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Patrick J. Rohan

LEGAL EDUCATION AND TRAINING FOR THE PROFESSION — AN OVERVIEW

PATRICK J. ROHAN*

*We thus find ourselves somewhat uncomfortably impaled on the horns of a dilemma. To be "practical" is impractical. To be "theoretical" is practical. But to be theoretical does not in itself make one fit for practice.***

Within the past year, various legal journals have carried warnings that the nation's schools are not producing attorneys competent to appear in state and federal courts. To some extent these complaints are reminiscent of the division that took place in the profession a generation ago, when the practical wing, chiefly the practitioners, urged "skill training" as a prelude to "actual practice," while the theorists, chiefly the law professors, championed "broad preparation" for the legal profession.[1] The issues, however, are more pointed this time, with the entry of the judiciary into the fray and the emergence of concrete proposals to influence legal education from without. Of greater significance, the matter has been widely reported in the media and may lead to a loss of the public's confidence if no prompt resolution is found.

Perhaps what is needed is a catalyst in the form of an assignment to prepare a Restatement (Second) of Legal Education.[2] The Restatement route is suggested because such reference works usually tend to be an admixture of things as they are and things as they ought to be. If a representative committee were chosen from the ranks of the judiciary, the professoriat, and the practicing bar, it could be charged with the task of charting the future of legal education. After laboring for a respectable period of time, and subjecting each succeeding draft to close scrutiny, the committee would no doubt arrive at a first principle of legal education that would read as follows:

> The main objective of legal education is to produce competent members of the legal profession.

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* Professor of Law, St. John's University. B.A. 1954, LL.B. 1956, St. John's University; LL.M., 1957 Harvard University; J.S.D., 1965, Columbia University.

** Nutting, *Training Lawyers for the Future*, 6 J. LEGAL ED. 1, 5 (1953).

[1] *See generally* Joiner, *Legal Education: The Extent to Which "Know-How" in Practice Should be Taught in Law Schools*, 6 J. LEGAL ED. 295 (1954); Rutter, *A Jurisprudence of Lawyers' Operations*, 13 J. LEGAL ED. 301 (1961).

[2] The writer has taken the liberty of crediting a first (fictional) Restatement of Legal Education to Christopher Columbus Langdell, the originator of the case method of law school instruction.

Comment: In order to insure competency, law schools must give students training that is practical.

Caveat: The definition of practical training, as well as the methods of achieving it, are beyond the scope of this Restatement.[3]

In short, everyone likes to be thought of as current, efficient, and practical. Moreover, there will always be disagreement as to whether these objectives are being realized on a comparative scale of good, better, best. In the writer's view, law schools are extremely practical places. This does not mean, however, that constructive criticism should not be entertained as part of an ongoing reappraisal process. At the same time, more should be done to acquaint the bench and bar with what legal education can and cannot do for the law student.

Should Law Schools Seek to Produce Competent Practitioners?

It would not be too much to hope that medical school faculties are doing their utmost to equip their students with what is necessary to practice modern medicine in our society. They, of course, enjoy the buffer of internship to bridge the gap between the academy and practice of the profession. In the absence of a similar transitional vehicle, it would seem that law school faculties have an even heavier burden to shoulder. For good or ill, the law school diploma is not regarded in the same light as a college diploma. Both the recent law school graduate and the public look upon it, in conjunction with successful completion of the bar examination, as a certification that the graduate is competent to begin to practice law.

Occasional statements to the effect that the training of students for the practice of law should not be a goal of the law schools needlessly complicate the issue and ignore the realities. The fact that both the graduate and the public regard the successful completion of law school as certification for practice can be seen from a history of law school relations with the bar examination, the only phase of qualification separating commencement from admission.

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[3] The proposed Restatement is modeled after the Restatement of Constitutional Law, suggested by Professor Thomas Reed Powell, which stipulated as follows:

> "Congress may regulate interstate commerce." A Comment would add: "The states may also regulate interstate commerce, but not too much." And then there would follow Caveat: "How much is too much is beyond the scope of this Restatement."

Freund, *Foreword* to T. R. Powell, Vagaries and Varieties in Constitutional Interpretation at ix (1956).

