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EDUCATION FOR PROFESSIONAL RESPONSIBILITY: THE BUCK STOPS HERE

BY EDWARD J. KIONKA*

INTRODUCTION

American law schools and law teachers—which for most purposes are pretty much the same thing—are being charged these days with an amazing variety of sins. Many of these are charges which we have brought against ourselves, which is a healthy sign. It is interesting to note, however, that it seems to be mainly our brethren at the bar who maintain that we are deficient in educating our graduates in matters of professionalism and professional responsibility.

In fact, not only has it been alleged that we are not doing enough—it has been decreed that we shall do better. At its midyear meeting in January 1973, the American Bar Association adopted a new set of *Standards for the Approval of Law Schools*, substantially in the form recommended by the report of the Section of Legal Education and Admissions to the Bar. However, the proposed *Standards* were amended on the floor of the House of Delegates to provide that henceforth:

> [All A.B.A. approved law schools] shall offer . . . and provide and require for all student candidates for a professional degree, instruction in the duties and responsibilities of the legal profession.[1]

It is not yet known, of course, how much of such instruction is enough, and what forms it may take. If anything other than nominal compliance is required, most law schools will have to undertake to increase substantially their activities in this respect.

The law schools' lack of enthusiasm for education in professional responsibility is not a recent development. Some 40 years ago Professor Elliott Cheatham wrote:

> The subject, What the Law Schools Can Do to Raise the Standards of the Legal Profession, is not fashionable among law teachers. The feelings of most of us toward it range from a high of mild interest to a low of complete hostility. These attitudes find expression in the

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[1]AMERICAN BAR ASSOCIATION, STANDARDS FOR THE APPROVAL OF LAW SCHOOLS BY THE AMERICAN BAR ASSOCIATION § 302(a)(iii) (1973).

> slur the subject is beneath our notice, and again in the assertion it is so important as to transcend our powers.[2]

Other writers have echoed this observation.[3] Why is this so?

In part, ambivalence arises from the schizophrenic nature of legal education itself. On the one hand, the law school sees itself as a part of the whole academic enterprise of higher education. In this sense, it disdains concern with matters relating to the delivery of legal services; its academic mission is to pass on the fundamental verities of the law and to lead the exploration of the frontiers of legal knowledge. At the same time, however, the law school also serves as the exclusive route to the bar. At least from the standpoint of the overwhelming majority of law students, the end product of the process of legal education must be a person who is adequately prepared to don the professional mantle and to assume responsibility for the legal health of others.[4]

Since 90 weeks are obviously insufficient time to prepare the complete lawyer, the law schools compromise. The justifications employed are persuasive: We cannot teach all the law, although we do try to expose students to a great deal of it so that they will be able to see a legal issue camouflaged in a haystack of raw facts. We try to teach some of the necessary verbal and mental skills so that they will know how to dissect a legal problem and how to

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[2]Cheatham, *What the Law Schools Can Do to Raise the Standards of the Legal Profession*, 7 AM. L. SCH. REV. 716 (1933).

[3]Bradway, *Making Ethical Lawyers—Some Practical Proposals for Achieving the Goal*, 24 GEO. L.J. 345, 359-60 (1936); Elliott, *What the Law Schools Can or Should Do*, in SETON HALL CONFERENCE ON PROFESSIONAL RESPONSIBILITY 33-37 (1956); Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL ED. 189, 202-03 (1948); Mathews, *The Public Responsibilities of the Academic Law Teacher*, 14 J. LEGAL ED. 97, 98-99 (1961); Starrs, *Crossing a Pedagogical Hellespont Via the Pervasive System*, 17 J. LEGAL ED. 365 (1965); Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 393-95 (1971); Thurman, *A.A.L.S. Presidential Address*, in 1962 AALS PROCEEDINGS 63, 66; Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL ED. 1 (1963); Weckstein, *Training for Professionalism*, 4 CONN. L. REV. 409 (1971-72).

[4]In 1970, out of 324,818 lawyers accounted for in the United States, 276,571 (85.1%) were active in the private sector (practice or private employment). To this must be added those government lawyers (city, state, and federal) who engage in the practice of law. These figures are not separately available, but since there were 35,803 lawyers (11.1%) listed as "legislative and executive" governmental employees and 5.2% of lawyers are retired or inactive, even allowing for some overlap between the private and public sectors, it would seem reasonable to assume that something over 90% of all lawyers are engaged in the practice of law and must deal with professional responsibility issues. It is also interesting to note that slightly less than half of all lawyers in private practice are sole practitioners. AMERICAN BAR FOUNDATION, 1971 LAWYER STATISTICAL REPORT 10-12 (1972). *See* Smith, *Is Education for Professional Responsibility Possible?*, 40 U. COLO. L. REV. 509 (1968).

be advocates, judges, arbiters, and advisers. When asked to summarize what we do, we say that we do not purport to teach our students "the law," or how to practice law, but merely "how to think like a lawyer." We teach what we hope is enough to provide adequate fuel for such thought, and we hope that one learns to practice law properly by practicing law.

What, then, of education about professionalism and professional responsibility? To say that the law schools as a whole have officially ignored these subjects would be slightly overstating the matter. Most have at least made available a course, a seminar, or a few lectures.[5] Occasionally, such things are discussed in law courses.[6] Some schools have relied mainly on a presumption that such education occurs through osmosis.[7] As Felix Frankfurter said, speaking of the Harvard Law School:

> There weren't any courses on ethics, but the place was permeated by ethical presuppositions and assumptions and standards. On the whole, to this day I am rather leery of explicit ethical instruction.[8]

But whatever a law school's program, most law students and faculty can testify that the glowing generalities in law school catalogues about the importance of the role and responsibilities of the lawyer have rarely been translated in corresponding proportion into the daily life of curriculum and cocurricular programs.[9]

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[5]*See* L. LAMBORN, LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY: A SURVEY OF CURRENT METHODS OF INSTRUCTION IN AMERICAN LAW SCHOOLS (1963).

