ADDRESS TO THE LAW SOCIETY OF WESTERN AUSTRALIA LAW SUMMER SCHOOL 2012 CONFERENCE

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I am delighted to have the opportunity to observe first-hand the model for continuing professional development followed by the Law Society of Western Australia and feel honoured to have been asked to speak. The subject of continuing legal education and the regulation of the legal profession is under scrutiny in most common law jurisdictions, including mine. If the profession is not to be subjected to increasingly intrusive regulation aimed at raising standards and encouraging diversity careful response is necessary. The measurement standards being rolled out in the United Kingdom entailing formal appraisals show what could be ahead if the profession does not get its own house in order. These are interesting times. I thought in speaking I would touch on some of the challenges and revisit some of the virtues of the profession to which we all belong and the role it fulfils in societies which aspire, as ours do, to live under the rule of law. My theme is that continuing professional development is indispensable to a practising lawyer and that our aspirations for continuing education as lawyers must not be too narrowly tailored.

The profession

There is a whole world of law that never sees a courtroom. Sir John Baker emphasised this in writing of "Why the History of English Law has not been Finished":[2]

> Law can exist, in the sense that people are aware of it and conform to it, even when it is neither written down in legislation nor the subject of accessible declarations by the judiciary.

Enacted or decided law is only part of the picture. Law is also the collected wisdom to which people adhere, not simply to keep out of trouble, but because they believe it is right to do so. The rule of law then depends on law-mindedness. Justice Robert Jackson of the US Supreme Court did not refer to the rule of law, but expressed much the same idea when he said that "the administration of justice is based on *law practice*".[3]

The learning and independence of the profession underwrites "law practice" and "law-mindedness" through the advice it gives and in its preparedness to

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1 The Rt Honourable Dame Sian Elias, Chief Justice of New Zealand.

2 JH Baker "Why the History of English Law has not been Finished" [2000] CLJ 62 at 78.

3 Robert Jackson "The County-Seat Lawyer" (1950) 36 ABAJ 497 at 497.

stand up for what is right when necessary. That is why Sir Owen Dixon[4] and others have rightly seen the contribution of the lawyer to the rule of law as more important than the contribution of the judge. Nor is it a contribution made even principally through litigation. In addition to the advice they give clients, lawyers contribute to law-mindedness in the community by participating in public debates and by protecting the values of the legal system. In an age of talk back and populism there are risks to the rule of law if law is seen as remote, inaccessible and incomprehensible. Lawyers are a bridge to understanding. To be effective in promoting law-mindedness in the community, however, lawyers need to be trusted and respected for their independence and learning.

It should therefore be a matter of concern that the standing of the legal profession in most societies is not high. In New Zealand and I am sure here, caricatures of lawyers as blood-sucking parasites or amoral mercenaries are staple fare. (They are almost as common as cartoons of judges in full-bottomed wigs asking inane questions to demonstrate how out of touch they are). That perception erodes the moral authority of the profession to speak for the legal system and to explain its operation. The problem is also compounded by the circumstances of modern practice in which public service and the disinterested representation of those engaged in public controversies may no longer be seen as the clear responsibility of legal practitioners. The managing partners of legal firms do not generally like controversy if the client base of the firm is conservative. Increasing specialisation can lead to increasing fragmentation of the profession. In a number of jurisdictions, including my own, the larger firms which represent corporate clients are increasingly disengaging from the organised profession. Other factors which may contribute to a lack of popular sympathy or respect for lawyers may be found in doubts about the representativeness of the profession and its commitment to excellence in the provision of legal services. There may be complex cause and effect in some of these factors.

I am conscious that every generation bemoans the ethical standards of the day compared to those of times past. I do not propose to suggest that the lawyers of my youth were more altruistic, more connected with the community, more willing to take on unpopular causes or give advice their clients do not wish to hear than today. In fact, although the incomes of lawyers may have been lower in 1970 when I entered the profession, there is no doubt that the profession today is much more representative and much better educated. While legal practice has altered in a number of ways that may have affected the effectiveness of the profession in assisting law-mindedness, the real causes of erosion of such a climate are to be found elsewhere, perhaps in the decline of faith in expertise, in a rising querulousness, in increasing claims for pluralism, in widening differences within our communities.

