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Competing Aims of Legal Education

Geoffrey C. Hazard Jr.

COMPETING AIMS OF LEGAL EDUCATION

GEOFFREY C. HAZARD, JR.*

The following is the manuscript of a presentation given by Geoffrey C. Hazard, Jr. in conjunction with the University of North Dakota Centennial Academic Symposium on February 23, 1983. Professor Hazard graduated from Swarthmore College and earned his law degree from Columbia University. He has taught at Boalt Hall (Berkeley), the University of Chicago, and Yale.

I. INTRODUCTION

We celebrate the 100th anniversary of the founding of the University of North Dakota. In doing so we should especially celebrate the faith and generosity of those who founded the university and those who continue to sustain it — the taxpayers and other donors who have given of their own that this institution might prosper. That kind of faith and generosity is particularly worthy of appreciation in an era whose ethos is not only "me first" but also "right now," with the motto of our time being "I want it right now."

Whatever "it" might be, those who want it "right now" had better stay away from universities. Those who found and maintain universities get little in direct return for themselves; the direct returns go to the students. And the returns are not realized "right now" even for the students. The benefits of a university are

*Baker Professor of Law, Yale University.

enjoyed by the next generation, but only years after the original investment.

It therefore behooves us, in considering universities, to think in the long term, difficult as that may be. It is especially appropriate that we think in the long term when thinking of a university law school. A university law school engages in education in an art that the students will perform for a lifetime. It is not easy to think, in any realm of endeavor, what we should do now with an eye to consequences as many as forty years from now, but that is the way we must try to think about professional education.

The task of long-range thinking is no less difficult when the subject matter is law. It is true that there is an affinity between the law of 1933, or even 1883, and the law of today, and it is probably true that this affinity is greater than that between the medicine of 1933 and the medicine of today. Yet the affinity between the legal past and the legal future can be a source of misdirection, leading us to think that there is more continuity in the law than actually exists. Just because we can cite a judicial opinion of a century ago in a contemporary legal controversy does not imply that the language does or should mean the same thing in the present context as it did when uttered. Justice Holmes said in his lifetime that the law remakes itself every twenty years or so; if that is true, these days the law must remake itself every ten years or so, whether we realize it or not. Hence, the educational task for law schools is in fact not much different from the educational task of medical schools, whose technical subject matter obviously revolutionizes itself every decade.

The poet Addison said:

> Books are the legacies that a great genius leaves to mankind, which are delivered down from generation to generation, as presents to the posterity of those who are as yet unborn.

One might say that educational institutions, including law schools, are the legacy of ordinary genius to those who are being born into adult life. But what should that legacy be? As we lawyers would put it, what should be the terms and conditions of the gift?

II. THE IDEAL LAW SCHOOL CURRICULUM

The question can be restated by asking, what is the ideal law

school curriculum? When the question is put this way a standard rejoinder is the impossibility of creating an ideal curriculum, or an ideal anything. This counsel of conventional wisdom is of course in a sense correct. Given the fallibilities of human material and the limitations of material resources, we know we cannot construct the ideal in the real world. Conventional wisdom also tells us that no practical program has universal applicability. This counsel is also of course in a sense correct. Given the variations in local need and circumstance, we know that every real world structure cannot be built from the same blueprint.

From these conventionalities, it follows that we should settle for second best. That wisdom is not only conventional but profound, for there is no enemy of change more relentless than the counsel of perfection. But the predication that we must settle for second best does not signify that we should contemplate the second best in defining our aims. Actually achieving the second best is very difficult. It requires great and continuing effort, especially in matters of detail. It also requires that we contemplate the best; that is, that we construct a conception of what we are trying to do even if we know from experience that we will fall short of achieving it. Otherwise, we will achieve not second best but second rate.

From this perspective, I believe it is possible to describe an ideal law school curriculum. The reason I am confident of this proposition is that such a curriculum already has been described. Indeed, it has been described over and over again with tiresome repetition in the last twenty years.[1]

The ideal law school curriculum includes eight elements. First, conventional case law analysis beginning in the first semester and continuing on a diminished basis throughout law school. The purpose is to teach reading, critical analysis of reasoning, and elementary legal synthesis — the putting together of two or three decisions on the same subject.

