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Handmaker: The Law School Product from the Buyer's Point of View

THE LAW SCHOOL PRODUCT FROM THE BUYER'S POINT OF VIEW

STUART A. HANDMAKER*

The university law school of 1950 was a relatively pleasant place. Tucked away on the edge of the university campus or, in some cases, several miles away in a downtown location, it was within sight of the ivory tower but not in its shadow. Often, its graduating class was only a fraction of the size of the group which matriculated three years previously, the erosion being partly voluntary, partly encouraged by the resident cabal of evaluators of students, and partly involuntary, mandated by that same group of savants. Those who survived the entire process may have complained vigorously but only to each other. They may have lampooned some of their experiences, but they did so in a sense of intrafamilial jocularly; and they may have had concern for their future, but it was normally a concern softened by the basic confidence in one's eventual success as a lawyer.

The educational process of the school consisted of a range of mandatory courses, generally embracing all of the first year, half or more of the second year, and a minor part of the third year. The content of the courses was dictated by tradition, by static inertia, and, above all, by the subject range of the local bar examination. If the bar examiners announced that next year's examination would include a question on embroidery, within days, every law school in the state would announce the implementation of a third year mandatory course on *The Law of Applying Decorative or Informative Colorful Matter to Otherwise Unadorned Cloth, Leather, or Other Substances*.

Usually, the Socratic method controlled the classroom environment, with only occasional courses following the traditional undergraduate approach of pre-planned professorial presentations in the presence of furious note-taking of questionable accuracy. Some defined the distinction as being between the lecture model and the Torquemadal. The more caustic and incisive the professor, the better the educational experience. One can imagine the following exchange:

"I'm sorry, sir, I can't explain the difference between those cases."

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"Then, accept my congratulations, young man. You are compiling a record of uninterrupted incompetence."

"Thank you, sir."

Tuitions were in three figures (per year, not per course), and the number of graduates per year was a reasonably close approximation of the number of available positions. It was possible (although hardly preferable) in many towns for a fledgling graduate to pass the bar examination, hang out his or her own shingle, and succeed.

The era was also one in which there was, compared to today, a gentle dignity to the practice. In all except the very largest of cities, the beginning practitioner could ask for and receive guidance from judges, court support personnel, and colleagues at the bar. Stories abound, apocryphal and real, about young lawyers who were saved from error or embarrassment by kindly older opposing counsel.

Matters moved from the filing of the complaint to the finality of a judgment with sufficient speed to allow the quest for a court ruling to be an appropriate approach to an existing controversy. Justice was not delayed and, therefore, not denied. The ability to prepare and try a case was a lawyer's most important (if not only) developed ability.

The last half century has seen extraordinary change in the law, the court system, the practice of law, the attitude of the public toward law and lawyers, and the business of lawyering. The dramatic change in the law, however, has not been paralleled by similar changes in the system of training lawyers.

Growth and development have been profound in the law. The playing field has expanded greatly. Entire new areas of substantive law have arisen: computer law, the tort of outrage, sexual harassment law, pension plan law, environmental law, and elder law. Codification in general and uniform laws in particular have joined population mobility and long distance commercial transactions in dimming, if not obliterating, jurisdictional distinctions. Choice of law provisions in contracts have become items of "My place or yours?" rather than matters of significant substantive content.

Courts have proliferated, but not to the extent that lawyers have. Jefferson County, Kentucky, is a middle-of-the-road example. Over the last fifty years, the population of the trading area has doubled. The number of divisions of the Circuit Court, the trial court of unlimited jurisdiction, has quadrupled. The number of practicing lawyers, however, has multiplied by eight or more.

Even with the growth of the court systems, the preeminence of the jury verdict or the court judgment as the resolver of a dispute has diminished greatly and continues to wither. The proportion of controversies resolved by entry of a judgment continues to decline. Although the convincer in any situation is, or should be, the answer to the question of how will or how would a court determine this matter, in practice, only a very small percentage of the conflicts which develop in the United States at the end of the twentieth century is resolved by a document entitled "Judgment."

