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## Monrad Paulsen and the Idea of a University Law School

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## MONRAD PAULSEN AND THE IDEA OF A UNIVERSITY LAW SCHOOL\*

*Michael J. Graetz\*\* and Charles H. Whitebread II\*\*\**

Monrad Paulsen played a very special role in both of our lives. He was our friend and our first dean, and we will likely remember no future dean with the same affection, loyalty, and admiration. Monrad knew when to encourage and when to criticize, and he used his knowledge and the force of his personality to help launch both of us in the academic profession. He was, however, more to us than friend, supporter, and critic: our views about legal education were, in important and permanent ways, shaped by Monrad Paulsen.

Central to Monrad's view of legal education was his belief in the special nature and role of a university law school. For Monrad, it was supremely important that the law school be engaged not merely in vocational training, but in serving as an integral part of the university. As such, the school has a unique function: to marshal the many intellectual resources of a university toward the promotion of justice. Today, when the performance of law schools is being questioned by the judiciary, the organized bar, and the present generation of law students, we could think of no better way to participate in this tribute to Monrad than to remind people of his ideal and to record briefly our views about law schools and legal education—views that bear the unmistakable influence of Monrad Paulsen.

### I. THE ROLE OF A MODERN UNIVERSITY LAW SCHOOL

The notion that a university law school is a very special place is, of course, not original to us or to Monrad. In 1874, President Woolsey of Yale described the purpose of a law school:

Let the school, then, be regarded no longer as simply the place for training men to plead causes, to give advice to clients, to defend

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criminals; but let it be regarded as the place of instruction in all sound learning relating to the foundations of justice, the doctrine of government, to all those branches of knowledge which the most finished statesman and legislator ought to know.<sup>1</sup>

A university is a place for dialogue, for reflection, for definition and comparison of values. A university law school must differ from institutions that aim at a narrower, vocational kind of instruction; it should consider the claims of justice first and, from this perspective, the techniques of law. The school's fundamental commitment must be the promotion of social good, not the private interests and benefit of its faculty and graduates. As a recent report of a Harvard Law School committee recognized:

[This] implies that the School should design its practices, and maintain its climate, with a view to furthering the likelihood that the professional activities of graduates will reflect a sense of commitment to the consideration and advancement of social interests, while the work of the faculty will contribute both to that end and to learning on a broad range of human and social concerns.<sup>2</sup>

Such grand aspirations would undoubtedly produce difficulties for any branch of a university, but they are exacerbated in a law school because of its uneasy marriage with the goal of producing well-trained, functioning lawyers—many of whom individually aspire to nothing more lofty than becoming financially comfortable through the successful practice of law. Given that tension, any law school seeking to accomplish the larger mission must acquire certain qualities that will enable it to advance the cause of social justice. Monrad's way of capturing this sentiment was to ask his faculty two questions repeatedly. The first: "What are you working on?" The second: "What does it have to do with justice?"

## II. THE QUALITIES OF A UNIVERSITY LAW SCHOOL

### A. *A Community of Scholars: What Are You Working On?*

The paramount quality of any university law school—whether

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<sup>1</sup> Fortas, *Training of the Practitioner*, in *THE LAW SCHOOL OF TOMORROW* 179, 191 (D. Haber & J. Cohen eds. 1968).

<sup>2</sup> Committee on Education Planning and Development, Interim Report 26 (October 1980) (Harvard Law School Michelman Committee Report) [hereinafter cited as Michelman Committee Report] (copy on file with the Virginia Law Review Association).

private or public, urban or rural, regional or national—must be that it is and knows itself to be a community of scholars. Only in such a community can one have the luxury of time and the support of colleagues to focus on new ideas and methods in an atmosphere that permits contemplation and reflection.