Complacency about the role of the lawyer is not an option for the profession. Its shared values need nurturing. The opportunities to reinforce these values are much more limited than in the past when members of the profession were

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[4] Owen Dixon *Jesting Pilate* (The Law Book Company Ltd, Melbourne, 1965) at 245–246.

thrown together all the time. The size and organisation of the modern profession means that it is harder to meet together and to make common cause. That is why what is learned in law school and in professional admission programmes needs to be reinforced by professional associations and through continuing legal education.

There are those who may see this view of the profession in standing up for the rule of law as romantic. One American commentator said of such exhortations:[5]

> I know perfectly well that when lawyers start talking this way about their public duties, being officers of the court and so on, most of us understand that we have left ordinary life far behind for the hazy aspirational world of the law day sermon and Bar Association after–dinner speech – inspirational, boozily solemn, anything but real.

I believe these suggestions are dangerous and wrong, but there is sufficient truth in the gibes of self-interest to require lawyers to reflect upon their roles. If the profession loses focus, further erosion of its standing is inevitable. Unless the profession has a clear vision of its role and demonstrates dedication to the values that underpin it, it forfeits its claim to independence and the moral authority to defend the rule of law.

Continuing education

Focussing on enduring values rather than everyday pressures is not easy for busy practitioners. That is why continuing education is inescapable obligation for the lawyer.

The need for continuing education is not only so that the practitioner remains current with recent case-law and legislation. Such technical changes are readily accessible to anyone who can read and everyone has an incentive to maintain technical competence. The need for life-long education should be more ambitious in scope.

The intellectual scaffolding to which we attach technical legal learning itself changes with experience and perspective. It needs maintenance and development if we are to have the spark to imagination and thinking which marks the accomplished lawyer and makes legal practice worthwhile. In the press of everyday practice it is difficult to find the time to lift our eyes and to see the whole. That is why time on a summer school such as this is precious. It is not so much *what* is learned, but the opportunity to look beyond book-learning and to *think*, spurred by other perspectives and the experiences of other practitioners.

This summer school has two outstanding features. First, it puts ethics to the fore. If law is, as Aristotle taught, the highest branch of ethics,[6] lawyers need

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5 Robert W Gordon “The Independence of Lawyers” (1988) 68 BUL Rev 1 at 13.

6 As cited in William Blackstone *Commentaries on the Laws of England: Book the First* (Dawsons of Pall Mall, London, 1966) at 27.

to be conscious of the ethical underpinnings of law and the enduring values immanent in law. I want to come on to say something about values shortly. Secondly, the Law Society of Western Australia is, I think, to be commended for bringing together *all* practitioners for the purposes of continuing education. In other jurisdictions professional formal education for lawyers is often confined to new lawyers or is segregated according to areas of interest. Both approaches are I think deficient. The differences in perspective provided by combining more and less experienced practitioners and those practising in different areas of law are valuable in themselves and necessary prod to reconsideration of preconceptions and outdated learning. Combining those with different practices helps reinforce understanding of the legal system as a whole. Such inclusiveness also helps support the ethical standards of the profession as a whole by preventing the sort of silo-mentality that has led at times to lawyers losing the detachment that is a principal virtue. No branch of law is an island. Additionally, the opportunity for each member of the profession to participate on terms of equality is important to the development of professional identity and independence and the culture of the profession.

Learning the law

Since continuing education should build on what has already been learned, it is perhaps helpful to reflect on the sort of formal instruction we have had in becoming lawyers, its benefits and its limitations.

The teaching of law in universities is a relatively modern development. The teaching of law students by professional teachers of law is more recent still. It was not until the 1960s in both Australia and New Zealand that law schools were transformed from centres staffed by practitioners, which trained lawyers, to academic institutions with the purpose of advancing learning about the law. They became places concerned with what Professor Shils calls "the methodological discovery and the teaching of truths about serious and important things".[7]

The former teaching on the job and by legal practitioners had some advantages. Chief Justice Gleeson once remarked to me that it had the benefit of imparting a certain "rat-cunning". Albert Venn Dicey thought the merits of on the job training could be summed up in the word "reality".[8] But, as my former colleague Sir Kenneth Keith, now on the International Court of Justice, wrote of his legal education in the 1950s (taught at university but principally by practitioners) there was an emphasis on the learning of rules and little sense of "the law-making enterprise".[9]

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7 Edward Shils *The Academic Ethic*, as cited by William Twining *Blackstone's Tower: The English Law School* (Sweet & Maxwell Ltd, London, 1994) at 49.

