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Law Schools and Law Firms

Ralph Nader*

It was a similar ritual every year. About 550 new law students would file into venerable Austin Hall at Harvard Law School on a September day and hear the no-nonsense dean, Erwin N. Griswold, orient them. The good dean had the speech down to a practiced spontaneity. He advised them that at that instant they had become members of the legal profession, that law firms were the backbone of the profession, that there were no glee clubs at the Harvard Law School and that the law was a jealous mistress. Thus was launched a process of engineering the law student into corridor thinking and largely non-normative evaluation. It was a three-year excursus through legal minutiae, embraced by wooden logic and impervious to what Oliver Wendell Holmes once called the "felt necessities of our times." It is not easy to take the very bright young minds of a nation, envelop them in conceptual cocoons and condition their expectations of practice to the demands of the corporate law firm. But this is what Harvard Law School did for over a half century to all but a resistant few of the 40,000 graduates.

The Harvard Law pattern—honed to a perfection of brilliant myopia and superfluous rigor—became early in the century the Olympian object of mimicry for law schools throughout the country. Harvard also did everything it could to replicate its educational system through its production of law school teachers, casebooks, and an almost proselytizing zeal. This system faithfully nourished and fundamentally upheld a developing legal order which has become more aristocratic and less responsive to the needs and strains of a complex society. In turn, the established legal order controlled the terms of entry into the profession in ways that fettered imagination, inhibited reform and made alienation the price of questioning its assumptions and proposing radical surgery.

Unreal as it may appear, the connection between the legal establishment and the spectacular increase in the breakdown of the legal system has rarely been made outside the fraternity. This is due to the functional modesty of the profession, its re-

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luctance to parade itself as the shaper, staffer and broker for the operating legal framework in this country. What is not claimed is not attributed. This escape from responsibility for the quality and quantity of justice in the relationships of men and institutions has been a touchstone of the legal profession.

Anyone who wishes to understand the legal crises that envelop the contemporary scene—in the cities, in the environment, in the courts, in the marketplace, in public services, in the corporate-government arenas and in Washington—should come to grips with this legal flow chart that begins with the law schools and ends with the law firms, particularly the large corporate law firms of New York and Washington.

Harvard Law's most enduring contribution to legal education was the mixing of the case method of study with the Socratic method of teaching. Developed late in the nineteenth century under Dean Christopher Columbus Langdell, these techniques were tailor-made to transform intellectual arrogance into pedagogical systems that humbled the student into accepting its premises, levels of abstractions and choice of subjects. Law professors take delight in crushing egos in order to acculturate the students to what they called "legal reasoning" or "thinking like a lawyer." The process is a highly sophisticated form of mind control that trades off breadth of vision and factual inquiry for freedom to roam in an intellectual cage.

The study of actual law cases—almost always at the appellate court level—combines with the Socratic questioning sequence in class to keep students continually on the defensive, while giving them the feeling that they are learning hard law. Inasmuch as the Socratic method is a game at which only one (the professor) can play, the students are conditioned to react to questions and issues which they have no role in forming or stimulating. Such teaching *forms* have been crucial in perpetuating the status quo in teaching *content*. For decades, the law school curriculum reflected with remarkable fidelity the commercial demands of law firm practice. Law firm determinants of the content of courses nurtured a colossal distortion in priorities both as to the type of subject matter and the dimension of its treatment. What determined the curriculum was the legal interest that came with retainers. Thus, the curriculum pecking order was predictable—tax, corporate, securities and property law at the top and torts (personal injury) and criminal law, among others, at the bottom. Although in terms of the seriousness of the legal interest and the numbers of people affected,

torts and criminal law would command the heights, the reverse was true, for the retainers were not as certain nor as handsome. Courses on estate planning proliferated, there were none for environmental planning until a few years ago. Other courses dealt with collapsible corporations, but the cupboard was bare for any student interested in collapsing tenements. Creditors' rights were studied deeply; debtors' remedies were passed by shallowly. Courses tracking the lucre and the prevailing ethos did not embrace any concept of professional sacrifice and service to the unrepresented poor or to public interests being crushed by private power. Such service was considered a proper concern of legal charity, to be dispensed by starved legal aid societies.

