

1-1-1989

What Is a Law School?

Stephen Wizner
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers



Part of the [Law Commons](#)

Recommended Citation

Wizner, Stephen, "What Is a Law School?" (1989). *Faculty Scholarship Series*. Paper 1853.
http://digitalcommons.law.yale.edu/fss_papers/1853

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

WHAT IS A LAW SCHOOL?

by
Stephen Wizner*

I. INTRODUCTION

What is a law school? That is a question that ought to have a fairly straightforward answer: a law school is a professional school for the education and training of lawyers. If we know what lawyers do — or ought to do — we should be able to design a curriculum that will prepare law students to carry out that professional role in a competent, ethical, socially responsible manner.

Why, then, is there such widespread dissatisfaction with the state of legal education? Law students believe that today's law schools do not prepare them to be lawyers, and program them to aspire, or resign themselves, to narrow and materialistic career opportunities. Law school faculties cannot agree on what should be taught in law schools, how it should be taught, or who is qualified to teach it. Faculty appointments and promotions are based upon the production of legal scholarship that often has only a tangential relationship to the work of lawyers and the problems of clients. The public views lawyers — law school graduates — as a necessary evil, at best, and more often as greedy, sleazy technicians who prosper from the problems and misfortunes of others.

The purpose of this piece is to offer some ideas and conclusions about the law, legal education, and legal process. Specifically, I will argue that the dynamic relationship between legal education and the law must be channelled toward a greater fulfillment of a law school's social obligation to the public and its educational obligation to its students. These responsibilities include the provision of free legal services to the poor and under-represented through live-client clinical programs. I will also summarize my views on the functions of law, the roles of lawyers, and the proper

* Director of Clinical Legal Studies and Clinical Professor of Law, Yale Law School; A.B., Dartmouth College; J.D., University of Chicago. Versions of this paper were presented at faculty seminars at the DePaul University College of Law on March 14, 1988, and the Boston University School of Law on April 18, 1988. I am grateful for the skepticism of participants in those seminars, which helped me to rethink some of what appears in the following pages. I am especially grateful to Eli Bard, whose creative editing almost succeeded in turning a polemic into an essay.

objectives of legal education because the obligations that I intend to argue for arise out of those processes.

This Article will also venture some opinions about why there is a lack of representation for the indigent by both the private bar and law schools. This includes both the substance and manner in which law students are taught. Another purpose of this Article is to remind people of the remarkably visionary view of Jerome Frank, and how his and other pleas for a more practical legal education remain unfulfilled today. I conclude with my thoughts about how clinical programs occupy a position of paramount importance in satisfying both a law school's obligation to society's poor and underrepresented, and to its students.

II. CRITICISM OF THE LEGAL PROFESSION AND LAW SCHOOLS

The legal profession is accused both of too much lawyering — witness the attacks by the insurance industry, product manufacturers and the medical profession — and of too little lawyering — the unavailability of legal services to large segments of the population, especially the poor, is a matter of continuing concern. Lawyers are criticized for what they do, how they do it, and whom they do and do not represent. Their work, their competence, and their ethics are the subject of ridicule. Listen to the words of Carl Sandburg:

The lawyers, Bob, know too much.
They are chums of the books of old John Marshall.
They know it all, what a dead hand wrote,
A stiff dead hand and its knuckles crumbling,
The bones of the fingers a thin white ash.
The lawyers know
a dead man's thoughts too well.

In the heels of the higgling lawyers, Bob,
Too many slippery ifs and buts and howevers,
Too much hereinbefore provided whereas,
Too many doors to go in and out of.
When the lawyers are through
What is there left, Bob?
Can a mouse nibble at it
And find enough to fasten a tooth in?

Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?

The work of a bricklayer goes to the blue.
The knack of a mason outlasts a moon.
The hands of a plasterer hold a room together.
The land of a farmer wishes him back again.
Singers of songs and dreamers of plays
Build a house no wind blows over.
The lawyers — tell me why a hearse horse snickers hauling a lawyer's bones.¹

Sandburg's mocking ode to the work of lawyers should not be dismissed as the grumbling of an uninformed curmudgeon. After all, Sandburg was a biographer of Lincoln and friend to illustrious lawyers like Altgeld and Darrow. He was familiar with the work of compassionate, socially responsible lawyers. What Sandburg lamented was lawyers' formalism, their use of jargon and abuse of procedural technicalities, their inflexible adherence to ancient rules and doctrines, and most of all their failure to be more constructive and creative contributors to the community.