Second, exploration in depth of basic legal ideas. Without explaining the point, I will simply say that these ideas can be subsumed under the headings of contracts, wrongs, and procedures. The purpose is to explicate these fundamentals for

1. *See generally* E. GEE & D. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA (1975); D. JACKSON & E. GEE, BREAD AND BUTTER?: ELECTIVES IN AMERICAN LEGAL EDUCATION (1975). *See also* CURRICULUM STUDY PROJECT COMM., ASS'N OF AM. LAW SCHOOLS, *Training for the Public Professions of the Law: 1971,* 1971 A. AM. L. SCHS.; Cramton, *The Current State of the Law Curriculum,* 32 J. LEGAL EDUC. 321 (1982); Cramton, *Report of the Task Force on Lawyer Competency: The Role of the Law Schools,* 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE B.; Currie, *The Materials of Law Study,* 8 J. LEGAL EDUC. 1 (1955-1956).

their own sake and to make it possible for the student to discover the elements of legal controversy in whatever form they may be manifested.

Third, description in moderate to shallow depth of a wide range of legal subject matter, such as constitutional law, taxation, and zoning law. The purposes are to provide practice in discovering the elements of legal controversy in various disguises, to provide citations to relevant books, and to prevent later embarrassment, for example, in an employment interview when the student is asked whether he has ever heard of these subjects.

Fourth, practice in lawyer's writing, the purpose of which is obvious. Fifth, practice in lawyer's argument, in various forms of advocacy and negotiation. The purpose of this is also obvious.

Sixth, instruction in elementary facts about legal institutions, such as where to find the clerk's office and the lavatories. The need for this information is also obvious and the question is only why it needs to be taught in law school. One answer may be that many practitioners do not know these elementary facts. It is more plausible, however, that these are the only facts which many practitioners know, hence they are guarded as trade secrets.

Seventh, an understanding of the state of the art of various social sciences, particularly economics, sociology, and political science. An explanation of this would take more time than we have on this occasion. I will only say that the Critical Legal Studies movement,[2] now very energetic in some law schools, perhaps can be better and more sympathetically understood if it is interpreted as a response to the neglect of politics in the study of law.

Eighth, moral education, that is, the analysis of right and wrong independent of the law's definition of right and wrong. This also is a large topic for another occasion.

Most of these components of an ideal legal education appear on many lists, often designated by different names. The challenging problem is thus not to work out an ideal law school curriculum, but to work out why it is so difficult to put the ideal into practice. Put differently, we have reinvented the wheel many times but now need to discover how to put it on the sledge.

III. COMPETING CONSTITUENCIES

Even if everyone agrees as to what legal education ought to be,

2. Gerson, *Professors for the Revolution,* NAT'L L.J., Aug 23, 1982, at 1, col. 2. The views of the Conference on Critical Legal Studies are now appearing in legal journals. *See, e.g.,* Kennedy, *Legal*

they certainly do not agree on the proportions for the components. They probably also disagree as to the character of some of the components, particularly the relationships between law and social science and between law and morality. I believe that impasses in the development of legal education are attributable to these differences and to the implications they have for the various constituencies involved in legal education. In a realist analysis of a legal problem, one comes to understand the problem by searching out the real conflicts of power and interest lying beneath the surface controversy. The same approach may be useful in a consideration of our present problems with legal education.

Looking at legal education in this perspective, we might proceed through analysis of the relevant constituencies. By constituencies, I mean simply the more or less identifiable groups who have some special interest in the operation and survival of the institution. In the case of a business corporation, for example, we identify the constituencies as the stockholders, management, employees, and the public. In the case of a local school district we might identify the constituencies as the parents, the students, the staff, and the taxpayers. Using the same approach to a law school, we could identify the relevant constituencies as the faculty, the students, the bar, the outside funding sources, and the public. It will be apparent that this approach not only gives us the names and numbers of the players in the competition, but also a place of beginning to determine what the game is all about.

This approach of course requires some sensitivity and forebearance. To say openly that there is conflict among constituencies of an institution can have the effect of exacerbating the conflict among them. Particularly is this true if identifying conflict is simply a predicate for resorting to the technique of conflict resolution that has become only too prevalent in our era, the use of legal compulsion. I come not to legislate problems of legal education but to explicate them.

