

LAW SCHOOLS AND THE WORLD OUTSIDE THEIR  
DOORS: NOTES ON THE MARGINS OF "PROFESSIONAL  
TRAINING IN THE PUBLIC INTEREST"

*Stewart Macaulay\**

AMERICAN legal education is a relatively mature social institution which functions in enduring and comfortable patterns. Even those law professors who like to think of themselves as in the vanguard of the forces for reform play a well-established role; it is disconcerting, for example, to find many of my own pet ideas in a speech given in 1914 by Professor William Herbert Page,<sup>1</sup> one of my predecessors as a Wisconsin contracts teacher. Every now and then a manifesto calling for reform or revolution is issued, but few grand plans calling for major changes are put into effect. Of course, legal education has moved since the days of Langdell, but the movement has been evolutionary rather

---

\* Professor of Law, University of Wisconsin. A.B., 1952, LL.B., 1954, Stanford University. Professor Lawrence M. Friedman of the University of Wisconsin Law School, Professor Sheldon Plager of the University of Illinois Law School and my wife, Dr. Jacqueline R. Macaulay, read the manuscript at an earlier stage and made valuable suggestions. Many of the ideas expressed in this paper were developed during 1966-67 when I was a Fellow at the Center for Advanced Study in the Behavioral Sciences, and I gratefully acknowledge that opportunity.

<sup>1</sup> For example,

The extent of divergence between the theory of law and its actual working outside of litigation could, of course, be determined only by an actual investigation into life itself.

A series of attempts to ascertain the views of business men as to the law which actually controls in case of business contracts has given results that are largely negative. There are strong tendencies to regard nothing as a contract that is not in writing; to regard consideration as unnecessary where the promise is made in the line of business, and to insist, on the other hand, that a contract is not a binding promise at all, but a mere statement of present intention, which is to be carried out if it proves convenient or reasonably practicable. There is a rather strong feeling that the payment of a part of a debt ought to be a discharge of the whole debt, if this was the agreement of the parties, especially if the agreement was in writing. Those who held this view were unable to see why resort should be had to a court of bankruptcy to accomplish this result. In the foregoing case it seems impossible to tell whether these represented real views as to the nature of the contract, or whether they were merely excuses to evade a just liability or to impose a liability which was understood at the outset to be moral and not legal.

W. PAGE, *Professor Ehrlich's Czernowitz Seminar of Living Law*, in PROCEEDINGS OF THE FOURTEENTH ANNUAL MEETING OF THE ASS'N OF AM. LAW SCHOOLS 46, 70 (1914). Compare Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963).

than revolutionary, and graduates of the class of 1968 will find that their experiences have much in common with those of the class of 1938, if not with those of the class of 1908.

Professors Lasswell and McDougal in 1943 published *Legal Education and Public Policy: Professional Training in the Public Interest*.<sup>2</sup> This article called for sweeping change: the focus of legal education was to be shifted to the study of socially important problems in terms of "the goals and the . . . processes of democracy,"<sup>3</sup> with emphasis upon instruction in the skills of "scientific thinking" and social science methodology. The proposal was detailed and bold, but no law school has yet adopted it. Now, twenty-five years later, the editors of this Review think it time for a look at the future of legal education and propose the Lasswell-McDougal article as a meaningful focus of discussion.

There is much in the article that most law professors would readily applaud. First, Lasswell and McDougal would make lawyers aware that law in this society ought to serve democratic values, and their ideal lawyer would be skilled in understanding the full meaning of these values. His role would be far more than manipulator of words and people in the service of the powerful; he would instead see himself primarily as a "policy-maker," seeking to implant in society the values he had been taught to understand. The authors also emphasize that law is far more than appellate opinions, and they press for concern with the many other formal legal processes.<sup>4</sup>

Furthermore, Lasswell and McDougal are impatient with the conventional categories of legal education, such as contracts, property and trusts.<sup>5</sup> These categories were originally selected not because they were significant social issues, but because they facilitated the classification of problems into orderly analytic schemes.<sup>6</sup> Today this fact is widely recognized, and many defenders of orthodoxy claim that they are not really teaching substance but rather legal method, the history of legal ideas, or the skills of careful reading and writing. Lasswell and McDougal recognize the value of such knowledge, but they would have us organize our efforts openly in courses called "Legal Skills."<sup>7</sup> We would then be forced to analyze explicitly the relevant skills and to

---

<sup>2</sup> 52 YALE L.J. 203 (1943) [hereinafter cited as Lasswell & McDougal].

<sup>3</sup> *Id.* at 216.

<sup>4</sup> *Id.* at 205, 264.

<sup>5</sup> *Id.* at 248-56.

<sup>6</sup> See Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present and Future*, 1967 WIS. L. REV. 805, 806.

<sup>7</sup> See Lasswell & McDougal at 215-17.

confront directly the problems of how to teach them and how much to teach them.

Finally, the authors shrewdly anticipated several developments of the past twenty-five years. For example, they talk of a negative income tax,<sup>8</sup> a theory of differential participation in government by those with different amounts of power (the "Power Elite"),<sup>9</sup> and behavioral approaches to predicting appellate decisions,<sup>10</sup> now so fashionable with many political scientists.