What should law schools be doing in order to fulfill their obligation to society's poor and underrepresented? Before this central question can be answered, the source of the problem must be identified. Lawyers are the product of law schools. If lawyers have a bad reputation, it is partially the fault of how and what they are taught.

Dissatisfaction with the current state of legal education and the performance of law school professors is widespread. In 1983, Derek Bok fired a well publicized salvo at the profession, noting that too many of the brightest students are choosing law over some presumably more socially useful profession.² Judge Harry Edwards, in an address to the Association of American Law Schools, criticized the lack of commitment to public-interest law and the increasing tendency of legal academics to "talk only

¹ C. SANDBURG, *COMPLETE POEMS* 189 (rev. ed. 1970).

² Bok, *A Flawed System of Law Practice and Training*, 33 *J. LEGAL EDUC.* 570 (1983).

to each other.”³ He rhetorically asked,

How is it possible to have a fair system of justice without a strong public-interest bar and without significant governmental involvement in funding legal services for those who cannot otherwise afford them? And, should this not be a matter of the greatest concern for legal education?⁴

I will attempt to analyze what has led us to the point in legal education and the law where the interests of indigents are too often ignored, jeopardizing our attempts at a “just” legal system.

Blame for the dissatisfaction with current law school graduates may also be placed, in part, on the form and substance of legal education itself. The public perception of a law school professor is, of course, Professor Kingsfield of *The Paper Chase*. His introduction to his students was to tell them that they came to his classroom with a skull full of mush. If they survived his pedagogical torture they would leave with that most cherished of possessions, the ability to “think like a lawyer.” What does law school teach its graduates and why is this training so susceptible to producing privately- rather than publicly-oriented lawyers?

It is not a new idea that legal education teaches its graduates to be value-neutral. The question asked of students is rarely which party is “right,” but which has the most convincing legal position. This approach allows value-neutrality because the lawyer has no problem arguing for either side with equal conviction. This promotes the hired-gun attitude that the public perceives and some lawyers outwardly profess. Law school teaches respect for legal rules and processes, but the results are generally not examined as closely. There is disdain for those who consider the ends as well as the means. “Results-oriented” is a pejorative term for those judges who slight the process to achieve a decision they consider just. The process is important; it must be effective and impartial or the law loses its legitimacy. But it is a mistake to view the process as everything. If the process is consistently producing an unjust result due to inequalities of power or wealth then changes must be made. These systemic changes have occurred periodically. They are usually the result of an expansive

³ Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285, 291 (1988).

⁴ *Id.* at 289.

reading of constitutional protections. For example, the requirement that indigent criminal defendants receive counsel was an important systemic change. Yet, despite the occasional progress made in the judicial system, this system remains the heart of legal education.

Law students are taught that it is the system that is the ultimate savior of justice. The people involved occasionally may be corrupt, motivated by greed and self-interest, but as long as the process is pure, then justice, or at least equity, is preserved. This approach makes it irrelevant who the parties are or what their respective social, economic, or political status is. The student is taught that she is the guardian of the process and that without her, there will be no justice, nor any possibility of ever reaching a just result. The student learns that the ultimate perversion is not an individual result that is skewed but a process that is manipulated. The process-oriented mindset contributes to the ease with which lawyers represent any type of clientele. It is not in the nature of an attorney to feel that he should be representing different sorts of clients because he really represents the system itself. The process-oriented mindset is reinforced when lawyers see consistent examples of the imperfections inherent in our (or any) legal system.