On the basis of an analysis of the *1972 Directory of Law Teachers*, it would appear that not more than three-fourths of all A.A.L.S. member schools currently offer a course on "the legal profession" (which is defined to include courses in law and public opinion, legal education, legal ethics, preventive law, professional responsibility, and the lawyer as negotiator). A.A.L.S., 1972 DIRECTORY OF LAW TEACHERS 754-56. At about 72 of the 92 or so schools offering one or more such courses, the courses are taught by law teachers who have been teaching them for five years or less.

Lamborn found that at 84 percent of the schools offering a course, it was required for graduation. L. LAMBORN, *supra* at 4. However, a survey of current law school catalogues indicates that today only a minority of schools have such a requirement.

Compare Cheatham, *The Inculcation of Professional Standards and the Functions of the Lawyer*, 21 TENN. L. REV. 812, 814-20 (1951) *with* EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER (D. Weckstein ed. 1970) [hereinafter cited as BOULDER II].

[6]*See* L. LAMBORN, *supra* note 5.

[7]Malone, *The Sine Qua Non of Legal Education*, 32 ROCKY MT. L. REV. 7, 10 (1959); Thurman, *supra* note 3, at 63.

[8]H. PHILLIPS, FELIX FRANKFURTER REMINISCES 19 (1960).

[9]Malone, *supra* note 7, at 10.

> [S]o many of them [law review editors] in listing shortcomings of legal education, which they were asked to do, referred in varying ways to the

Yet our professional consciences continue to prod us to seek a better answer. We sense that a real gap exists between what we say a lawyer is in brochures and Law Day speeches and what the curriculum says he is. The real question is, to what extent can we justify the crowding or displacement of law materials in an already crowded curriculum in favor of materials on professionalism?

Faced with these uncertainties, we have naturally resorted to the time-honored devices used by groups in all civilized societies when they do not know how to handle a problem—we have held conferences and conducted surveys. Beginning in 1915[10] and culminating in 1962 with the most recent comprehensive survey by the American Bar Foundation,[11] we have tried to determine what the law schools are actually doing.[12] To the extent that these surveys are mostly based upon reading law school catalogue descriptions, their validity is open to serious question. However, even assuming them to be accurate, they reveal a wide variation in the quantity and techniques of professional responsibility education. Significantly, despite years of experience and experimentation in these matters, there was widespread dissatisfaction with the quantity and quality of efforts explicit and implicit in the 1962 A.B.F. survey.[13] In general, these dissatisfactions stemmed from doubts as to the relative effectiveness of any given method or combination of methods of instruction, as illustrated in part by their diversity and instability. In these surveys, as well as other writings on this subject, there are frequent overtones of uncertainty and frustration—uncertainty as to how and how much, and frustration caused by the desire to have an effective program without knowing how to do so.[14]

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failure of law schools to paint the broad picture of the legal profession. Thurman, *supra* note 3, at 66. *See also* Weckstein, *Boulder II: Why and How?*, in BOULDER II at 12; Cheatham, *supra* note 5, at 814-20; Kingsley, *Teaching Professional Ethics and Responsibilities: What the Law Schools Are Doing*, 7 J. LEGAL ED. 84 (1954); Mathews, *supra* note 3, at 97-100; Samad, *The Pervasive Approach to Teaching Professional Responsibility*, 26 OHIO ST. L.J. 100 (1965); Stevens, *Professional Responsibility—the Role of the Law School and the Bar*, 6 J. LEGAL ED. 203 (1953); Van Hecke, *Education for Professional Responsibility*, 17 LA. L. REV. 513 (1957).

[10]Bond, *Present Instruction in Professional Ethics in Law Schools*, 4 AM. L. SCH. REV. 40 (1915).

[11]L. LAMBORN, *supra* note 5.

[12]1931 AALS HANDBOOK 97; 1934 AALS HANDBOOK 189; 1951 AALS PROCEEDINGS 167; 1958 AALS PROCEEDINGS 169; 1959 AALS PROCEEDINGS 98; O. PHILLIPS & P. MCCOY, CONDUCT OF JUDGES AND LAWYERS 21-45, 206-08 (1953).

[13]*See generally* L. LAMBORN, *supra* note 5.

[14]*See* O. PHILLIPS & P. MCCOY, *supra* note 12, at 21-45, 206-08; L. LAMBORN, *supra* note

Unsure of where we are and where we ought to be going, we have held scholarly conferences and published their proceedings.[15] The grandest of these were held at the University of Colorado in 1956 and 1968 and have come to be known as Boulder I[16] and Boulder II[17] respectively. Boulder II represents the culmination of the resurgence of academic interest in this topic which began with the reactivation of the A.A.L.S. Committee on Education for Professional Responsibility in 1955.[18] In addition to these conference reports and proceedings, which themselves virtually exhaust the subject in all of its nuances, there are literally hundreds of articles, books, and book reviews which offer all of the various views and reviews one could imagine.[19] If the minds of legal educators remain undeveloped on this subject, it is not for lack of available nourishment.

Surely at this point in time, standing on the summit of this mountain of information, we ought to have a clearer view than ever before of the ways and means of professional responsibility education. Yet all of us who labor in the vineyards of legal education can take judicial notice of the fact that our historic apathy and uncertainty have persisted. To be sure, there are a few dedicated enthusiasts, mainly those who attend the conferences and write the books and articles, but the sparks struck at Boulder seemingly have not yet kindled a larger flame of interest among the rank and file of legal educators.

5; Cheatham, *supra* note 5, at 814-20.

[15]In addition to BOULDER I and BOULDER II (see notes 16 and 17 *infra* and accompanying text), we have had the A.B.A.-A.A.L.S. Joint Conference on Professional Responsibility (*Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958)); the Asheville Conference of Law School Deans on Education for Professional Responsibility (PROCEEDINGS — THE ASHEVILLE CONFERENCE OF LAW SCHOOL DEANS ON EDUCATION FOR PROFESSIONAL RESPONSIBILITY (H. Sacks ed. 1966)); the Seton Hall Conference on Professional Responsibility (1956); and the University of Chicago Conference on the Profession of Law and Legal Education (1952); several interdisciplinary conferences (*e.g.*, DAVIS, EDUCATION FOR PROFESSIONAL RESPONSIBILITY (1948); DeCapriles, *A Report on the Inter-Profession Conference*, 1 J. LEGAL ED. 175 (1948)); and several roundtables at A.A.L.S. annual meetings (*see, e.g., Symposium on Professional Responsibility*, 4 CONN. L. REV. 409 (1971-72); *A Re-Evaluation of the Canons of Professional Ethics: A Symposium*, 33 TENN. L. REV. 129 (1966)).