A. THE PUBLIC

I suggest we consider these constituencies in reverse order from that just specified, that is, beginning with the public. In some sense, there is no such thing as the public. The public is simply everyone left over after others have been identified as specific

Education and the Reproduction of Hierarchy, 32 J. LEGAL EDUC. 591 (1982); Klare, *The Law School Curriculum in the 1980's: What's Left?*, 32 J. LEGAL EDUC. 336 (1982).

constituent groups. And yet the public does exist in the sense that there is general citizenry which has an idea, vaguely defined and loosely held, of what an institution is supposed to be. I doubt very much that a public opinion poll would yield very precise ideas about a law school. But such a poll would yield something, particularly if it were a probing conversation instead of a simple questionnaire. In any case, I believe that the average citizen could make some relevant distinctions.

For example, I am sure that the general public of this state would make some important distinctions between the aims of this law school and the aims of say, Harvard Law School[3] or the law school at the University of Minnesota. One distinction that citizens of this state would make is that the law school at the University of North Dakota is in some proprietary sense "their" law school. By this they would mean, if pressed to explain, that the school is supposed to serve the interests of this state in some specific sense. It should provide education for students from this state who want to go to law school and who have the ability to complete the curriculum. The school should graduate lawyers in sufficient numbers and of sufficient competence and inclination to meet the needs of the state in the years ahead.

The responsibility thus imputed to the school is underscored by the fact that the school is a part of a public university. In this country, public universities are constituted not merely to meet a supposed need of the younger generation. We think of grade school and high school in those terms, that is, as a right of each individual, and we have a similar attitude toward undergraduate collegiate education, though with more ambivalence. But when we get to graduate and professional education, the notion of education of right is clearly no longer operative. There is some concept of quid pro quo, even if both the quid and the quo are hard to define.

In this regard, we might compare the public's expectations for places like the University of Minnesota and Harvard. I suspect that the Minnesota public's conception for the law school in that state is much the same as in North Dakota, with the difference that Minnesota is a much more metropolitan and commercial community. The public there is more heterogeneous, more distant, necessarily less focused in its collective wants. Accordingly, its law school can indulge in a wider variety of aims. For example, the

3. "Harvard Law School" is a term of art meaning any one of a number of law schools generally included in lists of schools nationally regarded as the most prestigious. *See* Van Alstyn, *Ranking the Law Schools: The Reality of Illusion?*, 1982 AM. B. FOUND. RESEARCH J. 649.

Minnesota law school perhaps can accept a higher percentage of students from out-of-state, because the need to supply the state with lawyers weighs more heavily than that of providing opportunity for local students to go to law school. Also, variations in the curriculum that might be regarded as exotic at the University of North Dakota might be regarded with acceptance at the University of Minnesota.

When we extend the comparison to the elite law schools, if I may use that term, the differences in public expectation are greater. I suppose that the average citizen of a midwestern state regards those schools with some mixture of respect, disdain, and possibly resentment. Respect, because the elite institutions are recognized as great universities, whatever might be the exact meaning of that term. Disdain, because the physical, social, and economic distance is great between the average citizen and the privileged few who are at Harvard Law School, if indeed it is supposed that there are actually real people at such an institution. Resentment, because the elite universities are perceived to be academies for the wealthy, the influential, and possibly the brilliant, in contrast to the good, the true, and the diligent. But as long as those elite institutions can avoid being cradles of upper class radicalism, or at least keep that kind of radicalism on the East Coast where it belongs, they can be regarded by the public as more or less irrelevant.

Yet the elite institutions are relevant, even to the average citizen. The general public shares the hope that the education at the state university will be good enough that its graduates can compete with those who had the money and other advantages that permitted them to go to Harvard. The public constituency for the state university law school thus is at least somewhat ambivalent in its attitude. Consistent with the American tradition of availability of opportunity, the public university law school should afford the average good resident student an opportunity for education in a place other than an institution that only the privileged can attend. Consistent with the American tradition of equality of opportunity, that education should be fundamentally as good as the education available to the privileged, which means an education something like that in the far away places attended by the privileged. This ambivalence is not simply confused thinking. It reflects that our citizenry, in its aspirations for higher education as in many other of its aspirations, has great difficulty giving concrete meaning to the ideal of equality of opportunity. For that reason, a public university law school has more leeway to pursue a program like the elite law schools than on the surface might appear.

