

THE CHANGELESS, EVER-CHANGING UNIVERSITY: THE ROLE OF THE LAW SCHOOL *

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Dean Paul Marcus' invitation to deliver the Isaac Marks Memorial Lecture for 1984 came at a good time for me. After a virtual lifetime devoted to the arcane mysteries of the law—a brief period in private practice, twenty years as a professor, and twelve as a dean and professor—I fell from grace in 1979 to become, for five years, the Chancellor of the 35,000-student campus of the University of Illinois at Urbana-Champaign. I will be returning to my first love, law teaching, in the fall of 1984.

Actually, the chancellorship is not unlike the practice of law, and a legal education is good preparation for any chief executive officer. Count Otto Von Bismarck, the "Iron Chancellor of Germany" once said: "Those who love both the law and sausages should not inquire too closely into how either one is made." Not a bad point, but inquire we must lest there be too much extraneous material inserted into either one. The chancellorship is similar to the practice of law because in both positions one must constantly assimilate totally new facts, sort out the issues, go for the jugular vein, and try to make the right decisions. In both roles, one must constantly learn or ossification will take charge. No one leaves a university with a closed briefcase of knowledge and graduation is but one step in a lifetime process.

As Chancellor, I seem to spend a majority of my time drawing bull's-eyes around pre-existing bullet holes—a challenging and intricate task to be sure, but not a particularly creative one. I now long to fire a few bullets of my own, and see if I can hit an occasional bull's-eye along the way.

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good time not only for me personally, but in a broader professional sense. All of education in this nation is undergoing an unusual period of re-examination and evaluation. Criticism is rife and much of it is justified, whether aimed at primary and secondary education, at higher education, or at the professional schools. The law schools are not being neglected in this process; nor should they be, since they are responsible for the education of a professional group vital to the welfare of a free society. No one bothers to kick a dead horse, and the legal profession in its multifarious roles is far from dead. Derek C. Bok, President of Harvard University and former Dean of the Harvard Law School, has delivered the most widely publicized indictment in his 1981-82 Report to the Members of the Harvard Board of Overseers.¹ President Bok concludes:

In short, the public seems critical of all institutions and increasingly concerned that the country is no longer working well. International comparisons—in industrial productivity, infant mortality, the extent of pollution, crime, poverty, and many other social ills—seem to give ample reason for this concern. Universities cannot hope to solve such problems by themselves. Progress calls for cooperation from many institutions beyond the reach of the campus. But faculties can supply knowledge that is often vital to the development of sound solutions. Universities can also prepare able people with a broad view of their profession and with skills to help address its problems. *Unfortunately, most professional schools have done little to meet this challenge. They have concentrated on training practitioners for successful careers while failing to acquaint them with the larger problems that have aroused such concern within the society.*²

President Bok's indictment should be taken seriously because those of us who labor and learn in the vineyards of higher education are trustees for the future; if we fail to discharge our responsibilities, it is future generations who will pay the price. I intend to explore the role of the law schools in responding to this challenge, but first I wish to provide some perspective on the changeless, ever-changing university, of which the law school is an important part. One cannot discuss legal education in isolation and, anyway, I am a "big picture" man.³

I. THE CHANGELESS, EVER-CHANGING UNIVERSITY

The university is one of society's most imaginative and enduring creations. It has survived and, more or less, prospered throughout time and space. It has withstood the onslaught of war, pestilence, economic chaos, and periodic attacks of anti-intellectualism. Perhaps more surprisingly, it has even overcome its own innate conservatism, best summed up by F. M. Cornford, a Cambridge University classicist at the turn of the century:

1. See D. BOK, THE PRESIDENT'S REPORT 1981-82 (Report to the Members of the Board of Overseers, Harvard University, Mar. 1983) The full Report is available from Harvard University and should be read by all of those seriously interested in our legal system and in legal education.

2. *Id.* at 24-25 (emphasis added).

3. For the author's "big picture" story, see J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY (2d ed. 1975). Preface to the First Edition, at 1x.

"Nothing should ever be done for the first time. . . . Nothing is ever done until everyone is convinced that it ought to be done, and has been convinced for so long that it is now time to do something else."⁴

The university is also one of society's most paradoxical institutions. The concept, and to some extent the form, appears to be changeless; but, below the surface, the institution is in constant flux, reacting to the ceaseless flow of society itself. In this sense, it is not unlike the common law—the more the form remains the same, the more the substance shifts.⁵ The university appears to be self-contained, self-controlled, the master of its own "ivory tower" fate; in fact, it has never been any of these things for any extended period of time. Indeed, if it had, it would have gone the way of the monastery and the cathedral and would have become a monument to past achievement with little vital life in the present. So long as we do not confuse the illusion with the reality, there is no harm in placing our faith in the changeless university; but there are perils if we fail to recognize the nature of change. It is one thing to pay homage to our medieval origins, to Cardinal Newman's *The Idea of a University*, to Dr. Flexner's concept of the German research university, even to Jacques Barzun's *House of Intellect*; it is quite another to misunderstand the unique institution that the American university has become. The peril is particularly acute in the 1980's when the national commitment which undergirded the university system is being steadily eroded. President Donald Kennedy of Stanford University put it succinctly: "These remarkable changes . . . have left universities in a state of confusion about what society will do for them and what they must do for themselves."⁶ There is no clear chart to wisdom for the future, but it will clarify our thinking if we reflect briefly on where we are in 1984 and how we arrived there.

