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Law of the Future Series

**The Law of the Future and
the Future of Law: Volume II**

Sam Muller, Stavros Zouridis Morly Frishman and Laura Kistemaker (editors)

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**2012
Torkel Opsahl Academic EPublisher
The Hague**

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ISBN 978-82-93081-80-7

LAW OF THE FUTURE AND THE FUTURE OF LAW

This is the second volume of *The Law of the Future and the Future of Law*, and a reflection of our continuing efforts to map trends in the global legal environment. In this volume, we focus on areas that received less attention in the 2011 volume. There is, for example, less on criminal law, and more on intellectual property and trade law. We start the volume with an introduction in which we set the stage. The volume ends with some concluding thoughts by Professor Jan Smits, who was amongst the earliest of law of the future thinkers. He reflects on common threads in the think pieces. We extend our appreciation to him for his willingness to take the time to do this.

Once again, it has been a very inspiring endeavour to work with outstanding thought leaders from very different fields. It was at times a tight process, which asked a lot from the authors. We thank them for their patience and commitment.

We would also like to thank our copy editing team, Wendy Bre-mang, Kaitlyn Jones, Sarah-Louise Todd, Lisa-Felicia Akorli, Tsvetelina Mihaylova, Lara Schaefer and Kate Elliot, led by the indefatigable and ever meticulous Alexander Orona. We thank Alf Butenschøn Skre and Morten Bergsmo from Torkel Opsahl Academic EPublisher, for their patience, and endurance with our inability to stick to deadlines. We are humbled by your continuing belief in us and treasure our cooperation. Lastly, a special word of thanks to Dessy Velikova, who managed the whole process with both softness and determination.

Sam Muller, Stavros Zouridis,
Morly Frishman and Laura Kistemaker

6.3.

Law School of the Future: Centre of Cutting-Edge Practice?

Clark D. Cunningham*

To meet the challenge of the rapidly changing future of law and to play a vital role in creating the law of the future, law schools must move beyond the delivery of static knowledge through classroom instruction and become centres of cutting-edge legal practice. The origins of modern medical education provide encouraging evidence that such a transformation is both needed and feasible. At the end of the nineteenth century, the curriculum at most North American medical schools consisted entirely of lectures, provided by part-time practitioners to supplement their income. There was no patient contact or laboratory experience. Schools varied widely in quality, as did the competence of their graduates. Then, within a matter of decades, all was changed through the widespread adoption of a powerful new model of education: the teaching hospital staffed by physician-scientists.

1. Introduction

The Hague Institute for the Internationalisation of Law (HiiL), working from a foundation of 49 thought-provoking essays published in 2011 as the volume, *The Law of the Future and the Future of the Law*, has developed the *Law Scenarios to 2030* as an instrument to help key decision-makers in the legal systems of the world work towards preparing for an uncertain future. These scenarios predict with some confidence a number of trends that will challenge existing legal systems over the next twenty years, including rising population; greater scarcity of food, water and fossil fuels; heightened security concerns; expanding economic globalisation; and increased access to information. However, the scenarios imagine quite different responses to such trends. For example, in terms of govern-

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ance, one possibility is a robust global legal order with its own authoritative rules and institutions, while yet another plausible future is a retreat from global constitutionalism as legal borders thicken and State-made law dominates.

In planning for a future that we feel certain will be radically different from the present, but lacking certainty about the direction the future will take, those responsible for shaping legal education can best spend their energy altering the current institutional structure rather than fermenting by speculation new courses to be poured into the cracked and rigid vessels of today. A law school serves society in at least two ways: (1) its current staff can be a resource of knowledge and expertise for addressing immediate societal issues, and (2) its graduates will design and operate an evolving legal system over the course of their professional careers. Therefore, two questions should guide the analysis: (1) is the law school as an institution a useful resource for the current needs of the real world, and (2) are the current graduates of the law school being prepared to be effective lawyers and innovative actors in the legal system in response to changes that take place over their own professional life span?

