

11-1-1977

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Recommended Citation

Robert B. McKay, *Law Schools, Lawyers, and Tightly Closed Circles*, 1977 BYU L. Rev. 991 (1977).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1977/iss4/7>

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COMMENTARIES

Law Schools, Lawyers, and Tightly Closed Circles

*Robert B. McKay**

Lawyers are central to the decisionmaking process in the United States. That is entirely understandable in connection with the resolution of the vast array of disputes, civil and criminal, that either end up in court or have the potential for adjudication. American adherence to the adversary system makes lawyers necessary to advise all parties to all disputes, actual and potential. There are strikingly few alternatives to the adjudication model. Even arbitration, mediation, and conciliation processes, useful as they are, are largely administered by lawyers. The uniquely American rush to the courts has carried with it, however, not only matters that are traditionally "judicial," but general problems of society, large and small, as well.

The fact is that lawyers play a significant, often a dominant, role in making public policy on the great social issues of the day, from school desegregation to the siting of nuclear energy plants. Despite repeated complaints that the dispute-resolution process has been overjudicialized and that lawyers wield disproportionate control over the levers of power, there is little indication of a slackening of the litigation pace or a retreat of lawyers from the centers of power.¹

Unquestionably, the United States is the most law-minded nation in the world. Whether that is good or bad is not the point here. The reality is that the nearly half a million lawyers in the United States play the dominant role in deciding disputes between private individuals and are extremely influential in shaping public social policy.

* Director, Program on Justice, Society, and the Individual, Aspen Institute for Humanistic Studies; former Dean, New York University School of Law, 1967-75.

1. Interestingly enough, the principal effort to find nonlawyer alternatives for dispute resolution comes from the largest lawyer organization in the world, the American Bar Association (ABA). The ABA was one of the sponsors of the 1976 Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. It has subsequently supported experiments in the use of less formal methods of dispute resolution, such as Neighborhood Justice Centers, and has established a Special Committee on the Resolution of Minor Disputes.

The importance of the lawyer's role is further emphasized by the fact that lawyers have a self-conferred monopoly over all legal issues. Only lawyers can represent others in court; only lawyers can give legal advice; only lawyers can authenticate legal documents.

If that is true at the output side of the law, it is also strikingly true at the input side, that is, legal education. It is almost impossible to become a lawyer in the United States without attending a law school for at least three years of relatively formal study. Standards for admission to practice are fixed by lawyers; bar examinations are written and graded by lawyers; discipline and disbarment standards and procedures are principally controlled by lawyers.

If the circle does not yet seem tightly enough closed, consider one final fact. The law schools, as gatekeepers of the profession, establish their own criteria for admission to the study of law. In a period when demand for legal education is high—which has been the case since the mid-Sixties—there is no such thing as an “open-admissions” law school. Since law professors generally are, or consider themselves to be, part of the intellectual elite, they seek students in the same mold—high achievers in primary and secondary schools, in college, and on the Law School Admissions Test (LSAT). To be sure, some less-than-superb applicants slip in because they are sons or daughters of favored alumni, legislators, or donors to the University. Moreover, in the last decade preference has sometimes been given to minority applicants to enlarge their representation in law schools.² In general, however, the preparation of lawyers is a meritocracy that begins before college and progresses in a straight line through admission to law school, proficiently testing in law school, bar examination, and admission to the bar. The skills emphasized and tested remain essentially the same from the LSAT through law school and the bar examination. It is now understood that the high achievers on the LSAT are the ones most likely to excel in law school and to perform well on the bar examination. Whether they will also be the “best” lawyers, whatever the criteria for

2. But the special admissions program (known to its foes as reverse discrimination) has been challenged in public institutions as a violation of the equal protection of the laws clause of the fourteenth amendment. *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977). If special admissions programs are held invalid, the elitism of legal education will be further emphasized as the number of minority students declines further.

that judgment, is less clear. But that matter is being studied,³ and we should not be surprised if it turns out that the LSAT is a pretty good prophet at least as to financial success at the bar.

