THE TEACHING AND RESEARCH MISSIONS OF THE UNIVERSITY PROFESSIONAL SCHOOL

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In a commendable effort to look beyond the limits of the College of Law in our University's Centennial celebration, the architects of this program wisely chose the general subject of professional education, not merely the schooling of lawyers. However, in stating my topic they created a task beyond the capability of this particular legal educator—one who is more lawyer than educator by personal background and who knows little about other professional schools.

My first difficulty in this regard is embarrassingly basic. It requires a full confrontation with the question: "What Is a Profession?" This must be the threshold inquiry in any general discussion of professional education. Unfortunately, the term "professional" is quite imprecise. It is used to describe careers from athletics to politics. One narrowing definition was furnished by a great legal educator, Dean Roscoe Pound. It is simply: "A group pursuing a learned art as a common calling in the spirit of a public service."[1] Abraham Flexner, a pioneer in modern medical education, supplied a more complex definition, finding six criteria to be characteristics of a profession. They are:

> (1) intellectual operations coupled with large individual responsibilities, (2) raw materials drawn from science and learning, (3) practical application, (4) an educationally communicable technique, (5) tendency toward self-organization, and (6) increasingly altruistic motivation.[2]

Both definitions have merit but neither is adequate to identify those professions whose education can be considered together under my topic. Theology satisfies most any definition and stands with law and medicine as one of the three ancient learned professions, but it seems to have too little in common with them for all three to be treated in this paper.

However, there is one common element among certain professional schools which makes them appropriate for combined analysis. In some schools the University both confers a degree and satisfies a licensing requirement of an organized occupational group which controls access to its own ranks. Thus, we can pragmatically limit our inquiry to problems of institutions who train in the health services, architecture, engineering, education, and law. Each supplies the manpower needs of an organized, monopolistic profession and each is accountable to its respective professional community as well as to higher academic authority. This is the single most im-

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[1] R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5-6 (1953).

[2] Flexner, *Is Social Work a Profession?*, 1 SCHOOL AND SOCIETY 904 (1915).

portant distinguishing characteristic of professional education as I have chosen to define it.

This introductory note serves two purposes. First, it gives early emphasis to the responsibility of the professional school to its profession, a concept which pervades both its teaching and research missions. Second, this narrowing of focus reduces a huge subject to manageable proportions. Speaking from the vantage point of the law school, we can concentrate on those aspects of professional education which raise problems common to law schools and to other schools similarly related to an organized profession.

Research and teaching should be viewed as a single unitary subject, not as two separate and independent functions. Indeed, one could add the third mission of the law school, public service, with no real change in substantive content. After this somewhat simplistic analysis, the subject becomes exceedingly complex, and even frustrating, because there is so little agreement among legal educators on the ultimate goals served by any of these three functions of legal education in today's society. In this respect we probably differ considerably from educators of the other professions.

Regardless of how the mission of a law school is verbalized, it must find its tangible embodiment in the work of that unique human being called a law teacher. By contrast to his medical counterpart, the professional teacher is a relatively recent arrival in law. Although compulsory law schools may be traced to those of the Roman Empire in the Fifth Century,[3] the schooling of lawyers by persons making careers of legal education is largely a development of the last century.

The medical profession's Hippocratic oath points up both the earlier origins of medical teachers and another sharp historical difference between educators of lawyers and doctors. There is not yet anything in the history of the law teacher to compare with the first obligation of this famous oath, which from ancient times has guided the ethics of medical practitioners. The new physician swore by Apollo:

> To regard my teacher in this art as equal to my parents; to make him partner in my livelihood, and when he is in need of money to share mine with him; to consider his offspring equal to my brothers; to teach them this art, if they require to learn it, without fee or indenture; and to impart precept, oral instructure, and all the other learning, to my sons, to the sons of my teacher, and to pupils who have signed the indenture and sworn obedience to the physicians' law, but to none other.[4]

There is no evidence that law teachers as a group have ever enjoyed—or are likely to enjoy—comparable devotion from their students. The ex-

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[3] S. ELIOTT, OPPORTUNITIES IN A LAW CAREER 12 (1969).

[4] Fitts and Fitts, *Ethical Standards of the Medical Profession*, 279 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 29 (1955).

planation for this is not demeaning, but it is too complex to be developed here.

Another historical note is much more generous to law teachers. There is one legal educator whose personal impact on America's history is equalled by few men of any profession. He was an Englishman named William Blackstone, the forerunner of our modern law teacher. Despairing of the quality of the training of British lawyers by the practicing profession, Blackstone delivered at Oxford a series of masterful lectures which were published in 1765-69 under the title "Commentaries on the Laws of England." Blackstone thus furnished the basic textbook for the schooling of American lawyers for almost a century, including the self-education of young Abraham Lincoln.[5]

Blackstone's work still stands as the paramount example of the influence which a legal scholar can have on public institutions. The architects of American freedom were greatly influenced by this conservative English scholar and Blackstonian lawyers engineered the wholesale transplant of the English common law to this country—an event of enormous historical importance. The American revolution had been the last desperate effort of English subjects abroad to obtain their constitutional rights under their homeland's fundamental law.[6] The English common law and basic civil rights traceable to Magna Charta were the foundation stones of the new nation's legal system. Law teacher Blackstone is entitled to great credit for the conservative quality of this new system and its contrast to the radical convulsions which were to accompany the French Revolution. As historian Daniel Boorstin has noted, it is remarkable that "such a work as the *Commentaries* and the institutions which it expounded could continue to dominate the legal thinking of a people who had rebelled against the country of its origin."[7]

Our first American law teacher was Blackstonian George Wythe, Thomas Jefferson's mentor, who assumed a chair of law at the College of William and Mary in 1779. In 1817 the first full-fledged school of law appeared at Harvard. It was late in the 19th Century, however, before university legal education began to assume a dominant role in the training of the profession.

