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The Study of the Legal Profession in the Law School

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THE STUDY OF THE LEGAL PROFESSION IN THE LAW SCHOOL

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For five years, I have offered an optional seminar called "The Legal Profession" to second and third year students at Osgoode Hall Law School.[1] By many conventional criteria, the seminar might be judged a disappointment: enrolment has been as low as six or seven students, and only once has it reached twenty; except for a bibliography,[2] the seminar has inspired publication of little scholarly writing;[3] and so far as I know, those who have taken the seminar have emerged neither as ethical exemplars for their less favoured colleagues, nor as movers and shakers within the legal profession. Since the aims of the seminar are to sensitize reasonable numbers of law students to the ethical norms and social responsibilities of the profession, by encouraging them to consider its activities in a systematic, serious, intellectual fashion, it might be urged that the experiment be abandoned, or at least avoided by other schools. Not so. The study of the legal profession is, in my view, justified by so many important considerations that to abandon it would be irresponsible.

THE RATIONALE FOR A LEGAL PROFESSION SEMINAR

My statement of the rationale for a Legal Profession Seminar must begin with a disclaimer. The practising bar sometimes looks to the law

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[1] For the first year or two, before other commitments claimed his attention, Prof. Graham Parker shared responsibility for the seminar with me.

[2] Arthurs and Bucknall, Bibliographies on the Legal Profession and Legal Education in Canada (York University Law Library, 1968).

[3] The only exceptions are a brief note by Prof. Parker, *The Teaching of Legal Ethics,* (1968) 1 Can. Leg. Stud. 267, and two student papers, see Bastedo, *A Note on Lawyers' Malpractice: Legal Boundaries and Judicial Regulations,* (1970) 7 O.H.L.J. 311 and see Bucknall, Baldwin and Lakin, *Pedants, Practitioners and Prophets: Legal Education at Osgoode Hall,* to 1957 (1968) 6 O.H.L.J. 137. Several other student papers are being considered for publication, and a limited-circulation casebook, Materials on the Canadian Legal Profession (Experimental Edition), will be used for the first time in September, 1970.

schools to raise what are conceived to be declining standards of morals and manners amongst young lawyers. A rash of trust fund defalcations by lawyers, or an outbreak of informality in court, may bring demands that law students be instructed in honesty or deportment.[4] My seminar is not a response to these demands which, I feel, are not properly directed to the law schools.

Honesty cannot be secured by preachment; if fidelity to trust is not inculcated in a person by the time he reaches the age of majority — and law studies — he is not going to be made honest by anything that legal educators can do.[5] Moreover, as Professor Lederman has pointed out, the law schools should have nothing to do with identifying "moral risks" who might subsequently be denied admission to practise although found guilty of no wrongdoing.[6]

This is not to say that either the law schools or the profession should remain passive until an actual theft of clients' funds occurs. On the one hand, law teachers can — and sometimes do — use their position as teachers and scholars to provide students with the opportunity to exercise and heighten their moral sensibilities. "Is it fair?" or "Is that the real reason?" are questions often heard in a law classroom. On the other hand, the profession itself has done much to prevent dishonesty by enacting stringent rules concerning the keeping and auditing of accounts, by systematic policing of these rules, and by tough-mindedness in dealing with offenders.[7]

Deportment, too, lies largely beyond the concerns of the law school. First, one may well question the contemporary relevance of many of the archaic rituals of legal etiquette. Beyond restraint, civility and genuine respect for the law, its institutions, and officers, many of the unwritten rules which govern relationships between lawyers and judges or amongst lawyers, have little substance. Second, to the extent that these rules are thought to be important, they can most effectively be instilled during the informal "socialization" processes by which articled students or young lawyers are brought into conformity with their seniors in the profession. Third — and for legal education, most important — the spirit of mutual respect and confidence between the participants upon which the learning process depends, can only be impaired if it is burdened with trivia.

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[4] See *e.g.* two editorials by His Hon. Judge S. Tupper Bigelow in The Ontario Magistrates Quarterly, reproduced in (1970) 42 Obiter Dicta 1:

> . . . [T]here are still a few [lawyers] whose knowledge of court-room etiquette and decorum is lamentably deficient. Quite obviously, the Law Schools have not concerned themselves with the matter . . . It seems to me the Deans of the laws schools maybe better smarten up a little.

[5] *Cf.* O'Sullivan, *Teaching Legal Ethics,* (1967) 10 Can. Bar Jo. 39.

[6] This rather sinister proposal is to be found in an editorial, *Morals and the Professions,* (1962) 20 The Advocate 221; but see Lederman, *Law Schools and Legal Ethics,* (1965) 8 Can. Bar Jo. 212, at 214-217.

[7] See Rules Respecting Accounts (adopted by the Law Society of Upper Canada, October 20, 1961), and Ford, *Notes on the Discipline Committee,* (1967) 1 Law Soc. Gaz. (no. 2) 24.

To return, then, to my disclaimer, a Legal Profession Seminar does not seek to meet the external demands of the profession for law school participation in what may be either impossible or unimportant enterprises.

I see the seminar, rather, as a response to three questions: "Who are we?", "Who am I?" and "What should I do if . . . ?". The questions are posed in the order of priority I assign to them:

"Who Are We?"

The intellectual core of my seminar relates to the problem of defining the social identity of the legal profession. What jobs do lawyers do? How do they do them? Why do lawyers have the exclusive right to do these jobs? What institutions have been developed, what norms proclaimed, what rules effectively enforced, to govern the profession?

