

Spring 1970

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The John Marshall Journal Of Practice and Procedure

Volume 3

Spring Term, 1970

Number 2

IS LEGAL EDUCATION DESERTING THE BAR?*

by ROBERT F. BODEN†

INTRODUCTION

Writing in the October, 1969 issue of the *Wisconsin Bar Bulletin*, Chief Justice Warren E. Burger of the United States Supreme Court, in a most frank and forthright manner, stated:

1) That the legal profession as a whole has a very poor standing;

2) That one of the causes of this is the incompetence, misconduct and bad manners and lack of training of a great many lawyers who appear in the courts; and

3) That the cure for this sad state of affairs is partially the responsibility of the law schools and partially the responsibility of the bar.

The Chief Justice, basing his opinion on twenty years of law practice and ten years on the bench, stated in his article, entitled "A Sick Profession":

When I first reached some tentative conclusions some years ago, my appraisal of courtroom performance was so low that I began to check it with lawyers and judges in various parts of the country, as I attended meetings, to see whether I had misjudged. From time to time, in meetings with judges, I would ask what proportion of the cases tried before them were properly presented. The highest figure ever stated was 25 percent; the lowest was 10 percent. From that general and sweeping proposition, I began to probe for the specific reasons why trial judges — the best available observers — took such a dim view of the performance of lawyers in the courts. The answers covered the entire range of the acts performed in the courtroom.

The Chief Justice further explained:

The first and larger part of the defect is lack of adaptability

* This article is reprinted from the January, 1970 issue of the *Insurance Counsel Journal*. The Editors express their appreciation to both Dean Boden and the *Insurance Counsel Journal* for their permission to reprint this extremely timely article.

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and lack of adequate technical and practical training. The second category has to do with manners and ethics.

THE PROBLEM

The Chief Justice is not alone in his concern over the competence of lawyers in the field of trial work. Nor has recent criticism of the bar, in its ability to perform the task for which it is licensed, been limited to courtroom performance. There has been a general dissatisfaction with the quality of service rendered in the office as well as in the courtroom.¹

The response of law schools to the growing concern of the bar has been very discouraging. At a time when the bar has come to the realization that an erosion has occurred in the technical competence of its members as representatives of clients in the daily business of administering justice at all levels, the law schools of the country, or at least a growing number of them, have literally turned their backs on the profession they serve. They have gone about promoting a new kind of legal education even more removed from the realities of law practice than the classical brand which we have come to associate with Christopher Columbus Langdell, the Harvard Law School and the case method of instruction.

The "new departure" in legal education is really not new at all. It is the resurrection of a corpse which many legal educators have thought long dead. In 1943 Lasswell and McDougal, in a famous article entitled "Legal Education and Public Policy," 52 *Yale Law Journal* 203, advocated that "if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient and systematic training for policy-making."

The Social Engineering Curriculum

This is the "social engineering" approach to legal education. Its theory is that the purpose of legal education is to train architects of society and policy-makers for the future, not narrow practitioners of the law or mere legal technicians. This being the goal, the law school curriculum must reflect this great breadth of purpose. Operating within the restrictions of a three-year course, it is impossible to train a man as both legal technician and architect of society, and so the former goal must be at least partially abandoned to pursue the latter. The abandonment of the

¹ Chief Justice G. Joseph Tauro of the Superior Court of Massachusetts, Boston, has been a leading critic. See for example his excellent article, *Law School Curricula Must Change To Give Bar More Trial Lawyers*, 4 *TRIAL* 48 (October-November, 1968). See also, O'Toole, *Realistic Legal Education*, 54 *A.B.A.J.* 744 (1968), which contains an excellent bibliography on the subject. The laity, too, has been critical. An objective discussion can be found in *MAYER, THE LAWYERS* (1967), and a far less objective one in *BLOOM, THE TROUBLE WITH LAWYERS* (1968).

traditional purpose of legal education is justified on the ground that the task is impossible.²

The change in emphasis is accomplished by adjusting the law school curriculum in the following ways:

1) Courses in substantive law beyond the very basic first-year subjects, such as Torts, Property and Contracts, are made electives to permit the introduction into the curriculum of the new courses in social architecture. The basic courses of the freshman year are retained not particularly because of their fundamental content, but because they provide the professor with a vehicle for teaching legal analysis, otherwise known as "thinking like a lawyer." Making elective substantive law courses beyond the first year means that a student can take a J.D. degree without any study or classroom exposure to such subject matter as Corporations, Wills, Trusts and Income Tax. At the same time the elective offerings are so enlarged as to make it less likely that he will take such subjects as Secured Transactions, Negotiable Instruments, Administrative Law, etc.

2) The emphasis in the substantive law courses is changed to raise in these courses the policy questions which the professor desires to include. Thus, the course in Criminal Law now includes "such questions as what action should be criminal and why, what steps can be taken to deal most effectively with those whose behavior is deemed criminal and the role of the law in deterring such behavior." Because of this and because the "course demonstrates the importance of integrating the social sciences and law if we are to maintain a socially viable legal system," the treatment of the substantive law of crimes is reduced to coverage of homicide and theft only.³

3) Courses in adjective law are minimized and de-emphasized. The subject matter of these courses is infected with the blight of relation to the practice of law. They are, therefore, beyond the scope of the curriculum. Conceding that graduates should probably know at least the difference between a demurrer and a judgment, the typical social engineering curriculum retains one survey type course in procedure. Beyond that it is assumed that adjective law can be taught to the student after he graduates by the lawyer who has hired him at \$10,000 or more to work in his office.

² Martin Mayer, in his book, *THE LAWYERS*, p. 107, quotes a law professor as saying, "We would never dream for one moment of putting any of our personal affairs in the hands of the new lawyers we graduate and license every year." The notion is commonplace among many law professors, as any attendee at an Association of American Law Schools meeting will attest.

