

# Is Legal Education Doing Its Job?

## A Reply

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■ The article in our November issue by Arch M. Cantrall, of West Virginia, entitled "Law Schools and the Layman: Is Legal Education Doing Its Job?" apparently aroused great interest among our readers. This article in rebuttal is one of several full-length articles and many letters commenting on Mr. Cantrall's views. Dean McClain is well qualified to speak on the subject, having had ten years' experience in practice and eighteen in legal education.

■ A recurrent theme of lawyer critics of the modern law schools is that they place too much emphasis on the "theoretical" and do not give sufficient training in the "practical". This criticism assumes various forms and ranges from an attack on the entire body of materials and methods used in law schools<sup>1</sup> to a plea for more practical training in law school so that the "know how" of practice would be taught. This latter thesis is the chief burden of a recent article in this JOURNAL by Arch M. Cantrall.<sup>2</sup>

Extremists on both sides of the perennial argument "theoretical versus practical training in the university law school" have created more heat than light by extravagant claims and criticisms. A good law school can and should give considerable training in the practical, but cannot and should not be expected to do all that is demanded of it by the extreme exponents of practical instruction. No middle ground position is ever dramatic or calculated to enlist zealots in its cause, but very often it is

much closer to the reality of feasible goals, and this I believe to be true in this controversy.

In my opinion the views and charges of Mr. Cantrall are those of an extremist "asking for the moon". It is not my desire to claim perfection for the law schools. There are many faults and defects to be found in legal education, and certainly it can stand improvement in its efforts to attain even its admitted objectives, which do not include practical training to the extent urged by Mr. Cantrall. But whatever may be its shortcomings, it is important that a distorted picture of the actual conditions that exist not be accepted. A good many of Mr. Cantrall's observations as to current legal education obviously rest on a misapprehension of what is being done in the better law schools of the country and tend to lead the uninitiated into the erroneous belief that law teachers, as a class, are impractical theorists, who are both lazy and perverse, and who claim and exercise complete independence as individuals as to what and how they teach.

Mr. Cantrall fixes the complete responsibility on the law school to produce young lawyers who are competent in the practice instantly upon graduation. Unless law schools do turn out such products, he claims they are failing in their obligation to society and lose their reason for existence and claim for support.

To the layman (the public), he says, a lawyer is a lawyer, and the profession contributes to this belief by refusing "to identify for the layman the apprentice lawyer, on the one hand, and the specialist, on the other hand, which amounts to a representation to the layman that all lawyers, even the newly admitted ones, are equally capable in all fields". It may be doubted that to the layman "a lawyer is a lawyer" and that all look alike—young or old—as to competency. Many young lawyers hopefully waiting for clients would be glad if this were true.

In this one statement and admission, however, regarding what the profession refuses to do, lies, it is believed, one of the chief errors in Mr. Cantrall's whole thesis. The law schools do not control admission to the Bar, nor do they control the kind of license the neophyte receives. This is determined by admitting author-

1. Frank, "Why Not A Clinical Lawyer School?", 81 *U. Pa. L. Rev.* 907 (1933).

2. "Law Schools and the Layman: Is Legal Education Doing Its Job?", 38 *A.B.A.J.* 907 (1952).

ities which are under the ultimate control of the profession. Are, then, the law schools to be condemned for not producing graduates who can justify by "know how" skill the receipt of identically the same kind of license that is held by mature and experienced lawyers or by specialists?

The suggestion has often been advanced that there should be a probationary system before an unrestricted license is given to practice. Other countries and at least one state, New Jersey, have found it desirable to require more than one examination for permission to practice in all phases of the profession. Some American jurisdictions do not recognize mere graduation from law school as entitling one to admission to the Bar and therefore require a period of apprenticeship training before taking the bar examination.<sup>3</sup>

Mr. Cantrall's argument really amounts to saying that since the profession has not seen fit to differentiate between the apprentice and the mature, experienced lawyer under the licensing procedure, an erroneous impression has been created that all lawyers, young or old, are equally well qualified, and that it is up to the law schools to produce young lawyers who will make good on this unfortunate representation. The law schools have enough sins to answer for without being asked to shoulder the failure of the Bar to be more careful as to the representations made by its licensing provisions.<sup>4</sup>

The United States is probably the only jurisdiction in the Western world that does not provide some system of apprenticeship or internship after graduation from law school. England has such a system and so do the European countries. The legal profession in the United States has failed even to attempt to provide such a system. It is recognized that the great number of lawyers coming to the Bar in the United States makes the effective functioning of such a system very difficult. But that is no final answer to the problem nor does it give any valid basis for shifting the entire responsibility to the law schools to provide

a finished product in three years of training.