These are hard questions, often demanding quantitative judgments for which no facts are available,[8] or qualitative judgments which no one can make with assurance.[9] But, they are questions worthy of study, both for their intellectual weight and for their social importance, and they raise themes which are encountered elsewhere in the curriculum. For example, administrative law raises the basic issue of whether the rights and status of individuals should be ultimately determined by the regular courts or by the tribunals of the legal sub-culture in which they live and work; the Legal Profession Seminar places this issue in a specific context when it examines the power of a professional body to discipline its members. Again, the effect of interdisciplinary research and teaching in areas such as criminal law is to force the student (and society) to confront the divergence between the law's formal objectives and its results; a study of the profession's enforcement of "no-solicitation" rules may yield similar insights.

In fact, in order to fully understand the legal process, the operation of legal institutions such as courts and legislatures, we must also understand those who animate the process.

"Who Am I?"

Many students and lawyers approach a legal career with ambivalence or reluctance. For some, law was a career of last resort; unsure of what they wanted to do, or unqualified to do it, they drifted into law. For others, law was the choice of a lawyer-parent or a parent who viewed law as a vehicle for his progeny's upward mobility. For a third group, law was a romantic choice, stimulated by fantasies of Clarence Darrow or visions of corporate power.

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[8] For example, it would be useful to know how much time lawyers actually spend in litigious proceedings, as against "office" work. The only published data (so far as I am aware) are either two decades old, Nelligan, *Income of Lawyers,* (1951) 29 Can. Bar Rev. 34, or limited to a single province, Cadres Professionals, Inc., Les Advocats du Quebec (1968).

[9] It is surprising that there has been virtually no serious discussion in Canada, for example, on the issue of whether the legal profession should be self-governing, as in England, or regulated by the courts, as in most American states.

Ultimately, these individuals arrive on the threshold of practice, or begin to take stock of how the years have passed in practice. Self-doubts are almost inevitable. One of the important functions of the Legal Profession Seminar is to offer its members a vehicle for resolving these self-doubts. By permitting students to consider a variety of lawyer's roles and to identify those most congenial to them, the seminar may possibly assist individuals to make use of their talents in a way most gratifying to themselves and most beneficial to society.

This is not to say that actual occupational counselling is a matter with which the seminar is concerned. Rather, what is provided is exposure to individual lawyers and to ideas about law practice so that the student can begin to resolve for himself the question, "Who am I?".

"What Should I Do If . . .?"

The practical problems of ethical professional behaviour cannot be avoided: how to sense the presence of an ethical problem, how to know what is "ethical", how to act "ethically" when others do not do so, and how to reconcile a personal conviction of rightness with commitment to a client whose views differ. Yet, most lawyers are left to confront these questions without forethought or the intellectual apparatus to find the answers. Law schools which would not think of sending lawyers into practice without the ability to find, read, analyze and synthesize cases and statutes, which are increasingly (and properly) committed to heightening the lawyer's awareness of the social sciences, do almost nothing in a formal or systematic fashion to confront these practical problems of acting ethically.

This is not to say that firm answers can be given to the question of "What should I do if my client tells me of his guilt in the middle of a criminal trial?" or "What should I do if my client proposes to do something which is technically lawful, but highly immoral or anti-social?" Nonetheless, if he is given the opportunity to grapple with these questions as a student, there is less chance that the lawyer will simply slough them off or be frustrated and perhaps embarrassed when he encounters them in practice.

In summary, I believe that the legal profession warrants study as an intellectual enterprise and that participation in the seminar is potentially rewarding for the student both in terms of his personal sense of identity and in terms of the practical conduct of his law practice.

PEDAGOGIC STRATEGIES FOR STUDYING THE LEGAL PROFESSION

The Legal Profession Seminar, which will be described in greater detail below, is only one of several pedagogic strategies for an attack on the objectives I have enumerated. Other approaches may be used in the alternative or in combination.[10]

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[10] See generally, *Symposium on Education in the Professional Responsibilities of the Lawyer*, (1969) 41 U. Colo. L. Rev. 303 ff., and bibliography at p. 467 ff.

Pervasive Teaching of Legal Ethics[11]

It has been suggested that students may tend to regard a special course or seminar devoted to problems of professional conduct as a "Sunday School" exercise, a somewhat ethereal enterprise having no relevance to the daily cut and thrust of "real" legal work.

To counter this tendency, students might be encouraged to consider ethical issues which are especially developed to "pervade" or permeate substantive courses. A course in trusts might illustrate the obligations of a fiduciary by a series of cases arising out of lawyer-client relationships; courses in evidence and civil and criminal procedure offer ample occasion for exploring the ethics of advocacy; almost any casebook or problem-oriented course materials can be "pervaded" with ethics problems appropriate to that area of law.[12] By encountering problems of professional responsibility in the normal course of studying substantive law, it is hoped, the student will develop the habit of responding to ethical issues as they are later presented to him within the context of substantive problems in practice.

The pervasive method has undoubted merit from the point of view of pedagogic strategy. To the extent that my own use of this method is indicative, I find that students tend to respond enthusiastically to ethical problems when they are presented in the context of a "real" or substantive problem. Perhaps two factors produce this response. First, the current generation of law students possesses a deep, but seldom tapped, reservoir of idealism and social sensibility. Much of our law teaching places a premium on detachment, on moral neutrality, and asks the student to play the advocate's role, now for one side, then for the other. Thus, the opportunity to consider the ethical dimensions of a problem provides a welcome occasion for the student to declare his allegiances and his personal values, to put *himself* on record.