8 AV Dicey *Can English Law be Taught at the Universities?* (Macmillan, London, 1883) at 8 as cited in Peter Birks "Adjudication and interpretation in the common law: a century of change" (1994) 14 LS 156 at 161.

9 KJ Keith "1883 to 2008: Law and Legal Education Then and Now" [2009] NZ Law Review 69 at 76.

The modern law school and its place in the education of lawyers arrived in the 1960s under the influence of the law schools developed in the United States from the end of the 19th century in the confidence of educators such as Dean Langdell that the study of the law could be made "scientific". Inevitably, there has been erosion of Langdellian optimism in the science of law. Recognition that craft and experience are essential for the lawyer has led more recently to the development of additional professional training components before admission to practice, and acknowledgement of the need for ongoing professional education post-admission.

I do not think that anyone would want to go back to purely vocational training for lawyers in their initial legal education. Equally, I think there is a danger if continuing legal education in its turn is thought of as vocational training. Continuing education too, benefits from the discipline of academic thought. If such courses develop simply to fill perceived vocational needs, they may easily revert to the teaching of rules and technical skills. Practitioners then may come to regard the content of their law degree as a necessary gateway to the profession, largely irrelevant to their future legal practice. Peter Birks, in this vein, once expressed the fear that, if the degree came to be regarded as simply something to be endured "as a midshipman must stand before the mast", then practitioners would not value the study of law[10] and if practitioners do not value the study of law, then our legal systems will lose the sense of the reach of law and the scope of the principles which, as Sir Gerard Brennan emphasised, provide the skeleton which gives coherence to the whole legal order.[11]

One of the reasons why the learning acquired in the course of a law degree needs to be followed up by more learning in the course of every professional career is that, without the incentive and context provided by experience, many of the ground-setting lessons and ideas do not take secure root. They have to be revisited regularly.

Most of us, I imagine, have had the experience of finding that the subjects we had least interest in at Law School or doubted we would ever need in practice turn out to be those we would most like to revisit with the understanding achieved through practice and experience. I have for example, almost no recall about Evidence as a taught subject, because it was not real enough to me to absorb except for the purposes of passing the exam. I do not mean that my very able professor did not teach it adequately or that his content was not practical as well as theoretically sound. I simply mean that it was a foreign country to me as a full-time student. Similarly, I would never have thought at the time that a grasp of legal history would turn out to be of immense practical help in my work as an appellate judge. In subjects such as these I would have valued the opportunity to have had more formal continuing education once I had grown in understanding and experience.

Again, I do not mean vocational or technical training. I mean academic education because these are subjects that raise points of principle and

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10 Peter Birks "The academic and the practitioner" (1998) 18 LS 397 at 406.

11 *Dietrich v R* (1992) 109 ALR 385 at 403.

important legal values or set the stage for classifications and rules of general application which need contextual understanding for modern application. What is more, having learned law for my degree in terms of the classifications it is convenient to adopt for the purposes of introductory instruction, I would find it invaluable with the benefit of practical experience to follow themes of principle across the face of the law.

The lesson of value imparted in law schools is not the law as a system of rules at the date of study, or even a prediction about the law for the future. It is the sense of the way in which new problems (or apparently new problems) can be confronted in the future, in whatever capacity the student ends up working. Both principle and process are necessary equipment for a life in law, however spent.[12] "Principle" is not however to be confused with detailed knowledge over vast and changing areas of law (and is a reason to resist calls for greater coverage and new specialisations in law courses). The process that matters is "based on reading (including researching), thinking, and writing (and talking)".[13]

I therefore have some questions as to whether we are ambitious enough in our notions of what is required of continuing legal education and whether the profession is best placed to provide it or whether the law schools need to step up to the gap. It seems to me that if the profession is to be fit for purpose, we have to provide opportunity for second thoughts about subjects first encountered in other, younger lives. Second thoughts, as Lord Reid once said about judgments, are not always better, but they generally are.[14]

Change in law

Of course, the principal reason for a lawyer to undertake continuing education is to be fit for the changes that are inevitable as law comes to meet the changing needs of the societies it serves. The common law, as Benjamin Cardozo argued, is best seen as a method of change.[15]

