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Legal Education and Legal Services--Some Reflections

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LEGAL EDUCATION AND LEGAL SERVICES—SOME REFLECTIONS*

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Stories about lawyers tell us something about ourselves—just as political cartoons communicate essential ideas by exaggeration and caricature.

Consider the following stories about lawyers. One summer day two men are floating through the countryside in a lighter-than-air balloon. Clouds move in and then a thunderstorm hits them. They are thrown off course and have not the foggiest notion of where they are. Finally, they spot a town down below, through a clearing in the clouds, and they lower the balloon closer to the ground. A gentleman is walking down the street and one of the balloonists leans over and shouts: "Where are we?" The man cannot hear at first, so he repeats his request, and finally the response comes. "You're in a balloon." One balloonist looks at the other and says "That man is a lawyer. His answer was entirely correct but revealed absolutely nothing."

A second story. A shipwreck leaves a number of people marooned on an island, separated from the mainland by a peninsula filled with sharks. Several persons attempt to swim across this shark-infested water and, after a minister and a doctor have failed, a lawyer plunges in and easily swims across. Everyone is saved, some saying, "It's a miracle!" "Nothing of the kind," the lawyer replied, "just an example of professional courtesy."

These are caricatures. But what are they saying about lawyers and their characteristics? Lawyers, more than the population in general, have some characteristic tendencies: they are analytical and highly rational, detached and impersonal, aggressive and adversary. There is increasing evidence that both the self-selection of law students and their experience in law school accentuates those characteristics.

Because more college graduates want to go to law school than

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can be accommodated, law students tend to be smarter, more aggressive and more "tough minded" than other college graduates. At the elite schools, where the pressure for admission is the greatest, a group of chronic overachievers has been collected and there is a highly competitive atmosphere. Even if examinations and grades were abolished, a highly competitive law school atmosphere would persist because of the self-selection of individuals who thrive on competition. The reward-incentive mechanism of law school—especially the importance of first year grades as the basis for law review selection and future employment prospects—undoubtedly reinforces these underlying competitive appetites.

Law students excell in certain analytical skills that are reasonably well tested—again and again—by the LSAT, by law school examinations, by bar examinations, and, most recently by the Multi-State Bar Examination. (It is no wonder that studies of the relationship of performance on these tests show an extremely high correlation!) Those analytical skills are powerfully enhanced in law school, which does an excellent job of expanding a law student's ability to handle concepts, verbalize them, and use them in argument. This law school instruction is done for the most part in an impersonal, detached way that is abstracted from the day-to-day experience of living and breathing human beings. The law curriculum nearly everywhere—and certainly at my school—gives insufficient emphasis to people-oriented knowledge, skills, and attitudes. We do not do enough in the intellectual, practical, and humane dimensions of interviewing, counselling, getting information from clients, handling the emotional aspects of professional roles and dealing with the dynamics of negotiation and bargaining.

Another observable trend in law school is a tendency on the part of many law students toward passivity, detachment, and emotional withdrawal after the first year of law school (and sometimes before). Most law students experience this phenomenon to some extent and some to a great extent. It is inevitable, of course, that the enthusiasm at the outset of professional study is bound to fall off—the same level of effort and anxiety cannot be maintained for a three-year period. The same phenomenon is found in all professional education, whether it be for the ministry or for medicine. The extent of detachment and withdrawal in law school, however, seems greater than necessary. If we had a clearer perception of its causes, we could take more effective steps to meliorate it.

Many students and some faculty attribute the passive withdrawal or hostile frustration of law students to first-year teaching

methods and the first-year environment. Dialectical teaching is strong medicine—a powerful technique of learning that deeply engages the student and, if not carefully done, may also produce some negative byproducts. But inadequacies in the use of a highly effective teaching method provide only a partial explanation, if that.

Another explanation points to the failure and frustration of the chronic over-achievers of which I spoke—the Phi Beta Kappas and others with top records who do not receive similar rewards in the more highly selective atmosphere of law school. Their expectations and hopes for success in law school are not achieved, and in their rejection, hurt and frustration, they withdraw from engagement in what is perceived as a painful experience. This factor suggests that a broader inventory of rewards and incentives in law school might be helpful, recognizing students who have lawyering talents distinct from those possessed by the small minority who are rewarded by high grades and law review status.