Historically, this emphasis on scholarship is remarkably recent. As late as the 1960's a thoughtful commentator on legal education could state:

As the law schools are essentially professional schools, it is scarcely surprising (and by no means necessarily unfortunate) that law schools are predominantly teaching institutions. For a hundred years commentators have expressed surprise that despite the number of distinguished lawyers teaching in law schools, the output of scholarly literature is small. Teaching still takes pride of place over scholarship.<sup>3</sup>

Similarly, other commentators have pointed out that the research activities of most law schools could then be characterized as essentially incidental, and that law professors who focused primarily on research were often treated as second-class citizens.<sup>4</sup> Ironically, at the very time these comments were being written, change was occurring. It was during Monrad Paulsen's generation that one could see a clear trend emphasizing scholarship in most national law schools and a new respect for scholarship in those law schools that followed the lead of the national schools. By the late 1960's, Thomas Bergin had noticed that the new trend had produced an essential schizophrenia—a tension between the need to train lawyers and the need to publish—in law teachers and, to some extent, in the law schools as institutions.<sup>5</sup> Although the individual schizo-

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<sup>3</sup> Stevens, *Two Cheers for 1870: The American Law School*, in 5 PERSPECTIVES IN AMERICAN HISTORY 405, 538 (D. Fleming & B. Bailyn eds. 1971).

<sup>4</sup> See Cavers, *Legal Education in Forward-Looking Perspective*, in LAW IN A CHANGING AMERICA 139 (G. Hazard ed. 1968).

<sup>5</sup> Professor Bergin stated:

By compelling true academics, or those who have the potential for serious scholarship, to play out a Hessian-trainer role, and by compelling highly skilled Hessian-trainers to make believe they are legal scholars, the disease dilutes both scholarship and Hessian training to the advantage of neither. That this compulsion . . . exists in today's law schools seems to me plain upon inspection; for there is no fact more visible in our law schools than that teachers with extraordinary scholarly skills are being made to "pay for their keep" by rule preaching and case parsing. The time they must give over to preparation for their Hessian-trainer roles makes it literally impossible to

phrenia of the law professor often remains, most of the national law schools have by now shed the parallel institutional cleavage. Their commitment to scholarship is widely evident.

It would be rare indeed for a university law school to hire a new member of its faculty before thoroughly investigating the person's scholarly intentions and capacity. Those without a genuine commitment to scholarship, who would enter law teaching primarily to train practicing lawyers, will find the marketplace remarkably uncongenial. By the same token, the recent dramatic extension of tenure requirements for young law professors parallels those of other university departments that have a much longer academic tradition. In the past, one relatively technical publication within the first three years of a law professor's career was sufficient to award tenure at virtually any law school. Today, the period of time has been extended from three years to five or six, and the nature of the work produced must be of both quantity and scope to justify a prediction that the individual is embarking on a life of productive scholarship.

As Monrad Paulsen knew well, however, it is simply impossible for any law professor to master the techniques of all related disciplines as well as a major body of rapidly changing law and to produce interesting and insightful scholarship that merges the two. A first-rate law school, therefore, cannot remain insular, but must become integrated into the university. The interrelatedness of human knowledge is too apparent, and the kinds of social behavior that the law regulates too varied, to permit legal scholars to rely solely on legal reasoning, no matter how tough or good. Legal scholarship necessarily must employ the techniques of other disci-

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produce serious works of scholarship. The result is that we have so little authentic scholarship in our law schools that we are lucky not to be driven out of the academic herd.

Almost as serious is the effect of this compulsion on the solid non-scholar Hessian-trainers. Since they are in a university environment (and not the Practicing Law Institute), and since the term "scholarship" in a university environment is affectively connotative of "the good," it is not surprising that the non-scholars are as diluted by their painful attempts to produce works of scholarship as the scholars are by their attempts to teach their students how to be lawyers. As proof of the proposition that non-scholars are driven to produce vast tonnages of trivia each year in the name of scholarship, I refer the reader to that Forest Lawn of catalogues, the Index to Legal Periodicals.

Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 645-46 (1968).

plines—economics, history, philosophy, and psychology—for the law governs all kinds of human behavior. The law schools must serve to place law among other social sciences, which are engaged in the pursuit and refinement of theoretical understanding and the development of methodologies for testing theories. Cases can no longer serve—as they did in the Langdellian era—as the only source of principles; along with the problems of clients in legal clinics, legislation, and social problems, cases must become a testing ground for theoretical ideas and fundamental values. We cannot move far afield from the law itself, but the study of law must become, in the best sense, *applied* social theory.

Once a group of committed scholars with different skills and widely varying subject matter interests has been assembled, it becomes essential that a law school community function in the way that only a university can: through the endless interchange of ideas, reflection, and dialogue in an atmosphere of mutual support and understanding. The emphasis must be on *community* as well as on scholarship.