[16]J. STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY (1959).

[17]BOULDER II. Many of the articles presented at the conference may, in addition, be found in *Symposium on Education in the Professional Responsibilities of the Lawyer*, 41 U. COLO. L. REV. 303 (1969).

[18]*See* 1956 AALS PROCEEDINGS 88; 1963 AALS PROCEEDINGS 144.

[19]The bibliography included in BOULDER II at 359-401, contains 347 items. This is the most comprehensive and useful bibliography in this field, although it is not exhaustive.

Why? Each of us, obviously, will have his own reasons. Professor Cheatham observed:

> The wide indifference of law teachers to the subject has many sources. The feeling comes in part from an objection to Pharisaism. If the place of the teacher carried with it the title of exemplar, no one of us would serve. But immaculateness is no more essential here than is infallibility.
>
> The indifference toward the field comes, in great part, from the fact we gain more pleasure from the wholly intellectual puzzles than we do from intricate problems containing broader and more difficult elements. As a result, we have relegated to the unfashionable all elements of a lawyer's equipment other than the intellectual, and tradition and the pressure to conform have held most of us within the limits of the fashionable.
>
> Lastly, the feeling comes from the belief that law schools can do nothing about it. Here, I think we have erred in emphasizing the disadvantages of our position and minimizing the advantages. It is true our students are mature and on many sides the moulds are set. It is equally true they are new to law and have a professional motive and drive that create new habits of study and of thought. We can as easily direct them to an intelligent consideration of professional standards as to the Rule in Shelley's Case.[20]

No doubt his observations remain valid today. Perhaps the root causes of our disinterest are more fundamental and include one or more of the following:

(1) An overly narrow view of the meaning of "professional responsibility";

(2) The absence of a conviction that education for professional responsibility is a proper or necessary function of the law school;

(3) Lack of information about teaching methods; and

(4) Lack of motivation to become personally involved in education for professional responsibility.

Formidable as they may seem, however, these attitudinal and informational gaps are not impossible to bridge. It is true, of course, that necessity is the mother both of invention and motivation, and to the extent that more must be done in order to comply with the A.B.A. *Standards*, it can and will be done. There are other and better reasons for shaking off our historic apathy and

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[20]Cheatham, *supra* note 2, at 718.

making education for professional responsibility a full-fledged member of the curricular family.

I. THE MEANING OF "PROFESSIONAL RESPONSIBILITY"

In the case of some law teachers, antipathy toward education for professional responsibility is based in large part upon a misconception as to the meaning of that term. In their minds, "professional responsibility" is limited to the lawyer's duty to refrain from the more flagrant violations of the Canons of Ethics and conjures up an image of a wicked reprobate who has stolen his client's funds or lied to the court. Since, obviously, the law school cannot teach morality and save souls,[21] that is the end of the matter.

Of course, that is far too narrow a view. There are at least four components of a lawyer's professional responsibility:[22]

1. *The obligation of professional competence.* It is fundamental that the lawyer must possess adequate knowledge, skills, and self-discipline to undertake to deal with the legal rights of others.[23] The nature of the lawyer's role requires that he speak for others in a language they can only dimly understand. The laymen whose legal rights the lawyer affects can judge his work product only in a very general way, and often not until long after he has acted. His adversary in a given matter, if any, is not likely to point out mistakes or incompetence. In most cases, he sets his own standards of performance, and he is answerable only to his own conscience for the quality of his work.[24]

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[21]Chadbourn, *High Ethical Standards and Professional Ideals—The Problem of Inculcation at the Student Level*, 51 THE BRIEF 17, 18 (1955); Thurman, *supra* note 3, at 66; Wirtz, *Training for Professional Competence and Responsibility*, 13 J. LEGAL ED. 461 (1961). This argument is well refuted in Weckstein, *supra* note 9, at 14-18.

[22]Numerous articles discuss the meaning and scope of professional responsibility. *See, e.g.*, Countryman, *The Scope of the Lawyer's Professional Responsibility*, 26 OHIO ST. L.J. 66 (1965); Craig, *Ethical Responsibilities of the Individual Lawyer*, 17 ARK. L. REV. 288 (1963); Drinker, *The Ethical Lawyer*, 7 U. FLA. L. REV. 375 (1954); Hurst, *The Legal Profession*, 1966 WIS. L. REV. 967; McDougal, *Education for Professional Responsibility*, 12 STUDENT LAWYER J. 6 (1966); Nutting, *The Emerging Lawyer and Legal Education*, 16 AM. U.L. REV. 1 (1966); Ringer, *The Lawyer's Obligation to be Competent*, 50 A.B.A.J. 235 (1964); Stason, *Why a Profession?*, 21 LA. L. REV. 153 (1960); Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A.J. 31 (1954); Wade, *Public Responsibilities of the Learned Professions*, 21 LA. L. REV. 130 (1960). The text represents this author's own distillation of their components. Also, *see generally* BOULDER II; Currie, *Reflections on the Course in the Legal Profession*, 22 J. LEGAL ED. 48 (1969).

[23]*See* King, *A Neglected Responsibility*, in BOULDER II at 277.

[24]Watson, *Canons as Guides to Action: Trustworthy or Treacherous*, 33 TENN. L. REV. 162, 163 (1966).

The law school can teach this aspect of professional responsibility, if at all, only indirectly. Perhaps it is instilled by the insistence upon high standards of performance in the classroom, in writing assignments, and on examinations.[25] Or perhaps it is mostly the product of the character development which each student brings to law school, and is little influenced by anything in the educational process.[26] In any event, it may be useful for the law teacher to bear in mind and profess the attitude that a self-imposed standard of competence is a necessary attribute of a responsible professional.