#### The Need for an Internship Has Long Been Recognized

The need for internship training for the law graduate has been recognized countless times. Mr. Cantrall, himself, in a previous article contrasting the medical and legal professions with respect to the adequacy of their training programs made a strong case for internship training for the young lawyer. He stressed that the superior preparation of the doctor, including internship training and postadmission education, was largely responsible for the better economic position of the medical profession.<sup>5</sup>

In the 1949 Survey of Legal Education and Admissions to the Bar in California, the Survey Board of which I served as chairman,<sup>6</sup> made this statement regarding the need for an internship system:

A law school graduate who passes his bar examination is not a lawyer. No one knows it better than he, unless it be his law office or his prospective clients. Neither is a medical school graduate a physician or surgeon, even though he has the degree of Doctor of Medicine and his state license. There is in each case a gap between professional school and qualification for practice. The medical profession bridges this gap, or at least tries to, and with reasonable success. The legal profession does not. From time to time suggestions are made that an apprentice system be revived and superimposed on law school education as a prerequisite to bar admission. Certainly the value of good apprentice training to those who receive it is very great. But the brutal fact is that such training cannot be made available to all law school graduates, and especially to those who need it most. It is relatively easy for a high-ranking man from a "good" law school to get a job in a big law office, where he may receive some apprentice training; yet he is the man who needs it the least. The man who completes his law work with a mediocre record in a part-time school is the forgotten man of the junior bar. It is these unapprenticed and unapprenticeable law school graduates who need first consideration.

If there were to be an apprentice system superimposed on law school training as a condition for bar admission, it would have to be compulsory

on master as well as on apprentice. To require each applicant to serve a clerkship before taking the bar, without insuring that clerkships could be found for each law school graduate, would not only be unjust but would lead to all sorts of demoralization. Law clerkships would become an article of commerce, and any attempt to regulate their purchase and sale would mean a black market within the bar. But to require every lawyer or law firm to take an apprentice or clerk would not work well either.

Nor can the problem be solved by leaving it to the government. Public service by a young lawyer as a preliminary to private practice may be valuable for some purposes, but it does not make a law school graduate into a practicing lawyer. It makes him into a civil servant or a law teacher. Even a man who has been secretary to a federal judge has to learn how to draw a will, organize a corporation, collect a claim and examine a witness before he is fit to practice law and collect fees from clients.

But if clerkship or apprenticeship is not the answer, why not an interne system? That is what the doctors have, and it seems to work. But the doctors have hospitals, and the bar does not. There is nothing in the legal profession now which could be made to offer to a young lawyer the equivalent of a hospital internship or residency for a young doctor.

If, however, the organized bar were to set up legal service offices for persons of low and medium incomes who now feel that they cannot afford legal advice, something very like legal hospitals would have been created. This possibility has already been referred to in another connection. It might then be possible to provide the kind of practical training by internship which is the greatest need of legal education today.<sup>7</sup>

As a result of the absence of an apprentice or intern system, the entire job of training for the practice of law is left with the law schools,

3. Delaware, Pennsylvania, Rhode Island and Vermont require six months. New Jersey requires nine months.

4. Mr. Cantrall has stated elsewhere that it is a fraud on the public to hold out a young man as a qualified and competent lawyer when the Bar knows he is not. "Economic Inventory of the Legal Profession: Lawyers Can Take Lesson from Doctors", 38 A.B.A.J. 196 (1952).

5. *Supra*, at note 4.

6. The other two Board members were Thomas F. McDonald of St. Louis, now chairman of the American Bar Association Section of Legal Education and Admissions to the Bar, and the late Professor Sidney Post Simpson.

7. *Legal Education and Admissions to the Bar in California*, pages 135-136 (1949).

all to be done in three years. In this period provision must not only be made for study and instruction in the so-called fundamental courses, but also in entirely new fields of law which have sprung up in the last twenty-five years. Moreover, there seems little prospect of lengthening the law course to four years which was advocated before World War II. The demands of veterans and veterans-to-be make such a move impractical—at least for the near future.

It should be reasonably clear to any lawyer who studies legal education thoroughly that regardless of how hard any law school tries to provide both theoretical and practical training, there will still remain after graduation the necessity for training in the actual school of experience—practice—before the young lawyer is really competent in the “know how” of which Mr. Cantrall speaks.