Counsel is consulted by a client with respect to a dispute which has developed. First, the client is advised as to his apparent rights and as to possible ways in which he can proceed in direct conversation with his counterpart. Many issues are resolved in that manner, but if no resolution is reached, counsel reenters the picture to negotiate with the adversary or with the adversary's attorney. If that fails, in a growing number of situations today, a form of Alternate Dispute Resolution, such as mediation, is employed. If a compromise is not reached at this point, a complaint is filed, and the road to trial begins. Yet, over three-fourths of the lawsuits filed today are settled before judgment. So, perhaps one percent of the disputes discussed in those initial consultations proceed to judgment. Yet, it is that one percent and, to an extent, only that one percent, which the law school curriculum fully prepares the student to handle.

Lawyers have reacted to the described changes in a number of ways. Firms have increased in size far beyond anything ever foreseen. In 1900, five lawyers joined together were a group to be reckoned with. In 1950, twenty-five lawyers in a mid-sized city were a large firm. In 1995, firms of five hundred lawyers are not unknown.

Lawyers and law firms have also developed fields of specialization: not only criminal lawyers and civil lawyers, not only trial lawyers and office lawyers, but employment claim lawyers, medical malpractice defense lawyers, industrial revenue bond lawyers, soft tissue claim plaintiff's lawyers, estate planning lawyers, toxic waste disposal claim defense lawyers, breast implant lawyers, and celebrity criminal defense lawyers. Thousands of lawyers have reacted in entirely different ways. They have become insurance salesmen, real estate brokers, investment bankers, retailers, wholesalers, air traffic controllers, and clergymen.

For reasons far beyond the scope of this Essay, the people of our nation have become far more litigious. It is irrelevant for the purposes of this Essay whether this is because of increased literacy and awareness of the law or a growing sense of impotence in the face of huge government, huge employing corporations, and huge threats to peace and safety. The point is that Americans

do not hesitate to bring lawsuits. As a corollary to increasing litigation, there is increasing social condemnation of the essential tool to that litigation, the lawyer. Various studies have demonstrated that in today's America, the lawyer is somewhat more respected than the professional gambler or the scavenger, but not much. The reason that lawyer jokes proliferate is that vox populi feels no remorse in ridiculing the lawyer.

Today's practicing lawyer is constantly aware of an ever-present threat of a malpractice claim. Unlike the physician, the litigating attorney approaches the average case with a fifty-fifty chance of failure. A large aspect of the enhanced degree to which we are a litigious people is the brooding concept that whenever one experiences a disappointing result, it must be the fault of someone else. "I was in the right going into this mess, and I paid that guy to tell the court about it, and look what happened. If he'd'a done a half decent job, I'd'a won instead of lost. So it's his fault, and he can pay me for it."

In addition to the changes in society and in the law, there appears also to have been a change in the law school's raw material, the entering student. A dangerous but not wholly erroneous generalization is that contemporary students are more mature and more worldly but notably less literate than their counterparts of a few years ago. Certainly the six semesters allotted to the university to manufacture a practicing lawyer does not afford a school the luxury of time to offer classes in remedial grammar, geography, literature, or logic. However, the young lawyer who cannot compose grammatically sound letters or who does not know where Idaho is, is an embarrassment to both the law firm which has hired him and the law school which produced him.

It is not suggested that it is the role of the law school to control and direct the attitudes or the predilections of the people of the United States with respect to the law or the lawyers. Nor is it the role of the law school to guarantee the future happiness of its graduates. It is its role, however, to make good on its implied warranty of merchantability and fitness for the intended purpose of its product, and it is the purpose of this Essay to offer a standard or two for measurement of the success with which that warranty is met.

While these significant changes in society have been taking place, the most noticeable change in the law school has been the increase in the number of students. A few years ago, there was a suggestion made that the growth in the university law school was brought about by the crisis in funding that the university faced. The only graduate school that could be expanded without expense, it was said, was the law school. The scientific schools, the medical schools, and the dental schools all required physical plant expansion and equipment purchases to grow. The academic areas required larger libraries, larger faculties, and funding for new areas of research. However, the law

school only required a few more chairs in the back of the room and more catalogs. With negligible expense, the university could collect more tuitions. Apocryphal? Of course. Believed? Of course.

Nonetheless, the growth took place. The LL.B. became the J.D., and the number of mothers who could rejoice in describing "My son, the doctor; of Jurisprudence" tripled. Was the increase in quantity accompanied by an offsetting decrease in quality? There are conflicting arguments and little meaningful data concerning this question. Was the result a broadening of opportunity, extending the possibility of the American dream to 130,000 new dreamers a year? Or was it a hoax, spewing into the economy each June thousands of diplomas that could find no economic resting place, even in the most litigious society the world has ever known? Arguments abound on both sides of the issue and, for today, perhaps it does not matter.

