

THE ROLE OF THE UNIVERSITY LAW SCHOOL IN THE EVOLUTIONARY SCHEME

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INTRODUCTION

AT THE CONCLUSION of his speech delivered at the last meeting of the American Association of Law Schools, Nobel laureate George Wald¹ offered an allegory. The dinosaur, he noted, seemed superbly suited, to survival in the Mesozoic era because of its size, strength, and toughness of hide. The brain-weight to body-weight ratio of this great brute, however, was very low. Compared to the dinosaur, the small warm-blooded mammals which later appeared on the scene seemed very puny indeed. With their sensitive and vulnerable skins and their lack of strength and natural weaponry, they hardly seemed candidates for survival under the hostile conditions which then existed. Significantly, however, these small creatures possessed a higher brain-weight to body-weight ratio than the dinosaur. We are all aware of the evolutionary outcome: the dinosaur, with its low ratio, became extinct; the warm-blooded mammal, man included, survived in spite of the odds against him. It appears, Dr. Wald suggested, that the differences in outcome were attributable to the differences in ratio. Recently, however, man entered the automobile and made it virtually a part of himself. In consequence, the ratio of man's brain-weight to his machine-body-weight has dropped considerably, perhaps to the low level of the dinosaur. The implications are obvious.

If the implications are taken seriously,² man's major task is to circumvent the inherent physical limitation on his brain-weight to body-weight ratio and to increase substantially the total amount and ef-

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1. Professor of Biology, Harvard University, *Science and Technology: The Challenge to Social, Political and Legal Institutions*, Association of American Law Schools, 1970 PROCEEDINGS (pt. 2) 59.

2. The implications are more serious if brain power is compared with the weight and power of all the instruments man now commands to extend his physical power. All man's machines and power sources, including nuclear power, would then have to be considered.

fectiveness of brain power that can be applied to man's survival.³

The very recent past affords little reason to expect that such an increase in brain power can be marshalled or, if it can, that it will succeed in securing our survival.⁴ Man has imposed fantastically durable constraints upon his own ability to solve the problems that threaten his survival. Yet, no purpose is served in adopting a defeatist attitude. Those concerned about the future have no choice but to turn their attention to the removal of those constraints and to the solution of the problems.

This article will suggest contributions that law schools, which claim some skill at enhancing brain power, might make to ensure man's survival, or at least, to enhance the quality of his existence until he extinguishes himself.

I. THE SUCCESSES AND FAILURES OF LEGAL EDUCATION

On one count American legal education has been a great success; on two counts it has achieved substantial although not unqualified success; and on a fourth count it has proved a dismal failure.

The law school's greatest success has been in providing adequate, often superb, legal services to all those who could afford them. Thus law schools have demonstrated the viability of the free market.⁵ Concomitantly, law school curricula have reflected economic supply and demand, offering the knowledge and skills necessary for legal services in fee-producing areas but, until recently, giving scant attention to the legal services needed by individuals and groups with inadequate resources to pay for them.⁶ Notwithstanding many complaints about legal education, the free market for lawyers has provided the legal know-how necessary to build the world's most affluent and productive in-

3. Increased brain power is a product of increasing the effectiveness of the individual brain. This may be accomplished by improvements in education and training, aided by computers, by marshalling more brains to work on the problem, and perhaps by developments from on-going research in genetics.

4. See A. SZENT-GYORGI, *THE CRAZY APE* (1970); Szent-Gyorgi, *15 Minutes to Zero*, N.Y. Times, Sept. 25, 1970, at 41, col. 4; Feld, *The Stake at SALT—Survival*, *id.*, Dec. 9, 1970, at 35, col. 4; *id.*, Nov. 19, 1970, at 22, col. 4; Barnes, *Crisis of Survival*, Ohio State Lantern, Jan. 6, 1971, at 4, col. 3; Cole, *Can the World Be Saved?*, 18 *BIOSCIENCE* 679 (1968). But see Bendiner, *A Word for Science*, N.Y. Times, Feb. 15, 1971, at 23, col. 1; Macomber, *Purdue President Wonders About Problems of 2069*, Columbus Dispatch, Nov. 23, 1970, at 3A, col. 1.

5. Cf. M. MAYER, *THE LAWYERS*, chs. 2, 3, 8 *passim* (1966) [hereinafter cited as MAYER]; Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 *VA. L. REV.* 637, 651 (1968).

6. Of course, the skills and substance imparted by the law schools were necessary for lawyers serving indigent clients. However, the formulation of the curriculum as a whole and the content of specific courses, was not addressed to the needs of those who could not afford legal services. The most widely cited example was the number of courses in "creditor's rights" while few law schools had "debtor's rights" courses.

dustrial state. Although some view this as a mixed blessing, or even a curse,⁷ it has been no mean achievement.

On the second count, the law schools have produced an impressive number of graduates ready and able to serve a wide variety of important causes which are not fee-producing and which may be personally hazardous.⁸ Few professions other than the clergy can match the willingness of lawyers to devote substantial time and expertise to remedying societal wrongs and lending assistance to charitable enterprise. As a corollary of the market system, however, the effort expended in such noble endeavors has been insignificant compared to the need for such legal services.⁹ Adequate services still depend largely on subsidies which have been insufficient so far. Nevertheless, the law schools played a commendable role in encouraging public-spiritedness in their graduates; law may be a profession with special responsibilities, but there is no reason why an individual lawyer should deem himself under a greater obligation to render free services than a member of any other calling.¹⁰

Thirdly, the law schools have created a marvelously superior system for sharpening the intellect and developing skills of analysis and reasoning. To quote Bayless Manning:

We of the legal profession have a reputation, which in my judgment is deserved, for possessing a special capacity for dispassionate analysis, a clear-eyed regard for the facts, an open-minded willingness to look at a problem from every side, a human historical perspective that enables us to perceive problems in their full context, a nose for detecting trouble in advance, and a talent as conceptual architects to design imaginative adaptations to head it off.¹¹

Training which produces such a reputation for those exposed to it must be deemed a triumph¹²—particularly so, some law teachers like to think, when compared with the soggy-headed thinking often produced in some other academic disciplines. Unfortunately, the triumph is marred by the vast number of law graduates who contribute

7. See C. REICH, *THE GREENING OF AMERICA passim* (1970); H. MARCUSE, *AN ESSAY ON LIBERATION passim* (1969).

8. See MAYER 21. Some of the work for the civil rights movement in the South involved hazards for the participants.

9. See MAYER ch. 8.

10. Perhaps some lawyers take Professor Harry Jones' admonition as part of their professional obligation: "A lawyer, a real lawyer, should react to unfairness, inequality or abusive procedure as a bishop reacts to heresy or a painter to a meretricious composition." ASSOCIATION OF AMERICAN LAW SCHOOLS, 1963 PROCEEDINGS (pt. 2) 77.

11. Manning, *Introduction: New Tasks for Lawyers*, in *LAW IN A CHANGING AMERICA* 1, 11 (G. Hazard ed. 1968). Not everyone has been so charitable: "If you think that you can think about a thing inextricably attached to something else without thinking of the thing it is attached to, then you have a legal mind." This remark was attributed to Professor Thomas Reed Powell of the Harvard Law School in T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 101 (1937).

12. "What the law professors offer in their courses is the best quality of education in America." MAYER 118.

nothing to this fine reputation, but only ride the coattails of those who do; there must be literally thousands of victims of the law who have not received justice because of lawyer failures.

Finally, the American law school has failed to turn its attention adequately to the *effects* on real people of the same legal rules and legal institutions whose operations it has passed on so assiduously to generation after generation of law students. Ralph Nader stated it succinctly: "Great questions went unasked, and therefore unanswered."¹³ This failure was compounded by virtually ignoring that law-trained persons consistently dominate the major decision-making agencies of our society, the very agencies which might have dealt effectively with negative legal effects.¹⁴

How can it be that more than one hundred years since the death of Charles Dickens many of our lower courts, jails and prisons, located in communities close to leading law schools, still resemble *mutatis mutandis* the chambers of delay, deprivation, and depravity he depicted in nineteenth century England?¹⁵ How can it be that private and public decision-making institutions in so affluent a society have failed to eliminate hunger, poverty, and slums, to end racism, to compensate accident and disease victims, to control the instruments of war, to preserve peace, to conserve our natural resources and, in general, to prevent serious threats to our existence and its quality? How can this be, given the vast numbers of lawyers with the ability to "perceive problems in their full context, a nose for detecting trouble in advance, and a talent as conceptual architects to design imaginative adaptations to head it off"?¹⁶

Part of the answer is inherent in the market system: law schools have trained lawyers principally to serve paying clients.¹⁷ Few of the victims of the social problems mentioned have been able to organize

13. Nader, *Law Schools and Law Firms*, 54 MINN. L. REV. 493, 496 (1970).

14. MAYER 11-12: "Twenty-three of the thirty-six presidents have been lawyers, and half of the governors elected since the Civil War; and lawyers account consistently for about 60 percent of the U.S. Senators and Representatives." Of course, lawyers also account for a very high percentage of the policy-makers in most agencies at all levels of local, state and federal government.

15. See Tapp, Book Review, 17 U.C.L.A.L. REV. 1333 (1970). Discouragingly, the following statement, made by a distinguished law professor in 1932, is almost as applicable today:

There is scarcely a phase of American penal administration which is worthy of civilized population. A few of the larger American law schools should at once offer comprehensive training in criminology and penology and simultaneously assume responsibility for a vigorous and sustained campaign for the placing of their graduates in responsible positions of criminal and penal administration.

Hanna, *The Law School as a Function of the University*. 10 N.C.L. REV. 117, 152 (1932).

16. Manning, *supra* note 11, at p. 11.

17. See Nader, *supra* note 13, at 494-95. This tendency was also noted and disapproved earlier by a less controversial figure, Professor Sidney Post Simpson. Simpson, *The Function of the University Law School*, 49 HARV. L. REV. 1068, 1083 (1936).

effectively to hire the services of adequately trained advocates.¹⁸ Consequently, training to deal explicitly with these problems has been sparse. Even when counsel were retained by government or other groups, they retained too few, paid them too little or, as in the case of federal administrative agencies,¹⁹ permitted them to forget whom they were representing.

Arguably, problems of this dimension and complexity will not yield to the rational skills of the lawyer. The arguments are familiar and not without cogency: these problems are political, not legal;²⁰ profound disagreements about values and differences in "consciousness" prevent resolution by rational or traditional legal processes;²¹ lawyers are not omniscient.²² The law and the legally trained are, however, capable of affecting politics and consciousness; the people do not form their views and their prejudices uninfluenced by leaders and institutions. Since many leaders are lawyers and most important institutions are controlled by lawyers, law schools constitute a proper arena for confronting these problems. Moreover, no acceptable alternative²³ exists except for law schools to try to help. If the serious problems remain unresolved, the democratic institutions and values we cherish may be doomed.²⁴

18. Since most of the "victims" of social problems are ordinary citizens, the corollary has to be that the democratic process has been subverted. If it has not been subverted, then why do the people need advocates other than their elected officials?