Beginning as students, lawyers see that the system often is manipulated. Frivolous lawsuits are brought against corporations with deep pockets because it is often cheaper to settle than to litigate. Prosecutors find ingenious ways to circumvent the rules against introducing evidence of past bad acts or crimes.⁵ The academic and judicial processes abound with contradictions and corner cutting. The mere fact that there is a doctrine of "constructive" notice or knowledge in the law points to the acceptance of a certain amount of sleight of hand that is tolerated even in the theoretical basis of the law. When a law student tries to decipher exactly what the components of a penumbra are he learns that getting others to agree with you may be the essential component of jurisprudence rather than any dissectible logic. The Supreme Court, instead of being above cults of personality, seems to thrive on them. These contradictions create an undercurrent of contempt for the system which, coupled with a process-oriented mentality, create an ambivalence toward law and justice. Every attorney

⁵ See generally Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135 (1989).

knows that obedience to the rules and clean hands alone do not guarantee success. These must be coupled with a healthy dose of realism about people and processes. The lawyer is taught that she cannot rely exclusively on the system, but must still respect it; this cuts her adrift philosophically. She needs the system to achieve goals for her clients and must rely on the system to function, yet she is also an important component of the system. The result of these conflicts is that the lawyer tends to remove herself completely from the system she uses. Clients become fungible because they serve only to present problems for the lawyer to solve. She becomes distanced from the practice of law as a justice system or as a protection for the powerless who cannot afford her counsel but who have rights that need advocating. Lawyers are often accused of being unduly cynical but considering how they are educated, it is not surprising that they find it difficult to give themselves wholeheartedly to the system that they both revere and manipulate.

The finger of blame is pointed at law schools not only for how they teach, but what they teach. Fifteen years ago, in what some cynically call the "post-Watergate morality boom," law schools began to require a course in ethics. The problem is that legal ethics have little to do with notions of morality and some schools more appropriately label the course Professional Responsibility. The rules and regulations regarding the duties an attorney owes his client sometimes require behavior that may be objectively immoral. The problem of client perjury has yet to be satisfactorily resolved. The lawyer, as an officer of the court, has a duty to report what he suspects to be a crime yet his duties of loyalty and confidentiality may force his silence. If his client confesses a crime to him that someone else is blamed for, the attorney may be prevented from freeing an innocent person. What lessons are to be learned from a profession that *requires* its members to participate in these rather obvious perversions of justice? The rationale is that if the clients cannot rely on confidentiality they will not disclose everything to their lawyers which will result in a diminished system overall. It is not particularly satisfying to rely on the adage that the good of the many outweighs the good of the few when the result is injustice.

The lack of legal services for the poor and the dearth of instruction in publicly-oriented law in law schools is accentuated by another factor: money. As much as we would like to avoid acknowledging it, money fuels

career decisions and forces career choices. The cost of attending law school is a severe financial burden on many students. Although there are federal and private loan programs available, they do little more than leave the student with a financial albatross when he leaves school. Even assuming that he has no loans from college, many graduates have loans totalling thirty, forty, or fifty thousand dollars. The government or private lender does not care whether a law graduate is doing public-spirited work for the homeless, or hostile takeovers; it simply wants its money. The salaries paid for public interest legal work just do not reflect the reality that most young lawyers, carrying substantial financial burdens, are not independently wealthy. It is unfair to place the burden of public service exclusively on recent graduates who can rarely afford this luxury.

Who can afford it? There are two obvious answers: The private law firms and the law schools. Most firms have a pro bono policy which allows their members to engage in a certain amount of non-billed time. The quality and commitment of every firm differs. Some policies are outstanding, while some just go through the motions. There is a systemic problem with most law firm pro bono policies which is also money-based. Many firms allow associates to spend a certain percentage of their time on pro bono work but do not count that time toward billable hour quotas. The result is that the harried associate must complete all her regular work, no mean feat, before turning to pro bono work. This approach, which is quite common, again places the burden of public service on those who cannot best afford it. Because a partner bills at a higher rate than an associate the firms are loathe to give away that time.⁶ Many large law firms also confuse their pro bono programs with patronage of the arts. These firms' lists of pro bono clients read like a Who's Who of museums, ballet, and opera. Such firms have mistaken their pro bono responsibility for charity. Instead, pro bono is the responsibility that accompanies society's granting of a monopoly on legal practice to the members of the bar with the difficult questions of their role in society.

The question raised by this Article is, what should law schools be doing instead of the generally unsatisfying compromises that most reach? Before discussing that question, the relationship between law schools and the legal profession must be addressed.