In addition to the founding of The Ohio State University in 1870, there was another event that year of historical importance to professional education. It was also in 1870 that one Christopher Columbus Langdell was hired from law practice in New York to be a professor of law and to bear the new title of dean of the Harvard Law School. Until then law offices were much more important than law schools as educators of the profession,

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[5] C. SANDBURG, ABRAHAM LINCOLN, THE PRAIRIE YEARS AND THE WAR YEARS 33 (1954).

[6] S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 207, 216-19 (1965).

[7] D. BOORSTIN, THE GENIUS OF AMERICAN POLITICS 88 (1953).

and the few law schools in business offered little more than scattered lectures by practicing lawyers and judges. Langdell began a revolution by hiring full-time professors. He also launched a first-year compulsory curriculum, which still survives to a surprising extent, and soon unveiled the case method of teaching. In 1871 he introduced our first casebook, a collection of judicial decisions on contracts.[8]

Langdell's case method, accompanied by the Socratic technique of teaching, still pervades legal education. The extent to which this should continue into a second century is at the core of any assessment of the legal education of 1970. We shall return to the subject.

One who seeks accolades for today's law teaching may turn to the 1967 book *"The Lawyers"* by Martin Mayer, which devotes one of its better chapters to the law schools.[9] Mayer surveyed legal education on a national basis and concludes: "What the law professors offer in their courses is the best quality of education in America. . . ."[10] He described law school teaching on the average as being "more intense and more intelligent teaching than is offered in any other variety of academic institution in the United States."[11]

Unfortunately, critics of legal education can cite more persuasive authorities. The October 1969 *American Bar Association Coordinator and Public Relations Bulletin* carried as its front-page headline "Concern Rises over Quality of Legal Education."[12] The item was based largely on an address at the 1968 ABA Convention by Chief Justice Warren E. Burger, in which he accused law schools of failing to meet their basic duty to provide society with "people-oriented and problem-oriented counsellors and advocates to meet the broad social needs of their changing world." This resulted, said the Chief Justice, not from deficiencies of law graduates in their knowledge of law but the fact that they receive "little, if any, training in dealing with facts or people—the stuff of which cases are made."[13]

There is really no disagreement between author Mayer and the Chief Justice. Note that Mayer applauds only the quality of education in "what the law teachers offer in their courses."[14] He gives us low marks quantitatively for not doing more and finds the main problem of today's law school to be that ". . . startlingly little is known systematically about the real world of the lawyer, and even less . . . about the purposes the society wishes the lawyer to serve . . . ."[15]

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[8] C. LANGDELL, A. SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).

[9] M. MAYER, THE LAWYERS 71-118 (1967).

[10] *Id.* at 118.

[11] *Id.* at 74.

[12] *Concern Rises Over Quality of Legal Education*, 17 AMERICAN BAR ASSOCIATION COORDINATOR AND PUBLIC RELATIONS BULLETIN, No. 10 (1969).

[13] *Id.*

[14] M. MAYER, *supra* note 6, at 118.

[15] *Id.*

Few will fully defend either the content or method of current law school programs. Dissatisfaction from the practicing profession, judges, students, and increasing numbers of law teachers have put legal education on the defensive. Along with most other legal institutions, it is in serious trouble. However, unlike some legal institutions, it is undergoing rigorous self-examination which holds considerable promise for major reform.

A Ford Foundation grant to the Association of American Law Schools has made possible a major study which is being conducted by a committee headed by Professor Paul Carrington of Michigan. We hopefully await that committee's report but, in the meantime, are engaging in much introspective self-study at every law school.

Most law teachers can agree on several points. First, legal education is too rigid, offering little latitude for tailoring students' course selection to individual interests and career goals. Students all do exactly the same thing in the first year and pretty much the same kind of things in the second and third year. This is true within law schools and from school to school, a uniformity due largely to the success and spread of Langdell's methodology.

Second, legal education is too narrow. Even in third year offerings which depart from the mold of large classes taught by the case method we do not sufficiently exploit the knowledge of other disciplines or opportunities for field and clinical experiences. Our comfort with the case method keeps us locked in various extensions of the law library. Non-legal and non-bookish resources are little used.

Thirdly, the total experience is too repetitious. The third year contains so little that is new and fresh that we must concede that it is a crashing bore to many students. The bright ones may be ready to practice after two years. We admit that we cannot teach all the law and the elective feature of the third year curriculum justifiably leads students to question the need for *any* particular course in it.

Curricular reform, or at least change, is advancing perceptibly, but not coherently or in accordance with anything approaching a consensus on goals. In keeping with the trend towards student voluntarism, most second and third year courses are elective. This may represent a nod towards specialization in large schools with enough teachers to offer a variety of advanced specialty courses. There is also a trend towards more elective offerings in newly developing subjects related to international relations, urbanology, the environment and civil rights. For instance last year's elective curriculum at a major eastern law school[16] included: Police Administration, Economic Development for the Poor, United Nations Law, First Amendment Freedoms, The Great Rights in the New States, Health Services in the Urban Society, Juvenile Delinquency, Land Use Planning,

[16] New York University.

Environmental Control, Law of Political Activity, Law of Urban Affairs, Civil Disobedience, Private Law Problems of the Poor, Public Education, Welfare and Public Assistance, Urban Housing, and Social Justice.

It is safe to say that such courses are added primarily because individual teachers want to pursue them and there is some current evidence of student interest. They do not result from new institutional commitments to any particular principles other than faculty-student voluntarism around the fringes of the curriculum. It is also safe to say there is deep dissatisfaction with this and every other law school curriculum in the country. Hopefully the AALS study may give stalemated, self-conscious law faculties the outside help they need to make real surgical changes.