Within my 40 years in the law there have been profound changes. Some of course have been in response to changes in the legislative landscape. I do not think it fanciful to think that there has also been a shift in the way law is viewed in our societies. This shift has been partly fuelled by legislative changes such as freedom of information statutes, the move to open government enforced by ombudsmen, and (in my jurisdiction) by expressions of human rights. It has been partly brought about by increasing internationalism in law and the impact it is having on domestic laws. The revolution in access to legal materials has made comparative and international materials essential tools for the practising lawyer of any jurisdiction. Other change has in part been brought about by the reassertion of judicial

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12 Keith, above n 9, at 78.

13 Ibid.

14 Lord Reid "The Judge as Law Maker" (1972) 12 J Soc of Public Teachers of Law 22 at 29.

15 This is a theme developed in Benjamin N Cardozo *The Growth of the Law* (Yale University Press, New Haven, 1924).

supervision of executive action in administrative law. Such shifts in the way law is viewed have implications for the role of lawyers and their ethical obligations. They point to increasing emphasis on the rationality of law and a willingness to engage with substantive values. In this change, lawyers brought up in the positivist traditions that held sway when I did my degree have some challenges.

Law and substantive values

The legal historian, Holdsworth, considered that an impoverishment of ethical reasoning in law in the last two centuries has been attributable to the hold of positivism on law, with its strict separation of morals from law.[16] I doubt whether public expectations have ever been as austere. Lord Radcliffe made the point that something has gone wrong if law is only a rule of rules to which people adhere to for the purely practical reason of keeping out of trouble.[17] Law, he thought, responds to a deeply held ethical need.

Whether or not a strict separation of law and morals ever accorded with popular conceptions of law, certainly modern statements of rights and modern legislation make it impossible to maintain a purely formal vision of law as a collection of value-neutral rules. Today lawyers must engage with substantive outcomes. I think indeed it has always been so. "Value-neutral" lawyering is not good lawyering. It deprives clients of the full range of considerations the lawyer is able to provide. Karl Llewellyn was right to say that that "[i]deals without technique are a mess, but technique without ideals is a menace".[18]

Today a number of commentators have expressed the view that human rights are revolutionising our understanding of law.[19] I appreciate that in this jurisdiction you do not have comparable legislation. But I wonder whether that insulates you entirely.

Lord Bingham expressed the view that human rights are part of the rule of law.[20] Even if that idea does not take hold, it is the case that in measuring administrative action against standards such as reasonableness or trial practice for fairness it may not be possible to ignore the international standards to which Australia has committed. Much modern domestic legislation today is based on international covenants in which such standards are usual. It seems foolish to resist help from the case-law of jurisdictions which have adopted similar standards in domestic law. Comparative legal material is now an indispensable part of legal reasoning and source of ideas. With the shrinking of the world of ideas brought about by modern technology

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16 William Searle Holdsworth *Some Lessons from our Legal History* (The Macmillan Co, New York, 1928) at 158.

17 See Lord Radcliffe "Law and the Democratic State" in *Not In Feather Beds: Some Collected Papers* (Hamish Hamilton, London, 1968).

18 Karl Llewellyn "On What is Wrong with So-called Legal Education" (1935) 35 Colum L Rev 651 at 662.

19 See, for example, Martin Loughlin *The Idea of Public Law* (Oxford University Press, Oxford, 2003) at 127.

20 Tom Bingham *The Rule of Law* (Penguin Books Ltd, London, 2010) at 66.

and the rise of supra-national legal institutions able to pass the rule over domestic bodies, this trend is only likely to continue.

Whether or not substantive values based on human rights standards are admitted as law, expectations of rationality and deliberation which have followed on from freedom of information and other reforms are having a transformative effect on law. A South African academic coined the term "culture of justification" to describe this change.[21] It is a theme picked up in Australia by Chief Justice Gleeson.[22] It is reflected in much contemporary legislation which, at least in New Zealand, emphasises the reasons given for exercise of authority over others. Such legislation indicates contemporary community expectations about the need for justification. And since the deliberative processes of the courts provide the best known model of public reasoning and are the forum in which claims of right under statements of right are publicly made, it is perhaps not surprising that legal process seems to be playing an increasing role in the public life of many jurisdictions.