³ The quoted material, and the admitted limitation on substantive law coverage, is contained in the course description of Criminal Law in the current bulletin of the College of Law at the University of Iowa.

4) Skills training or applied learning has no place in the law school curriculum. It is beyond the competency of a law school to conduct a meaningful skills training program. Training for practice should be left to the bar. Legal skills will be taught to recent graduates in bar-sponsored programs by continuing legal organizations or by individual practitioners in the old manner of law office internship.

5) To fill the void created by removing from the curriculum, or by making elective, the traditional kinds of law school subject matter, new courses are added for the purpose of producing a law school graduate who is a well-rounded architect of society. Because this architect needs to know something more than merely law to perform successfully his policy-making role, these new courses must draw heavily on other disciplines. In the law school catalogue they are traditionally the "Law and" courses, but sometimes they are disguised under even more exotic titles. Some typical examples are: Law in Communist Countries, Law and Sociology, Law and the Problems of the Emerging Nations of Africa, Law and Outer Space, Law and Poverty, Student Rights, World Food Problems, River Basin Planning, etc.

Taking, for example, one prominent policy-oriented law school,⁴ an examination of the catalogue reveals that a student could obtain a J.D. degree and be eligible to write the bar examination after taking the following courses:

In the first year he would take a required curriculum of 30 hours. These hours include courses in Civil Procedure (6 hours), Conflict Resolution (3 hours), Constitutional Law (3 hours), Contracts and Sales (6 hours), Criminal Law (3 hours), International Law (3 hours), Property (4 hours), and Resource Planning (3 hours). All of these courses, except Conflict Resolution and Resource Planning, are traditional enough, but the bulletin discloses a heavy emphasis in all of them upon policy questions and the policy-making role of the lawyer.

Beyond the 30 hours of the first year there are only three other required courses in the second and third year. These are Torts (4 hours), where there apparently is a heavy emphasis on the question of whether fault should be the sole basis for tort liability, Constitutional Law (3 hours) and Criminal Procedure (3 hours).

Thus, 40 of the 90 hours required for graduation are required, and all of them tend away from the purpose of training for technical competence toward the policy-making area.

The 50 remaining hours are elective. The policy of the

⁴ University of Iowa, College of Law.

school is stated in the bulletin as follows:

Among the courses offered, but not required, are there some more necessary than others? The theory at Iowa is that beyond the relatively few courses which are required, a student should be free to follow his own intellectual curiosity and interests in selecting courses.

In addition to a wide range of elective offerings in the law school, students "are encouraged to take courses in other Colleges of the University" and may do so with the permission of the Dean.

An examination of the elective offerings discloses all of the traditional courses to be found in the required and elective curriculum of the practice-oriented law school, together with a vast array of inter-disciplinary courses and seminars. If the intellectual curiosity of a student is not stimulated by such subjects as Evidence, Wills, Trusts, Corporations and Taxation, he may study such things as the Common Market, Human Rights, and World Order, Law in Communist Countries, Race Relations, Poverty and the Law, World Organization and World Public Order, Democratic Control of Institutions, Judicial Behavior, Law and Morality or Student Rights.

The liberal arts value of a curriculum of this type is not questioned. That it should be found in a school with the purpose of training persons for entry into a highly technical and specialized profession is questioned.

A Critique of the "New Curriculum"

In one of the most delightful critiques ever given concerning the social engineering type law school, Professor William L. Prosser of the Hastings College of Law described the decline and fall of a mythical medieval medical school. The article, entitled "The Decline and Fall of the Institut," was published in Volume 19 of the *Journal of Legal Education*, p. 41. Prosser traces the sad tale of a medical school of great renown, which under the control of a new dean and faculty changed the curriculum to eliminate therefrom courses which concern themselves with "education for . . . mere patient care-taking." The new faculty lamented that for patient care-taking "physicians received fees, which introduced an element of the profit motive, a thing that in a community of scholars could only be characterized as deplorable and disgusting. The place was a mere vocational training ground, a naked trade school, which in any self-respecting university must be anathema." Operating from this hypothesis, the faculty began a systematic revision of the curriculum which in time substituted for the trade school type courses those of greater meaning and those which would produce doctors oriented to the social needs of the day. The faculty was unconcerned with

the declining percentage of graduates passing the medical examinations and indeed cared very little about such mundane matters. In due time the following sad end of the Institut was recorded.

In the sixteenth year, when the enrollment of the Institut had fallen to 89, and its examination percentage to 11, the good old Kaiser Friedrich died. He died of acute appendicitis, misdiagnosed by a recent graduate of the Institut, who administered a strong purgative. He was succeeded by Ludwig the Disagreeable. The Emperor Ludwig was suffering at the time of his accession from a slight case of housemaid's knee, which he had treated by another young graduate of the Institut. Unfortunately this worthy and estimable doctor was one of those who never had studied Anatomy below the waist; and his well-intentioned but quite unorthodox efforts to cure the ailment by cauterizing the joint with a hot iron, as once suggested in the classroom by Professor Umgestalter, not only caused the Emperor excruciating agony, but succeeded in crippling him for life.

Unlike his sainted father, Ludwig the Disagreeable was not an understanding or a forgiving man. He had the unlucky physician drawn and quartered. Then, since he harbored a vindictive spirit, he pursued the matter further, and made a complete investigation. In the end he hanged the faculty of the Institut from the battlements of the Schloss, observing meticulous care to see that Dekan Theophrastus was hanged higher than the rest, in deference to his rank. He then issued orders to seek out and reinstate the original faculty of Dekan von Glutz. Nearly all of these, however, had died or become superannuated; and the reputation of the Institut had become such that good medical professors from other universities refused to come within miles of it.

Its glory was never restored. During the Thirty Years War, when Seiwach was sacked by the troops of Tilly, it passed quietly out of existence. The Schloss was taken over as an annex to the brewery. That, at least, had always turned out good beer.