New methods of classroom teaching, supplementing, not replacing the case method, are also an observable development in most schools. The basic materials are rarely called casebooks anymore. They typically are labeled "cases, materials, and problems," combining reported judicial decisions, discussion problems, trial transcripts, legislative hearings and reports, law review excerpts, and drafting exercises. This is the best evidence of a declining reliance on the casebook, particularly after the first year fundamental courses.

One particularly exciting idea is beginning to emerge from curricular reform: We should be able to do more for a student in three years than did the law school of 25 years ago. With four years of pre-law training and rising Law School Admission scores, our students unquestionably have greater capabilities. By reducing the compulsory curriculum, we have both conceded that most course offerings are not indispensable and have freed students for more variety in individual programs. It may well be that we can achieve what we view as our minimal general task in two-thirds of the time previously used. Then, the third year can be used for something totally different—innovations which are specifically designed to remedy some or all the quantitative shortcomings now attributed to legal education.

In a sense we may be reaching the point of medical educators when they divided studies into preclinical or basic science years and clinical years. They have since moved further, at least here at OSU, and provide what they call "an amalgamation of basic sciences as a method of systematic clinical problem solving."[17] If supporters of clinical programs for legal education have their way, we might initially devote the third year of law to such work and later follow our medical brethren into an amalgamation of methods in which clinical experiences pervade the entire law course.

If one-third of a student's law school career becomes available for something new, clinical work is not the only alternative. Determining how

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[17] Meiling, *A New Era In Medical Education*, 11 THE OHIO STATE UNIVERSITY COLLEGE OF MEDICINE JOURNAL 14 (1970).

best to use such a dramatic new resource will compel, for the first time, an institutional definition of purpose—the development of a coherent underlying philosophy of legal education.

The main difficulty is that we train lawyers for so many different kinds of careers, ranging from highly specialized work on Wall Street to general practice in county seats and from solo practice to huge firms. Government, corporate, and educational careers claim almost one-third of our graduates.

One expert has suggested that law schools should vary their curricula according to whether they are primarily supplying manpower for small or large firms. He places the top 15 or 20 law schools in the latter category.[18] As the dean of a law school which supplies graduates to both large and small firms and serves both the countryside and the metropolis, I can see serious troubles if we must elect either category. It may be workable for some schools, but not for Ohio State and much can be said for a pluralistic professional mission such as ours.

Another suggested solution to the problem of institutional mission was contained in an announcement made recently by a large Northeastern university which has no law school but enjoyed a short tenure under a lawyer as its president. It proposed to start a new kind of law school designed for policy makers rather than practitioners. The implicit notion in this—that sensitivity to public policy is foreign to the regular training of lawyers —is another view I cannot accept. Furthermore, the proposal of a policy-law school may overlook the fundamental skills which are essential in anyone who would make public policy. How many good causes have been lost because they were entrusted to proponents who were weak in advocacy? Lawyers who would make public policy should first be well trained in the basics of legal analysis and the marshaling and presentation of facts and arguments. They need much the same minimal qualifications as do private practitioners. The great success of lawyers in attaining and holding public office in this country demonstrates that we are achieving some success in producing policy-makers. It is my guess that the chief reasons lie in their talents in advocacy and problem analysis and their sense of relevance which inevitably flows from legal training.

Nonetheless, we are not doing enough, and we should be concerned with the quality of much of the public policy now being made by the lawyers who dominate governmental public office in this country. The legal mind frequently is accused of being inadequate to broad, complex public policy issues, and methods of legal education may be partly responsible. A perceptive staff member of the United Nations recently commented on

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[18] Cavers, *Legal Education in Forward-Looking Perspective*, LAW IN A CHANGING AMERICA 142 (G. Hazard ed. 1968).

the shortcomings of lawyers in dealing with complex issues of international problems, saying:

> Lawyers, by and large, are not in the intellectual vanguard. . . . At best, they are the present day classicists, skilled in verbal analysis, in structured argumentation, in close reading of documents. . . . For the most part, their emphasis is on words, on abstractions, on a highly limited slice of the real world. They prefer to operate in a tidy world . . . to take their facts in restricted predigested doses and to keep their distance from the new techniques and concepts of economics, social science, management and the like. . . . [T]he great bulk of law school graduates, . . . , manifest an intellectual provincialism that hardly qualifies them to deal with the kind of world I have referred to . . . .[19]

This criticism is heard frequently from non-lawyers in the Humanities and Social Sciences. Some feel that lawyers are one dimensional and, indeed, barely literate outside their own spheres. This might be tolerable to the educators of such lawyers if we were only satisfying them—our brothers in the practice—but, as Chief Justice Burger indicated, we are under fire from that source too. At the 1968 American Assembly on "Law In a Changing America," a prominent practicing lawyer stated views surprisingly close to those of our non-lawyer critics, saying:

> The preoccupation of legal education with matters of doctrine and formal analysis is a product of the case method of study, which accentuates the development of law at the appellate level. This method treats pertinent facts and conditions as given by hypothesis. It tends to ignore, and even to condition the law student against concern for, the correlation of legal concepts with the marshalling of evidence and the interactions of people, a process which ultimately commands much of the practicing lawyer's time and attention. This is compounded by the fact that legal education is induced by something akin to artificial insemination, through the efforts of teachers who are generally unfamiliar with the workaday role of the practitioner.

Then, turning this to a sort of complement, he added a softening qualification:

> This statement should not be taken as disparagement of law teachers. By and large, their want of appreciation of the true demands upon the "average" lawyer results from the fortunate fact that the teachers are not "average." To the extent that they have practiced, their manifest intelligence, talents and application have usually earned for them select positions, removed from the general practice of the law and the persons and problems which traffic there.[20]

To some extent, this cross-fire can be rationalized. Law teachers work a tense middle ground between academia and the profession. If we do our

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[19] Schachter, *Professional Education In The Public Interest—Remarks*, 1966-II PROCEEDINGS—ASSOCIATION OF AMERICAN LAW SCHOOLS 159 (pt. 2).