We can thus find much to admire in this still timely article; yet it did not succeed in overturning the establishment. In explaining why the law schools did not embrace the revolutionary curricular changes suggested by the article, it is easy to point to the problems created by World War II and the post-war flood of veterans.<sup>11</sup> Yet I think there is more to the story, and while an attempt to probe further necessarily involves a considerable degree of speculation, many of the reasons I would offer for the lack of response to their plan can tell us much about likely trends in legal education in the future.

Lasswell and McDougal presented an elaborate proposal that would have made radical changes in legal education. While in one sense this may have been a virtue, in another it was a great weakness. Legal education is an established institution, reflecting a wide variety of interests and seeking multiple overlapping, if not conflicting, goals. As such, its changes are typically incremental rather than revolutionary.

Recent studies have identified and analyzed the incremental decision-making process in organizations.<sup>12</sup> Initiation of the process requires that those in control recognize the necessity for change, for as long as existing policies appear satisfactory they are continued and reinforced by routine, informal practice and by attitudes of the organization's personnel who are comfortable with familiar ways. When the need for change is acknowledged, however the admission may be disguised and rationalized, one or two alternatives at a time are considered. Typically these are marginal variations on the status quo, the least change that

---

<sup>8</sup> *Id.* at 226-27.

<sup>9</sup> *Id.* at 246.

<sup>10</sup> *Id.* at 237.

<sup>11</sup> See, e.g., Cavers, *Science, Research, and the Law: Beutel's "Experimental Jurisprudence,"* 10 J. LEGAL ED. 162 (1957).

<sup>12</sup> See, e.g., D. BRAYBROOKE & C. LINDBLOM, *A STRATEGY OF DECISION* (1963); Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?*, 2 LAW IN TRANSITION Q. 134 (1965). My description of incrementalism is drawn, to a great extent, from Shapiro's excellent treatment, but it differs in some respects.

might plausibly solve the problem.<sup>13</sup> Because fringe changes involve only small commitments of resources, the organization can pull back in the face of adverse reaction and disown its new program at a minimum of cost. If the change is somewhat successful, a series of small steps may follow which finally will produce a substantially new program. The incremental decision-maker does not identify goals, investigate consequences, forecast conditions and make plans, but simply moves away from some present difficulty. The institution's actions will be those that allow flexibility and minimize the power of outsiders to demand changes. For example, rules may be used so that one can point to them and claim to be bound when an action is questioned. Conversely, sometimes policy themes and the importance of discretion are stressed in order to avoid final decisions or to cover up a policy's true nature as a compromise designed to protect the organization.

An incremental approach is well suited to maintain existing organizations, provided that the organization does not face a real crisis and that the gradual pressures for improvement of performance do not become too intense. Any complex organization must not only satisfy many internal decision-makers before action can be taken but also is subject to the power of outsiders whose interests must be respected. Because the organization has no one set of rationally ordered goals, agreement among these people with power is hard to reach. An incremental approach may succeed since both insiders and outsiders can support a proposed change, or decide not to oppose it, for various reasons; one frequently important reason is that the issue is so minor that it is not worth a fight. Moreover, since incremental decisions can be scrapped with minimum cost if the experiment fails, the proponent can easily argue that the organization should "give it a try." On the other hand, elaborate ends-and-means decision processes are costly. Defining problems, identifying all alternatives, predicting the full range of consequences and then evaluating them require much time, energy and skill. This expenditure is rarely justified from the standpoint of the organization itself.

Although incrementalism is often all that we should expect, there are usually critics of any complex organization who are not pleased by what

---

<sup>13</sup> I think it useful to see incrementalism as a matter of degree: steps away from the status quo can be small or a little larger; the costs of a retreat can be negligible or real but acceptable; the process can proceed by many small steps or can be accelerated; acceptance by all those with some influence may or may not be necessary.

they would call timid drift (or something less polite).<sup>14</sup> Some may advocate cost-benefit analysis, large-scale planning or pure leaps of faith. To them incrementalism is a euphemism for much of what is wrong with our large private and public institutions. They may be right. Nonetheless, the advocate of major change must contend with all of the structural reasons why incrementalism is so attractive to those in large organizations.

Law schools usually behave incrementally. Numerous interests are involved: some law schools have conflicting factions, most professors regard their major course as their property, and legal education must at least placate a number of influential outsiders. Incremental decisions can please each of these power groups, since it is fairly easy to quiet differing blocks by a series of changes only marginally different from the status quo. A large measure of freedom for each professor to teach what he wants under traditional course titles, some seminars with fancy names to dress up the catalogue, a few courses devoted to so-called practical subjects, and a required series of legal ethics lectures by a leader of the bar will usually appease all but the real trouble-makers.