⁶ Edwards, *supra* note 3, at 288.

III. THE DYNAMIC RELATIONSHIP BETWEEN THE LEGAL PROFESSION AND LAW SCHOOLS

What is dominant or deficient in law schools both reflects and stimulates what is dominant or deficient in the legal profession, and vice versa. Simply put, what we fail to instill in our law students we find lacking in our lawyers. The problems in the legal profession and the law schools are dynamically related to each other. For example, the "business" character of most law practices shortchanges the poor and other underrepresented interests. The excessively theoretical approach to legal education leads to the value-neutral technique of private dispute resolution over public interest advancement. The consequences of the dynamic relationship between law schools and the legal profession are that changes in both areas influence each other.

The relationship of the law school to the legal community is both direct and indirect. It is direct in the sense that law students and their teachers become participants in the community; it is indirect in the sense that legal education may influence what lawyers do. There is one more foundational matter that must be examined: the functions of law, the roles of lawyers, and the objectives of legal education. If we are able to come to some basic agreement about those matters, we should be able to agree about the social and educational obligations of law school.

The functions of law include the institutionalization of social norms and the implementation of social policy. For example, the Civil Rights Act of 1964 formally legitimized the social policy of a greater equality between whites and blacks and also placed opponents of equality outside the law. The law also develops, pronounces, codifies, and enforces legal rules. A good example of this function is in tort law. If a certain course of conduct always results in tort liability, it will eventually be abandoned. The law also protects individual rights, resolves disputes, and facilitates transactions. The roles of lawyers reflect these functions and therefore include legislation, adjudication, arbitration, mediation, law enforcement, and representation.

The objectives of legal education ought to bear a significant relationship to the functions of law and the roles of lawyers. Legal education should prepare law students to assume lawyers' roles and carry out law's functions. Accordingly, law schools should train lawyers to be practitioners,

legislators, government officials, and business entrepreneurs. Law schools should also educate legal scholars and law teachers, conduct research, and develop legal theory.

It is through the law school professor that theories about legal education become practice and that implementation starts to “spin the tumblers” of a student’s mind, to borrow a phrase from Professor Kingsfield. The task of professing law incorporates two distinct functions. One is the academic function, the job of criticizing, expounding, and reforming law. The other is the training of young lawyers, which includes teaching legal doctrine and skills training.

IV. SOME SOLUTIONS: FRANK, KEYSERLING, LASSWELL AND MCDUGAL

The problems of law schools are not new. Nor are pleas for a more practical and socially responsible legal education. In 1947, Jerome Frank published an article entitled *A Plea for Lawyer-Schools*.⁷ Professor Frank’s dissatisfaction with the state of legal education was both insightful and prescient. His critique of legal education is perhaps even more relevant today because the problems of forty years ago have become institutionalized. Frank began his critique by addressing the bedrock of American legal education, the case method.

Frank described Christopher Langdell, the father of the case method, as a “neurotic escapist.”⁸ His pedagogical theory that the library should be the heart of the law school and that legal education was akin to scientific research naturally emphasized the theoretical over the practical. The result of Langdell’s influence, according to Frank, was stifling. By ignoring the actual process of litigation, the case method provides the law student with only an academic view of the law. But the law does not exist in books; it ultimately exists in court cases between disputing parties. The bottom line of the law is that one has a legal right if one wins the case and a legal duty if one loses.⁹

⁷ 56 YALE L.J. 1303 (1947).

⁸ *Id.* at 1304.

⁹ *Id.* at 1313.

Frank's solution was to put practicing law offices inside the law schools, side-by-side with the libraries and classrooms. The teachers would also be practitioners who would guide the students in the actual representation of real clients. Frank did not advocate running a trade school where theory was ignored for the nuts and bolts of practice. He wrote,

[an] interest in the practical should not preclude, on the contrary it should invite, a lively interest in theory. For practices unavoidably blossom into theories, and most theories induce practices, good or bad.¹⁰

Frank enumerated several ideas for putting law schools back on the right track and for "repudiat[ing] Langdell's morbid repudiation of actual legal practice, to bring the students into intimate contact with courts and lawyers."¹¹ These ideas, unfortunately, were not implemented forty years ago, and the problems Frank sought to correct are still present today.