The generations of lawyers shaped by these law schools in turn shaped the direction and quality of the legal system. They came to this task severely unequipped except for the furtherance of their acquisitive drives. Rare was the law graduate who had the faintest knowledge of the institutionalized illegality of the cities in such areas as building and health code violations, the endemic bribing of officialdom, the illegalities in the marketplace, from moneylending to food. Fewer still were the graduates who knew anything of the institutions that should have been bathed in legal insight and compassion—hospitals, schools, probate and other courts, juvenile and mental institutions and prisons. Racism, the gap between rich and poor, the seething slums—these conditions were brought to the attention of law firms by the illumination of city riots rather than the illumination of concerned intellects.

Even the techniques of analysis—the ultimate pride of the law schools—were seriously deficient. Techniques which concede to vested interests a parochial role for the law and which permit empirical starvation of portions of their subject matter become techniques of paralysis. This was the case in the relation of tort courses and motor vehicle injuries. Law as prevention, law as incorporator of highway and vehicle engineering facts and feasibilities was almost totally ignored. The emphasis was on legal impact after crashes occurred, so as to assign liabilities and determine damages between drivers. Another failure in analysis was thematic of the entire curriculum. Normative thinking—the “shoulds” and the “oughts”—was not recognized as part and parcel of rigorous analytic skills. Although the greatest forays in past legal scholarship, from the works of Roscoe Pound to those of Judge Jerome Frank, proceeded from a cultivated sense of injustice, the nation's law schools down-

played the normative inquiry as something of an intellectual pariah. Thus the great legal challenges of access to large governmental and corporate institutions, the control of environmental pollution, the requisites of international justice suffered from the inattention of mechanized minds. There was little appreciation of how highly demanding an intellectual task it was to develop constructs of justice and injustice within Holmes' wise dictum that "the life of the law is not logic, it is experience." Great questions went unasked, and therefore unanswered.

Possibly the greatest failure of the law schools—a failure of the faculty—was not to articulate a theory and practice of a just deployment of legal manpower. With massive public interests deprived of effective legal representation, the law schools continued to encourage recruits for law firms whose practice militated against any such representation, even on a sideline, *pro bono* basis. Lawyers labored for polluters, not anti-polluters, for sellers, not consumers, for corporations, not citizens, for labor leaders, not rank and file, for, not against, rate increases or weak standards before government agencies, for highway builders, not displaced residents, for, not against, judicial and administrative delay, for preferential business access to government and against equal citizen access to the same government, for agricultural subsidies to the rich but not food stamps for the poor, for tax and quota privileges, not for equity and free trade. None of this and much more seemed to trouble the law schools. Indeed, law firms were not even considered appropriate subjects of discussion and study in the curriculum. The legal profession—its organization, priorities and responsibilities—were taken as given. As the one institution most suited for a critical evaluation of the profession, the law school never assumed this unique role. Rather, it serviced and supplied the firms with fresh manpower selected through an archaic hierarchy of narrow worthiness topped by the editors of the school's law review. In essence it was a trade school.

The strains on this established legal order began to be felt with *Brown vs. Board of Education* in 1954. *Brown* rubbed the raw nerves of the established order in public. The mounting conflict began to shake a legal order built on deception and occult oppression. The ugly scars of the land burned red. Law students began to sense, to feel, to participate, and to earn scars of their own. Then came the Kennedy era with its verbal eloquence, its Peace Corps—overseas and later here. Then came

Vietnam and Watts, Newark and the perturbation became a big-league jolt. Law students began to turn away from private practice, especially at the Ivy League law schools. Those who went directly to the firms were less than enthusiastic. The big corporate firms in New York and Washington began to detect early signs that their boot camps were not responding to the customary Loreleis of the metropolitan canyons. Starting salaries began to reflect the emergence of a seller's market. Almost two years ago, the big New York Cravath firm set a starting salary of \$15,000 a year and many firms followed. Still the law graduate detour continued. The big firms began to promise more free time to engage in *pro bono* work—the phrase used to describe work in the public interest such as representing indigents. The young graduates were still dissatisfied—first over the contraction of the promises and second over the narrow interpretation given to *pro bono* work.