19. See, e.g., R. FELLMETH, *THE INTERSTATE COMMERCE COMMISSION—THE PUBLIC INTEREST AND THE ICC* (The Ralph Nader Study Group Report on the Interstate Commerce Commission 1970).

20. See C. Black, *Some Notes on Law Schools in the Present Day*, 79 *YALE L.J.* 505, 509 (1970):

[T]he lawyer can see that the culture in which he lives, and in which his law must grow or not grow at all, is light-years from being ready to put forth the kind of effort and sacrifice it would take to give relief against the injustice of poverty. I have implied that a decent living ought to be a civil right. With this concept, if the society workingly accepted it, lawyers could deal. But the society does not accept it, does not show signs of beginning to accept it, and the lawyer who would mould it into the shape of law feels no clay coming into his hands.

See also Note, *Legal Theory and Legal Education*, 79 *YALE L.J.* 1153, 1176-78 (1970).

21. See C. REICH, *supra* note 7, *passim*; Savoy, *Toward a New Politics of Legal Education*, 79 *YALE L.J.* 444 (1970). See also Jaffe, *Forum: Points of Rebellion*, 37 *BROOKLYN L. REV.* 1, 11-15 (1970).

22. Cf. C. Black, *supra* note 20, at 509-11.

23. Neither revolution, *à la* the New Left, nor awaiting a Consciousness III consensus, *à la* Reich, seems to be a palatable or realistic strategy for dealing with our problems.

24. See generally authorities cited in note 4 *supra*. See also Gross, *Can It Happen Here?*, *N.Y. Times*, Jan. 4, 1971 at 31, col. 4.

Even Professor Black, wary of turning law schools into "agencies of social action, with emphasis not so much on keen thought and research as on the present relief of misery," urged that law schools should

make a start toward applying the reason of the law, its highest and most inclusive reason, to the claim of the poor, . . . and beginning the work of projecting a rational system in which the claim not to be poor, in a rich society, shall seem as natural as the claim not to be beaten up in a society which has the means to keep order. . . . [This work should be done] without bias or preconception, except for the lawyer's bias in favor of that justice which must be done *lest the heavens fall upon our children*.

C. Black, *supra* note 20, at 510, 511 (emphasis added).

From this perspective, the past failure of the law schools to break out of the market system and to confront these problems—problems of the effects and effectiveness of law and legal institutions—constitutes a failure of cosmic proportions.

II. THE RESTRUCTURING OF LEGAL EDUCATION

Legal education can be restructured to provide the legal resources to deal with the problems mentioned above. A few disclaimers, however, are in order:

First, with respect to existing law schools, no program could possibly succeed which undermines the training of lawyers to meet the existing demand for traditional legal services. Therefore, all proposals are framed to avoid weakening the training of practitioners or forcing unwilling faculty or students into the programs that are recommended. Nor is the development of the skills of intellect which already set the lawyer apart weakened.

Second, no great benefit will accrue by creating special law schools to train policymakers.²⁵ Although the complexity of legal problems may soon require specialization by law schools,²⁶ categories of specialization should be substantive subject matter areas, such as tax and economic relations, property and housing, accident and health, transportation, transnational legal relations, or regional problems.²⁷ Since each area embraces important policy problems, future policymakers would emerge from each institution despite its specialization and regardless of its excellence. Therefore, confining the training of policymakers to special schools would not only be inadequate, but also would tend to undermine the democratization by which all kinds of law students from all kinds of law schools are drawn into the structure of community decision making.²⁸

25. A special law school for training policy makers may have been recommended for Brandeis University by its former President, Morris Abram. See Interview with Morris Abram, *Educating the Lawyer As a Policy-maker*, 6 TRIAL, April/May 1970) at 41. Mr. Abrams purported to describe an accredited law school which would turn out graduates capable of practicing law. The projected size of the school (50 students per class), however, and the extent of planned concentration on policy training suggested, to some, a rather elitist school for decision makers. Mr. Abrams was probably misunderstood. See also ASSOCIATION OF AMERICAN LAW SCHOOLS, 1966 PROCEEDINGS (pt. 1), *Report of Curriculum Committee* 39-43.

26. See Goldstein, *The Unfulfilled Promise of Legal Education*, LAW IN A CHANGING AMERICA 157, 162-63 (G. Hazard ed. 1968). Johnstone, *Student Discontent and Educational Reform in the Law Schools*, 23 J. LEGAL ED. 255, 257-64 (1970).

27. Obviously there would be much overlap in the courses taken in such schools. Each course would, however, where feasible, concentrate on issues relevant to the area of specialization.

Other kinds of specialization which have been proposed include training for general practice in small communities, training for corporate practice, and training for poverty law. Cf. Jones, *Local Law Schools vs. National Law Schools: A Comparison of Concepts, Functions, and Opportunities*, 10 J. LEGAL ED. 281 (1958).

28. The dangers of elitism are nowhere more evident than in Professor John

Third, as will be seen, the ideas proposed draw heavily on the prior efforts of others.²⁹ For some of the earlier ideas, the time may have come. What follows is basically a new score with variations on an old theme.

Essentially, the broad problem is fashioning significant decision-making agencies, governmental and nongovernmental, with both the will and the ability to serve society effectively. Although most agree that the sum of these goals is human dignity, a primary task is to identify specifically their content in each problem area. Next, strategies most likely to achieve these goals must be found. Before those strategies can be implemented, however, the constraints which prevent effective implementation must be removed. This task is clearly the most unyielding and difficult one facing the world today: there seems to be no way for decision makers to break out of the narrow and unreasonable constraints imposed upon them by a host of factors—historical, cultural, political, economic and social.³⁰ Thus, imaginative and potentially successful programs for dealing with poverty and urban blight are doomed in advance to failure because of inability to allocate sufficient resources. Effective accident and health programs are certain to be sabotaged by interest groups whose great influence is not counterbalanced by groups advocating the public interest. Arrangements to achieve peace never leave the drawing board because of unrealistic historical perspectives, widespread parochialism, and infectious mistrust. We may have become a society which reacts to most of its problems with circumlocution, if not doublethink, and with half measures designed at best to fail, or at worst to exacerbate the problems.³¹

Hanna's early call for "super law schools" for "picked students." Hanna, *supra* note 15, at 153-56.

29. If the organization of society and the administration of that organization are expertly to be adapted to the profound changes in the bases of social and economic life resulting from the Industrial Revolution of the last century and the even more sweeping Technological Revolution of the present one, it is mainly to the bar that the community must look.

This forward-looking suggestion was written in 1936. Simpson, *supra* note 17, at 1069. Professor Simpson, in turn, noted that inquiry into the role of the law schools in serving the needs of society was not at all original with him, citing several other significant efforts. *Id.* at 1070 n.2. This is all rather depressing. The history of such reform efforts is traced in Currie, *The Materials of Law Study* (pts. 1-2), 3 J. LEGAL ED. 331 (1951), 8 *Id.* at 1 (1955); and Note, *Legal Theory and Legal Education*, 79 YALE L.J. 1153 (1970).

30. Professors Reich and Marcuse both see the constraints to be products of culture and consciousness. See note 7 *supra*. Apparently Professor Savoy agrees: "The real 'unliberated zones' are the interiors of our own personal lives." Savoy, *supra* note 21, at 503.

31. Examples are legion; they include almost every federal program undertaken during the last decade or two, from urban renewal to the Alliance for Progress to Headstart to the Vietnam war. The pattern is almost always the same: A problem is identified, described and characterized (often incorrectly); a variety of programs is developed to deal with the problem; fanfare and extravagant rhetoric (sometimes lies) attend the presentation of the programs to Congress; the hopes of the victims of the problem are raised; in some cases half measures are taken and in others the programs

Law schools and their faculties can play a vital direct role, by defining goals, by developing, recommending, and appraising strategies, by removing constraints, and by assisting implementation. Indirectly, they can train people to perform those tasks when they leave law school. Developing proposals and strategies need not politicize law schools, unless one believes that recognizing crises and attempting to deal with them is, itself, a political posture. Policy-oriented legal education might succeed now, despite former failures. The reason is a real change in the values or "consciousness" of a significant percentage of law students.³²

III. AN HISTORICAL PERSPECTIVE

A. *Law, Science, and Policy*

The American legal realists—Holmes, Pound, Cook, Frank, Moore, and Llewellyn,³³ just to name a distinguished few—convincingly shattered the naive belief that logic is, or ought to be, the life of the law. Although many courts and some law teachers have been slow in catching on, it is well established that pure logic does not decide concrete cases. The realists understood that there are other ingredients, such as the realities of life and the needs of society. Lawyers and judges were referred to historical experience, to legislative facts, as in the Brandeis brief, and to other disciplines which have insights about the forces of society—economics, sociology, and psychology.³⁴ Until the forties, there

fail of adoption; half-measures prove ineffective and some are canceled; victims' hopes are dashed and nothing remains but seething discontent and bitterness. Subsequently, the opponents of programs use the prior failure, inevitable as it was, to prove that new programs cannot succeed.

32. Former Dean Bok of the Harvard Law School reported the results of a 1970 poll of the first-year students in which 21% expressed a preference for practicing civil rights, civil liberties, and poverty law after graduation and 10% expressed an interest in working in a corporate law firm "if time allowed for pro bono work." Bok, *New Lawyers in Old Firms*, N.Y. Times, Feb. 3, 1971, at 31, col. 4. Dean Bok noted that this is a marked shift reflecting "the concern of the present student generation for social reform." *Id.* Informal discussions and personal experience suggest that this phenomenon is common to most law schools. See also NEWSWEEK, May 24, 1971, at 52, 57; cf. L. MUMFORD, *THE MYTH OF THE MACHINE—THE PENTAGON OF POWER* 413 (1970):

For its effective salvation mankind will need to undergo something like a spontaneous religious conversion: one that will replace the mechanical world picture with an organic world picture, and give to the human personality, as the highest known manifestation of life, the precedence it now gives to its machines and computers. This order of change is as hard for most people to conceive as was the change from the classic power complex of Imperial Rome to that of Christianity, or, later, from supernatural medieval Christianity to the machine-modeled ideology of the seventeenth century. But such changes have repeatedly occurred all through history; and under catastrophic pressure they may occur again. Of only one thing we may be confident. If mankind is to escape its programmed self-extinction the God who saves us will not descend from the machine: he will rise up again in the human soul.

