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Legal Education: An Illusion

Judith T. Younger*

*Things are seldom what they seem,
Skim milk masquerades as cream*

...
*Black Sheep dwell in ev'ry fold;
All that glitters is not gold.*

So sings Little Buttercup in Gilbert and Sullivan's musical *H.M.S. Pinafore*.¹ She sings about the seamen Ralph Rackstraw and Captain Corcoran of the *Pinafore*, who, as babies, were entrusted to her care. As their nursemaid, she mixed them up so that each grew up as the other: Ralph is really the well-born Captain and the Captain is really the common sailor Ralph. Little Buttercup's ultimate disclosure of the mix-up allows the *Pinafore* to sail along to a happy ending: Precisely because they are not what they seem, Ralph and the Captain get the women they love. Ralph, his change of condition now revealed, is able to marry Josephine, the daughter of a Royal Navy Captain. The Captain, now revealed to be of common rank, is free to marry his true love, Little Buttercup herself.

Predictably, Little Buttercup's mysterious words were written for her by a lawyer, Sir William Gilbert.² They apply not only to Ralph and to the Captain but, as well, to "legal education," the commodity now being sold by the nation's 175 accredited law schools³ to 124,471⁴ law students in what has

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1. W.S. GILBERT & A. SULLIVAN, *H.M.S. Pinafore*, in GILBERT & SULLIVAN AT HOME 57 (A. Wier ed. 1925).

2. Gilbert entered the Inner Temple as a law student and was called to the bar in November 1863. He was knighted in 1907. 5 ENCYCLOPAEDIA BRITANNICA 264 (1989).

3. All these schools are accredited by the American Bar Association, 156 are accredited by the Association of American Law Schools as well. There are 33 other law schools that are not accredited by either group. AALS DIRECTORY OF LAW TEACHERS, 1989-90.

4. This figure includes only the ABA and AALS law schools. *The Best*

become a \$900,000,000 business.⁵ My thesis in this Essay is that legal education, this big seller, is not what it seems and that precisely because it is not, it succeeds.

Though students think they are getting it, in fact legal education does not exist.

To the extent that law students are being educated, there is nothing legal about the process. Rather, today, law schools can only attempt to impart the basic skills: how to read, analyze what is read, write, and do library research.

To the extent that law students are learning anything about the law, the process is not education. Rather, it is practice in using the law through clinics. I use the term "clinic" in its broadest sense to include the modern development of legal services for the poor, as well as other non-classroom activities in which there is some contact with the real legal world or an attempt to simulate it. Thus law review, moot courts, legislative drafting projects, neighborhood law offices, and lawyering programs are all clinics. At best, these clinics are fun for students and give them the incentive to master the law library; at worst, they are seedbeds from which sloppy or incorrect work habits grow.

This is what law schools offer. In content (if not quality) the experience is now quite uniform throughout the nation. So is the packaging: a first year of required courses and a varied menu of electives thereafter, including clinics of various kinds as well as classroom courses in history, philosophy, sociology, political science, and mathematical technique. What is the effect of all this? We need only look about us. There is an appalling degree of incompetence among law school trained members of the profession. "For most recent graduates, the first year of practice traditionally is a crash course in everything they didn't learn in law school: writing and communication skills, creative problem solving, giving advice and law practice management."⁶ There is also a rather shocking lack of equivalence between a student's academic success during law school and his ultimate capacity at the bar. In every class, some

Professional Schools in America, U.S. NEWS & WORLD REP., Mar. 19, 1990, at 60.

5. Law school tuition at private institutions and at public institutions varies greatly. For example: Yale, \$15,015 per year; Harvard, \$14,520; University of Chicago, \$14,445; University of Minnesota, \$4,250 for residents, \$8,166 for nonresidents. LAW SCHOOL ADMISSION SERVICES, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS (1990).