A. *The American University Today*

In 1963, Dr. Clark Kerr, then president of the University of California, delivered the Godkin Lectures at Harvard under the inauspicious title, *The Uses of the University*.⁷ The only inauspicious aspect of the lectures was the title. They were a succinct, even stylish, statement about the roads behind and ahead and are well worth reading today. Dr. Kerr popularized the word "multiversity"⁸ and demonstrated that he, at least, was aware of

4. F. M. CORNFORD, *MICROCOSMOGRAPHIA ACADEMIA: BEING A GUIDE FOR THE YOUNG ACADEMIC POLITICIAN* 32 (1923).

5. "The law has occasionally been pictured as a vast substratum of society which is constantly in a state of change and a superstructure of legal rules adjusting, sometimes tardily, to shift in the foundation below." See Hamilton, *Property Rights in the Market*, 1 J. OF LEGIS. & POL. SCI. 10 (1943).

6. *Advancing Knowledge*, an address by Donald Kennedy at the 75th Anniversary Colloquium of the Carnegie Foundation for the Advancement of Teaching (1980).

7. Harvard University Press later published the lectures as a small book, C. KERR, *THE USES OF THE UNIVERSITY* (1963).

8. In 1972, Dr. Kerr wrote a postscript to *THE USES OF THE UNIVERSITY* in which he expressed some regret about the use of the word multiversity, pointing out that it was "in the air" at the time and "had several more or less simultaneous authors." He suggested:

It might have been called a pluralistic university, or a conglomerate university—making an analogy to business; or as some Germans now do, the comprehensive university; or a number of other things. What I wanted to do was mark the contrast with a more nearly

the reality of the national, research-oriented institution that the university had become. He traced the changing nature of the changeless concept from Cardinal Newman's beautiful ivory tower of Oxford as it once was—a university which prepared a man “to fill any post with credit, and to master any subject with facility,”—through the German model which was already replacing the Cardinal's vision of an intellectual Utopia. He rightly saw that the two most important developments in American higher education, following the rise of the great private universities, came not from *within* the universities, but from *without*, and both represented a national commitment to higher education. The first was the Morrill Act of 1862⁹ which marked the beginning of the land grant movement and which, combined with the German research model, changed forever the nature of the American university. The second was the phenomenal reaction to World War II, which tied the universities to the national purpose, and which continued after the war in the form of commitments to nearly every phase of higher education from student aid, to buildings, to massive research grants. It would be gratifying to claim that all of this commitment came because of the leadership of the universities, but the truth is that they were more reactive than active. The nation turned to them because in those ivy-covered halls resided the expertise and the intelligence which a threatened society required. We can take considerable pride that this was so, but we must recognize that it was society that changed the university far more than the university changed society.

The federal largesse was not without its price; but, by and large, all concerned prospered under the new arrangements. Federal research aid helped meet the national need; both the universities and the nation were stronger because of this partnership, previously unknown in American society. The chief executive officers of the universities knew that their institutions were being changed in ways over which neither they nor the faculties had ultimate control, but the federal grant universities adapted to the new role quickly and effectively. As Dr. Kerr put it:

There was a young lady from Kent
Who said that she knew what it meant
When men took her to dine,
Gave her cocktails and wine;
She knew what it meant—but she went.

He added: “I am not sure that the universities and their presidents always knew what it meant; but one thing is certain—they went.”¹⁰

One major change as the result of the federal commitment was a further fragmentation of the disciplines that comprise the university. The bulk of the research funds were available for science and technology and it

single-purpose institution having a more monistic spirit, a more monolithic leadership, and a single clientele—whether the older Oxford concentrating on teaching, run by the faculty, and serving would be gentlemen or the older Berlin concentrating on research, run by the chair professors, and serving new knowledge.

C. KERR, *THE USES OF THE UNIVERSITY: WITH A "POSTSCRIPT - 1972"* 136-37 (1972).

9. Morrill Act of 1862, ch. 130, 12 Stat. 503 (1862) (codified at 7 U.S.C. §§ 301-305, 307, 308 (1982)).

10. C. KERR, *supra* note 7, at 69.

was in agriculture, engineering, the hard sciences, and medicine, that the principal impact was felt. The humanities, the performing arts, the social sciences, and the law were not totally neglected, but the difference in degree of support was so great that it was almost a difference in kind. The latter were affected by a variety of "trickle down" consequences. The major foundations provided some assistance, and all disciplines did share, to some extent, in the academic affluence. It became increasingly clear, however, that C. P. Snow's "two cultures" was too little by half. In fact, the multiversity became multicultural as well, and under one umbrella clustered science and technology, agriculture, the humanities, the social sciences, and the professional colleges, all united by the common educational mission that sometimes divided them. To quote Dr. Kerr again:

Hutchins once described the modern university as a series of separate schools and departments held together by a central heating system. In an area where heating is less important and the automobile more, I have sometimes thought of it as a series of individual faculty entrepreneurs held together by a common grievance over parking.¹¹

Dr. Kerr's insightful portrait of the modern American university ended nearly two decades ago, but his third lecture on *The Future of the City of Intellect* was only slightly less accurate than his survey of the past.¹² In the late '60's and early '70's, the Vietnam War tore at the fabric of American society and revealed how fragile was the structure of the university built in society's image. At the same time, the nation belatedly recognized that its free society was free only for some, and the cause of civil rights, women's rights, et al., moved to center stage. Here the universities demonstrated that there was a toughness in the midst of the fragility, and equality of opportunity once more changed the nature of the changeless university, again as a result of forces largely outside the institutions themselves. They responded, albeit imperfectly, and the modern university looks far different from its pre-World War II counterpart. By the mid-1970's, "a remarkable transformation had been wrought—only to be followed by another upheaval as the [federal] support stabilized, then waned, and ultimately threatened to decrease dramatically."¹³ It should be noted that by this time all of the major research universities, both public and private, were *de facto*, federal universities, and thus shared a more or less common fate. This fate is, of course, tied also to declining state support for the publics, an ever-increasing struggle for private funds, rising tuition and fees for the students, and the inroads of inflation and energy costs for all of society. Once again, the universities are at a critical crossroads. Either more resources will have to become available or the changeless university will have to change radically, and this time, I do not believe it will be for the better.