The Notion of the "Last Generalist"

Why would lawyers, albeit academic lawyers, set out upon a deliberate course to destroy the professional character of a law school and to convert it into an interdisciplinary mishmash under the label of social engineering? One finds no real parallel for this phenomenon in other professional schools. The medical schools continue to be interested in training people to practice medicine, as are the schools of dentistry and engineering concerned with their professions. Perhaps the closest parallel to what is happening in the law schools of this country could be found in the Divinity schools. The clergy seem to have assumed a new role not unlike the architect of society image envisioned for the bar. Perhaps their schools have responded in like manner.

The answer to this question is in the grand dream of some law professors — the lawyer as the "Last Generalist." Unlike all professions and occupations which are today tending more and more to specialization, the legal profession, according to some, is

already too specialized. The specialty is advocacy, in the broad sense of that term, i.e., the preoccupation of lawyers with representing clients in legal controversies. The lawyer's role as policy-maker demands something greater. Forsaking narrow specialization, he should be the "Last Generalist." He is conceived as a sort of Bernard Baruch, who should be able to advise in general about everything. He should be prepared to make the policy which will guide the future of the nation.

That some lawyers will lead in this fashion is inevitable. The Founding Fathers, the Marshalls, the Kents, the Storeys, the Websters, the Lincolns and Roosevelts were all lawyers who might fit the classification of Generalist. The list of societal architects from the legal profession is legion. No one will quarrel with the destiny of the profession to lead the country. It always has and it always will.

The hang-up comes with the notion that the law school is a place to teach people how to be "Generalists." Most of the above-named great men of the law achieved stature as architects of society without the benefit of any legal education in a formal sense, let alone exposure to a course in social engineering. The idea that candidates for first degrees in law should be educated as "Last Generalists" is dead wrong. It suggests their training as jacks-of-all-trades, implicit in which is the proposition that they shall be masters of none. It seems to be built upon several invalid hypotheses, namely:

- 1) That students come to law school with no ideas or convictions about public policy or what it should be;
- 2) That classical legal education cannot build upon or develop insights into questions of public policy by drawing upon background obtained in pre-legal work and by using traditional materials in law courses.
- 3) That a legally diluted curriculum at the undergraduate law level is sufficient formal training for the great mass of graduates who will become journeyman lawyers and not statesmen;
- 4) That graduate law departments are not a place to train "Generalists"; and
- 5) That prospective statesmen are incapable of themselves combining convictions about public policy with knowledge of the law for effective discharge of the policy-making role.

A frightening aspect of the whole problem of the direction being taken by American legal education is found in the notion that the departure into quasi-legal fields and a broader curriculum is in response to student demands for that kind of education.

It is suggested that if we don't provide this brand of education, we will no longer attract top-flight students.^{4a}

Finally, there are those who say that the function of a modern law school probably has nothing at all to do with teaching law and that it exists merely to screen candidates for the bar who will learn law later. This language will shock practicing lawyers:

. . . the function of a professional school is not primarily to teach a narrowly defined set of skills of the kind measurable by examinations, but to define a set of general criteria that recruits to the profession ought to meet, and to screen out those who do not measure up. The novice is supposed to display a certain amount of diligence and the right mixture of assertiveness and docility, to accept the basic values and assumptions of the professional sub-culture and to master the rudiments of the professional vocabulary. If he does this, he gets through the course of study; otherwise he does not. *Whether he actually learns the details of anatomy, court procedure or sewer design may indeed be irrelevant, or nearly so, since, if he gains entry to the profession, he can fill in the gaps in his technical knowledge later.* The primary role of the professional school may thus be socialization, not training. [Emphasis added.]⁵

This view of professional legal education puts training for law practice right back where it was 100 years ago — in the law office. The law school serves no real professional function. Depending upon how one looks at it, it is either a graduate school for social planners or a finishing school for aspirants to the bar who will learn law and legal practice later.

Why the "New Curriculum"?

What has brought legal education to this incredible position? Why is law, among the great and learned professions, the only one being deserted by its educational arm? There are several reasons, none of them pleasant to contemplate.

1. *The Legal Inexperience of Law Faculties.* In the past decade, law school enrollments and the numbers in law teaching have risen sharply. Increasing numbers have entered law teaching directly from graduate law schools and without any experience in or exposure to the practice of law. Indeed, for many, summer employment while in high school and college has been their only contact with the world beyond academe. At the same time, an earlier generation of law teachers, LL.B.s often recruited from the practicing bar, have been retired. Further, the affluence of the legal profession has made it more and more difficult to balance a law faculty with men drawn from practice. Accreditation rules have discouraged part-time teachers. The placement programs of the graduate schools have helped give credi-

^{4a} Pedrick, *Collapsible Specialists*, 55 A.B.A.J. 324 (1969).

⁵ JENCKS AND RIESMAN, *THE ACADEMIC REVOLUTION*, p. 206 (1968).

bility to the doctrine against "in-breeding" law faculties; that is, hiring one's own graduates after a period of practice. All of these forces have combined to isolate the law teacher from the profession and from the realities of practice, to place students more and more in classes taught by pure academic lawyers, and to put curriculum planning at the mercy of persons with little or no experience in the practice of law.

Are these kinds of law teachers (or a controlling majority of them on a law faculty) fit to lead students into the rough and tumble world of law practice? Like football, the adversary practice of law is contact sport, and it is fully as bruising as the great game. Would even one, let alone a majority or all, of the coaching staff of the Green Bay Packers likely be a man who had never played football? Granted that experience is not the only, or even always a necessary, credential for a teacher, or even for a law teacher. The purely theoretical parts of the law curriculum can be handled most adequately, and perhaps better, by the pure academician. But the *action part of law* — the nitty, gritty stuff that has to do with practice — is a body of knowledge gleaned only partly from books and from hearing related to the experiences of others. These are the materials on procedure, the skills part of the curriculum, and the upper division substantive courses that become necessarily related to the outside world.