B. THE LEGISLATURE

We come then to a second type of constituency, the outside funding sources. In a public university, of course, this means primarily the state legislature. The state legislature is especially significant in relation to the law school of a public university. This is because state legislatures have a substantial fraction of lawyers in their membership. Even though that ratio declined over the last 30 years or so, if we take account of the influentials in the legislature, and take account also of the third house consisting of the lobbyists, the legal profession has heavy weight in the legislature. As a consequence, the legislature has a special interest in the law school, and one might say peculiar knowledge about its affairs. This interest and knowledge is most sharply focused where, as in this state, there is only one state law school and only one law school in the state.

What does the legislature want the law school to be? To a large extent, its expectations are the same as those of the general public. This should not be surprising, because legislators who do not generally share public expectations do not generally remain legislators. But the legislature has some special concerns of its own. Its chief concern is expense. The perennial concern is the cost of staff, particularly faculty: how many positions are there and what is the salary structure? The legislature generally sees this problem in a narrowly local comparative framework: how do the salaries and fringes of law school faculty compare with other university faculty, and with other professionals on the state payroll, such as the staff in the attorney general's office?

The cost side of legal education in a public university is thus rigidly controlled by the state legislature. At the same time, benefit tends to be measured in very conventional terms. Observers of the public budgetary process describe this phenomenon as incrementalism. It means that the agency will do best with the legislature if it does the same thing as last year and therefore asks for the same appropriation plus an inflation factor. This budgetary method is sometimes frustrating from the legislative perspective, because change in programs becomes impossible except by small degrees and then only over long periods of time or upon the occasion of a crisis. But the procedure is equally frustrating from the viewpoint of the agency, in this case the law school. Everyone knows that the surest course is to do the same thing as last year, and the most dangerous is to do something discernably different. When

enough years go by under this kind of discipline, internal interests in the department become so entrenched as to defy consideration of new approaches, let alone their implementation. For example, it would be almost unthinkable to formulate and execute a plan whereby twenty-five percent of the present salary dollars might be converted into an equivalent budgetary amount for teaching assistants and clinical faculty, or converted into building a really sophisticated videotape library. I do not say that these are desirable transformations, but only that they entail unjustifiable risks if proposed in the typical legislative budgetary process.

I wonder whether state legislatures comprehend how much their procedures and attitudes toward finance affect the atmosphere of a public university. The institution is supposed to be preparing young people for a lifetime in competition with others from the national community, but the legislature focuses on the variance of next year's salaries from this year and from the salary level in the state highway department. Yet if the facts were fully faced, the situation is not much different in a private university, except that the budget overseer is not the legislature but the provost or financial vice-president. In either case, incrementalism dominates and program change is proportionately difficult.

One lesson to be drawn is that a law school, or any university department for that matter, usually has to move by small increments if it is to move at all. Those who advocate change, bless them, should recognize how hard even a willing dean will find the task of bringing it off. At the same time, it should be appreciated by other constituencies of the school, particularly alumni, that the school will gain great advantage from having some "free" money, i.e., money not tied directly into the regular budget. Even in small amounts, money of that character can provide what money always provides, namely freedom. And it will be a wise although uncommon legislature or provost that can recognize its own disability, and therefore leave the "free" money outside the regular budget at least for a few years.

No doubt I have missed nuances in the relationship that actually exists between this law school and its legislature. There are many variations in this relationship, running from continuing esteem to civil war. The fact remains, however, that this relationship is very important in determining the curriculum of a public law school. It is widely recognized that process is an important determinant of outcome, and particularly that the budgetary process is an important determination of program

outcome. I believe this relationship helps explain the inertia in law school curricula, particularly but not exclusively those in public university law schools, just as it explains inertia in the Defense Department. However, the very identification of this relationship is a step in transforming it, for the process of criticism itself changes prior behaviorial process. And we need not go the whole way to zero-base budgeting to see that it would be desirable for the legislature, or the provost's office, once in a while to ask not only, "How much does it cost?", but "What are we trying to do?"

