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LEGAL EDUCATION: LAW, LAWYERS, AND ETHICS

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ONE might expect me to talk about Watergate, since the subject is lawyers and ethics, but Chief Justice Warren covered that very well today. He laid it on the Watergate line, and I accept everything he said.

I wish to begin more remotely with a theological illusion from an earlier and more placid time. My story is about a gentleman who asked the Episcopal Bishop of Virginia if a non-Episcopalian could be admitted to Heaven. The Bishop modestly replied that he could not be certain. Then, on further reflection, he said he was sure of one thing at least. If the non-Episcopalian in question were truly a gentleman, he would not seek entrance to Heaven.

Today you will see that I am no gentleman. Not because I seek to crash the gates of Heaven, prematurely or otherwise, but because I have some iconoclastic, even some unpleasant, things to say about legal education, particularly about the inadequate attention the law schools have given legal ethics and professional responsibility.

Today we are here to celebrate the happy occasion of the 75th anniversary of a great university and I am glad to discover, as I checked the history, that the law school was actually in existence one year before the university. In short, first things first. Seventy-five years is not a very long time in the story of higher education, but it is a very long time in the history of legal education. Nearly all the important things in legal education and nearly all the effective training has occurred within the last seventy-five years, and in fact, even a rather shorter period than that.

Three quarters of a century ago, law school training was just emerging from a period in which legal education had been con-

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sidered of no great importance. You may recall that during the Jacksonian period, before the Civil War, the prevailing notion was that every person could be a lawyer. There were no educational requirements for admission to the bar, no licensing procedures. Some of you who are now in law school may think that was a better day; but I cannot agree. After the Civil War, during the excesses of the reconstruction period and the impatience of the industrial period, little attention was given to legal education or to the ethical niceties of the practice of law.

Nearly 100 years ago, the American Bar Association was established. At its very first meeting, in 1878, it created a committee on legal education, but nothing much happened until 1893 when that committee became the Section of Legal Education and Admissions to the Bar, the title which persists even to this day. Parenthetically, that first meeting was addressed by Professor Samuel Williston, which I find an interesting historical footnote.

Of the 72 law schools in 1894, just a few years before this law school was established, few had admission requirements of any kind beyond a high school degree. Not until several years later did Harvard become the first school to require a degree from an undergraduate college, but it was generations before the rest of legal education grew up to a requirement of substantial pre-law school education as a condition for admission. Legal education was not a very big thing in the late nineteenth-century. In 1889, for instance, there were only about 4,500 law students in all the law schools in the country. By 1899, shortly after this law school opened its doors, the number had nearly tripled to 12,408. The Association of American Law Schools, of which most law schools are members now, began in 1900 with 35 law schools. DePaul joined that organization in 1924. At the beginning the requirement for admission to law schools, as specified by the AALS, was simply high school graduation. The requirement of a two-year law school program was increased to three years in 1906. There was also a specification that there must be an adequate library, although I am confident that what then was described as "adequate" would not be acceptable in any institution today.

Efforts to inquire into the nature of legal education and what could be done to make it more effective began with a grant by

the Carnegie Foundation for the Advancement of Training in 1913. From that beginning came three studies in the next ten years that catalogued the nature of legal education and pointed out some of the major deficiencies. The effort paralleled the Flexner Report that advanced medical education at about the same time. But the medical educators imposed rigorous standards and forced out of business the inferior medical schools. The law schools did not do the same, and so inferior legal education continued for decades.

In 1920, for the first time, there began to be some interest in high quality education when Elihu Root became chairman of the ABA Section and began to advocate higher standards for admission to law school and for training in legal education. He called for two years of pre-law school training at the college level, a three-year law school program, an adequate library, and at least some full-time law teachers, which most law schools did not have at that time. There was also a good deal of elevated talk, as there has been ever since, about the need to serve the public interest. But the reality is that not much was done by legal education to serve the public interest. We have testimony from Jerome Carlin, in books published in 1962[1] and 1966,[2] that many of those who graduated in the 1920's and 1930's did not have a very high sense of ethical standards. But the number of students during this whole period, and the number of those who went on to be admitted to the bar, was large. Interestingly enough, during the whole period of the 1920's through the 1950's, there were 30,000-45,000 students registered each year, except, of course, for the few years during World War II when there were almost none.