The students who drift through the last half of the curriculum are not permanently harmed; they do recover their sense of self confidence, their zeal for learning, and their capacity for growth when they get out into actual practice settings. While there is no evidence that law school deforms the character or personality of law students, there are tragic costs in the lost opportunities of what might have been. The walking wounded of law school fail to take advantage of the precious time that they have in law school for learning, for reflection, for inquiry and for personal growth. This waste of unutilized opportunity is a tragedy for faculty, law students and society.

Although some of the negative effects of law school are temporary, others are more lasting, particularly the changes in attitude relating to professional performance. Law students not only withdraw to some degree—to jobs, social activity, poker or extracurricular activities—they also become more cynical and less idealistic about their legal education and about the goals of public service which they brought to law school. The American Bar Foundation has recently published a study which documents this point fairly thoroughly. This study of law students at a representative group of law schools reports dramatic changes in student attitudes as students move through law school. After the first year, law students begin to have very serious doubts about the methods by which they are taught, the structure of the curriculum, and the efficacy of law study as compared to apprenticeship experiences. Third-year

students more than first-year students are inclined to believe that the faculty is neither interesting nor interested in them.

Changes in attitude toward possible careers follow a somewhat similar course. First-year students who express great idealism in terms of service to others, or in terms of public interest or public service careers, show marked declines in the second and third years in their interest and desire to serve others. They have shifted markedly from an interest in public service jobs to a desire to make money in private practice on behalf of corporate interests.

Many informed observers believe that law students acquire a marked tendency to approach problematic situations in somewhat narrow legalistic terms, a characteristic that is then carried into the legal profession in the United States. Law students tend to arrive too quickly at adversary solutions—confrontations, law suits, and strictly legal remedies. There is an avoidance of the emotional aspects of the particular human problem, a failure sometimes to get at the heart of what's really bothering the client, because the problem is perceived too quickly and too emphatically in strictly legal terms that call for a legal remedy. The result is a resort at too early a point in time to an aggressive or combative posture when accommodation, negotiation and a more careful exploration of the real aims and interests of the client might better get to the heart of the problem and provide a better solution.

Law students, it is said, become better and more aggressive talkers during the course of law school—and worse listeners. They are better at law application, with which most of the curriculum is concerned, than they are at law creation, which represents more of the day-to-day life of most lawyers. Law application involves taking a body of doctrine and applying it, usually in an adversary setting, to an event that has already occurred. Law creation involves the design and implementation of private or public regimes of law for the future, such as counselling a client on an estate plan, or dealing with a legislative or administrative body. While the two tasks are intimately related, creating legal regimes that will guide clients through an uncertain future is a more creative and difficult legal task that calls on somewhat different talents. In short, some aspects of lawyering are overemphasized in law school, while others are underemphasized.

Dean Norman Redlich has argued that American law schools train their graduates solely for entry level jobs in large law offices, government or private. The average law graduate, in his view, does not have the full repertorie of skills, attitudes, or information necessary for a wide range of private or public practice alternatives.

Many competencies that are required of good lawyers are not emphasized in law school.

Most law schools are not very candid about this, primarily because it is assumed that the recent graduate will receive a good apprenticeship experience in the beginning years of practice. While this may be the case with graduates at Cornell—who tend to begin their legal careers with large law firms and well-organized government law offices—there is increasing concern that the majority of recent graduates are left to fend for themselves. More important, the members of the public served by these graduates may not be aware that their educational and other experiences have not trained these young lawyers to handle a wide range of legal matters by themselves. Law school catalogs contribute to the misleading impression that anyone who passes the bar exam is capable of performing nearly any law job by stating that preparation is provided for a wide variety of legal and public careers. Catalog statements of this kind do not meet the standards of full disclosure that are applied to businessmen who are selling a service.

A rare example of full disclosure of the present limits of law school education is found in the latest edition of the University of Michigan Law School catalog, which states my point quite succinctly:

> Although the [Michigan] Law School is a professional school, it is distinctly not a vocational school. Students are not trained to perform many or even most of the tasks that its graduates may be called upon to perform as lawyers. Students coming to the School should not expect to be fully prepared to deliver a wide range of legal services on the day of graduation . . . . Learning of skills is best done on the job. The University is poorly organized to provide on-the-job experience efficiently. Applicants should know that there are other law schools which are more ambitious than the University of Michigan in providing for skills training preparatory to first job tasks, and correspondingly less preoccupied with intellectual development and insight than is Michigan . . . . Hence, Michigan is not the right choice for students who are in haste to acquire the vocational skills of technicians or technocrats.