I will not say much about other funding sources, because in most public institutions they are of distinctly subordinate importance. For reasons already indicated, however, even small independent resources procure large measures of program initiative and opportunities for distinction. I would hope that alumni of public universities could come to appreciate this as much as their private university counterparts.

C. THE BAR

We come next to the alumni and the bar. The legal profession is inevitably an influential constituent of a law school. Particularly is this so when the law school is the only one in the state. For one thing, in such a situation the bar as a group coincides to a large extent with alumni as a group. Everyone knows that alumni are important, especially the alumni themselves. They continually monitor the school and contribute to the fluid consensus as to how it is doing. The question uppermost in the minds of the alumni, of course, is whether the place is still as good as it used to be when old Professor Fudd scared hell out of the first year students. The answer to this question, of course, is that the school is not what it used to be, and never was. But allowing for the deterioration that nostalgic eyes always detect, the assessment can shift upward or downward over time.

The level at which this assessment stands at any given time is of great importance. If there is a tradition of substantial gift-giving, as there is in many law schools, the state of opinion will register on the barometer of donations. But the constituency in the legal profession includes not only lawyers who are alumni, but also lawyers who are not. The category of alumni thus merges into the category of the bar, the difference being that alumni define their own legal education in a positive way, while members of the bar do not necessarily do so.

The influence of the bar on legal education is very great, although the character and impetus of that influence is often misperceived by legal academics. The most obvious influence of the bar is upon accreditation. Here, the standard interpretation by law faculty is that the bar is a bunch of philistines. I would be the last to say that there are no philistines in the bar, having met a number of them myself. Furthermore, the specific accreditation proposals emanating from the bar often are superficial and mechanical. Having said that, however, I believe it is also true that the concerns that animate these proposals have a lot more basis than legal academia is willing to admit.

Take the law of procedure, for example. The bar wants to know why some law school graduates do not know how to make an evidentiary objection. This seems to me a legitimate objection, both because many law school graduates in fact do not know how to do this and because all of them should know how to do it. Of course, it is a long way from that point to requiring every law student to take a semester course in trial advocacy. However, the exaggerated form of the remedy should not obscure the fact that the remedial proposal was instigated by a real deficiency.

Take commercial law. Shouldn't every law school graduate know the basic difference between assignability and negotiability? I do not say every student should therefore be required to take a course in commercial law, but on the other hand it doesn't take a full blown course in commercial law to teach the idea of negotiability.

These items would appear in a detailed elaboration of the ideal law school curriculum that we have postulated. There are many more such items. However, the bar's list is not infinitely long. Indeed, I think the list would be shorter if it were conceded at the outset that such a list could be compiled. That concession, however, will not be made by many legal academics, especially at some of the elite law schools. The result will be continued pressure from the bar, which will continue to try in a clumsy and frustrated way to get the law schools to fulfill their promise of professional education.

In this regard, it is important to consider another aspect of the influence of the bar on legal education. This is the appraisal of law schools that members of the bar disseminate to prospective students and new law school graduates. The interaction between the bar and the students has an importance often greatly underestimated, particularly by faculty. The interaction occurs not only in the

placement process but in many other channels. Lawyers and law students have direct contacts in such activities as moot court and practice trials, in which practitioners assume an immediate role of professional mentor and model. Lawyers have direct influence, whether or not well informed, in advising students what courses are important and on the ways to open and develop one's professional career. More fundamentally, the bar establishes the operative standards of skill, acuity, diligence and autonomy in the profession for which students are preparing themselves. Quite apart from the bar's conventional pieties on these subjects, it is against these standards that the students will measure themselves and the faculty will teach. I sometimes wonder whether the bar understands how influential it is on law school education, not so much by precept — which is regarded with justified skepticism — but by example, which is observed more closely than lawyers might imagine.

In this vein I have to say that I get quite impatient with members of the bar who tell me what I as a faculty member should teach the students, as though I am unaware of my responsibility in this regard. I wonder whether they understand how much they teach the students — in what they do, what they say, and what they do not say. The students all the time are watching and listening, as are the faculty, who have explanations for what it all means.