Lasswell and McDougal, on the other hand, offered a plan which almost seems designed to offend all relevant interests. Many professors were told that a life's work was irrelevant and that they had to start over, work out an analysis of democratic values, and write their own set of new materials based on an untried theory. The proposal was unlikely to look practical to certain members of the bar, since nowhere were students to be taught such important things as getting the widow a flag from the government when handling the estate of a veteran.<sup>15</sup> The emphasis on planning by "experts" to solve social problems was not likely to impress many legislators who pass on budgets for state law schools, or many donors to private ones, since "planning" connotes anything from improved budget-making to a socialist take-over, and the social scientists' reputation for ultimate wisdom is not universally secure.

Moreover, the untried Lasswell and McDougal plan was a gamble

---

<sup>14</sup> See, e.g., J. HURST, *LAW AND ECONOMIC GROWTH* (1964); J. HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 28-92 (1960); Reich, *The Law of the Planned Society*, 75 *YALE L.J.* 1227 (1966). Compare Handler, *Controlling Official Behavior in Welfare Administration*, 54 *CALIF. L. REV.* 479 (1966).

<sup>15</sup> This illustration of the "practical" side of legal education is undoubtedly unfair, but it comes from a lecture by a practicing lawyer to law students. On the other hand, I think that much that goes on in law school classes conducted by professors has no more merit.

with high penalties for failure. A school which, at the cost of much effort, tried the plan and failed might achieve nothing more than a reputation for foolishness. The substantial risk of failure and the difficulties of getting the proposal past all the groups with power to veto it would be justified only if a law school perceived its present situation as a crisis calling for drastic action. However, during the twenty-five years since the article was published most influential insiders and outsiders have been more or less pleased with legal education. Because many talented young lawyers emerge each year from the nation's law schools, it is assumed that the institutions must be doing something right.<sup>16</sup>

Therefore, one significant lesson of Lasswell and McDougal's experience is not to expect dramatic change absent a widely shared view that legal education faces a crisis. Some incremental change in the direction charted by the authors has indeed occurred in the past twenty-five years, and it is possible that their article may have influenced that change to some extent. Many contracts courses, for example, are becoming significantly concerned with value problems, and there are more and more seminars and advanced courses on problems, such as poverty and civil rights, which often involve a detailed analysis of democratic values. In a few schools even as technical a field as taxation has become a vehicle for examining values in the context of the relationships between government, pressure groups and the economy. But not one of these developments is exactly in the form advocated by Lasswell and McDougal.

Moreover, revolutionaries tend to give rise to counter-revolutionaries. One group of law teachers has concentrated its energies on studying law as an instrument affecting other social institutions and serving substantive values, but another group has turned its attention back on the proper functions of institutions within the legal system.<sup>17</sup> While Lasswell and McDougal had to deal with law professors who insisted that policy was no proper concern of a law school,<sup>18</sup> it would be hard to find many today who would consciously take that line. The current counter-revolutionaries want legal education to consider such matters as the nature and limits of adjudication and the duty of a court to follow neutral principles. Their tacit position is that law schools ought to be

<sup>16</sup> See Friedman & Macaulay, *supra* note 6, at 810-11, for a criticism of this argument.

<sup>17</sup> See, e.g., L. Fuller, *Adjudication and the Rule of Law*, in 1960 PROCEEDINGS OF THE AM. SOC'Y OF INT'L LAW 1; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>18</sup> See Lasswell & McDougal at 205 n.7, 207.

concerned primarily with appellate courts, and they assert that appellate courts are not appropriate general policy makers in our legal system.

This reaction against realism suggests that an additional reason for resistance to the Lasswell-McDougal proposals may be found in misplaced emphasis or incompleteness in the proposals themselves. The perspective of twenty-five years reinforces this conclusion, though the significant weaknesses in the proposals are only partially those emphasized by advocates of judicial restraint. It must be conceded that in an article of such length and complexity one can find mention of almost any conceivable idea relevant to legal education.<sup>19</sup> Therefore, the criticisms offered here must deal with the authors' emphasis and general position, and are made with the knowledge that the critic is writing a quarter of a century later and is not including their later work in his analysis.

At the outset one must agree with the principled neutralists<sup>20</sup> that the internal functioning of the legal system as a system is a major problem and one given little emphasis by Lasswell and McDougal. Adjudication may be a distinctive process ill-suited to polycentric decisions, and perhaps the judiciary implements the theory of our federal constitutional system only if it engages in policy-making with great restraint. However, the costs of limiting adjudication to the tasks for which it is theoretically best suited may in some situations be too high, and judicial restraint may preserve only the empty form of our democratic values while destroying much of their substance. At least one must consider both sides of such a balance sheet. There are other problems of system maintenance as well. The legal system operates through the creation of rules, standards and procedures, and the nature of this output affects both the kind and amount of demands on the legal system.<sup>21</sup> Both the Lasswell-McDougal article and the judicial restraint theorists give little attention to this important problem.

---

<sup>19</sup> Lasswell and McDougal do make a number of statements such as

the ultimate aim of those who seek better preparation for policy-making should be an attempt to achieve a curriculum organized on the basis of a realistic and comprehensive picture of the structure and functions of society, joined with the best knowledge now attainable of the dynamics of social process, and oriented toward the implementing of a consistent and explicit set of democratic values.