In the last few years, many schools have institutionalized the process of dialogue through both internal and external faculty workshops—meetings of the entire faculty in which professors present their scholarship (at various stages of completion) to be tested and improved through the interchange of ideas. External workshops permit scholars from other law schools to appear from time to time to convey their work and to be brought into the dialogue. This tradition had existed in the past at very few law schools, but is now spreading throughout the nation. If it is to be successful, the ego of individual faculty members must be subordinated to the common enterprise. The faculty workshop must not become an institution in which a few dominant members of the faculty impose an orthodoxy as to the legitimate subjects of scholarly inquiry. Now more than ever, legal scholarship must take a variety of forms and deal with an unlimited number of subjects if it is to confront the complex problems of legal order in a free society. The problems with which we are now dealing are far more alike than we previously imagined, and we have much more to learn from one another than had earlier been thought.

The mission of creating and nurturing a community of scholars has met with varied success throughout the country, but all law schools have failed in one crucial respect. The promotion of a com-

munity of scholars among the faculty has to date everywhere excluded students, alumni, members of the practicing bar, judges and legislators. History shows only too well that scholarship simply cannot flourish in an atmosphere that does not support the endeavor. The failure of the modern law faculty to enter into a dialogue with these other constituencies as a means of convincing them of the worthiness of the enterprise is fast producing a crisis of misunderstanding—a misunderstanding of both the utility of scholarship to society as a whole and the value of scholarship in producing first-rate law practitioners in a rapidly changing legal environment.

This misunderstanding has resulted in a remarkable overstatement of the supposed divergence between important theoretical scholarship and the short-term goals of successful law practice. Theoretical knowledge has a lasting and permanent value in an enormous range of circumstances. If law faculties are successful in developing among students theoretical understanding, critical judgment, and the discipline to apply those qualities rigorously to a variety of situations, their graduates will achieve success when they enter the bar. As Robert Hutchins stated: "There has never been any evidence that how-to-do-it instruction has saved or could save the young from starvation."<sup>6</sup> If we were to set about in our courses on taxation and criminal procedure, through Herculean effort, to teach our students twenty-five rules a day during their sixty classroom hours, we could at most impart fifteen hundred rules. Of these, many would become obsolete as they were uttered,

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<sup>6</sup> Hutchins, *The University Law School*, in *THE LAW SCHOOL OF TOMORROW*, *supra* note 1, at 5, 7. This is not to say that the law schools have abandoned their capacity for training future members of the practicing bar, but such training now almost universally contains theoretical insights—often those of other disciplines. The university law school has rejected the anti-intellectualism that characterized some efforts to emphasize the training aspect of legal education. As former Dean Francis Allen of the University of Michigan Law School has pointed out, this is not a conflict between clinical and classroom instruction:

The incontestable fact is that both clinical training and traditional instruction can be trivial or profound, can serve broad social and humanistic goals or the narrowest of ends. Indeed, properly conceived and executed, clinical programs advance the higher educational aspirations and support the objectives of classroom instruction. The student is given, among other things, an opportunity under field conditions to test his command of analytical skills and a broader experience with which to evaluate the legal norms and the values expressed in the administration of justice.

Allen, *The New Anti-Intellectualism in American Legal Education*, 28 *MERCER L. REV.* 447, 456 (1977).

and others would have little force by the end of the semester or certainly by the end of the students' third year of law school; the number that we could genuinely expect to be applied in the students' practice ten or fifteen years later would be small indeed. Although the compromises of the legislature or judiciary will change over time, the underlying theoretical and policy conflicts remain remarkably constant. For example, the underlying tension about the proper pretrial treatment of the criminal defendant—presumed innocent in a free society—will always be a question for inquiry; likewise, the appropriate taxation of income from capital. We simply cannot know what the law will be in the years ahead. Given the acceleration of social, economic, and technological change, the one thing about which we can be confident is that change will become even more rapid. Because important changes must be reflected in the law, theoretical education becomes remarkably practical.<sup>7</sup>

This evolutionary quality of law, which is so evident to most legal scholars, inevitably loses its clarity for students preoccupied with taking courses leading to the bar exam and for practicing lawyers concerned with the numerous problems of their clients. For this reason, it is especially important that university law schools take seriously their duty to communicate to students, attorneys, and judges the relevance of the scholarly enterprise to future legal developments. Moreover, communication is not enough. A law school must attempt to involve every segment of the legal community in the on-going scholarly enterprise. The most surprising failure of the law school is the isolation of its students from the scholarly work of the faculty.<sup>8</sup>

A law school will fully succeed only if its students are willing to engage in the dialogue, to be intellectually curious, to be excited by ideas, and genuinely to believe—in a world dominated by moral relativity—that it is simply better, as a normative matter, to understand than not to understand. Given the importance of integrating the students into the scholarly life of the institution, it is odd indeed that the law schools have been so unsuccessful. Communication about major goals should be the first step. Orientation

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<sup>7</sup> See Hutchins, *supra* note 6, at 7-8.