Now that is a plain statement of the limited scope of law school instruction, a statement probably true of most law schools in the country. For the most part, our law schools are training entry-level practitioners who go into organizations which we hope will provide a good apprenticeship experience.

What is the relevance of all of this to legal services for the poor? Let me try to draw a relationship that is not entirely obvi-

ous. To do so, a brief sketch of the substantial social program which provides civil legal assistance to poor people in the United States may be helpful.

The legal services program consists of about 5,000 lawyers assisted by a roughly similar number of paralegals and secretaries who serve poor people through approximately 300 community-based programs. Most of the funding is provided by federal money dispensed by the Legal Services Corporation, a quasi-public body established in 1975 by an act of Congress.

For a better understanding of this program, you should have in your mind a picture of one of the neighborhood legal offices that are the heart of the program. Imagine some drab and crowded office, poorly furnished, in the poorer section of one of America's cities. In it are three to twelve lawyers, and an equal number of paralegals and secretaries. There is the buzz of activity characteristic of a busy and overcrowded law office—phones ringing, people dashing around, typewriters hammering away, and deadlines being met. There is also a cramped waiting room filled and overflowing with hurt and suffering humanity.

The reality of the legal services programs is a number of hard-working and hard-pressed lawyers attempting to provide a vast variety of legal service to a massive and overwhelming caseload under conditions of limited resources and tremendous pressures.

It is not surprising that in this kind of setting, the press of numbers results in a degree of bureaucratic impersonality and a good deal of routine behavior. The result is a lower quality of service than is ideal. Not that the quality of service is poor—quite the contrary. It is probably at least as good as in the average private law office, particularly in the small law office framework. The general performance of legal services offices, however, is not as high as are our hopes and aspirations for it. On many occasions the service does not fully comply with the requirements of Canon 7 of the Code of Professional Responsibility, which requires the lawyer to provide the client with zealous representation.

Gary Bellow, after extensive study[1] of the day-by-day operation of legal services offices, concludes that there is too much routine processing of cases and too little client autonomy. The control exercised by the attorney involves a constricted definition of the client's concern and of methods of dealing with it. Inadequate outcomes in many cases occur because settlements are made that do not reflect the full value of many claims. In short, clients are

1. Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, NLADA BRIEFCASE, August, 1977, at 106.

"cooled out" to accept awards that are less than the full value of their claims.

This pattern of behavior is not the result of lack of attorney sympathy with the plight of the people being served. Legal services lawyers are a dedicated group of professionals who identify with poor people and want to help them both as individuals and as a group. They care about the work they are doing and the population they are serving.

The enormous need for service and resulting high case loads are responsible in part for the characteristic deficiencies of legal services offices. When lawyers are handling as many as 150 to 200 on-going cases at a time, as many as 500 a year, the quality is bound to suffer. The pressure of numbers has effects on the routine handling of cases: Bellow reports, for example, that clients are generally seen only once in the course of a case, and then for an average of twenty minutes per client. Under these circumstances, the opportunity of the client to reveal the dimensions of the case and the attorney to understand it are limited. There is insufficient time for the client to be treated as a person who may have other problems which need attention. Opportunities for larger service and for a personal approach are lost.

Bellow concludes his study of the routine operation of legal services offices with a striking characterization:

> Legal aid programs for the poor function surprisingly like the welfare departments, collection agencies and other bureaucracies they were designed to challenge. Some [thousands of] lawyers working primarily in neighborhood offices, service thousands of cases each year in ways that can best be described as minimal, routine, impersonal and conforming. There is too much mechanical communication with clients, too few motions or aggressive legal action, too much routine processing of cases, too many settlements that do not take into account the real value of the client's claim.

Gary Bellow, one of the most dedicated supporters of the legal services program, makes these comments not in anger but in sorrow. What is there about legal services practice that tends toward this unhappy state of affairs? Here as elsewhere, conditions that persist are related to the skills and attitudes of the participants and the environment in which they work.