33. Cf. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934).

34. See generally Note, *Legal Theory and Legal Education*, 79 YALE L.J. 1153 (1970).

was no comprehensive guide to lead the decision maker in systematically assimilating these nonlegal materials into his decision making. Furthermore, the realists had not really faced the handling of value choices which emerge when decision making departs from pure logical analysis.³⁵

In 1943 Professor Myres S. McDougal, a law professor, and Professor Harold Lasswell, a social scientist, both on the Yale Law School faculty, took a hard look at the future of legal education.³⁶ They accurately foresaw a host of problems confronting the post-war world. Moreover, they perceived the need for vast numbers of trained decision makers to help preserve democratic values and human dignity in the "booming, buzzing confusion" which was to come. They believed that legal education was the appropriate place to begin:

We submit this basic proposition: if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic *training for policy-making*. The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.

. . . .

It should need no emphasis that the lawyer is today, even when not himself a "maker" of policy, the one indispensable adviser of every responsible policy-maker of our society—whether we speak of the head of a government department or agency, of the executive of a corporation or labor union, of the secretary of a trade or other private association, or even of the humble independent enterpriser or professional man. As such an adviser the lawyer, when informing his policy-maker of what he can or cannot *legally* do, is, as policy-makers often complain, in an unassailably strategic position to influence, if not create, policy. . . . How frequently lawyers turn up in government—whether as legislators, executives, or administrators, or as judges (where they have a virtual monopoly)—is again a matter of common knowledge. Nor can the policy-making power of lawyers as executors, trust administrators, administrators in insolvency, and so on, be ignored. Certainly it would be difficult to exaggerate either the direct or indirect influence that members of the legal profession exert on the public life of this nation. For better or worse our decision-makers and our lawyers are bound together in a relation of dependence or of identity.³⁷

35. *Id.* at 1172-75.

36. Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943). See also McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L.J. 1345 (1947).

37. Lasswell & McDougal, *supra* note 36, at 206, 208-09 (footnotes omitted).

They then structured a system which described, sometimes in bewildering detail, how law, science, and policy could be integrated in scholarship and decision making to achieve human dignity, and how law students could be trained to operate within that system. They have continued to build, explain, correct, and apply their system to this day.³⁸

Their entire system has been described in detail elsewhere.³⁹ Its essentials, however, are quite ingeniously simple and reasonable. They first described five intellectual tasks or skills of thought essential for effective policy making: First, identification of preferred policies or goals;⁴⁰ second, examination of trends over time; third, examination of real-world conditions which affect decisions and are affected by them; fourth, prediction of future decisions in light of the conditions; and, finally, the development of alternatives and strategies designed better to achieve the goals first identified.⁴¹

The need for performing these tasks would be obvious to anyone claiming expertise in decision making. They describe nothing more than the factors which any rational man would try to consider in arriving at even the most simple decision. Nevertheless, law teachers and judges focused almost all of their attention on only the third and fourth tasks: trends of decision and prediction. Worse yet, they used only the legal decisions found in appellate court opinions to deduce trends. Predictions were based largely on an extension of the logic of earlier decisions.⁴²

38. A single work containing the complete details and rationale of their entire approach has yet to appear. Comprehensive examples of the application of the system include M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967); M. McDUGAL, H. LASSWELL & I. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* (1963); McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision* (pts. 1-2), 19 J. LEGAL ED. 253, 403 (1967); and Lasswell & McDougal, *Criteria for a Theory About Law*, 44 U. SO. CAL. L. REV. 362 (1971).

39. The best short description and explanation of the system is in Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968). Greater detail is found in Lasswell, *Toward Continuing Appraisal of the Impact of Law on Society*, in *THE LAW SCHOOL OF TOMORROW* 87 (Haber & Cohen eds. 1968).

40. Many critics of Professors McDougal and Lasswell have erroneously assumed that, because of their concern with policy clarification and values, they seek to teach or impose a certain value system on law students. Nothing could be further from the truth. They do express personal preference for policies and values consistent with our democratic tradition. As Professor McDougal has stated, however:

Any attempt to impose an abstract hierarchical ordering upon [individuals'] value demands would be as irrelevant as unreal. One function of law is to provide the procedures by which people can *continuously* clarify and integrate their common interests in value demands and expectations while rejecting all claims of special interest.

McDougal, *Remarks*, in *PROCEEDINGS OF THE ASHEVILLE CONFERENCE OF LAW SCHOOL DEANS ON EDUCATION FOR PROFESSIONAL RESPONSIBILITY* 125 (1965).

41. McDougal, Lasswell & Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L L. 237, 240 (1969). See also Moore, *supra* note 39, at 672.

42. The judges whose reputations have survived often referred to policy considerations in their opinions, but policy references were often highly general and conclu-

Although some brilliant research was performed and some fine decisions written within this limited framework, goals and relevant societal conditions were ignored or oversimplified. Furthermore, the research rarely offered alternatives founded on systematic evaluation of real world needs. This may be why so few of our current legal-social problems were anticipated by legal scholars and why viable solutions were not developed and implemented.

Professors Lasswell and McDougal foresaw the need for a detailed inventory of the contextual factors which might prove relevant. Drawing on the work of the social scientists, they drew a map which identified features common to every social process and interaction between human beings. Each of these features was felt to be relevant and necessary to policy making and legal decision making. They ordered these features to reflect the way the processes themselves operated. They asked: Who, with what Objectives and Perspectives, with what Resources, in what Situations, are using what Strategies, to seek what Outcomes, with what Effects, in the context of what Societal Conditions?

Who, intends that all the participants—all those involved in the process and all those affected by it—be identified and described with particularity whether private persons, groups, or governmental agencies. Once identified, each participant's personality characteristics, social class, culture, interests, and crisis level were to be described.

Objectives and perspectives, refer to a detailed examination of the participants' attitudes, beliefs, myths, perceptions of the world, motives, and demands for value as well as the levels of consciousness at which such perspectives were held.

Resources, is an inventory of participants' "base values"—those things, tangible and intangible, which people, groups, or agencies use to

sionary. See, e.g., Chief Judge Cardozo's decision that accountants should not be held liable to third persons who loaned money in reliance on their negligently prepared financial statements:

If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt as to whether a flaw may not exist in the implication of a duty that exposes to these consequences.

Ultramares Corp. v. Touche, 255 N.Y. 170, 178-79, 174 N.E. 441, 444 (1931).

This, coupled with his reluctance to allow an action for negligent representation to swallow up the limits of the action of deceit, led him to qualify the definition of duty, based upon the zone of foreseeable risk, that he had developed in the *Palsgraf* case. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928). A more careful consideration of the policy implications might have led him to consider, at least, the effect of his holding on lenders and sellers because lenders in a depression would not lend money on a financial statement they could not rely upon. The availability of insurance to lenders and sellers and to accountants, and whether accountants could disclaim liability on the face of the statement should also have been considered. Cardozo saw one problem, but he failed adequately to consider the "real world" context in order to determine what other effects his decision might have. Furthermore, he failed to consider alternatives or the policies they might serve.

acquire other desired things or "scope values." All such values were placed within eight categories acceptable to social scientists—power, enlightenment, wealth, well-being, skill, affection, respect, and rectitude.

Situations, is the identification of the arena of the interaction. When in time, where in space, and at what level of crisis? Does it take place in the street, in a court, a legislature, on the battlefield? Does it take place during a depression, a war, or in times of tranquility?

Strategies, identifies the means used to achieve the participants' objectives and places those means on a persuasion-coercion continuum. Was the strategy one of physical force (military), economic means, face to face bargaining (diplomacy), or ideological (propaganda)? Did the strategy offer gains or threaten losses?

Outcome, asks what specific decision or result was sought or achieved. For example, what did the rioters, or advocates, or negotiators, achieve in this particular interaction. Were the participants' value demands, as earlier described, realized?

Effects, are longer term consequences of the particular interaction. How was it intended to affect, how did it affect other participants, their objectives and perspectives, their resources, their situations, their strategies, and their outcomes?

The context of conditions calls for a careful examination of the societal conditions which affect and are affected by the process of social interaction which is under examination.⁴³

Lasswell and McDougal recommended that in performing legal research or decision making one should examine each of the foregoing elements. On first exposure, however, their system seems terribly detailed and complicated. Their language, drawn heavily from the social sciences, seemed to be alien, jargonistic, and turgid to some lawyers, and was occasionally ridiculed⁴⁴ and more often misunderstood.⁴⁵ The

43. A somewhat fuller exposition with examples of what is expected to be considered under this and the other headings may be seen in McDougal, Lasswell & Chen, *supra* note 41, at 241-45.

44. See, e.g., Scafuri, Book Review, 18 VAND. L. REV. 863, 864-65 (1965).

45. *Id.* See also, Macaulay, *Law Schools and the World Outside Their Doors: Notes on the Margins of "Professional Training in the Public Interest,"* 54 VA. L. REV. 617 (1968). The principal fault of this article is in treating Professors Lasswell and McDougal as if they had stopped thinking in 1943. Even then, it fails to perceive the potentialities of the ideas expressed in 1943. For example, Professor Macaulay asserts that Professors Lasswell and McDougal overlooked

the need to get a picture of the system in action . . . [and] neglect[ed] one [problem] which is of crucial relevance to democratic values; insofar as the legal system operates informally and serves to support a market for justice, there arises the classic contracts problem of inequality of bargaining skill and power. . . . Lasswell and McDougal's system of democratic values fares badly as an approach to these important problems.

Id. at 626-27. Probably nothing could be further from the truth. If their system requires anything it requires an examination of the relative value positions, such as the relative wealth, skill, and respect of the participants, and the effects of discrepancies on human dignity in concrete contexts. This was clearly implied in their germinal

language, however, was painstakingly selected to avoid the confusion and ambiguity of language used for generations to obscure the real reasons for decisions. Moreover, it freed inquiry from a vocabulary already heavily laden with value preferences. The negative response to their system cast no credit on the legal profession, particularly on the academic lawyers who shared the response. Serious undertones of anti-intellectualism were present in those who wrote-off the system without understanding it and, worse, who did not care to understand it.⁴⁶

Even those who appreciated the worth of the system as an approach to intelligent research and decision making might be troubled by its apparent ponderousness. How could anyone perform all of these tasks every time a problem needed solution? How could any person gather all of this information and assimilate it? Particularly, how could judges ever begin to examine all of this detail and still continue to grind out decisions?

Professors Lasswell and McDougal, however, never asserted that every legal problem required a complete examination of all the possible relevant factors derived from their suggested analysis. The economics of research or decision making would necessarily solve that problem.⁴⁷ Rather the system provides a method, in the best tradition of American pragmatism and democratic decision making, to raise all the questions which might profitably be examined. The system essentially provides for planned and intelligent inquiry for decision making on human affairs. It resembles systems analysis and the program planning and budgeting approach so useful today in the development of technology and in business management.⁴⁸ Attention to the intellectual tasks and to the phase analysis of the elements of social interaction inevitably leads to the recognition and systematic examination of questions most significant to the decision-making task.⁴⁹ Most importantly, this approach

article, Lasswell & McDougal, *supra* note 36, at 237-38, 241, 283-84. Their subsequent writings could not be more explicit. See, e.g., McDougal, Lasswell & Chen, *supra* note 41.

