Macaulay on Legal Education

(excerpts from his article, "Law Schools and the World Outside Their Doors II.")

Both the legal profession and legal education have officially authorized group portraits which are offered to the public. Most lawyers and law professors recognize that a few facial blemishes have been retouched to make the portraits look better, but most of us talk as if we assume that the official picture is a fairly good likeness. In the past decade scholars have begun to offer us a more reliable picture of who lawyers are and what it is that they do. We also are learning more of the reality of legal education.

Two recent studies of the bar in Chicago — Heinz-and-Lauman and Zemans-and-Rosenblum — suggest that there is an important gap between what is taught in law school and most of the practice of law. Of course, such gaps are characteristic of the entire American legal system, which tends to promise different things than it delivers. Moreover, concern about a gap between university legal education and the practice of law is longstanding. Indeed, there is something of a ritual here, with actors representing both the profession and the academy declaiming predictable matched sets of opposing arguments.

However, the two studies of the Chicago bar suggest that it would be profitable to think about the functions served by what law schools do and do not teach about the legal system and the roles of lawyers in it. It will be clear that I am using the two studies as a kind of Rorschach test, and the four authors should not be held responsible for what I read into their work. Moreover, I may be wrong about the nature of legal education in the 1980s; I can only guess what is going on in classrooms all over the country.

We can conclude that the two studies of the Chicago bar reveal a gap between legal education and the practice of many lawyers. Generally what is taught seems aimed at the work of those professional specialties with high prestige, what Zemans and Rosenblum call "the ideal symbolic work of the profession."

Accepting the accuracy of this picture, we can ask whether this gap makes any difference to anyone. On one level, it is easy to conclude that it does. Judges, lawyers and law professors regularly debate the competence of the bar and the law schools' responsibility for what some see as far too many poorly trained attorneys. On another level, the gap between the academy and the practice is seen as serving important functions. I will sketch some of the polemics before I turn to what I see as more serious arguments.

Elite lawyers have long worked hard to distance themselves from what they see as the lesser members of their profession. Recently charges have been made that large numbers of lawyers do not know how to try cases. The proposed reform is an immediate change of legal education so that all future lawyers would have received training in what the reformer sees as critical courtroom skills.

Elsewhere, I have pointed out that we only have weak opinion evidence indicating that there is a real problem. We do not know what percentage of what kind of lawyer representing what kind of client in what kind of case does an inadequate job as measured by what standard. Indeed, what appears to be inadequate competence at trial in some cases may be no more than a lawyer doing the best s/he can in light of what the client can pay. Perhaps lawyers should turn away clients who cannot pay for complete first class legal service rather than trying to wing it on their behalf, but this seems to be something other than a question of competence.

Moreover, at a time when legal services programs are being crippled or destroyed by a group of elite lawyers, we must look behind the rhetoric of competence and wonder about the actual motives of those pressing for training in trial techniques. We know that only a very small fraction of all disputes entering the legal system ever go to trial. It is possible, and I think likely, that more damage is done to clients by lawyers who draft inadequate documents, negotiate poor settlements or plea-bargains and place their own interests before those of their clients, than is done by poor trial lawyers. Even lawyers who are masters in a courtroom may be incompetent if they regularly take cases to court which never should have been tried in the first place.

If the reformers deserved to be taken seriously, they would be arguing for an appraisal of what most lawyers do for most clients. Moreover, any such appraisal would have to be concerned with cost barriers to access to justice — qualifications, skill and the opportunity to do a competent job must be paid for by someone.

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All in all, I think we can look with some skepticism at the charges of incompetence in the courtroom and the need for a crash program directed at all law students. Certainly we should note that changes in legal education will not trouble lawyers now in practice — although some or many of them are the ones who are supposed to be incompetent. Moreover, the reformers want someone else to pay for the changes. Law schools are asked to find the money to pay for intensive training in trying cases for all their students. At the very least, we can ask the advocates of this reform to put their money where their mouths are — law school deans will happily accept cash, checks or money orders.