Here is where time and again the man without practice experience fails. Here he is observed by his colleagues and students to be the most insecure, the most often unprepared for practical questions, the most ready to retreat to within the walls of academe. His insecurity is also partly related to the fact that his training for law teaching has one glaring deficiency. Because he has never battled or bargained in the marketplace of justice, pitting his wits and learning against an adversary of like or similar stature, he has never really had his ideas or his skills tested in combat with his peers. The test of his professional views is always artificial — the little battles between student and professor in the classroom, or with colleagues over coffee.⁶

In short, we need pure academic law teachers. But we don't

⁶ Chief Justice Warren E. Burger, speaking at the American Bar Association Annual Meeting in Dallas, Texas, in August, 1969, criticizing legal teaching technique, and comparing it to medical education with its heavy emphasis on clinical work, said:

Would we of the legal profession not say at once that the doctrine of *res ipsa loquitur* might well apply if a man held himself out as a doctor without having done real life acts with live patients as part of his training? What would we say of a physician or surgeon who relied solely on reading books and listening to lectures to learn his skills? If this criticism of teaching technique is valid, and it is, then how much more should we be concerned if the learning process is under the direction of teachers who themselves have not "done real life acts" with live clients?

Prosser, with his usual wit, in *The Decline and Fall of the Institut*,

need them in such overwhelming numbers, and we most certainly can't let them dictate curriculum. The latter they are beginning to do, and in their flight from reality and the needs of the practicing bar they are destroying legal education. This is perhaps the primary reason for the "new look" in curricula. The amputations from the practice-oriented curriculum in favor of the social engineering courses always occur in the areas where the academic is least secure and least able to defend his inadequacy to cope with the subject matter. Disguised in the high-blown rhetoric about the "Last Generalist" and the greater mission of the bar, simple self-preservation is the real reason in most cases.

The defense against inability to train people to practice law assumes less grand forms on some occasions. Arguments that one hears include the time-worn observation that practice "contaminates" a law teacher. A favorite cliché is the old adage that practice-oriented teachers turn out "mere technicians," as though anybody technically competent in the legal field was a product of which to be ashamed. Professor Prosser, in "The Decline and Fall of the Institut," summed it up by referring to the complaints of the profession concerning the quality of graduates of a socio-medical school. He said:

Complaints from doctors looking for young associates that they were being sent illiterates, morons, imbeciles, visionaries, crack-pots, congenital loafers, and medical ignoramuses, were disregarded as the hysterical maunderings of second-rate minds.

What is happening in legal education because of the changing background of law teachers is that ideas and subject matter from graduate legal education (where the interdisciplinary emphasis belongs) is being more and more imported into undergraduate law schools. The main reason for it is simplicity itself; namely, the pure academic law teacher knows nothing else. He is the narrowest of all law teachers, though he professes great breadth of vision. He cannot escape from behind the wall of books with which he has surrounded himself.

It is a problem of huge magnitude that faces the legal profession. At a time when the demand for legal services has never been greater, the legal competence of law faculties to train lawyers has been vastly diminished. No other profession finds

19 JOURNAL OF LEGAL EDUCATION 41 (1966), described the young medical professors at that unfortunate institution as follows:

The term Neunzigtagwunder, or Ninety-Day Wonder, applied to these men by the students, is believed to have been derived from the ninety-day period of emergency war-time training for second lieutenants in the Imperial Reserve Officers Training Corps, established by Kaiser Friedrich. Actually this appears to have been a bit unfair. Except for a complete lack of all practical experience, they were fully as well qualified to become professors of medicine, and to express opinions on questions of policy in medical education, as a man who has completed his year's service as an intern in a modern hospital.

itself in such a quandary. In it are the seeds of the destruction of the legal profession. The profession decries the inroads into legal practice by other professions and the capture of large blocks of law practice by non-lawyers. It is equally serious that the law schools of this country are beginning themselves to turn out non-lawyers.

2. *The Obsolescence of the Classical Curriculum.* The law schools operating more or less in the tradition of Dean Langdell and the case method have long been open to attack. In its too-heavy reliance upon the case method, particularly in upper division courses, in its ignoring of statutory materials, in its avoidance of problem-solving and its almost entire devotion to appellate decisions, the case method and the curriculum it spawned have rightly been criticized. The method was designed in the 1870's to bring law students in touch with the law itself as distinguished from commentary on the law, a truly noble advance. It ignored in large measure the fact that a good deal of what lawyers do is unrelated to the work of appellate courts or theoretical notions of the substantive law, but is involved with negotiation, factual investigation, draftsmanship, planning the affairs of men to avoid controversy and the skills which we lump generally under the term "advocacy."

There are, in short, great gaps in the case-oriented curriculum which most law schools followed as the gospel well into the middle of the 20th Century. The case method of instruction in traditional areas of substantive and procedural law determined a curriculum upon which the law schools were willing to rest too long. When the attack upon Langdellian theory came, it probably should have been mounted by those who were concerned with a curriculum more slanted toward equipping people to be practitioners. But the influence in legal education of persons of that mind was beginning to wane when the attack came. Instead, the attack on the traditional method was from the other flank, mounted by those who despaired of training practitioners and who desired the law school product to be a statesman. The result is that modifications of the classical curriculum too often include a departure from its subject matter into the more exotic interdisciplinary fields.

3. *Demand for Quasi-Lawyers.* The social engineer or statesman product of the policy-oriented law schools is a person for whom there is a demand in the modern world. The practicing bar must realize that, for example, governmental agencies with a planning function or a policy-making role are interested in a law school graduate who has been exposed to the kind of training which a policy-oriented school can offer. These employers are not

interested in the fact that such a person knows nothing about court procedure or evidence, or even about trusts or corporations if his policy-making job doesn't involve these areas. When the curriculum and academic emphasis of a law school is adjusted to meet this demand, the practicing bar suffers in direct proportion.