Lasswell & McDougal at 248. See also *id.* at 212, 216, 242. However, they devote no time to developing the full role of law in society, including law's informal processes and the bargaining that so often is associated with them. Moreover, they say a number of things inconsistent with my views about important parts of legal education.

<sup>20</sup> One of those who read this manuscript noted in the margin at this point, "As distinguished from the unprincipled ones?"

<sup>21</sup> For an important and challenging treatment of these issues, see Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786 (1967).

In common with what most law professors write, Lasswell and McDougal seem to assume that one can achieve democratic values simply by identifying them through logical analysis and giving directions based upon this analysis to legislatures, executives, courts, administrative agencies and the police. While their proposal stresses the need to expand our vision from a narrow preoccupation with the appellate courts, it still seems limited to little beyond the formal operations of the various branches of government. To me this is the most serious omission of all, although I suspect Lasswell and McDougal themselves are well aware of the less formal activities of government and the interactions between law and other social systems.

For example, there is little stress in the article on the need to describe the legal system as it actually operates. But its actual operations affect the realization of whatever goals one selects. Although a good deal of praiseworthy effort has gone into working out the theoretical implications of the first amendment, even a line of Supreme Court decisions governed by the best possible value analysis will not guarantee meaningful freedom of expression. The best the Court can do is supervise the relatively formal actions of the legal system, and even at this level its supervision is not totally effective. But the informal actions of government officials may limit free expression of political ideas at least as effectively as the formal. In an article published about two years ago,<sup>22</sup> my colleague Ted Finman and I considered the statements of public officials, in presidential press conferences and congressional committee reports, about opposition to the war in Vietnam, and concluded that these statements can prompt the imposition of all kinds of extra-legal sanctions. Former friends can refuse to associate with an anti-war demonstrator, he can lose his job, or he can be beaten. Thus, without taking formal action that could be at least partially controlled by appellate courts, government officials could limit freedom of expression to those brave or foolish enough to suffer such sanctions. There is some evidence that the Johnson administration has been under pressure to do this,<sup>23</sup> and therefore anyone interested in the reality of freedom of expression cannot ignore this kind of informal governmental power.

One must have a model of how the legal system really works if he wants law to aid concretely in the achievement of democratic values.

<sup>22</sup> Finman & Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 Wis. L. Rev. 632.

<sup>23</sup> See Milwaukee Journal, Nov. 23, 1967, § 1, at 3, col. 2; Wall Street Journal, Dec. 1, 1967, at 1, col. 5.



Far too often idealistically conceived programs based on a "high school civics" model of the legal process fail when they face the pressures of the real world. Study after study of areas ranging from automobile accident claims to criminal law enforcement indicate that in practice problems typically are solved through a bargaining process wherein the potential use of the formal legal machinery plays a marginal role as one of the things to be bought and sold.<sup>24</sup> For instance, in Wisconsin the relationship between automobile dealers and manufacturers is theoretically controlled by a formal licensing system, wherein a manufacturer's representative who mistreats a dealer may have his license revoked and lose his right to do business in Wisconsin. Actually, the typical dispute between manufacturers and dealers is mediated by the Executive Vice-President of the dealers' trade association, and only when he fails does the dispute go to the state licensing agency. The trade association gets its power through a tacit bargain. If the manufacturer has a good case, the trade association representative will help the manufacturer cancel the dealer and keep the dealer from appealing to the state agency. In return, if the mediator is not satisfied with a manufacturer's case, the dealer will get another chance to perform satisfactorily. The formal legal process helps support this private system of dispute settlement, but one could not discover its existence by reading the Wisconsin statutes.<sup>25</sup> Similarly, we are all familiar with the function of the potential lawsuit in negotiations between a claimant and an insurance adjuster,<sup>26</sup> where the suit is to settlement negotiations as war is to diplomacy.

At one place, Lasswell and McDougal do focus on the less formal process of the law. They see lawyers advising the powerful, and lawyers counselling those making decisions which may be insignificant considered individually but critical in the aggregate of thousands of similar actions. Correctly asserting that lawyers have some power to channel behavior for good or for evil, they call upon lawyers to use

<sup>24</sup> See, e.g., A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS—STUDIES IN THE ECONOMICS OF INJURY REPARATIONS 181-223 (1964); W. LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 102-24 (1965); S. MACAULAY, LAW AND THE BALANCE OF POWER 151-58 (1967); Blumberg, *The Practice of Law as Confidence Game*, 1 LAW & SOC'Y REV. 15 (1967); Fisher & Fairbanks, *The Politics of Property Taxation*, 12 AD. SCI. Q. 48 (1967); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963). Aubert says that we are less likely to get bargaining where the dispute involves a relatively pure conflict of values rather than of interests.

<sup>25</sup> See generally S. MACAULAY, LAW AND THE BALANCE OF POWER (1966).

