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## Need For More Professors Who Have Practiced Law

James M. Dente\*

I WAS DELIGHTED to receive recently a copy of a letter from the distinguished faculty advisor of the *Cleveland-Marshall Law Review*, inviting law faculty members, whenever they are seeking a vehicle for expression, to send short un-annotated articles about a pet idea or gripe in legal education. After having practiced law for fourteen years and (after having been turned down by some of the best law schools in the country) having taught law for the past year, I now feel eminently qualified to write just that type of unscholarly article.<sup>1</sup>

### The Gripes of Wrath

In student protests at universities across the country, one of the constant cries of the malcontents has been for relevance in higher education. There is probably no field in which there is a greater need for relevance than in legal education. Although it appears that the actual riots have not yet spread to the law schools, some student displeasure with the present establishment seems evident. In a speech at the Association of American Law Schools meeting in New Orleans on December 27, 1968, the National President of the Law Student Division of the American Bar Association complained that the law schools are not adequately preparing students for the actual practice of law. Law schools might do well to heed the cry as a prophylactic measure.<sup>2</sup>

With experience in both private practice and as an assistant state attorney general, I thought that I might be able to help fill this need to make law school courses more relevant, and I decided to enter the law teaching field. When I attempted the bold transition, I was bewildered to learn that the very thing that I thought would help qualify me to be a good teacher seemed to be looked upon as a detriment by many of our leading law schools. I found that many schools frown upon anyone who has been corrupted by the actual practice of law for any period of time, regardless of his success in practice, his previous scholastic background, and his personality qualifications to inspire and really teach a class. These schools prefer to hire as new professors only those whom they consider to be legal scholars, which in their view are inexperienced recent graduates with good academic records and who had published law review articles (which for the most part have been read only by a

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<sup>1</sup> I have nevertheless included a few superficial footnotes in an abortive attempt to give this article a semblance of legal scholarship.

<sup>2</sup> Note also the recent boycott of classes and take-over of the law school building by students at Howard University, which may be an ominous sign.

few professors and law students, but almost never by the courts or legislators).<sup>3</sup> I was informed by the dean of one such school that, although my academic record was satisfactory for teaching, I could not qualify for a position there because I had been out of the academic life too long. If he had ever practiced law he would have known that a good lawyer remains a legal scholar and cannot stop studying law after he leaves law school if he is to serve his profession properly.

Although a law professor's primary responsibility is (or in my judgment should be) to train lawyers, the paradoxical belief seems to be that lawyers are not as qualified to train prospective lawyers as the research scholar who has not wandered out of his sheltered academic environment. I dissent!

### Re: Law in Books and Law in Action

I am certain that all law school graduates can recall research professors who might have enhanced the prestige of their schools *inter sese* by their publications, but who did not have the basic ability to put their material across to a class. As for relevance, since many of these specialists had never seen the inside of a law office or a courtroom, much of what they thought was relevant turned out to be too theoretical for practice. Two of my actual experiences may help to illustrate this point. I can well remember a professor of civil procedure who had never practiced law telling the class that in order to gain common ground with prospective jurors, you might start their *voir dire* by telling them a joke.<sup>4</sup> When I put this great scholarly idea into practice in my first jury trial, everyone laughed but the judge.<sup>5</sup> His glare indicated that if I told one more joke, I might be laughing all the way to my disbarment proceedings!

Since I intended to practice in my home state of Pennsylvania, I was especially interested when a professor mentioned a specific point of Pennsylvania law. In an admirable attempt to do research for research's sake (probably under the usual university pressure of publish or perish), this same civil procedure professor had made a library survey of the number of directed verdicts and judgments n.o.v. granted and denied by the trial judges in the various states. He then categorized these by the ingenious classification of "strong judge" or "weak judge" states. We were told that Pennsylvania was a weak judge state. Again in one

<sup>3</sup> Cf., "Father McKenzie, writing a sermon that no one will hear. Nobody cares!" (Lennon & McCartney, in "Eleanor Rigby").

<sup>4</sup> In hindsight, I cannot help but feel that even an Ivy League school could have condescended to require some private practice as a qualification for teaching civil procedure.

<sup>5</sup> I told them about the elderly male character witness who was asked about the reputation of the young female defendant for truth and veracity. He replied that her reputation for truth was good, "but as for veracity, some say she do and some say she don't!"

of my early trials I attempted to utilize the fruits of his laborious and enlightening research. When my adversary moved for a directed verdict, I cavalierly informed the court that since Pennsylvania was a "weak judge state," he did not have the power to grant a directed verdict in this particular case. The judge immediately impressed me with the strength that Pennsylvania judges really have, as I hopelessly tried to explain to my client why we were out of court! Needless to say, when the appellate court affirmed his strength, I was finally convinced that Pennsylvania judges were not as weak as my scholarly professor believed.<sup>6</sup>

My point, of course, is that if this fine scholar had actually practiced law for even a brief period, he probably would have learned, perhaps less painfully than I, that attorneys do not tell jurors jokes on *voir dire* and, regardless of the results of his library research, there is really no such phenomenon as a "weak judge state." In short, so many of our unpracticed professors are unable to distinguish between what Dean Pound called law in books and law in action.<sup>7</sup> I believe today's law student wants and is entitled to a piece of the action which only a professor who has previously practiced law can give him.