At the same time, more new or alternative career roles in public service began to emerge. Neighborhood Legal Services, funded by OEO, was manned by 1,800 young lawyers around the country at last count. The draft is driving many graduates into VISTA programs. There are more federal court clerkships available. And the growth of private, public-service law institutions such as Edgar Cahn's Citizen's Advocate Center and the Urban Law Institute headed by his wife, Jean Cahn, are not only providing such career roles but articulating their need throughout the country.

Meanwhile back at the law schools, student activism has arrived. Advocacy of admission, curriculum and grading reform is occurring at Harvard and Yale. Similar currents are appearing at other law schools. New courses in environmental, consumer and poverty law are being added to the lists. The first few weeks of the present school year indicate that the activists' attention is turning to the law firms that are now coming on campus to recruit. In an unprecedented move, a number of detailed questionnaires, signed by large numbers of students, are going out to these firms. The questions range far beyond the expected areas of the firms' policies on minority and women lawyers, and *pro bono* work. They include inquiries about the firms' policies on containing their clients' ambitions, on participation in law-reform work, on conflict of interest issues, on involvement in corporate client and political activity, and on subsidizing public-interest legal activity. Such questionnaires are preliminary to the development of courses on law-firm activities,

and to more studies of specific law firms, which began this past summer with a study of the largest Washington, D.C. firm, Covington and Burling.

The responses which the firms give to these questionnaires, and whatever planned response the students envisage for those firms who choose not to reply, will further sharpen the issues and the confrontations. The students have considerable leverage. They know it is a seller's market. They know how vulnerable these very private firms are to effective public criticism. Status is crucial to these firms. Status is also a prime attraction for competent law school graduates.

In recent months, there has been much soul-searching among the larger firms. Memos suggesting various opportunities for *pro bono* work by younger associates have been circulating between partners. A few decisions have been made. Some New York and San Francisco firms are considering or have instituted time off allowances ranging from a few weeks a year to a sabbatical. Piper & Marbury, a large Baltimore firm, has announced its intention to establish a branch office in the slums to service the needs of poor people, without charging fees if there is an inability to pay anything. Arnold and Porter, the second largest Washington, D.C. firm, has appointed a full time *pro bono* lawyer and is permitting all firm members to spend, if they wish, an average of 15 percent of their working hours on public service activities. Hogan and Hartson, the third largest D.C. firm, is setting up a "Community Services Department" to "take on public interest representation on a non-chargeable or, where appropriate, a discounted fee basis," according to the firm's memorandum on the subject.

The Hogan and Hartson memorandum is a fairly candid document. Like other firm memorandums on *pro bono* ventures, there is the acknowledgment that such a move "may have a favorable impact upon recruitment." The executive committee of Hogan and Hartson concedes that "there is a tendency among younger lawyers, particularly those with the highest academic qualifications, to seek out public-service oriented legal careers as an alternative to practice in the larger metropolitan law firms." In its internal firm statement, the committee notes that it "regards the relative disfavor into which the major law firms have fallen to be attributable, at least in part, to the feeling among recent law school graduates *that these firms have failed to respond to the larger problems of contemporary society.*" (Their emphasis.) Some statistics impressed the senior part-

ners: the University of Michigan Law School reports that 26 of its 1969 graduates entered Wall Street law firms as compared with an average of 75 in preceding years. Harvard Law School reported that the percentage of its graduates entering private law practice declined from 54 percent in 1964 to 41 percent in 1968, and an even more significant decline is expected in the next few years.