[20] Nahstoll, *Regulating Professional Qualification*, LAW IN A CHANGING AMERICA 129-30 (G. Hazard ed. 1968).

job well, we must condition ourselves to complaints from within the University that we are oriented too much to the profession and contradictory complaints from the practicing profession itself that we are too much turned inward toward academia. If this ever changes we will undoubtedly have moved too far in one direction or the other, but it does tend to make the teaching of a profession a rather lonely business.

Nonetheless, we cannot ignore sympathetic criticism based upon what we know to be true. Attackers of the case method's doctrine-oriented teaching join a succession of realists and pragmatists in an intellectual line which can be traced to Roscoe Pound. In 1910 he coined a term still used in this debate when he published *"Law In Books and Law In Action."* From Justice Oliver Wendell Holmes came the famous dictum that "The life of the law is not logic but experience,"[21] a truth totally at odds with Langdellian methodology.

In the 1930's, a school of legal realists, led by Karl Llewellyn and Jerome Frank, moved directly against traditional law teaching. Llewellyn urged the emersion of students in the concrete details of law work, attacking cases as they appear to lawyers who handle them. He also showed how law teachers can lead the way in law reform by going outside the lawyer's realm and studying the marketplaces where our commercial laws function.

There is a brilliant student note on this subject in a recent issue of the Yale Law Journal.[22] It does much to confirm the case for continuing the law journals. The schools of legal realism and pragmatism are traced from Pound to the present and a conclusion is reached which is critical of these would-be reformers:

> In their work on the legal process, the realists focused on empirical investigation and the conceptual framework for such investigation: behavior studies, "squaring" doctrine against facts, "pragmatic statesmanship," judicial fact-finding. Some of them, particularly Frank and Llewellyn, were aware that something larger than empirical method was needed to supply a professional model for making, practicing, and studying law, and that this model or paradigm involved values, concepts, and theories as well as contact with "reality." But they thought very little about the probable connections between the level of finding out "how it works" and the level of constructing a paradigm. Similarly, in education they realized that a new "method" of interpreting cases opened up large questions about how to study society and the legal system. But they tended to evade these questions through vague ideals of craft addressed primarily to pragmatic technique, and not directly to the difficult issues of what values the profession should support, how manpower should be allocated and paid for, and what kinds of intellectual, material, and political developments were required to realize their social and educational ideals.[23]

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[21] O. HOLMES, THE COMMON LAW 1 (M. Howe ed. 1963).

[22] Note, *Legal Theory and Legal Education*, 79 YALE L.J. 1153 (1970).

[23] *Id.* at 1172.

In other words, the pragmatists were not pragmatic. They stopped short of the difficult task of specifying responsive law school programs. This is a valid point and a provocative way of identifying the unfinished business of legal education as a whole. It fails to recognize, however, that the larger battle fought by the pragmatists has finally been won. Few will deny that the doctrine-oriented model built around the case method is obsolete. Students hunger for contact with the real world. Teachers can easily hold student attention by injecting practical experiences and actual, rather than hypothetical, problems. Living, unsolved problems and future solutions, as opposed to cold cases revealing past solutions, are the new order. But the next stage, implementation of this triumphant pragmatism, is a massive task and the debate has just begun on what should be done by way of concrete curricular change.

There is general agreement that students still should receive a substantial initial experience in rigorous case analysis and some minimum accumulation of substantive rules of law. The first-year curriculum seems a safe bet to remain in the hands of strong case and Socratic method-men teaching the basic subjects. Beyond this there is wholesale disagreement on clinical programs, specialization, individual research, draftsmanship, skills development and other means of enriching and expanding the law students' individual educational experiences.

Dean Goldstein of Yale has concluded that specialization is the answer[24] and I agree with a portion of his reasoning. It is no longer possible for us to claim that we are turning out true general practitioners. Just as no M.D. can now minister to all the ills of his patients, no J.D. can serve as a general practitioner for all the legal problems of the client. Specialization is a fact of life in the practice. But, just because the law schools can no longer turn out true generalists, it does not follow that we can now turn out true specialists. Specialization results generally from specialized experience in the practice or graduate education in law. I doubt seriously that the typical law school, or even the superior law school of typical size, can multiply its offerings to the point that any wide range of specialized practitioners such as tax, patent, corporate, criminal, domestic, labor, civil rights, or poverty lawyers can be produced in a three-year program. This may be one way to use that possible released third year that I mentioned, but law school resources will not be equal to such rich offerings in the foreseeable future. However, we should be able to offer more specialization than is now done. Making it possible for third-year students to do substantially more in-depth work in areas of personal interest through supervised research, writing, clinical work and seminars is a real possibility.

Here we collide with a stark reality. Such programs are impossible

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[24] Goldstein, *The Uufulfilled Promise of Legal Education*, LAW IN A CHANGING AMERICA 164-66 (G. Hazard ed. 1968).

with current teacher-student ratios of 20 or 25 to one. The common ingredient in all proposals for reform is to shift away from formal classroom instruction in large groups. More individualized and small-unit learning experiences are the basis of an emerging consensus. These can take the form of smaller sections, additional seminars, individual writing and research, and individual participation in problem-solving experiences, both in the classroom and in the field. All these innovations require increased faculty manpower. Thus, a priority item for law schools must be to expand faculties at a much greater rate than student enrollment. This is a difficult assignment in times of restricted budgets for higher education, but it is the duty of all those who believe in quality legal education to begin now in asserting the primacy of reduced student-teacher ratios.