11. *Id.* at 20.

12. As pointed out, *supra* note 8, Dr. Kerr revisited his earlier theme a decade later and discussed the trauma involved in the university world of the '60's and '70's. He then asked two questions which are still relevant: "Will 1870 and 1970 have been the century of the rise and the beginning of the decline of the American university? Or, after a pause for a time of troubles, will it gain new strength and rise to greater heights?" C. KERR, *supra* note 8, at 128.

13. Dr. Kennedy's words. *See supra* note 6.

B. *The Next Two Decades*

In 1916, Alfred North Whitehead, with prophetic wisdom, struck for the jugular: "In the conditions of modern life, the rule is absolute: the race which does not value trained intelligence is doomed. . . . Tomorrow science will have moved forward yet one more step, and there will be no appeal from the judgment which will be pronounced on the uneducated."¹⁴ If we are to avoid that grim judgment, we must have a renewed commitment by society to the importance of all of education to the welfare of the nation. This is not a plea for the universities *qua* universities but for society itself. We can retrench, we can retract, we can go into temporary or permanent decline, but we cannot serve this nation as in the past without adequate resources. Survival is not enough in an age which cries out for more knowledge, more understanding, a more educated citizenry. We cannot escape totally the fiscal razor, and we recognize that every interest group believes its case is special. This *is* a matter of national priorities, however, and we *are* special pleaders for society's case. The changeless university has proven that teaching, research, and public service are its *raison d'être*; the ever-changing university has proven that it can transmit knowledge, educate the new generations, and unlock many of the secrets of the physical and social world in its laboratories and libraries. Society creates institutions to fulfill certain needs, and it disturbs those institutions, when they are working reasonably well, at its peril. No one claims that the universities are perfect, far from it. They have many changes to make to put their internal houses in order, but like democracy itself, they are the best institutions thus far conceived and they are essential to the future of a free society.

One stark fact seems to be frequently forgotten as the universities face the remainder of the 20th century—most universities have already been through nearly a decade of budget-cutting. Essential technological equipment is obsolescent at best, buildings are suffering from inadequate maintenance, critical shortages of space exist, and the salary and fringe benefits of faculty and staff have not kept pace with the cost of living. Budget reductions have already pared away the so-called fat, and the next steps will cut into the very fiber of the institutions. The universities will do what they have to do, but there is no use pretending they can continue to perform their present mission with status quo or declining budgets. The exact consequence of the present course must be clarified and society must make the final choice. Faced with this choice, I have some faith that the nation, in the sense of both federal and state governments, will be unwilling to back away from a long-held commitment to higher education.

At this juncture, there is considerable discussion about a new partnership for the ever-changing university—a partnership between industry and the university. Just as the era from 1940 to 1980 was marked by a government-university joint venture, there is speculation that 1980 to 2000 could see the dawning of yet another era of change. United States industry is

14. A. N. WHITEHEAD, *THE AIMS OF EDUCATION AND OTHER ESSAYS* 22-23 (1929).

dependent on the universities not only for educated manpower, but also for research and development and, in theory, industry could replace government in the equation. Among the many discussions of this new approach, the most succinct is that by Dr. Kennedy of Stanford.¹⁵ He concludes that there are real possibilities here for science and technology, but that there are also huge problems that will need to be carefully resolved lest the industry-university relationship alter the basic structure of the university as we have known it. Perhaps it should be altered as it has been in the past, but it will not do to simply substitute industry for government and assume that the substitution of resources leaves the university fabric intact.

Even more fundamental, perhaps, is the fact that industry now provides only a small fraction of the resources that are available from federal and state government, and it seems unlikely there will be massive infusions of the kind that would be required to maintain and improve the university's role. As Dr. Kennedy put it:

Even if we can [develop satisfactory industry-university relationships], and put in place a mechanism of corporate support for basic research with which we are comfortable, I doubt whether we shall see more than marginal relief from the fiscal woes engendered by the federal retreat. Very little of basic research represents, in return-on-investment terms, an attractive proposition for industry in an economy like ours.¹⁶

Once again, we are left with the simple proposition: the 1980-2000 era for the universities will be determined by society's priority for higher education!

At this moment in time, higher education does not appear to have a high priority on society's agenda. President Harold T. Shapiro of the University of Michigan encapsulated the federal view:

It is apparently the Administration's view that education is not a federal function, it is not even a federal purpose, and that specific educational outcomes do not effect the federal interest. I cannot speak to the constitutional issues that may, in part, lie behind this perspective; but it seems to me that as long as adequate investment in physical capital is an appropriate concern so, too, is investment in human capital an appropriate federal interest. Such an analogy is, by itself, an overly narrow defense of legitimate federal interest in education; but we must ensure that a national debate on the appropriate federal role in higher education is engaged. If we stand passively by as federal policy is dramatically restructured, we will not have met our responsibilities to ourselves, to our students, and to America's future.¹⁷

We must not stand passively by, and we must meet our responsibilities to ourselves, to our students, and to America's future. Who are "we"?