There are members of the constituency in the bar who provide strong positive support for a sensible program in a law school. They understand that legal education is not merely to provide navigation in the first year of apprenticeship but to inform for a lifetime of continuous adaptation and learning. They know that the forms of actions and law office forms are merely that, forms in which substance must be poured not slavishly but with intelligence and discrimination and therefore with fundamental understanding. They know the law recreates itself every ten years, and therefore that to study only what the law is results in studying only what the law was. They know that disciplined imagination is a major component of successful law practice, and therefore that a good legal education nurtures imagination as well as inculcates discipline. And those members of the bar who understand these things, and act and speak accordingly, contribute much to a law school's concept of itself.

Yet the bar inevitably has interests that move in an opposite direction. Particularly is this true of a bar whose practice is conducted primarily in relatively small firms and solo practices. As an analytic statement, that is not intended as an invidious

comparison. The fact remains that small organizations, whether in law or any other discipline, shape their operations around immediate necessities much more than do large organizations. They are too busy to plan, too busy to develop systems, too busy to train, too busy to review and redirect the work of their junior members except in response to crisis. Their technical needs are felt now, not tomorrow or next year. These needs translate into demands of similarly immediate dimension. The small firm lawyer usually wants graduates who can draft a pleading, a deed, a will, an application for a zoning variance, a set of corporate bylaws — now. And that want is translated into student expectation through the media of exchange referred to earlier.

It is surely not to the student's long-range interest to define his or her educational expectations in terms of these immediate expectations, even though it surely appears in his short-range interest to do so. Yet in the interest of the students a law school program cannot ignore the short-range perspective. Nor can this perspective be ignored if the attention of the students is to be maintained, particularly as they approach the bar in their third year. Having acknowledged that point, however, the main point should be made clear: it will be a disservice to the students of today and the bar of tomorrow if the longer-range perspective of legal education is not kept foremost in mind. In the long run, after all, it will be more important to understand the fundamentals of administrative procedure, for example, than to know exactly where to file the zoning petition. The clerk knows where to file the petition, and the young lawyer should be careful to ask him.

D. THE STUDENTS

We come, then, to the students. Frankly, I am not sure that they should be considered a constituency, as distinct from a medium through which other constituencies operate to shape the life of a law school. No doubt the attitudes and ambitions of law students in the elite law schools are more volatile than those of students who study closer to the ground. Hence, my observation of the student constituency over the last several years, made while teaching in an elite school, may be misinformed when it comes to the student populations elsewhere. My guess is, however, that the fluctuations in student attitude at the elite schools are greater only in magnitude and not in frequency than the fluctuations elsewhere. We have all witnessed the cycle from the radicalism of the Vietnam

War years to the conservativism of the last several years, and the current extreme distress in the face of a decimated job market.

My inclination is to discount these fluctuations, though of course not to ignore them, and to assume that the students want to be properly educated to practice law. The students' problems are, however, that they know little about the practice of law, and less about proper education for the practice. In this respect, the students at elite schools may be much more confused than students in state university law schools. On the one hand, they envision an enormously wide variety of practice options, running from legal aid for the Navahoes to being conseil juridique in Paris. On the other hand, something like eighty-five percent of these students actually locate in five major metropolitan areas, primarily in large or middle-sized private firms practicing corporate law. A large part of the developmental process for most students in an elite school therefore consists of dropping hypothetical possibilities in favor of a reality which some of them regret but which others envy, an envy that further compounds their confusion. In contrast, most of the students at a public university law school such as North Dakota, from the inception of their education, have a pretty clear idea of the kind of practice they expect to enter.

But that does not mean that students in any law school have any idea what their curriculum should be. I remember a student at the University of Chicago who was preparing herself for poverty law but discovered, fortunately before she finished, that the most important course from a practical viewpoint was property law — for reasons that reflection may suggest. And we all know the discrepancies in our own professional careers between our law school prognostications and our careers as they have actually turned out. For example, I thought I would aim for general practice in southern Connecticut. As things developed, all I got right was the location.