This *self*-assertion, I believe, is a second important consideration. Much of the law-learning experience takes place in the third person: "What should the judge (or the lawyer, or the legislator) do with this set of facts, this case?". But problems of ethical conduct have a first-person immediacy which cannot be — and is not sought to be — avoided. "What should I do?" is the question the student asks himself. He thus becomes involved to a significant degree in what is no longer an abstract assessment of someone else's response.

However, the pervasive method is not without its disadvantages. An obvious drawback is the lack of any systematic presentation of the issues which must, by definition, be arranged so that they are encountered almost accidentally by the student. Second, while coordination and cooperation between members of faculty teaching a variety of courses may help to overcome this difficulty, with each assuming responsibility for a defined range of

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[11] Symposium, *supra*, note 10, at pp. 336-372.

[12] A series of "problem books" have been prepared under the auspices of the Council on Legal Education in Professional Responsibility Inc., for use in such courses as criminal law, civil procedure, insurance, mortgages, and wills and estates. In Canada, at least one casebook integrates legal ethics problems directly into the text, see Labour Relations Law Casebook Group (ed.s), Labour Relations Law Casebook (1969).

issues, the logistical problems are formidable. Third, while much can be done with one of the questions posed — "What should I do if. . .?" — the other two questions require a longer perspective and a fuller development of materials than can be presented by a random scattering of professional conduct issues throughout a substantive law course.

"Perspective" and "Co-curricular" Courses[13]

Another, perhaps more Fabian, strategy begins from the premise that the professional responsibilities of lawyers are best perceived through cultural, philosophical or historical study of the legal process and of legal institutions. Courses specially designed with this objective in view, courses such as legal history and jurisprudence, courses in adjacent disciplines, all help the student to perceive the essential validity of his choice of profession, and the responsibilities which this choice places upon him.

"Perspective" and "co-curricular" courses, of course, need no justification specifically related to the enhancement of a sense of professional responsibility. They possess an independent intellectual content which is their raison d'être, and about which no defensiveness need be felt. However, it is also true that a lawyer is a better professional and a more socially responsible citizen if he is versed in the traditions of his craft, if he recognizes the breadth of principle which is confined within the smallest legal problem, if he can easily reach across an undefended border and mobilize the resources of his allies in the social sciences.

Accepting the basic validity of these courses and their contribution to a sense of professional responsibility, it must still be admitted that they may not be pedagogically effective. The very advantage of the pervasive approach, its cogency and compatibility with the study of substantive law, is missing from the "perspective" and "co-curricular" courses.

This admission, no doubt, reveals how much we are the slaves of the pragmatic case-by-case approach, how little the masters of intellectual constructs familiar in other disciplines. This is no less true for being unpleasant. The law teacher has been aptly described as "A Man Divided Against Himself".[14] Neither intellectual nor practitioner, but yearning to be both, he tends to take solace in being "effective" as a teacher or a reformer. The difficulty encountered generally by legal educators in entrenching intellectualism in the curriculum is epitomized by the very terminology employed: "perspective" courses are those far removed from the real stuff of law study; "co-curricular" courses are not "curricular", but only marginally so. The description betrays the value judgment. The student gets the message.

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[13] *Symposium, supra,* note 10, at pp. 398-437.

[14] Bergin, *The Law Teacher: A Man Divided Against Himself,* (1968) 54 Va. L. Rev. 637.

Clinical Training[15]

No development in contemporary North American legal education has aroused greater expectations than the establishment and elaboration of clinical training programmes, in which law students handle real cases for real clients. Not without reason. Originally conceived[16] as a technique for developing legal skills, involvement of law students in the actual process of lawyering has acquired a much deeper significance.

On the one hand, clinical training has enormous dramatic appeal. It represents a change from the structured classroom situation to the unpredictable client interview or courtroom context, from decided cases and hypothetical problems to unresolved and very real controversies, from the purely intellectual to the highly personal, from the student-as-lowly-apprentice to the student-as-respected-advisor. These changes are appealing to students precisely because they are changes, and are appealing to educators because they offer a natural opportunity for the student to use his newly-acquired knowledge and to develop relevant skills which cannot be exercised in a classroom setting.

On the other hand, clinical programmes provide an outlet and a reinforcement for the creativity and idealism of law students. By working with the poor and the powerless, providing legal advice, personal counselling and community organizing assistance, law students are helping to define a new clientele of conscience whose claims on the legal profession have been too seldom recognized in the past. In doing so, they are developing a high sense of professional responsibility.[17] It is not surprising that the major private funding organization for clinical training programmes is called "The Council on Legal Education in Professional Responsibility".

In the assessment of clinical training, however, it is also necessary to total both sides of the ledger. Quite apart from the high costs of running a well-organized and well-supervised programme for what may well be a fairly small group of students, there is some risk that unexpected and undesirable effects may be generated; two warrant special attention.

One risk is that actual exposure to poor people and minority groups may be disillusioning and disheartening to law students who had viewed them uncritically, perhaps romantically, from a distance. Clients are, after all, clients — whatever their socio-economic status; they will number amongst them the rapacious, the fraudulent, the paranoid, and the foolish; human beings are seldom enobled by privation. The result of this exposure for many will be increased maturity and understanding; for some it will produce cynicism and rejection. The other risk is that the role of intellectualism in legal education will be further diminished. In the clinical setting, there are many victories to be won by the use of common sense, of negotiating skills, of

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[15] *Symposium, supra,* note 10 at 438-466; Sachs, *Student Fieldwork as a Technique in Educating Law Students in Professional Responsibility,* (1968) 20 Jo. Leg. Ed. 291.

