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## COLLAPSIBLE SPECIALISTS\*

WILLARD H. PEDRICK†

A GREAT disappointment of our time has been the failure of those who make and change the social order to modify the system so as to provide opportunity to all segments of society for growth as individuals, for participation in creative productivity, for well-being and satisfaction. Any honest assessment will conclude that our spectacular success on the scientific and material level has been marked by an equally spectacular failure to use the new means available to better the real quality of life. Now, with riots in the cities and rebellion on the campus, some of it violent and some of it intellectual, there is general agreement that our society has simply not worked hard enough at the task of developing new social and economic frameworks, and particularly has not worked hard enough at producing leaders to help in the process of essential innovation, adjustment and accommodation. In this setting of general disaffection with the way in which we have been managing our stewardship of the system handed to us by our forebears, we increasingly hear concerned voices urging that the legal profession move into the void to provide a much larger share of the men who will be trained to give, and will give, much of their lives to the task of providing better direction for society.

### GENERALISTS AND SPECIALISTS—ARE WE BOTH?

It does seem that lawyers have been eclipsed to some extent as the leadership cadre. We have been absorbed in very important work, serving the business community for the most part. So, in a real sense, we can properly claim a share of the credit for our incredibly productive economic system—and wonder why that is not enough. As we have become more expert on the intricacies of modern finance,

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business administration, taxation, governmental regulation and related fields, it has been a bit dismaying to see other callings summoned for advice on some of the large issues. In some ways, it seems that as we get better and better at more restricted assignments, we are valued less and less on matters of general importance. Scientists, engineers, economists, sociologists, city planners, even accountants, sit with the mighty in seats occupied in former times by counsel. As Lord Radcliffe put it some years back, it is as though we lawyers, to a considerable extent, have become spectators while others are "where the action is."<sup>1</sup> How often is the tax lawyer the general adviser to the corporate president? Not often, it is believed, if he is solely a tax lawyer.

Certainly we in the law school world are concerned about the profession and the dimension of its role. Our concerns were accurately reflected in a recent statement by McGeorge Bundy, president of the Ford Foundation, when he said, "As concern for social problems has grown in the private as well as the public sector of society, the concept of professional responsibility has assumed new dimensions for the legal profession." In pointing to the law schools he observed that "exposure to real problems reinforces the consciousness of the activists and develops in others a sensitivity and perspective which prepares them for careers as professional men and public policy makers."<sup>2</sup>

There is these days a great ferment in legal education. Many of our students are simply not satisfied with the prospect of working for the Wall Street firm—even in San Francisco. Of course, any rational man knows the conventional work of the profession is very important to a complex society, but there are many whose interests in the law, as students at least, are simply not limited to the conventional work of the profession.<sup>3</sup> To hold these bright and interested young men, and in recognition that they are really right about the desirable

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1. For an articulate statement of this viewpoint see RADCLIFFE, NOT IN FEATHER BED 81-82 (1968).

2. Press Release, Ford Foundation, June 12, 1968, at 1-2.

3. Any large law firm habituated to interviewing second- and third-year law students in the leading law schools can verify this from experience—in part from those interviewed and in part from those not seen. For further comments along the same line as the text, see Brennan, *The Responsibilities of the Legal Profession*, 54 A.B.A.J. 121, 123 (1968).

scope of the responsibilities of the legal profession, we in the law school world are cudgeling our brains and bringing some new, not-so-legal academic types into the act to try to make of legal education something a bit more grand in terms of its sweep and ambitions. In the process, there is not very much enthusiasm about more learning on sections of the Internal Revenue Code. In fact, to the extent there is any real interest in taxation at all, it is in terms of the sentiment expressed by the late Louis Eisenstein that "Any intelligent thinking on taxes eventually reaches the ultimate purpose of life on this planet as each of us conceives it."<sup>4</sup> It is at this time, when there is a great concern about the need for making the lawyer a man of broad vision and general capabilities—the generalist for a technological society—that the American Bar Association continues to agonize, through a duly constituted committee, over the wisdom of setting up a system for certifying specialists in the law. To say that ambivalence has characterized the study is to summarize in a phrase the story of the Association's dalliance with the topic over a fifteen-year period.<sup>5</sup>

The problem approaches a dilemma. When the great need is for generalists—for leaders who can understand, unravel and explain to the rest of society the complexities of the modern technological and regulatory era and propose new directions, do we want to turn the face of the legal profession in the direction of greater emphasis on the technical and limited specialties? When the chairman of the American Bar Association Committee on Federal Judiciary says that a lawyer who has worked largely in a narrow specialty is not qualified to be a federal judge,<sup>6</sup> we are neither surprised nor offended. We

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4. Eisenstein and others, *A Discussion of the Ideologies of Taxation*, 18 *Tax. L. Rev.* 1, 23 (1962).

