



BEWARE THE SQUID FUNCTION

PUNGENT
ADVICE BY
A TEACHER WHO
HAS HAD 42 YEARS
TO DISCOVER
HOW UNIMPRESSIVE
OUR ADMISSION
POLICY IS

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I have been asked to systematize, in a policy-oriented framework, the problems which face the Law School Admission Council.

A policy-oriented approach requires a number of specific steps. The first is the establishment of your observational standpoint: who you are, and what you are trying to do. The second is a very careful delimitation of your problem in factual or social process terms. The third is the explicit postulation of, and commitment to, a fundamental set of values. The fourth is the very deliberate and explicit performance of a wide range of interrelated intellectual tasks, including the detailed clarification of policies.

I think it is pretty clear that you play a very significant role in the whole function of recruiting new members to the profession. You are a part of a large process in which the lawyers who serve our communities are recruited, processed, trained, and sent out to do their best or worst for the community. You determine who gets into the profession and, hence, the quantity and quality of the services that the community gets. Therefore, an indispensable recommendation is that you identify with the whole community, and that your effort should be to clarify, implement, and secure the general community interest in training for the legal profession. The implications of this will be developed as we proceed.

Turning to the careful delimitation of your most general concern, one has to distinguish between the manifest problem and the genuine problem. Your manifest one, is simply to predict the grades that students are going to make in the first year of law school, or in the whole of law school. All this elaborate apparatus, and the various esoteric word formations you have developed, perform the same function that legal doctrines perform for lawyers—the *squid function*. They serve to cover up the arbitrary aspects of your choices; perhaps even to keep some of you from recognizing or realizing what it is you're doing.

One good example of this squid function is in a memorandum sent along to prepare me for this talk. The memo is from an old friend of mine, a distinguished international lawyer but a beginning dean. The memo was addressed to the alumni of the law school. I'll quote just a few sentences from it, out of context, of course. Remember, this is your manifest, not your genuine, problem.

The Dean says, "We use Law School Aptitude Test (LSAT) scores and gradepoint averages on the undergraduate level as the primary indicia of predicted achievement. The correlation between these indicia and the performance at the school is among the highest in the country." If you will recall the observations that Professor Lasswell and I made on the quality of legal education in this country some 30 years ago, this is a dubious cause for self-congratulation.

In continuing, the dean finds that a "related

concern is whether or not predicted academic performance in law school should be the primary criterion for admission. There are a number of reasons why, in my judgment and in the judgment of the faculty as a whole, it should be, though the issue is not free from doubt."

Offering reasons for making predicted academic performance the primary criterion, he adds: "Perhaps most important, admitting students on the basis of potential for academic performance is seen as the means to realize what most would posit as the central objective of the School: to graduate those lawyers who will maximize the interests of the clients (individuals, institutions, or causes) that they serve."

Apparently sensing that this might not be regarded as adequate, he continues: "The centrality of this goal is not, of course, beyond dispute. It is avowedly neutral with respect to the worth of the interests being represented or the worth of serving them, on the ground that the school as an institution cannot properly make such judgments."

He agrees that academic performance in law school may not be "directly related to the quality of lawyering," but finds the "many other qualities that make up a good lawyer" difficult to measure. He concludes that "at least some law schools should seek to provide the best minds with the best possible training." On reading all this, I couldn't help wondering what many of our students of recent years might think of this mode of formulating the admissions problem.

Let me emphasize that your genuine problem is, as some of you have suggested, to attempt to anticipate those who will be successful in the profession.

It's your job to know what kind of community you want and what role lawyers are to play in that community—not merely what roles they have been playing in the past, but what roles you wish them to play in the future. The relevant questions are: What capabilities and skills are required for the performance of these roles? How can one devise tests to anticipate these capabilities and skills? How can one positively encourage the interest of those with the relevant capabilities and skills?

With the broad outlines of your problem indicated, we turn next to the postulation of, and commitment to, a set of basic goal values. This, again, is a step you cannot avoid even if you wish to. The position that Professor Lasswell and I took many years ago was that while all law is policy, not all policy is law. All law, in the sense that it affects a distribution of values among people in a community, is policy; some policy is, however, naked power. Whether we like it or not, law schools, lawyers, government officials, all of us, are working with values all the time. The only question is how consciously, how deliberately, and how systematically we formulate and clarify these values.