6. *The Making of a Professional*, 76 A.B.A. J. 43 (1990).

whose training was mediocre or even worse nevertheless become legal stars. Others, after three years of exposure to the finest law school offerings, are never heard from again. If law schools were effectively teaching the qualities that make exceptional lawyers, the level of competence of law school trained lawyers would rise and the disparity between law school experience and lawyers' performance would narrow or disappear.

If law schools were, as they say they are,⁷ successfully training lawyers for practice of the profession, their graduates would emerge with the ability to do eight things:

- (1) Put problems in their appropriate places on the substantive legal map; in other words, spot the issues, characterize or affix the right legal labels to facts;
- (2) Plumb the law library to its greatest depth and come up with buried treasure;
- (3) Write grammatically, clearly, and with style;
- (4) Speak grammatically, clearly, and with style;
- (5) Find, outside the library, the facts they decide they need to know. This includes the ability to listen;
- (6) Use good judgment;
- (7) Find their way around courts, clerks, legislatures, and governmental agencies; and
- (8) Approach any problem with enough social awareness to perceive what nonlegal factors bear on its solution.⁸

Law schools are successfully teaching only one of these qualities — the first on the list. The ability to correctly place a problem on the legal map requires a combination of reading ability, analytic skill, and superficial knowledge of substantive law. Students generally master it in the first year of law school through casebook collections of appellate opinions, the Socratic method, and endless briefing.

The second listed quality — ability to use the law library — is something that law schools could and should teach. Indeed their catalogs say they do teach it in courses called "Legal Method," "Introductory Seminar," and "Research." Yet few law school graduates have mastered the law library. Those who have, learned it not from faculty in their courses but from peers in clinics, especially law review. The rest graduate without this skill, ever fearful thereafter that the library contains

7. For example, "The educational mission of the University of Minnesota Law School is to prepare men and women for their roles as lawyers and professionals." 92 U. MINN. BULL. (Law School) 6 (1989-91).

8. For a similar, but not identical, list, see H. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 22-23 (1972).

material they have missed.⁹

The third quality — the ability to write — is something that should be taken for granted by the time a student reaches professional school. Its learning should start in first grade, but American elementary schools, high schools, and colleges have not done the job. Students arrive in law school lacking knowledge of the rudiments of grammar, punctuation, and composition. It would be futile under these circumstances to demand any style. Faced with this situation, all law schools have instituted writing programs, but few have much interest or faith in their effectiveness.¹⁰ The prevailing faculty attitude is *laissez-faire*: A student either knows how to write when he arrives, learns that he doesn't thereafter and remedies it himself on his own, or continues illiterate into the profession. Even law review editors may suffer this fate. (Usually, however, they do know how to edit; for editing is easier to learn than writing.) Learning to write requires constant practice — writing and re-writing under close supervision. The supervisor, of course, must know how to write. This requirement eliminates all but a few qualified faculty members as teachers.

The fourth quality — ability to speak correctly, clearly, and well — is, like writing, a skill that should begin to be taught early. Like writing, its development is hopelessly neglected in the students' earlier schooling. As a result, many first year law students are inarticulate or vulgar of speech. Three years is too short a time to work a complete transformation, but long enough to erase the most flagrant mistakes. Certainly, conscience requires law schools to devote more curricular hours and effort to trying.

The remaining qualities — the ability to find facts outside the library, find one's way around courts and government, good judgment, and social awareness — cannot be taught in law school. About these qualities law schools can do only one thing — provide teachers who, by example, encourage students to learn them. Example is powerful. Said one of Roscoe Pound's students:

9. See, e.g., Howland & Lewis, *The Effectiveness of Law School Legal Research and Training Programs*, 40 J. LEGAL EDUC. 381 (1990).

10. See, e.g., Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 355-63 (1987) (arguing that law school efforts to improve legal writing programs have not produced encouraging results); American Association of Law Schools Memorandum 90-50, Sept. 1, 1990 (recognizing that law school graduates do not write as well as they should despite law school writing programs).