In academic circles the bar examination has traditionally been regarded with something less than affection. Initially, some conceived it to be an unmitigated nuisance and waste of time; others regarded it as a necessary evil which induced the recent graduate to attend a cram course wherein information and details unworthy of class time were, in an equally unworthy fashion, learned by rote.

These views, in turn, spawned indifference and led to a lack of communication between the schools and the examiners. The law schools handed the graduate his diploma and viewed their responsibility as at an end. In the post-War period, this approach gave way to mild interest in the examination, generated by concern over the rumor that its content might vary in significant degree from that of the curriculum. This concern rested, in part, on the assumption that the examination's subject matter should coincide with that of the then prevailing courses and was inconsistent with the view that the function of the bar examination, and the attendant cram course, was to supply and test information not covered in the law school. The current mode, one of increasing cooperation with the examiners, is an attempt to clarify the relationship between these two phases of the lawyer-certification process. A major objective of the teaching branch appears to be to shift the makeup and evaluation of such examinations from a factual orientation, with emphasis on memory, to the standards of testing and grading employed in the law schools. To the extent that this end is realized, the examination will constitute a doublecheck on academic evaluations and will move even closer to the public's conception of it, that is, a test which measures whether a candidate has made adequate use of his law school years and, as a consequence, is equipped to begin to practice law.[4]

The law schools' responsibility for the going conception of the capabilities of the recent graduate is also traceable, in part, to the demise of the mandatory clerkship program. The economic ills and uneven training inherent in a clerkship system militate against its use. Nevertheless, these factors would not excuse the schools' acquiescence in the status quo if they truly believed that their graduates were not sufficiently prepared to commence handling other people's affairs. The law school is the sole institution charged with supplying society with lawyers. If the schools believed their graduates were not ready for practice, they would be under a

[4] The equation of a law school diploma with sufficient competence to begin to function as an attorney is all but inescapable in the "diploma privilege" states, wherein the bar examination is waived for graduates of intrastate law schools.

distinct obligation to insist upon either postgraduate training, or a waiting period before graduates are permitted to take the bar, or some similar device. The fact that they have not done so evidences a belief that, unlike the doctor and certified public accountant, the law graduate should be permitted to practice soon after completion of his course of studies.

The conclusion to be drawn from these observations is not that the practical school was correct all along and the theorists mistaken. Rather, it is the realization that the training of law students for practice is both an immediate and a long-range goal of legal education. The role of the schools in the certification process makes this clear, as does their acquiescence in the present law degree-bar examination-admission arrangement.[5]

ARE THE LAW SCHOOLS STRIVING TO PRODUCE COMPETENT ATTORNEYS?

Despite occasional protestations to the contrary, law school faculties strive to give their charges an education that is both relevant and effective. Nowhere is this fact more evident than in the area of curriculum planning. Here value judgments are constantly being made and then subjected to unrelenting reexamination. How many credits should be required for the basic law degree?[6] Should formal courses be extended into a fourth year of law school? Should the existing law school fare be contracted to facilitate graduation within 2 years, with a year of internship to follow? How much of the traditional case method instruction should be dispensed with to make room for clinical instruction, participation in legal aid, and related efforts? What foundation courses should

[5] The internal workings of the schools reflect this professional orientation as we gauge the utility of specific courses by their importance in practice, consult the practicing alumni via questionnaires, conduct mock trials and appeals, and cram casebooks with the minutest points while lamenting in the preface that we cannot cover them all. Even the resources of the schools, which enable them to sponsor programs of continuing legal education, reflect upon the professional orientation of our institutions. This is not to say, however, that the details and minutiae of day-to-day practice are deserving of a place in the course of studies or assist in any meaningful measure in the training of lawyers.

[6] As in the day of their predecessors, law students must be exposed to a broad range of topics in order to obtain a well-rounded legal education. The late Professor Leach of Harvard aptly stated this proposition when he remarked:

> It therefore follows that there is some body of doctrine — legislative, administrative, and judicial — with which the working lawyer must be familiar.
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> I believe that this necessary amount is large and that it stretches the limits of a three-year curriculum. In practice the lawyer will quickly outstrip his law-school learning in the fields of his specialization; but, if he is to be well rounded, this concentration . . . must be balanced by a distributive comprehension which he is unlikely to acquire after his law school days are done.