46. Professor Falk's critique of some of the criticisms of Lasswell and McDougal cannot be improved upon. See Falk, *International Legal Order: Alwyn V. Freeman vs. Myres S. McDougal*, 59 AM. J. INT'L L. 66, 70-71 (1965).

Typical of the indefensible responses to Professor Lasswell's description of the models of the decision process and the social process, is Professor Kalven's: "[I]t did not stimulate my curiosity." He did admit, however, that his reaction might have been different if he had had "the opportunity to spend more time on it." *Discussion by Harry Kalven, Jr., in THE LAW SCHOOL OF TOMORROW* 159, 161 (Haber & Cohen eds. 1968). This is rather curious, since the model presented by Professor Lasswell, or earlier versions thereof, has been described in most of the writings of Lasswell and McDougal since 1943.

47. See Moore, *supra* note 39, at 680.

48. *Id.* at 672-73. Cf. Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318, 337-41 (1964).

49. Characteristic of the Lasswell-McDougal system is that it tends to raise more pertinent questions than a single researcher trying to grapple with a significant legal-

necessarily leads to the development of more, rather than less, effective and realistic alternatives. Pitfalls and problem areas will be found which, if inadequately considered, may lead to decisions which will undermine the attainment of preferred policies or even result in catastrophe.

For example, application of this analysis to the social processes in our cities would have yielded information sooner about the deprivation of the legal rights of the poor. We might have known, much earlier than the Kerner Commission's report,⁵⁰ the extent of deprivation in the ghettos, and the probable outbreak of riots and violent protests. We might even have developed alternatives—legal institutions and reforms—which could have alleviated the deprivations and staved off the riots. Similarly, earlier teaching of the intellectual tasks in the law schools might have resulted in recognition of life-threatening problems and conditions. Environmental pollution, automobile accidents, racism, urban blight, and invasions of privacy might have been noticed sooner. Effective solutions might even have been developed.

B. *The Response of the Law Schools*

The law, science and policy approach of Lasswell and McDougal could have had great utility in an effective appellate brief, in arguing or deciding a case, and in the practice of law generally, but the law schools have been slow to pick up the banner.⁵¹ There has been, of course, a rapidly burgeoning interest in policy-oriented and interdisciplinary research.⁵² Except for a loyal few who studied under Profes-

societal problem can answer within the time limitations of traditional legal research. This is not a valid criticism of the system, but suggests that research may have to be planned and coordinated in accordance with a blueprint derived from preliminary application of the system to a problem area to determine: that computers will be useful; that research teams, rather than individuals working in isolation, might prove more effective in developing alternative solutions; and that, in general, a more efficient division of labor among researchers and among disciplines may be needed.

50. THE REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

51. See MAYER 93-95.

52. This interest has been reflected in the publication of a course book in law and the behavioral sciences, L. FRIEDMAN & S. MACAULAY, LAW AND THE BEHAVIORAL SCIENCES (1969), and in the appearance of new law journals which specialize in the relationship between law and the social sciences or social action. In addition, the SMILE program at the University of Denver is designed to teach social science techniques to law teachers. See also UNIVERSITY OF DENVER, COLLEGE OF LAW ADMINISTRATION OF JUSTICE PROGRAM, ANNUAL REPORT (1969-70).

The Friedman and Macaulay book displays the insularity of academic lawyers. They recognize that "it is important to see the legal system as an integral part of the larger social system rather than as a set of rules, procedures and activities of officials sealed off and isolated from the rest of society. . . . [The law is] a social system with demands, responses, role players and moving parts." L. FRIEDMAN & S. MACAULAY, *supra*, at vii. The book, however, contains no excerpts from the Lasswell-McDougal materials and, in fact, contains but one reference to an article co-authored by Professor Lasswell. It is much like a course in world religions which omits Christianity.

sors McDougal and Lasswell at Yale, the system and its insights have seldom been applied to specific research projects by legal scholars and never been implemented as the basis for a full program of legal education.⁵³

Of course every law teacher worthy of the title today talks about policy, but policy discussions are unsatisfactory and often fatuous. The reason is obvious: Unless students have access to the kinds of contextual information required by the Lasswell-McDougal analysis, there is no adequate basis for discussion. Even the first task—goal or policy clarification—cannot be performed, except on the most general level, unless substantial information about the nature of the problem and its effects is known.

Some new course books bring factual information about real-world conditions to the students' attention.⁵⁴ On the whole, however, most academic lawyers still seem to revere materials which call for the most rigorous—and admittedly, stimulating—intellectual gymnastics within the isolated gymnasium of pure legal analysis. Hart and Wechsler's monumental and brilliant work on federal courts and federalism⁵⁵ is still widely regarded as the ultimate in casebooks, but it never really

53. The Yale divisional program provided the opportunity for applying the system if faculty were so disposed, but that program has been disbanded. See generally Freilich, *The Divisional Program at Yale: An Experiment for Legal Education in Depth*, 21 J. LEGAL ED. 443 (1969). Columbia's abortive efforts to revise its entire curriculum to emphasize policy making is described in Currie, *supra* note 29. These efforts took place, for the most part, prior to the 1943 article by Lasswell and McDougal.

The cooperative program at Northeastern University School of Law embraces objectives similar to those suggested by Professors Lasswell and McDougal:

The purpose of the Northeastern University School of Law is to train lawyers who can meet the challenges and obligations cast upon the profession by contemporary society. The School was founded on the conviction that traditional legal education inadequately approaches this goal, and that law schools have not altered their programs quickly enough to match the pace of change on the world and national scene. . . .

Even more serious is the failure of law school curricula to reflect a genuine concern for the urgent problems of American society. Although our society leans heavily upon lawyers for solutions to its social, economic and political problems, the narrow training afforded by a conventional curriculum does not equip the lawyer for these tasks. To a remarkable degree, the typical course of studies appears to be based upon the narrow assumption that most graduates seek to enter very large law firms where they are likely to work chiefly on the problems of large corporations and financial institutions. Large segments of the curriculum are devoted to these problems, and the most pressing questions of our age are either neglected or are examined by a handful of students in an elective seminar.

The curriculum for the School of Law is shaped in substantial measure around significant issues of contemporary life, especially those which arise with increasing urgency in our populous metropolitan areas.

NORTHEASTERN UNIVERSITY SCHOOL OF LAW BULLETIN 7, 8 (1968-69).

54. In the torts area, see, for example M. FRANKLIN, *INJURIES AND REMEDIES, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* (1971); C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 691-910 (2d ed. 1969).

55. H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

asks whether the division of decisional authority the authors were examining really made any significant difference to any real human beings. This is not to say that the issues discussed might not be decisive in particular cases between live litigants, or even that they were frivolous.⁵⁶ Rather, a course on the federal system seems to be the appropriate place to discuss whether the system—federalism and a dual system of courts—can effectively govern and control a modern large nation. If it can not, it should then discuss what, within the limits of the significant values of federalism embodied in the Constitution, might be done to change it. Almost anyone can see that fifty states and a dual court system, carved out in simpler days, create serious contemporary problems of coordination, costs, planning, and policy implementation. Can we be so sure that a generation of Harvard law graduates aware of the problems of American federalism and perhaps committed to making it more efficient and workable might not have had some positive impact?

Similarly, the core of the law school curriculum is still examining existing legal arrangements and analyzing the manner in which such arrangements are applied. For example, civil procedure casebooks have traditionally contained virtually no information about the effects of existing rules on live human beings, especially poor ones, and, until very recently, nothing about delay and injustices.⁵⁷ No course has ever really considered whether dual litigation in which civil and criminal law overlap, serves societal values, and, if not, whether there is a viable and efficient alternative. Nor has any course regularly considered whether the all-or-nothing approach of the common law maximizes the law's effectiveness in serving its policies.⁵⁸

56. Obviously, the doctrinal underpinnings of our federal system are worth examining, as are questions about whether such doctrines have been logically applied.

57. The theory and constitutional limits of jurisdiction and service of process were carefully treated in most procedure casebooks. The abuses, such as "sewer service," however, were virtually ignored. These omissions work positive harm since the student was frequently left with the impression that the complex doctrines he worked so hard to learn were working well and fairly. Even worse, the student may have developed a vested interest in the system as he learned it, no matter how unfair. "Taught law," said Maitland, "is tough law." See Leflar, *Taught Law Is Tough Law*, 8 WAYNE L. REV. 465 (1962).

Attempting to bring contextual data into a coursebook presents a considerable problem, since the data may be extensive and new information may be developing at a rate which would require annual coursebook revision. This problem might be solved by: printing inexpensive casebook supplements, a growing practice; assigning substantial outside reading, creating heavy burdens on library budgets or students' pocketbooks; or, using looseleaf coursebooks. In any event, once the decision to examine the law's effect is made, the practice of relying exclusively on single volume bound textbooks will be doomed.

58. Examining this all-or-nothing approach should go far beyond merely exploring the doctrine of comparative negligence. Divided verdicts might be useful for dealing with situations where proof does not meet current standards, or where losses, under current law, have to be placed on only one of two innocent parties, or where, under current law, an injured plaintiff is cut off from any recovery because his loss is too remotely connected to defendant's wrongful act.

Furthermore, the courses in the core curriculum continue to focus mainly upon the judicial process. Except for some introductory courses which students recognize as exceptions, most first year requirements deal primarily with court-made law and the judicial process. This bias continues throughout the three years.

Lawyers, however, do not function only in the context of the judicial process. They are present and serving clients wherever important decisions, official and unofficial, are made. Recently, some of the most effective work done by major law firms has been in the administrative and legislative arenas.

The limited scope of the educational focus may mean that most law graduates emerge from law school ill equipped to function effectively on the unfamiliar ground of nonjudicial decision making. Furthermore, excessive attention to the judicial process may have caused lawyers to rely too heavily on the fragile judicial system for redress of major societal grievances. Courts are not well-equipped to handle claims involving major policy implications and are vulnerable to attack on political grounds when they try to do so. As a generation of civil rights lawyers may now be learning, significant decisions which represent hard-fought victories may be eroded or reversed when court personnel change as a result of changes in the political winds.⁵⁹ Institutional change brought about by private decision making, legislation, or constitutional amendment and, especially, by a change in popular perspective or "consciousness," may prove more durable.

Professors Lasswell and McDougal did not place so much emphasis on the judicial process. Decisional processes which lawyers and policy makers might profitably examine take place in many arenas other than the appellate courtroom.⁶⁰ Law, they pointed out, includes patterns of *authority*—the degree to which decisions are made in accordance with community expectations about how decisions should be made and who should make them—and patterns of *control*—the degree to which decisions are made effective.⁶¹ No more reason exists for law schools to confine their study to the authoritative decisions of appellate courts than there is for medical schools to limit their students' study to surgery.

