most of his ideas remained, 'a set of vague aspirations' which had not been sufficiently refined as working tools which in turn could be applied to law, and in particular to legal education.[59] Nevertheless, Pound had provided the direction and inspiration for much of the work that was to follow. While the tasks of refinement and application would be the principal contributions of that disparate group known as the realist movement, one of its leading figures once stated that the work of Pound, 'is the basis of our forward looking thought of the twenties and thirties and has provided half of the commonplace equipment on and with which our work since has builded'.[60] This work is the basis of our discussion of the next most important phase in the development of American legal education and the contribution of the realist movement.

Of course, from one perspective it is incorrect to speak of a movement. If the name *movement* implies a discrete group of individuals then it is a description which must be used with caution. As recent scholarship has repeatedly emphasised, '[t]he legal realists were a heterodox lot'.[61] They, 'consisted of a loosely integrated collection of interacting individuals, ... with a complex family of related ideas, given some coherence, perhaps, by a shared dissatisfaction, not always precisely diagnosed, with the existing intellectual milieu of law in general and legal education in particular'.[62] The 'shared dissatisfaction' of course was with Langdellian formalism but the quotation also points to a difficulty with the realist contribution, namely, their lack of overall coherence which militated against the production of a comprehensive theory for legal education.[63] Nevertheless, their individual contributions and their isolated group efforts were the most serious and viable alternative to legal education since the Langdellian model.[64]

One of the earliest major contributions was a product of an intellectual ferment at Columbia University in the 1920's. We pointed out earlier that one of the principal criticisms of Langdell's approach was

58 There appears to be emerging a slow stream of literature reassessing Pound's position in American law including Twining, *supra* n. 25, at pp. 22-25; Morton J. Horwitz, 'The Conservative Tradition in the Writing of American Legal History' (1973) 17 *American Journal of Legal History*, 275; Robert W. Gordon, 'J. Willard Hurst and the Common Law Tradition in American Legal Historiography' (1976) 10 *Law and Society Review*, 9 at pp. 25-44.

59 Twining, *supra* n. 25, at pp. 23-24; Rumble, *supra* n. 44, at pp. 20.

60 Llewellyn, *supra* n. 35, at p. 496.

61 Rumble, *supra* n. 44, at p. 28.

62 Twining, *supra* n. 25, at p. 26.

63 This was not to emerge until Harold Lasswell and Myres S. McDougal published their seminal essay, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52 *Yale L.J.* 203.

64 It is of course impossible to trace the development and contribution of the realists in full within the confines of this paper. Rather, we hope to highlight some of the principal contributions which were essentially products of the reactions of realists to Langdellian formalism.

that it often became divorced from the realities of legal practice.[65] The teaching of law as 'doctrine' tended to draw fields of law into classifications which were untenable and overlapping when applied in practice. Another major thread which we identified earlier was the call for a greater integration of law and the social sciences. Both of these ideas were motivating forces behind the Columbia debates lead by personalities such as William Underhill Moore (1879-1949) and Herman Oliphant (1884-1939).[66] The culmination of the debates was a two year study of the curriculum under the chairmanship of Leon Marshall, Professor of Political Economy at the University of Chicago.[67] One scholar has described this study as, 'the most comprehensive and searching investigation of law school objectives and methods that has ever been undertaken'.[68] The extent of the discussions, their underlying motivations and their significance is vividly described by the same scholar:

> Individuals and committees prepared for discussion at the faculty conferences approximately one hundred reports, covering eight hundred mimeographed pages, on various aspects of legal education. The result was a sweeping challenge to the adequacy of the organization, the materials and the rational basis of existing legal education. The fundamental thesis which emerged was this: *Since law is a means of social control, it ought to be studied as such.* Solutions to the problems of a changing social order are not implicit in the rules and principles which are formally elaborated on the basis of past decisions, to be evoked by merely formal logical processes; and effective legal education cannot proceed in disregard of this fact. *If men are to be trained for intelligent and effective participation in legal processes, and if law schools are to perform their function of contributing through research to the improvement of law administration, the formalism which confines the understanding and criticism of law within limits fixed by history and authority must be abandoned, and every available resource of knowledge and judgment must be brought to the task.*
>
> A drastic retooling would be required to convert the facilities of legal education to such an effort. Two basic requirements were announced to the law school world with seismic effect: First, the formal categories of the law, shaped by tradition and by accident, tend to obscure the social problems with which law deals, the purpose which is the vital element of principle, and the actual working of legal processes; they constitute a framework which forces artificiality in perspective and development; they must be revised along lines of correspondence with the types of human activity involved. Second, an understanding of the social structure in which law operates can no longer be taken for granted or regarded as irrelevant; law students — and hence law teachers — must acquire that understanding, and must somehow learn to

65 This was one of Holmes's chief criticisms in *The Path of the Law, supra* n. 45. Interestingly, it was also of major concern to Arthur Corbin, one of the very early realists: Twining, *supra* n. 25, at p. 28.

66 Twining, *supra* n. 25, at p. 41-55.

67 Stevens, *supra* n. 1, at pp. 472-474.

68 B. Currie, 'The Materials of Law Study' [Part I] (1951) 3 *J. Legal Ed.*, 331, at pp. 332-334.

> take into account the contributions which other disciplines and sciences can make to the solution of social problems.[69]
>
> [Italics added].

If Currie's appraisal is correct, then the enormous significance of these discussions becomes immediately obvious. Law was now to be seen within a social context. This meant that the rules and the classifications within which they were confined by formalism needed to be revised along so-called 'functional' lines.[70] The other, and perhaps more startling revelation, was that law was to look, 'to the solution of social problems' and, to this end, take into account the contributions of the other social sciences. The ultimate implications for the implementation of these proposals was to prove too much for the Columbia Law School and eventually they were rejected in favour of preserving an institution primarily devoted to the training of practising lawyers.[71] The faculty split and some of its most eminent scholars left to take up positions at Yale and to commence the ill-fated John Hopkins Institute for the Study of Law.[72] Nevertheless, the conflict had proven tremendously fruitful. While the initial contact with the social sciences was to produce limited success, it provided the foundation for more successful and pioneering studies in future years of which the Chicago Jury Project is an outstanding example.[73] Langdell's isolationism had been breached and finally law was to consider the relevant contributions of other disciplines. This was no better illustrated than in the legal literature which began to emerge after the dissemination and diffusion of the realist ideas in the late twenties and early thirties. In keeping with Langdell's cloistered approach the majority of texts had been concerned almost exclusively with cases. A change from the Langdell model began to appear with titles such as *Cases and Materials on the Law of Sales*[74] and *Cases and Materials on the Development of Legal Institutions.*[75] Extra-legal material began to be included in students' text books and law was often viewed as a dynamic process taking place not within the pages of appellate opinions but within the realities of the market place. This approach to law ultimately produced the Uniform Commercial Code, one of the great monuments to the realist contribution.[76]

While it alleviated the overconcentration on cases to a small extent, the approach did not overcome the problem that law was still predominantly studied through the eyes of appellate court judges. The

---

69 Ibid, at p. 334-335.
70 Stevens, *supra* n. 1, at p. 473.
71 Ibid, at p. 474-475.
72 Ibid, at p. 475.
73 Twining, *supra* n. 25, at pp. 56-69.
74 Karl Llewellyn (Chicago, Callaghan, 1930).
75 Julius Goebel (1928). These changes are discussed by Twining, *supra* n. 25, at p. 57.
76 The special insights of the realist movement are shared second hand by Australia. They have not yet become part of the mainstream of Australian legal thought, though there are signs of adaption, especially since the avant-garde schools (in particular New South Wales and Monash) diversified legal studies.