Exactly how this additional manpower will be used must be subject to experimentation and diversification. Some of my colleagues strongly feel that small first-year sections should have first claim on additional faculty resources. Others feel that the small unit experience is more valuable in seminars chosen after the student has developed special interests of his own. Those who support clinical programs are unanimous in agreement that close faculty supervision is essential and would give this priority in faculty expansion. Supervised writing and advocacy is another possibility. But it is totally unrealistic to expect faculties large enough to offer all such programs. At this school and others, difficult decisions are now being made on priorities among such changes.

One avenue to enriching the curriculum and also of satisfying some of our public service obligations, is to explore new research avenues for both students and faculty. This aspect of my subject reminds me of Thomas Reed Powell's famous definition of the legal mind. He said that one has such a mind if he thinks he can "think about a thing inextricably attached to something else without thinking about the thing to which it is attached."[25] Under Langdell's views of the library, the law books hold all the things about which the lawyer need be taught to think. The library is our only laboratory, despite its sterile isolation from so many of the human problems of the world outside.

Our library research is typically the matching up of legal precedents and deriving rules and exceptions from analysis and synthesis of lines of cases. We have been highly successful both in teaching such research and in providing the profession with adequate publications to find the law.

It is research in the things to which these materials are attached—nondoctrinal inquiry, outside the library, into the society in which the law operates and the impact of law upon human behavior—which too many law teachers have resisted. The law-in-action which Pound contrasted to law-in-books is still the frontier of legal research.

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[25] T. ARNOLD, THE SYMBOLS OF GOVERNMENT 101 (1937).

Our preoccupation with doctrinal inquiry in research has caused many of our academic colleagues in other disciplines to accuse us of having no real research function. Many of us have had experiences comparable to that recounted by Harvard law professor David Cavers. A distinguished social scientist on their faculty once said to him "You people in the law school aren't interested in research."[26] Cavers denied this, but conceded that some temporary conditions had cut down his colleagues' usual flow of contributions to the law reviews. Still unsatisfied, the critic retorted "Oh, I know you Law School people write for the law reviews, but you aren't interested in research. You aren't interested in adding to knowledge."[27]

A document recently issued here at OSU by our Office of Research and Sponsored Programs could well be cited by such a critic. It is entitled "Facts on Sponsored Research at the Ohio State University"[28] and details how much more than $18,243,000 was spent last year on sponsored research programs totally within this University. Most went to engineering and physical sciences and the life sciences, but over 14% or $2,321,000 was spent in the social sciences. Yet, not a single penny is shown for a project in the College of Law. One must conclude that we legal researchers at Ohio State are hardly taking advantage of resources right at our door.

Do not be misled. There was sponsored research going on in the College of Law and next year some law projects will appear in the Research Foundation's report, but law teachers have largely passed up the contemporary grantsmanship, and they continue to makeshift with such modest supports as research quarters of leave, occasional summer grants and mild exploitation of student research aides and the projects of seminars and individual studies. There may be a hidden blessing in this. At least we don't have the problem of our medical brothers. They became accustomed to almost unlimited federal financial support, designed mainly to ease the physician shortage, and now face drastic financial problems as Congress sharply cuts back on this source. Nonetheless, our legal institutions might not be on the verge of total collapse if research in law had enjoyed 25 years of federal largesse comparable to that afforded medicine.

In all events, the low level of extramural research is a big part of the law schools' problems and law teachers are now ready and anxious to remedy this. One reason is the example of other disciplines, in particular the social sciences, which have made great strides in empirical studies of human behavior. These have a potential which lawyers can no longer ignore. Another reason is related to our students. The communications explosion, improved levels of pre-legal education and a generation of "tell

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[26] Cavers, Legal Research 1, March 22, 1957 (unpublished materials for seminar in Legal Education at Columbia Law School; copy in possession of author.)

[27] *Id.*

[28] Office of Research and Sponsored Programs, Facts on Sponsored Research At The Ohio State University—Preliminary, May 14, 1970.

it as it is" young people compel us to go behind the old fictions and presumptions of our rules and cases and to measure theory and substance against real practice and actualities of human behavior. Differences in theory and practice are no longer tenable. If something is not good practice, it is not good theory.

A final reason is the enormous pressure upon legal institutions in present day society. Bringing legal instruments to bear upon such problems as racism, pollution, crime, dissent, and the alienation of youth and answering the charges of sham, hypocrisy and repression levied against the law compel us to get out of the library and to measure our legal norms against reality.

This is not as radical for law scholars as some of our critics claim. Call it empirical, factual, or field research, it is not totally alien to legal methodology. Consider the "Brandeis Brief" by which lawyer Louis Brandeis proved to the Supreme Court in 1908 the actual effects of unregulated hours of labor for women.[29] His intellectual heir, Felix Frankfurter, used the same technique as an advocate in 1919 to get the court to sustain a state law setting maximum hours in general.[30] Then, as a scholar and teacher, Frankfurter pierced the veil around strike-breaking labor injunctions. His published research[31] was a direct cause of Congress' enactment of the Norris-LaGuardia Act limiting the injunctive powers of federal courts.

There is an acute need for more of such research in the labor law field today. I once heard a federal judge describe labor law as a "dense jungle through which lawyers and judges hack their way with dull machetes." Those of us who work in this field must concede some truth to this and, unfortunately, the law schools are doing little more than sharpening machetes for lawyers who will hack adversary paths through the jungle. Empirical research testing the presuppositions of national labor policy and measuring actual behavior of both labor and management against the norms of statutes and regulations is conspicuously rare.

Ironically, the crushing need for a new era in legal research comes at a time when university research is becoming suspect. A subcommittee of the Ohio Legislature which recently investigated campus disorders questioned the present scope of faculty research and recommended study of the extent to which research projects "may unduly limit the availability of faculty for teaching duties."[32]

The committee missed the main function of research and the basis of the publish-or-perish theory. Productive research is essential to good teaching; and writing is the best self-discipline to assure that research is pro-

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[29] Muller v. Oregon, 208 U.S. 412 (1908).