This is true for several reasons. The law school cannot provide the environment in which certain practical skills must be learned—that is, live clients and live problems. That is not true of medical education with the clinical material available and the six years normally used to do the job. Whether it would be wise to attempt to imitate medical training is quite a debatable question on economic grounds alone.<sup>8</sup> Neither can the law schools assemble—at least with present resources—the teaching ability necessary for imparting all practical skills, assuming they could be learned in law school, which is not accepted.

On the point of teacher personnel alone Mr. Cantrall would condemn as futile any effort by most law teachers to prepare students for the practice of law. He states of the law teacher:

Usually he has not practiced, or at least not thoroughly enough, or for enough years, and recently enough, to even comprehend the present-day and future needs he is supposedly trying to fill, and on the filling of which he claims to be an expert.

If we accept this at face value it would appear to call for almost an entire replacement of all law teacher personnel. With such a dismal view

of law teachers' lack of capacity, certainly Mr. Cantrall couldn't expect law schools as presently constituted to make even a beginning on his ambitious program of imparting the “know how” of practice. The case then is hopeless to start with unless Mr. Cantrall would propose an entirely different teaching personnel.

But then the question arises: Who would they be and how would they be attracted to teaching? And if we got them, how would they keep their practice “recent enough” to meet Mr. Cantrall's standards? If we assume (though it has not been proved) that law teaching would be better performed by lawyers drawn from the practice with substantial experience, just how do we go about getting such men? Can such lawyers of real ability be expected to enter a profession whose maximum teaching compensation is all too often \$7500 to \$8000? How does one entice that kind of lawyer to give up a successful practice (and he is not wanted if unsuccessful) to accept a teaching position which, realistically viewed, has a compensation limit of one-third or one-fourth of what he can expect from continued practice? The problem of adequate finances for legal education remains its greatest single problem.<sup>9</sup>

Aside from the financial considerations there are such obvious matters as temperament and skills—the willingness and ability to *teach*, and to fit oneself into a faculty group pursuing a common objective. Success in the practice is no guarantee of these qualifications. All of these things, and others, make it necessary for the law schools to seek the ablest and most promising men who plan a law teaching career as their life's work. Many of these make outstanding successes as law teachers, as can be testified to by many successful lawyers. We do not know that better results would be obtained by drawing full-time teachers from the practice. The experiment has never been tried, except in a few special cases. Nor is there any substantial evidence that such men as teachers

### Concerning the Author

Joseph A. McClain, Jr., has been dean of the law school at Duke University since 1950. A graduate of Mercer University, which awarded him an A.B. degree in 1925 and an LL.B. in 1924, he received the degree of J.S.D. from Yale in 1929. Dean McClain practiced in Macon and Columbus, Georgia, from 1924 to 1926. In 1927 he returned to his alma mater as dean of its law school. Since then, he has been dean of three other law schools, including University of Louisville (1934-1936) and Washington University (1936-1942), and has had eighteen years' experience in the field of legal education. From 1942 to 1945 he was general counsel for the Terminal Railroad Association (St. Louis) and in 1945 he became general counsel of the Wabash Railroad. He was chairman of the Section of Legal Education and Admissions to the Bar from 1945-1947.

would be able to impart the “know how” of practice without live clients and live legal problems which do not exist in law schools. Over a period of twenty-eight years I have closely observed able practicing lawyers serve as part-time teachers. While some of them have done excellent teaching jobs in which their practical background stood them in good stead, yet I do not know of a single one who would claim that he did or could teach the “know how” skills to the extent demanded by Mr. Cantrall.

8. See Clark, 3 *J. Legal Educ.* 423, 425 (1950).

9. Salaries of \$10,000 to \$12,000 are still exceptions in the law teaching profession and 80 per cent of the law schools tend to aim at \$8,000 to \$10,000 as a ceiling. Of course, anyone entering law teaching should be willing to forego great financial rewards. So, too, must those who enter the judiciary. But is not there a floor, a reasonable minimum, below which neither should be asked to undertake the assignment?

The truth is that legal education in America, as compared to other professional education, particularly medical education, has traditionally suffered from financial starvation. The erroneous idea gained currency at an early date that adequate legal education could be cheaply provided. Too many university administrators, officials and lawyers apparently still hold this to be true.

Many law schools are operating with woefully inadequate budgets and are struggling with four to six full-time teachers who must carry excessively heavy teaching loads. In such circumstances it is almost impossible for adequate attention to be given to practical assignments outside of class, which, if properly supervised, require a great amount of time.