majority of graduating students would rarely appear before appellate tribunals and, even if they did, the training they gained through the case method may not adequately equip them as advocates. These were two major concerns of a leading realist, Jerome Frank, a judge of the United States Court of Appeals for the Second Circuit.[77] In an article published shortly after the Columbia debates, Frank voiced his concern with the academic lawyers almost exclusive preoccupation with appellate court cases. As he stated in characteristic language, 'It is absurd that we continue to call an upper court opinion a case. It is at most an adjunct to the final step in a case.'[78] At this point, Frank was more concerned with the fact that law students had been isolated from the operation of the courts and he was calling for a need to set up law school clinics much like those provided for medical students.[79] It was not until 1949 that he published the most comprehensive attack on the 'upper court myth' and its relation to legal education.[80] The myth, Frank argued, was, 'that upper courts are the heart of court-house government and that the upper courts on appeals can and will safeguard litigants against the trial judges mistakes concerning the facts'.[81] The true drama of the law, according to Frank, was carried on at the trial court level and Langdell's approach had alienated students and the study of law from this fact. Frank's criticisms still ring true today. Although there has been an enormous upsurge in clinical legal training, law students are still predominantly served a fare of appellate court opinions as the staple source of legal doctrine.

2. *A COMPREHENSIVE WORKING THEORY FOR LEGAL EDUCATION*

The extent of the realist contribution of course was much more comprehensive than we have been able to trace here.[82] At most, we have illustrated our general thesis that while the specific contributions of the realists concretized the vague aspirations of sociological jurisprudence in a way which left a lasting impact on American legal education, their efforts were largely unco-ordinated attacks on Langdellian formalism and they did not provide a comprehensive working theory for legal education. This was to be the contribution of two pioneering scholars

77 Of course, Frank was also concerned with the role of psycho-analysis, pschiatry and judicial decision-making: *Law and the Modern Mind* (1930); see Twining, *supra* n. 25, *passim*; and G. Edward White, *supra* n. 9, ch. 12. However, we are more concerned with Frank's position as expressed in *Courts on Trial: Myth and Reality in American Justice* (1950) and 'Why not a Clinical Lawyer-School?' (1933) 81 *U. Penn. L.R.* 907.

78 Frank. ibid, at p. 916.

79 Ibid, at pp. 917-920.

80 *Supra* n. 77, chs. XV and XVI, although many of the ideas and language are found in his earlier article referred to in n. 77.

81 *Supra* n. 77, at pp. 222-223.

82 It produced possibly one of the most successful collaborations between a lawyer and a social scientist in Karl Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Justice* (1941).

in a seminal article entitled 'Legal Education and Public Policy: Professional Training in the Public Interest'.[83]

If the article is first viewed within its historical context, it provides valuable clues as to the state of American legal education at that time. Many of the contributions of the realists were by now obvious and Lasswell and McDougal were able to use them as a basis for proceeding to a more radical approach to legal education. The movement to integrate law and the social sciences and the new literature, to which we referred earlier, provide two striking examples. As the authors stated that, 'Heroic, but random, efforts to integrate "law" and "the other social sciences" fail through lack of clarity about *what* is being integrated, and *how*, and *for what purposes*'.[84] Later they continued, 'The relevance of "non-legal" materials to effective "law" teaching is recognised but efficient techniques for the investigation collection and presentation of such materials are not devised'.[85] The realists had provided the foundations and part of the construction but had stumbled on the details for completion. The story of how this was accomplished is beyond the scope of this article but an outline of their principal theses and the criticisms they prevoked are worthy of consideration, particularly as their theory of legal education has received very little attention within Australia.[86]

The crux of their approach was contained in a now famous statement:

> We submit this basic proposition: if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth it must be a conscious, efficient and systematic *training for policy-making*. The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American policy.[87]

'Policy', in this context, they defined as 'the making of important decisions which affect the distribution of values'.[88] The basis for the call to this approach was a conception of a lawyer which might appear grandiose to an Australian lawyer used to a less conspicuous role in Australian society. The authors stated:

> It should need no emphasis that the lawyer is today, even when not himself a 'maker' of policy, the one indispensable adviser of every responsible policy-maker of our society — whether we speak of the head of a government department or agency, of the executive of a corporation or labor union, of the secretary of a trade or other private association, or even of the humble independent enterpriser or professional man. As such an adviser the lawyer, when inform-

83 (1943) 52 *Yale L.J.* 203.
84 Ibid at p. 204.
85 Ibid at p. 204.
86 Twining, *supra* n. 8, at pp. 412-413, makes a very similar comment with regard to the United Kingdom. However there have been some attempts to use a policy framework for legal education in Australia: John R. Peden, 'Goals for Legal Education' (1972) 24 *Journal of Legal Education* 379.
87 Lasswell and McDougal, *supra* n. 83, at p. 206.
88 Ibid at p. 207.

> ing his policy-maker of what he can or cannot legally do, is, as policy-makers often complain, in an unassailably strategic position to influence, if not create, policy.[89]

The training of a policy maker was not a simple process and the lawyer needed to be trained to acquire and develop certain skills, which were categorised as 'goal-thinking', 'trend-thinking' and 'scientific- thinking':[90] thus the name given to their system of *Law, Science and Policy* (or L.S.P. for short).[91] 'Goal-thinking' essentially asked the lawyer to clarify and state his moral and social values before proceeding to implementation. 'Trend-thinking' took account of past phenomena and, 'the shape of things to come regardless of preference'.[92] In order for the lawyer to be able to make an informed decision about trends he would need to become familiar with the ways in which 'scientific thinking' could assist him in collecting the relevant information or data.[93] Lasswell and McDougal proposed their own set of values which they saw as quintessential to a democratic society and argued that the then existing law schools were not 'orientated toward achieving' these values or goals.[94] Their criticisms of the status quo re-echoed many of the concerns of the realists. The law schools, they argued, were, '[c]oncerned largely with the traditional, conventional syntax of appellate opinions, the curriculum offers little explicit consideration of alternative social objectives, general or specific, or justifications for preference or preference priorities'.[95] In order to remedy these problems they submitted explicit proposals for the reorganisation of curricula in American law schools.[96] Their approach to legal education was eventually to develop into a comprehensive working theory for many other areas of law, notably the field of international law. Nevertheless, for all the originality and coherency of their theory, it has been subjected to severe criticism and little, if any, of their proposals have been accepted or implemented. One scholar has recently argued that there is evidence of a change and American law schools are becoming increasingly influenced by Lasswell and McDougal's ideas.[97] Still, this appears to be the exception and criticism of their proposals seems to be the impetus of most discussions.[98] While there have been many criticisms,[99] some which we believe have

89 Ibid at pp. 208-209.
90 Ibid at p. 212.
91 Twining, *supra* n. 8, at p. 412.
92 Lasswell and McDougal, *supra* n. 83 at p. 213.
93 Ibid at pp. 214-215.
94 Ibid at pp. 217-232.
95 Ibid at p. 232.
96 These proposals occupy the major part of the article. No summation does them justice.
97 Twining, *supra* n. 8 at p. 414
98 Admittedly this observation is based upon the writers' own personal experiences.
99 The following are some of the critical discussions: Bodenheimer, (1958) 3 *Natural Law Forum* 44, at pp. 53-59; Twining, *supra* n. 8, at pp. 412-415; Stevens, *supra* n. 1, at pp. 529-542; B. R. Crick, *The American Science of Politics: Its Origins and Conditions* (1959) Ch. 10; R. E. Speidel, 'A Matter of Mission', (1968) 54 *Virginia* L.R. 606; S. Macaulay, 'Law Schools and the World Outside Their Doors: Notes on the Margins of "Professional Training in the Public Interest"' (1968) 54 *Virginia L.R.* 617.

been adequately answered,[100] we propose to deal with some matters which we believe may go some way towards explaining why Lasswell and McDougal's proposals have not had a greater impact on legal education.