Yet the excesses of the bar can always be matched, if not topped, by the excesses of the law professors. For example, a professor at an elite law school recently was quoted as defining the mission of legal education as teaching students "how to think and to obtain critical analytical faculties." He continued that "if you want to jump on this bandwagon arguing for more instruction of practical skills such as client counseling and negotiation techniques, then our law schools will become trade schools, and we shouldn't kid ourselves about it."

I've often heard this position taken by law professors; one version talks of teaching students "to think like a lawyer." Usually, teachers fail to specify the lawyer they want their students to emulate. Most law professors have few heroes on the bench, and their classes are devoted to scoring points off appellate opinions.

Certainly, few law professors are teaching their students to think like most of the lawyers I interviewed in my 1979 study — those lawyers were concerned with the costs of gaining the best result they could through bargaining in the shadow of the law. They thought tactically rather than what most law professors would call analytically.

Moreover, both my study and the two Chicago bar studies indicated that many lawyers use "critical analytical" skills that are not usually taught in law school. They analyze situations so they can plan transactions and draft documents designed to ward off trouble and to deal with some of the problems which might arise rather than researching the intricacies of case law and drafting briefs with conceptual niceties.

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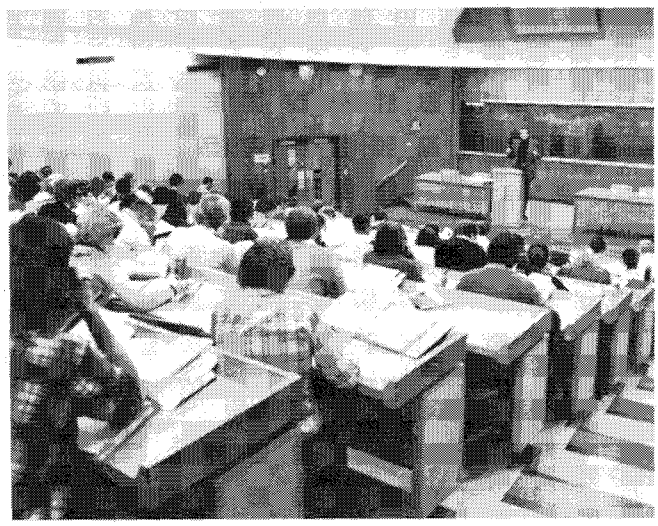
We can wonder whether most law professors really are attempting to teach their students to think like law professors — or, more accurately, to think as law professors of a particular type think. Perhaps law professors are teaching their students to think as the professors would have lawyers think in what the professors see as an ideal world. This would be one in which there were no transaction costs in bringing rules into play, all clients could afford first-class legal craft, and all who played legal roles would be autonomous from any influence other than correct legal analysis. Clean reason rather than dirty deals would typify the system. Judges would respond to correct analytical technique and write opinions which would serve as models for both beginning and experienced lawyers. Trial judges, police, and officials of administrative agencies would carry out the law as properly explained. The public would respond with confidence to a legal system where reason rules,



and the pronouncements of the courts would affect behavior of all concerned so that there never would be a gap between the law on the books and the law in action.

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Into this lovely utopian project come agitators urging attention to what lawyers actually do in the real legal system. They are met with concern about becoming a mere trade school.

In the real world, however, there would be serious problems if university-based law schools refused completely to perform as trade schools, preferring instead only to develop "critical analytical faculties."

On one hand, potential clients and the society have an interest in minimizing the number of incompetents at the bar. Large law firms and government agencies may be able to afford to carry young lawyers for a time while putting them through basic training. Lawyers who represent individuals and small businesses, however, tend to learn by trial and error at their clients' expense. At the very least, law school must not get in the way of this learning.

On the other hand, professors of philosophy, history, literature and the other humanities also claim to be involved in teaching "how to think" and developing "critical analytical faculties," and do it more cheaply. Law school deans justify the difference in pay by pointing out that law schools — even those at the most elite universities — are trade schools. They seldom put the matter so indelicately. They talk of market factors such as the salaries in practice commanded by those with the credentials necessary for professorships. Lower standards for law professors' tenure also tend to be rationalized in terms of connection with the profession.