<sup>8</sup> For a rare and excellent example to the contrary, see Project, *Parole Release Decision-making and the Sentencing Process*, 84 YALE L.J. 810 (1975).



for entering students is typically marked by an address by the dean, a member of the practicing bar, or an important judge about what it is like to be a practicing lawyer, about what one can expect in law school and so forth. Only rarely does the orientation include a statement by a faculty member about the mission, role, and function of the university law school and the place of legal scholarship within that endeavor. This, it seems to us, is an opportunity lost. Second, because student orientation ends after the first week of law school, whatever lore is subsequently imparted will typically come from colleagues in the student body rather than from the faculty. A second orientation after the students have become familiar with law school—either at the end of the first year or the beginning of the second—might usefully serve as an additional occasion for dialogue about the functioning of a university law school. Other important aspects of the law school experience must be modified. For example, perhaps the least productive aspect of law school tradition—one which happily is diminishing—is the notion that one must demean or humiliate another adult in order for students to learn. It is simply not the case that one must be hostile in order to be rigorous; that one must humiliate in order to illuminate; that learning can occur only in an atmosphere of fear.

To be sure, the high ratio of students to faculty in all law schools is a barrier to the integration of faculty and students, but there are mechanisms for alleviating this problem, such as the small section in the first year, where a law student has at least one course in which no more than thirty students have classroom contact with a single faculty member. In addition, professional dialogue can be expanded outside the classroom. It should become a common practice to make welcome at faculty workshops interested students who have read the scholarly paper being presented. Further, faculty should generally attend student-sponsored lectures and participate in other serious student contributions to the intellectual life of the law school community. A faculty member's obligation does not end with availability to law review students for advice and consultation about the content of the next issue.

Student antagonism and apathy accelerate in their second and third years of law school, principally because law schools fail to engage any significant number of them in serious scholarly work. Such experiences are generally available only by working on the law review or other student scholarly publications, or through

moot court competitions. In the 1970's, law schools throughout the nation adopted a second- or third-year writing requirement, but they have failed to provide the student with the supervision, time, and hourly credit necessary for such a project to fulfill its promise as a work of serious scholarship. One encouraging and innovative idea recently advanced at the Harvard Law School is the creation of a research semester in which students would receive twelve credits for a research project—the entire academic work for the student for the semester. The research topic would be selected by the supervising faculty member, who would be relieved of further teaching responsibilities during that semester. Under the Harvard proposal, students would not be graded, but would receive a written evaluation of their work. This proposal would not only enable students to produce independent, creative, and in-depth scholarship, but would also create an opportunity for the small number of students involved in the research semester to share with other students the value of their experience. This apparently costly method of involving students could, even with a limited enrollment, have a rather dramatic multiplier effect throughout the student community at the law school at any given time.<sup>9</sup>

In contrast to these efforts, the kinds of energies that can be devoted to integrating members of the practicing bar, judges, and legislators into the scholarly endeavor are more limited. Perhaps all that we should reasonably hope for is that the current schism not widen, but we could do more. At a minimum, alumni could be brought into the dialogue by professors communicating with them in detail about their recent scholarship and what it is they hope to accomplish.<sup>10</sup> Additionally, law schools could develop new forms of continuing legal education. It is not to law professors' comparative advantage to explain to practicing lawyers the latest technical maneuvering for satisfying their clients' desires. On the other hand, law professors can communicate to attorneys trends in policy and theory occurring within their areas of specialization. There are a variety of opportunities for innovation in continuing education;

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<sup>9</sup> For a description of the proposal for a research semester at the Harvard Law School, see *Committee Proposes Research Semester*, Harv. L. Rec., Nov. 14, 1980, at 4, col. 1 (copy on file with the Virginia Law Review Association).