There is a belief among legal educators that law schools are diverse in their educational aims. This belief was well encapsulated by Macaulay when he stated that 'Legal education is an established institution, reflecting a wide variety of interests and seeking multiple overlapping, if not conflicting, goals'.[101] Ever since the education of lawyers was taken from the offices or chambers of practitioners, law schools have struggled to maintain a balance between variegated and often opposing images of 'The Lawyer'.[102] While clearly accepting their vocational tasks and objectives, law teachers were also concerned to show their fellow university colleagues that a law school was not merely a 'trade school' but an institution pursuing a great liberal intellectual tradition and hence fully justifying its position within a university.[103] Obviously, from what we have discussed, the acceptance of lawyer training within a university is a well established American tradition.[104] If Lasswell and McDougal's highly radical proposals and exclusive image of, 'the lawyer as policy maker' are viewed within this context, it is not difficult to see why they have not had more appeal to law schools imbued with a desire for diversification in its alumni. Unfortunately, Lasswell and McDougal's proposals on legal education seem to project a conception of a single-minded institution even though their breadth of vision creates enormous flexibility. As one commentator stated, '... the Lasswell-McDougal plan for legal education seems ... to be a thinly disguised elitist programme for the training of national leaders, the sort of thing that might emerge if, in 1984, Plato's Academy were taken over by M.I.T. with Jeremy Bentham as director'.[105] While we do not share these sentiments, but see the Lasswell-McDougal enterprise essentially as a methodology of rational thinking, they undoubtedly underscore the difficulty the enterprise has in communicating to law teachers. This is a serious problem. If law teachers uncritically reject the Lasswell and McDougal conception of a lawyer, they also indiscriminately reject the most comprehensive working theory for an approach to curricula and subject matter reform available to law schools.

The rhetoric of diversity is, however, only part of the explanation, American legal educators would readily acknowledge that a generally

100 J. N. Moore, 'Prolegomenon to the Jurisprudence of Myres S. McDougal and Harold Lasswell' (1968) 54 *Virginia L.R.* 662, at pp. 674-688; F. S. Tipson, 'The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity' (1974) 14 *Virginia J. Int. L.* 535.

101 *Supra* n. 99, at p. 619.

102 A theme constructively developed by Twining, *supra* n. 8, *passim*.

103 T. F. Bergin, 'The Law Teacher: A Man Divided Against Himself' (1968) 54 *Virginia L.R.* 637.

104 Legal education has always been offered by Australian universities and England's *Ormrod* Report has followed this philosophy. Throughout the common law world, law has established itself as a university discipline.

105 Twining, *supra* n. 8, at pp. 412-414.

accepted definition of professional skills and a well established methodology of inculcating and evaluating these skills has in practice produced a professionally accepted common denominator of *The Lawyer*. This is not to say an institution could not be devoted to the type of legal education advocated by Lasswell and McDougal but, in the same way that Columbia rejected the implications of the twenties debates for its traditional role of training practitioners of law,[106] law schools today are cautious of radical proposals that might endanger their reputations as professional schools successfully imparting professionally recognised skills. As with Columbia in the twenties, this perception of professional skills is largely based upon a shared image of *The Lawyer* which will in practice continue to be acceptable to the ruling members of the profession. Without educating these professionals, a law school devoted to a conception of, 'the lawyer as policy maker' is neither a viable nor a desirable institution.

In short, then, the Lasswell-McDougal enterprise strikes two major hurdles. First, the intellectual vision of law as a liberal, classical discipline, unconstrained by professional narrowness and orientation. Secondly, the professional vision that is currently entrenched in legal education practice in the United States. Accepting the Lasswell and McDougal concept does not endanger the claim of law to be a discipline in its own right — rather it enhances it — but it clearly requires complete rethinking of the day-to-day operations of law schools and a concerted effort to widen the concept of professional skills. It redefines *The Lawyer* and does this at a time when the American schools have completely adjusted to the task of producing marketable lawyers with a high level of intellectual and financial gratification for all involved. Lasswell and McDougal's proposals are in fact a compelling argument for American law schools to do even better when they currently do very well, and law teachers are not slow to realize that the gain is attainable only at the cost of a tremendous amount of work.