[16] Frank, *Why Not a Clinical Law School?,* (1933), 81 U. Penn. L. Rev. 907.

[17] But see *dubitante,* Simon, *An Evaluation of the Effectiveness of Some Curriculum Innovations in Law Schools,* (1966) 2 Jo. Applied Behav. Sci. 219.

political and psychological pressures. There are relatively few opportunities for the exercise of highly sophisticated legal analysis. In part, of course, this reflects the insensitivity of lower courts and officials to legal rights, and in part the limited range of problems offered by most clinical settings. However, there is the danger that some students will not perceive the continued relevance of "hard law" studies, and will depreciate their own professional credentials.

With adequate supervision, careful planning, and a diversification of clinical training opportunities, many of these risks can be avoided. What is particularly relevant for purposes of this discussion is that some deliberate attention be paid to their professional responsibility implications.

Two illustrations make the point. A 50-year old male "client" arrives for an interview with a student in a legal clinic. The student is advised by the referring agency that the client is litigation-prone and paranoid. The client begins to state his problem, puts his head down on the desk, and weeps uncontrollably. Question: what is the responsibility of a humane lawyer for the emotional, as opposed to the legal, interests of his client? Another "client" — a promiscuous, alcoholic, mentally-retarded mother — appears at the clinic and seeks the assistance of a law student in regaining custody of her allegedly neglected child from the Children's Aid Society. Question: does a lawyer have an obligation to accept a brief from any client, no matter how distasteful, and to vigorously defend that client's interests, no matter how socially undesirable? Neither question can be easily answered, but a clinical training program which does not provide students with some assistance in reflecting upon them does not enhance his sense of professional responsibility, or clarify his professional self-image.

In conclusion, it is perhaps obvious that although clinical training programmes do provide exposure to real problems of professional responsibility, and are intrinsically valid for a host of other reasons, the analysis of those problems is necessarily *ad hoc*-ed, the accidental by-product of accidental encounters between student-lawyer and "client". There is little opportunity within the legal clinic itself to develop an intellectual framework or a broad overview of professional or personal roles. The point is, of course, not that clinical training should be shunned, but that participants should be involved in periodic discussion and investigation of the ethical and legal problems they have encountered.

Legal Profession Courses and Seminars[18]

The course or seminar devoted explicitly to problems of professional responsibility — however broadly or narrowly defined — has certain obvious advantages. It can be designed specifically to do its own job, and there is no need to "bootleg" or borrow time from other course objectives or learning situations. As with any course or seminar, decisions can be made deliberately about breadth, intensity and method of instruction.

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[18] *Symposium, supra,* note 10 at 373-398.

Such courses may deal with conventional legal ethics problems, with the broad spectrum of social issues confronting lawyers, with the internal organization and regulation of the profession, with interpersonal relations between lawyers and clients, and with any desired admixture of these matters. Teaching methods offer a similar range of choice.

However, there is a price to be paid for offering a course whose objectives are bound to be labelled (at least by many students) as the propagation of virtue, or mere propagandizing for conformity to legal conventions and customs. How many of these courses actually do suffer from the "Sunday school" syndrome, I do not know. At a minimum, the risk warrants a special effort to ensure that the reputation of the course is soundly based upon genuine free intellectual inquiry.

Related to this problem is the difficulty of meeting a minimum reality quotient. By this I mean that consideration of broad issues facing the profession should be preceded by factual analysis if it is to be meaningful; we cannot even know what problems we should address ourselves to unless we have an accurate and realistic sense of what is happening in the real world of the profession. Similarly, the "What should I do if. . . .?" questions can only be raised and answered contextually. General exposition of general ethical precepts is bad pedagogy. At least the clinical and pervasive methods provide a frame of reality within which these discussions can be conducted. In the Legal Profession Course, such a frame must somehow be established as well.

This concern has special relevance in Canada, as I shall try to show. However, in the United States, it is met — at least partly — by several imaginative teaching tools. For example, there is a "problem book"[19] which presents a series of narratives raising issues of professional responsibility, each being complemented by a list of references and readings so that the student can seek his own answers. To the extent that these narratives are realistic (some are more successful than others) the point is more vividly and effectively transmitted. Moreover, the use of problems as the primary focus of discussion (rather than cases) allows the student to explore areas of importance which have not yet been litigated, or are unlikely to be litigated because they involve tough choices between alternative lines of legitimate conduct. Again, several casebooks and collections of readings have been published,[20] which provide access to a significant body of decisional material, statutes and ethical codes, and valuable sociological data, so that a minimum reality quotient is established for class discussion and individual reflection.

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[19] Mathews, Problems Illustrative of the Responsibilities of Members of the Legal Profession, (1968).

[20] See *e.g.* Cheathem, Cases on the Legal Profession (2d, ed., 1955); Countryman and Finman, The Lawyer in Modern Society (1966)., Pirsig, Cases on the Standards of the Legal Profession (2d. ed., 1965); Bradway (ed.), Selected Readings on the Legal Profession (1962).

THE LEGAL PROFESSION SEMINAR AT OSGOODE HALL LAW SCHOOL

As indicated, for five years I have offered a Legal Profession Seminar, on an optional basis, to second and third year Osgoode students. My experience may be worth recounting because it does help to identify some special frustrations of Canadian legal education in general, and of the teaching of professional responsibility in particular.