The demand that exists for quasi-lawyers or statesmen or social engineers justifies the existence, without question, of some institutions to train them. That all or most law schools should jump to get on the bandwagon is the unfortunate part of the entire picture.⁷ Unfortunately, an increasing number of law schools, staffed with policy-oriented faculties, are attempting to satisfy this demand and this can produce only a corps of young lawyers ill-equipped for the practice. Certainly it is easier to sell a young man on the glamour and prestige of a career in policy-making, but the simple fact is that every tribe needs both chiefs and braves, and we simply cannot afford a system of legal education which caters only to demands of this sort.

4. *Accidental Changes in Curriculum Emphasis.* A law school curriculum can be changed and its emphasis directed away from the practice without the faculty even being aware of it. In recent years, grant money from foundations and the government has become available to law professors in increasing quantities. The demands of these foundations and of the gov-

⁷ They have not all jumped, and those that have have done so in varying degrees, as the catalogues and bulletins will disclose. The danger lies in the clearly discernible trend. And it also exists more acutely in those states served by a small number of law schools. If the law school, or one of the two or three law schools, within a state is the major source of supply for the bar of that state, then the departure of that school from the ranks of practice-oriented schools can be disastrous for that state. A lesser problem exists when the policy route is taken by a school not charged with supplying a particular bar with people who should know some law and something of how to practice it.

Social standing in the family of American law schools becomes involved in this matter. There is snob appeal connected with being a training ground for architects of society. Joining the select group with this high mission most often goes hand in hand with becoming a "national law school," departing, so to speak, from the mundane task of training journeymen lawyers for practice in a particular jurisdiction. Martin Mayer, in *THE LAWYERS* (1967), sums it up well in discussing, at p. 92, social engineering at the University of Southern California:

Harold W. Solomon, a lean and earnest New Yorker who died in early 1967 while still in his forties, was the recognized pater-familias of these Young Turks (USC law faculty). He liked to talk about lawyers as fitting into three general categories — physicists, engineers and plumbers. UCS was to train the physicists . . .

'The legal physicist,' says William Bishin, 'the sort of lawyers I'm talking about, will get the very hardest problems.' Pervasive in the conversation of the USC professors . . . is the concept of the lawyer as the last generalist in a fragmented society, the one figure who can pull together all the expertise and tie up a program. The attitude deliberately ignores the warning recently given by Dean Pollak of Yale, against 'the folly of building a law school on some sort of principle of omniscience.' If a law faculty is not omniscient, after all, who is?

ernment relates mostly to work in the policy-making areas and is of an interdisciplinary nature. Foundations and the government are apt to fund grant proposals which are "exciting" because they involve the participation of law faculty members in the policy-making role. These interdisciplinary studies have attracted, and will continue to attract, large sums of money to individual faculty members and to the law schools as institutions.

On the other hand, foundations and the government are seldom interested in the kinds of research projects which would look into a revision and updating, for example, of the code of civil procedure in State X or the probate code of State Y, or the model jury instructions of State Z. Law professors continue to serve these projects largely as volunteers without grant aid.

Faculty members can make a significant contribution as participants in these studies at both levels. While it would be helpful in the total law revision effort if foundation and government funds could be attracted to a broader range of fields, that is the subject of another article. We are here concerned with the impact of these research projects on the undergraduate law curriculum. When Professor X obtains a grant to make an empirical study of whether police departments are acting in brutal fashion, or to compare the tribal laws of North American Indians with those of the dynasties of ancient China, or to plan land reform in South America, the first thing that happens is the creation of a seminar course as a vehicle for him to obtain research assistance. The new course, however remote may be its connection with practicing law in the sense of office or courtroom advocacy, takes its place in the curriculum usually as an elective in the senior year. It competes in that slot with other elective courses such as Negotiable Instruments, Restitution, Creditors' Rights, Domestic Relations, Trial Practice, etc.

Participation in courses of this kind are always at the expense of exposure to subject matter which will help prepare a student to practice law. These courses become immensely popular. The professor thinks they are popular because he is popular and the subject matter of his course is exciting. More often, the courses are popular because typically they do not involve final examinations, the student is graded on a paper which he prepares at his leisure, and traditionally higher seminar grades pad the average and boost class standing.

The involvement of students in any great degree at the undergraduate level in this type of research project for faculty members, as a substitute for regular courses, can be as damaging to the training of the student for practice as would be restructuring of the curriculum generally. No one quarrels with the use of

faculty members in projects of this kind nor with the involvement of students in them. Substituting them for the tools that a student needs to practice law is the objectionable practice of an increasing number of law schools.

5. *The Indifference of the Bar.* Enough of criticism of the law schools and legal educators. Until the very recent past the bar has virtually ignored the direction of legal education and has gradually forfeited its historic role of prime responsibility for the education of new lawyers. This responsibility has been vested in the bar, in our Anglo-American system, since the very beginning of the Inns of Court in England some 700 years ago. In the beginnings of the law school era in this country the bar took an active interest in legal education. The oldest section of the American Bar Association is the Section on Legal Education and Admissions to the Bar, formed in 1890. In 1900 the American Bar Association spun off the Association of American Law Schools. In the early 1920's the ABA instituted its program of accreditation of law schools.

The modern history of bar involvement in legal education has been one of indifference to the law school and almost complete delegation of the regulation of legal education to the educator-dominated organizations which are the AALS and the ABA Section on Legal Education. It cannot be proved, but it certainly seems likely, that the awakening interest of the bar in the problems of legal education, and the direction that it is taking away from professional education, is related quite directly to the increasing salaries which law school graduates command. When a law school graduate could be had for nothing or for \$200 a month, the bar was unconcerned that he came to the practice with no skills or from a school that trained him as a statesman. But now the firm which finds him incompetent in small claims court is disturbed because he commands between \$10,000 and \$16,000 per year. The bar, in short, is beginning to be worried about an immediate return on investments of that substance. The lawyers are beginning to listen to men like the Chief Justice when he asserts that only 10% to 25% of the cases presented in court are competently presented.