How else has the law school changed? It has added courses in Energy Law, Employment Discrimination, and Medicine, Bioethics and Law. Most of these courses, of course, are seminars, and many of them appear far more regularly in the catalog than on a student's transcript. Still, they exist, and provide a rubric for faculty scholarship, in some cases, and in other cases, a source for enhancement of the body of law in the community, a resource for legislatures, and an influence in the courts.

Many, if not all, law schools have established some system under which the student and the community are introduced to one another. This can come from accepting, endorsing, or establishing a program in which the student is engaged in a clerkship with the local bench or bar, sometimes leading to a form of internship with community service organizations. In some instances, these internship programs grant credits toward graduation requirements, consisting of hands-on experiences in prosecuting attorneys' offices, in public defenders' offices, and the like. This development, which seldom constitutes as much as ten percent of a law school education (and, perhaps, should not constitute more) is one of the most welcome changes to note.

The establishment of public service opportunities or requirements is another development to applaud. To invite, or, better yet, to insist upon, a student's familiarization with the underlying problems that a community faces is a service rendered to the student as well as to the community. A practicing lawyer, more than virtually any other person in the community, is positioned to affect these problems.

In other areas, there has been little change that is sweeping enough to be to the outsider. The casebook is still the casebook, although it is no longer limited to selected opinions. The student is still belittled, although apparently

not in the consummate ego assassination manner that once held sway— Student: “I’m sorry, sir, I’m not prepared.” Professor: “For this class or for life?”

The school is faced with a series of dilemmas. A larger student body in times of economic constraint means larger classes, less individual attention to the student, and less opportunity to teach, inspire, and motivate. Explosive expansion in the body of substantive law and in the rapidity with which new areas, new rules, and new approaches develop, exacerbate the formidable difficulty of teaching a basic command of the law. An understandable adherence to traditional teaching systems and traditional curriculum produces an ever-widening gap between the skills possessed by graduates and the skills that they will be called upon to demonstrate if they are to succeed in their chosen profession. The end result is that the law school graduate of 1995 will be less qualified, on balance, to enter the world of practicing lawyers than was the law school graduate of 1955, who was, in turn, less qualified than the graduate of 1915. To that extent, the school, while making considerable advances in serving the nation as a law school, may be backsliding in its efforts to serve the local community as a lawyer school.

There are several areas in which law schools generally have not heard the cry for help from town to town. The oldest and most classic of these areas is in the teaching of research techniques. Classically, law schools offer a two or three hour first year course in legal bibliography or legal research. Usually, the students receive this instruction just after entering law school. With no concept of what an issue is, they are set loose amid several thousand books in sedate colors and in large matching sets, challenged to find the answer. More than one summer intern working in a law office has been asked what “AmJur” has to say on a matter and responded that he or she does not know who “AmJur” is. The routine of working back and forth from text to cases and back to text, the running of key numbers, the shepardizing of cases, are all foreign concepts which some learn when they “make the Review,” some learn when they fortuitously find clerkships with someone willing to take the time to show them, and regrettably, some never learn at all.

There are some sadistic practitioners of law who take fiendish delight in looking at the reaction of the third year student clerk or the first year associate who sits down with his tablet at the ready, across from his mentor, and hears, “I’d like for you to draft a shopping center lease for me,” or, perhaps, a stock restriction agreement, or a simple A-B trust will. The universal reaction is one of utter panic, sometimes tinged with despair. “I’m sorry, sir, I’m not prepared.”

Should they be “prepared?” No course in legal writing can cover every type of document that a young attorney may expect to encounter, but it does not

appear to be totally beyond the scope of pedagogy to offer instruction in how to formulate certain basic transactional tools: a commercial lease, a contract to sell a small business, a trust for the children's education, a mercantile partnership, and so forth.

Another area which appears to have been overlooked by academia is the art of communication: speaking, asking, listening, hearing, one-on-one persuading, fact gathering, and confidence building. "Your job this morning is to go out to Mrs. X's house and find out just what happened on the day in question." The most complete exposition of the factual background of the case is not adduced by "Good morning, Mrs. X. I have my yellow tablet and pencil and I want you to tell me just what happened on the day in question." There are people skills which are of extraordinary value in interviewing clients and potential clients, witnesses and opposing parties, and even adversary lawyers. They may indeed be the anathema to academia that they have appeared historically to be, and they may have no place in a law school. But in a lawyer school, they are invaluable. If the only persons who could teach such skills reside in the Business School or the School of Psychology, a visitor's visa could likely be obtained in most cases.