The Background: The Organization and Government of the Legal Profession in Canada

The Canadian legal profession is self-governing. Admission to a provincial law society is the only way to become a lawyer. Not surprisingly, then, the profession — as a profession — has been largely inner-directed, at least until recently.

By this I mean that its goals have been set by internal decisions, its value-system has reflected professional rather than public concerns, its decision-making processes have been private, often informal, and occasionally secretive. There is some evidence of change — initiatives in the areas of legal aid,[21] law reform,[22] experimentation with democratic forms of internal government[23] and with public accountability[24] — but the tradition is essentially inner-directed. This tradition makes study of the profession difficult, and puts unnecessary barriers in the way of students who wish to know what it means to be a lawyer.

Consider a fairly specific example. Students, whether for personal reasons or out of genuine intellectual curiosity, wish to know whether a person with deviant political views, idiosyncratic dress, or a conviction for the possession of marijuana, can be admitted to the bar. The query is an important one because it invites discussion both of the mechanisms of professional self-government and of fundamental questions of whether there is a common lawyers' life-style or professional image to be preserved. But what answer can one give? The statutes, at most, stipulate that "good character" is the price of admission to practice.[25] Because any decision to refuse admission would be made internally, by the governing body of the

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21 See *e.g.* The Report of the Joint Committee on Legal Aid (Ontario, 1966) supporting the establishment of a government-funded, professionally-administered comprehensive legal aid plan, and the Legal Aid Act, S.O. 1966, c. 80, as amended.

22 In British Columbia, interest paid on clients' trust funds is now not to be retained by a solicitor. It is to be paid to the Law Foundation, for purposes of legal education, law reform, legal aid etc. Legal Professions (Amendment) Act, S.B.C. 1969, c.15, s.711.

23 The Law Society Act, S.O. 1970, c.—, s.3, establishes for the first time on a formal basis an annual meeting of members, and a variety of other devices designed to facilitate democratic practices in the profession.

24 Under the Law Society Act, S.O. 1970, c.—, s.26, a Law Society Council is established, whose members include several non-bencher lawyers, and nine non-lawyers. The function of the Council is to "consider the manner in which the members of the Society are discharging their obligations to the public and generally matters affecting the legal profession as a whole".

25 See *e.g.* Solicitors Act, R.S.O. 1960, c. 378, s. 11(1)(b)(iii).

profession, on an *ad hoc* basis and probably without a written, reasoned decision, the student cannot discover the answer for himself by scrutinizing source materials. Because court review of such decisions is narrow in scope, and almost never invoked,[26] recourse to normal legal research tools is pointless.

To be sure, it might be possible to make inquiries of the governing body directly, in order to find out what its policy or practise is. Assuming an answer were forthcoming,[27] would a brief policy statement provide a basis for intelligent discussion? Assuming no answer, or (more likely) an answer stating that there is no "policy", would not any discussion on the merits of exclusion of such persons have to be conducted at a superficial level? The minimum factual quotient is lacking, so that one cannot say either that the "good character" qualification is a dead letter, or that the qualification is in fact administered in a sinister, subterranean fashion. For much the same reasons, discussion is foreclosed even of the means by which the decision is made to admit or exclude. At most, one can only record his impression that the governing bodies tend to be rather reasonable on these matters; this is hardly the stuff of which serious intellectual activity is generated.

It might be argued, of course, that the legal profession is under no obligation to so organize its affairs as to generate materials for academic study. Framed this way the proposition seems sound enough, but it has at least two weaknesses.

First, the profession's right of self-government must ultimately meet the test of the public welfare. Without academic study (or any other form of disclosure to the public) there is a risk that the profession might be unfairly blamed for exclusionary policies which it did not in fact follow or that individuals might be unfairly denied admission, unknown even to the profession and, possibly, against its wishes or against the interests of the public. Lack of informed scrutiny, then, may give rise to rumour and perhaps injustice.

Second, the inability of students to investigate such matters may produce in them unnecessary resentment against, or indifference to, the official bodies of the profession. It certainly will not provide a good basis for their identification with the profession after graduation from law school.

I might have chosen almost any example to illustrate the problem: what is the profession's concern with professional incompetence? how many lawyers practice in large corporate firms or primarily in the courts? what is the average income of a small-town lawyer? what will happen if a lawyer solicits business in violation of a prohibition against such conduct? what is the rationale of no-solicitation rules? To none of these questions is there an authoritative, even unofficial, answer. We simply do not know, and it has not been part of our tradition that we should know.

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[26] But see *Martin v. Law Society of B.C.*, [1950] 3 D.L.R. 173 (B.C.CA.).

[27] In fact, in relation to this very question, my query to the Law Society was answered in a helpful fashion, with specific information relating to a recent (though anonymous) case involving an applicant seeking admission following a criminal conviction. However, I was advised that there was no fixed "policy".

Teaching Materials and the Oral Tradition

It should be clear, from the foregoing, that the absence of indigenous writing about the legal profession in Canada presents great pedagogic problems. To be sure, there is a Canadian treatise on legal ethics[28] — unfortunately heavily weighted with English materials of arguable relevance — and a small recent literature about disciplinary procedures.[29] A fairly comprehensive bibliography[30] was prepared for students in the seminar, but offers little of substance or relevance. Thus, if written material has been used for teaching purposes, it has not been Canadian. However, American teaching materials suffer from the obvious disadvantage of cultural differences in such fundamental matters as the profession's right to self-government. English materials, relatively few in number,[31] suffer from a similar disadvantage insofar as they reflect the peculiarities of a divided profession (barristers and solicitors) which does not exist in Canada.