President Levi indicated very aptly when he

remarked that the legal profession has always had a high concern for our great inheritance of the Western European values of human dignity. These are the values that now are incorporated in the Universal Declaration of Human Rights, in the United Nations Covenants on Human Rights, and in most national constitutions. Quite recently I have been working with colleagues in trying to delimit the field of "human rights." Ultimately it dawned on us, as we should have known from the beginning, that there is a "human rights" dimension in every decision with which lawyers are concerned.

In your more detailed clarification of the basic community policies you serve, you need to become more precise about the goals for which you choose and train lawyers. One common conception of a profession is that it is a group that has not only a special skill but also a responsible concern for the goals and aggregate consequences of the exercise of this skill.

From this perspective, the social role of the lawyer is that of the specialist on authority and control who has a responsible concern for the common interests of all the communities of which he is a member. The function of the lawyer is to assist in the establishment and maintenance of the totality of a community's public order—to reduce the number of decisions taken by mere naked power, to manage authority and control in a way that will maximize the production and sharing of all values, and to increase the civic domain in which people are free from all forms of coercion.

In the performance of this general role, the lawyer must obviously engage in many more specific roles or tasks. Your first task is to identify these more specific roles and tasks and the capabilities and skills required for their performance. It should scarcely require saying that your every effort should be to encourage pluralism and experimentation.

If we turn to past trends in the achievement of clarified goals, we find little cause for complacency. Certainly you have improved your capabilities for predicting first-year grades, and the indicators for quality that you employ would suggest that the quality of law students is improving. You have, however, left many important questions unanswered, and much of the contemporary writing about legal education appears not even to ask the important questions. I would refer you to such prestigious exercises as the American Bar Association Assembly in Chicago, 1968, "Law in a Changing America," The Carrington Report for the AALS, and now the report prepared for the Carnegie Commission on Higher Education by Packer, Ehrlich, and Pepper in 1972 entitled, *New Directions in Legal Education*. The combined effort of all these exercises seems to me to be somewhat bland and defeatist, resolutely facing backwards. Thus Packer and associates write (p. 54) in description of the Carrington Report:

In this respect, the Model assumes that a law school is not equipped with a suitable process for identifying the ultimate goals of society. It also assumes that no institution committed to inquiry

should attempt firm conclusions because to do so would impair its receptivity to other ideas. . . . It expresses scepticism that a law school can be effectively used as a means of altering the goals of the larger society.

On the copy I was reading, some student had scribbled the marginal comment: "Fiddling while the world burns." In little of this recent writing does one find any vision of the different possible intellectual standpoints or of the great range of intellectual tasks that are relevant to inquiry about law, or any commitment to, or even understanding of the relevance of values. Yet an occasional dissenting voice does ring clear. Thus Edgar and Jean Cahn write:

. . . [T]he law school—as an institution—has failed to acknowledge that it has an institutional obligation to the legal system as a whole. . . . The question is whether the law school . . . can utilize its unique vantage point and its relative detachment to enable society to proceed more rationally to reshape its legal system, to provide effective redress of grievances and to permit orderly and rapid social change within the rule of law. [Edgar and Jean Camper Cahn, Power to the People or the Profession—The Public Interest in Public Interest Law, 79 Yale L.J. 1005, 1027 (1970).]

If we seek the factors affecting past achievement, we find even less knowledge. Ideally your inquiry should extend to the demands the community makes upon us as law schools, the resources put at our disposal, and the demands we make upon ourselves, including the whole set of perspectives (demands for values, identifications, and expectations) we bring to present and past failures. Inquiry that would be helpful has scarcely begun to be made. I would suspect that one of the most important variables has been our own low aspiration. In this connection, without intending any offense to good friends, I should like to quote certain words from an address by the famous Mr. Cravath to Harvard students:

Too much imagination, too much wit, too great cleverness, too facile fluency, if not leavened by a sound sense of proportion, are quite as likely to impede success as to promote it. The best clients are apt to be afraid of those qualities. They want as their counsel a man who is primarily honest, safe, sound, and steady. [Quoted from Travnor, Who Should be a Lawyer, But Why, 13 J. Legal Ed. 157, 170 (1900)]

I submit that it is to Harvard's great credit that it hasn't taken this advice.

Turning from the factors that have affected the past to a glance toward the future, if you take seriously the job that I suggest for you, you would construct alternative futures from the most optimistic to the most pessimistic, and you would construct these simply as heuristic devices to encourage your imagination and to cause you to dream up new alternatives.