2. Drawing Inspiration from Medical Education

This essay is deeply informed by the work of the Carnegie Foundation for the Advancement of Teaching, founded in 1905 by the philanthropist Andrew Carnegie. Over the past century this organisation has prompted many important changes in higher education. In the last decade a major initiative of the Foundation has been the Preparation for the Professions Program, which has overseen a series of multi-year comparative studies of the education of the clergy, engineers, lawyers, doctors, and nurses.

The Foundation's report on American law schools, "Educating Lawyers" (2007), has been widely discussed in both the profession and academia, largely because of its unfavourable comparison of the process of preparation for the American legal profession with the educational programmes of the other professions it studied, notably medicine. "Educating Physicians", the Foundation's final report, was published in 2010 and, along with *Learning to Heal* by Kenneth Ludmerer, provide the basis for much of the following information about the distinctive features of medi-

cal education that the Carnegie Foundation would have law schools emulate.¹

2.1. The Twentieth Century Revolution in Medical Education

A century ago, in 1910, the Carnegie Foundation issued a blistering critique of the medical education, known as “The Flexner Report”, named after its author, Abraham Flexner. Flexner found that because scientific progress had greatly increased the physician’s diagnostic and remedial resources, medical education had a different function to perform. However, according to Flexner, it had taken medical schools upward of half a century to wake up to that fact. The gap between what was known and what was taught had become unacceptably wide. But how could medical schools, at the turn of the twentieth century, cope with the onslaught of new information and contend with the realisation that scientific knowledge is not fixed? Flexner advocated what he considered to be the only viable approach: to redesign medical education so that it had a procedural rather than substantive emphasis. The new objective of medical education should be to produce problem-solvers and critical thinkers who knew how to find out and evaluate information for themselves. “Though medicine can be learned, it cannot be taught”, wrote Flexner. “Active participation in doing things is therefore the fundamental note of medical teaching”.

The critical question was, then, what kind of institutional structure would facilitate this new educational method? Flexner proposed a new model: a four-year post-graduate programme built around faculty supervision of both patient care and laboratory investigation. The keystone of this new structure was the university-based teaching hospital, staffed by ‘physician-scientists’ who were competent both in the research laboratory and at the hospital bedside. Flexner asserted that no distinction should be made between research and practice, saying that “the [hospital ward] and the laboratory are [...] from the standpoints of investigation, treatment and education, inextricably intertwined”. Remarkably, within twenty years, Flexner’s proposed standard became the universal model for medical education both in the United States and Canada.

¹ This chapter also draws from the history of the Johns Hopkins medical school provided on the school’s website. An expanded version of this chapter with full attribution to sources is available at www.teachinglegalethics.org.

2.2. The Teaching Hospital as the Premier Provider of Health Care

Flexner pointed to the example of Johns Hopkins University in Baltimore, which had brought to America the scientific approach to medicine developed by German universities. Throughout the nineteenth century and into the twentieth, hospitals were generally reluctant to host anything more than nominal educational activities. However, Hopkins owned its own hospital and the medical school made all staff appointments. As a result the hospital at Hopkins achieved international eminence by combining patient care with path-breaking scientific research.

By 1910 the Johns Hopkins medical school was less than 20 years old, but had already demonstrated the viability of Flexner's proposal. Hopkins combined rigorous training in small classes and at patients' bedsides with an emphasis on research that was then rapidly applied to improved patient care. Teachers and students worked collaboratively on both patient care and research. The exemplar of this approach was the famous surgeon and teacher William Osler, who summed up the integration of scholarship and practice by saying: "He who studies medicine without books sails an uncharted sea, but he who studies medicine without patients does not go to sea at all".