His classes meant life to us. Learning and fiery insight he had; and in the classroom itself, these were forged into the crucible of his genius. . . . In looking back, fantastic analogies rush into my memory: the impact of the French Revolution on Wordsworth, Francis Bacon's wild assertion that he would take all knowledge for his province. For us, in our halting, timid, clumsy thought, Pound insisted that we use all our resources, and he enabled us to continue to use them, far beyond what we or others thought possible.¹¹

Faculty selection is thus crucial. Since Langdell¹² hired Ames,¹³ however, the accepted measure of a law teacher has been "not experience in the work of a lawyer's office, nor experience in dealing with men, nor experience in the trial or argument of cases, — not, in short, in using law, but experience in learning law"¹⁴ through the reading and analysis of judicial opinions. Thus, for many faculty members the road to teaching has been short and narrow: a brilliant record in an Ivy League law school, a clerkship for a distinguished judge or a judge of a distinguished court, and then straight to the classroom. As Harlan Fiske Stone pointed out, good "teachers of law are born, not made exclusively by training or environment,"¹⁵ but before we loose any on students, in addition to natural gifts, we should insist on demonstrated ability in both learning *and* using the law.

Law schools today seem oblivious to their failures and certainly so do the men and women who apply to,¹⁶ are admitted to, and ultimately are graduated from them. Some observers

11. P. SAYRE, *THE LIFE OF ROSCOE POUND* 179 (1948). As Robert Browning, inspired by Wordsworth, put it in *The Lost Leader*:

We that had loved him so, followed him, honored him,
Lived in his mild and magnificent eye,
Learned his great language, caught his clear accents,
Made him our pattern to live and to die!

THE COMPLETE POETICAL WORKS OF BROWNING 164 (H.E. Scudder ed. 1895).

12. Christopher Columbus Langdell (1826-1906), father of the case method and Dean of the Harvard Law School from 1870 to 1895. 7 *ENCYCLOPAEDIA BRITANNICA* 141 (1989).

13. James Barr Ames who, when he was approved assistant professor at the Harvard Law School at the age of 27, full professor at 30, and Bussey Professor at 32 "had not practiced law for a single day." Woodward, *The Limits of Legal Realism: An Historical Perspective* in H. PACKER & T. EHRlich, *supra* note 8, Appendix B at 360. Ames succeeded Langdell as Dean of the Harvard Law School in 1895. *Id.*

14. *Id.* (citing Ames, *Christopher Columbus Langdell*, in *LECTURES ON LEGAL HISTORY* 478 (1913) (quoting Langdell)).

15. A.T. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 86 (1956).

16. "Last year, Law Services administered 130,000 LSATs, supported 350,000 law school applications, and processed 180,000 transcripts." *LAW SERVICES INFORMATION BOOK* 1 (1990-91). Of course, applicants apply to more than one school. In 1989-1990 they produced an average of 4.6 applications each.

suggest that, in admitting and graduating so many of their applicants, law schools are behaving unethically because there are not enough legal jobs for the huge supply of lawyers.¹⁷ This charge might be justified if law schools were, in fact, training students to practice law. However, they are actually doing something quite different. Whether they realize it or not, law schools are merely giving their students a three-year liberal education, and, in the course of it, extending the students' time to find themselves, to answer the questions "what is man?" and "who am I?," to acquire the "wherewithal to examine their lives and survey their potential."¹⁸ This is what four years of college used to do, but does no longer.

The default is the result of the "post World War II popularization of schooling"¹⁹ and the accompanying changes in curricula and educational standards.²⁰ The idea was to

Vaseleck, *LASC Report: New LSAT to Debut in 1991*, 21 SYLLABUS: A.B.A. SEC. LEGAL EDUC. ADMISSIONS 7 (Fall 1990).