Inevitably, then, the oral tradition reasserts itself in my seminar. Although I use American materials to raise issues — which they do well — and a few Canadian sources to establish a framework, much of the seminar is based upon the spoken word rather than the written word. Only in 1970, for the first time, has it been possible to assemble an experimental edition of teaching materials with a significant Canadian content.

Depending on the particular plan of the seminar for the year, a variety of visitors may be invited. These have included sociologists (to discuss such matters as the concept of a profession and an empirical study of disbarments in Ontario), a psychiatrist and a social psychologist (to explore the dynamics of the lawyer-client relationship and counselling by lawyers), Benchers of the Law Society (to describe its policies and practices), a journalist (to comment on the public's image of the profession) and a variety of lawyers engaged in different types of legal work (to recount their experiences and impressions, especially in relation to ethical problems). To supplement these sources, I try to convey any relevant information I may have gleaned from personal experience or other sources; needless to say, my contribution on this score suffers from my limited exposure to practice. In addition, students' research projects involving considerable interviewing and collation of unpublished information are presented to the seminar.

I am not comfortable with this "oral tradition". In the first place, the information presented (whether by visitors, students or myself) tends to be rather subjective, vague and impressionistic. It does not provide a basis for tough-minded analysis. Secondly it is emphemeral—by virtue of being oral—

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[28] Orkin, Legal Ethics: A Study of Professional Conduct (1957).

[29] Orkin, Some Aspects of Professional Self-Government; A Comparative Study of the Disciplinary Powers and Procedures of the Law Society of Upper Canada (unpublished LL.M. thesis, Osgoode Hall Law School, 1967); S. Arthurs, Disbarred Lawyers: A Study on the Discipline in the Legal Profession in Ontario (M.A. thesis, Univ. of Toronto, 1967), (1970) 7 O.H.L.J. 235.

[30] Arthurs and Bucknall, *op. cit. supra,* note 2.

[31] See *e.g.* Abel-Smith and Stevens, Lawyers and the Courts (1967); Zander, Lawyers and the Public Interest (1968).

and does not increase from year to year. Thirdly, the absence of conventional written material tends to undermine the student's belief that the seminar is a valid learning experience worthy of his attention. Occasionally (by no means always) this produces a casual attitude towards participation in the seminar. More frequently, opinionated assertion becomes a substitute for thoughful reflection.

Nonetheless, the seminar does represent a means of breaking the cycle in which nothing is analyzed because nothing is recorded, and nothing is recorded because no one is committed to conducting the analysis. This notion will be expanded below.

The Seminar Format: the Problem of Exposure

If study of the legal profession is as important as I have suggested, why should exposure to the exercise be limited to the few students who enrol in the seminar each year?

My defence of the seminar format flows from two different considerations. On the one hand, given the lack of teaching materials and the dependence on oral presentation and student research, a large class format would simply not be practical. The only way in which members of the seminar can profit from it is through active involvement, which is impossible in a larger class. Students, moreover, welcome the chance of participating in seminars because the setting is less formal and hence more conducive to self-expression and free enquiry. On the other hand, I am opposed in principle to any attempt to coerce students into virtue. If it is suggested that a Legal Profession course be mandatory for all students (which is the case at a few American schools) such a course would inevitably contain many students who were resentful and antipathetic to its objectives. Their presence would be of little benefit to themselves or the rest of the class, although they are most likely to be in greatest "need" of exposure to the material.

This is not to say that I am satisfied with the present miniscule enrolment, although I recognize that it is a reasonable consumer judgment. However, there is some comfort in the knowledge that issues raised in the seminar have a way of percolating into other courses and into informal discussions within the student body.

In an effort to further stimulate broad informal discussion, I have tried two experiments. In 1968-69, the members of the seminar were encouraged to hold a one-day Conference on the Legal Profession, at which they presented the fruits of their research to an audience of almost 200 persons, including about 150 of their fellow students.[32] This experiment I would definitely consider a success. In 1969-70, the members of the seminar were urged to hold a series of noon-hour meetings at which, again, topics developed in the seminar could be explored with significant numbers of other students. Logistical difficulties have so far largely frustrated this device, although in principle it seems sound.

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[32] A report of the conference is found at (1969) 3 Law Soc. Gaz. (no. 1) 58.

Suffice it to say that the problem of exposure continues to be troubling. In all likelihood, only the pervasive method offers real prospects for reaching almost everyone, although that method's shortcomings have already been canvassed.

The Content of the Seminar: the Problems of Coverage and Direction

Because the Legal Profession seminar is open-ended in its concerns and experimental in nature, its content has varied from year to year. Amongst the themes which have been covered are: legal education; the organization and government of the legal profession; patterns of legal practice and related problems of professional responsibility; the canons of legal ethics and other normative sources defining professional responsibility; legal aid; lawyer-client relations; starting a legal practice; the public responsibilities of the legal profession; professional competence; and remuneration for legal services.

With so many themes to choose from, it is obvious that each year's seminar is virtually designed afresh. Indeed, "designed" may be misleading; each seminar tends to develop its own momentum and direction.

One of the more tightly-organized seminars was based upon a book of ethical problems prepared by Prof. R. E. Mathews, a pioneer in the teaching of professional responsibility in the United States.[33] These problems are grouped around such functional themes as "Building a Law Practice", "The Lawyer as Prosecutor" and "The Public Responsibility of the Lawyer". Each is accompanied by a series of references to relevant cases, law review articles, and the ABA Canons and rulings relating thereto. The problems were used as the basis of a mock proceeding before the Discipline Committee of the Law Society of Upper Canada, with members of the seminar assigned to act as counsel for the "prosecution" and "defence", and as members of the Discipline Committee itself. Following each "hearing", the Discipline Committee prepared a brief opinion, focussing on the articulation of a rule for the guidance of the profession. This exercise was preceded by several preliminary sessions devoted to an examination of the profession and its disciplinary procedures, and was followed by two sessions dealing with lawyer-client relations from a psychological perspective.