15. See *supra* note 6.

16. *Id.*

17. The Green Sheet, Circular Letter No. 1, January 12, 1982 (Published by The National Association of State Universities and Land Grant Colleges).

I would include all of the leaders of public thought in America, those whose business it is to articulate and clarify the great issues of our time. A special burden, however, rests on the chief executive officers of the colleges and universities. While they have a duty to manage the institutions with the resources available, they have an even greater responsibility to provide the leadership which will enhance those resources so that higher education will be able to fulfill its vital mission. This will not be an easy task, for one must ask whether education, as such, has ever enjoyed a high priority in the nation's scheme of things. Although this question may seem odd in light of the preceding discussion, a slight analysis will clarify it.

Higher education prospered not as an end itself, but as a means to an end; *i.e.*, the universities thrived because they served the national purpose, not because of some vague commitment to knowledge for its own sake. The Morrill Act was congruent with the goals of an expanding nation and provided education in the "agricultural and mechanic arts" at a time when society had a particular need for skills in those areas.¹⁸ The G.I. Bill and related legislation provided an opportunity for the millions of returning veterans to receive an education which would fit them for jobs in the emerging post-war world.¹⁹ The billions spent for aid to the universities in the 1950's and '60's followed the launching of Sputnik and the Soviet's growing prowess in science and technology. The national purpose in each instance was relatively clear, and society's consensus about goals was not in much doubt. Other purposes were served as pointed out earlier, and to the universities those purposes, too, were of central importance, although they would not, in and of themselves, have evoked the response which built the modern university. It is vital, therefore, that society understand that the universities still serve the national purpose and that the universities' health is essential to the nation's health. If that understanding can be achieved, then the "national debate" which President Shapiro called for can and will occur.

None of us is wise enough to foresee the parameters of the new world which is emerging in the closing years of this century, to say nothing of the twenty-first century, which is approaching all too fast. There are seers aplenty, and I have no desire to compete in that market. I am convinced, however, that we are on the verge of changes more far-reaching than the miracles already disclosed in this century. What science and technology have already wrought is but the base on which the new edifice will be built. This nation has been a major force in the developments of the past decades precisely because of its educated manpower. It will maintain its role if, and only if, it devotes the necessary resources to meet the challenges of the future. If it does not, then the mantle will pass to other nations which have the vision to follow the lead in which we pioneered. Society's purpose and the universities' purpose coincide now as never before. It will be a tragic mistake if this fundamental fact is not thoroughly understood.

18. See *supra* note 9.

19. See, *e.g.* Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284 (1944) (codified as amended at 38 U.S.C. §§ 1801 et. seq.).

Science and technology alone are not enough. Indeed, with the best of motives, they could create an all-devouring monster, as history has demonstrated all too clearly. Surely, the nation's purpose goes far beyond ascendancy in those fields. I believe in a university which is intellectually based and humanistically motivated, a university which strives to graduate a broadly educated person with some understanding of the past and some sense of direction for the future. I believe that, too, is consistent with the national purpose and is worthy of the highest priority on this society's agenda.

C. *A Hopeful Note*

This portrait of the changeless, ever-changing university, at the moment, has a predominance of the darker hues, but, overall, there are rosy tones as well. "The true American University," David Starr Jordan once observed, "lies in the future." It still does, and it always will, for like all living institutions, *e.g.*, the United States Supreme Court, it is forever in the process of becoming something else. The challenge to our generation is to help shape the institution to rational ends. If we are to be more than temporary managers of a vital institution, we must have a vision of the future directions. That vision includes an understanding of the past and a dedication to the value of a "trained intelligence." As in the past, the university will be changed quite as much by external as by internal forces, but we must help shape those forces and not go quietly into the dark night of decline.

The multiversity is a fact, but the university remains the ideal. My greatest fear is that in the struggle for adequate resources, we will expend all of our energies and neglect the internal changes that must also be made if the institution is to fulfill its highest mission. We are a community of scholars still, despite the fragmentation and the specialization, and Cardinal Newman's beautiful vision should not be forgotten. That it has not been, even by those outside the academy, is illustrated by a paragraph from a recent speech by R. A. Hanson, President of Deere and Company. After praising the quality of recent engineering graduates, he said:

But the decade of the '80's will demand substantially more. We'll need engineers with an appreciation of the global nature of our business and engineers comfortable in their knowledge of computer-based engineering effort. In addition, but most important, we'll need engineers who are articulate, who can write and speak concisely, effectively and persuasively. We would like our engineers to have at least some knowledge of a second language and not to be subject to cultural shock if involved in projects in the Middle East, the countries of the East Bloc, or even the Peoples Republic of China.²⁰

So say we all, whatever our discipline.