17. See Wines, *Lawyer Proliferation and the Social Responsibility Model*, 39 J. LEGAL EDUC. 231 (1989). For a different view, see Auerbach, *Legal Education and Some of Its Discontents*, 34 J. LEGAL EDUC. 43, 44 (1984) (arguing against restrictions on law school enrollment).

18. This is the function of a liberal education. A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 21, 50 (1987).

19. L.A. CREMIN, *POPULAR EDUCATION AND ITS DISCONTENT* 14 (1990). This popularization "combined two elements: the drive to make secondary schooling universal in the United States and the drive to extend the opportunity for higher education to all who wished it and were qualified." *Id.* at 14-15. As to higher education, the drive began with the report of President Truman's Commission on Higher Education called *Higher Education for American Democracy* (1948). *Id.* Says Cremin:

It argued that American colleges and universities could no longer serve democracy by merely turning out an intellectual elite; they would also have to become 'the means by which every citizen, youth, and adult is enabled and encouraged to carry his education, formal and informal, as far as his native capacities permit.' It asserted that at least 49 percent of the American population had the mental ability to complete fourteen or more years of schooling and that at least 32 percent had the mental ability to complete an advanced liberal or professional education.

Id. at 15.

20. The process and resulting "crisis" are described by A. Bloom in *THE CLOSING OF THE AMERICAN MIND* (1987), *supra* note 18 and accompanying text, and by L.A. Cremin in *POPULAR EDUCATION AND ITS DISCONTENT* (1990), *supra* note 19 and accompanying text. Summing up Bloom, Cremin says:

The educational and political crisis of twentieth-century America is essentially an intellectual crisis It derives . . . from the university's lack of central purpose, from the students' lack of fundamental learning, from the displacement of the traditional classical humanistic works that long dominated the curriculum — the works of Plato and Aristotle and Augustine and Shakespeare and Spinoza and Rousseau

democratize higher education so that colleges and universities, instead of merely turning out an "intellectual elite" would enable everyone "to carry his education . . . as far as his native capacities permit."²¹ What happened instead was vulgarization, abandonment of the liberal arts "in favor of narrow specialization and crass vocationalism."²² Colleges and universities are awarding more baccalaureate degrees, to be sure, but the degrees have declined in value. The J.D. degree, on the other hand, is still a meaningful credential. Its recipients are generalists who can go on to learn how to practice law or to pursue any number of other careers as many do.²³ Students choose law school because colleges and universities have failed to give them a liberal education and law study is the best available substitute.²⁴ Unlike other graduate programs, instead of limiting their later options, it expands them.

What, if anything, should law schools do about this state of affairs? The choices are three. They could go on as they are, profitably enrolling large classes, purporting to train for the profession, while really serving only as extensions of college. They could acknowledge their failures, admit that many of their graduates are lost in the law library, can neither read nor write English, and, in three years of law school, have met no inspiring faculty example. Having admitted that, they could forget about remedies and merely match their advertising to their product by revising their catalogs to reflect their actual achievement — not professional training but three years of liberal education. Alternatively, and I suggest, ideally, law schools could keep their catalog statements of purpose and actually try to train lawyers for practice by gearing the curriculum to competence in the profession, finding faculty who can inspire students to learn, and tailoring enrollment to better fit the market for lawyers. Only then would law schools be doing what I think they ought to do and "legal education" be worthy of the name.

— by specialized electives and courses in the creative arts, and from the triumph of relativism over perennial humanistic values.

Id. at 34.

21. L.A. CREMIN, *supra* note 19, at 15.

22. *Id.* at 33-34.

23. See, e.g., D. ARRON, *RUNNING FROM THE LAW* (1989); Piccoli, *Legal Eagles are Fleeing the Nest*, *INSIGHT*, Aug. 20, 1990, at 56.

24. For more answers to the question of why law students are in law school, see Auerbach, *supra* note 17, at 52. See also R. MOLL, *THE LURE OF THE LAW* 21-44 (1990).