It is difficult to know what is cause and effect here. But in our increasingly pluralistic societies law is a principal means of achieving social adjustment.[23] My point is not to say whether or not this is a good thing. It is however part of the reality to which the lawyer must adapt. Providing legitimacy is a principal contribution of legal process to the rule of law. Full exposition of questions that have been glossed over or overlooked in the political process is also a benefit of the deliberative process of legal advice and litigation. Well done it facilitates wider understanding. If Amartya Sen is right in saying that the pursuit of justice sees us bound up with "what [it is] like to be a human being",[24] then the lawyer cannot see law as aloof from the values and concerns of men and women in contemporary society.

Law is, of course, more than the sum of enacted and judge-made rules, as I have already suggested. It includes the habits of thought – what I have described as law-mindedness – by which people adjust their own conduct.[25] In some cases however the exposition of the issues through the deliberative processes of court proceedings and the marshalling of the reasons of justice for one position or another may be critical in achieving the leap in insight that the unpopular and overlooked have just claims. In such cases, legal processes may provide a temporary "stay against confusion",[26] informing a

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21 Etienne Mureinik "Emerging from Emergency: Human Rights in South Africa" (1994) 92 Mich L Rev 1977 at 1986.

22 Murray Gleeson "Outcome, Process and the Rule of Law" (2006) 65 AJPA 5 at 12.

23 Peter Birks "Adjudication and interpretation in the common law: a century of change" (1994) 14 Legal Studies 156 at 174–175.

24 Amartya Sen *The Idea of Justice* (Penguin Books Ltd, London, 2009) at 414.

25 Sir John Baker referred in this way to the "whole world of law which never sees a courtroom": JH Baker "Why the History of English Law has not been finished" (2000) CLJ 62 at 78.

26 Walker Gibson "Literary Minds and Judicial Style" (1961) 36 NYU L Rev 915 at 930, adapting to the legal context Robert Frost's view of the work of the poet in "The Figure a Poem Makes" in *Collected Poems of Robert Frost* (Henry Holt & Company, New York, 1939).

wider social debate and allowing the political processes space to achieve solutions. This is the notion of "dialogue" most developed in Canada.[27]

There are significant implications in these modern conditions for the role of lawyers in advising clients and in presenting arguments to the courts. Lawyers today work within an overall view of law as a "form of institutionalised discourse or practice or mode of argument" which is partially political in effect, as the late Professor Neil MacCormick long argued.[28] In similar vein, Cass Sunstein has written of the "expressive function of law".[29]

To fulfil such roles, lawyers need insight into the values of their societies. Without such insight, they will not convince in their identification of what is in the public interest in a particular case, what is demonstrably justified in a free and democratic society, or what is "reasonable" or "fair".

The rule of law

Today, much discussion about the nature of law takes place under the banner of the rule of law. It is hard to find any society which does not profess to live under the rule of law. There is some measure of truth in the view that the phrase has a moral force which may not aid proper analysis[30] but perhaps it is the moral force of the rule of law that matters most.

The fact is that the idea of law is bigger than the sum of enacted and judge-made rules. The courts may be mere "interweavers" in the development of law, as Justice Roger Traynor once described them,[31] but the idea of law is bigger even than the product of sovereign legislatures. The rule of law then is not simply the rule of rules. Law responds to a human ethical need. It must comply not only with the rules of valid law-making, it must also comply with what Roscoe Pound described as the "general body of doctrine and tradition" which are drawn on by positive law and from which we criticise it.[32] That general body of doctrine and tradition rests on ethical foundations. A good lawyer needs to know the doctrine and the ethical foundations behind it as well as the content of positive law.

Lawyers in New Zealand have had since 2008 a statutory obligation to "uphold the rule of law and to facilitate the administration of justice".[33] The statute

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27 Peter W Hogg and Allison A Bushell "The Charter of Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" 35 Osgoode Hall LJ 75.

28 Neil MacCormick "Beyond the Sovereign State" (1993) 56 MLR 1 at 10.

29 Cass Sunstein "Incommensurability and Valuation in Law" (1994) 92 Mich L Rev 779 at 820–824 and "Conflicting Values in Law" (1994) 62 Fordham L Rev 1661 at 1668–1669.