20. Remarks by R.A. Hanson to ASHE Forum, Chicago, Illinois (December 17, 1981).

II. THE ROLE OF THE LAW SCHOOL

Where does the law school fit into the larger mosaic of the changeless, ever-changing university? Despite the fact that law, medicine, and theology were the trinity of the medieval university, and in that sense were present at the creation, there have been periodic questions as to whether it fits at all. The epithet "trade school" floats in and out of the variegated criticisms, and always a certain amount of tension exists between the law school and the rest of the university. Some of it is jealousy over higher salaries (medicine has the same problem, theology does not), some of it is the more or less separate status of the law school as a professional college, and some of it is the belief that all law schools do is *train* (an epithet in itself) a largely parasitic class of technicians devoted to serving the rich and powerful in American society. This theme is not a new one. In 1886, Christopher Columbus Langdell, the Harvard law professor who developed the case method of instruction, stated: "If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices."²¹ Thirty-five years later, Thorstein Veblen, obviously unimpressed by Langdell's claim to scientific status for the law, noted that, "law schools belong in the modern university no more than a school of fencing or dancing."²² Clearly, President Bok does not agree with either Langdell or Veblen, but some of his comments do add fuel to the flames. He wrote:

A nation's values and problems are mirrored in the ways in which it uses its ablest people. In Japan, a country only half our size, 30 per cent more engineers graduate each year than in all the United States. But Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 every year. It would be hard to claim that these differences have no practical consequences. As the Japanese put it, "Engineers make the pie grow larger, lawyers only decide how to carve it up."²³

There are two threads running through these three quotes. Does the law school have a real role in the modern university? Are law and lawyers too dominant in American society and should fewer of our ablest young people be opting for a career in law? My answer to the first question is an unequivocal yes; my answer to the second is more complex.

A. *The Law School and the University*

1. *The Teaching Role*

If a legal education is designed solely to prepare the student to pass a bar examination, to know the rules (whatever that may mean), and to learn "the tricks of the trade," then the law school does *not* belong in the modern university. These things can be handled outside the academy and with far

21. Address delivered November 5, 1886, 3 L. Q. REV. 123, 124 (1887).

22. Quoted in Stevens, *Two Cheers for 1870: The American Law School*, 5 PERSP. IN AM. HIST. 405, 427 n. 12 (1971).

23. See *supra* note 1, at 6.

less of an expenditure of time, money, and energy. Such a design would also result in an unlearned bar and in lawyers ill-equipped to serve the needs of a complex, democratic society. Nonetheless, it is this view of the legal education that leads to the argument that law schools have no place in the academy. To the extent that law schools see themselves in such a narrow role, they are sowing the seeds of their own destruction. But no law school worthy of the name sets so narrow a goal for its graduates. Rather, it understands that lawyers are being educated,

- (1) to assume direction of all phases of the areas of personal conduct inherent in a complex society and economy; (2) to provide a very large proportion of national leadership at all levels of authority; and (3) to serve, at little or no compensation, the needs of indigent criminal defendants and to participate, so far as a lawyer can, in the "war on poverty."²⁴

In a sense, then, the law school's role, like that of other disciplines, depends in part on the qualities of its end product—its graduates. Professor Casner and the late Professor Leach of Harvard described the basic qualities of a good lawyer as follows:

The best way to describe a good lawyer in a phrase is to call him a professional in versatility. This is another way of saying that he has acquired certain abilities that enable him to operate effectively in any enterprise, familiar or unfamiliar, to diagnose its difficulties and contribute substantially to the solution of its problems. His usual field of operation is one in which the legal ingredient is large, and to this ingredient he brings professional knowledge as well as the basic abilities; but the fact that the nonlegal ingredient is frequently dominant and the further fact that the situations in which his help is solicited are many and varied give him the habit of tackling new problems with confidence and skill, regardless of their nature.²⁵

I agree with this description, and also believe law schools are fulfilling the teaching role reasonably well and in some cases superbly so. A non-lawyer, Martin Mayer, has given law schools extravagant praise in *The Lawyers*, a book not wholly adulatory of the legal profession: "What the law professors offer in their courses is the best quality of education in America—but in a professional school educational excellence may not be enough."²⁶ Chauvinistically, I agree with him, and I believe the roots of the success lie in a combination of the case and the Socratic methods, with their emphasis on legal thinking rather than rote memorization. (Langdell was wrong in thinking that law was a science with all of the material of that science to be found in the cases, but he was right that the case was an ideal teaching tool, at least in the first year.) The problem is that a technique that works in the first year, palls in the second, and bores in the third. New methods are required and, frankly, most law faculties know what they are. They are also in the process of developing these new methods so that the hoary chestnut of three years of case study is just that—a

24. A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 3, 4 (2d ed. 1969).

25. *Id.* at 4-5.

26. M. MAYER, *THE LAWYERS* 118 (1967).

hoary chestnut. Nonetheless, more supervised, individualized instruction is needed. The "know how" is available to provide it, the resources are not. Smaller teacher-student ratios (a minimum of one to ten) appear to be fiscally impossible in the financial climate discussed earlier in my lecture. Given the resources of medical education, for example, a revolution in legal education could occur almost overnight.

But law teachers, like their colleagues of the bench and bar, are pragmatists, and they must operate within the constraints of the possible until the resources are forthcoming. We are making substantial strides within those constraints. Without examining them in detail, I wish, instead, to stress some often overlooked facets of legal education.

Aside from their research and public service roles, law schools operate at two levels so intertwined as to cause confusion, even in the minds of the students. At one level, they teach the substantive and adjective law of specific areas, severed strands of the seamless web. All lawyers understand this, and most of the ferment relates to how successfully it is being done. The common and statutory law of nearly every important area is covered, in varying degrees of detail, and the student, through the grading process, is in effect certified as to his or her level of competency in these subjects.

This is extremely important to both the lawyer and society and would have to be done in any case because law in the broader sense cannot be taught in a vacuum. It is not, however, *all* important because the retention rate is only about twenty percent, at best, and all law changes at a rapid rate. I do not know what the half-life of legal knowledge in this sense may be, but I would guess it is not too different from knowledge in other disciplines. Even in real property law, for example, landlord/tenant and land-use doctrine has virtually reversed itself in the last fifteen years so that much that a student "learned" in the 1960's is now wrong. Obviously, the technique and method, taught in the interstices of the subject matter, turns out to be the principal product of even this level of legal education.