The concern of the bar will have to be expressed in even stronger terms. The bar is not fully aware of the erosion that has occurred in professional legal education.⁸ If the legal pro-

⁸ Consider, as typical, the excellent speech of Chief Justice Burger at the ABA meeting in Dallas in August, 1969, *supra*, note 6. His critique of teaching methods and advocacy of clinical experiments is perceptive and persuasive. But he does not treat of the departure from legal curricula, assuming the choice to be between types of curricula and teaching techniques within the traditional area of practice-related material. That, as seen, is only half the battle.

fession and the adversary system of justice is to be preserved, the bar is going to have to police legal education. *It is going to have to assert some control over what is taught in the law schools and who teaches it.*

THE CURE

At the present time the bar examination process is the only control the bar or the courts have over law school curriculum. Indeed, in this day and age curriculum control may well be the only valid reason for a continuation of bar examination, at least in many states. As long as the examiners test candidates for admission on the substantive and adjective law, at least those schools concerned about the records of their graduates on bar exams will be discouraged from departing too drastically from the practice-oriented curriculum into the world of education for policy-making. The problem with the use of the bar exam as a brake is that it may be too effective. A law school may become so involved in competition with other schools to produce a high percentage of graduates passing the exam on the first try that the curriculum becomes nothing more than a glorified bar review course. This is as undesirable an extreme as the other extreme that we have been discussing.

Of course, the bar examination in no way deters a school which has no concern for the record of its graduates on bar exams. It may be true that the concern of a school over its record on bar exams decreases in the same proportion that it diffuses its graduates beyond the jurisdiction in which the school is located. For example, if 80% of the graduates of X State University write the bar exam in State X, the failure to pass a large percentage of them on the first attempt will be publicly noticed and will adversely affect the reputation of the school, particularly in State X. On the other hand, if the same small percentage of graduates of Ivy University are able to pass the bar exams in the 50 states in which they take them, this is a fact that is apt to go unnoticed and certainly will not be publicized by the only office having the statistics; i.e., the dean's office at Ivy University. Thus, the effectiveness of the bar examination to police the curriculum diminishes with respect to those schools whose graduates are widely dispersed.

When the first standards for legal education were developed in 1921 by the American Bar Association, it was appropriate to generalize that the faculty of an approved school should be competent and of suitable size and that the curriculum could be entrusted to the faculty. Today that is impossible, and yet the proposed new standards for legal education, which were presented and so rightly defeated at the ABA convention in Dallas,

Texas in the summer of 1969, were, while specifying in great detail other things that law schools must have and do, content to leave the all-important matters of curriculum and faculty standards to the schools themselves.

1. *Curriculum Control.* The American Bar Association Standards for Legal Education should set minimum standards in this area. This is by far a more important consideration than dictation of faculty-student ratios, library size, etc. As long as graduation from an ABA approved school remains a condition of entitlement to admission to the bar exam (or to the bar itself in diploma-privilege states like Wisconsin), the ABA must be interested in what is taught in the specified three-year period of legal education. It should not dictate in detail the curriculum or attempt to standardize the course in all schools. Nor should the rules be so rigid as to preclude innovation and experimentation. But the Standards should express the policy that the course of study leading to the first degree in law be structured so as to produce a candidate for the bar reasonably equipped for the general practice of law. It is probably also wise for the "factors" which implement the ABA Standards to detail this policy to some extent, including probably some guidelines encouraging a skills or applied learning program in each school.

Presently a debate rages in ABA and in many state bar organizations over the recognition of specialists in the practice of law. One of the hardest problems being considered is how to certify specialists, which includes the question of the desirability of a specified course of study as a condition of a specialty certificate. How can the bar even consider such matters until it has set educational standards for the general practice? The bar should not tolerate, and indeed is beginning to be unable to afford, an educational arm disdainful of training for the practice and operating under a theory that law schools cannot turn out reasonably competent practitioners.

2. *Faculty Standards.* With rare exception, appointments to medical faculties are not made unless the candidate has approximately ten years' experience in the practice at the internship, residency and specialty practice levels. If the ABA prescribed such a standard for legal education, the teaching fraternity would cry out that an attempt was being made to transform law schools into "naked trade schools" designed to produce "money grubbing practitioners." The same law professors, however, would be as reluctant to trust their lives to doctors with less technical training as they would be to trust their fortunes to last year's law review editor.

The needs of legal education do not exactly parallel those of

medicine, and it is not suggested that a rigid rule be imposed requiring every law teacher to have had some law practice when he joins the faculty. First, there is room in every school for the purely academic lawyer. In a school with a practice-oriented curriculum, he is not freely assignable to all courses, but this becomes merely a scheduling problem for the dean. Secondly, practice experience may be acquired after appointment to fill any gaps in a new teacher's credentials. Thirdly, an academic lawyer can be exposed to the practice without actually practicing law on a full-time basis. He may obtain a feel for the problems of the practice through close association with the bar and involvement in bar activities. It is entirely probable that in the course of recruiting faculty, the practice-oriented law school, which ordinarily looks to teaching candidates with experience in the practice, may find bright young men with academic credentials only, who should have the opportunity to round themselves out after joining the faculty and who should not be excluded from careers in law teaching because of lack of practice experience.

Therefore, it does not appear that the answer to bar supervision over who teaches law is simply to write a standard for legal education which requires x number of years in the practice as a credential for appointment to the law faculty. What seems more reasonable is that the bar should be interested in protecting the teacher with a practice background and in encouraging the appointment to law faculties of men who can bring to law teaching expertise obtained through experience at the bar or on the bench.