2. *The obligation to know and follow transactional rules of conduct.* As most lawyers and law teachers should know, the American Bar Association Canons of Professional Ethics were superseded in 1969 by the Code of Professional Responsibility, now adopted in most states.[27] The new Code is similar to the old Canons in that it consists mainly of rules governing the lawyer's conduct in dealing with his clients, other lawyers, and the courts, usually in the context of specific cases or matters which the lawyer has been retained to handle. For convenience, these will be referred to as "transactional rules." It is these rules to which most people refer when they use the term "legal ethics."[28] Termed the rules of "ethics and etiquette,"[29] in general they are limitations on conduct arising out of the fiduciary aspects of the lawyer's role.

There would seem to be no reason why these transactional rules cannot be taught to law students just as we teach any other body of legal rules. In effect they are just that—a system of legal

[25]In this respect, one wonders whether there has been a general decline in the quantity and quality of student input into the education process, in spite of (or possibly in part because of) the increased level of the paper qualifications of those recently admitted to law schools. If so, what effect will this have upon the self-imposed standards of professional competence of the next generation of lawyers as a whole?

[26]In this respect, one wonders whether law school grades do not reflect, to an extent, each student's own standards of professional performance. If so, are they not at least in part a valid means of assessing a student's attainment of the necessary standards of professional competence?

[27]*See* Sutton, *Re-Evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132, 136 (1966). A new *Code of Judicial Conduct* has now been developed and its adoption is being urged. *See* Weckstein, Thode & Grossman, *Round Table Discussions on the Proposed Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 785 (1972); *ABA Unit Seeks Adoption of Judicial Code by States*, Chicago Daily Law Bulletin, Nov. 28, 1972, at 1, col. 5.

[28]Chadbourn, *supra* note 21, at 19.

[29]*See id.*; Weinstein, *On the Teaching of Legal Ethics*, 72 COLUM. L. REV. 452, 455 (1972).

rules which happen to apply to lawyers themselves instead of their clients. Indeed, they are just as teachable as "the Rule in Shelley's Case."

While the substantive differences between the old Canons and the new Code are not great, the Code's organization should facilitate the teaching of these transactional rules. The Code consists of three parts: (1) nine "Canons," which are very broad, one-sentence statements of general principles—*e.g.*, "A lawyer should assist in maintaining the integrity and competence of the legal profession"; (2) a series of mandatory "Disciplinary Rules" under each canon which set forth the *minimum* level of conduct below which the lawyer cannot fall without being subject to discipline (*i.e.*, the professional rules of law); and (3) a series of "Ethical Considerations" under each canon, higher norms which "are aspirational in character and represent the objectives toward which every member of the profession should strive."[30] Thus, for the first time, recognition is given to the dichotomy between the minimum level of acceptable conduct and the higher ideals which are enforceable only by the conscience of the lawyer himself. The Canons confused these, and the Code's distinction between the two levels of rules should help to make education about the Code more realistic and meaningful.

3. *The obligation to understand and improve the legal profession.*[31] Every freshman law student knows that he is an apprentice member of an elite society—the legal profession. For some, this is probably a significant motivating factor in their decision to study law. Clearly, in order to function with maximum effectiveness as a member of this society, one must understand its functions, structure, and goals. What is the "bar"? What distinguishes the legal profession from any other trade or business? What are the benefits and burdens of membership in this exclusive guild? What are the individual lawyer's responsibilities to the group? In other words, who are we?[32] These are questions which every law student and lawyer confronts, and the answers are not deducible by a priori reasoning.

Moreover, the legal profession as an institution is being sub-

[30]A.B.A., CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (1969).

[31]Curiously, this aspect of professional responsibility is often ignored in the literature. *But see* Arthurs, *The Study of the Legal Profession in the Law School*, 8 OSGOODE HALL L.J. 183 (1970).

[32]*See id.*

jected to strong pressures for change.[33] Fee schedules are being challenged. Group legal services for the poor have given a new dimension to many legal disputes, and experiments in group legal services for the middle class are being conducted. Both of these drastically alter the traditional structures for the delivery of legal services and will have far-reaching effects on the future practice of law. Plans are being developed for the recognition and certification of practice specialties. The necessity and validity of bar examinations are being questioned. Young lawyers are challenging the structure of the bar associations and, in some cases, creating new associations of their own which parallel the existing organizations but have conflicting positions on many issues.[34]

Most would agree that the lawyer has an obligation to participate in needed reforms of his profession, to promote constructive change which is in the public interest, and to devote some of his time to the work of the organized bar. But to do these things well and in a lawyer-like fashion, the lawyer ought to understand his profession's structure and history and have a sound working knowledge of the facts underlying the issues which the profession must resolve.

Again, as in the case of transactional rules of conduct, the legal profession as an institution is a subject which surely lends itself to law school instruction as well as any other.

4. *The obligation to facilitate justice for all.* Lawyers, individually and collectively, are the trustees of our legal system. As such, the burden is upon them to see that the system functions with maximum efficiency and fairness. They have a duty to work to achieve constructive law reform and to improve the administration of the courts and all other adjudicatory and legislative institutions. As the guardians of the sacred principle of due process, they must see that adequate legal services are made available to the poor and the unpopular.[35] Their training and experi-

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[33]*See* Weckstein, *supra* note 3, at 409-11; Weinstein, *supra* note 29, at 463-66.

[34]For example, the new Chicago Council of Lawyers, composed mainly of young reform-minded lawyers, has grown rapidly in membership and has recently obtained a seat in the A.B.A. House of Delegates, displacing a seat held by the Illinois State Bar Association.

[35]*See* Wirtz, *supra* note 21, at 463:

> A second illustrative question of "responsibility" has to do with the supplying of representation to those who seek it. The Canons do little more here than recognize a professional ideal of adequate representation to all responsible interests. Nor is any absolute rule practical.

ence are deemed especially good preparation for public service, and with such expertise goes the duty to answer the call to public leadership and public service as required.

It is doubtful that this aspect of professional responsibility can be "taught" in any meaningful way by direct methods.[36] Law students, especially those beyond their first year, are not receptive to sermons. Some believe that clinical programs may help to instill these ideals,[37] although opinions to the contrary are not without weight. Those who elect to participate in such programs are usually the students who are most public service oriented, and it has been observed that the negative aspects of clinical work with poor clients can have a backlash effect unless the student is already strongly committed in principle before he undertakes such work.[38]

This is not to say, however, that public service responsibilities cannot be taught at all. For example, faculty attitudes which support these principles can be expressed at appropriate times, with the result that students will tend to emulate them.[39] Some faculty will themselves participate in public service work, law reform, and extensions of legal services, thereby reinforcing the role model effect. Perhaps the mere existence of certain kinds of clinical and minority group programs sponsored by the law school will be perceived as an affirmation of the law school's commitment to these ideals.