I happen to be a little on the pessimistic side here. I recall a remark that my predecessor in international

law at Yale, Professor Borchard, once made. He said that an optimist is a man who believes that the future is uncertain. I think that we are in for much rougher times in the future than we have had in the past both from the demands that will be made upon us and the resources that will be put at our disposal. Our best hope is that the larger communities of which we are members will come better to understand the conditions not only of law but of a law of human dignity.

This brings me to my last point, your task in inventing and evaluating improved alternatives for the discharge of your responsibility. After looking through much of your literature, the recommendation I would make is that you constitute yourself an effective body for the continuing appraisal of how well our profession is doing this job of recruiting its new members, of selecting and preparing the people to go out into the profession. When I say continuing appraisal, I intend a contrast with a one-shot affair, a single study of the kind that you've commissioned on a number of important but relatively minor problems.

The reason I make this recommendation to you is that you are the people who are most directly concerned with these problems. The role that you perform in this total process is indispensable. Somebody has to perform it, and it needs to be performed with an understanding of its larger context.

A comprehensive, continuing appraisal would require you to take seriously many of the questions that I have outlined. You would recognize that you're not simply selecting the people for certain roles, but you are in measure helping to create the roles. You would specify and clarify the skills and capabilities that are necessary for the better performance of these roles. This would require some study of what kinds of communities you want in the future from the local to the national. Some of us are interested in even the global level; we know that we cannot live in isolation any more. The questions for all the communities are: what roles have lawyers played, what roles should they play. Your concern should be for the "functional" roles of the lawyers, not for the labels or the formalities. This would bring in all the paraprofessionals, all the people who actively participate in government, politics and community service.

It may bear emphasis even to you that the distinction so commonly made between the legal and the political is highly artificial. The lawyer's principal function is to minimize the role of naked power, to maintain a minimum order in which changes may go forward by peaceful and non-arbitrary ways in accordance with community expectations. Beyond this, he has a function in establishing and maintaining an optimum order in which all values are greatly produced and widely shared.

A public order in which values are widely shared must, further, be one in which people have adequate opportunity to get into the legal profession. You can be sure that our country will not long tolerate a situation in which able people are denied access to the

profession, while many segments of the community do not get adequate legal service.

Here is a quote that appeared in the New Haven paper the other day from a member of the Yale medical faculty, Dr. George A. Silver. The heading is "More Efficiency in Medical Care Needed." The doctor says: "Medical schools, such as Yale, and their 'pussycat' professors 'are the real paper tigers—the villains'—who are preserving the *status quo* and limiting the number of students admitted to medical schools." The newspaper report adds:

Dr. Silver contended that the present system of producing doctors isn't the best way of doing it.

The current medical education program, he said, is "undifferentiated" and its training is "neutral in theory... but in actuality the training is directed at laboratory orientation, specialism and a continuing umbilical attachment to the medical centers."

The doctor continues with a theme comparable to that which I've been offering here about the law schools. The people are simply not going to tolerate the lack of medical care and this kind of restriction upon the profession. He adds again:

However, the villains opposing change... sit in the faculty seats of medical schools... Their anachronistic concepts of what constitutes medical education preserve the constraints that limit the number of students to be admitted or educated.

He comes out for more medical schools and even more students; as large as Yale is, it could, he asserts take a great many more students, perhaps twice as many students as it does.

We may have to take such admonitions to heart. If one thinks of the lawyer in functional terms, as one who performs all the many roles in the making and managing of authoritative decisions, if one thinks of all the paraprofessionals and lawyer equivalents, I don't think we have any flood of lawyers or could have such a flood.

What I would urge upon you is that you step up your committees, your studies, to raise these fundamental questions, to get the facts about them, and to clarify your policies in detail. None of this two-day-session business with a few off-the-cuff speakers who come in with a lot of bland, glib, complacent platitudes. Maybe after a few years of genuine inquiry you can reformulate your problem and quit fooling with this insoluble problem of trying to get better predictive accuracy of what some first-year student is likely to score on the traditional plabum.

Some of the best lawyers I've trained at Yale were not very good first-year students. Some of them weren't even good third-year students, but they've been great judges and great lawyers.

I might say that having taught for some 42 years, I regard myself as perhaps one of the senior members of the profession. I don't think, despite all of your improvement in your techniques, that the students we get today are any better than we have had at several periods during the 42 years.