This does not mean that all is well with law teaching personnel. Great and even good teachers are hard to come by, and the search for good prospects is intense and highly competitive among schools. Any dean and faculty in a good law school will readily admit that the procuring and keeping of able teachers constitutes one of the greatest problems of the school.

Mr. Cantrall states that law schools excuse themselves for not turning out lawyers with all necessary "know how" by saying they are only supposed to teach theory. The implication here is that legal theory is impractical, but he is no doubt using practical in the sense of the "know how" of doing rather than the application of sound legal theory to a problem.

Space does not permit discussion here of the practical value of developing ability to apply sound legal theory to specific cases and problems, nor to stress the importance of guarding against allowing the student to pursue so-called practical training to the neglect of thorough and indispensable scholarly and analytical legal training. Without this the student is hopelessly lost in practice, and practical "know how" becomes empty and meaningless.<sup>10</sup> The young graduate's lack of "know how" is soon cured by experience, whereas the graduate without broad scholarship background and strong analytical reasoning ability never recovers. The public is much more apt to suffer seriously from the latter type of lawyer over the long pull than from the neophyte who lacks practical "know how" at the beginning of his practice.

Is it true, however, that law schools really purport to teach only theory? Isn't it more accurate to say they do not purport to turn out graduates who have the "know how" that only experience with live clients and live problems can bring? Any good law school teaches many things that all reasonable lawyers would admit to be highly practical (used even in the sense of "know how"), but it would be a brave school which claimed to

prepare a student in the so-called basic professional skills and knowledge which Mr. Cantrall lists as minimum for a graduate.

In his words:

It seems to me, *as a minimum*, that he should be competent . . . to examine a title; write a deed and other customary instruments; close a real estate deal; institute and prosecute suits, including the statutory proceedings of his jurisdiction; defend a criminal; prepare individual, partnership and fiduciary tax returns; work out an estate plan; prepare and probate a will; administer an estate, with the federal and state returns, etc.; and form, operate and dissolve an individual proprietorship, a partnership and a corporation, including compliance at each of these stages with all the requirements of federal, state and local laws, tax and otherwise, applying to a small business. . . .

It goes without saying that a proper law course would include instruction on the management of a law office, the handling of clients, the development of a practice, the charging of fees, practical legal ethics, and the benefits flowing from participation in professional organizations and movements.

The question might well be asked, how many lawyers who have practiced five to ten years could do all these things with real competence? How many lawyers can properly defend a criminal? How does one instruct in how to develop a law practice, how does one teach how to handle clients, and so on? And how would one teach all these things in law school? It is submitted that regardless of teaching ability many of these skills can only be effectively learned with live clients and live problems.

If we are to be practical in deciding what kind of practical training should be attempted in law school, the first test would clearly seem to be that of feasibility of success in the undertaking, given the conditions and means available for the effort. This must be true unless it is claimed that all practical skills can be adequately taught in law school. Very few, if any, lawyers would make such an extreme claim. It would seem that in determining what practical training is to be undertaken in law school,

that type should be selected which gives the greatest promise of real dividends, both in terms of a better understanding of the subject-matter under study and of the practical skills likely to be gained thereby. Judged in this light, and to use one example, it is true that much can be and should be done in law school to cultivate and develop sound legal draftsmanship, and many law schools have made much progress in this direction, though much more can be eventually accomplished. On the other hand, many aspects of skills, advocacy, for example, cannot be successfully taught or learned in law school. Efforts to simulate actual conditions and problems encountered in trial work too often fall flat because of their artificiality and result chiefly in a waste of time and effort of all concerned.

#### Law Schools Teach More than Theory

Now law schools, at least many (one wonders just which ones Mr. Cantrall chose as his models or targets), teach a good deal more than mere theory. In our own school we have operated as an integral part of our curriculum a legal aid clinic for twenty-two years, with a director and five lawyers attached to it.<sup>11</sup> It provides practical experience and instruction in many of the "know how" skills demanded by Mr. Cantrall. All law schools for various reasons cannot successfully operate a good clinic. Cost is one major factor if proper supervision is provided, and the availability of material and clientele is another. We have courses in which considerable draftsmanship is required. We have several teachers with substantial practical experience. All of these things help to bridge partially the gap between law study and law practice, and we believe we do a reasonably good job towards this end. Yet we do not claim or attempt to attain the perfec-

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10. See Bradway, *Legal Aid Instruction at Duke University* (1944); Bradway, *Clinical Preparation for Law Practice* (1946); Bradway, *Basic Legal Aid Clinic Materials and Exercises in Taking Hold of a Case* (1950).

11. *Supra*, note 8.