Additionally, Lasswell and McDougal described seven decisional functions far more sophisticated and meaningful than the traditional

59. See, e.g., *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643 (1971).

60. Others agree:

[P]eople and their interests have multiplied so greatly and their affairs have become so intricate that the courthouse and its processes are no longer adequate to accommodate the demands of a just and efficient government. Numberless other forums more suited to the conflicts that arise in a fast moving society have been provided. Instead of one, the lawyer now must be able to play his role on other stages where the issues and the members of the supporting cast are new to him and the script does not follow the courthouse patterns.

Green, *Law Schools: Reclamation of Human Resources*, 21 J. LEGAL ED. 1, 3 (1968).

61. See Moore, *supra* note 39, at 666-68.

executive, legislative, judicial, and administrative categories: (1) promoting or recommending policy, (2) gathering intelligence, (3) invoking the application of law or policy, (4) prescribing law or policy, (5) applying law or policy, (6) appraising existing law or policy and (7) terminating law or policy.⁶² In the decisional context, identifying the participants who actually perform each of these functions, rather than merely locating those who have that formal responsibility, helps identify the real possessors of power. Law schools did not examine existing legal institutions to discover how and by whom these decisional functions are really performed. Had they, we might have discerned long before Ralph Nader that groups importantly effected by decisions, such as consumers, had no effective role in decisional processes. Other interest groups, however, were monopolizing decision functions in many areas of public concern. Certainly we would have learned earlier that many governmental agencies designed to serve important public interests were failing in their statutory duties.

In the law school envisioned by Lasswell and McDougal, all decisional functions and all significant strategies for achieving decisions would have been subject to study. Law schools would not have become debating societies or social science departments. Rather, such study in a professional school would have led inexorably to more effective skill-training in the performance of all seven decisional functions.

IV. CURRENT PERSPECTIVES ON LEGAL EDUCATION

Observers have recently noted a kind of schizophrenia in law faculties and law teachers.⁶³ Generally, the split is between the traditionalist views—law schools are doing what they ought to be doing and are doing it well—and the reformist view—law schools can and should turn their attention to the solution of societal and global problems. Among the latter, there are some who believe that law schools must become more specialized—that no one law school can effectively fulfill all the appropriate educational objectives.⁶⁴ Others feel that all law schools

62. *Id.* at 671. There is nothing obscure or unrealistic about these categories. There are persons or institutions which have traditionally been specialists in performing each function. Thus, for example, lobbyists promote, investigators gather intelligence, grand juries invoke, legislatures prescribe, courts apply, legislatures and courts appraise and terminate. Using these categories to analyze the power possessed by particular legal institutions under study adds considerably to clarity of thought. See Miller, *Administrative Agency Intelligence-Gathering: An Appraisal of the Investigative Powers of the Internal Revenue Service*, 6 B.C. IND. & COM. L. REV. 657, 705-08 (1965).

For fuller exposition of the definition of these terms in the context of transnational law see M. MCDUGAL, H. LASSWELL & I. VLASIC, *supra* note 38, at 113-27.

63. See Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968).

64. See Cavers, *Legal Education in Forward-Looking Perspective*, LAW IN A CHANGING AMERICA 139 (G. Hazard ed. 1968), and Johnstone, *supra* note 26.

can and should continue to train all law students to handle broad policy problems and to perform traditional lawyer skills.⁶⁵ These divisions of opinion are not necessarily between liberals and conservatives. Furthermore, some of those teachers who wish that law schools would battle social ills seem to accept traditional law teaching approaches. They desire only to expand their own or their students' exposure to the judicial process, particularly in the civil liberties area.⁶⁶ One thing is clear: despite much talk at meetings of the American Association of Law Schools (AALS), there is no consensus that law schools should begin to evaluate all of society's major decisional processes in relation to society's, rather than paying clients', problems. Certainly there is not universal support for using the law school experience, or any part of it, to frame and appraise alternative strategies for solving society's problems.⁶⁷

On the other hand, there are two movements which elicit considerable, if not universal, approbation. One movement is toward clinical legal education and the other is toward interdisciplinary study and research. Generally, the programs promulgated under either of these headings tend to be oriented toward societal problems. Law schools are embarking upon such programs in increasing numbers. No consistent educational philosophical basis for them, however, has been developed. In interdisciplinary study and research, much of the activity is undertaken to fulfill faculty research commitments, and is only loosely integrated with the curriculum. Clinical programs tend to be practice and exposure oriented. Scant attention is paid to educational objectives and, sometimes, even to adequate supervision.

Interest and support for clinical legal education will continue for a while. Support for interdisciplinary programs is likely to expand rapidly. As technological and economic research loses its luster, the federal government and foundations will turn to research and training in socio-legal and techno-legal problems. Unfortunately, absent any coherent basis, the new education or research is likely to be haphazard, ill-organized and unworthy of the efforts of legal educators. If so, such programs will not meet the need for policy-oriented training and research.

65. See, e.g., Kirby, *The Teaching and Research Missions of the University Professional School*, 32 OHIO ST. L.J. 523 (1971).

66. This is particularly true of law teachers who teach in the constitutional law-criminal justice area or who have participated in the achievement of substantial successes in extending constitutional protections to criminal defendants through the courts. Perhaps these teachers should try to understand that policy problems of criminal justice are more susceptible of resolution through the courts than policy problems related to accidents, transportation, urban decay, and the like.

67. There is, however, powerful support from many highly respected leaders of law and legal education for law schools to face societal problems. See, e.g., *THE LAW SCHOOL OF TOMORROW* (1968); *LAW IN A CHANGING AMERICA* (G. Hazard ed. 1968); and Kirby, *supra* note 65. See generally the extensive bibliography in Del Duca, *Continuing Evaluation of Law School Curricula—An Initial Survey*, 20 J. LEGAL ED. 309 (1968).

The overall situation may be summarized by observing that in most good law schools some people are grasping for ways of making legal education and legal research "relevant" to the problems and needs of the day. Most of these people are not working within a coherent program, well coordinated with the goals and operations of legal education. Too few of us have paid adequate attention to the highly suggestive blueprint, worked out with meticulous care and concern during the last twenty-eight years by Professors McDougal and Lasswell.

V. A PROGRAM FOR LEGAL EDUCATION

A. *Developing a University Law School*

Early in this century Veblen suggested that law schools have no place in a university.⁶⁸ Many law schools were and still are physically isolated from the university campus. All too frequently their isolation is also intellectual. Although the law schools pass on knowledge as well as impart practical skills, such knowledge is frequently technical and concerns the operation of what appears to be a closed system. The oft made comparison to a trade school is not entirely inapposite; much of the education in most law schools comfortably fits the comparison.

Nevertheless, the proper response is clearly not to remove law schools from the university. Instead, in today's confused world, law schools should engage more deeply in the university's most important function: "to identify and clarify the great issues of our time."⁶⁹ This function requires broad examination and communication not only of what is, but of what might be and what ought to be. In passing on knowledge about legal institutions and rules, their effects must not be ignored. The cold eye of criticism must be turned upon them; their effectiveness in serving society's preferred goals and justice must be appraised. In the course of criticism and appraisal, as in scientific research, unworkable hypotheses must be rooted out and new hypotheses developed and tested. As George Wald suggested to the law teachers at the last AALS meeting, we need a constant flow of new alternatives, so that we can reject existing operations and replace them with better ones as they appear. Otherwise, our evolutionary political and social system may go the way of the dinosaur.⁷⁰

68. T. VEBLÉN, *THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN* 211 (1918). For a summary of Veblen's views on legal education in the university see Geis, *Thorstein Veblen on Legal Education*, 10 J. LEGAL ED. 62 (1957).

69. Hutchins, *The University Law School*, in *THE LAW SCHOOL OF TOMORROW* 5, 21 (Haber & Cohen eds. 1968). Cf. K. JASPERS, *THE IDEA OF THE UNIVERSITY* (1959); Simpson, *The Function of the University Law School*, 49 HARV. L. REV. 1068 (1936); Smith, *Legal Education and Universities*, 8 U. TORONTO L.J. 3 (1949). See also the interesting development of views on the place of a law school in an English university in Stallybrass, *Law in the Universities*, 1 J. SOC. PUB. TEACHERS L. 157 (n.s. 1948).

70. The same point was made in an earlier statement by Dr. Wald. Wald, *The*

This is not to suggest that university law schools become politicized. Their appropriate role is performing all five of the intellectual tasks described by Professors Lasswell and McDougal and training law students to perform those tasks effectively. In addition, important knowledge discovered in the process of performing these functions must be passed on to other disciplines. If attention to all five tasks occasionally evokes controversy, then so be it. Better to suffer controversy than be a bystander to the breakdown of the social order. Only through the performance of all five functions can law schools become integral and organic parts of their universities.⁷¹

B. *The Interface Between Law and Other Disciplines*

Surprisingly the practically irresistible tendency toward empire building of most institutional administrators has been successfully resisted by law school deans. The law schools have ignored myriad opportunities to expand their organization to carry their truths to the graduate and undergraduate departments and colleges of their own universities.⁷² Some might argue that they had no truths to carry, although most law professors would rightly deny it. Instead, this phenomenon was attributable to arrogance, snobbism, and insecurity. The arrogance was precipitated by the superiority complex resulting from the rigorous training which went on in the law school classroom and, in the secret view of most law teachers, almost nowhere else.⁷³ The snobbism was a refusal to deal on a simplistic level with analytically untrained students outside the law school as demeaning and not worthy of the talents of a "real" law teacher. Perhaps the snobbism also reflected the belief that little occurred outside of law schools that might contribute to

Evolution of Life and the Law, 19 CASE W. RES. L. REV. 17 (1967). See also A.S. Miller, *Science and Legal Education*, *id.* at 29. A similar analogy was drawn by Professor Simpson, at the height of the depression. "The penalty of failure [to adapt society to change], in social as in biological evolution, is ultimate elimination from the evolutionary scene." Simpson, *supra* note 69, at 1069. Cf. Gossett, *The Rule of Law or the Defiance of Law?*, 55 A.B.A.J. 823 (1969).

71. The history of earlier efforts to create a "university law school" at Columbia University are related in FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *A HISTORY OF THE SCHOOL OF LAW—COLUMBIA UNIVERSITY* 312-46 (1955). Dean Young B. Smith is there quoted:

If the university law school is to perform its proper function in society, it cannot remain content with merely schooling its students in legal doctrine and lawyers' technique. . . . If the law is to be made more useful in the regulation of human affairs, the lawyers and the judges of the future must also acquire an understanding of legal phenomena, an appreciation of the social implications of rules of law, and a knowledge of their actual effects, which cannot be obtained from the literature of the law alone.

COLUMBIA REPORTS 99 (1929).

72. The failure to educate the general public about its legal system is also quite evident.

73. See, e.g., *Discussion of Jerome Hall*, in *THE LAW SCHOOL OF TOMORROW* 61 (Haber & Cohen eds. 1968).

legal education. Finally, most law professors were unfamiliar with the work of other disciplines. Exposure to these disciplines might have removed the security of the closed system whose intricacies they had succeeded in mastering so well.