Frank's first idea was that law school professors should have no fewer than five to ten years experience in the practice of law. They should be lawyers who have dealt with every aspect of the practice including litigation, client counseling, arbitrations, and administrative agencies.¹² The lack of practical experience in law school professors continues to be a weak point of legal education. How can a teacher train lawyers to do what she has never done? A stint on a law review and a circuit court clerkship is no substitute for years of practical training. Many legal scholars are not cut out to be practicing lawyers, yet the law school must train practitioners in greater proportion than scholars. The lack of experience of most law school professors does a disservice to their students and to the public which receives a constant stream of new lawyers ill-equipped to deal with real legal conflicts.

Frank's second suggestion was that the case method be revised to provide a genuine understanding of how cases are won or lost.¹³ Instead of reading a great number of court opinions that provide only the result or conclusion of an appellate court, all of the papers and pleadings of a few cases should be studied. This method would more closely resemble the

¹⁰ *Id.* at 1321.

¹¹ *Id.* at 1313.

¹² *Id.* at 1313-14.

¹³ *Id.* at 1315.

case histories used in medical schools.¹⁴ Continuing his analogy to medical schools, Frank urged that students and teachers get out of the classroom and get into court. Even the mock trials and exercises that were done in the thirties and forties, which are even more in vogue today, provide little more than “amusement” according to Frank.¹⁵

The most important step in Frank’s plan to transform law schools into lawyer-schools was his proposal that each school have a clinic. This clinic or “legal dispensary,”¹⁶ would provide free legal services to a variety of clients. These clients would include the indigent, government agencies, legislative committees, and public interest groups. Frank was concerned that students see the human side of the law. The practical consequences of a system run by imperfect human beings is something completely lost in casebooks. As for the argument that three years is a short period of time in which to train lawyers, and, therefore, clinical projects were too time-consuming, Frank was as unimpressed as I am. He recognized that six months is enough time to teach the case method of analysis, leaving plenty of time for the more useful work of the clinic.¹⁷

At about the same time Jerome Frank was criticizing the slavish devotion of the law school to Langdell’s case method other scholars were exposing the lack of commitment made to social objectives in the law. For example, Leon Keyserling argued that:

A course of study which neglects to describe adequately how the law actually works today fails to provide the groundwork necessary for an examination of whether the law works as well as it should.¹⁸

A decade later, Harold Lasswell and Myres McDougal published their blue-print for a new kind of law school. In *Legal Education and Public Policy: Professional Training in the Public Interest*¹⁹ they argued that legal education must move “beyond the classroom”²⁰ and into the world. Acknowledging that “[p]roposals for ‘clinical’ law schools or ‘internships’

¹⁴ *Id.*

¹⁵ *Id.* at 1316.

¹⁶ *Id.*

¹⁷ *Id.* at 1316-18.

¹⁸ Keyserling, *Social Objectives in Legal Education*, 33 COLUM. L. REV. 437, 440 (1933).

¹⁹ 52 YALE L. J. 203 (1943).

²⁰ *Id.* at 289.

have been increasingly prominent in recent years,"²¹ Lasswell and McDougal asserted that:

the training of modern [law] students deflects their attention from the factual contexts in which legal technicalities are made functional and . . . this cannot receive entirely satisfactory correction by providing more fact books.²²

Rather, it is necessary, they argued, "that opportunities be provided for direct contact with courts, administrative agencies and other parts of our social process."²³

However, it was not until the 1970s with the rise of the clinical legal education movement, that some of the ideas of Frank, Keyserling, Lasswell, and McDougal began to be reflected in the curricula of the law schools to any significant extent. While it should no longer be necessary to make the case for clinical legal education, the forty-year delay in implementing Jerome Frank's proposal, and the continuing skepticism of some law school administrators and faculties toward the integration into the curriculum of live-client clinical programs, suggests that clinical education will continue to occupy a marginal position in all but a handful of law schools.