As the Hopkins model was replicated elsewhere, a new consensus developed, held by both medical educators and hospital officials, that education and research improved the care of patients. The presence of students ensured that every detail of patient care would receive attention and served as an intellectual prod to the faculty, stimulating thorough study and discussion, and benefiting not only the immediate patient but also other patients should something new be discovered. The intellectual excitement of teaching hospitals attracted the most accomplished physicians to the staff. The most up-to-date information on the management of diseases was to be found in university hospitals, where the search for the cause, mechanisms, and cure of human afflictions was being actively pursued. Thus medical schools were continually improving medical practice through their success in discovering new knowledge and translating that knowledge into everyday medical care.

2.3. The Teaching Hospital as the School for Adaptable Experts

Incorporating a teaching hospital into the modern medical school not only makes the school immediately relevant to current society, the members of

which turn to its hospitals and outpatient centres for the best and most innovative health care, but also produces graduates who are adaptable experts rather than mere recipients of static knowledge.

For the central experiences of medical education, the student does not sit passively gazing at the solitary teacher, but rather works actively next to her teacher and fellow health care providers, while all focus on the patient. By the end of four years of American medical school, a typical student has conducted 500 physical examinations, made 300 clinical notes on hospitalised patients, assisted in the delivery of 10 to 30 babies, and probably attended at least one death of someone for whom the student has provided care.

Actual practice becomes the primary site for producing both knowledge and skill because the compelling real-life situation provides the motivation for understanding the patient's condition from many perspectives, prompts curiosity for more knowledge, and reinforces the desire for improving patient care which is the defining characteristic of the physician's identity. As not mere didactic instructors, but rather collaborators with students in this shared enterprise, teachers are constantly calling for higher performance from themselves as well as the students, and, critically, exemplifying their own initiative and resilience in the face of disappointment and failure.

According to the authors of "Educating Physicians", becoming an expert requires not only efficiency in a core set of competencies but also the capacity to expand those competencies and the ability to innovate. Thus an educational programme fails if it produces professionals who perform routine work skilfully but fail to see new possibilities or greater complexity in their daily practice. Such skilled professionals may be experienced but are not truly experts because they do not engage in knowledge building through inquiry and improvement of the field in which they work. Experts have the ability to respond flexibly to varied situations, to modify existing practices and develop new practices to improve performance, and to cross conventional domain boundaries to explore new perspectives and develop novel solutions to persistent problems. Experts are highly aware of the limits and uncertainty of their knowledge. They recognise their interpretations as provisional rather than conclusive, their questions are open rather than closed, and they actively pursue more complete understanding rather than assuming that they al-

ready know the most important things and, thus, become indifferent to what more remains to be learned.

Medical school ideally integrates formal and experiential knowledge longitudinally over the four-year span of the curriculum, matching what the student needs to learn next with the opportunities presented by practice at the teaching hospital. The student learns how to make increasingly high-stakes decisions under close supervision that assures both effective education and safe patient care. Space is created in which the student can develop professional judgement in determining how much help she needs, and how to get it, in order to deal with a clinical problem, establishing the foundation for becoming an expert. Medical education is thus progressive, developmental, participatory and situated.

3. A Path Not Taken

In 1916, only a few years after the publication of the Flexner Report, the New York State Bar adopted a resolution that “every law school shall make earnest clinic work [...] a part of its curriculum for its full course”. William V. Rowe, the author of that resolution, had earlier prepared a memorandum for Columbia University asserting that the “radical changes in the conditions of legal practice have now made adequate provision for clinical training and experience the most essential part of legal education” and that the “chief immediate duty [...] is to develop for law students the same comprehensive and exceptional clinical opportunities which [...] [are] open to medical students”. To create such opportunities, Rowe recommended that Columbia acquire part or all of a prominent New York law practice and move it to the university campus, where it would be “a large office organization, with a very general practice, and with no restrictions upon the kind, value, or amount of business”. Columbia would thus immerse its students in a practice superior even to the most prestigious private firms, a clinical experience that would be “the principal medium of instruction in all years for all subjects”.

Rowe’s ardour and impatience could easily be imagined as expressed today:

“We have had enough of mere debate and the time is now ripe for action [...] Why [the legal profession has] for so many years lagged behind all other professions [...] in providing systematic and experienced clinical and practical instruction [...] all laymen and nearly all lawyers find [...] utterly impossible to understand”.