<sup>10</sup> For an excellent example of what we have in mind, see Schwartz, *Economics and Enforceability Contract*, USC CRRS, Fall 1980-Winter 1981, at 21 (copy on file with the Virginia Law Review Association).

summer programs for the practicing bar are but one example. A more original and comprehensive effort is exemplified by the master's degree program for judges recently adopted by the University of Virginia School of Law, which involves both summer course work and a faculty-supervised master's thesis. The courses offered in the first summer of this program included: the nature of the judicial process, which traced the development of the courts from medieval England to the present, focusing on the various schools of jurisprudence that have influenced the development of American law during this century; a course in law and economics, taught by three Virginia law professors, which emphasized the role of legal and economic theory in judicial decisionmaking, principally in property and contract cases; and a course that dealt with the allocation of state and federal power in the federal system. The success of this program demonstrates that interdisciplinary and theoretical material can be taught in a reasonably short period of time that is structured to meet the needs of the practicing lawyer, judge, or legislator.<sup>11</sup>

In summary, fostering scholarship is of first importance to the university law school. This requires not only a committed faculty with the time and resources to devote to that endeavor, but also a supportive community, including the law faculty itself, students, alumni, and other members of the bar. A university law school should be a place of endless discussion, not merely a place to transmit what we now know or a place where one is overly concerned with how a given legal maneuver can be accomplished. It must confront head-on its obligations to society and must recognize explicitly that future social needs will be different from today's problems. A university law school is among the few institutions for anticipating future social needs and for relating the role of law to furthering those needs. It must produce lawyers for tomorrow.

We have mentioned here just a few techniques that might advance this goal. They are not all expensive; in fact, many of them are ridiculously cheap. What they require is thoughtfulness, energy, and a commitment derived from the belief that they are im-

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<sup>11</sup> For a more comprehensive description of this program, see *Unusual Experiment in Legal Education*, VA. L. SCH. REP., Fall 1980, at 41 (copy on file with the Virginia Law Review Association).

portant and worthy of the institution's efforts.

*B. Values and the Public Interest: What Has It Got To Do With Justice?*

Historically, one of the objectives of law professors has been dispassion and value neutrality, coupled with an almost religious faith that adversary processes will produce valuable outcomes. We now know, however, that the study of law is not a science, and that we cannot expect neutral legal principles to be derived merely from parsing and analyzing cases. On the contrary, law is fundamentally a normative business. Law school classes and legal scholarship must necessarily be linked to the articulation and clarification of values—values that are not “neutral,” values that prompt one either to endorse or to reject various aspects of the existing legal order.<sup>12</sup> No particular set of values or single perception of the public interest should become orthodox within a law school—in fact, it is essential to protect minority views of the public interest—but students and faculty must be aware that resolving legal controversies inevitably entails making social choices and that those social choices can be justified only by reference to underlying values. This requires individuals constantly to test their own vision of social justice and their own values against outcomes determined by law to ensure the promotion of justice. In the classroom, the values of the professor should be expressly stated and discussed along with other conflicting value choices. In faculty recruitment, there must be no exclusion of persons of diverse value backgrounds and different views of the public interest. All that should be required is that one attend consciously to values; acknowledge when one's pronouncements are grounded in value rather than science; cooperate

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<sup>12</sup> A more restrained view is expressed in the Michelman Committee Report of the Harvard Law School. Michelman Committee Report, *supra* note 2, at 6-8. That report endorses the principle of neutrality and with the exception of professional responsibility, indicates that the “school's program is not designed to affect student goals.” *Id.* at 7. This is qualified, however, by the following observation:

The standard view is (i) that the established legal order is *both* a necessary assumption for professionally relevant education *and* a legitimate object of critique by participants so minded; and (ii) that the implicit clash of values is both inevitable and benign, contributing to enlightenment but leaving essentially unaltered the fact that it is the student who chooses . . . his or her own values.