30 Paul Craig "Formal and Substantive Conceptions of the Rule of Law – An Analytical Framework" [1997] PL 467.

31 Roger Traynor "The Courts: Interweavers in the Reformation of Law" (1967) 32 Sask L Rev 201.

32 As cited in Benjamin N Cardozo *The Growth of the Law* (Yale University Press, New Haven, 1924) at 37.

33 Lawyers and Conveyancers' Act 2006 (NZ), s 4(a).

setting up the New Zealand Supreme Court refers to New Zealand's commitment to both the sovereignty of Parliament and the rule of law.[34] In Australia, the Law Council of Australia has recently released a policy statement on rule of law principles, for the purpose of analysing whether federal legislation complies with the rule of law.[35] So although it is necessary to avoid using the rule of law as a talisman against all evils, it is difficult to resist engagement with the concept in day to day lawyering.

The rule of law checks the powerful. Such checks are not always welcome and not only for those who are *trying* to be above the law. That is for the very human reason that it is difficult for anyone to resist headlong self-conviction when sure that the end in sight is right. Those who are not acting for personal advantage but for what they believe to be the public benefit or for another good may be especially indignant or impatient when questioned by advisers taking rule of law responsibilities seriously. There is little as distorting as a conviction that you are a good guy, that you are on the right side.

The role of lawyers is to resist enthusiasms and express doubt. We must be conscious always that decisions taken by public and private actors impact, directly or indirectly, upon the lives of real people in our society, many of whom are vulnerable. All are entitled to be treated with dignity and respect. Where they have claims of right they are entitled to be heard. That is the rule of law in action.

If the profession is truly the bedrock of the rule of law, it needs ethical insight, it needs to be independent, it needs to be courageous, and it needs a sense of the law as a whole. These qualities need to be demonstrated by practitioners in their work and they need to be demonstrated by the organised profession in standing up and speaking for the rule of law, even when it is not popular to do so or when others are silent.

What shape are we in?

Following the spectacular corporate collapses in the United States and Europe, accountants now work in many jurisdictions under mind-numbing regulation. There is a real risk that the same regulation will be imposed upon the legal profession if it is not able to demonstrate its integrity and fitness for purpose.[36] If so, that may well impact adversely upon the attraction of the legal profession.

Already, in many jurisdictions we are noticing that law no longer pulls and retains as many able young practitioners. All of us like to think our work worthwhile. A drop off in the standards of courtesy, a querulousness, a jostling, a naked self-interest is a dispiriting climate for anyone to work in. That is what can happen when shared ethical values are eroded. A loss of

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34 Supreme Court Act 2003 (NZ), s 3(2).

35 Law Council of Australia "Policy Statement: Rule of Law Principles" (Law Council of Australia, Canberra, 2011).

36 Bevis Longstreth "Corporate Law: Problems in the Corporate Bar (As It Appears to a Retired Practitioner)" (2006) Montana Lawyer.

commitment to the legal system and to law removes a real reason most of us took on legal careers. A lack of passion for the work, a loss of appetite for achieving what is right according to law are, I think, part of the turnoff for able practitioners who leave the profession. Law is an ethical and thinking profession. We diminish the enjoyment of our work and the attraction of it if lawyers act as "value-neutral technicians".[37]

Some commentators have suggested that the move to transactional work, specialisation, in-house counsel, and professional management of law firms puts the lawyer under pressure to facilitate what the client wants to do.

Giving the answer clients want to hear is bad lawyering. It is not in the interests of the client. Lawyers do not serve their clients well if they see themselves only as "value-neutral technicians". Harold Williams, a former Chairman of the Securities and Exchange Commission, explained why when he described the Securities Bar in the United States as too much in the service of its clients:[38]

A counsel does disservice when, in effect, he limits his advice to whether the law forbids particular acts or to an assessment of the legal exposure and does not share with the client his view of the possible ramifications of the various alternatives to the short- and long-term interests of the corporation and the private enterprise system. He pre-empts the opportunity for his client to make the fullest possible judgment by not providing a full range of information and advice of which he is capable and on which the client can make the most informed choice.

Williams was of the view that the profession must place greater emphasis on the lawyer's role as an independent professional – particularly on the responsibility to uphold the integrity of the profession.