It is essential to recognize that clinical programs offer an educational experience that differs from, and simply cannot be provided for, in the traditional law school classroom. Professional education involves the constant interaction of the theoretical and the practical, not just in the classroom and the library, but in the settings where the profession is actually practiced.²⁴

I am not claiming that so-called "skills training" is the primary goal of clinical legal education, nor that the social and educational objectives I have outlined can be met by the inclusion of simulated skills training courses in the law school curriculum. I agree with Lasswell and McDougal that "[i]n a sense all courses in the law school exemplify the skill principle, since they provide the student with command of legal technical-

²¹ *Id.* at 291 n.137.

²² *Id.* at 291.

²³ *Id.*

²⁴ See Wizner & Curtis, *Here's What We Do: Some Notes on Clinical Legal Education*, 29 CLEV. ST. L. REV. 673, 677 (1980).

ity.”²⁵ In these courses, students learn to read, analyze, criticize, distinguish, and construct arguments from appellate court opinions and other legal and related materials. However, to study appellate court opinions by any method, even moot court, is not to study the life of the law in its intellectual, practical, or social dimensions.

Similarly, to practice lawyering skills such as interviewing, counseling, negotiating, drafting, and courtroom advocacy through simulation, for whatever practical value that may have to the student, is also not to study the life of the law in all its complexity and uncertainty. Professional education and “skills training” are simply not the same thing. Law is not all “skills” and no substance. Law cannot be manipulated without limit to suit a client’s goals. Law is grounded in history, doctrine, and professional ethics.

The goal of *clinical* legal education — and it should be the goal of legal education — is to teach students to *be* lawyers, not just to “think like lawyers” or “act” like lawyers. This means that we must teach law students — provide a setting in which they can learn — the proper and effective representation of clients, in the legal system, in society. Our educational goals²⁶ for our students should be that they learn:

1. To establish and maintain an attorney-client relationship, by learning to deal with clients as human beings, not impersonal elements in hypothetical fact situations.
2. To plan and carry out legal representation, including gathering facts, marshalling facts and legal theories, determining ends and means, and carrying the plan to a reasonable conclusion. (This process involves, but is not reducible to, interviewing, counselling, negotiation, drafting, legal research and writing, and courtroom advocacy.)
3. To exercise professional judgment, to analyze complex situations, and to help clients choose among alternative courses of action.
4. To become sensitive to, recognize and deal with ethical considerations.

²⁵ Lasswell & McDougal, *supra* note 19, at 262.

²⁶ These goals were first articulated by John Bradway, who started the first legal clinic in a modern law school. See J. BRADWAY, A HANDBOOK OF THE LEGAL AID CLINIC OF THE UNIVERSITY OF SOUTHERN CALIFORNIA (1930).

5. To appreciate the limitations of legal intervention, and the value of inter-professional cooperation, in resolving human problems.

6. To employ the legal system to seek social change.

7. To see their role as lawyers as including a duty of public service, and an obligation to contribute to the provision of legal assistance to the poor and underrepresented.²⁷

To respond to Jerome Frank's plea for lawyer-schools, to Keyserling's emphasis on social objectives in legal education, and to Lasswell and McDougal's call for transforming legal education into professional training in the public interest, will require changes in the curricula of law schools, in the make-up of law school faculties, in the attitudes of law teachers and law students, and in the shape of the legal profession.

V. CONCLUSION

Legal education occupies a unique position in society; it must both train students in the technical aspects of law and instill in them the responsibilities of the profession. If law schools fail to enlighten students about their obligations to represent those who are unable to help themselves, it is unlikely they will ever fulfill their societal obligations. Judge Edwards writes that "we can no longer tolerate any further growth in the disjunction between the study and practice of law."²⁸ He has cut directly to the heart of the problem which is that the study leads the practice in certain directions. If legal educators are to enhance and nurture the goals of a just legal system, they must realize that how and what they teach future lawyers must reflect a commitment to equal systemic access and ultimately equal justice.

²⁷ Many of these goals are currently being addressed in the clinical program at Yale. The program features an "in-house" set-up, with most of the teaching and instruction done by faculty members. The needs of the poor and underrepresented receive priority treatment. Clients include the urban poor, prisoners, and mental patients, who, without this program, would likely have no legal representation at all. *See generally* Wizner & Curtis, *supra* note 24.

²⁸ Edwards, *supra* note 3, at 293.