[30] Bunting v. Oregon, 243 U.S. 426 (1917).

[31] F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).

[32] THE SELECT COMMITTEE TO INVESTIGATE CAMPUS DISTURBANCES, 108TH OHIO GENERAL ASSEMBLY, INTERIM REPORT 16 (1970).

ductively organized, analyzed and preserved. A scholar who does not write risks that he may stop reading and investigating. If so, his vitality as a teacher is ended.

But this is not the only justification for research in law schools. Research is the bridge across the gaps of reality we discussed earlier, the means of perfecting the unfinished business of legal realism. The new scholarship must furnish for all areas of law—from the policeman on the beat and discretion of bureaucratic administrators to the highest legislative and judicial decision-making—a critical, skeptical scrutiny of the sort which lays bare their faults and leads to responsive reform.

In a recent article by Jean and Edgar Cahn, two of the new breed of public interest lawyers, contemporary law schools were severely criticized on the customary grounds as well as some new ones.[33] A particularly provocative comment was directed at legal clinics. They cautioned against clinical responses to student demands if such programs are to become manifestations of what they call "the self-conscious posturing, the anti-intellectualism and the uncritical demand for involvement that characterizes much of the current revolt against traditional legal education."[34] Then, describing the typical clinical program as one largely concerned with providing student legal services to the poor and thereby possibly making the student more competent as a practitioner while also satisfying his demand for relevance, they issued this challenge to clinical undertakings:

> Clinical programs must not be permitted to degenerate into a grandiose abdication of responsibility whereby the law school simply abandons the student during the third year and leaves him largely to his own devices under the guise of affording him "practical experience." It must become a joint venture in discovery for the academic community where undigested chunks of reality are subjected to the most highly disciplined form of intellectual scrutiny.[35]

Herein lies the key to completing the unfinished work of the legal realists in overhauling the law school curriculum. Bringing undigested reality into true legal laboratories and forging a co-partnership of teachers, students, practitioners and interdisciplinary workers in a process of modernizing the law. A university law school located in an urban and governmental center, such as this one, should be a law center, of the sort envisioned by Arthur T. Vanderbilt when he spoke at the dedication of the new N.Y.U. law center building in 1951. Vanderbilt called upon lawyers, judges, legislators, law teachers, and concerned non-lawyers to join in cooperative research efforts to adapt our laws to new needs and to restudy

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[33] Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970).

[34] *Id.* at 1029.

[35] *Id.* at 1030.

legal institutions in terms of values which enable every person to realize his maximum potential as a human being.[36]

On another local historical note, I find that interdisciplinary efforts and field research are both rooted deep in the history of this College of Law. In the bulletin for the 1894-95 academic year of the infant School of Law of The Ohio State University, the virtues of a university law school were extolled in a statement quoted from the committee which had recommended establishment of the school:

> The new questions growing out of the developments of science and the inventions of the age which are coming before the lawyers for solution, would seem to impose upon them a certain amount of scientific attainment. It follows that the best place to locate a Law College would be in connection with a University where science was extensively taught, and where law students could avail themselves of the benefits of scientific lectures—in short, where laboratories and all the philosophical instruments and the instrumentalities have been provided for the teaching of science, its illustration and demonstration.[37]

Then, on the same page the bulletin cited, somewhat contradictorily, the advantage of Columbus as a place for legal study because of its many courts. It quoted an anonymous clinical champion as saying:

> There is no place where law is learned so quickly and thoroughly as among lawyers. No teaching is so effective as the object lessons of the trial of cases in court.[38]

The apparent contradiction of these claims can be removed, but only by rich, versatile programs which include interaction with both academia and the practicing profession.

If in 1894 OSU had social science departments to match those in the physical sciences, one wonders if the law school would have made similar claims for their interdisciplinary possibilities. Probably not. Candor compels us to concede that too many lawyers still do not see much value for them in joint efforts with social scientists.

A national leader of the organized bar recently cautioned law schools against rumored "sociological excursions," urging us instead to stick to "basic legal instruction."[39] He clarified neither term and doubtless caused some listeners to fear some conjured vision of wholesale frolics and detours by law teachers into sensitivity training, Kinsey reports on the legal profession and inconclusive behavioral studies. If he meant this, there is no real cause for alarm; but if he meant that law teachers and students should con-

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[36] Vanderbilt, *The Mission Of A Law Center*, 27 N.Y.U. L. REV. 20, 29-30 (1952).

[37] OHIO STATE UNIVERSITY SCHOOL OF LAW ANNOUNCEMENT FOR 1894-95 at 2-3.

[38] *Id.* at 3.

[39] The Indianapolis Star, Oct. 17, 1970, at 21, col. 6 (L. Jaworski, President-elect of American Bar Association).

tinue to examine legal rules and procedures in ignorance of their social and economic contexts then we are in a state of fundamental disagreement.

Nonetheless, legal realists should not be discouraged by such resistance to empiricism. In the same speech he called for more pragmatism from law schools in exposing students to the real problems of the practicing lawyer. Given the occasion, I am confident that we can persuade most who share these views that consistency in the pragmatic approach requires that we also seek some of the practicalities of other aspects of the social order.