Whatever the cause,⁷⁴ most law schools have existed in splendid isolation from other university departments. If the law schools assume their proper role, there will be immense opportunity for increasing their participation in the life of the university.

1. General Education in the Law at the Undergraduate and Graduate Levels

Our legal system, broadly conceived, is the instrumentality for establishing and achieving our society's policy goals. Therefore, no university graduate is properly educated, certainly not liberally educated, if he is not familiar with the structure and operation of our own legal system.⁷⁵ The process of common law decision making, the adversary system, and the allocation of, and constraints on, decision making power established by the Constitution must be understood. Law professors understand the detailed workings and assumptions of the formal legal system. They, with their colleagues in history, psychology, and political science, bear primary responsibility for providing basic and advanced education about their own discipline to the undergraduate and graduate students in the university. The parallel to the obligation undertaken by economics departments is striking: professional economists are trained at the graduate level, but those departments traditionally have also provided education in economics to nonspecialists throughout the university.

2. Cross-Fertilization Between Law and Political Science

The distrust between political science and law school faculties is understandable, given their divergent approaches. From the standpoint of the search for understanding it is incomprehensible and reprehensible. The legal system is a principal instrument of policy in our society; there is no clear-cut line between power and authority. Thus, the

74. In fairness, one of the causes of the isolation of the law schools is surely the heavy demands put upon law teachers in teaching large numbers of law students. This, however, does not account for the sparsity of attempts by law schools as institutions to develop programs for interdisciplinary teaching and research and to fund such programs through usual university channels or through foundations and government.

75. See generally Barkman, *Law in the Liberal Arts: An Appraisal and a Proposal for Experimentation*, 19 J. LEGAL ED. 1 (1966) (contains extensive bibliography). Cf. Weissman, *Law and Liberal Education*, 15 VAND. L. REV. 609 (1962); Appel, *Law as a Social Science in the Undergraduate Curriculum*, 10 J. LEGAL ED. 485 (1958). But see ON THE TEACHING OF LAW IN THE LIBERAL ARTS CURRICULUM (H. Berman ed. 1956).

study of the theories and techniques of exercising power cannot conceivably ignore the insights of law teachers—experts in the methods and details of performing official decision-making functions and the substance of the decisions themselves. Conversely, law teachers cannot train practitioners and ignore political scientists—experts in how significant decisions are really made in our society. Their sophisticated techniques for predicting and appraising decisions and developing decisional alternatives—such as model building and game theory—should be studied by legal decision makers. Furthermore, political scientists studying the effects and operations of legal processes, such as the criminal justice system, may have much to contribute to the law school's appraisal function. Undoubtedly, expanded cooperation between the two disciplines will tend to improve the quality of the performance of both.

3. *Interrelation Between Law and Other Disciplines*

The law schools will necessarily have to draw heavily on research best provided by other disciplines in examining the operations and effects of the legal system and in developing and appraising alternatives.⁷⁶ For example, reform of accident laws and regulations cannot be spun by the lawyer out of whole cloth. The findings of many disciplines including business, economics, statistics, industrial, mechanical and civil engineering, preventive medicine, and others engaged in the performance of human factors research will prove relevant and useful.

Law teachers and law students, however, need not become credentialed in other fields in order to perform the recommended tasks.⁷⁷ The lawyer has characteristically assimilated enough information about non-legal institutions and problems to perform his client-serving task effectively. Similarly, the law teacher and his students must learn how to understand enough of the detail of relevant disciplines to perform their own research tasks. Law teachers or students should not invest heavy efforts in the solo performance of empirical or social science research. The law schools cannot carry out all, or even a major part, of the necessary research without substantial assistance. Except to familiarize themselves with the realities of a live situation or to gather information other experts cannot be induced to acquire, members of the law faculty must work with experts in related disciplines to frame joint research projects to be carried out by those familiar with research techniques. In many areas much excellent and relevant research has already been completed. Law teachers need, with the assistance of tal-

76. The interdependence of law and the social sciences was diagrammed in an interesting way in Updegraff, *The Social Sciences and the Law Curriculum*, 25 ILL. L. REV. 743, 745 (1931). The social sciences, however, ought not to be the only disciplines with which the law school must interact today. Caldwell, *The Intersections of Medicine and Law: Bases for Future Collaboration*, 31 OHIO ST. L.J. 224 (1970).

77. Others share this view. See, e.g., Green, *supra* note 60, at 6.

ented translators, the ability to communicate with experts in other fields. This does not necessarily require law teachers to acquire an advanced degree in another discipline, although some training in social science methodology might help. Specialization in another field might inhibit the legal researcher who may discover that he needs to draw on research from many other disciplines.

Conversely, university law schools should also provide legal education for the specialized needs of graduate students and faculty in other fields.⁷⁸ Students may be sadly ignorant of the working of their own legal system and the laws which affect and are affected by their own research. Frequently, their research findings can be given effect only through the legal system. Current highway accident research, for example, could lead to substantial improvement of driver-licensing systems, and to highway and automobile safety systems. Providing researchers with understanding of the legal processes through which their research findings can be implemented could help to maximize the utility of such research. Conversely, understanding of the legal constraints—such as due process requirements—may prevent unnecessary frustration and ward off proposals inimical to basic rights.

4. *Legal Education for Educators and Journalists*

Education about the nature and principles of the legal system for would-be teachers and journalists has been largely inadequate. Schools of education occasionally offered courses in school law and schools of journalism usually provided an exposure to the law of defamation.⁷⁹ Courses and programs (such as the Nieman Fellowship at Harvard) designed to portray the significant premises of our legal system—the adversary system, the common law method, the organization and function of courts—have been rare. Consequently, most teachers cannot enlighten their students about the legal system. Journalists are often incapable of reporting intelligently about significant occurrences in the courts or about problems of the judicial process. The result, of course, is that understanding of the law and the need for reform of the legal process often remains unknown to the general population. Thus, generations of Americans have been deprived of the ability to appraise their own legal system, its significant decisions, the judges and lawyers who run it, and its effects on the population exposed to it. This ignorance creates unnecessary frustration, while leaving demagogues free to play

78. In the fall of 1970 the author conducted a one quarter, three-hour interdisciplinary seminar in accident law. Law students and graduate students in industrial engineering and other disciplines were required to work together on joint research projects. The content of research papers and a student survey taken at the end of the seminar indicated that the students were beginning to communicate effectively among themselves about the details of each other's disciplines.

79. See Elson, *General Education in Law for Non-Lawyers*, in *LAW IN A CHANGING AMERICA* 183, 186-89 (G. Hazard ed. 1968).

on fears and frustrations and to blame the system's defects on the wrong institutions.

These failures can best be remedied by having law schools provide fundamental education in the nature and operation of the American legal system to schools of journalism. The introduction of basic law and "how to teach law" courses into colleges of education will enable graduating teachers to utilize the new teaching materials which are rapidly coming available.⁸⁰

C. The Details of New Programs of Legal Education

Making the law school an integral part of the university through the forms of education and research just suggested will not be easy or inexpensive. Some experimental programs are bound never to start or to fail if they do begin. The cost of such failures is more than balanced by the disastrous consequences of a continuing failure to educate policy-trained and oriented lawyers and law-knowledgeable citizens. The following are some specific programs, impressionistically outlined, which might be tried.

1. Clinical Training for Law Students

Most law cases are not like medical cases. Exposing law students to hundreds of live legal problems in a legal aid clinic is just not a feasible or economical way to educate them. Complex law suits frequently outlive the period of legal education. Short and simple cases, such as uncontested divorces and some juvenile and criminal cases, do not reflect the spectrum of legal-policy problems to which law students might profitably be exposed. Most practicing lawyers do not have the time, patience or ability to act as effective clinical professors to large numbers of law students. Economic realities at most law schools do not permit the high faculty-student ratios necessary to achieve success for in-house practice clinics of the traditional type. Furthermore, most legal educators agree that nonsupervised practice experiences do not provide adequate heuristic education.

However, an educationally sound clinical program is conceivable.⁸¹

80. See, e.g., M. BASSIUNI, R. SUMMERS, & I. STARR, *JUSTICE IN URBAN AMERICA, CRIMES & JUSTICE* (1970); *LIBERTY UNDER LAW* (Tucker, Pearson & Cutler eds. 1963); R. MILLER, *COURTS AND THE LAW—AN INTRODUCTION TO OUR LEGAL SYSTEM* (1971); D. OLIVER & F. NEWMANN, *THE LAWSUIT* (1968); D. OLIVER & F. NEWMANN, *RIGHTS OF THE ACCUSED* (1968).

81. The term "clinical" is used here in a very broad sense to include not only live litigation situations but other experiences, such as field work, internships, and exposure to interdisciplinary experiences which deal with "live" societal problems and conflicts. See and compare the approaches and definitions in the statement and reports of two law schools in *COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY (CLEPR), CLINICAL LEGAL EDUCATION IN THE LAW SCHOOL CURRICULUM* (1969).

A program could provide both practical and policy training for the student in a particular area of the law.⁸² Clusters or blocks of courses would provide four components of the program for interested students as resources and faculty became available. First, every student enrolled in a cluster would take prerequisite and corequisite courses, designed to provide the necessary substantive law and policy background. Second, enrolled students would be systematically exposed to the practical techniques and methods of the area in question. The practicum might utilize parts of live cases, files of closed cases, and simulation as training devices for systematic and controlled education in the techniques of practice.⁸³ Third, each student would participate in a related internship outside the law school and the regular curriculum, in a federal, state, local governmental or public service agency, or even a lawyer's office.⁸⁴ The major purpose of the internship would be exposure to live problems. Preferably, the internship would be closely supervised by a faculty member or graduate student, and regular meetings or seminars would be held to discuss the problems and put them in context. Fourth, the student would engage in advanced course study and seminars where both the substantive law and the larger policy problems of his area would be treated. At this point education would become heavily interdisciplinary, requiring the development of materials and the use of experts from outside the law school. Students would be required to engage in goal clarification, examination of trends and relevant societal conditions, prediction of future decisions and their consequences and the framing and appraisal of alternatives.⁸⁵ Special attention might be paid to planning the implementation of favored alternatives.

In their germinal article, Professors McDougal and Lasswell stated: "It is desirable that at least brief periods of field experience should occur at different times." Lasswell & McDougal, *supra* note 36, at 291.

82. Compare Yale's divisional program, described in Freilich, *supra* note 53 with Jerome Frank's "clinical lawyer school." Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933). Frank's proposal placed more reliance upon apprenticeships and teaching by social scientists than the program proposed here. Furthermore, Frank's proposal was not explicitly tied in with the Lasswell-McDougal approach.

83. Assistance from other professionals should be sought. Client counselling, for example, might be taught with the assistance of psychiatrists and social workers. See Watson, *Professionalizing the Lawyer's Role as Counselors: Risk-Taking for Rewards*, 1969 LAW & THE SOCIAL ORDER 17.