The second and higher level is less obvious both to the teacher and the taught. It is the silent *raison d'être* of legal education and the lasting claim for public and private support of the law schools. At this level, the faculty seeks to guide the student toward an understanding of, and respect for, the rule of law, without which a free society cannot long endure. Whatever else this century has disclosed about the human condition, it has revealed the knife edge on which individual freedom is forever balanced. Totalitarianism (left or right) is constantly pulling society back toward the abyss, and constant vigilance is the price of liberty. The same forces that unite, divide; the fragmentation that in previous centuries led to feudalism and oppression has not disappeared from the face of the earth.

Reason cries out for the rule of law, however inadequate specific rules of law appear at any given moment. The fragile ideal of equal justice under law must be nurtured, especially in those who will be among the leaders of public thought and primarily responsible for the administration of justice.

One of my English colleagues once told me he was surprised by the absence of specific courses in jurisprudence in many American law schools

but that, after teaching in the United States, he now understood. "Every American law teacher in every subject sees himself as teaching jurisprudence, at least in a small way." Just so! This is the second level of American legal education, a largely unarticulated premise on which the curriculum is based. It will be more apparent in some subjects than in others, but it is always there. In constitutional law, it may be explicit; in commercial law, implicit; but all courses stress the need for a rule of law to govern the activities of a wayward, perverse mankind. The success of the American law schools should be measured, in part, against how well they meet the rigorous standard of this second level of legal education. Viewed in this light, many suggestions for reform in legal education take on a different perspective. A two-year legal education would turn out more graduates faster and perhaps satisfy the professional requirements of the first level, but it would eliminate an important segment of the present curriculum and put the emphasis on coverage of that subject matter which is regarded as minimally essential to the lawyer as a technician. Specialization in law school, or even specialized law schools focusing on some particular phase of the practice, might produce more knowledgeable experts, but at the cost of a balanced view of law as a whole. The law school experience is, and should be, a general education in law, not a narrow view of a particularized area.

Supervised clinical training and simulated practice courses are valuable adjuncts to more traditional teaching methods, but they *are* adjuncts, not substitutes for the core of the curriculum. After all, "reading" law in a law office once satisfied the first level of legal education, but it never came to grips with the second. A better trial bar is a critical need, but not if the cost is a lawyer who sees litigation as the "be all" and "end all" of the rule of law. More opportunity for all qualified students who wish to study law is a worthwhile goal, but not at the cost of a return to the 1920's, when almost anyone could set up a "law school" on a shoestring, with little concern for standards or the quality of the educational process. We may need more practical courses in law school, but only if they provide understanding of what the practice is really about and how each legal task fits into the broad goals of the law. My thesis is not that the modern American law school is a finished product—far from it. Rather, it is a plea for a clearer understanding of what those law schools are trying to accomplish and for reasoned change that maintains the present strengths as it builds for the future.²⁷

2. *The Research and Public Service Roles*

The law school is an ambivalent institution. Janus-like, it faces in two directions: inward, to the university of which it is a vital part and outward, to the profession which it serves in so many ways. Just as there are ten-

27. For an excellent analysis of the strengths and weaknesses of American legal education, see F. ALLEN, *LAW, INTELLECT, AND EDUCATION* (Michigan Faculty Series, 1979). Professor Allen speaks to all who believe in an education which is intellectually based and humanistically motivated. In this collection of essays, he defends with penetrating insight this conception of liberal and professional education, often attacked in recent years.

sions between the law school and other disciplines, so there are tensions between the law school and the bench and bar. I believe these are healthy tensions and can be made to work for the benefit of all concerned. Nonetheless, it is frequently a slippery slope and one which requires a certain sure-footedness to negotiate. President Bok states it well:

All graduate schools risk becoming captives of their professions, absorbed in preparing skilled professionals and seeking new knowledge for practitioners to employ. This preoccupation is understandable, since the acquisition and transmission of specialized knowledge are the central tasks of a professional school. But they are not its only tasks. A vigorous school should address the larger problems of its calling, serving as a conscience to its profession and a stimulus for change. In fulfilling this function, a faculty must be knowledgeable enough to speak convincingly to practitioners, detached enough to see the blemishes of their profession, skilled enough in research and analysis to explore each defect thoroughly and offer thoughtful suggestions for reform.²⁸

Lawyers know that one of the endemic problems of regulatory agencies is that the regulators tend to be captured by the regulated. Then we have the question, who regulates the regulators? We also have the answer—the courts do (sometimes), all the way up to the Supreme Court of the United States. The analogy is not inapt for the professional schools: if they serve only the profession, what of the total society? Do colleges of medicine serve only the doctors or are they critics of the profession, interested in the health and welfare of all of society? Who sees that they take the broad view? If they are part of a university (and not all are), presumably the university itself sees that they do not become captives of the profession alone. The law schools may be an even better example of the process because the social problems with which law deals are more complex, and less subject to solution, than health problems. Indeed, even health problems are grist for the mills of the law. A part of President Bok's Report relates to this very point. He calls the American legal system "a flawed system" and criticizes the law schools for their complacency in the face of these pervasive flaws. Indeed, he states that: "Our legal system bears a strong resemblance to our health care system twenty years ago. . . . There is far too much law for those who can afford it and far too little for those who cannot. No one can be satisfied with this state of affairs."²⁹