*Id.* at 7-8 (emphasis in original).

in examining one's own values and those of others; and maintain an atmosphere that fosters debate about conflicting values and their relationship to law. A law school that contains energetic students and faculty openly arguing and debating about values is far preferable to one that cloaks itself in logic and reason—supposedly value neutral—and discourages the open debate of value choices in both scholarship and classroom. The quest for “value neutrality” or “neutral principles” has inhibited the law schools from adequately investigating and promoting law as a moral force and from examining the role of lawyers in that process.<sup>13</sup> Our sentiment has

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<sup>13</sup> Something of the sentiment we are expressing here is reflected in the following remarks of Judge A. Leon Higginbotham:

Unless we focus on the range of “permissible” options in the judicial decision making process, unless we recognize that in deciding cases and in casting arguments lawyers and judges make key value judgments, our mastering the mechanics of advocacy and our differentiating esoteric legal doctrines will be irrelevant and meaningless in improving the quality of life in our society. Let me give you an example:

A decade ago, Professors Albert P. Blaustein and Roy M. Mersky surveyed 65 prestigious law school deans and professors of law, history and political science who evaluated Supreme Court justices from 1779 to 1964. The scholars were invited to designate the justices as Great; Near Great; Average; Below Average; or Failure. Of the 100 justices, only 12 got the highest accolade of “Great.” Included among the 12 “Greats” named by the scholars was Roger B. Taney, author of the *Dred Scott* decision. It was Chief Justice Roger B. Taney who wrote that under the Declaration of Independence and the U.S. Constitution, the “[black] man had no rights which a white man was bound to respect.” The scholars proclaimed that Taney was one of the truly great justices even though they knew that many reputable scholars have branded his *Dred Scott* opinion as an unjustifiable, unprincipled political decision. Strangely, the same scholars did not label the dissenters, Justice John McLean and Justice Benjamin Curtis, to the *Dred Scott* decision, as “Great.” Does this survey suggest that the most talented contemporary scholars and law professors in America believe that a judge's unnecessary and unprincipled hostility towards blacks should not preclude him from being designated at the highest rung as one of the greatest of all times? Further, does the exclusion of McLean and Curtis as “great” justices suggest that their sensitivity in the *Dred Scott* case to the aspirations and rights of minorities and blacks was not enough to make them great in the eyes of our foremost scholars? No group of black scholars would have designated Taney as one of the 12 greatest justices to sit on the Supreme Court. The differences in the evaluation of Taney are not predicated on abstract logic, but instead are determined more by one's values as to the relative significance of injustice to blacks.

Why did the vote of those premier legal and constitutional law academicians seem astonishing to me? For many blacks the *Dred Scott* decision is our “holocaust.” There were two options which the court had and the option adopted by both the majority and the dissenters was predicated more on the values of the justices than any required or explicit rule of law. These premier academicians seem to be saying that we will disregard the fact that Taney wrote a decision which was unprincipled and stood for the proposition that the nation could do something to black people that

perhaps best been captured by Calvin Woodard in his essay on the limits of legal realism:

The legal education of the future must be governed by a combination of two maxims. First, within the House of the Law there are many mansions—in which practitioners of all kinds, counsellors, judges, public servants, scholars and philosophers work in their several ways to further the course of, and to implement, Justice. . . . That is, law schools must assume, as their basic premise, that the man who first understands his obligations to Justice will be better able to fulfill his legal “function,” whatever it might be. Justice, in a word, must take precedence over law.<sup>14</sup>

If a law school is to be considered successful by this test, not only must its classrooms be filled with forthright discussion and debate over values, but the idea of Justice must somehow become part of the practical affairs of the members of the law school community. To us, the most significant failure in this regard is the virtually uniform lack of success of American law schools in encouraging and inculcating the value of public service. The law schools have not committed themselves to furthering the public interest—to undertaking a genuine service function for society as a whole and for the communities in which they reside. To begin to redress this omission, we would heartily agree with Robert Clark’s recommendation that a law school adopt as a formal policy that “a major purpose of the educational program of the School is to support and encourage educational activities that further the public interest, as conceived from time to time by its faculty and students.”<sup>15</sup> What this means is that “most students and faculty actu-

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it would dare not do to any other group in the country and that nevertheless they would rank him as a truly great justice because of what he may have written on interstate commerce, or in other fields. Yet for blacks, Taney’s thoughtful opinion on interstate commerce will not obliterate from our minds his values or position on racial issues; these latter aspects will cause us to give him a lower niche on the totem pole of greatness.

Address by Judge A. Leon Higginbotham, *Value, Race and Legal Process: The Role of the Advocate*, Justice Lester W. Roth Lecture, University of Southern California Law Center (Oct. 30, 1980) (copy on file with the Virginia Law Review Association).

<sup>14</sup> Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 737 (1968).