II. JUSTIFICATIONS FOR AN ADEQUATE PROFESSIONAL RESPONSIBILITY PROGRAM

It is not enough for a law faculty merely to be aware of the full scope of the principles and ideals of professional responsibility. Nor is it sufficient if they also realize—as they surely do—that most of their students will encounter professional responsibility problems frequently during their professional lives. If

[36]Clark, *How Far Can Professional Competence and Responsibility Be Taught?*, 13 J. LEGAL ED. 472, 477 (1961).

[37]*E.g.*, BOULDER II at 223-25; Sacks, *Education for Professional Responsibility in the Law Schools*, in PROCEEDINGS, ASHEVILLE CONFERENCE OF LAW SCHOOL DEANS ON EDUCATION FOR PROFESSIONAL RESPONSIBILITY 4 (1966); Brickman, *Contributions of Clinical Programs to Training for Professionalism*, 4 CONN. L. REV. 437 (1971-72). *But see* Simon, *An Evaluation of the Effectiveness of Some Curriculum Innovations in Law Schools*, 2 J. OF APPLIED BEHAVIORAL SCIENCE 219 (1966), in SOCIOLOGY OF LAW 573 (R. Simon ed. 1968).

[38]*See generally* BOULDER II at 223-68 for articles discussing the pros and cons of clinical education as a vehicle for education for professional responsibility.

[39]*See* note 68 *infra* and accompanying text.

a law school is to have a meaningful professional responsibility program, the faculty must be committed to the idea that law school is the necessary and proper forum for professional responsibility education. Of course everyone agrees that lawyers ought to be ethical. We are all for virtue and against sin. In the minds of many legal educators, professional responsibility issues are not legal issues but practice-related issues, and therefore are not within the scope of law school legal education. There is an attitude that law schools should teach law and leave matters of ethics and morality to the bar, the church, individual conscience, or others.[40]

What then are the justifications for allocating more than nominal resources to the teaching of professional responsibility?

A. *Professionalism*

No matter what else we may think a law school ought to be, the fact is that it is primarily and fundamentally a professional school. For the overwhelming majority of its graduates, its principal function is to prepare them to enter the legal profession.[41] Therefore, we cannot ignore professional responsibility matters by use of the fiction that we merely teach law and award law degrees, claiming indifference to the use which is made of those degrees following graduation:

> We are educating students to be lawyers—not law students. As a result, it is the legal profession and the public—rather than the law schools—which suffer if there is a deficiency in education for the law.[42]

Once we admit that certain components of professional responsibility can be the subject of law school instruction, we must determine the nature and extent of the law school's obligation to the profession it serves. If we take this obligation seriously, as we must, is it not fatuous for us to teach extensively the rules of law and the skills necessary for manipulating them while at the same time virtually ignoring the professional milieu in which the lawyer must work? Justice Stone, at the dedication of the University of Michigan Law Quadrangle, stated:

> From the beginning the law schools have steadily raised their intellectual standards. It is not too much to say that they have worshipped the proficiency which they have sought and attained to a

[40]*See* Chadbourn, *supra* note 21.

[41]*See* note 4 *supra*.

[42]Malone, *supra* note 7, at 11.

> remarkable degree. But there is grave danger to the public if this proficiency be directed wholly to private ends without thought of the social consequences, and we may well pause to consider whether the professional school has done well to neglect so completely the inculcation of some knowledge of the social responsibility which rests upon a public profession. . . . I have no thought that men are made moral by mere formulations of rules of conduct . . . . But men serve causes because of their devotion to them. . . . It is not beyond the power of institutions which have so successfully mastered the art of penetrating all the intricacies of legal doctrine to impart a truer understanding of the functions of those who are to be its servants.[43]

It is difficult to understand the attitude of those legal educators who seem to feel that to teach about professionalism in law school is somehow undignified or ignoble. Rather, the opposite is true. Pervasion of the curriculum with concepts of professionalism enhances the status of the law school by emphasizing the distinctions between it and other schools which merely prepare students for entry into a trade or business.

B. *Ethics and Substantive Law*

Pervasive consideration of many ethical problems in certain courses can be an important adjunct to the learning of the law. Some substantive and procedural rules cannot be fully understood or critically analyzed without a simultaneous consideration of the ethical context in which the lawyer is operating. A student cannot be taught to "think like a lawyer" without some appreciation for all of the elements which may affect the solution of a given legal problem.[44]

C. *Ethics and Law Reform*

Sometimes rules or subsystems of law in actual operation, particularly in an adversary context, give rise to ethical problems which in turn may be part of the justification for law reform.[45] For example, many of the reasons advanced for the adoption of "no-fault" automobile insurance plans are premised upon the alleged existence of widespread violations of professional ethics inherent in the present tort system.[46] Conversely, proposals for law reform which appear sound from the standpoint of the law alone may have deleterious ethical side effects which should lessen the desir-

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[43]Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 13-14 (1934).

[44]Weinstein, *supra* note 29, at 461-63.

[45]*Id.* at 466-67.

[46]*See* J. O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE (1971).

ability of that particular plan and stimulate the search for a better alternative. Certain law reforms, such as facilitating the access of poorer citizens to legal remedies, are presently being advanced in furtherance of the public responsibilities of the profession.[47]

Thus, proposals for law reform often cannot be understood or evaluated without full consideration of the ethical, as well as the legal, effects of the present or proposed law.

D. *Law School as a Socializing Process*

Whether we intend it to or not, the entire law school experience serves as the primary socializing influence upon law students.[48] It is natural for law students, most of whom have had no opportunity to learn about the legal profession from personal experience, to view the law school as a model, at least in terms of the issues and attitudes which are important to the profession. In other words, law students come to law school expecting it to transform them from laymen into lawyers. They expect socialization as well as law. Thus, if they see professional responsibility issues as unimportant to the law school, they may tend to adopt the same attitude.[49] If we wish our students to believe that professional responsibility issues are significant in their professional lives, we must address these issues at some time in the curriculum. Occasional exhortations to "do good" are not enough, and may actually be worse than useless if students see such statements as hypocritical.