It is too early to appraise these programs because they have not yet gotten underway. The likelihood that serious or abrasive conflict of interest situations will arise depends on the kind of *pro bono* work selected. If this work deals with "band-aid law" in the slums on a case basis, few conflict of interest problems should arise. On the other hand, should the *pro bono* lawyers grapple with the financial institutions who fund the slum moneylenders for example, or strive toward structural reform of a legal institution, then the probability of conflict is increased.

Because of the enormously greater cost-benefit which attaches to the more basic *pro bono* efforts, the external and internal pressures on the firm's leaders will be in that direction. This could lead to more profound clashes between the firm's allegiance to its paying clients and its recognition of public service responsibilities. With additional law student and younger lawyer demands for cash contributions for scholarships to minority law students, for admission of more minority lawyers to firm membership, and for senior partners to pay "reparations" out of their own salaries to assist the legally deprived—all demands made or in the process of being made—the pressure may soon exceed the firms' threshold of tolerance. At that point the experiment in *pro bono* may terminate.

Whatever the outcome, the big firms will never be the same again. They will either have to dedicate substantial manpower and resources to public service, and somehow resolve the conflict of interest problem, or they will decline in status to the level of corporate house counsel or public relations firms. The polarization of the legal profession seems a more likely development. Before he left Harvard almost two years ago to become U.S. Solicitor General, Dean Griswold wrote of his belief that there would be a "decline in the relative importance of private law practice as we have known it in the past." This trend is in fact occurring as far as the younger lawyers' concept of importance is concerned. However, the immense power of these firms and their tailored capacity to apply know-how, know-who and

other influences remains undiminished.

Recent evidence of the resourcefulness of large corporate law firms in overwhelming the opposition on behalf of its clients comes from the firm of Wilmer, Cutler and Pickering. A firm team, headed by Lloyd Cutler, obtained last month on behalf of the domestic auto companies a feeble consent decree in return for the Justice Department's dropping its civil antitrust case charging the domestic auto companies with conspiracy to restrain the development and marketing of pollution control systems since 1953. Earlier Mr. Cutler succeeded in having the Antitrust Division heed his representations that the original policy to initiate criminal proceedings, after an 18-month grand jury strongly wanted to return an indictment, be dropped. The terms of the consent decree are being challenged by a number of cities in federal district court at Los Angeles. The petitioners allege that there are inadequate provisions for disclosure of the conspiracy information and for long-term compliance, and that the great deterrent effect of a public trial was lost. Without going into further detail, it is sufficient to state that many law students and younger lawyers see a divergence in such a case between the lawyer's commitment to the public interest and his commitment to the auto industry.

Professor Charles A. Reich of Yale Law School expressed one form of this heightened expectation of the lawyer's role as follows: "It is important to recognize explicitly that whether he is engaged publicly or privately, the lawyer will no longer be serving merely as the spokesman for others. As the law becomes more and more a determinative force in public and private affairs, the lawyer must carry the responsibility of his specialized knowledge, and formulate ideas as well as advocate them. In a society where law is a primary force, the lawyer must be a primary, not a secondary, being."

The struggle of the established law firms to portray themselves as merely legal counselors affording their corporate clients their right to legal representation is losing ground. So too is their practice of hiding behind their responsibility to those clients, and not taking the burden of their advocacy as the canons of ethics advise them to do wherever the public interest is importantly involved. Either they are technical minions or they bear the responsibility attendant upon their status as independent professionals.

Clearly, there is need for a new dimension to the legal profession. This need does not simply extend to those groups or

individuals who cannot afford a lawyer. It extends to the immense proliferation of procedural and substantive interests which go to the essence of the kind of society we will have in the future, but which have no legal representation. The absence of remedy is tantamount to an absence of right. The engineer of remedies for exercising rights is the lawyer.

The yearning of more and more young lawyers and law students is to find careers as public-interest lawyers who, independent of government and industry, will work on these two major institutions to further the creative rule of law. The law, suffering recurrent and deepening breakdowns, paralysis and obsolescence, should no longer tolerate a retainer astigmatism which allocates brilliant minds to trivial or harmful interests.

