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EDUCATION FOR PROFESSIONAL RESPONSIBILITY

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As you know, my remarks tonight are entitled, "Education for Professional Responsibility." I selected the title. When I did so I must have been in an expansive mood. It is much too broad. To discharge his professional responsibilities a lawyer must be a man of probity, professional competence, and dedication to the ideals of his profession. His education in professional responsibility, therefore, is influenced by all the factors that made him the man that he is: his parents, his home environment, his cultural development, his church, his formal education, his brethren of the bench and bar, his participation in the activities of the organized bar, and the political climate of his time and his country. Obviously I have not the time tonight to discuss the impact of all these people, institutions, and activities on the professional education of the lawyer. Of necessity I must narrow the scope of my remarks. Recognizing that necessity, I have decided to limit my comments to some observations on the role of the law school in educating the law student in the professional responsibilities which he should assume on his admission to the bar. A quick survey of the history of legal education in this country will, I believe, provide a frame of reference which will make my observations more meaningful.

When DeTocqueville wrote in 1835 that "Lawyers . . . formed the highest political class and the most cultivated circle of society . . ." most members of the bench and bar were apprentice-trained. Few had attended a law school. The University related law school was just beginning to catch on. The proprietary law school, which had enjoyed some popularity in the first quarter of the nineteenth century, was on its way out. Study in a lawyer's office was by long odds the most popular method of preparing for admission to the bar. Typically a fee was paid for the privilege. Textbooks proscribed by the preceptor were read. Legal documents were copied in long hand—remember the typewriter was not invented until 1867. Processes were served, witnesses were interviewed, brief cases were carried and routine clerical work was performed. Essentially the student learned by reading, listening, observing and doing. The quality of his training varied according to the ability of the preceptor, the nature of his practice, and the interest that he took in educating the apprentice for the practice of law as an honorable and learned profession demanding of its votaries a far higher standard of conduct than is acceptable in the marketplace.

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Although most lawyers in this country continued to be apprentice-trained until the latter part of the nineteenth century, the university related law schools slowly gained in popularity. Twenty-one were in operation at the outbreak of the Civil War. None had any entrance requirements, except that the applicant be of good moral character and in some states had attained a stipulated age.

The Civil War was followed by a tremendous growth of American industry and a growing admiration by Americans for the methods of natural science. These developments combined to produce a fundamental change in American legal education. As industry expanded, corporate structures, the credit system, and our economy in general became increasingly complex. These developments resulted in our law becoming more complex than it had been in the essentially agrarian pre-war days. Thus preparation for the bar required far more extensive and rigorous training than had hitherto been thought sufficient. And a conviction grew that this training could best be given in law schools applying the methods of science to the study of law. Out of this conviction came the casebook method of instruction, which in its inception was based on three assumptions: First, law is a science; second, all the materials of a science are contained in books, and third, legal doctrines gradually evolve and develop from a relatively few basic principles, which can be learned by studying a relatively small number of appellate court opinions. Observe that the casebook method of instruction, as developed in the last quarter of the nineteenth century, regarded law as a self-contained discipline, expressed in appellate court opinions, constitutional provisions, and a few statutes.

By the turn of the century the casebook method of instruction had gained ascendency in American law schools over its rival, the so-called lecture or textbook system. Also, by the turn of the century, an awareness was developing that the narrowly technical legal dialectic of the original casebook method was vulnerable to the criticism that it largely ignored the social, economic, and political matrix in which law operates and develops. This realization was well expressed in 1923 by Harlan Fisk Stone, then Dean of the Columbia Law School, in the following words:

> Present day problems of legal education, . . . arise . . . from our traditional attitude toward the law as a body of technical doctrine more or less detached from those social forces which it regulates. We fail to recognize, as clearly as we might, that law is nothing more than a form of social control intimately related to those social functions which are the subject matter of economics, and the social sciences generally.

Recognition of the verity of Stone's observation is attested by law teachers' growing awareness of the contributions the social and behavioral sciences are able to make to the understanding of legal prob-

lems. Witness, for example, the inclusion of social science materials in the modern casebook and the appointment of economists, sociologists, political scientists, psychiatrists and psychologists to law faculties. More often than not these appointments are joint in law and the basic discipline of the appointee. The joint nature of the appointment serves to emphasize the capability of interdisciplinary undertakings improving legal institutions.