Given this set of circumstances, it is scarcely surprising that lawyers in the aggregate—the legal profession, as we like to be called—have been relatively self-satisfied, even arrogant about their rights and prerogatives, until the last few years. Now, however, no less an authority than the Supreme Court (how could fellow lawyers be so unfriendly?) has told lawyers that they may be members of a profession, but it is not so “learned” a profession as to be exempt from the antitrust laws.⁴ Moreover, the profession cannot continue its long-cherished practice of self-regulation insensitive to such constitutional commands as the first amendment.⁵ In short, lawyers who wish to inform the public about legal services they offer (beyond the business card or discreet listing in the Yellow Pages and approved law directories) must be allowed to do so. There is a right to speak and a right to listen.

The organized bar may be shaken, but legal education moves on regally, apparently impervious to change. Perhaps that is as it should be. For the fact is that legal education in the United States today is very good indeed. No other nation approaches the quality, indeed the luxury of the legal education apparatus in the United States. Teachers, students, libraries, and physical plants are excellent, often superb, and the level of intellectual excitement is very high. No one should question the attainments, which are of the very highest order. On the other hand, it is equally unwarranted for legal educators to sit back on their Blackstones in real or feigned unawareness that, as the world changes, so perhaps should legal education.

And so I come at last to the excellent Gee-Jackson study. Their commendable purpose is to attempt “a critical examination of American legal education.” In the process they “raise some current issues and review certain historical antecedents as they illuminate those issues.” And they further “seek to evaluate the processes and prospects for stability or change in American legal education.”⁶

3. The Competent Lawyer Study, initiated in 1973, is jointly sponsored by Educational Testing Service, the American Bar Foundation, the Law School Admission Council, and the National Conference of Bar Examiners.

4. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

5. See *Bates v. Arizona State Bar*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Counsel*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

6. Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*,

Good. High time. But can they pull it off? My answer is a resounding affirmative, despite initial doubt that they could succeed in so ambitious an undertaking in only about 300 pages. My original skepticism was not based on lack of faith in the ability of these two young authors. Their capacity has been amply demonstrated in their two 1975 monographs, *Following the Leader?: The Unexamined Consensus in Law School Curricula*⁷ and *Bread and Butter?: Electives in American Legal Education*.⁸ Both studies provide useful confirmation of points long suspected: that law schools are essentially imitative in their curricular choices, and that students choose electives on the basis of real or imagined advantage in preparation for the bar or in having a record that will look good to a prospective employer. But neither of the earlier studies attempted any major probing of legal education in its entirety.

In fact, there have been only a few efforts to look at legal education as a whole. Perhaps the best, by A.Z. Reed in 1921,⁹ is not widely read today. Probably it never was; some of its recommendations are still untried, but continue to be suggested anew as if in reinvention of the legal education wheel. The most ambitious survey of legal education was compiled for the Association of American Law Schools (AALS) under the supervision of an able law school dean.¹⁰ But the substance behind the mass of not-very-illuminating data was disappointing, and the volume was not particularly influential.

More recent studies of legal education have been useful, and each has made specific suggestions for modification and improvement of legal education,¹¹ principally in ways to shorten and intensify the law school experience. But it is scarcely too strong to say that most of those recommendations have sunk without a trace into the placid pool of law school self-satisfaction. Even the most careful evaluation of legal education is not likely to survive as standard reading matter if its proposals for change are not

1977 B.Y.U.L. REV. 695, 698.

7. E. GEE & D. JACKSON, *FOLLOWING THE LEADER?: THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA* (1975).

8. D. JACKSON & E. GEE, *BREAD AND BUTTER?: ELECTIVES IN AMERICAN LEGAL EDUCATION* (1975), reviewed in Kelso, Book Review, 1976 B.Y.U.L. REV. 597.

