

Problems in American Legal Education and Practice

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Legal Education in the United States

I was interested and also a little amused to see, in the Proposal for this meeting, that there is concern in Korean Legal Circles about the enormous increase in candidates who are passing the bar examination. I read that form any years less than 100 candidates passed the National Bar Examination each year in Korea, and that almost all of these obtained beginning jobs as judges or public prosecutors. But it is said that 300 candidates will pass the bar examination in 1981, and many of these will not be able to find jobs in the public sector. In the United States approximately 42,000 new lawyers joined the bar in 1980. The population in the United States is about 6 times that of South Korea, so a comparable figure for Korea would be 7,000 new attorneys per year. So I envy the people of Korea that they have so few lawyers to worry about.

I do not point to these statistics with any pride in my own country, or in my own state of California where the population explosion in lawyers has been even greater. If the economy and government of the United States ever collapses, I am sure that historians will give a good share of the blame to our excessive number of attorneys and the constant multiplication of new laws and regulations. Our system feeds on itself. We have so many conflicting legal rights and duties that we need an enormous number of lawyers to litigate the various claims and advise clients how to stay out of trouble. At the same time, more lawyers make more business for lawyers. It is a saying in my country that

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one lawyer in a town starves but two lawyers in the same town prosper. Probably no nation in human history has ever devoted so great a proportion of its wealth and talent to the legal profession.

I hope you are able to stop the growth of the legal profession in Korea before it reaches the epidemic proportions to which we are accustomed in the United States. But the purpose of this Conference is not to discuss how to limit the size of the legal profession, but how to give the best possible education to future lawyers. As the legal profession inevitably increases in importance, although hopefully within limits, it is necessary to give thought to the kinds of professional training that new lawyers ought to have. Possibly the American model of legal education may be of significance to you, both for its strong points and its shortcomings. To that end I am first going to give a brief description of American legal education, highlighting those aspects which I think will be most interesting to you, and then discuss two problems which are much under discussion in the United States. First, there is the relationship between the law schools and the Bar, and the degree to which the schools are failing to give adequate practical training. Second, there is a controversy within the law schools themselves over teaching methods and curriculum, and efforts that are being made to make legal education more successful from an academic and intellectual point of view.

Let me caution you at the beginning that in describing American legal education I am describing only what we consider to be the better part of it, which means the law schools that are part of a major public or private university. There are a great many law schools in the United States that are not university-connected and that aim only to prepare students to pass the bar examination and practice law. Some of these schools specialize in evening courses for persons employed full-time during the day, and they rely mainly on practicing lawyers to teach on a part-time basis. Many successful lawyers and judges have come from these schools, and their contribution to the profession should not be slighted. I am sure, however, that foreign observers would be much more interested in

the university-related schools which have academic and intellectual as well as professional training dimensions to their programs, and which now produce very nearly all the leaders of the profession.

Description of American Legal Education

The first thing to note about American law schools is that they are graduate schools; that is, students come to them at a minimum age of about 22 years after having completed four years of college education and having received the Bachelor of Arts or Science degree. This is in marked contrast to the general pattern in Europe and (I am told) Korea, where the basic professional degree in law is an undergraduate program. The advantages of this have been thought to be two-fold. First, students come to law with relatively mature minds and with a background in liberal arts or some other field of study which is supposed to broaden the mind. It is thought that lawyers should be educated in more than just the law. Second, when they do study law they supposedly study it full time, without distractions. Law students (particularly in the first-year) until recently tend to keep apart from other university students and devote much of their waking hours to studying or talking about law. Law became not just a course of study but a way of life. As I shall explain later, this pattern has changed due to the growth of interdisciplinary programs and part-time employment.

It is perhaps odd that the law schools do not require or even recommend any particular course of study during the undergraduate years. This means that the law professor cannot assume any common background of knowledge or any particular degree of preparation on the part of his student. In a given class on Property, say, there may be some students who have advanced degrees in Economics and others who do not have the simplest understanding of how a market works. On any given topic that comes up in a large law school class there will always be some students who have learned a great deal about it before coming to law school, but there will be others who are completely ignorant of

it. Medical schools in the United States, which are also purely graduate schools, at least require all student to have had the basic science courses during their undergraduate years, and assume knowledge of this material. Law schools do not regard any particular body of knowledge as necessary preparation, and admit prospective students from a wide variety of undergraduate courses of study.