Leach, *Property Law Taught in Two Packages,* 1 J. LEGAL ED. 28, 31-32 (1948).

be required, in what sequence, and what number of hours allocated to them? What traditional courses have outlived their usefulness, and what new offerings deserve space in an already crowded curriculum? What proposed electives are merely current fads, window dressing, or old wine in new bottles?

One byproduct of this process has been the realignment and consolidation of traditional subjects into functional or transactional courses under such rubrics as "Estate Planning," "Business Organizations," and "Commercial Transactions." Special attention has also been devoted to developing research and writing skills, drafting, professional ethics, and broadening courses such as Jurisprudence and Legal History. Ideally, in carrying out the instructional program, individual faculty members should be fully conversant with current law and practice in their chosen fields. Accordingly, it is fair to assume that both the content and approach of the law school curriculum would reflect the real world of the practicing attorney, whether he be engaged as a counselor, negotiator, or litigator.[7]

THE LIMITS OF COURSE INSTRUCTION

It may well be argued that the law school curriculum is constantly being updated on the substantive side, but benignly neglected on the adjective side. It cannot be gainsaid that the practicing attorney must view every problem from the perspective of procedure and proof, at least where an adversary situation may develop. Perhaps the root question is whether every student should be required to complete extensive courses in such areas as civil and criminal procedure, trial tactics, federal courts, and the rules of evidence (as opposed to the schools' merely making these courses

[7] As in most fields of human endeavor, incompetency among young lawyers may stem from a lack of effort on the practitioner's part, as opposed to a lack of awareness of the essentials. This observation was recently made by a joint committee of the Association of the Bar of the City of New York that was assigned the task of delving into the competency question.

> [B]ased upon extensive observation, it is the feeling of our Committees — most of whose members have had substantial trial experience — that to the extent incompetency exists (and can be explained), the problem is rooted more in lack of preparation and failure to take the time required thoroughly to understand cases (because of economic pressures, emotional problems or the like) than in unfamiliarity with rules of evidence or procedure. Nor do we believe that the problem lies mostly with "younger and less experienced lawyers" . . . . Rather, in the experience of our members, the problem is surely as great — if not greater — with older attorneys, thus indicating quite clearly that lack of training is not the major cause of the "incompetency" problem.

Special Comm. on Professional Education and Admissions & Committee on Federal Courts of the Association of the Bar of the City of New York, *Joint Report on the Proposed Rule for Admission to Practice Before the United States District Courts in the Second Circuit,* 31 RECORD OF N.Y.C.B.A. 95, 96-97 (1976).

available on an elective basis). Reasonable men can differ on this question, particularly as applied to any given subject matter.[8]

While the curriculum should reflect current legal doctrines and problem areas, and while a lawyer might benefit from every offering in the law school bulletin, no one would seriously suggest that a student take every course that is offered. There are only so many hours in the student's day, and some time must be left for discussion and digestion of the material presented in class. Most observers would agree that the lasting benefits of any form of education lie in the development of sound habits of inquiry, research, analysis, and communication. Classroom instruction should be designed to develop these skills against the backdrop of the law's historical development and present application. The student should be brought to realize both the skills he must acquire and the level of performance expected of a competent attorney. In the process, he has the opportunity to view the approaches and techniques of several different instructors and thus learn by both precept and example. Course content runs a poor second to pedagogical objectives such as these.[9]

The veritable explosion of legislation, administrative regulations, and judicial opinions is another fact of life that must be taken into account. Each day brings new developments in all fields as well as the proliferation of fields themselves. A decade ago, considerations such as consumer protection, environmental impact statements, age and sex discrimination, and the like were all but nonexistent. Today some attorneys spend all their waking hours attempting to guide clients through the legal issues presented in these emerging areas. Even if it were deemed advisable, it would be impossible to prepare a law student for every type of practice, in

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[8] One of the strong points of law school education lies in the systematic study of various fields, as distinguished from the haphazard experience that would be acquired in clerkship situations. Systematic study, however, is only available for the first 3 years of a lawyer's professional life; forensic skills and the application of one's law school training are developed over the balance of that career. To the extent that practice-oriented training is imported into the curriculum, we are taking away hours from what the schools do best and allocating them to an objective they make no pretense of achieving at all.