5. For a short account of the difficulties the American Bar Association has encountered in dealing with the specialization-certification proposal see Bracken, *Specialization in the Law*, 53 *A.B.A.J.* 325 (1967). See also Joiner, *Specialization in the Law*, 41 *A.B.A.J.* 1105 (1955).

An American Bar Association Special Committee on Specialization, under the Chairmanship of Chesterfield Smith, presented its recommendations on the subject in a resolution which was adopted by the House of Delegates at the 1969 Midyear Meeting. The thrust of the resolution was against adoption of any national system of certification of specialists in the various branches of the law at this time. A minority report filed by Dean Charles W. Joiner put the case for national certification.

6. An informal statement made by Albert E. Jenner, Jr., on the occasion of a short report to the Conference of the Ninth Judicial Circuit, in San Francisco, California, on July 18, 1968.

agree that we don't wish to entrust the important work of governance to legal specialists.

Some of us are concerned not only about the circumstance that specialization may deprive society of leadership talents it might otherwise use to advantage, but also about what happens to the specialists as persons. Consider the "tax lawyer," if there is such a specialty.<sup>7</sup> A steady diet of the Internal Revenue Code can do things to a man—not very pleasant things either. IRC has at least something in common with LSD. Both tend to be habit-forming. They offer an escape from reality and produce in the addict illusions of pleasure and power followed by fits of depression and disorientation. Addicts get so they can't distinguish illusion from reality. Too many tax lawyers who spend all their time on taxes, and there are a few who seem completely absorbed with the high literary style of the Internal Revenue Code, wind up as bored cynics, believing neither in the system nor in the value of their work.<sup>8</sup> The narrow focus of the Internal Revenue Code for most who have tried it as an exclusive diet is simply not by itself an adequately satisfying basis for either the professional or the personal life, nor for that matter is securities legislation an appreciably richer diet. Erwin Grisworld said years ago that tax lawyers didn't have to sell their souls along with their minds.<sup>9</sup> But some have, though, I hasten to add, many have not.

But there is no escaping the fact that working in a field with some considerable frequency enables the lawyer to do the job better, more quickly and at less cost to the client. We know that the legal profession is moving rapidly along the specialization trail, with more and more of the profession practicing in partnerships, where one of

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7. On August 6, 1968, in conjunction with the Annual Meeting of the American Bar Association, a panel was convened by the Section of Taxation to discuss specialization in the legal profession. It was in connection with that panel discussion that these comments were first written out in substantially their present form. At the round table discussion, one of the propositions to which there was general agreement was that the tax field cuts across too many other substantive fields to be regarded as a specialty in the conventional sense. It will no doubt come as a shock to MARTIN MAYER, *THE LAWYERS* 404-409 (1966), that tax law is not to be regarded as a specialty. That was the view, however, of the "tax specialists" participating in the panel discussion at Philadelphia.

8. This is a highly unscientific conclusion based on personal observation.

9. Grisworld, *The Blessings of Taxation: Recent Trends in the Law of Federal Taxation*, 36 A.B.A.J. 999, at 1002 (1950).

the great inducements is the opportunity to enjoy the returns and satisfactions that come from a more efficient division of professional labor.

#### LEGAL EDUCATION AND SPECIALIZATION

What is to be done? Some of the answers are clear. Do not expect the law schools to undertake to give specialist training as a part of undergraduate law courses. What we are trying to do in the law schools at any particular time may not be entirely clear, but we do know that we are not and should not, in the basic law course, be engaged in training specialists.<sup>10</sup> What does one really get out of law school? Has anyone ever practiced the law learned in school or even worked on a problem of the sort that absorbs the law school classroom? We think that we are teaching analytical approaches, vocabulary, skepticism, advocacy, process—an understanding of and a sensitivity for a sophisticated, and occasionally mystical, system of governance. These, we believe, are “generalist skills”. There are skeptics who are not at all sure that we teach anything. Jencks and Riesman in their *Academic Revolution* opine that:

. . . the function of a professional school is not primarily to teach a narrowly defined set of skills of the kind measured by examinations, but to define a set of general criteria that recruits to the profession ought to meet, and to screen out those who do not measure up. The novice is supposed to display a certain amount of diligence and the right mixture of assertiveness and docility, to accept the basic values and assumptions of the professional subculture and to master the rudiments of the professional vocabulary. If he does this, he gets through the course of study; otherwise, he does not. Whether he actually learns the details of anatomy, court procedure, or sewer design may indeed be irrelevant, or nearly so, since, if he gains entry to the profession, he can fill in the gaps in his technical knowledge later. The primary role of the professional school may thus be socialization, not training.<sup>11</sup>

But, whatever the assessment of the basic law course, we know that we will not and should not undertake to train specialists at this stage. The law student cannot with any wisdom choose to walk a path he has only read about in books. He needs to give life and fortune a chance to work their wiles on him. Later, he is very likely indeed to become something of a specialist on something.

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10. Cf. Macaulay, *Law Schools and the World Outside Their Doors*, 54 VA. L. REV. 617, 631-636 (1968).

11. JENCKS & RIESMAN, *THE ACADEMIC REVOLUTION* 206 (1968).

Whether we should, as law schools, become deeply involved in providing specialist training on a graduate or continuing education basis is another matter. Some law schools have already moved into this field and others doubtless will. It must be recognized, however, that specialist training is quite a different thing from the generalist basic law course. Regular law teachers may be good teachers for specialist training. Whether they should spend their energies in this channel is another matter. To a considerable extent, specialist training involves the dispensing of technical information—spoonfeeding, as we call it in educational circles. Some law teachers can be the stimulating, provoking, prodding, eternally-question-asking, ideal law school teacher for the law student and also become a model attention-sustaining, technical-information-dispensing instructor for the graduate lawyer who would be a specialist. Not all law teachers can sustain both styles and switch with ease from one to the other. Specialist education necessarily relates to the practice, and whether this training is in the hands of the profession through its continuing education programs or is, to some extent, based in the law schools is probably not a matter of really great importance. The important thing to appreciate is that whether it is one place or the other physically, specialist training will be practice oriented, as it must be. I would go further and submit that much of the specialist training will be conducted by practitioners—who can indulge at last the not uncommon desire to teach and give a waiting world “practical” solutions to mankind’s nagging problems.

We assuredly shall see more specialization in the law practice—with a growing recognition that a modern law firm is really the counterpart of the medical clinic—offering a wide range of legal services to be administered by specialists. To train those specialists, we shall see an increase in formal educational programs. What then of the proposal to formalize the process with some form of certification of the competence or attainments of the asserted specialists?

#### SOME DIFFICULTIES IN CERTIFICATION

When we talk of official recognition of specialties, we would do well to keep a number of nearly self-evident truths in mind. For whose benefit will a certification program be undertaken? For the

clients? How many clients would choose to go to a particular lawyer because he was certified as a specialist on federal tax matters, on custom and excise matters, on estate and gift tax matters, on tax aspects of corporate reorganization, a specialist on collapsible corporations, a collapsible specialist so to speak?<sup>12</sup> Other fields are subject to similar division and subdivision—property, for example.

Does the Bar need, and would it really use, an official certification of specialists as the basis for making referrals? Would not personal judgment of capabilities and inquiries addressed to common acquaintances still be more prudent and more used? And would the specialist certification be of any importance to the law partnership that is already known to its clients as a firm offering specialist services through the partnership? Isn't the function of specialist certification rather to try to raise to some extent the standard of the profession by providing a new inducement for continuing education in the profession?

The specialist certification would probably assist the solo practitioner and the small law firm in its developmental stage. It may well be that this objective is a worthy one, if we recognize the matter for what it is, a modest step to help improve the competence of the profession—not warranting creation of a system of intricate, burdensome or expensive supervision.

We should certainly be loath to embrace any system of examinations as the basis for certification. Anyone who has administered law school examinations for twenty years or more and shuddered on occasion at particular bar examination results should look with horror on any expansion in the role of examinations in the life of the legal profession. Perhaps an adequate examination of the whole man as a legal specialist could be devised, but the professional skills and time required to construct such an examination would make the cost monstrous. Even then, for how long would results on the particular examination be meaningful—five years or until the passage of the next legislative “reform”? Advocates of examining boards in the specialties would do well to ponder the fact that the bar examinations

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12. The reference is, of course, to Section 341 of the Internal Revenue Code dealing with “collapsible corporations,” one of the most involved and difficult sections of the code. Within the tax field, only a relative few can claim genuine competence on the complexities of this section and its relief provisions.

do not appear to exclude many really determined applicants.<sup>13</sup> Would subjecting practitioners to re-examination for the Bar promise improvement in the standard of the profession?