Lack of a required program of preparatory studies is one factor that makes law school unusual among graduate programs in America. Another factor is that real education is mass education in large classes rather than the intimate faculty-student relationship more common to graduate study. Law school classes tend to have 70 to 100 students or more and students who have been accustomed to smaller and more informal classes as advanced undergraduates often find it difficult to adjust. Many of them find the experience of sitting in a large class (and especially speaking up in it) intimidating and uncomfortable. Yet the large law school class seems to work well as a device for teaching student how to think about legal problems. I have taught the same subjects in both large (up to 200 students) classes and small (20 to 30 students) classes. The small class has some advantages, especially allowing students to ask questions or make comments more frequently, but I am convinced that students learn every bit as much in the larger class. The major disadvantage of a large class for the professor is the large number of examinations to be graded: we have no teaching assistants for this purpose.

The first year of study in an American law school is the most important and it is entirely different from the second and third years. Traditionally the entire first year curriculum was required, although many schools now permit a substantial number of electives, particularly in the second half of the year. Students are required to take the basic "common-law" courses, such as Torts, Contracts, Property, Crimes, and Civil Procedure. Sometimes Constitutional Law is an additional requirement or is substituted for one of the common-law courses. Whatever the precise sequence of courses, the real subject of the first-

year curriculum is not so much the substance of the law as the skill of legal analysis. Students gradually learn to think as lawyers do. They learn to understand the report of a case, to pick out the relevant facts from the irrelevant, and to follow a chain of reasoning to its logical conclusion. The process is mysterious, and many students suffer acute anxiety worrying about what it is they are supposed to be learning, but somehow the job gets done. By the end of the year students are comfortable with legal materials and terminology, and have usually advanced considerably in their ability to make a legal argument for either side of a proposition.

The first year also aims to teach the basic skills of legal writing and research. There is typically a separate program, taught by young teaching assistants, in which students write short research papers and practice making arguments to an Appellate Court. Although the legal writing program is usually a small part of the academic curriculum, and given proportionally little academic credit, students tend to take it very seriously because it seems so much more like professional work than sitting in a classroom.

Another feature of life in the first year of an American law school is that it is extremely competitive. Tension builds near the final examination period because the grades which students receive on these exams are very important to potential employers. The private law firms that offer the most attractive and remunerative jobs interview students while they are still in law school and attempt to recruit them by offering them jobs during the summer vacations. This interviewing and recruitment process, which was formerly confined to the third year, has now spilled into the second year and even the first year, so that students are focusing their attention on job opportunities and prospects almost from the very beginning of their legal education. This has become a major distraction from the academic work.

Things settle down a great deal for the law student after his or her (about one-third of law students are female) first year. By that time the student feels familiar with legal concepts and has taken a set of examinations. There is less

concern about grades because the student usually expects to perform in the future about as he has performed in the past. There is continuing anxiety about obtaining a job or the best possible job, but much less worry about the classes. All or nearly all of the classes are now elective, although the student feels some compulsion to take those subjects which are obviously necessary for practice or which are included on the bar examination. Classes do not usually take up the student's full time, and so a great deal of energy goes into other activities related to professional development. One of the most remarkable features of American law schools is the large variety of student-edited law journals. Many students devote an enormous amount of time writing for publication or editing the writing of others. There are also competitions in Appellate Court argument or even in Trial Advocacy or Counseling. In major urban centers the greatest activity of all is law practice. Many students get jobs with law firms, and work part-time assisting qualified lawyers in legal research and writing. Some law school even permit students to receive academic credit for a semester or so of law practice at an approved law firm or government office. We have a number of students at the University of California, for example, who work full-time for a judge for a semester writing memoranda and legal opinions. Essentially, this type of program substitutes apprenticeship training for a part of the academic program.

In summary, law school in the United States consists mainly of a year of concentrated introduction to the study of law in largely required basic courses, and two years of elective courses with perhaps some time off for practical training. Many law schools actually run legal clinics themselves and supervise students in legal apprenticeship for practice. Others do relatively little of this and leave the job to outside law offices that use student assistants and compensate them with money or academic credit or both. In no case is it assumed that students graduate from law school genuinely prepared to practice law without supervision. Law schools at most give an introduction to techniques of advocacy, client counseling, and the like. What they aim to teach is mainly

legal reasoning and research, the subjects that are most susceptible to classroom teaching. Students learn to practice law through apprenticeship while in law school but much more so in their first jobs after graduation. A few graduates actually set themselves up in independent law practice right after law school, but most take jobs with government offices or more experienced attorneys in order to learn from experience.