If students in their internships deal with persons from different cultural backgrounds, sensitivity training might first be conducted by experienced experts from appropriate disciplines, under strict controls. Ways of sensitizing students to the dynamics of the counselling process are suggested in Watson, *id.*

84. These internships will move law schools a long distance from the earlier type of "legal aid" clinic, a condition which, it has been suggested, might help to make clinical experience "an important part of legal education." Stolz, *Clinical Experience in American Legal Education: Why Has It Failed?*, in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 54, 75 (UNIVERSITY OF CHICAGO LAW SCHOOL CONFERENCE SERIES No. 20) (Kitch ed. 1970).

85. The order of the four components, whether consecutive or concurrent, would depend on a number of factors which might differ for each area of study and each law school.

Clusters might deal with poverty and racism, urban decay, the accident problem, transportation, the use of force in international relations, and any area or sub-area interested faculty members might deem manageable. The number and nature of the components in any cluster would depend on the substantive problems involved and the opportunities available. Practice courses in the poverty area are obviously needed and internships could be plentiful. In some areas where opportunities for litigation are scarce, such as urban mass transportation, the practice element might be replaced by a longer internship or greater exposure to the interdisciplinary aspects of the problem.

The educational objectives of such clusters would be twofold: First, students would have the basic knowledge and the minimal skills necessary to work effectively in their chosen area of practice immediately upon graduation without close supervision or, at least, with only a short apprenticeship. Graduates who plan to work in agencies or firms providing legal services to the poor, who intend to enter practice on their own, or who intend to join a prosecutor's staff would be especially benefited. Second, the practice and policy-planning skills would add depth and breadth to the traditional thinking skills of the lawyer. The ability to unscramble complex socio-legal problems, to utilize research and insights from others disciplines, and to fashion and implement alternatives, would hopefully be transferable to any job the law graduate might foreseeably undertake.

Gradual development of such programs in existing law schools can be achieved through the cooperation of interested faculty members and by coordinating the teaching of existing seminars and courses. Initially, clinical clusters might be made available only to especially interested students. If early experiments proved successful, clusters might ultimately be required of every law student.

The number of courses and percentage of credit hours devoted to clusters might vary considerably. The ability to marshal faculty manpower and the extent training for bar examinations is deemed necessary would limit the use of clusters. In principle, the bar exam should not control legal education.⁸⁶

This multi-faceted approach is consistent with what some knowledgeable law students have indicated they want from legal education. See Cowgill, Hoerger & Ridberg, *Report of the Student Participants*, CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE, *supra* note 84, at 29, 31-32. Some leading authorities have called for the same approach:

Clinical programs must not be permitted to degenerate into a grandiose abdication of responsibility whereby the law school simply abandons the student during the third year and leaves him largely to his own devices under the guise of affording him "practical experience." It must become a joint venture in discovery for the academic community where undigested chunks of reality are subjected to the most highly disciplined form of intellectual scrutiny.

Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1030 (1970).

86. It is encouraging that Harvard Law School's clinical committee has recently

2. *Education in the Law School for Non-Law Students*

The doors of the law school must be opened to provide programs and opportunities in legal studies for advanced students from other disciplines. These might range from the auditing of a single course, which is probably now permitted in most law schools, to carefully planned programs leading to a certificate or special advanced degree.⁸⁷ Artificial barriers, such as grading standards which penalize graduate students who have not been trained to read and analyze legal materials, ought to be removed. Pass, nonpass or even explicitly separate grading standards could be tailored to the purpose for which the course is being taken. The skills of analysis, problem solving, and advocacy demanded from a law student should not measure the success of a graduate student in a course to acquire substantive understanding of the law and legal institutions.

Much can be gained by bringing graduate students from other disciplines into the law school.⁸⁸ Law students and graduate students can learn to communicate and are likely to discover that each discipline has something significant to contribute to the other. This discovery is particularly likely to emerge from the research seminars, advanced courses, and other offerings connected with the clinical programs. Contact with well-motivated graduate students with different value systems and career goals may also dispel the parochialism and enrich the education of law students.

3. *Legal Education Outside the Law School—A Department of Legal Studies*

Law teachers are already beginning to move outside the law school to teach law courses in other colleges of the university.⁸⁹ The law schools should follow and encourage this trend by assuming primary responsibility for education in the law throughout the university. However, the demands of professional legal training and the teaching in-

suggested that its own faculty should undertake the job of modernizing bar examination requirements to permit wider clinical training.

87. Special degrees might include the M.A. or Ph.D. in Legal Studies. Special certificates might be awarded, for example, to graduate students in social work, sociology or criminology, who take courses and seminars in areas such as civil procedure, constitutional law, criminal law and procedure, and social legislation. These programs will undoubtedly require new resources and special courses. Law schools, however, are currently having difficulty finding spaces for qualified students who intend to become lawyers. Therefore initial efforts to open the doors to graduate students will have to be modest and opportunities will have to be limited mainly to existing courses and seminars which are undersubscribed by law students or in which special benefits may be derived from the presence of graduate students with special expertise.

88. See note 78 *supra*.

89. See Elson, *supra* note 79, at 186-87. See also Martin, *Law for the College Undergraduate, the Past, the Present and a Proposal*, 6 AM. BUS. L.J. 459 (1968); Barkman, *supra* note 75.

terests of most law teachers impose insurmountable barriers to expansion of legal studies through existing law school structures and faculties. Therefore, a new structure, with new faculty, will be required. The best solution is the creation of a new department of legal studies within the law school.⁹⁰ The departmentalizing of law schools should not seem terribly alien. Most university law schools already consider themselves, in fact, and often in name, "colleges" of law. Most colleges, other than law schools, have several departments.

The responsibility of the legal studies department would be to develop and teach general and special courses in law and the legal system to undergraduate students throughout the university. Administration of the programs in law for graduate students suggested earlier would also be undertaken. The idea of one department in the university providing education in its discipline to students with other majors is obviously not unique or revolutionary.

The new department might be staffed with new faculty members, with members of the existing law faculty who opt to spend some of their time teaching outside the law school, and by gradually transferring qualified law teachers in other departments of the university into the legal studies department. Except for budgetary purposes, a strict separation between the faculty teaching professional law students and the members of the legal studies department should be avoided. Some faculty members should teach in both areas. Indeed, one of the objectives of a new legal studies department is to enhance the exchange of ideas and perspectives between those who see themselves primarily as trainers of lawyers and those who consider themselves mainly social studies teachers or legal experts in other disciplines.

The principle advantage of creating a legal studies department is to ensure the development of adequate programs of education in law and the legal system throughout the university. Placing the department in the law school provides maximum opportunity for exploiting the expertise already available in most law schools and avoiding duplication of administrative structures. The high standards for appointment and retention of faculty and the high teaching standards of most university law schools would likely carry over to the new department.⁹¹ Finally, locating the new department in the law school would likely provide a cadre of law teachers who, because of their involvement with students and faculty in other disciplines, could contribute substantially to

90. Cf. Martin, *supra* note 89, at 468: "I believe that the time has arrived for universities to include within their organization a full-fledged undergraduate department of law, as is done in some British and Canadian universities." Apparently Professor Martin did not consider putting such a department under the aegis of the law college. His call for a separate department makes great sense where a university does not have a law college.

91. It follows that administrators of institutions with weak law schools ought to think twice before locating the new department in the law school.

courses and clinical programs designed to train students in legal policy planning.⁹²

4. *Other Steps*

a. Broadening course content. The clinical-interdisciplinary program previously suggested may begin to solve the so-called third-year problem and will work some changes in the second-year curriculum. The general assumption, however, is that the first year of law school is satisfactory as is. As many disaffected first-year students will attest, this assumption may be a myth. Although not all or even most of the basic substantive knowledge imparted to first-year students in the traditional courses is irrelevant to the problems of society, much of the content seems irrelevant to many good law students. Explicit connection between the materials and major problems is rarely made. It is also scurrilous to assert that the skills of case analysis are useless or harmful to those who might later wish to grapple with societal problems. However, the narrow focus and the ease of case analysis, once learned, condition the law student to reject or disdain the much less neat thinking required in policy analysis.

The first year needs a deconcentration of emphasis on the judicial process and appellate decisions and a more balanced approach including attention to other decision-making agencies and processes. Furthermore, the contents and commitments of recent college graduates⁹³ might be exploited, or at least not dampened. Course materials and curriculums concerning societal problems and using nonlegal materials should enable students and faculty to engage in rational policy discussion.⁹⁴ The same suggestions are applicable to some of the regular courses in the last two years which bear heavily on societal conditions.

Arguably it is not possible to provide the basic training in lawyer skills and foundational knowledge necessary for every practitioner if a major part of every course is the analysis of policy and nonlegal issues. There are several answers to this, which will not entirely satisfy law teachers who are enamored with current legal education or, though concerned, fear a depreciation of the superior aspects of the present system.

92. Thus, for example, law teachers assigned to teach in the School of Social Work would be in a position to develop cooperation between that school and the law school with respect to clinical programs for poverty lawyers. Those law teachers might even spend some time teaching in the law school clinical program.

93. Cf. Diamant, *The Liberal Arts College and Legal Education*, 16 HARV. L.S. BULL., May, 1965, at 3.

94. See, e.g., M. FRANKLIN, *INJURIES AND REMEDIES, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* (1971). Similar ideas are not new. In 1934, for example, one commentator stated: "A course in transportation law might present a favorable field in which to familiarize the student with many of the general principles of tort law." Frey, *Some Thoughts on Law Teaching and the Social Sciences*, 82 U. PA. L. REV. 463, 470 (1934).

First, the existing curriculum obviously does not and cannot provide knowledge of all or even most of the areas and legal problems which practitioners deal with in their practices. Legal education has been heuristic, providing graduates with enough knowledge and, most importantly, with sufficient skills to enable them to educate themselves to handle the novel legal problems confronted in practice. Additional problem-solving skills to enhance that competence are needed. Furthermore, the change in approach suggested will not necessarily eliminate an excessive amount of traditional knowledge from the curriculum. If important chunks of knowledge must be excluded from regular courses, concentrated reading courses may be substituted to fill the gaps. These would also meet the demand for courses to help students pass tradition-oriented bar examinations.