Perhaps, however, the most significant law school development of the twentieth century is the upgrading of the academic requirements of law schools and what amounts to their accreditation by the American Bar Association and the Association of American Law Schools.

The improvement of law school standards was one of the principal reasons for the organization of the American Bar Association in 1878. Progress was so painfully slow that in 1893 a section of legal education and admission to the bar was created by the association. This election, the first in the history of the American Bar Association, established the Association of American Law Schools in 1900. The original articles of that Association limited membership to schools which required at least a high school education, or its equivalent, for admissions, which required a course of instruction covering at least sixty weeks spread over two years for the law degree, and which provided its students with access to a library that contained at least the reports of the Supreme Court of the United States and the reports of the courts of last resort of the state in which the school was located. In 1906 the Law School Association increased the required period of law study from two to three years. Since then quantitative requirements for membership have been gradually raised and in 1962 the Association adopted articles shifting the emphasis from quantitative minimums to qualitative norms.

The formation of the Association of American Law Schools did not terminate the American Bar Association's interest in improving legal education, and in 1921 the American Bar Association adopted a series of resolutions establishing minimum standards to be observed by law schools. In 1923 the council of the section of legal education and admission to the bar published a list of the schools satisfying these standards. Each year since then the American Bar Association has published a list of approved schools. About half the states now limit eligibility to take the Bar Examination to graduates of schools approved by the American Bar Association. And all but a very small fraction of those coming to the bar in this country today are law school graduates. Apprentice training for admission to the bar has virtually disappeared. Presumably the law schools are doing a reasonably good job in discharging their responsibilities.

Clearly the mission of a law school is educating the law student for the performance of the professional responsibilities of a lawyer. These responsibilities relate to the role of the lawyer in society. They may be subdivided into professional competence and professional ethics. By professional ethics I mean all of the professional obligations of a lawyer except competence.

In my view each law school should offer a separate required course in professional ethics. This course should be dedicated to developing an understanding of the wholehearted commitment to the imperatives of professional ethics, including, of course, the obligation of the lawyer to serve the public by working for law revision and reform, by providing the leadership in public affairs for which his education has so well prepared him, and by assuring adequate representation in criminal and civil matters of indigents, of unpopular causes, and of unpopular people. The canons of professional ethics should be studied critically and in depth. The reason for each canon should be understood and its validity measured against the basic obligation of the lawyer to serve the public. The student should understand that the duties defined by the canons range from the avoidance of downright dishonesty to the observance of conventions associated with an honorable and dignified profession. They should understand also that these conventions and their application should be responsive to changes in the social order and may vary from place to place and from time to time. Four questions will suggest what I have in mind:

First, the industrial revolution followed by the technological revolution have given us an age of specialization in law as well as in science and in business and in medicine and other vocations. Recalling the canonical admonitions against advertising and solicitation (Canon 27) when, if at all, should the legal specialist be permitted to list himself as a specialist?

Second, is that recent development of the Office of Economic Opportunity, the neighborhood law office, guilty of advertising and soliciting when it makes its services known to indigents in the community which it serves?

Third, in the words of Mr. Justice Brennan, does the fact that the O.E.O. lawyer representing an indigent, ". . . received his compensation from government pose a threat to that independence in representation which is the very heart and core of the lawyer's role in a democratic society?" The Justice concludes that O.E.O. guidelines provide adequate safeguards and that therefore the answer to the question under discussion should be a resounding no. But in an address which he delivered before his appointment to the Supreme Court he called attention to the danger of government subsidizing representation for indigents in these words: "The plain fact is that an independent bar is just as

essential to the preservation of freedom as is an independent judiciary, or the Bills of Rights in our federal and state constitutions. The bar is the creation of a democratic people to intervene as a champion between the individual and his government . . . the fear is that a government agency of lawyers paid with tax money may be followed by governmental control of the profession. The fear is not so much on the part of the lawyers, but of thoughtful citizens concerned with the preservation and protection of our democratic form of government. If the government becomes the lawyer's paymaster, it may become his master."