A related area of teachable expertise, and one in which some notable beginnings have taken place, is that of negotiation. As noted above, for every conflict that proceeds to judgment, there are literally dozens which have been resolved by conversation and Alternative Dispute Resolution. Although one cannot quantify the importance of relative skills in this area, it would seem fair to assume that the ability to engage in the verbal exchange of negotiating is as important as the ability to ascertain the underlying legal principles inherent in the problem. Yet, only a few years ago, there was no training at all given by a law school in this area. What is there today? The following is from the catalog of one of the more advanced schools of law:

"Negotiations. Gives students actual experience in a variety of negotiation settings, as well as discussion and analysis of the theory and practice of negotiation. . . . Two or three hours; may be offered as a seminar."

Those two or three hours offered may be the total training for an activity that will occupy two-thirds of an attorney's time.

From the point of view of the practitioner, we can summarize a wish list. What could a university do with its lawyer school to give its graduates spots in the front of the line of applicants for the relatively small number of openings that appear each year? After we have filled the small number of clerkships in very important courts, after we have filled, by time honored selection processes, the empty associate's office in the firm where Daddy is the senior partner, and

after we have anointed the valedictorians by ensconcing them in the megafirms, what can we do to give the remaining entering lawyers a leg up on the 25,000 openings for which there are 125,000 eager applicants?

Rubbing one's lamp for the genie, spitting over one's left shoulder for luck (or wherever one spits for such purposes), and reciting the incantations that one remembers from childhood, this practitioner would envision a lawyer school with these characteristics: A substantial number of its instructional hours follow the traditional pattern of the casebook and the cantankerous Socratic professor spooning torts, panic, contracts, fear, and remedies into receptive minds. The balance of the hours, perhaps one third to one half of the total, is devoted to these courses:

1. *Communication.* The course entails three separate and distinct disciplines: speaking, hearing, and listening, and conveys a sense of the art and the science of each. Emphasis is placed on establishment and maintenance of open and trusting relationships, earning confidence and openness and using the relationship to understand the communicant. If some of the techniques offered smack of crass salesmanship, so be it, because we are all, in one way or another, always selling. The course has a strong footing in psychology and conveys an understanding of the process of understanding. It addresses each link in the chain from the speaker's mind to the speaker's mouth to the hearer's ear to the hearer's mind.

2. *Advanced Communication.* The course utilizes the skills developed in the Communication course in the asking of questions and the adducing of facts in an orderly and informative manner, followed by exercises in negotiation, mediation, problem solving, and the development of meaningful results. It is footed in etymology and semantics.

3. *People-dealing.* The course teaches how to bring about mutually satisfactory agreement by learning what each party to a negotiation really wants, how much of it is attainable without removing what the other side really wants, and how to split the balance on the directly adverse issues. It produces a mind which is able to seek a way in which something can be done, rather than merely producing several reasons why it cannot.

4. *English II.* The course emphasizes the use of the English language as a communicating medium, with all its traditional rules and nuances of meaning, including, but not limited to, the preparation (not the copying) of leases, wills, deeds, contracts, and other documents, written clearly and specifically, in such a manner so as to bear a resemblance to the thought processes, wishes, and decisions of the party whose name will be signed to the document. Any submitted document containing the word "whereas" or "whereof" or "witness-

eth" will result in automatic failure. The course continues for all three years.

5. *Legal Research and Bibliography.* This is an ongoing course of familiarization with case reports, texts, encyclopedias, loose leaf services, computer-based research facilities, and the interrelationships among them, including recognition and expansion of key words, concepts, and numbers, as well as forays into extralegal sources of information. The course is divided into two equally significant inquiries: first, finding the question and second, finding the answer.

If there is one area in which the schools seem to have come up universally short, it is here. The courses here, therefore, convey a process which begins with taking a complex factual situation and parsing it out into the issues involved. If A, then not B; if C and D, then E but not F. Once the issues are perceived, the student learns to analyze them, to find case law and text which responds to each issue, and to analogize where necessary and desirable. The student next learns to express the findings of his or her research concisely and persuasively, and to set out, in understandable prose, the conclusions and a cogent basis for these conclusions.