Finally, I should say a word about the bar examination. This is a matter of state regulation in the United States, and each of the 50 states has its own approach. In some states the bar examination is formidable hurdle, whereas in others it is a relatively easy formality. One rather ironic fact is that the better the law school one goes to the less likely one is to be prepared to pass the bar examination. It is the lesser schools which concentrate on coaching students to pass the examination, while the more prestigious university schools aim at teaching intellectual skills and ideas which have very little to do with the knowledge of basic law tested on the bar examination. For this reason, law graduates usually enroll in a "bar review" course. These courses are commercial enterprises which offer the kind of concentrated coaching in bar exam knowledge and techniques which the law schools largely do not provide. Some professors make a substantial outside income teaching in these courses, and professors of other disciplines sometimes think it odd that law professors should make so much money teaching subjects which they failed to teach in law school. It is sometimes said that the best law schools aim to teach their students how to be Justices of the Supreme Court, not how to pass a basic test on the details of law.

Two Problems of American Legal Education

In this second part of my paper I would like to tell you about two important problems of legal education in America. First, there has been controversy over whether the law schools provide adequate training in all of the practical skills

needed in the practice of law, especially skills relating to trial advocacy. Second, there are questions relating to the relationship of the law schools to other faculties of the universities, and the academic and intellectual content of legal education. Putting the two problem areas together, we might say that some critics have charged the law schools with being insufficiently practical in orientation, and others have accused them of being too narrowly professional and thus insufficiently academic and intellectual. Obviously, these criticisms go in opposite directions.

Concerns about Professional Training

As I have said, the better law schools are connected to universities, and they rely on faculties composed of full-time educators who in most cases make teaching a lifetime career. Especially at the most prestigious schools, the professors tend to be among the brightest law school graduates. As a rule, they could have looked forward to successful careers in practice with very high incomes, but they preferred the academic life to a career of serving the interests of clients. Inevitably, the process of self-selection produces professors who are far more intellectual in their orientation than practicing lawyers, and who tend to teach what is of most interest to themselves rather than what is most immediately useful in law practice. Much of the education that law students get is more in the nature of training to be a Supreme Court Justice (or at least a law clerk to a Supreme Court Justice) than a routine practitioner.

From the professorial point of view, this is just the education that young lawyers should be receiving. The humdrum details of law practice can best be learned by apprenticeship, but a university education should train the mind to think broadly and creatively. I think few would dispute that this point of view has merit, but some have questioned whether in three years of education the law schools cannot do more to teach practical skills along with the more intellectual qualities. Chief Justice Warren Burger of the United States Supreme Court, for example, made a widely-reported speech in which he deplored the incompetence with which many lawyers conduct trials, and called on the law

schools to do something about upgrading the skills of younger persons in the bar. The American Bar Association and various state bar associations have debated and on occasion adopted accrediting requirements designed to force the law schools to offer courses thought to be of practical value. There has been a special concern about Legal Ethics in the light of the revelations of misconduct by lawyers working for President Richard Nixon in the notorious Watergate scandal. The American Bar Association has adopted a regulation requiring schools approved by it to offer required instruction in Legal Ethics, apparently in the hope that such courses will contribute to better behavior by lawyers.

The law schools have not been entirely reluctant to provide skills training. Some law schools maintain substantial legal clinics which aim to combine training for law students with providing needed legal services to poor and low income people. Trial practice courses, involving simulated trials and hearings with videotape assistance so that the student can see his own performance later are common. Competitions in mock appellate arguments—called Moot Court contests—have always been common. As a rule, however, these activities are at the margin rather than at the center of legal education, and most professors believe that this is as it should be. Faculty who specialize in supervising such programs usually have a kind of inferior status in the law schools, and often are appointed for limited periods of time rather than with life tenure. There is considerable difficulty in American universities in making appointments to the faculty of persons who are not distinguished in scholarly publication. The theory is that university professors are supposed to be not just teachers but scholars, and this theory creates problems for the trial practice teacher, who is less likely to have scholarly interests and qualities.

Some leading judges and practitioners have urged the schools not to give in to pressures to make their training more immediately practical. The major law firms themselves, when hiring new attorneys, do not seem to be particularly concerned about whether a young lawyer has had a trial practice course or

other practical skills training. They are much more interested in hiring a bright young person with good habits of thought and a willingness to work hard than they are in any particular type of practical training. For one thing, they know very well that there is a great difference between applying practical skills in practice and learning them in a school. They feel that students can learn practical skills better on the job than in the classroom. This is a fact of life which is observed in every profession. Soldiers in combat, for example, report how they had to learn to “throw away the book” and ignore what they had been taught in training exercises.