<sup>26</sup> See A. CONARD, *supra* note 24.

their influence upon clients to help realize democratic values.<sup>27</sup> Generally one can only applaud such a plea, for it is hard to defend a profession that does no more than make rich people richer. However, by what warrant may lawyers judge their clients' goals illegitimate although legal, and impose their own views about the path of virtue upon their clients? Further, one can question how much power attorneys are actually able to wield in influencing clients to act in support of democratic values. Lasswell and McDougal come close to saying lawyers were responsible for the rise of Hitler, the depression, and other assorted social problems of the 1930's.<sup>28</sup> If they really mean this, it is hard to accept, for the evidence we have is that the lawyer's professional leverage is frequently very limited despite our profession's institutional propaganda. Of course, influence varies with circumstances, but my research indicates that many lawyers have difficulty in getting their clients to ask for advice before the clients have made decisions and taken action, and even in getting them to follow the advice that is given. For example, consider the embarrassment of the General Electric legal department when the price-fixing conspiracy was discovered and it was disclosed how carefully the conspirators had evaded the scrutiny of the legal staff.<sup>29</sup> Furthermore, consider how little leverage the individual practitioners in Chicago studied by Carlin<sup>30</sup> have to implement democratic values in their roles as "fixers," bill collectors and mediators. Fidelity to such values may be far too expensive a luxury for lawyers who are really marginal small businessmen struggling to make a living. A legal advisor must help a client reach his goals or he will be ignored.

Overlooking the need to get a picture of the system in action distorts Lasswell and McDougal's treatment of the problem of power in an egalitarian society. While they see many of the issues, they neglect one which is of crucial relevance to democratic values: insofar as the legal

---

<sup>27</sup> Lasswell & McDougal at 207-09.

<sup>28</sup> It should need no re-emphasis here that these democratic values have been on the wane in recent years. . . . The outburst of racialism in Germany is but one of several profound recessions from the ideal of deference for the dignity and worth of the individual. . . .

The question may be asked whether the lawyer can be held responsible in any significant degree for the plight in which we find ourselves. . . . The answer . . . is: most assuredly, yes.

*Id.* at 207-08.

<sup>29</sup> See R. SMITH, *CORPORATIONS IN CRISIS* 113, 122, 143, 145-47 (1966).

<sup>30</sup> See J. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* (1962). See also J. HANDLER, *THE LAWYER AND HIS COMMUNITY* (1967).

system operates informally and serves to support a market for justice, there arises the classic contracts problem of inequality of bargaining skill and power. One who needs money immediately is in a poor position to tangle with an insurance adjuster, and the legal system generally only increases the adjuster's power by its cost and delay barriers. Likewise the criminal law system, in which the accused can often trade a guilty plea for a reduced charge and a reduced sentence, is at most stages a complex bargaining process heavily weighted against an innocent person who is wrongly accused. If he refuses to accept the trade of a plea of guilty for a lesser sentence, he runs the risk of facing a more serious charge and receiving a much heavier sentence if he should lose. Finally, the legal system supports the interests of powerful socioeconomic classes at high costs to the less powerful through zoning and neighborhood school laws, aiding public transportation to the wealthy suburbs, and some types of urban renewal. Lasswell and McDougal's system of democratic values fares badly as an approach to these important problems, but their article does not clearly propose any more study of them than exists in most conventional law schools today.

Another important topic is missing in Lasswell and McDougal: their proposal omits analysis of the limits of effective legal action, or, defined alternatively, analysis of the problems in making law effective. However defined, some concern with implementing the legal system's decisions is vital if one insists that law serve policy. Members of the legal profession must come to grips with such problems as communicating with and persuading both those affected by a law<sup>31</sup> and those charged with its enforcement, selecting and obtaining those resources which can and must be devoted to enforcement measures, and balancing interests in situations where the enforcement of certain laws will necessitate the sacrifice of important values. A further problem limiting the system's effectiveness is that we may not know how to eliminate poverty or the harmful effects of discrimination on children even though we agree that it would be nice, or even essential, to accomplish these goals. An assumption which runs through much of Lasswell and McDougal is that social scientists in the 1930's were well on their way to solving our problems by action research if only we would listen to their expert advice,<sup>32</sup> but twenty-five years later most social scientists are unwilling

<sup>31</sup> See Litwak & Meyer, *A Balance Theory of Coordination Between Bureaucratic Organizations and Community Primary Groups*, 11 *Ad. Sci. Q.* 31 (1966).

<sup>32</sup> See, e.g., Lasswell & McDougal at 225.

to make such claims.<sup>33</sup> Moreover, the very effort to apply social science methods to citizens affected by government may itself offend Lasswell and McDougal's democratic values. The ideal of equal treatment for those in equal situations raises clear problems when scientific method demands a control group for an experiment, and attempts to gather data often involve invasions of areas many think should be private.