The neighborhood offices are small law offices with more than three attorneys but usually less than a dozen. They are staffed with relatively inexperienced attorneys. There is an enormous turnover of attorneys, with approximately one-third leaving each

year. Fifty percent of the lawyers in legal services have less than three years of experience, and only a few have more than five years of professional experience.

Turnover of lawyers at this scale involves a hemorrhage of talent that is a severe problem for the national program—and one for which the Legal Services Corporation is trying to develop effective remedies. One cause—referred to by the term "burnout"—is related to the emotional drain on the inexperienced professional resulting from handling 200-500 clients a year in a routine and minimal way. This type of work becomes professionally unsatisfying after a certain period of time as the lawyer perceives that his efforts do not appear to affect the endless stream of clients and cases.

A second set of causes is related to the manner in which manpower is deployed in the legal services program. The inexperienced beginner—usually straight out of law school—is given the most difficult of all tasks—handling a broad range of client problems from intake to final disposition. Operating in a setting in which there is relatively little supervision by senior or more experienced attorneys, the young lawyer must learn in the hard school of experience. The ideology of legal services accentuates the isolation of the inexperienced attorney since it emphasizes the equality and autonomy of staff attorneys, thus minimizing the degree of supervision.

The range and difficulty of subject matter of proverty practice belies the widespread (but erroneous) notion that the legal problems of poor people are lacking in complexity and difficulty. If any of you have dealt with the intricacies of welfare law, or social security disability law, or HUD regulations, you know that these legal regimes present legal questions as complex and challenging as those arising under the federal tax laws. Even if a program is large enough to allow attorneys to specialize in areas such as welfare and consumer law, a high degree of skill is required.

Special problems of communication are also involved in legal services practice. Unlike business clients, poor people, almost by definition, are less "middle class" in their background and education than, for example, the business clients served by major firms or the officials who direct government agencies. In general, poor people are less articulate than the rest of the population. They are hurt and suffering humanity faced with problems that they do not fully understand, and they must communicate these difficulties to lawyers who generally come from a different educational and cultural background. The range of skills required—to get the confi-

dence of the client, to extract relevant information from clients and witnesses, to negotiate with adversaries, to prepare cases for trial (including the use of depositions when required)—is enormous. To do all of this while managing a tremendous caseload is a staggering undertaking. Even the most experienced lawyers would find this a difficult assignment.

The external environment of the legal services lawyer is also a fairly inhospitable one. Trial judges are frequently unsympathetic to anything that increases judicial business; the efforts of legal services attorneys to get a fair shake for their clients often are perceived as an imposition on the courts. Opposing attorneys and the bar in general, although supportive of the legal services program in theory, are likely to be critical of effective and zealous representation in individual cases. Thus the inexperienced attorney normally carries on his work in an atmosphere which runs the gamut from mildly unsympathetic at best to actively hostile at worst. These environmental factors press toward routine and minimal service. The staff attorney is encouraged to avoid taxing the system with contested matters.

The inexperience and limited competence of the recent graduate may also contribute to the problem. Few law school graduates have the experience or skills required to counteract the pressures of this kind of environment. Like the rookies in welfare agencies, police forces, and other organizations, beginning lawyers conform to established ways of doing things. And the reason is simple: they don't know any other way!

Law school training gives law graduates excellent internalized standards by which to judge the quality of a law review article and perhaps of an office memorandum or an appellate brief. But it has not given them the capacity to judge the quality of a pleading or deposition, the counseling approach that will elicit facts from a client, or the relative merits of various strategies of negotiating, bargaining, or litigating with adversaries. For the most part law students are woefully untutored in these matters, fearful of them, and dreadfully frightened by the spectre of potential failure. They lack the experience with high quality lawyering that might allow them to criticize or to improve the practices they meet and see.

The most important single justification for clinical education lies in this insight. In law as well as medicine, clinical experience is valuable not so much for the actual skills that are taught as for the attitudes that are conveyed concerning what constitutes good practice. The teaching hospital, for example, provides the beginning physician with a standard of medical practice that inspires

and measures a lifetime of professional work. Even if the young physician is not capable of performing a particular task with the skill of the experienced practitioner, there is an awareness of what high quality performance medicine means in day-by-day patient care. With this internalized standard the tyro can work for improvement while resisting pressures to conform to a lower standard.