### **The Problem Is Compounded by Inbreeding**

I note with dismay the number of law schools that are hiring as professors their own top students immediately upon their graduation. Although this may help perpetuate the sheltered academic environment of their entrenched unpracticed faculties (the establishment), they are also compounding their frailties by inbreeding reminiscent of the educated imbeciles and hemophiliacs of nineteenth century European royalty. Irrespective of how outstanding these students were in writing casenotes for their law reviews, I suspect that they will have difficulty making their courses relevant.

The preference for hiring as law professors unpracticed and inexperienced scholars over seasoned attorneys is justified (or more accurately, rationalized) on the theory that one who has never practiced law can take a more detached view in analyzing cases for students and in proposing improvements in the law. Assuming that this may sometimes be true, experience has shown that courts seldom accept such impractical and theoretical analyses and proposals, and most students will be practicing before courts rather than law professors. I am not alone in the belief that the proposals of law professors published in law reviews and other publications have made much more of an impression

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<sup>6</sup> I believe to this day that the motion would not have been granted if I had not made this scholarly argument.

<sup>7</sup> Cf., Mae West in "Diamond Lil," who, in attempting to persuade a studious prospective lover, quipped, "Honey, I can teach you things that they don't put in books."

upon the writers than upon the courts or legislatures. "The authors cite one another in profusion, until there is a superficial impression of an abundant mass of authority; but up to the present time, at least, they received little mention in judicial opinions."<sup>8</sup>

The problem in many of our law schools is analogous to that of a spinster trying to teach expectant mothers how to rear children. Never having experienced the pangs of childbirth, she may be able to take a more detached view, but that does not make her better qualified than a mother to teach the subject. Fortunately this situation does not exist in medical schools. Can you conceive of a medical school hiring as a professor of surgery a scholar who has read many books and perhaps written a number of articles on the subject, but has never operated on a patient? This is in effect what many leading law schools are and have been doing in legal education.

### **Solution: *Inclusio Unius Non Est Exclusio Alterius***

The answer, of course, is to weigh the equities and strike a proper balance. There are certain courses, such as civil procedure, evidence, moot court, and torts, which are so related to actual practice that they should never be taught by one who has not practiced law.<sup>9</sup> There are others, such as accounting, constitutional law, jurisprudence, and legal history, which can probably be taught just as well by someone whose closest association with the law has been the library. I submit, however, that all other things being equal, there is no course that can better be taught by someone who has never practiced law because he can take a more detached view of the subject.

Law schools would also do well to concentrate a little more on the personality qualifications to teach and get the material across to a class, rather than only on the research and legal writing ability of prospective professors. Although this would apply to both the lawyer and the non-practitioner, a lawyer who has been baptized in the fires of actual legal controversy is probably more likely to have developed the type of articulate extrovert personality required to get across points of law in an interesting and lucid manner.

By what has been written above,<sup>10</sup> I do not mean to imply that law professors should not be legal scholars. What I am saying, which may come as a surprise to some deans, is that good lawyers are usually legal scholars.<sup>11</sup> When you ask what research have we done, I say we did

<sup>8</sup> See, Prosser & Smith, *Cases and Materials on Torts*, 689 (4th Ed. 1967).

<sup>9</sup> My experience indicates that it would not be possible to answer about 50% of the relevant questions posed by my freshman torts class if I had not had the benefit of actual law practice. I can only surmise that these questions go unanswered in many tort classrooms.

<sup>10</sup> At times with pen in hand and tongue in cheek.

<sup>11</sup> The writer notwithstanding.

research with every case that came into our offices. When you ask what have we published, I say our publications were to appellate courts in the form of briefs that have had a greater impact on the life of the law than most law review articles; briefs on the scholarship of which may have depended the life, liberty, or property of our clients; briefs which helped decide some of the very cases you purport to be better qualified to analyze. Although the exigent demands of practice may have denied some of us the time to otherwise publish the fruits of our research, once we are teaching we too can enhance the prestige of your schools by publications. I suggest that our analyses and proposals are more apt to be of the type that may have an influence on the law. All we ask is the opportunity, and you will see that we are peculiarly qualified to teach relevantly the living law to students, the way we often had to teach it to the courts! Given this opportunity, we believe the ultimate beneficiaries will be your students and the administration of justice.