The general public attitude has never been very enthusiastic about lawyers. You may recall the pejorative references to lawyers that were uttered by characters out of Shakespeare and Dickens. And I particularly like the line attributed to Samuel Johnson, who was himself a lawyer. He said: "I do not wish to speak ill of any man behind his back, but I do believe he is a lawyer." It was not until the nineteenth century that anyone outstanding had much good to say about lawyers in this country, and that was by

1. J. CARLIN, LAWYERS ON THEIR OWN (1962).
2. J. CARLIN, LAWYERS' ETHICS (1966).

visitors from abroad: from France, Alexis DeTocqueville, and from England, Lord Bryce. Perhaps that is why lawyers in the United States are so fond of quoting those two and so seldom remember the others.

Public opinion polls have shown that the credibility of lawyers has not improved much, even in recent years. In a recent poll, lawyers were well down on the public's credibility rating, in ninth place, just above law enforcement officers, TV news reporters and plumbers. The word "plumbers" may not have had the same significance at the time the poll was taken as it might today, but sometimes today I fear the public confuses lawyers and plumbers as to the nature of their professional activities.

Despite the decline in the credibility of the profession, the rush to the bar is very significant. As you are all well aware, the demand for legal education has increased dramatically in the last several years and shows no immediate sign of decline. None of us fully understands the reasons that each year produce more than 100,000 applications for the Law School Admission Test; and nearly that many are actual applicants for fewer than 40,000 positions in American Bar Association-approved schools. There are each year now nearly three times as many students in accredited law schools in the United States as there were just twenty years ago, and there is no indication that the number will decline. By the middle of this decade, two years from now, there will be at least 30,000 law degrees given each year; and in almost all cases, those graduated will be admitted to the bar. That is roughly twice as many as the American Bar Association Task Force on Professional Utilization has said can find jobs of a traditional nature. We are about to enter a period of very real opportunities and very real dangers. Let me outline them briefly.

First, the opportunities. Legal education now has the best students it has ever had. It is not myth but fact that most of us who are now teaching in law schools could not be admitted to the law schools at which we teach if we had to face the present competition. We have, accordingly, a chance to move toward perfection, or at least great improvement, in the quality of legal education. We should raise the professional standards of competence and of

responsibility. We should serve the public better than we ever have in the past through commitment to our professional ideals.

But there are dangers as well. If, in fact, we cannot place into legal positions the large number of lawyers who are going to be graduating in the next decade or two, or if the pay is not adequate, as was often the situation in the 1920's and 1930's, we may expect almost inevitably, however unfortunately, a decline in the ethical standards of those who practice and scramble for the dollar in the practice and profession of law. We also know from surveys of law students that in general the idealism of law students declines while they are in law school. If that means that there is also a decline in their sensitivity to ethical problems, the law schools are doing a markedly bad job of the one thing with which we should be charged above all others, the inculcation of a sense of discipline and morality into the practice of law.

A recent experience at New York University disturbed me. While attending a seminar made up of students from the criminal law clinic where our students practice in the criminal courts in cooperation with the Legal Aid Society, I discovered that none of them had seen the Code of Professional Responsibility. The instructor in the seminar, who had prepared a kind of "counter" code of professional responsibility, asked the students to point out its errors; but he found that many of the students thought that it was not necessarily bad in the criminal courts to do almost anything short of cheating and stealing on behalf of a client, placing responsibility to the client above all. Although the matter came out better than I had feared as I saw the experiment in progress, thanks to the skill of the instructor, it illustrates what I believe is a common failure to grasp the nettle of dealing with problems of professional responsibility and ethics within law schools.