One does not need to agree with all of the criticisms in President Bok's Report, and I do not; but it is difficult to argue with the proposition that the law schools must be constructive critics of the profession and of the legal system itself. It is a part of the law school's obligation to the university and hence to the larger society. I do think President Bok has underestimated what has already been accomplished in this area, but that may be an occupational hazard of the presidency or the chancellorship—a ten-

28. See Bok, *supra* note 1, at 1.

29. *Id.* at 2.

dency to forget one's own roots when clinging to so distant a perch. Law professors have been playing a key role in legal reform at least since the 1920's, and they have made significant contributions through research and their own activism in nearly every area of the law, sometimes in cooperation with the bench and bar, but often in opposition to their brethren outside academe. In all probability we have not done enough, but some of the problems are virtually intractable; and if solutions are ever found, they will require the support of the body politic in ways not yet in evidence.

Professor Francis A. Allen of the University of Michigan Law School strikes the right note:

If ever the law schools and the practicing profession are in perfect accord, it will be because one or the other has capitulated and abdicated its proper functions. In this sinful world, when the lion and the lamb lie down together the lamb is usually in the interior of the lion. It is of the highest importance, however, that the relations be based on mutual respect. Law schools urgently need the support of the bar and the judiciary to assist in devising new or even radically innovative bases for the financial support of legal education. Without that support, many of the reforms most sincerely urged on the law schools by some lawyers and judges are doomed to failure on financial grounds alone. . . . To law schools and the practicing profession, Benjamin Franklin's advice of two hundred years ago about hanging together or hanging separately seems not misplaced.³⁰

Granting that the law schools must not become captives of the profession, but must cooperate with the bench and bar, there remains a major issue as to the type of research that should be conducted by the law faculties. A few years ago, I heard Henry Kissinger address the annual meeting of the American Bar Association in Montreal. After noting how pleased he was to be with so many lawyers, he said, in essence: "I am not a lawyer, but a political scientist. The difference is that you lawyers find solutions to problems; we political scientists find problems with the solutions."³¹ A political scientist friend of mine puts it more directly. He claims, using a university analogy, that law professors are the engineers, political scientists are the physicists. These ideas appear in many guises. Professor Allen has written:

Several months ago, I sat at dinner listening to a well-known anthropologist denounce legal education. He spoke from some experience, for he had offered a seminar in a distinguished American law school. Legal education, he said, is narrow and provincial, operates in ignorance of new knowledge, and is deficient in intellectual curiosity. We stifle creative students and heap laurels on those who conform. The legal system fails to perform even its basic function of conflict resolution for the great majority of the population, and the law schools are doing little about it.³²

I do not agree with these stereotypes of legal education, but they do

30. See Allen, *supra* note 21, at 57, 58.

31. Address by Dr. Henry Kissinger to the American Bar Association, Montreal, Canada.

32. *Id.* at 56.

contain some elements of truth. To some extent, the law school is a bastion in a sea of change and while society is exploding all around us, we are exploring our own self-contained system and feeling content if we master its intricacies. That is important, but it is not enough; we need to bring to bear the tools of other disciplines in the university if we are to fulfill our responsibility to society. In fact, law faculty members, particularly young ones, have undertaken a remarkable task of self-education in the past several years and *have* utilized a wide range of techniques that were largely ignored in earlier times. These are healthy developments and promise rich dividends for the future as law faculties come to grips with the larger problems of law and society.

At the same time, we should be aware that there are hidden shoals in the interdisciplinary endeavors, and we must not lose sight of our basic discipline.

As the scope and demands of scholarship broaden and intensify, some law teachers lose their way and find themselves in a limbo where they are no longer lawyers, but also not quite behavioral scientists. One of the worst things that could happen to legal education is that the law schools should join the already-long procession of university departments engaged in a wistful search for a subject matter. We need not search. Our mission, as it has been for the past eight hundred years in the universities of the Western world, is the study of law and the institutions of the law. Our duty is to make our thought and our teaching more effective.³³

B. *Are There Too Many Lawyers?*

Earlier in this lecture, I asked the question: Are law and lawyers too dominant in American society and should fewer of our ablest young people be opting for a career in law? I opined that the answer to that question was complex, and so it is. President Bok put it this way in his Report:

The net result of this trend [more and more able young people turning to law] is a massive diversion of exceptional talent into pursuits that often add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit. . . . Yet far too many of these rare individuals are becoming lawyers at a time when the country cries out for more talented business executives, more enlightened public servants, more inventive engineers, and more able high school principals and teachers.³⁴

That ours is a nation based on the rule of law (even if we are not very law-abiding) cannot be denied. Our federal system, our Constitution, our protection of civil rights and civil liberties, our vast pattern of legislation, both state and federal, even the concept "Equal Justice Under Law," engraved in marble over the Supreme Court Building in Washington, D.C., all attest to the need for a large cadre of professionals to put flesh on the

33. *Id.* at 57.

34. *See* Bok, *supra* note 1, at 6.

bones of doctrine. Of course, President Bok would agree with all of this, but the question remains how many lawyers are enough?