In an evaluation of the seminar, the students almost all agreed that they had been most stimulated by the introductory and concluding sessions which were less "legalistic" than the mock disciplinary proceedings. Discounting this view to some extent because novelty is *per se* stimulating, I was still left with the impression that the "what should I do if. . .?" questions — which were the essence of the problem book — were less challenging than the global "who are we. . .?" questions.

This situation troubles me. As I have already indicated, there is an almost total absence of material on the Canadian legal profession, so that the kinds of questions which seemed most relevant to students are those which are hardest to treat in depth. By contrast, there is at least a little material (the

[33] Mathews, *op. cit. supra,* note 19.

Canons of Ethics, non-adjudicative rulings of the provincial governing bodies, occasional judicial *dicta*) bearing on the narrower issues of legal ethics. Thus, I cannot move easily into the areas of greatest student interest.

Moreover, I am not convinced that I should forsake "legal ethics" in the more limited sense. Many apparently narrow questions contain the seeds of great controversies. For example, definition of the extent of the duty of frankness owed to a court exposes the whole adversary system to scrutiny. Analysis of the rules prohibiting fee-splitting or tariff-cutting poses the provocative question of whether the legal profession should be brought under the anti-trust laws or some other form of public regulation.[34] It is, I believe, pedagogically sound to proceed from the particular to the general; at a minimum, this is a more familiar mode of legal analysis and pedagogy than the reverse process. Hopefully, students will retain the habit of perceiving small issues of professional responsibility in terms of their larger implications, whereas they are unlikely ever to consider very broad issues if they wait to encounter them in their pristine form.

Yet I confess to certain misgivings about my preference for the particular. Motivation, naturally, has a good deal to do with performance, and I am reluctant to divert students from the path of learning they choose for themselves.

There is a more important consideration too. The choice between what I have labelled the "particular" and the "general" mirrors a choice between different images of law study and law practice. Traditional high-quality legal education, by the case method, was rooted in the particular. By rigorous analysis of cases, it was felt, a student would develop lawyerly habits which would serve him well in practice. This reasoning, in turn, posited a portrait of the professional as appellate advocate. But, the portrait's authenticity was questionable, and even the efficacy of the case method has been challenged.

There is no need here to trace the progressive disenchantment with these images which has beset North American legal educators for almost fifty years.[35] However, my experience with the Legal Profession Seminar does illustrate what I believe to be its two contemporary manifestations. There is, first, the desire of many of the best students to be intellectuals in the sense that the term might be applied to their peers in non-professional graduate schools. In their impatience with the case method and their reluctance to continually probe the particular (at least as it is presented, prepackaged, in an appellate opinion) they are saying that they are capable of more challenging tasks. They are anxious to experiment with the architecture of ideas, rather than continue to tinker with the tools and skills of their trade. Projecting this first point forward in time, many of these students (and others, less intellectually committed) are anxious to find careers which they

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[34] See Economic Council of Canada, *Interim Report on Competition Policy*, (1969) at 148 ff., and Zander, *op. cit. supra*, note 31.

[35] See *e.g.* Note, *Modern Trends in Legal Education*, (1966) 64 Col. L. Rev. 711; Twining, *Pericles and the Plumber*, (1967) 83 L.Q.R. 396; Reisman, *Some Observations on Legal Education*, [1968] Wisc. L. Rev. 63.

consider more meaningful than those presently pursued by most lawyers. Whether framed in terms of self-fulfilment or of social commitment, they are not content to enter into a life's work which will be no more than a series of individual entries in a daily docket. I interpret their desire to discuss the "general" as an attempt to define their own futures in broader terms. If they succeed, they will transform the legal profession.

Needless to say, this discussion has overstated the dichotomy between "particular" and "general", between skills and intellect. Each feeds and reinforces the other. But if there is not a complete dichotomy, there is at least a tension, a competition for finite amounts of time and talent. In this sense, at least, the Legal Profession Seminar is typical of almost all offerings in the law school curriculum.

THE LAW SCHOOLS AND THE LEGAL PROFESSION

My final point has already been forecast by the suggestion that the Legal Profession Seminar is a microcosmic representation of two major concerns in contemporary legal education: the growth of intellectualism within the law schools, and the search for a meaningful legal professionalism. Obviously, the law schools do not, and cannot, deal with these concerns by themselves. Isolated in time and space from the student's post-graduation career, limited in their potential by inadequate financial and human resources upon which there are a multitude of legitimate competing claims, the law schools must come to recognize the inevitable influence of the practising profession on the shape of legal education. I make no judgment upon it; I merely urge that it be recognized. Of course, by "influence", I mean nothing so obvious as direct interference by the bar in curricula or teaching methods, or even indirect interference through requiring that certain courses be taken by those seeking admission to practice. At least in Ontario, the legal profession has recently demonstrated its confidence in the law schools by accepting university law degrees as the sole test of substantive legal knowledge, without regard to the student's course of study, and without re-testing the student upon his admission to the bar on subjects taught by the law schools.

What I refer to as "influence" is far more subtle. The kinds of professional and extra-professional work lawyers do, the image projected by the profession, the social and economic organization of the bar, will all have a profound influence on the law school programme.