Proving that they may be closer to their professional brothers than to academia, many law teachers also tend to be suspicious of their fellow intellectuals laboring in other parts of the University's socio-economic vineyard. Legal philosopher Edmund Cahn, himself a rare blend of intuitive and doctrinal talents, may have spoken for many when he challenged the Supreme Court's reliance, in *Brown v. Board of Education*,[40] on a series of sociological studies purporting to show that segregation in education was harmful to black children. Professor Cahn, while approving the outcome of the case, had this to say of its use of sociological data:

> . . . I would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records. . . . [S]ince the behavioral sciences are so very young, imprecise, and changeful, their findings have an uncertain expectancy of life. Today's sanguine asseveration may be cancelled by tomorrow's new revelation—or new technical fad.[41]

As Professor Harry Kalven has pointed out in disagreeing with Cahn, lawyers who are so expert in handling the imprecisions of the law should be able to become comfortable with the imprecisions of the social sciences.[42]

There is really no good reason for our traditional distrust of research patterned upon that of the behavioral researchers in the social sciences. Was not the Brandeis brief a study of factory worker behavior? And Frankfurter's work on labor injunctions a study of the behavior of judges and management lawyers?

Lawyers tend to dismiss social scientists' research as too often exposing behavior solely for its own sake and it is true that many are adept at posing problems without offering solutions. Lawyers pride themselves on problem-solving and view persons who advance no solutions, only problems, as themselves being parts of a larger problem and parts of no solution. Social scientists on the other hand tend to view lawyers as preoccupied with adjudicative solutions, applying formal rules to scatterings of circumstances and oblivious to whether a swirling chaos pervades society outside the narrow spheres of legal processes.

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[40] 347 U.S. 483 (1954).

[41] Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157-8, 167 (1955).

[42] Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy, in* LAW IN A CHANGING AMERICA 65 (G. Hazard ed. 1968).

Both groups have some basis for such beliefs. The salient fact is that each has the strengths the other lacks. For systematic solutions to social problems lawyers and social scientists should perfectly complement each other. And they will—as soon as each concedes the other's utility in matters of their joint interest. Then they will communicate and work together as a matter of mutual self-interest.

In this direction, examples are accumulating of effective interdisciplinary work between law and the social sciences. Legal problem-solvers who are also truth seekers surely must concede the enormous potential of such efforts as fellow panelist Smigel's study of the behavior of Wall Street lawyers,[43] sociologist Carlin's studies of the actual effects of the canons of ethics upon behavior of lawyers in the practice,[44] the joint study of lawyer Kalven and sociologist Zeisel of the American jury,[45] anthropologist Bohannon's inquiry, done with a law student, into social consequences of divorce adjudication,[46] and Skolnick's study of police behavior based on participant observation.[47] The list is growing and a fresh major interdisciplinary development is the recent announcement of federal funding of a joint J.D. and Ph.D. in sociology program at Northwestern.

Our goal is simple: every law teacher a law reformer and all reform based upon the broadest possible research. It is surely possible for every law teacher to do more to acquaint himself with the problems faced by lawyers who are practicing in the areas in which he teaches, and to inject some of this realism into his teaching. It should be possible through released time and increased funds for field research and through wider faculty participation in clinical curricular offerings for every teacher to become a worker for modernization of the law he teaches. This is why many enter teaching—to work to improve legal institutions from the objective vantage of academia. Through publications, work on committees of the organized bar, testimony before legislative committees, occasional court representation and political acitivity, most law teachers are activists for one cause or another.

But what of their teaching, which is supposed to be enriched and stimulated by research into inadequacies of the law? Is this to be insulated from the activist and reformist attitudes of the involved teacher? Is this even possible, assuming its desirability *arguendo*? Some who are both dedicated teachers and dedicated law reformers persist in claiming that their classroom teaching is truly neutral—that they are not indoctrinating any one.

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[43] E. SMIGEL, WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? (1964).

[44] J. CARLIN, LAWYERS' ETHICS (1966).

[45] H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

[46] Bohannan, *Institutions of Divorce, Family, And The Law*, 1 LAW & SOC. REV. 81 (pt. 2, 1967).

[47] J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY (1966).

I doubt this. Can teaching be neutral when it involves the conflicts of values and interests which inhere in most legal subjects? If this is possible, it is made so by the case method and Socratic technique. The teacher can artfully guide discussion until all issues which radiate from a case have been raised and all tenable positions have been presented. Then at a point of intellectual stalemate, he deftly turns to another case or another subject, leaving frustrated students with pens poised ready to write down a black letter rule of law which never emerges. This has the value of sensitizing students to the two-sided nature of legal questions and arming them to argue either side. At examination time two students who disagree can write equally well-reasoned answers to diametrically opposed conclusions and both receive maximum credit. This recognition of the ranges of reasonable difference is essential, but value-conscious students may become frustrated if the teacher never reveals personal commitment to any type of law reform. A national leader of law students has adopted one educator's criticism of the case method, describing it as tending "to keep teachers relatively invisible from their students, so that their social idealism and intellectual integrity is not always highly visible, especially under the anxious pressure of the classroom."[48]

If truly neutral teaching were the students' sole diet, it could produce students with warped and cynical views of law teachers, law school, and even the law itself. But I doubt that there are many teachers who do not, in some way, indoctrinate their students. Lawyers who want to teach generally have something to say, not merely a talent for presiding over inconclusive dialogue, and they find ways to say it.

I recently heard a more senior law teacher from a prominent law school claim that the procedural reforms of the 1960's resulted from effects of law school teaching of the 1930's upon graduates who ultimately attained high judicial posts in their middle and older years. There can be no doubt that the Uniform Commercial Code was aided greatly in its adoption by the fact that a generation of law students were indoctrinated to its virtues by their law teachers and then worked accordingly when they became legislators and leaders of the organized bar. The Code is also a monument to Professor Llewellyn, a legal realist who identified deficiencies in commercial law and devoted his energies to bringing about massive statutory reform. The earlier suggestion that Llewellyn was not truly pragmatic is belied by his major life's work.