The model of decision-making offered by Lasswell and McDougal is another instance where the omission of important considerations dilutes the applicability of the authors' scheme to real life situations. The authors seem to assume that law students should be taught to make decisions by identifying a problem, searching for all alternatives, predicting the likely consequences of each alternative, and evaluating all consequences within the framework of their system of democratic values.<sup>34</sup> Several scholars have questioned this model.<sup>35</sup> One can debate whether it presents a task that is ever possible, and few would assert that the task is easy. We are limited in our ability to define a problem precisely, to understand how many alternatives are possible, and to make more than a wild guess about consequences. When several decision-makers are involved, they may have difficulty reaching agreement on the values to be applied. Furthermore, in certain situations adherence to this model may be a foolish and costly expenditure of resources. Few would care to require it when selecting the best type-face to use on a parking ticket, and one hopes police departments responding to the report of a murder in progress do not spend too long debating all the likely consequences of all possible alternatives before they act.

Sometimes it makes sense to attempt to come as close as possible to this scientific model of decision-making, but often two other styles of making choices will be appropriate. In an unforeseen emergency where time is limited, the most rational approach is typically a leap of faith or the best guess of one with experience. At other times, incremental decision-making may be best since it offends the fewest interests and does not involve irrevocable commitments. Each style can offer high payoffs in some instances and prohibitive costs in others. Therefore, although one cannot fault Lasswell and McDougal for failing to foresee the

---

<sup>33</sup> See Ring, *Experimental Social Psychology: Some Sober Questions about Some Frivolous Values*, 3 J. EXPERIMENTAL SOCIAL PSYCH. 113 (1967).

<sup>34</sup> See, e.g., *id.* at 212. However, it is possible that Lasswell and McDougal anticipated the development of theories of incremental decision-making, although they did not develop the idea. See *id.* at 265, 290.

<sup>35</sup> See note 12 *supra*.

recent writing in this area, it is nevertheless true that their plan would concentrate attention on a decision-making process which is often inappropriate. Such a narrow focus is constraining in any educational system, to the extent that it inhibits the freedom of teachers and students to abandon old models and follow promising paths charted by other scholars.

My final objection to the Lasswell-McDougal plan is similar to those already discussed, but here I am concerned with the way they carry out their own proposal that law students focus on democratic values. While their article stresses analysis of democratic values and mentions individual liberties as a fit subject for a course,<sup>36</sup> it does not give adequate attention to protecting the individual from the will of the majority or from the will of experts with power. For example, the authors propose changing first year property to a course organized around "the specific goal of implementing the definite, intelligible and generally accepted norms of community planning experts for building stable and livable urban communities."<sup>37</sup> One can agree that first year property often appears to be a mindless historical exercise, conducted in a manner that would be disowned by any historian. Yet the revision proposed by Lasswell and McDougal suffers from their apparent assumption, present here as elsewhere in the article, that such "generally accepted norms" exist and that there are no countervailing values inherent in the nature of our democratic society. First year property could be taught as a study of a legal approach to allowing maximum scope for individual choice. Undoubtedly this value, usually labelled "property rights," must be limited if we are to have "stable and livable urban communities" and, indeed, if we are ever to solve our racial problems. But limited does not mean ignored. Students must recognize that the problem is one of proportion between competing values. Some of us want our own kind of house which may not be a neat rectangle with a uniform lawn; some want to live in an economically integrated neighborhood, others in a one-class enclave. Lasswell and McDougal, if I read them correctly, seem prepared to have the "experts" tell us that we cannot have some range of choices, and to tell us this in the name of democratic values. Throughout the article I sense that the authors are eager for law schools to align themselves on the correct side of the battles of the New Deal, and New Dealers were not noted for

---

<sup>36</sup> Lasswell & McDougal at 261.

<sup>37</sup> *Id.* at 248.

their defense of such concepts as property rights or freedom of contract, perhaps for good reason. The authors undoubtedly reflect the crises of their times just as my responses reflect that I went to law school during the McCarthy era and began teaching at a time of disillusionment with experts, planning and large impersonal bureaucracies, whether public or private. Some of the current generation of students would probably fault Lasswell and McDougal for not dealing with civil disobedience and the duty to defy an immoral law.

What does all this criticism of a great article prove except that it is hard to satisfy everyone, especially critics who shoot from the vantage point of twenty-five years? First, it shows that in legal education as elsewhere emphasis shifts. Our intellectual history shows a shift in emphasis from classification and systematization to the means of attaining social objectives. Lasswell and McDougal's article represents a high point of calling for real value analysis to replace the typical "realist's" solution which lamely told one to balance interests or look to the mores. Our current era has produced a reaction demanding analysis of the proper role of the units of the legal system, primarily appellate courts. The next wave may and ought to emphasize the place of the legal system in society.

Second, this criticism shows that other fields change too. The writing on incrementalism and other modes of decision-making is new and potentially of great importance to legal education. Social science has made important advances since World War II, but it has also become more modest in its claims to be able to remedy all social ills, and "action research" has to a great extent fallen out of favor as a route to such remedies. There is a growing awareness that the legal system cannot escape difficult value and fact problems concerning the consequences of legal action merely by delegating matters to experts.

Finally, we observe that even such brilliant and thorough scholars as Lasswell and McDougal are partial prisoners of their time, bound by current conceptions of the important problems and the important solutions. Their article foresees a remarkable number of developments, but, not surprisingly, it failed to anticipate the kinds of issues raised by the McCarthy era, the disillusionment with control by experts in big government, big labor and big corporations, and the concern with protecting minorities and individual dissenters.