E. *The Necessity of Formal Professional Responsibility Instruction*

There are those who suggest that today's law graduates, being bright and eager, can use a "common sense" approach to matters of professional responsibility. However, upon even minimal reflection, it ought to be obvious that an intuitive approach to resolving problems of professional responsibility is totally inadequate.

Clearly, many legal ethics issues are not self-evident, and many ethical problems and conflicts cannot be resolved optimally

[47]Examples might include the creation of special small claims courts and procedures by which persons may proceed without the need for attorneys, and proposals for "no-fault, do-it-yourself" divorces.

[48]Malone, *The Lawyer and His Professional Responsibilities*, 17 WASH. & LEE L. REV. 191, 197 (1960).

[49]*See* notes 68 and 69 *infra* and accompanying text.

without some prior training or experience in wrestling with such issues. For example, would it be self-evident to a young lawyer that he should not make direct contact with an opposing party who is represented by counsel? Or would he know how to go about resolving the dilemma presented by the client who has relevant evidence which the law requires to be disclosed to the court or to opposing counsel, but which the client instructs the lawyer to conceal? Indeed, the same justification exists for teaching professional responsibility as for teaching any other course in law school.[50] It prepares one to recognize the issues inherent in a set of undifferentiated facts and gives one some practice in solving problems in a hypothetical context. Perhaps the justification for studying professional responsibility per se is stronger than for studying any other single subject because of the pervasiveness of professional responsibility problems throughout all areas of the law.

F. *If Not During Law School, When?*

Given the fact that most law graduates enter professional roles, and the fact that members of the legal profession, of necessity, must learn to deal with professional responsibility issues, when should this learning take place—during law school or after? In the law school setting, professional responsibility can be examined systematically and objectively.[51] Various alternative solutions to professional responsibility problems can be studied and tested rationally and without the built-in biases, pressures, or conflicts of interest which the assumption of a particular occupational role may induce. A variety of relevant source materials can be brought to the student's attention while professorial guidance is still available.[52]

III. Alternatives to a Professional Responsibility Program

What are the alternatives to learning systematically about professional responsibility in law school?

One possibility would be to leave these matters largely to self-education in practice. For several reasons this is a rather naive and unrealistic approach. Is it not unreasonable to assume that a practicing lawyer will voluntarily undertake to research professional responsibility issues which he encounters in his day-

[50]Watson, *supra* note 24.

[51]*Id.*

[52]*See* Boulder II at 359-401, which includes a list of most of the available course materials.

to-day work (not to mention those he does not even recognize)? The extremely tight schedules of most lawyers in practice, coupled with the unlikelihood of an immediate external reward or punishment for right or wrong answers, produce strong disincentives to adequate learning.[53] If only the most flagrant misconduct is customarily punished, since by definition the wrongful act must be gross and obvious, there is little reason to undertake independent study. This is equally true of obligations to clients, other lawyers, the courts, the profession, and the public. As we have seen before, a "common sense" approach to these issues is patently inadequate because the issues themselves are not, in most cases, self-revealing. Even if the issue is discoverable, the best answer is not necessarily obtainable by common sense reasoning. In addition, the nature of professional responsibility obligations is such that often there is no adversary likely to call attention to violations, and the client is not likely to be willing to pay for his lawyer's self-education on issues of professional responsibility.

Given the current status of lawyer disciplinary processes (which, however, are improving), a mere reading of reports of disbarments and suspensions is not likely to provide an adequate education as to the full scope and extent of the lawyer's ethical obligations.[54] Certainly in this area experience is *not* the best teacher—if the lawyer goes so far as to incur the wrath of the disciplinary process, its terrible swift sword need fall only once, after which the ex-lawyer need no longer concern himself with professional responsibility matters at all.

Some have suggested that professional responsibility be taught in preparation for the bar examination. The inadequacy of this approach is also obvious. Professional responsibility obligations will be studied then, if at all, only in a perfunctory way, and study will be limited to the transactional rules. The amount

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[53]Bradway, *supra* note 3, at 352.

[54]*See* Wirtz, *supra* note 21, at 462:

> The current law of disbarment indicates with disheartening clarity that the profession is today so constituted as to be unable or at least unwilling to purge the "shyster" from its ranks. Others have suggested that so far as teaching law students legal ethics is concerned a few good disbarments would do the job nicely.

See also O. PHILLIPS & P. MCCOY, *supra* note 12, at 207-08; Pirsig, *A Traditional Course in Professional Responsibility*, in BOULDER II at 75, 83-84. *But cf.* J. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR (1966).

of study will be limited by its goal, which is to pass the one question on the bar examination dealing with legal ethics.[55]

What about bar association and continuing legal education programs or publications? These are unlikely to do an adequate job as they reach only a small minority of the bar, most of whom are among those least in need of such education. Practicing lawyers tend to become cynical about ethics problems and are more likely than law students to view such instruction as "preaching" and tune out.[56] Publications can be freely ignored, especially those parts which cover unfamiliar ground or which deal with matters having no immediate economic impact on the lawyer's current affairs. Moreover, the professional responsibility content of continuing legal education programs has been miniscule.[57] Programs dealing solely with professional responsibility issues are noteworthy both for their scarcity and for the fact that lawyers have stayed away from them in droves.[58]

In spite of admonitions to include more professional responsibility material pervasively throughout continuing legal education courses,[59] the amount of such material actually taught has been pitifully small.

Attempts to educate practicing lawyers on matters of professional responsibility may thus be characterized as too little too late.[60]

IV. A PROGRAM FOR PROFESSIONAL RESPONSIBILITY EDUCATION

A major reason—probably the most important reason—for the overall inadequacy of law school instruction in professional responsibility is that most law schools have neither a master plan for incorporating such material into the curricular and co-curricular program of the school, nor a person responsible for

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[55]O. PHILLIPS & P. MCCOY, *supra* note 12, at 30-33, 39; Bradway, *supra* note 3, at 353.