Examples could be multiplied of law teachers identifying deficiencies in the law and proposing and working for solutions. If this be indoctrination, then much of it is being done by some of our best. The virtues of one man—one vote, jury trials, comparative negligence, no-fault insurance,

[48] 1967-II PROCEEDINGS—ASSOCIATION OF AMERICAN LAW SCHOOLS 30 (statement credited to Andrew Watson, Professor of Law at University of Michigan by O. W. Corley, then President of the Law Student Division, American Bar Association).

easier divorce, pre-trial conferences, and many new doctrines have been advanced by teachers who related their work to law in action. In the law school of the law center which I have described it can be no other way.

Yet, there are limits. We hear much today of politicized universities and abuse of academic freedom by teachers propagandizing their students on controversial issues. The Ohio legislative subcommittee report previously mentioned tells of teachers who use the classroom to ridicule and degrade students holding political and social opinions opposed to their own. This is deplorable. No teacher should use the teacher-student relation to coerce actual or pretended conformity to his personal views.

This is manageable by men of good will, but admittedly difficult in politically-charged areas, of which there are an increasing number in the law school curriculum. Academic freedom protects a teacher in classroom discussion of controversial matters, so long as it is relevant to the subject matter of his course, but it is also his duty to maintain an atmosphere of objectivity. This is the approach of mature law teachers and holds the key to the apparent dilemma. We all know that it is quite easy for the law teacher to advance a view he prefers and still give a full airing to opposing views and leave the student free to choose. In my view, the benefits to be gained from law teachers manifesting their concern for advancement of the law, and imparting some of this concern to those entering the profession, clearly outweighs any speculative losses in classroom neutrality.

The research and teaching functions of the professional school blend together into a dual overall mission of training the profession and improving the institutions which the profession serves. The first task of a great law school is to turn out great lawyers—disciplined professionals who are conscious of their responsibility to the public and are eager to use their training to serve some causes.

The teachers who will contribute most of this—the really great ones—will not be those who steer gingerly around the tough questions, but those who confront and wrestle with them. Have no fear that such teaching risks narrow parochial indoctrination, for it is these teachers who are most conscious that they have no hammerlocks on certainty, no strangleholds on truth.[49]

Nonetheless, truth must be the goal. Harry Jones has made the point persuasively in his brief gem "Legal Inquiry and the Methods of Science."[50] He ascribes to most lawyers a basic belief that the real social utility of the rule of law is that "if social order and security are maintained, truth will be advanced and progress achieved."[51] He finds too that scientists who

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[49] See the remarks of Professor Grant Gilmore on his acceptance of the Trienniel Award of the Order of the Coif, *Id.* at 143-44.

[50] Jones, *Legal Inquiry and the Methods of Science*, LAW AND THE SOCIAL ROLE OF SCIENCE 120 (H. Jones ed. 1966).

[51] *Id.* at 130.

claim to be dedicated to the truth for its own sake, without concern for the consequences of their discoveries, really believe that the advancement of truth contributes in the long run to the greater fulfillment and happiness of mankind.

More specifically, the values in truth-seeking lead Professor Jones to some good advice for joint efforts of lawyers and social scientists:

> . . . [M]y only concern is that we lawyers tend to be unduly attentive to immediate applications of social science methodology—for example, what sociology can tell us today about today's problem of law administration—and to be insufficiently aware that fundamental knowledge comes, in the social sciences as in the natural sciences, only when truth is sought as an end in itself, without too much concern, at the stages of basic inquiry, with possible practical applications.[52]

Lawyers and others who are concerned about relevance may question whether problem-solvers should pursue truth as an end in itself, but Harry Jones is right. The relevance of a truth cannot be judged until it is fully discovered and any form of societal ignorance is a problem worth solving.

Another group may also quarrel with Jones on truth-seeking. Illusion and pretense protect us all from much discomfort. There are some truths many of us fear to learn—dark corners of society's imperfections where we doubt the wisdom of turning a bright light. Some reality may be too raw to be confronted by a fragile, delicately balanced social order. Too little has been written in serious social literature about the widespread preference for illusion over reality. One notable exception which has appealed to countless idealists, young and old, is in *Man of LaMancha*, the Broadway musical based on the life of Miguel Cervantes, the creator of Don Quixote. The theme of this classic of idealism is sounded in a speech delivered by Cervantes to fellow prisoners in a Spanish dungeon in 1597.

Cervantes first describes the human misery and suffering he has seen and speaks of the comrades who had died in his arms in battle and under the lash. He then says of those dying men:

> These were men who saw life as it is, yet they died despairing. No glory, no gallant last words . . . only their eyes filled with confusion, whimpering the question: 'Why?' I do not think they asked why they were dying, but why they had lived. When life itself seems lunatic, who knows where madness lies? Perhaps to be too practical is madness. To surrender dreams—this may be madness. To seek treasure where there is only trash. Too much sanity may be madness. And maddest of all, to see life as it is and not as it should be.[53]

Who is right, Jones or Cervantes? Dare we follow the quest for truth and face life as it really is? Yes. We do. And Jones is the greater idealist. Truth, life as it is, must be seen before life as it should be can be

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[52] *Id.* at 128.

[53] D. WASSERMAN, MAN OF LA MANCHA 60-61 (1966).

brought in. The difficulty with the other view is that no mortal knows enough to manage truth.

The implications of full dedication to truth-seeking in legal research may be deeper than all of us are prepared to accept. There are some ugly realities hidden behind the facades of our prisons, beneath the surface of law enforcement and criminal procedures, on picket lines, in the practice of law itself and in dozens of areas where the law has proceeded on untested assumptions or failed to check legal norms against reality.

If law is to be adequate to the enormous pressures about it, it must face up to all these. Mr. Justice Holmes once described our legal system as "an experiment, as all life is an experiment" and added, in a note of uncertainty: "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."[54]

We must dedicate both our research and our teaching to reducing the imperfections in human knowledge. As we do, we shall both increase the stakes and lower the odds in the daily wages of our collective salvation.

[54] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).