In summary, while sweeping and well-worked out plans for revising the entire process of legal education have great value, such plans neces-

sarily will prove incomplete and at least partially wrong when viewed twenty-five years later. A lesson for legal education which can be drawn from this observation is that any plan must have capacity for adapting to change and correcting mistakes as they are discovered. The more conservative are likely to see the lesson as a confirmation of the virtues of incremental change. The issue is likely to be resolved on the basis of one's judgment as to whether or not conditions are so intolerable as to warrant "revolution" and its necessary plunge into the unknown. Different observers will of course have different levels of tolerance for our present patterns of legal education.

What then is the future of legal education? Undoubtedly, law schools must and will continue to be schools of advanced reading and writing, stressing care and precision in thinking. It would be nice if our raw material came to us from college with high proficiency in these skills, but only a few law schools can hope to be so fortunate in the near future. As long as working with cases and statutes is an important part of the attorney's role, we must also devote some attention to the peculiar skills those functions involve, but we should articulate the nature of these skills and consider how they can best be taught. Furthermore, students must pick up a sense of professional identity and commitment, and they probably take their initial steps toward socialization as lawyers in the law student culture. While it would be difficult for law schools to attack the virtue of being "lawyerlike," we might serve our profession better and have fewer idealists drop out if we explicitly attempted to influence this socialization process by stressing standards for success beyond making money.

Assuming that legal education will and should continue to perform some of its traditional functions, there are still many areas where change is needed. In 1943 Lasswell and McDougal urged that law students learn to handle values in a sophisticated manner, and while we have been making progress in this direction, further effort is essential. Today it is particularly appropriate for lawyers to understand the values reflected in concepts such as due process and freedom of speech; concepts of basic relevance to the protection of individuals from the power of the state. After the performance of much of the bar during the McCarthy era, Lasswell and McDougal would probably agree. Also, it is appropriate for lawyers to understand when, if ever, "direct action" and civil disobedience are justified in a democracy. Furthermore, if we are going to train lawyers to perform their many profes-

sional roles and to be concerned with the legal system as an institution which serves to implement certain individual or group values, we must first understand and teach the realities of the legal system. We must talk about it not as an abstraction found in documents, but as an institution in its full social context, and we should know more of the lawyer's many roles. We should give equal energy to the study of the informal as well as the formal operations of all units of the legal system. We should know something about how those seeking to solve problems attempt to influence and use the system, and should examine the ways in which law and society affect each other. We should study how the legal system maintains itself by observing how it deals with such problems as too much demand for its services and resistance to its actions. Clearly anything we glean from this research is relevant to training lawyers, and it is also highly relevant to those concerned with analysis of values, at least insofar as their analysis is focused on the good and bad impacts of legal action. Evaluation based on assumed consequences is dangerous if the assumptions are questionable.

It is hard to tell what degree of change present conditions favor. Few law professors or deans view the present situation as critical, but there are signs of some disquiet. Some professors have drastically altered traditional courses or introduced entirely new ones, particularly in areas such as criminal law and domestic relations, where the products of social science theory, psychiatry, and field research have given content to courses which were far removed from life when I went to law school. There are even signs of incremental change in such unlikely places as a few contracts courses, although those who would tamper with that hoary tradition are viewed with alarm in many quarters. Schools located in large cities have attempted to engage students in the staggering legal problems of urban life. Also, many law schools offer what once were considered irrelevant interdisciplinary seminars such as "Law and Psychiatry." Even some hard line traditionalists are flirting with economics in trade regulation courses.

Another development may accelerate the pace of change. Some law students have shown real interest in making law school relevant not only to the problems of middle and upper-class wealth but also to what they consider major social issues. They want to talk about such questions as de facto segregation in Northern cities, attempts to control the use of drugs through law, the legal response to resistance to the selective service system, and the extension of due process concepts to large bureaucratic



organizations such as universities. Moreover, since so many students have participated or know those who have participated in demonstrations, in work in the slums, or even in the drug culture, they tend to be impatient with learning rules of law and handling abstract value statements while being asked tacitly to accept a model of the legal system which assumes that the officials gain their positions through an acceptable process and impartially apply rules. Ten years ago I had to try to make my students somewhat skeptical of the legal system, but today I have to resist the cynics and try to convince my classes that the system sometimes works well, that it is not merely an expression of ill-gained power and class rule, and that the formal due process model may be important as a basis for criticism even when the legal system fails to operate according to our ideals. My task was not made easier by two recent events in our community. A prominent attorney convicted of a nice middle-class crime—defrauding people who could ill afford to lose the money—was allowed bail pending appeal, but University students charged with staging a disruptive demonstration against the Dow Chemical Company during its campus interviews were not allowed bail pending appeal until they fought this denial all the way to the Supreme Court of Wisconsin. A few of our best students are challenging interviewers from the elite, typically conservative law firms, asking them to prove that a large corporate practice offers work that is socially and personally meaningful. They are asking these interviewers about the freedom of young associates to work with the American Civil Liberties Union or to accept assignments as defense counsel in criminal cases involving indigents. Such students want more from law school than the mastery of techniques of manipulating the legal system in the service of great wealth. When they become alumni, they may make demands for change in legal education very different from those we are accustomed to hear from our graduates.