The law school student body is uninformed and transitory, and also generally young. That describes an easily exploited clientele. When in the time of student protest the law students were protesting the law school curriculum, we told them they did not know what they were talking about. With many reservations I believed at the time that there was truth in that proposition, and with still more reservations believe that there is also truth in it today. But that makes the problem more complicated rather than less. If the students do not know exactly what the law school program ought to be, and neither do the bar nor the legislature,

who then is responsible for the curriculum? The answer is not far to seek.

E. THE FACULTY

The blunt fact is that a law school faculty largely determines the education that the school provides. As I have already established, the faculty does not have sole control of the situation. It operates only within the constraints imposed by the constituencies already mentioned. Hence, the faculty of a public university law school cannot pursue any program that the public, the legislature, the bar, and the students will not tolerate. Yet those constraints are relatively weak, and those degrees of tolerance are relatively large. Certainly the constraints on faculty initiative are far less limiting in a state university law school than they are in most privately financed law schools, that is, any private law school that does not have a substantial endowment. Relative to the average private school, the average state university law school is indeed very well funded.

Before making any critical suggestions about law school faculties, let me take note of the manifold transformations that have taken place in legal education in the last two decades. Twenty years ago, clinical education was improvisory; now training in dealing with clients and dealing with officials is part of the education of most law students. Twenty years ago, most courses at law school were taught in one of three formats — the Socratic dialectic, the discursive lecture, and the discussion seminar. Today most schools have variations in teaching methods running from computer-based exercises to independent legal research. Twenty years ago, the relationships between law and the social sciences centered on mostly descriptive absorption of sociology. Today the relationships range across other social sciences, particularly economics and politics, and are increasingly analytic in their method.

Indeed, such is the present richness of possibility that the task of selecting elements of a curriculum has become baffling to a degree perhaps not appreciated by outsiders in the bar and the legislature. Consider, however, how many alternatives there would be if we considered only three variables — subject matter, the clinical component, and the social science component. We could take all the subjects in the traditional curriculum, multiply each by the number of feasible clinical formats, and then multiply each of

the resultant variations by the number of social science possibilities that could be imagined. For example, we could study corporation law by clinical simulation of standard corporate transactions, and then analyze the transactions in terms of their financial, managerial and distributive justice implications, resulting in a course entirely different from the traditional coursebook treatment of corporation law.

The central problem in the design of the modern law school curriculum, therefore, is not what to include but what to leave out. These choices are inherently problematic, for once we cut loose from the traditional curriculum and traditional teaching methods, there are no established criteria for choice. But choice has to be made, for otherwise the law school curriculum will be ten years long, as Dean Prosser warned many years ago.[4]

The critical choices will have to be made by the law faculties. One might never know this from listening to legal academics. They curse the bar and the legislature, bemoan the funding sources, and commiserate with the students. Yet the fact is that a law school faculty holds most of the cards. No one is going to shut down the law school. No one is going to fire its faculty. No one is even going to interfere very long in its faculty recruitment or tenure decisions, else the AALS, the AAUP, and the ABA will descend with condemnation and even blacklisting.

The faculty has all the powers of an entrenched bureaucracy. Only the faculty has continuity in the enterprise, indeed tenured continuity. The members of the faculty have the best vantage point to see what is going on over time, although of course many of them do not look very carefully. The members of the faculty can, if they will, communicate with all the other constituencies, portraying the situation in whatever light is advantageous and collecting field intelligence. They have friends in outside academia and other high places. Some of them practice law on a consulting basis, thus tapping into other networks and maintaining other options for themselves. And, finally, they are supposed to know what a law school program is supposed to be.

IV. CONCLUSION

What, then, should we conclude is the primary source of inertia in legal education, in the discrepancy between what most

4. *See* Prosser, *The Ten Year Curriculum*, 6 J. LEGAL EDUC. 149 (1953-1954).

everyone agrees ought to be done and what actually is done in legal education? Not the public, for they are mostly bystanders. Not the funding sources, for they mostly pay on faith. Not the bar, for their councils are divided and their means not very effectual. Not the students, for they come and go.

I am afraid we must look among the law school faculty, here and everywhere else, and acknowledge, as Pogo said, "We have met the enemy, and he is us."

Now, who will volunteer to serve on the curriculum committee?