9. A. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* (1921) (Carnegie Foundation for the Advancement of Teaching Bull. No. 15).

10. A. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* (1953).

11. See, e.g., H. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* (1972); CURRICULUM STUDY PROJECT COMMITTEE, *TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW: 1971* (P. Carrington ed. 1971) (AALS 1971 Annual Meeting Proceedings, Part One, Section II) (Carrington report).

taken seriously.¹²

Despite the failures of the past, Messrs. Gee and Jackson plunged ahead. What might have seemed a further handicap—limited experience in legal education—they managed to turn into the virtue of providing a fresh and nonestablishment view of legal education.

The special attraction of the volume to me is that the scope of the undertaking is both so ambitious and so limited. Let me explain the apparent paradox. On the side of ambition they aspire to no less than a comprehensive review of contemporary American legal education, including such varied aspects as these:

- * A brief but useful history of legal education in the United States.

- * A review of English legal education in which they demonstrate (as we all should have known) its inferiority in comparison with American legal education (even though the British system has produced some dazzling masters of oral advocacy).

- * A summary of the various proposals for change which, as previously mentioned, came to little.

- * A survey of several law school programs (Antioch, Northeastern, and Southwestern) that differ from the mainstream.

- * A guide to the new techniques and technologies from the world of computers and programmed teaching.

- * An especially useful comparison of legal education and education for the related professions of business, accounting; and medicine.

- * A summary of current thinking about bar examinations (including the Multistate Bar Examination).

- * A comprehensible statement of the issues in the competent-advocate controversy sparked by Chief Justice Burger.

- * A careful look at clinical training, the only innovation that has really taken hold in American legal education.

The authors make no claim to complete exposition of every subject discussed, and some of the material, particularly the history and the British comparison, is admittedly derivative, although the sources are clearly identified for those who wish more detail. The virtue of this volume is that for the first time it is all

12. The American Bar Foundation has in progress a major study of legal education. The original statement of the study, a prospectus as it were, is excellent. Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 *CORNELL L. REV.* 221 (1974). But nothing further has surfaced to date.

put together in one place. Although the treatment of each subject is relatively brief, it is surprisingly complete—certainly full enough to permit a more comprehensive overall view of American legal education than is available anywhere else in a single volume.¹³

The study is also limited in its scope. The authors do not write as reformers, and they have no explicit recommendations for change. Rather, in their words, the effort is

to extrapolate certain trends and tendencies, make some tentative inferences, and present some projections (or speculations) about the future of American legal education. We offer suggestions and admonitions, not so much about the structure, content, or process of legal education as about the factors that are likely to affect efforts either to preserve the status quo or to produce educational change.¹⁴

Despite this clear warning that the authors intend to pursue a neutral course, passing no judgments except as to whether change (of an unspecified character) might or might not occur, I was at first disappointed in the final section which did just this and no more. On rereading, I think I was wrong. The important contribution Gee and Jackson have made in presenting a straightforward description of the forces that shape American legal education today might have been blunted if they were seen as advocates of particular change. By remaining neutral¹⁵ the authors can allow their work to stand as the excellent description that I believe it to be of the forces that shape legal education today and are likely to reshape it tomorrow.

If there is in the volume any element of seeming blandness in its failure to assert strong positions, that can be corrected in what I hope will be their next book on how to deal with the problems of legal education in the context of the problems of society at large.

13. Understandably, some matters receive little or no attention. I recall, for example, no substantial discussion of law libraries, university relations, financing of legal education, or faculty-student governance issues. Those are important matters, but not central to the profile of legal education which is uniquely available in the Gee-Jackson study.

14. Gee & Jackson, *supra* note 6, at 703.

15. Even that is not fully accurate. In Section VII the authors express a preference, which they state is shared by students, for training that prepares the graduate to be a "professional"—perhaps a blend of the best in the "scholar" and the "technician." Probably every law school would claim a similar objective.