There are opportunities to make changes in the direction of "telling it like it is." One of the problems presented by Lasswell and McDougal's plan was that the necessary teaching materials were not fully developed. They called on professors to abandon their inventory of class notes about traditional courses and join in the effort to create new materials organized around a value analysis. Law professors are not more eager than other men to abandon their past and start over from scratch, but today we have a growing body of field research to support the kind of movement I have advocated here. The prospects are excellent for getting

more, and we also are beginning to see more products of this kind of research reflected in published teaching materials. The cost of failure in trying a new book on the administration of criminal justice is much less than the cost of failure in trying to write such a book. Once books taking the line I suggest appear, course changes will accelerate.

If we are content with incremental change, we face far easier political problems. Legal educators have been sufficiently sold on the virtues of integrating law and social science to tolerate experiments by their colleagues, and if these experiments prove successful, more will be attempted, especially by young law teachers with less commitment to the past. Moreover, it can be argued that the present pace of incremental change, while slow, has some advantages over more radical methods in addition to its political acceptability. As Lasswell and McDougal suggest, a diversity of approach has real costs; but it may also have real values. Traditional courses cover important matters which may be overlooked in any grand plan that seeks to isolate all of the worthwhile things to teach. After all, legal education itself is an unstudied area. We may have some idea of what we are sending out, but we know little about what the students are receiving. The unintended consequences of our actions may be very important; we may teach far more about the reasons for limiting arbitrary exercises of power through the administration of our law school rules and the conduct of our professors in class than we ever do in Constitutional Law or Administrative Law.

By and large, however, if we assume that there will be any need for lawyers twenty-five years from now, there is a chance that they will be trained very differently than their fathers were trained in 1968. They may have far greater skills in handling values and a more accurate picture of how the legal system works. Their teachers may know much more about the diverse roles played by lawyers, and perhaps we will be able to discuss meaningfully such things as the arts of bargaining and counselling, planning transactions to maximize stability, and negotiating among opposing interests. These developments may mean that students will stay in school longer or start legal studies earlier, but more likely they will compel us to abandon some of the things we are doing now. Law students may have to specialize, much as medical students do now.

Perhaps all of this is fantasy. Institutions, including legal education, characteristically resist change as their members fight not to become technologically obsolete. Our promising beginning in field research

may prove a dead-end street, and we may never be able to teach effectively such arts as bargaining, counselling and transaction planning. The legal profession itself may change beyond recognition and call for a different kind of training than I have advocated. More and more of the lawyer's roles could be taken over by others, until only a few specialists in litigation and appellate work would be left. My views could look as incomplete in twenty-five years as Lasswell and McDougal's look to me today. But one thing seems clear to me. The Lasswell and McDougal focus on value articulation is not the solution to all the problems of legal education that they claimed it to be:

But—and here we take our stand—unless some such values are chosen, carefully defined, explicitly made the organizing foci of the law school curriculum, and kept so constantly at the student's focus of attention that he automatically applies them to every conceivable practical and theoretical situation, all talk of integrating "law" and "social science," or of making law a more effective instrument of social control, is twaddling futility. Law cannot, like golf or surgery, be taught only as technique; its ends are not so fixed and certain.<sup>38</sup>

The trouble is that careful definition cannot end all value conflicts. For example, most of us want to have our cake and eat it too, to have equality *and* differential rewards, control for the common good *and* individual freedom. Social problems raise delicate questions of the proportion of various social goods to be expended in different areas. Even when there is general agreement on abstract values, there is likely to be great difference of opinion on specifics. Thus it will be difficult for anyone to apply a set of values "automatically" to "every conceivable practical and theoretical situation."

A more fruitful approach might be to direct our efforts toward understanding the formal and informal processes of government as they affect people and are affected by them. Social processes can be understood and described even prior to value analysis, and social science can contribute markedly toward an understanding of how the wheels of society go round. Understanding *how* the society operates is a critical first step in framing effective social policy. I would hope that a law student who understood the problems of value conflicts and proportion would produce better judgments if his model of the legal system in op-

---

<sup>38</sup> *Id.* at 244.

eration were the more comprehensive one which I have described.<sup>39</sup> Moreover, if our attention is directed toward the process in actual operation and toward the real-life roles of lawyers, we will have a better chance of applying our knowledge to real problems while they are still alive.

---

<sup>39</sup> My colleague, Joel Handler, thinks we must separate professional training from the study of the impact of law on society if we are ever to get the kind and amount of research we need. He advocates a graduate department of law with no responsibility to train lawyers because the directions of research would be freed from the constraints imposed by the needs of practice. See Handler, *The Role of Legal Research and Legal Education in Social Welfare*, 20 STAN. L. REV. 669 (1968). I am not yet persuaded that research and practice are sufficiently inconsistent to warrant the costs of establishing a new department.