It may be that official recognition of actual experience in a particular field of law or of successful pursuit of a program of advanced study could be undertaken. Some administration, some checking, would be required, but it should be bearable. Perhaps the object, then, would be to enable the practitioner to represent that he was either experienced in tax matters (or some subdivision thereof) or specially trained in the tax field, or both, to take one example.<sup>14</sup> The same, of course, would be true of other specialties, and composing the list of officially recognized specialties would be a task of incredible difficulty. It is noteworthy that the panel on specialization presented by the Section of Taxation at the 1968 Annual Meeting in Philadelphia produced disagreement on some subjects, but agreement on the proposition that tax law is too general, with too frequent intermixture with other fields, to be classed as a specialty.

It is simply naïve to say that lawyers do not work at building a clientele. They do not use the mass media—and thereby practice wise economy and avoid unseemly touting—but lawyers are not required to be silent when asked about their experience and capabilities. Official certification of experience in a particular field of the law or special training would perhaps make dual contributions in the form of incentives for further training in particular fields and in the provision of a more solid basis for the word of mouth promotion that accompanies some of the practice of law.

Whether the official certification of experience or special training is administered by autonomous self-organized colleges of the particular specialty or is administered by the American Bar Association through its Sections is probably not a matter of really great moment. There is something to be said for not overorganizing this activity.

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13. The annual volumes of the *Bar Examiner* indicate that the sum of the first-time takers of the bar examination and the repeaters who succeed totals in the vicinity of 87 per cent in any given year. The persistent examinee, after two or three attempts, will almost always make it through, though there are a few so far off the pace that the race is hopeless. See 34 BAR EXAMINER 84-85 (1965) (data for 1964).

14. *But see* note 7 *supra*.

Central control can mean separation of decision-making from those who really know the problems of the particular field. A really large organization is organization-minded and produces its own organization men. Diversity and innovation will flower better if responsibility is divided. In the academic world, a great multiplicity of accrediting agencies operates, and the system works. There is, after all, great virtue in a pluralistic society, and those who are quick to worry about centralization of government would do well to recognize that government comes in many shapes and bares many names.

However the details are resolved, we shall see more specialization in law practice, with its economies, efficiencies, satisfactions and corrosion of the soul. It is the corrosion to which we must give our attention if we would keep the profession and its members in a state of well-being.

To succeed as a specialist in the law and be a lawyer still calls for some doing—the doing of other things. Most really good tax lawyers, for example, spend half or more of their time on other matters—in part, just to maintain their peripheral vision. And there is the public service work of the Bar, legal aid, criminal defense work, the juvenile court and endless opportunities for community betterment. Public service work must be seen not only as serving the interest of a clientele desperately in need of legal services and a public interest in need of champions, but as absolutely indispensable to the equilibrium of the specialist himself. The idealism with which most students come to the law is deeply ingrained. If the practitioner cannot reconcile what he is now doing with the idealism of his youth, he will, indeed, become cynical, bored and depressed.

The conventional work of the profession is not being dismissed as of no consequence. That conventional work is important and essential. Perhaps we ought to relate our work to the public interest more effectively in our own minds. In the tax field, for example, assisting in the administration of an intentionally complex and option-laden tax system is certainly useful, as long as that kind of tax system is preferred. But we hold to the view of a legal profession offering all the really demanding service society needs in relation to the law. To maintain our place in a profession of such nobility and dedication, we must swim a bit outside the confines of a specialty.

Indeed, one may ask whether a great lawyer should really live out his professional life as a specialist. In later years, may it not be wise for the lawyer, having served his apprenticeship as a specialist, to come back to the general practice, enriched with the learning from his specialty and his public service as well?

Finally, we should recall a treatise written many years ago on the subject of specialization and under that very title. Some will recall Chic Sales' little book, *The Specialist*. The author was apparently a bona fide specialist in the construction of a particular structure—now no longer used in any settled community in this country and banned by law in most. As we consider specialization, consider what a comprehensive loss insurance system might do to the personal injury practice. It is even conceivable that the United States Treasury could be supported in its accustomed style with a largely automatic levy.

If we keep our general capabilities trim, we can adapt as one specialty is succeeded by another and preserve ourselves as noncollapsible specialists.