To begin with, if legal practice is thought to consist of highly-paid, but routine, work of little intellectual substance, on behalf of a small and well-to-do clientele, law schools will attract — and the profession will ultimately receive — recruits who are content to pursue this kind of career. If, on the contrary, the legal profession is seen to offer challenges to the intellect and gratification to the social conscience, it will attract a different kind of recruit. Conceded, of course, that neither of these two images is wholly accurate, it seems likely that whichever one attracts a student to the study of law may well determine his behaviour in law school — his work habits, his academic programme, the range of extra-curricular activities in which he participates, the stimulating or dampening effect he has on the faculty.

To be sure, students do socialize each other to some extent, so that idealists may become cynical or dull plodders suddenly march to a different beat. The educational programme of a law school is itself premised on a hope, not always realized, that it will influence attitudes and perceptions, and turn out graduates who are better men and women than they were when they began. Yet, the fact remains: certain kinds of students will be attracted to, or repelled by, the study of law, depending on how lawyers are viewed; in turn the type of students who enrol in the law school will help to determine the configuration of its programme.

The profession's influence is felt strongly in another way. In the short run, it is possible for the law schools to graduate a new model lawyer who differs in many respects from the old. By systematically addressing ourselves to the task the law schools can produce lawyers who are more learned, more insightful, or more idealistic than the mill run of their elders. But, how long will it be before the new graduate "unlearns" what we have so diligently tried to teach him? Can he persist in habits of extensive and thorough research, for example, if the senior partner for whom he produces briefs, or the judge before whom he argues, impatiently brushes aside his scholarly product? Can he give the clients the humane and individualized concern which he has been taught is their due if he thereby fails to produce the quota of work assigned to him? Can he commit himself to a career of legal service to the poor or to social causes if he cannot earn his living by doing so? The degree to which attitudes nurtured in law school will survive in a sometimes uncongenial professional atmosphere is the ultimate measure of our pedagogic effectiveness.

The "re-education" of young graduates after they leave law school is a short-run risk. There may be a long-run risk as well. If successive generations of new model lawyers were to find that they had to divest themselves of what they learned in law schools, pressures would inevitably mount for a return to the kind of law school curriculum which was devoted to turning out old model lawyers. If recent graduates were to enter a totally hostile environment, it would only be a matter of time before their disillusionment would make itself felt within the law school. While some law teachers, no doubt, would be content to pursue the present trend of legal education simply because it is "right" or "good" in some abstract way, I suspect that most would wish to feel that what they are doing is also realistic and relevant. Given a permanent discontinuity between the law school's image of the ideal professional, and the reality, and no chance of making the two congruent, I doubt that many of the present group of law teachers would wish to continue with the present programme, if at all.

I do not wish to be understood as saying that there now exists a great and unbridgeable gap between the law schools and the profession. Law schools, for example, are still devoting themselves to a significant degree to the training of private practitioners, and the bar appears to feel they are doing so reasonably well. To the extent that more attention is now being given to equipping law school graduates for other professional roles, the gap is greater, though by no means unbridgeable. The range of new professional

opportunities is slowly expanding, as it must if the profession and the public are to benefit from the new currents of intellectualism and idealism to which reference has been made. Growing numbers of good students see themselves as legal researchers, policy planners, or citizen advocates, although the acceptance of these tasks as legitimate lawyers' activities is not yet as widespread in Canada as it is in the United States. The career satisfaction of these young men and women is an example of the kind of issue with which law schools must become concerned; the risk that they may be frustrated by the profession is the potential Achilles' heel of contemporary legal education. The Legal Profession Seminar is one — admittedly limited — vehicle by which the law schools can recognize and counter this type of "inevitable" professional influence.

On the other hand, the law schools will not merely be the passive recipients of professional influence. In turn they will inevitably influence the profession, if only by the sheer weight of numbers of graduates. Today one-half of the Ontario bar has been in practice ten years or less. Despite the "unlearning" process, many of their attitudes and values, acquired in law school, will survive their early years of socialization in the profession. Their numerical predominance will ensure that these attitudes and values gradually influence the official ideology of the profession.

However, I do not believe that the law schools can, or should, rely on osmosis as the chosen agent of change. If we genuinely believe that we are educating new kinds of lawyers, we have an obligation to define their function and to develop modes of practice through which they can exercise it. If we have an authentic concern for the impact of law on people, we have an obligation to ensure that the new lawyers who are responsible for this impact are provided with a frame of reference within which they can evaluate their own contribution. In other words, out of our position of potential influence upon the profession flows a fiduciary obligation to contribute our talents to the reshaping of the profession.

How derelict we have been in the discharge of this obligation is apparent when we contrast the preoccupation of the law schools with law reform as against their almost total indifference to the reform of the bar. We care so much about how judges decide cases, but so little about how lawyers argue them. We lavish so much attention on legislative law-making, but so little on lawyer-legislators or lawyer-administrators. We are obsessed with the quality of legal rules, but rather unconcerned with the quality and availability of legal services.

I do not mean to deny that most law teachers believe that good lawyering is important, or that they contribute to good lawyering by good teaching. But there has been almost no attempt to define what good lawyering is, or to articulate the institutional developments by which the quality and availability of legal services can be enhanced. There has been little systematic concern for sharpening the profession's perception of, and sympathetic response to, the issues of value which confront lawyers today. The discharge of these tasks, I believe, is the greatest potential contribution to be made by a legal profession seminar, and similar experiments.