In the thirty five years since the Lasswell and McDougal vision was published, United States law schools continued experimentation to varying degrees. The process was encouraged by the direction seeking, re-thinking, self evaluation, soul searching, and intellectual upheaval that came out of the urban crises of the sixties, Vietnam and Watergate. The Lasswell and McDougal enterprise, humanism and law,[107] social

106 Stevens, *supra* n. 7, at p. 475.

107 Characteristic writing of this movement includes: P. Savoy, 'Towards a New Politics of Legal Education' (1970) 79 *Yale Law Journal* 444; Bergin, *supra* n. 103, R. Nader, 'Law Schools and Law Firms' (1954) 54 *Minnesota L.R.* 493; C. A. Reich, 'Toward the Humanistic Study of Law' (1965) 74 *Yale L.J.* 1402.

theory of law,[108] contextual law, law and economics[109] and a reworked legal history are vying currently for incorporation into law school curricula. The better schools have made structural efforts to ensure a place on the faculty and in the curricula for these movements.[110] Conversely, in the United Kingdom the search for alternatives to a narrow concept of lawyering includes a small scale but highly committed and innovative attempt to use Marxist theory,[111] an area which United States law schools have not encouraged.[112] However, despite innovation the traditional paradigm of a lawyer in all common law countries remains largely unchallenged; attacks have been diffused, sometimes contradictory and have underestimated the strength of the tradition and its sources.

This overseas experience contains two important lessons for Australia: first, replacing formalism with modern theory can only be a long term goal. Second, it gives vivid counterpoint to our own unwritten history. It is possible to isolate stages in the development of American legal education by analysis of theoretical literature of educationalists and of the formal records. It is precisely this opportunity of analysis that Australia must create. At present analysis depends largely on looking at formal histories of law schools and their current operations. There is little literature of educational theory which maps the perspectives of the institutions as applied in classrooms or in interaction with the profession. Australia thus develops no educational theory which feeds a mature, detached, objective, critical appraisal of institutional progress in a process that consciously produces its next growth stage by an aware response to its own history. Moreover our capacity to utilize overseas innovations with consciousness of our local needs and an informed vision of local possibilities is unnecessarily limited. An L.S.P. program could not be spawned in Australia but it is an available model, facets of which ought to be borrowed by Australian law schools.

---

108 While it is too early to call this a developed theoretical perspective, social theorists are making the most direct attacks on formalism in the law available in recent U.S. literature.

109 At present the happiest marriage is between law and economics. The two disciplines share ideology and epistemology. Economic evaluation is an appealing way of avoiding the most troublesome problem in law: the articulation and ordering of values. It offers an apparently universalisable criterion of satisfaction and a finely-tuned language (of money, margins, trade-offs and efficiency) with which to express and to solve value questions.

110 Some law schools have developed specific specialty areas: law, science and policy at Yale; social theory at Berkeley; law and economics at Chicago; legal history at Wisconsin. Comparably the English schools with specialty areas include: the contextual approach at Warwick; sociology of law at Kent and Keele; and criminology at Sheffield.

111 I. R. Taylor, P. Walton and J. Young, *The New Criminology; for a Social Theory of Deviance*, (1973), E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975), *Inheritance* (with Goody and Thirsk, eds., (1976); T. S. Midgley, 'The Role of Legal History, (1973), 2 *British Journal of Law and Society*, 153.

112 There are now signs that this is changing. See Isaac D. Balbus, *The Dialectics of Legal Repression: Black Rebels before the American Criminal Courts* (1973) (second ed., Edison, 1976) which in the opinion of D. Trubek. 'brings a relatively unique perspective to the study of these well-known phenomena: the book uses empirical methods to study judicial behaviour, and Marxist theory to explain the results obtained' (1977) 11 *Law and Society Review* 529, 531.