When law graduates enter public or private law offices that provide an excellent apprenticeship experience, these young attorneys benefit by a similar standard-setting experience. Those offices expose attorneys in a systematic and progressive fashion to a range of practical skills, lawyer operations, and client problems that grow in complexity and difficulty during a three to seven-year apprenticeship period. Although the experience may be biased by the tunnel vision of the particular organization—whether it's the Wall Street bias or the ideological bias of the large government law office—young lawyers benefit from learning at each stage of their development from experienced and highly skilled practitioners. Many legal services attorneys—perhaps most—are not provided with a similar opportunity of supervised professional development and growth. Their experience is more haphazard and features the trial-and-error learning of the school of hard knocks. While this harsh school has produced some of our best lawyers, it has also institutionalized the bad habits, inadequate standards, and limited vision of others in the profession.

Gary Bellow has remarked that the incentive-and-reward structure within legal services accentuates the pressures on young lawyers. Thus the tasks for which recent law graduates are most qualified, such as the handling of law reform litigation in the appellate courts, are reserved for the most senior people in the legal services movement. The handling of test cases in support centers or specialized offices is the activity that has the greatest status in the legal services movement and receives the greatest rewards. These are activities with which law students, because of their experience in handling concepts, in performing legal research, and in writing briefs, are fairly adept.

The structure of positions in legal services, however, puts the inexperienced people on the firing line, where the broadest range of skills and information is required. The most difficult function—dealing with clients in the full service office—has the least prestige and is performed by the least experienced attorneys. If they survive the trauma of the initial years in the front-line trenches and decide to stay in legal services, they will move into

specialized litigation units and, after that, will become project directors or move into appellate, test case, and support center activities, which require more intellectual skill but less in the way of practical judgment and interpersonal skills.

This long detour brings me back to my starting point in legal education. My point is simply this—legal education that does not train law graduates to perform and to evaluate a broad range of lawyer operations immediately upon graduation poses difficulties for a public program that is not presently organized to provide this intensive experience.

Legal education, of course, cannot be blamed for all of the problems of quality in the mass delivery of legal services. Nor is it clear that legal education ought to be changed in order to ameliorate this particular problem. But the problem must be faced rather than ignored, since it raises important issues concerning the nature of legal education and the function of law schools.

To what extent do some or all law schools have a responsibility for preparing some or all law graduates to handle a broader range of lawyer operations immediately upon graduation? To what extent should law schools provide internalized standards that will equip graduates more fully to handle law jobs with organizations that do not provide good apprenticeship experiences to entry-level lawyers? One alternative, of course, is that the legal service program establish its own entry-level training program—a subject now under consideration by the Legal Services Corporation. A proposal for the creation of one or more postgraduate training centers designed to prepare law students to perform entry-level jobs in legal services programs is now under serious consideration.

Legal education does some things extremely well. In ninety-six weeks of instruction a layman is converted into a professional who is capable of thinking and acting within a rich and complex professional tradition. But legal education does not and cannot do everything that might be desired in so short a period of time, especially with resources and student-faculty ratios that make nearly every other department of the university look rich by comparison.

The fact that we cannot do everything in so short a time and at so little expense does not mean that we cannot do some things better than we do now or that we all need to do exactly the same things. An overemphasis on some attributes of being a lawyer can be replaced with a more balanced approach.

Different law schools may properly strike a different balance for several reasons. First, their students, faculty and resources are quite variable. Second, their varigated history and tradition em-

phasize one or another facet of the profession, whether it be an orientation toward the creation of new knowledge about law on the one hand or a more vocational approach on the other. And finally, the enormous variety of the legal profession finds its source in the paths that the graduates of a particular school typically pursue. In fact, we are not preparing our graduates for the same thing. A particular metropolitan school may produce most of the trial lawyers (and subsequently trial judges) in its region, while a sister school produces graduates who find their way into corporate law firms and large government law offices. Yet a third school may produce most of the law teachers and has graduates who are especially attracted to public life.

In this diversity of role there is room for diversity of educational organization and program. An appropriate degree of differentiation is more appropriate than the monolithic uniformity that comes either from the self-imposed tyranny of a single dominant model or from the heavy hand of regulation. The question of function and role is an inescapeable one for each law school. Each should endeavor to design its educational program to suit realities and aspirations that are adapted to its choice of function and role.