Alexander Hamilton put it—"In the general course of human nature a power over a man's subsistence amounts to a power over his will . . . if a citizen opposes his government, and the lawyers for both parties are paid by the government, will the citizen get that fearless and resolute representation by his counsel which history proves is essential to the proper administration of justice? If the government paid attorneys do this work, receiving their salaries from the public treasury, will that, despite its innocence, be the first step, the entering wedge, leading to a subservient bar with all that such a bar foretells in the threat to individual liberties not alone of lawyers, but of everyone?"

Fourth, and the last question is this: What is the full impact of the 1964 decision of the Supreme Court of the United States in the *Brotherhood of Railway Trainmen vs. Virginia* (377 U.S. 1) on the rulings that organizations offering the services of lawyers to their members were engaged in the unauthorized practice of law?

Hopefully, the questions which I have just asked dispell the notion held by some law students and members of the bar that professional ethics is a study without intellectual challenge of goody-goody exhortations enshrined a half century ago in the canons of professional ethics of the American Bar Association. Quite the contrary is the case, as will be attended, I am sure, by all who have studied the subject. Now, fortunately there is a resurgence of interest in the subject, stimulated in part at least by Ford Foundation grants and by the appointment two years ago of a committee of the American Bar Association to evaluate the existing canons of professional ethics and test them against the realities of contemporary practice in recognition always of the basic obligation of the legal profession to serve the public.

Not only do I urge the offering of a separate course in professional ethics, but I also urge what has become known as the pervasive approach to the subject. That is, I believe that ethical considerations should be discussed whenever relevant to the situation being studied, regardless of the course in which the situation is considered. A separate course in professional responsibility, plus the pervasive approach to the subject may result in some repetition and duplication of effort; but

in my view these disadvantages are more than offset by the enriched understanding of ethical considerations which the one-two punch will provide.

I turn now to a consideration of the law school's role in educating the student to be professionally competent. As you know, that is the target of most law school instruction. And generally speaking I think it is agreed that the modern law school is usually on target; but, of course, there is always room for improvement.

Probably the Law School of today is at its best in educating the student to think clearly and exactly, to analyze and synthesize, to sift the relevant from the irrelevant, to beware of over-generalizing and to seek constantly for the reasons in policy and doctrine underlying legal rules and principles. In short, to think like a lawyer.

Critics of the modern law school insist that it fails effectively to teach legal know-how. The courses in trial, appellate and office practice, and the participation by students in legal clinics and moot courts are cited in answer to this criticism, but it must be conceded that the old apprentice system, properly administered, excelled the law school of today in giving "how to do it" instruction. There is no substitute for the live client, the actual case, and the tutorial relationship ideally existing between the apprentice and his mentor. The actual cases students encounter in the legal aid clinics of today fail to provide the breadth of experience that the apprentice received in the office of a general practitioner. For the most part the cases coming in to the legal aid clinics are limited to collections, family problems, landlord and tenant controversies, and like matters. The businessman, the corporation, and the economic royalists do not come to the legal aid clinic; nor typically does the tort claimant as the institution of the contingent fee ordinarily assures him counsel of his choice.

To ask, as some do, that the law school give clinical training comparable to that now received by medical students, is in my view to ask the impossible. Generally speaking mental and physical ills are common to all mankind, poor and rich alike. Hence a medical clinic can give the intern a breadth of training which a legal clinic cannot hope to emulate. Only the law office can give the legal neophyte training equivalent to that received by the medical intern. The law schools emphasis, therefore, is likely to continue to be of know-why and know-what, rather than know-how. But this is merely a matter of emphasis. Most law students are now receiving at least elementary training in a number of lawyer-like skills. In my judgment, however, the law office and the bridge the gap continuing legal education programs provide, and will probably continue to provide, the most effective how-to-do-it training for the legal neophyte. I hasten to add that the defender programs with which I am familiar are doing what I regard as a rather remarkable

job in providing how-to-do-it training in criminal cases. Also at long last a number of law schools are making significant contributions in this respect. My earlier observations concerning apprentice-type training related to the civil practice. Few law offices provide how-to-do-it training in criminal cases. And in these post *Gideon v. Wainwright* days all coming to the bar should have received training in the trial of criminal cases.