What has been the response of legal education to these challenges? In the main, disappointing. In the 1920's and the 1930's the emphasis was on minimal competence, and I emphasize minimal. In most law schools, or at least in many law schools and for many practitioners, the aim was simply to pass the bar and get into practice. Since then, there has been much talk in more elevated terms. We have had conference after conference on professional responsibility; we have talked about the pervasive method of teaching

legal ethics in all courses; and we have talked about how to teach professional responsibility in legal profession courses. But I suspect that we have not succeeded very well in most American law schools. The Code of Professional Responsibility, as adopted by the American Bar Association, and by most states since 1969, is a great improvement over the Canons of Legal Ethics that preceded it. It deals more realistically with many of the problems. But I think it, too, is disappointing in the narrowness of its reach to the real issues that should be confronting legal education and lawyers in their professional life. Thus, we continue to accept the fact of a fragmented bar, in which each state has its own bar examination and, to some extent, its own standards of legal education. In New York, for example, the Court of Appeals, our highest state court, has promulgated rules which are different in some respects from those established by the American Bar Association and the Association of American Law Schools. The still-prevailing notion is that each state may set its own standards for admission to the bar, standards of competence and of professional responsibility. The matter is not easily resolved, but the fact is that little real attention has been given to the issue.

A second problem, as I phrase it rather too broadly, is that a lawyer's competence must be concealed, arising out of the perfectly sound principle that lawyers should not advertise and should not solicit business. In deference to this principle, the organized bar is only beginning to confront the question of specialized training and certification of competence, generally and in specialized areas.

The Code of Professional Responsibility does not address the central question of how the profession is going to go about the business of assuring adequate legal representation to all persons in the United States. The rich have always been able to take care of themselves, and the law schools mostly train to provide service for the well-to-do. We now recognize our responsibility at the other end of the scale and do a fair-to-middling job of providing adequate legal services for the poor. But the great middle class, which embraces most of us, about 70 percent of the American population, is not provided adequate legal representation. It is here that I think the bar must give attention to providing new ways to meet that problem, which may coincidentally provide employment for many of the law-

yers who will emerge from the law schools in the near future. The need is for prepaid legal services, other kinds of group legal services plans, and other means of providing vastly improved legal services to those who need them throughout the country.

Another concern relates to civility in the courtroom. We have all been concerned about problems of disorder in the courtroom. A committee of the Association of the Bar of the City of New York has just completed a comprehensive study of that, now published under the title *Disorder in the Courtroom.* As a member of that committee, I discovered, somewhat to my surprise, that the episodes of disorder are not very numerous. While the problems of disorder are not quantitatively significant, they do have an important bearing on public confidence in the judicial system and thus the problem with which we are all faced: What is the best way to deal with the problem of lack of confidence in the system? One law professor quoted in the volume says this: "The canons are as much use to a practicing attorney in the courtroom as a Valentine card would be to a surgeon in the operating room." An overstatement, I am sure, but there is just enough truth in it to remind that we have not addressed ourselves to the most important problems. Dean Albert Sacks of the Harvard Law School emphasized the difficulty of defining disorder when he appeared as a witness before the committee. He said, "If you tell me exactly how a professor should conduct his class, I'll tell you exactly how a lawyer must act in the courtroom."

Another problem has to do with character evaluation. A year and a half ago the American Bar Association, or at least a committee of the American Bar Association, proposed that law schools undertake the job of screening for character traits and determine on the basis of admission to law school who was qualified morally, ethically, and professionally to enter law school. The outcry from the law schools was so sharp that the plan was quickly abandoned, so we return to the more subjective and less certain means of dealing with the question of admission to law school and admission to the bar, including the advice of character committees.