[9] The confrontation described by the late Professor Patterson of Columbia Law School is worthy of consideration:

> Patterson [related] how a father of one of his recent graduates came back in a highly irritable mood and complained bitterly that his son . . . had not been taught how to draw a replevin bond. Patterson expressed his sorrow and inquired what the father had done. The father admitted that he was compelled to show the boy how to do it. He was asked . . . how long this process took. The answer was, roughly, five minutes. Patterson is reported to have replied, "I thought so. You see, we are teaching our students things which you couldn't teach him in a life time."

Wright, *The University Law Schools,* 2 J. LEGAL ED. 409, 415 (1950). A similar complaint and response is noted in Griswold, *Law Schools and Human Relations,* 37 CHI. B. REC. 199 (1956).

every type of firm, in even one jurisdiction. A moment's reflection gives rise to the realization that law schools cannot even prepare a student for the precise work that has to be undertaken in any one specialty or type of practice, such as trial work, even if the student were absolutely certain of the type of work he would eventually be doing.

While subject matter should be presented in an up-to-date and relevant manner, the chief objective should be to condition the student to function as a competent attorney must. The most that can be done is to expose the student to the need for peripheral vision in approaching a legal problem. In advising a client as to a proposed real estate transaction, for example, tax, tort, insurance, financing, and numerous other variables must be taken into account in formulating a sound approach; concentration upon conveyancing and title insurance aspects would be both inadequate and unreal. Accordingly, the instructor finds it increasingly necessary to make compromises between the need for coverage of major aspects of a subject and the equally compelling need for exploration of the complexities that lurk beneath the surface of any given situation.[10]

CONCLUSION

In view of differences in perspective, there will always be a divergence of opinion between those preparing students for a profession and those practicing that same profession. There is no doubt that the position of each side would be altered to some degree if they swapped their respective callings for a year. In the absence of such an exchange of roles, a continuing dialogue between the practicing and the teaching branches is essential. The law schools must keep abreast of developments in all areas of practice, including litigation. At the same time, the bench and bar must be careful not to impose a tyranny of expectation, that is, expect recent graduates to be seasoned lawyers. Experience cannot be

[10] The lack of utility in making a fetish of current law and practice is amply illustrated by the recent episode involving RESPA, the Real Estate Settlement Procedure Act. The Act was heralded as a major contribution of Congress to the consumer protection movement. The statute, and regulations issued pursuant to its terms, were studied nationwide for months on end by every attorney remotely connected with the conveyancing field, including counsel for home buyers, developers, title companies, and lending institutions. As the effective date of the new law approached, Congress belatedly realized that the legislation created many more problems than it solved. Consequently, the effective date of most of the RESPA provisions was delayed indefinitely, and all of the learning on RESPA became obsolete with one stroke of the pen. In a less dramatic though very real way, the procedural code of any given state is revised every time a court clerk retires and is succeeded by another.

bottled. No amount of formal courses, seminars, or moot court activity will produce an experienced trial or appellate attorney. Concentration upon forensic skills to the neglect of other pedagogical objectives would be counterproductive, although no one would argue for doing less in this area than we are doing now.

If law schools could be faulted in their present approach, criticism should perhaps be focused upon two failings. First, little or nothing is being done to help students chart their way through the maze of course offerings. Although no one would feel comfortable prescribing a specific, detailed program of study for a student with a particular law career in mind (much less for someone who has no particular goal), the fact remains that the faculty is in a far better position to make helpful suggestions than anyone else. While this type of guidance may have been unnecessary a generation ago, there is a real need for it today in light of the largely elective curriculum. Second, the law schools should be doing more in the field of continuing legal education. A more vigorous effort in this direction might enable the recent graduate to perform better and lead the experienced practitioner to a renewed awareness of the basic functions and capabilities of our educational institutions.