Nor is the lawyer who views his role as a technical one and who does not appreciate the wider context in which his advice is sought likely to be as effective as he should be in helping the client to address some of the problems thrown up in legal practice today. In modern societies, often secular or with diverse beliefs, law is important in permitting society to operate civilly. The deliberative discourse of law permits social adjustment to be achieved without serious disruption. Lawyers need insight into the shifts in society which make adjustment of legal thinking necessary. Richard Posner made this point about the famous case of *Brown v Board of Education.*[39] The Supreme Court's about-face in *Brown* did not come he said from pondering over the text of the Fourteenth Amendment, but from its understanding that the nation's social and political climate had changed.[40] Lawyers need understanding of a wider context to be able to advise in times when social conditions are changing.

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37 Harold Williams "Professionalism and the Corporate Bar" (1980) 36 Bus Law 159 at 165.

38 Ibid, at 165–166.

39 *Brown v Board of Education* (1954) 347 US 483.

40 Richard Posner *The Problems of Jurisprudence* (Harvard University Press, Cambridge, 1990) at 307.

The days when the law reports in common law jurisdictions were filled with cases about sale of goods or charter parties are past. Litigation today is in part a forum for advancing social ends through deliberative public process under claim of legal right. Lawyers today are asked to advise on some of the more intractable moral problems of the times. The cases that may result can be highly controversial. That throws the burden of explaining unpopular decisions on the legal profession because judges, having delivered judgment, cannot explain their reasons further. If lawyers lose the authority or inclination to speak out because they view their role narrowly, more is risked than bad outcomes for the client or poor arguments in court cases.

Cases at the margins are extremely difficult, particularly when questions of balancing different values arise. No one has yet come up with an answer to "incommensurability" – the problem when there is no common scale upon which to weigh and measure disparate rights. As Justice Scalia memorably commented balancing in such cases is sometimes "like judging whether a particular line is longer than a particular rock is heavy".[41] Pragmatic, unintellectual habits of legal reasoning are not good enough. If we are not to "sleepwalk" through changes in law, we need to engage not only with the international and comparative case law but with the intellectual scholarly tradition it draws on.

The future

It is nearly 20 years since Anthony Kronman wrote of a spiritual crisis in the legal profession in the United States.[42] What had been lost he thought was the sense that law required more than technical proficiency and that the work of the lawyer in providing "real deliberative counselling" sets a goal of attainment of practical wisdom which has an intrinsic value of its own.[43] I thought, reading the book soon after its publication, that its theme was too pessimistic and that the ideal it postulated, that of a "lawyer statesman", was somewhat embarrassing. Reviewing it today, I am left more doubtful. I am not sure how widespread the malaise he describes is. What I do not doubt is that the best way to meet any sense of loss of direction or effectiveness is to re-engage with the values of the profession and the principles of law and that the best way to do that is by committing to life-long learning and development in the law and its practice.

I have stressed the galvanising influence of the modern teaching of law in universities. What was new in the professional law schools was the development of the excitement of law. That sense of excitement had earlier been generated by the Inns of Court, which Professor Lévy-Ullmann had described as "the Church Militant of the Common Law",[44] but their lustre had

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41 *Bendix Autolite v Midwesco Enterprises* 486 US 888 (1988) at 897.

42 Anthony Kronman *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, Cambridge, 1995).

43 Ibid, at 309.

44 Henri Lévi-Ullmann *The English Legal Tradition: Its Sources and History* (Macmillan & Co, London, 1935) at 87, as cited in Richard O'Sullivan "St Thomas More and Lincoln's Inn" (1957) 3 Cath Law 71 at 71.

dimmed in England since the Restoration. It is a sense of commitment to law I hope we can cultivate again.

Albert Venn Dicey, who visited Harvard in the 1890s, described the "passion for the law" of teachers who were "masters of the philosophy and history of law" and who aimed to teach thinking.[45] The result he thought was the "vivid interest" of students and their enthusiasm for living in "an atmosphere of legal thought".[46] Even allowing for the politeness of a visitor, it seems likely that the energising effect of instruction in such an atmosphere followed students in their careers in practice and stayed with those who went on the bench or who taught in their turn.

The practice of law requires commitment to intellectual development. It is from such commitment that the profession draws strength. In turn it energises practitioners and provides the satisfaction in work that is oxygen to members of a thinking profession.

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45 AV Dicey "The Teaching of English Law at Harvard" (1899) 13 Harv L Rev 422 at 431.

46 Ibid, at 436.