What then are the real issues? We must learn how to capitalize on the moral commitment and the public service enthusiasm of our youth, those who are still in college or high school as well as those

who are in law school. This is a great natural resource which must not be dissipated. To be sure, sometimes our youth have been misguided; witness some of the initiatives between 1968 and 1971. But it is not clear to me that fault should not be partly attributable to those of us who are their seniors for failing to respond adequately to their concern about such problems as racial justice, equal treatment for the rich and the poor, improvement in higher education, and government morality. The danger now is that we might drift back to a period in which individuals think only about their individual security and their private concerns, forgetting to reach for a higher standard for the community as a whole. We must not lose the initiative that I think is still at hand.

The issues for the profession require more careful self-examination than we have yet undertaken. Socrates said an unexamined life is not worth living. In paraphrase, I suggest that an unexamined profession is not worth practicing. We have an obligation, as I have suggested, to provide adequate—in fact, better than adequate, *good* legal services for all individuals. We should encourage plans for prepaid legal services. We must welcome specialization as a way of making the services of lawyers available wherever and whenever needed. We must figure out ways to use paraprofessional training sensibly; and we must make sure that continuing legal education does an educational job as well as providing a pleasant respite for an evening or a weekend.

We must give greater attention to the administration of justice than sometimes we have as a profession. We must be concerned about proper standards for the selection of judges. We must make sure that there is an effective administration of all the court systems, including a unified court structure and a unified court budget (which I understand has been better achieved in Illinois than almost anywhere else). We must perfect our ways for disciplining judges and lawyers who are lax or lazy or inefficient or corrupt or dishonest. And we must, above all, improve the administration of the criminal justice system.

The issues for legal education have to do with many of the same qualities because we stand at the threshold of entry into the profession. I suggest that the law schools must examine more carefully how to combine training for professional competence, which I think we do rather well, with training for professional responsibility, which

I fear we do badly. There are difficulties. It is easier to say what is wrong with the way we train for professional responsibility now than it is to say what is right. For example: Should professional responsibility be taught in a special course required of all students, or should it be done pervasively throughout the curriculum? Can professional responsibility be taught by lecture? Can a sense of ethics be conveyed in clinical programs? I believe that much can be done in clinical programs, and I welcome as a model the kind of in-house clinic that DePaul has at the present time, providing a serious effort to train students in the actual administration of the courts and administrative agencies and an avowed commitment to the issues of professional responsibility.

The faculty of New York University has voted to deal with this question by doing some of these things on an experimental basis. In addition, we have offered to sponsor jointly with the Association of American Law Schools a workshop to figure out better ways to provide training in professional responsibility. The American Bar Association now requires such training for all law students. A few years ago I am not sure we would have welcomed that requirement. We might have thought it inappropriate or too difficult, preferring not to be told what to do. Now I believe we welcome the requirement because we recognize how badly we have done. Watergate has emphasized the imperfection of our efforts.

We must have in the law schools, as in higher education generally, a broader base for the training of women and members of minority groups. The effort to attract minority students to legal education presents problems, as we know from the case of *DeFunis v. Odegaard*,[3] in which the Washington Supreme Court validated the practices of the University of Washington Law School in applying preferential admission standards for minority group members. The Supreme Court of the United States has granted review of the case, raising a question whether law schools will be allowed to continue the methods they have used in the past few years to attract to the profession the broadened racial and ethnic balance that most of us believe is so necessary.

3. 82 Wash. 2d 11, 507 P.2d 1169, *cert. granted*, 42 U.S.L.W. 3306 (U.S. Nov. 19, 1973) (No. 235), *vacated as moot*, 42 U.S.L.W. 4578 (U.S. April 23, 1974).

In conclusion, I join with Chief Justice Warren in saying: "Every lawyer has an additional civic obligation, somewhat higher than that of one not privileged to belong to our profession, and that is to further the cause of sound government." I rest upon those words of our great Chief Justice.