6. *The Majesty of the Law.* The course is designed to accomplish a convincing, persuasive, and permanent infusion into the student of a pervasive love of a system of governance of the affairs of people which is rife with faults, inequities, and inadequacies, all of which are treatable, together with an awe of the privilege of serving in some capacity as a handmaiden of that complex system. This course, if successfully completed, will obviate the need (but not the desirability) of continuing courses in ethics throughout a practice career.

7. *The Business of Law.* There is one other area of learning that could be beneficial: the practice of law as a business. There are several elements of this aspect of practice, and chief among them are financial management and "rainmaking." As to the former, one could easily visualize some instruction in how to charge for one's services and how to collect what one charges, as well as the expenses of practicing law that are controllable and how to control them. Students would be further instructed on the reasonable expectations of revenues from different types of practice and the degree of controllability of these revenues.

The second business aspect is that of "rainmaking." The introduction of advertising has not only revised the playing field in some areas, particularly personal injury practice and bankruptcy, but has had a substantial effect on the public's view of the acceptable range of behavior in areas such as estate planning and corporate securities. There is still a considerable portion of the practicing bar who find the entire subject of positive, intentional action to

generate business for the law firm repugnant and thoroughly distasteful. Truthfully, however, some of the most pontifical proponents of the evils of solicitation are engaged in the same practices as the television huckster. They just do it on the golf course and at the cocktail party rather than on billboards and air waves.

It is not suggested that it is the role of the law school to teach its students how to create a clientele. It is the role of the school, however, to convey to the student headed into private practice what significance these issues will have upon his or her career. It is dishonest and foolish to pretend that the practice of the profession for which these students are spending three arduous years and many dollars preparing is anything other than a highly competitive business whose challenges run the entire gamut from rigorous intellectual exercise to intramural jostling for position.

One readily recognizes that the additions to the curriculum described above will be of no use whatsoever in preparing the student for the bar examination. Examinations in these courses will be difficult to compose and will probably be of little value in measuring the student's accomplishment. To the extent that they take time away from the student's efforts to commit to memory the five elements of a particular tort, the Supreme Court's three-pronged test of something-or-other, and the five prerequisites listed in section X of the Internal Revenue Code, they may even have a negative value to some.

Nonetheless, to the cantankerous curmudgeon who has lived long enough and dodged enough slings and arrows to have been designated a senior partner, a documented completion of the described courses, even on a pass/fail basis, would qualify the graduate for an enhanced position in the selection process that leads to employment as an associate. Absorption for a few days or weeks of enough rote and rite to successfully endure the hazing process that the bar examiners administer is something that can be shoe-horned into the skull by the instructors of bar review courses. Research into the nature of man and the desirability of new and different legislative explorations, while it may be the calling of the university as a repository of human knowledge, is secondary to the true calling of the lawyer school.

The practicing bar, although crass and pragmatic, remains and will remain the original end purchaser of the school's output. The salability of each graduating class is judged primarily by the performance of the classes that precede it. That performance, in the real world, is measured by the ease with which the employer, the practicing lawyer, can assign, delegate, and rely on the new associate.

The decision of a firm to employ a graduate involves a determination of the

dollar cost to the firm of that employment. The firm recognizes that for a period of time the salary paid to, the fringe benefits supplied to, and the overhead sustained as a result of the new associate will be a net loss. At a later date, the associate's performance will reach the break-even point and, one assumes, thereafter become a new profit center. The cost, therefore, is one of "turnaround time." There is no question that some such time is necessary. It is essential that students watch and assist the surgeon for a number of operations before they can or should handle the knife. But it is simple arithmetic that if "turnaround time" can be reduced from a year to six months, a firm can afford to hire two instead of one.

The lawyer school, by its existence, warrants and represents to the world in general, to the students whom it accepts and agrees to be the focal point of their lives for three years, and to the bench and bar of its community, that it is engaged in the production of counselors, litigators, mediators, and negotiators. The school warrants that its students know, first, how to find what the questions are, second, how to find what the answers are, third, how to act and encourage others to act based upon these discoveries, and last, how to earn a living doing all of this. The manner in which the school carries out those warranties and representations, as disclosed by the accomplishments and achievements of its graduates, is the measure of the institution.