So far as I am concerned the most valid criticism of the modern law school is that the faculty is much too small in relation to the size of the student body. The result is that classes are too large and that classroom instruction is continued throughout the student's three years in law school, whereas, to my mind, more individualized instruction should be offered to upper classmen.

The Socratic dialogue of the casebook system demands active student participation in classroom discussions. Large teaching units tend to stifle that participation. The discussion is likely to be dominated by the aggressive few in the class. Most members of the class tend to remain silent until called on. And in a large class they may not be called on more than once or twice during an entire semester. Most members of the class thus assume the role of spectators rather than participants most of the time. As spectators they derive a useful, vicarious experience, but those participating in the class discussion are the principal beneficiaries of the case system.

To my mind the case system is without peer in educating first year law students in analysis, synthesis and critical appraisal. Admittedly, however, it is extravagant of time and may well be modified in the second year by omitting the statement of cases and by focusing attention upon a series of problems to be discussed in light of the materials contained in the coursebook.

Many third year students find that classroom instruction no longer challenges their interest. A change in pace is desirable, and I am convinced that seniors in law school are prepared to realize optimum benefits from pursuing individual research projects with the close participation of legal clinics and moot courts, and should, I think, round out the balance of a third year student's program.

Observe that the senior research program which I have in mind would, I believe, in the words of my colleague, Professor Rahl, "result in the emergence of faculty-student research teams, opening a whole new dimension in legal research. In the past, the failure of law schools to utilize effectively the great research potential represented by their senior students can only be described as intellectual and social waste. The price paid has included not only the well-known phenomenon of 'senior boredom' but more importantly a significant loss of opportunity to develop to a new level the powers of the students. Perhaps most

serious of all has been the incalculable loss to society, which we believe may reasonably expect to receive broader contributions from the law schools as centers of learning in democratic processes and the administration of justice than it has been receiving."

Professor Rahl, the chairman of the objectives and curriculum committee of our law school, voices the criticism which I have directed at the modern law school in the following words: ". . . An area of relative weakness exists in the work of the law schools everywhere, in their failure to challenge to the full the senior students at the very moment they have reached the peak of their academic powers. This problem is partially, though not entirely, overcome for a relative few who work on the Law Review, or in Moot Court competition. For the many, there has been only the same old diet of formal courses and an occasional seminar. Little opportunity has existed for them to be pushed deeply into a problem with the intensity soon to be required of them as lawyers. Little opportunity has been afforded to work in close mind-to-mind contact with a senior member of the profession in order to sharpen further those powers of analysis, communication, and problem-solving which are the earmark of the good American lawyer throughout the world. These weaknesses exist in every law school; they are there because the schools have not basically changed their methods in this respect since the turn of the century. Change has been nearly impossible because the law schools have become committed to relatively large student bodies and relatively small faculties, whose manpower is spread too thin for much individual work with students . . . law school student-faculty ratios today will not stand comparison with leading schools in the arts and sciences, even at the undergraduate level."

"Comparison with medical and dental schools produces contrasts which show that we have sat still too long; for example, law school ratios of full-time students to full-time professors are in the range of from around 35 to 1 in the largest schools, down to around 20 to 1, in the leading smaller schools, such as Northwestern. In the medical schools, however, the ratios are from 2.5 to 4 to 1, or in other words 8 to 10 times as many full-time professors per student as in the law schools. This is because medical schools are committed to engage in a great amount of laboratory and clinical work with their students, and research on a broad scale is conducted by faculty members."

"We do not need such a ratio as that because of inherent differences in law and medicine. But, why should we not also commit ourselves to work with our students individually, and 'clinically', so to speak? And why should we not commit our law school to engage in research on the level on which it is done in other types of professional and

graduate schools, enlisting in that research to some extent the great pool of talent represented by our senior students?"

You may well disagree with the criticism that Rahl and I have directed at the modern law school, and you may also disagree with the third year program that we have suggested, but I have every confidence that you will agree with me that the overriding obligation of the American law school is to strive to inspire its students to practice law as an honorable profession demanding of its members selfless devotion to the ideals of liberty, justice and the rule of law.