Second, the elimination of the teaching of judge-made law is not advocated. Before policy alternatives can be framed for any problem area, it is absolutely necessary to provide students with an understanding of the existing system. Understanding requires large doses of case reading and traditional analysis, and inevitably, the cases will be organized along traditional lines. What must be left out is not necessarily any more significant than areas which have been dropped from law school education or made electives as other areas assumed larger importance. Teachers of advanced courses may fear that important prerequisites to their own courses will be omitted, but reasonable accommodations can and ought to be made between the faculty members concerned. Returning to my original premise which, of course, is not shared by every colleague: Society requires the training of lawyers more able than those of the past to confront and solve policy problems. Necessity must become the mother of invention. If law teachers turn their attention to these educational problems, they can be solved. Solving them may be one of the most demanding intellectual problems of the age, entirely deserving, therefore, of the careful attention of academic lawyers.

b. Improving law student motivation. The carrot and stick and the "failure and out" approaches to evaluating students interfere with the development of personal motivation⁹⁵ and professionalism. Although a law teacher may try to create an adult-adult rapport with his students, he cannot avoid being perceived as a quasi-parent who is in a position to dispense rewards and punishments which will profoundly affect the student's future. Some students, especially those who come from deprived backgrounds where failure is common, may be inhibited from perceiving themselves as self-motivated professionals or from performing effectively at all.

95. Cf. Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 475-77 (1970).

Although allowing students to take some courses on a pass-fail basis may provide some opportunities for self-motivation and intellectual curiosity, it is only a partial and insufficient answer. A better approach is suggested by the example of European universities: allow students to remain enrolled in law school for a reasonable maximum number of years, say six, until they pass examinations in required courses and meet graduation requirements by taking a required number of electives. Failure or falling below a minimum grade point average would not result in dismissal. Instead, the student could audit or enroll in the courses again and take the examinations over in later years. Alternately, examinations similar to the bar examinations, covering a series of subjects, might be given regularly once or twice a year. Students would be required to pass a certain number of questions before graduating. To ensure that clinical programs are not ignored, a minimum of three years in residence might be required. Students desiring to leave the law school for a quarter, semester, or year to pursue another interest would be permitted to do so. Some students would use this opportunity to try out different work experiences in practice, in government, in public interest work or elsewhere, or to seek other educational experiences.

A program of this kind might also create opportunities for allowing promising students to enroll in law school while attending undergraduate or graduate school.⁹⁶ This would enhance education for policy making by permitting a student to take a law school course and a related course from another discipline simultaneously or successively.

c. The economics of reform. Even assuming the programs recommended here are worth considering, they may well be regarded as too costly. Funding for university programs is facing hard times, and foundation grants—some of which have financed innovative programs of legal education in the past—would be insufficient to permit more than a few schools to experiment with such programs. The primary funding agency for the programs recommended here, however, is the university itself. If the appropriate role of the university law school is as described, the educational ventures recommended must ultimately be supported by the regular university budget. The current outlook is bleak, but we must assume that the attitude of public disfavor with universities is a passing phenomenon. In the interim, there seems to be some foundation support for internships and clinical experiences.⁹⁷ Existing faculty members interested in pursuing the legal-policy route can inexpensively coordinate their offerings with other

96. Cf. Kilgour, *Legal Education: In Favour of an Undergraduate Faculty of Law*, 11 U. TORONTO L.J. 77 (1955), where the author favors "an enlarged bachelor of laws course which would operate at the undergraduate level as an alternative to the bachelor of arts course," and contends that "legal education, notwithstanding its professional status, can and ought to be a liberal education." *Id.*

97. See Pincus, *A Statement on CLEPR's Program in CLEPR*, *supra* note 81, at 1-6.

faculty members with similar interests in related areas inside and outside the law school. A favorable omen is the increased interest of the National Science Foundation in providing support for interdisciplinary research and study in the role of law as an instrument of policy and its relation to science and technology.⁹⁸

VI. THE GREENING OF THE LAW SCHOOLS?

To some readers the writer may seem a classical example of Charles Reich's *Consciousness II*.⁹⁹ The writer, too, is appalled by the unrelenting flow of advertising, appealing to desires that cannot be fulfilled, which creates greater and greater demand for products that are not needed and whose manufacture merely destroys resources, pollutes the air, and clutters the landscape. The corporate state may have a dehumanizing effect on people. The elevation of status as the "new property" has effectively removed many of our freedoms and is one of the major constraints on action to deal effectively with the world's problems. Although the writer has serious doubt whether a drug culture is consistent with it, the free and unfettered life style Reich portrays and the humanized existence he predicts are tempting. The honesty in *Consciousness III* is irresistible: honesty in human relations, where facades are dropped and people begin to communicate with one another as human beings; honesty in perception of the world around us; and especially, honesty in the recognition of the realities of our actions and their effects.¹⁰⁰

Nevertheless, the *Consciousness III* Utopia will never come without a substantial impetus from something other than the tendency of some turned-on citizens to change consciousness.¹⁰¹ This impetus, some

98. At the last AALS meeting, Joseph F. Coates of the National Science Foundation's Office of Interdisciplinary Research met with law teachers "to discuss the Foundation's interest in stimulating interdisciplinary research with respect to the relationship between the legal system and technological developments." According to Mr. Coates, the NSF is also supporting interdisciplinary teaching efforts. The Ford, Rockefeller and Russell Sage Foundations are also providing support for social science and legal research and education.

99. C. REICH, *THE GREENING OF AMERICA* (1970).

100. As Herbert Marcuse points out, since most of Reich's commandments "from the Bible to Kant and beyond have graced the sermons of the moralists," it may not be surprising that they seem appealing. Marcuse, *Charles Reich—A Negative View*, N.Y. Times, Nov. 6, 1970, at 41, col. 4.

101. In this the author agrees with one of Professor Reich's severest critics. See Fried, Book Review, 84 HARV. L. REV. 749 (1971). See also Marcuse, *supra* note 100. The difficulties of waiting for *Consciousness III* to arrive via changes of attitudes of Americans is nowhere more candidly, and depressingly, stated than in Professor Louis Jaffe's comments about Justice Douglas' *Points of Rebellion* in *Forum: Points of Rebellion*, 37 BROOKLYN L. REV. 1, 11-15 (1970). Professor Thomas Emerson's remarks which give credit to new values and new consciousness among youth, are somewhat more optimistic. *Id.* at 3-7. *The Greening of America*, however, may not be Reich's entire story. See Reich, *Toward the Humanistic Study of Law*, 74 YALE L.J. 1402 (1965).

think, must come from revolution—but revolution would push us all back into Consciousness minus I. Therefore, the only vehicle for achieving the values of Consciousness III is the “system.” Professor Reich himself applauds the actions of young lawyers who have joined with Nader, and others like them, to work for a better country.¹⁰² These young people, he must recognize, are working within the system. The barriers to reform are much too strong to be eliminated without research and planning. How, for example, would Reich deal with the economic problems of a society in which production only meets genuine needs, where demand is curtailed, and where all people are working only at life-fulfilling jobs or not working at all? Moreover, the trend toward Consciousness III is not moving at equal pace throughout the world. Consciousness I’s and II’s in other countries might not adopt his live and let live attitude.

Perhaps Reich has already suggested his answers.¹⁰³ Nevertheless the policy planning route is needed. The American law school is the logical place to begin to educate for planning and policy-thinking.

The role of the university law school must be expanded to include education for appraising law and legal institutions, for policy planning, and for the extension of legal education outside the law school through the creation of a new law school department. The implementation of these recommendations in existing law schools will not be easy. Law teachers who have based their entire careers on a teaching methodology which they consider eminently superior to all others, and who believe that the training of legal minds for traditional law practice is a sufficiently worthy objective of a law school in our kind of society, cannot be expected to accept a major new direction. The specter of diluting the strong aspects of current legal education and failing to achieve success in a new direction is indeed frightening. We may not have the skill or the know-how to examine present and future human problems and to train young minds to deal with them effectively. Certainly the social sciences, which have tried to understand human behavior and motivation, have not proved an unqualified success. Nothing in the laws of evolution says the human species has to survive.

On the other hand, there is every reason to begin the experiment. The third year of law school is, in many instances, a disaster area.¹⁰⁴

102. Nader himself seems to approve of Reich’s goals for legal education. See Nader, *Law Schools and Law Firms*, 54 MINN. L. REV. 493, 500 (1970).

103. Reich’s earlier call for a more “humanistic study of law” which, if given a liberal interpretation, is not incompatible with what has been suggested here, provides a vehicle whereby these questions might be studied in law schools more vigorously than in the past. Reich, *supra* note 101.

104. It is not only the opinion of most students who have been consulted, but also of many eminent faculty representatives who have criticized traditional law school offerings (e.g. Professors Walter Gelhorn and Abraham Goldstein), that in terms of imparting the arts and skills of a lawyer the third year of law school is

Knowledgeable educators have already called for reducing the law school experience to two years. If we academic lawyers do not devise some new approaches, legislators and university administrators may perform the excision without consulting us. Bar associations, lawyers, and judges have been urging more practical education for lawyers.¹⁰⁵ Some phases of the broadened clinical program recommended will satisfy that demand. Further, the change of the law degree from the LL.B. to the J.D., regarded by many law teachers as the height of silliness and status-seeking, may be an opportunity to turn at least a part of the law school experience into genuine graduate education worthy of university status.¹⁰⁶

Finally, for some there is no other course than to begin to provide legal education for policymaking. Drug abuse; environmental pollution; overpopulation; poverty and hunger; decaying cities; carnage on the highways; interminable and unjust war; race and class hatreds motivated by seething discontent; recession and unemployment coupled with inflation; unsafe streets; and perpetual threat of nuclear holocaust do not exhaust the list of indignities which confront us. Man may not be able to live in peace or with peace of mind, nor long retain the liberties provided by our cherished institutions—even in a country which provides so many benefits in affluence and human dignity to so many people—in the face of such enormous and omnipresent threats to his tranquility and his existence. The irony is that we are living in an age when, for the first time in the history of man, scientific knowledge and technology have the potential to create a world free from poverty, disease and hunger. In a sense, the country—and mankind—is straddling the fence, waiting to be pushed either into total destruction or into total realization of Utopian dreams of dignity for all.

There is practically no choice but to try to provide lawyers, who, after all, run the "system," with the training, the knowledge and the skill to help them to be more effective "as conceptual architects to design imaginative adaptations to head [trouble] off."¹⁰⁷ Thus might the effective brain-weight to body-weight ratio be increased.

largely an unnecessary repetition of exercises already covered in the first and second years.

ANNUAL REPORT, NEW YORK UNIVERSITY SCHOOL OF LAW, CURRICULUM COMMITTEE (1969), in CLEPR, *supra* note 81, at 44. See also Speidel, *A Matter of Mission*, 54 VA. L. REV. 606 (1968).

105. See, e.g., remarks of Chief Justice Burger before the American Bar Association, *State of the Federal Judiciary*, 91 S. Ct. # 3, at yellow page 3 (Dec. 1, 1970). Harum, *Internship Reexamined: A "Do" Program in Law School*, 46 A.B.A.J. 713 (1960).

106. Professor Reich has noted that "[i]n many ways the LL.B. program is undergraduate, not graduate education." Reich, *supra* note 101, at 1403.

107. Manning, *Introduction: New Tasks for Lawyers*, in LAW IN A CHANGING AMERICA 11 (G. Hazard ed. 1968).