In the legal academic world today the man who comes to law teaching from the practice is most often penalized for having taken that route to an academic career. Practice is seldom given full credit, as compared to graduate law degrees or a candidate's publication record, in determining the rank to which a man will be appointed, and it is more rarely used as a basis upon which to justify promotion or tenure. A man, for example, with 8 or 10 years of law practice will most often be appointed to the law faculty at the rank of Assistant Professor, whereas a man with a graduate law degree and a record of publication may enjoy appointment at the higher rank of Associate Professor. Most law schools promote and award tenure upon a consideration of the accomplishments of a faculty member in teaching, writing and public service. In recent years the "publish or perish" doctrine has become more firmly established in legal education. Whether this is good or bad one never hears in conjunction with a discussion that the doctrine applied to law schools should be "practice,

publish or perish." Another notion that tends to keep practitioners out of law teaching is the stigma that is attached to a school which employs a large number of part-time teachers. It is, of course, to the advantage of the full-time teachers that the competition from part-time teachers be diminished as much as possible. However, there is a large body of the curriculum that can best be handled by qualified part-time teachers, and it is probably not in the best interests of the law schools to exclude them on any arbitrary basis that establishes a minimum percentage of the total curriculum that must be handled by the full-time faculty.

Therefore, the interest of the practicing bar in encouraging the appointment to law faculties of teachers with experience in the practice is perhaps best served by standards and factors which:

- 1) Remove any restriction on the percentage of the curriculum which may be taught by part-time teachers;
- 2) Express any restriction on the use of part-time teachers in terms of the types of courses which they may offer;
- 3) Give fair weight to the practice record of a candidate for appointment to the faculty as compared to the weight given graduate law degrees and publication records; and
- 4) Require the schools to include law practice as a substitutive norm for promotion and tenure on an equal basis with writing, research and public service.

In addition, the bar could make a great contribution to legal education if its local units would cooperate with the law schools in exchange programs which would permit law teachers without experience in the practice to enjoy leaves of absence from teaching for the purpose of practicing law in the local law firms in the area where the school is located. By this device those teachers coming to law faculties without any experience in the practice could obtain the background necessary to qualify them as well-rounded law professors.

3. *Clinical Legal Education.* One of the currently popular experiments in legal education involves "clinical" training for law students. To those law schools which have long mounted skills or applied learning programs, the concept of clinical education is not new in the sense that those schools have always made an attempt to bridge the gap between law school and law practice by providing clinical experiences for the students in skills training courses such as Legal Writing, Appellate Practice, Office Practice and Trial Technique and Practice courses. The new innovation in clinical legal education is that the students are exposed to actual cases instead of moot or contrived situations

or problems structured for classroom demonstration. The clinical legal education program typically goes hand in hand with a limited license to practice law accorded by the State Supreme Court to third year students and confined to the representation of indigents through the agency of a legal aid society or similar type legal services program. The appearance on the scene of OEO funded legal aid projects has given great impetus to all such programs of clinical legal education. They are universally considered to be effective teaching tools not only in the sense of teaching skills but of imparting a sense of professional responsibility to the student at the same time that a valuable public service is rendered.

Clinical legal education programs must, however, be approached carefully. Several pitfalls exist which the law school must guard against in planning and executing such a program.

In the first place it is probably folly to believe that the legal aid office is a place where a total clinical experience can be given to students. The clinical program of a law school should be more than merely a student legal aid clinic because the practice of law involves a great deal more than the handling of the kinds of cases that come to a legal aid society. Legal aid work seldom involves a student in the practice of what he has learned beyond the very rudimentary cases arising out of family problems, the consumer area and criminal law. Thus, the law school legal aid clinic, valuable as it may be, can only be a part of the total clinical program of a law school with a well-rounded skills curriculum. Recent events indicate a tendency on the part of law schools to equate clinical training with legal aid. Perhaps part of the reason for this may be found in the motivation of those who become involved in legal aid work at the law school level. The important thing for the bar to be wary about is an attempt by a law school to suggest that it satisfies fully the need of its students for clinical education by the establishment of a legal aid program. These programs are a great forward step but they must complement other forms of clinical education to produce a total package in the skills area.

In the second place the personnel of clinical legal education programs, built entirely around legal aid, is in many cases not the kind of personnel that should be responsible for clinical legal education. The instructor in a meaningful skills program, above all other areas of the law school curriculum, must be a person with experience in the practice.⁹ In the clinical area it is not merely a matter of preference for teachers with practice experi-

⁹ See *Meeting the Educational Needs of the Newly Admitted Lawyer: A Proposal for General Practice Courses*, ALI-ABA JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION (1967), pp. 9-11.

ence, but a matter of absolute necessity. As clinical legal education programs begin to emerge out of the current expansion of legal aid as a result of OEO impetus, it becomes clearer and clearer that the law school legal aid clinics are often staffed by persons without the kind of practice experience which should be the credential of a clinical legal educator. More often than not the direction of such a program falls to a highly motivated but youthful law professor whose principal purpose and interest is the public service to the poor which can result from the program. The staffing of these programs with inexperienced practitioners can be a backward rather than a forward step in clinical legal education. Most legal educators with experience in skills training would probably prefer a moot case under the direction of a skilled practitioner to a real case in a legal aid clinic under the direction of a person without substantial experience in the practice.

In the third place the clinical experience derived from participation in some legal aid programs may be of very doubtful validity from the standpoint of contributing to the training of a young man for the practice of law. Under the influence of OEO policy some legal aid programs have become so politically oriented (under the label "Law Reform") that they offer little, if any, opportunity in training a legal practitioner in the techniques of the day-to-day handling of controversies between private litigants.

4. *Teaching Professional Responsibility.* One of the deficiencies observed by Chief Justice Burger in the article referred to above was the failure of many lawyers to know or apply the principles of professional ethics and etiquette which are supposed to govern the conduct of attorneys in and out of court. Perhaps all law schools in recent years have seen an increase of interest in the subject of teaching professional responsibility. Most law schools have introduced into their curricula, if they did not have it before, a course on Legal Ethics and Professional Responsibility, and others have upgraded their offerings in the subject. The advent of widespread opportunity for students to participate in legal aid programs has given impetus to the idea that professional responsibility can also be taught outside of the classroom in a clinical atmosphere.