In the American context, practical training in law school is important not only because of whatever value it may have in preparing law students for practice, but also because it responds to a need many students feel to get out into the “real world” away from the university. Many law students have intensely practical objectives for their education, and they do not necessarily share the intellectual interests of their professors. They are eager to learn what they need to know to pass the bar examination and to practice law, but few of them love the study of law for its own sake. Inevitably the schools must bow to some extent to this feeling and they do. I have already mentioned that in my school students are permitted to take a full semester working in a law office or for a judge for academic credit. In addition to this formally recognized “clinical semester” many students have part-time jobs throughout the school year and full-time jobs during the summer vacation working for law offices. Twenty years ago such jobs were virtually unobtainable except for exceptionally brilliant students or those with family connections, but today the law firms hire students in great quantity. Thus, for some students, we in effect are going back to the much older practice where apprenticeship in a law office was the basic education for legal practice, with academic courses taken in the student’s spare time. Many students can afford to neglect their studies, especially in the second and third years, because our grading standards have grown more permissive as our students have become brighter. It used to

be that the brightest students went into academic or scientific careers, and financial barriers kept many of them out of higher education altogether. Today the brightest students tend to flock to the professional schools, especially law, medicine and business, and they are able to achieve at least passing grades without undue difficulty. Thus they can afford to devote the bulk of their time to legal employment or to writing for the student law journals.

Concerns About the Academic Quality of Legal Education

If outside critics of the schools from the legal profession have tended to emphasize the need for more training and practical skills, there has been much questioning from the universities and the law faculties themselves about whether legal education is sufficiently intellectual and broad-ranging. In addition to learning how to conduct a trial or draft a contract, should students be learning economics, psychology and philosophy? Is legal education too rigidly confined to reading cases and statutes, and should lawyers be more aware of the broad intellectual currents in areas related to law? Above all, does the fact that students have so much time for outside work indicate that we do not demand enough of them?

The law professors themselves have increasingly opted for interdisciplinary work. It is now quite common to find a professor of Economics on a law school faculty, and Political Scientists, Philosophers, and Psychologists may also hold regular faculty positions at law schools. My own law school, the University of California at Berkeley, has a special program with about twelve faculty positions for scholars in fields such as Sociology, Political Science, Economics, History and Philosophy. We offer not only the usual law degrees, but also the degree of Doctor of Philosophy, the essential scholarly degree in the Arts and Sciences. We see ourselves as engaged not just in professional training, but also in producing scholars in every area of intellectual activity that is related to law.

A young colleague of mine at Berkeley has circulated a paper to our faculty suggesting that too much of our curriculum occupies a "middle ground"

between practical training and theory. The students in each subject matter learn how to read cases and statutes, how to reason about them, and how to frame legal arguments and policy arguments. Possibly more of their training ought to be devoted to practical skills courses at one extreme, and at the other extreme, courses relating legal problems to advanced thought in areas such as philosophy and economics. Our school expects to be experimenting some along these lines. One difficulty is that law students have such a multiplicity of interests and career plans. For many years legal education in America has been not just training for the practice of law itself, but an education which is seen as useful by person intending to pursue a variety of careers. For example, most legislators are lawyers in both the United States Congress and the State Legislatures, and a very high percentage of top government administrative positions are held by lawyers. Legal education is seen as something that sharpens the mind, and this training is useful for a wide variety of occupations. Many persons go through law school who have no great interest in the practice of law as such. This is one reason we are relatively unconcerned about the very large number of law graduates each year.

One type of education is not suitable for every law student, and yet leaving every student to choose his own courses from a broad curriculum creates the danger that the educational experience will be fragmented and chaotic. Even if we knew exactly how to plan the best curriculum, it would be difficult to coerce either faculty members or students into following a single plan. Students expect to have a free choice among courses, and professors with life tenure are notoriously difficult to coerce. For this reason, planned changes in the curriculum sometimes change the titles and the formalities rather than the nature of the education itself.

Of course, the United States is a huge and very diversified country and its fifty state bar associations and hundreds of law schools are to a great extent autonomous. I am sure that your own country is in a much better position to

change the structure of legal education. Certainly it is far easier to change the course of a system which is producing a few hundred new lawyers every year than one which is producing tens of thousands.

I am very glad to see that you are devoting so much attention to the future of legal education in Korea at this critical point in the development of the profession. As a foreign guest with little knowledge of the Korean situation, I offer no concrete proposals or suggestions. I hope only that you will learn from what is best in the American system and that our failures as well as our successes will be instructive for you.