Rowe's recommendations fell on deaf ears, as did a report to the University of Chicago eighteen years later by the distinguished legal scholar and later federal judge, Jerome Frank. "Our law schools must learn from our medical schools", he wrote. "The parallel cannot be carried too far". He too proposed a legal clinic in every law school that would function as a leading law practice. "The law school clinics would not confine their activities [to legal aid] [...] They could take on important work for governmental agencies [...]" The professional work that they would do would include virtually every kind of service rendered by law offices. Such clinics, he believed, would attract exceptional lawyers, capable of becoming brilliant law teachers, who would not otherwise give up practice for what he termed "the elaborate futilities" of conventional law school teaching. The students produced by such education would be the very opposite of "mere technicians"; instead, they would have acquired "a rich and well-rounded culture in the practice of law", as well as encouragement to see that an important part of their professional future "is to press for improvements in the judicial process and for social and economic change".

4. The Suitability of Present Law School Structure for the Future

Although some of the Foundation's recommendations relate to distinctive features of American legal education, the central critiques of its report are relevant to legal education around the world. The Foundation begins with the premise that the "central goal of professional schools must be to form practitioners who are aware of what it takes to become competent in their chosen domain and to equip them with the reflective capacity and motivation to pursue genuine expertise". However, the Foundation found at best 'casual attention' at most law schools to teaching students how to use legal thinking in the complexity of actual law practice. The result is to prolong and reinforce the habits of thinking like students.

It is true that around the world law schools are adding elective courses involving real client representation during the academic law degree, and in many common law countries, though not the US, universities are becoming major providers of post-graduate professional training. However, such clinics and professional training programmes are, unlike the teaching hospital, not viewed by the profession or the public as the primary site where the standards of legal practice and the structure of the legal system are being constantly challenged and improved to meet the

changing needs of society.² The teaching hospital serves the medical school both as a window and a door into the real world, making it both a vital resource for current societal needs and a dynamic site for empowering students to take responsibility for their own learning and for applying their ever-growing expertise to real-life problems. Could Rowe and Frank, writing in the early twentieth century, have been right that law schools could change their structure to create an equivalent of the teaching hospital?

5. The Best Law Schools of the Future

The transformation of legal education ought to be much easier than the task undertaken by medical educators a century ago, because law schools could become centres of cutting-edge legal practice without needing to make the kind of massive infrastructure investment represented by the teaching hospital. With library and information technology resources already in place, the typical law school would only need to provide additional working space and support staff to become a world-class centre of legal services if it enabled legal scholars to extend their work into practice settings and provided a site for practitioners to engage in scholarly critique and research to inform and improve their practice.

The cost of teaching in a way other than a system of solitary teachers facing large classrooms of students is almost always raised as a conclusive argument against even considering moving law schools towards the model of medical education. But medical education faced and overcame the same cynicism. In 1871, a distinguished professor of medicine at Harvard said that no successful medical school was willing to risk the large receipts produced by large classroom instruction by attempting “a more thorough education”. In 1910, Flexner responded, “[p]ublic interest must be paramount and when the public interest, professional ideals and sound educational procedure concur in the recommendation of the same policy, the time is surely ripe for decisive action”. By 1920 it was clear that the distinguished Harvard academic was wrong and Flexner was right.

The Carnegie Foundation’s study does not end with its troubling description of the limits of modern legal education; its report also asserts

² The Development of Standardized Client Assessment, available at www.teachinglegalethics.org, last accessed on 20 August 2012.

the conviction that “this is a propitious moment for uniting in a single educational framework formal knowledge and experience of practice”.

What is needed far more than additional financial resources is a new vision of what legal education can and should be. The Future of Law Project, by moving our eyes away from the comforting certainty of the past to expand our gaze out and beyond the limiting horizon of the immediate, may do much to develop such a vision.

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