A law school with a professional emphasis, as distinguished from an interdisciplinary program, finds itself in a better position to teach professional responsibility. A professional law school can become more intimately related to the practicing bench and bar and can more easily identify its students with the profession. The professional responsibility program at such a school can be built upon the hypothesis that the students are

members of the legal profession, defined in the sense of that term, as it embraces the practicing bench and bar, bound by the code of professional responsibility. If a law school is merely offering a graduate course for social planners, policy-makers and "Last Generalists," it is far more difficult to implant in the student body a sense of professional pride, a desire to render competent professional service and a sense of the service obligations that a member of the bar should be willing to undertake. After all, the legal phase of the curriculum is secondary to the broader goal; the training for the practice of law is incidental to the main thrust of the program, and, therefore, little appreciation for a code of professional responsibility can be engendered. If no one is trying to induce the graduate to enter the adversary practice of law, then there is little reason to be greatly concerned about the ethics of advocacy and even less reason to be concerned about the positive professional responsibilities of a lawyer.

The law school should be the place where the student becomes acclimated to living under the code of conduct required of a member of the bar. It is unfair to treat him as a school boy or student until the time of his graduation and then suddenly to expect that he will adapt. To accomplish this transition, it is not enough that the school merely offer a course consisting of a series of sermons on the do's and don't's of the code. The school must create a professional atmosphere, encourage identification with the bar and develop professional attitudes in the students. The success of such a program depends as much upon the curricular emphasis of the school as upon anything else. In short, the professional responsibility program must be built upon the hypothesis that the school is a professional school.

CONCLUSION

The cure for legal education, as it enters the 1970s, is not an easy one and not one that can be accomplished overnight. It presupposes that the bar will become interested in preserving professional legal education in a majority of American law schools. This means a more active role by the bar, through the ABA, through boards of bar examiners and through state bar organizations and state supreme courts in regulating the training that candidates for admission to the bar will receive. That the law schools are unable to regulate themselves has been proved by events of the past twenty years. They have been unable to respond to the need for graduates reasonably equipped to practice law. It may be conceded that the law school cannot turn out a seasoned lawyer. There is a great deal that must be learned in the practice after graduation. But it is equally apparent that the law schools have not only been unable but unwilling to make the

best effort that can be made in that direction. Instead of experimenting with new techniques and new curricula, designed to improve the technical competence of their graduates, they have gone exactly in the opposite direction. For the sake of creating a new profession of "Last Generalists" they have helped to deprofessionalize the legal discipline and to mongrelize the bar, at the same time encouraging the departure of promising lawyers to other fields where they might serve as architects of society.

Thousands of law students are today attending policy-oriented law schools. They think they are being taught to be lawyers. The legal profession is threatened by a substantial portion of an entire generation of lawyers having little or no appreciation for advocacy or the adversary system of justice and a diluted exposure to the substantive and adjective law which law schools should be teaching. At a time of great need for reasonably trained legal practitioners, the bar is beginning to get, as the product of modern legal education, a group of super-sociologists and super-political scientists ill-equipped for the daily practice of law. It may be anticipated that when these young men discover that for most of them life holds a career in the daily practice, as distinguished from service as architects of society, a large number will become disillusioned and forsake the profession. It should be more evident that a massive infusion into the profession of quasi-lawyers, poorly trained for advocacy, will in the long run contribute to the downfall of the system itself. In this concept is perhaps found the greatest criticism of the "new look" in legal education. In its hurry to produce the "Generalists" who will remake society for a better tomorrow, it ignores the historical fact that those great generalists of the past who came from the legal profession, with very few exceptions, came by a route which included a post-graduate course in the adversary practice of law. It is not accidental, in the opinion of this writer, that the lawyers who built this country were tested in the marketplace of justice in the daily practice of law. They experienced firsthand as practitioners the need for social change and progress; their ideas about public policy emerged from experience far removed from the groves of academe.

Now some legal educators are telling today's generation of law students that legal education for the practice of law, or the practice itself, is unnecessary and that the bar can retain its role of leadership in the affairs of men by shortcutting the process to exclude not only training for policy-making in the hard world of practice, but training for law in the schools themselves, allowing the new graduate to leap immediately from a quasi-

legal education into such positions of leadership.

Advocates of a retention of the professional character of law schools are not arguing for the status quo. They recognize that changes must occur in the curriculum and in the teaching standards. They are open to changes which improve the program so long as the professional character of the school is not destroyed. Thus, they support curricular revisions which introduce clinical training and other techniques which will produce a man well-qualified for the practice of law. What horrifies men of this school is the spectacle, largely unnoticed by the bar, of curricular changes designed to detract from the professional character of legal education, coupled with a movement for the face-saving inclusion of clinical training of insufficient breadth and under the guidance of persons substantially without clinical experience.

The answer to the question of whether American legal education will continue to serve the needs of the practicing bar is up to the bar itself. The bar is going to have to tell the law schools of this country the kind of product it wants and what grounding in legal skills it wants the product to have. To accomplish this, the organized bar must see to it that it retains the accrediting function for law schools and that it writes meaningful standards for legal education which will reflect its needs. Individual practitioners are going to have to bring the message home on an individual basis by insisting upon properly trained graduates.

Such is perhaps the greatest public service that the bar can render, for it is from the professionally oriented law school and through the ranks of the practicing bar that the architects of society will come. The professional law school does not avoid coming to grips with the problems facing society and the need for lawyers to solve them; rather, it recognizes its role to be one chapter in the making of tomorrow's leaders. Before it is too late, the bar must tell the other law schools, less aware of their own limitations or of the other chapters in the total book, "Shoemaker, stick to thy last."