I was asked that question while testifying for a law building addition before the Illinois General Assembly a few years ago. My answer turned out to be too clever by half. I replied that I did not know exactly; but that whenever you graduated one lawyer, you needed another one, and that, at least, lawyers did not seem to be subject to technological unemployment. Of course, that begged the question since the legislator wanted statistics, lawyers per thousand of population, etc. I had that data, but it seemed to me to prove nothing and, anyway, he had already decided that we had lawyers aplenty. We did not get the addition, for reasons that had nothing to do with my testimony. Later the state of Illinois opened two new state-supported law schools with no apparent concern for any alleged oversupply of lawyers. Many well-qualified university graduates who wanted a legal education were being denied admission to the University of Illinois, other state-supported institutions badly wanted a law school to round out their programs, and the political dynamics of the state were such that Southern Illinois University and Northern Illinois University were able to secure new law schools. This has been the pattern elsewhere, and both public and private universities have added new law schools, or expanded existing ones, in the past few decades. The moral is clear: so long as student demand exists, universities will struggle to fill the perceived need and, within limits, will succeed in doing so. The American Bar Association, as the accrediting agency, will not attempt to regulate the number of lawyers at its source, the law schools, and will approve the new schools so long as they meet certain minimum standards. Old law schools seldom die; they don't even fade away and the number of lawyers continues to increase. The tide of expansion has now slowed down but, thus far, there has been no diminution in the supply of lawyers.

The reasons for this demand for a legal education are manifold. They include the realization by women that law is an attractive career and many law schools now have twenty-five to fifty percent women in their student bodies. Minority representation has also increased as equal educational opportunity has become a reality. More young people have realized that "law is where the action is," if they are interested in a wide range of social issues. There may be too many lawyers, but there are never enough good lawyers, and the law schools have been attracting increasing numbers of highly qualified university graduates. Assuredly, many of these individuals are being drained away from the other important areas that President Bok mentions, but how does a free society redress that imbalance? I assume that we are not ready for a national manpower commission which would allocate students to those disciplines which someone decides are critical to society. Even if we were, lawyers would contend, and judges would decide, that such a commission is unconstitutional. If Harvard, which has one of the nation's largest (as well as most prestigious) law schools, were to cut enrollment in half, that might be a beginning; the students denied admission could be directed to other fields. I doubt if Presi-

dent Bok has Harvard in mind as a candidate for this experiment; he probably would begin somewhat further down the line.

I do not mean to ridicule his point, however, since he was suggesting a problem not posing a solution, and he may be right about the problem. Too many lawyers may clog the system and may turn some social problems into court cases which should be left to the tender mercies of *de minimis non curat lex*. We do need better techniques for the solution of disputes; the role of mediation, arbitration, and negotiation has been neglected by the law schools in their overemphasis on litigation. The lawyer whose first thought is to file a complaint in court can be a menace in any community. Fewer lawyers might help this situation (although I am not sure), and many of them could make a greater social contribution in some other discipline.

Granting President Bok's premise, however, I see only three ways to deal with the problem. The first is to make other disciplines more attractive to those who now seek a legal career. This has already been done by the graduate schools of business; those schools are now attracting many individuals who previously would have opted for law school. That may be difficult to do in the other fields, such as primary and secondary education, however, unless the monetary rewards and social prestige can be improved. Similarly, the Ph.D. and a university career is a reasonable option only if tenure positions are available at the end of the pipeline. That situation may change, but it is definitely related to the points about the changeless, ever-changing university which I made earlier in my lecture.

The second way to deal with the problem is to accept the fact that a legal education is attractive to many of our brightest young people, and to restructure the law schools so that they offer a program which will deal more effectively with the "flawed system" which President Bok describes. There are not too many lawyers to deal with the myriad problems plaguing modern society if those lawyers are equipped to deal with them in an enlightened, constructive manner.

The third way to deal with the oversupply of lawyers, and the one most likely to prevail, is to leave the matter to the economics of the marketplace and allow the demand to subside as the supply becomes too great to provide an attractive career to most of those who graduate and pass the bar. This has worked in the past, not only for lawyers but for engineers and other professional groups, and I suspect it will continue to work in the future. Individuals intelligent enough to be admitted to law school will not be blind to the prospects available after three years of rigorous study. Prospective applicants are already beginning to raise serious questions about their careers in the decades ahead. If the numbers of law students do begin to decline, this will raise a new set of issues for the law schools, but those issues can await that event!

IV. CONCLUSION

In a sense, this lecture has been "The View from the Chancellor's Office." Of course, on a clear day you can see forever, but I assure you there

are no clear days in the executive suite, only murky fog and the distant cries of the engineers and scientists as they do battle with the humanists and social scientists over the budget. It is difficult to hear the moans of the law faculty in the distance. It has been a pleasure to be back in the law school world and to grapple with the problems of the changeless, ever-changing university. It is an important, indeed vital, area for exploration and I hope this lecture has cast some light on the "darkling plain."

A man once entered a monastery which operated under a vow of virtual silence. In fact, the members of the order were allowed to say only two words every ten years. After ten years, the man said to his superior, "Bad food." Ten years later, he was similarly verbose and orated, "Hard beds." He then served for another ten years in total silence and reported yet again to his superior. This time, he exploded, "I quit." The grim-faced superior opined, "And a good thing—you've been here for thirty years and all you've done is complain!"

I've been in the university world for thirty-six years and, while considerably more vocal than the silent man in the just-told tale, I have on occasion complained a little. Maybe "complained" is the wrong verb; rather, I have viewed with concern and have pointed out trends which seemed to me to augur ill for the state of the academy. Many of those concerns have related to the law school world and I have attempted to explore some of them tonight in the broader context of the total university. Despite my concerns, I am a congenital optimist and I believe the best days for the university and the law school lie ahead. I know they do if we all work together to preserve the best of the past as we develop new directions for the uncertain future.