[56]*See* Watson, *supra* note 24, at 165.

[57]*See* BOULDER II at 313-24.

[58]*See id.* at 53, 313-24. One course with which the author is familiar was scheduled as a part of the Chicago Bar Association Continuing Legal Education Program. It had to be cancelled when, a few days before the scheduled date, there were only six registrants—four of whom were from the law office of one of the speakers.

[59]*See* BOULDER II at 313-24; A.B.A.-A.L.I. Joint Committee on Continuing Legal Education, *Broadening of Continuing Legal Education Urged by Second Arden House Conference*, 50 A.B.A.J. 136 (1964); Mathews, Book Review, 13 J. LEGAL ED. 535 (1961).

[60]*See* Weckstein, *A Re-Evaluation of the Canons of Professional Ethics—Evaluated*, 33 TENN. L. REV. 176-77 (1966); Mathews, *Foreword* to J. STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY at 3 (1959).

preparing or implementing such a plan. What is everyone's business is no one's. By definition, law teachers are concerned about the law. Those things which do not press themselves upon the consciousness are of necessity ignored, and most law teachers have little reason to think about professional responsibility issues. Law teachers share concerns about *law* with practicing lawyers, but rarely deal with issues of professionalism.

Much has been written about the various methods of bringing professional responsibility materials into the law school—pervasive infusion into law and perspective courses, a course on the legal profession, lectures and other cocurricular programs, and clinical programs.[61] Most agree that some sort of mix of these methods is best.[62]

The real problem is to translate these ideas into action and to coordinate the presentation of these materials in order to insure comprehensiveness without waste or duplication. To do this the law school needs to have one person to plan and oversee the entire professional responsibility program of the school—a "guardian ad educatum." The "guardian's" professional responsibility education duties would include the following:

> (1) To make a study of the abundant literature on the subject of professional responsibility education and to develop a master plan for a comprehensive program of such education at that school. History teaches that no one method has been found to be superior to any other. There is still room for experimentation, and each faculty will have its own ideas as to the techniques it considers to be most appropriate. At the same time, the literature bears witness to a great deal of experience, which every faculty should consider.
>
> (2) To present the plan to the faculty, obtain their input, make revisions, and secure endorsement of the final plan; and
>
> (3) To oversee the implementation of the total plan and its component parts.

One especially important function which this person can perform is to educate and raise the consciousness of the other mem-

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[61] *See generally* BOULDER II, and especially the bibliography at 359-401.

[62] *See generally* BOULDER II, and especially Weckstein, *A Coordinated Approach*, in BOULDER II at 188.

bers of the faculty in order to expand the use of the pervasive method and to increase the instances of faculty-student communication on these issues.[63] He might arrange a short faculty conference on education for professional responsibility to discuss possible assigned readings and to coordinate by agreement the responsibilities of various teachers for pervasive coverage of the widest possible range of substantive professional responsibility problems. A side benefit of this faculty involvement would be an increased faculty awareness of the role of the law teacher as an attitude model.

This "guardian" should have ongoing responsibility for a periodic review of the school's professional responsibility program to determine its success and defects. Periodic testing of students to find out if they have learned this material and if their attitudes have changed might be included.

In most schools, the program will include a course or seminar devoted entirely to professional responsibility. Many (but by no means all) law schools now offer such courses,[64] but, in general, they have been less than a total success. Difficulties include lack of student motivation, less-than-complete teacher credibility, and less-than-adequate quality and coverage.[65] Most writers have concluded that the quality and value of such a course is directly proportional to the teacher's enthusiasm for the subject.[66] It should come as no surprise to learn that those who have been dragged, kicking and screaming, into the classroom to teach this course have usually had less than satisfactory results. Conversely, those teachers who have a missionary zeal for the subject do not have problems with student motivation, course quality, and the like.

It is not difficult to understand why most regular members of the full-time teaching faculty are less than excited about teaching this course. It takes only a short period of experience in law teaching to discover that most of the awards *honoris causa,* and the fringe benefits that go with them, are handed out to those who excel in teaching and writing about *law.* In the long run, time

[63] *See* Smedley, *The Pervasive Approach on a Large Scale—"The Vanderbilt Experiment,"* 15 J. LEGAL ED. 435 (1963).

[64] *See* note 5 *supra.*

[65] *See* BOULDER II at 39-111; L. LAMBORN, *supra* note 5.

[66] *See, e.g.,* Thoron, *A Course in the Dynamics of Professional Responsibility,* in BOULDER II at 88.

spent on this course is likely to be counterproductive in terms of one's teaching career.

There are, however, two groups of potential professional responsibility teachers who may well be enthusiastic about the task. One likely candidate would be a practicing lawyer from the community in which the law school is located. Many lawyers—especially graduates of the school in question—secretly carry chalk in their briefcases. The glory of teaching one course at old alma mater or a sister law school is a powerful form of psychic income. Among these lawyers are a few who have excellent academic records and very good classroom demeanor, and are sufficiently conscientious and dependable to teach a first-rate course with proper guidance. Surely it would not be difficult to find one or more qualified lawyers with high professional standards and a real concern about professional responsibility issues.

The use of an adjunct faculty member for this course has several advantages. First, it is not a drain on the work and resources of the existing faculty. Second, it is less expensive to the law school. The services of a practicing lawyer can be obtained for far less than the total cost of half the teaching time of a regular member of the faculty. Third, the course could be offered more frequently—every semester or quarter and perhaps even in the summer—enabling it to reach a larger number of students and thus underlining its importance. (If the course is to be required for graduation, such additional offerings will usually be necessary.) Fourth, it eliminates the credibility gap which may exist if the course is taught by a regular member of the faculty.[67] The practicing lawyer can draw upon his immediate experience for course material, making it more real and alive, something the law professor usually cannot do. Fifth, students will perceive that at least some segments of the bar are concerned about professional responsibility problems; in other words, the lawyer will serve as a positive role model.

On the negative side, the problem with using adjunct faculty for this or any other course is that practicing lawyers sometimes have a tendency to be out of touch with the school's educational goals, and may not understand what needs to be done to develop the course as it ought to be. This is where a second potential instructor comes in.

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[67] *See* Mathews, *A Problem Approach*, in BOULDER II at 70-71; Starrs, *supra* note 3.

The various deans in the law school—"The Dean," and the associate and assistant deans—often wish to have some teaching function but may not have the time or inclination to develop a particular substantive course. One or more of them may have a special interest in professional responsibility matters, particularly because deans often are brought into direct contact with bar associations, judges, bar admission committees, and others who sometimes ask embarrassing questions about professional responsibility training in the law school. Indeed, many legal educators will intuitively deem professional responsibility matters most appropriate for decanal concern.

If there is a dean ready, willing, and able to do so, why not have the professional responsibility course team-taught by him or her and the practicing lawyer described above? Such dean might also be the logical person to be chosen as the law school's professional responsibility coordinator. In this way, the practicing lawyer would provide the expertise, realism, enthusiasm, and most of the work for the course, while the dean would insure that the course approach and coverage were appropriate to the law school's overall program. Thus, the course would be assured of having both the necessary academic and practical components.

Of course, the academic member of the teaching team need not be a dean if there is another member of the faculty interested in this subject. The use of the team-teaching device with the primary burden of the course resting on the practicing lawyer would enable an interested member of the regular faculty to participate with a relatively minor expenditure of his own time, making the course much more attractive to a law teacher with an interest in the subject.

The team-teaching concept has been used successfully in other subjects where instructors with different backgrounds each make a unique contribution to the course by virtue of their own special experience and expertise. The nature of education for professional responsibility is such that it is particularly appropriate for the team-teaching device.

Conclusion

Law schools traditionally have faced outward to the profession as well as inward toward the academy. Today it is more important than ever that this dual stance be maintained. As legal institutions and the profession itself face new challenges and demands, tomorrow's lawyers must be especially well prepared to

respond affirmatively and effectively to the changing needs of the consumers of legal services. Lawyers must understand who they are and what the traditional responsibilities of their profession have been, before they can make intelligent decisions on these issues, both for the present and the future. The law school can and must educate them about professionalism, for all other means of such education are inadequate.

There are many ways to accomplish this education. Some have been mentioned in passing here, and these and others are extensively discussed in the literature. However, professional responsibility education at each law school will be no better than the personal and corporate commitment of the faculty to such a program. In particular, law teachers must be sensitive to their role as model lawyers.[68] By hiring a teacher and placing him in front of a classroom, the law school implicitly represents that he is at least an acceptable prototype of a lawyer. It is true, of course, that law teachers try to instill an independence of thought in their students. But we cannot escape the fact that the minds of law students are blank slates so far as the issues of professionalism are concerned. Our attitudes will tend to become their attitudes, and the greatest danger is that we will communicate too little.[69] To ignore professional responsibility is to say to the student that it is not a real professional problem, or that the issues are so basic that they are self-evident. Neither is true:

> The role of the law teacher as a psychological conveyer of attitudes also appears to be of crucial importance. Students new to a field are generally impressionable with reference to the facts and the views of that field. The attitudinal overtones which an instructor reflects or deliberately asserts in his elucidation of methods and points of law provide cues to the student in how to value the methods and findings that are the primary substance of learning. A cynical or disinterested instructor can make his attitude felt and important to a student just developing an orientation toward law and legal work. If the identification of student and instructor is a strong one—that is, if the student's psychological as well as intellectual needs are well-nourished by the instructor—the transfer of attitude may prove intractable to time and other influences. A whole faculty, generally disposed to the completely rationalistic view of law, for example, cannot help but present an imposing force of influence on

[68] E. SMIGEL, THE WALL STREET LAWYER 265-66 (1964); Cheatham, *supra* note 2, at 719; Thurman, *supra* note 3, at 68-69; Weinstein, *supra* note 29, at 455-59.

[69] *See* Thielens, *The Influence of the Law School Experience on the Professional Ethics of Law Students*, 21 J. LEGAL ED. 587, 598 (1969).

> the molding of attitudes, modes of analysis, and choice of judgments of students.[70]

Surely professional training which assumes that the professional will learn all he needs to know about his profession and its ethics—however broadly or narrowly defined—by trial and error in the marketplace is totally inadequate. Such education inevitably will be incomplete and warped.

Law schools as institutions have a responsibility to their profession, not merely to train legal carpenters, but to prepare their graduates for the professional status which the law degree implies—men and women who understand that they are entrusted with the design, construction, and maintenance of a cathedral. That responsibility is abdicated only at the risk of becoming less than lawyer schools, which carries with it the corresponding risk that lawyering will become less than a profession.

The raw material exists by which the law school can fashion a comprehensive program for the infusion of professionalism into the life of the school. All that is needed is the commitment to that goal and the effective delegation of responsibility to ensure that a concrete program is developed and brought into being.

Again, the words of Elliott Cheatham, although written 40 years ago, are fully appropriate today:

> Let us make this work an integral part of our wider study of law. We have been engaged in examining afresh almost every element of law, except the profession that administers the law—the profession in which our graduates will be engaged through life. Many of these other elements of law can better spare university study than can the profession itself. The zeal of the lawyer in advancing his clients' interests is constantly modifying the substantive law, and as a means to this modification much excellent study is devoted by lawyers and by laymen. But a study of the bar itself can scarcely be hoped for by the active bar, and cannot be carried on with understanding by laymen who do not know the difficulties involved. As I have already said, it must be made by those whose training gives them understanding of the work of the bar and whose work does not inevitably incline them to uphold its inherited position.
>
> This is a propitious time for action. Depression and want in the midst of plenty have caused wide re-examination of our institutions. Important political and economic and social changes seem in the making, and our students will have a hand in the making. Law reform and professional changes have often gone along with these

[70]Eron & Redmount, *The Effect of Legal Education on Attitudes*, 9 J. LEGAL ED. 431, 442 (1957). *See also* Thurman, *supra* note 3, at 69-70.

broader movements. One of our successors, writing from the vantage point of the year 2000, may say . . . that the greatest change in law administration was an improvement in the tone of the profession. May he add, the law schools had their full share in achieving the change.[71]

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[71]Cheatham, *supra* note 2, at 720-21.