<sup>15</sup> Clark, *The Goals of Legal Education at Harvard Law School* 19 (Nov. 12, 1979) (memorandum to the Committee on Planning and Educational Development of the Harvard Law School) (copy on file with the Virginia Law Review Association).

ally do accept some obligation to act . . . so as to further the welfare of others in accordance with some conception or intuition of a just society, and that the sense of obligation influence their actions to some significant extent."<sup>16</sup>

The lack of a public service orientation is exacerbated by the now overwhelming tendency of the national law schools to place graduates in established commercial practice. As a current University of Virginia law student stated: "Certainly, the predominant vocational funneling of this school's students toward corporate placements of status, influence and power does not conspicuously manifest a reverence for the preservation of liberty and the promotion of justice as fundamental goals in the study of law."<sup>17</sup> We have reached a point where the following student remark to a professor is commonplace: "I am really interested in criminal law and have an offer from the United States Attorney to work in that office for the summer, but it only pays \$5.90 an hour. Any law firm in town will pay a great deal more. How can I take it?"

The law students' identification with their future practice not only infects their attitude toward public service, but somehow has also produced an unfortunate student view of the professional responsibility of lawyers. During classes on the ethics of tax practice, for example, large numbers of students routinely indicate they would disregard the rather weak requirements of the American Bar Association canons of ethics that an attorney have a "reasonable basis" for advising a client to take a position on a tax return. There is a special sadness when one discovers that only the likelihood of detection limits the advice they would give. Somehow the notion that an attorney, at a minimum, should never be less ethical than the client has been lost.

More important, students are comfortable in looking only to the adversary process when they have an opportunity to participate in setting clients' goals, and somehow leave law schools with a remarkable faith in the ability of the adversary system to produce positive results. It therefore should come as no surprise to hear of interminable delays created by lawyers and used to advance the narrowest of client interests—for example, divorce cases in which

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<sup>16</sup> *Id.* at 16. See *Committee Proposes Research Semester*, *supra* note 9, at 5.

<sup>17</sup> Wilkinson, *Learning to Think Like a Professor*, VA. L. WEEKLY, Nov. 21, 1980, at 3, col. 4 (copy on file with the Virginia Law Review Association).

property disputes have been worsened by lawyers and probate cases in which lawyers have eroded beneficiaries' interests by overvaluing the virtue of advocacy. If the law schools fail to promote public service and the role of justice in a lawyer's professional life, we shall surely witness continuation of the litigation explosion. The growing lay concern about the conduct of attorneys may well lead in the name of more efficient administration of justice to runaway efforts to exclude lawyers from dispute-resolution processes at the sacrifice of many due process values. Parochial decisionmaking based upon an entirely adversary model of justice has for too long typified every aspect of legal education, removing lawyers further and further from the ethical values of their peers in the lay community. This is, in our view, a suicidal course for modern legal education that can best be reversed by free and open discussion of a range of value choices and by a reverence for public service among a pluralistic community of faculty and students.

### III. CONCLUSION

Whatever else Monrad Paulsen may have believed, he was unwavering in his commitment to the notion of a university law school. Never was this better reflected than in his final statement to the University of Virginia law faculty as its dean, when he quoted the following statement (said to be from an anonymous 18th-century British schoolmaster):

At school you are not engaged so much in acquiring knowledge as in making mental efforts under criticism . . . . You go to a great school not so much for knowledge as for arts or habits; for the art of expression, for the art of entering quickly into another person's thoughts, for the art of assuming at a moment's notice a new intellectual position, for the habit of submitting to censure and refutation, for the art of indicating assent or dissent in graduated terms, for the habit of regarding minute points of accuracy, for the art of working out what is possible in a given time, for taste, for discrimination, for mental courage and mental soberness.

During his time as dean, Monrad challenged faculty and students alike to meet that standard. He understood as well as anyone the fundamentally new role that the changes in legal education required of a law school dean. He knew that his job was primarily to preside over the community of scholars, to raise money and other support services to a level that made scholarship possible, and to



encourage by his example members of the faculty to achieve their potential. He exhorted us to scholarship and he made sure that our teaching loads were consistent with scholarly output. He found resources to enable us to devote our summers to scholarship. Moreover, he prepared for the present decade when the financial benefits of practicing law so outweigh those of law teaching that only participation in a community of this sort will sufficiently appeal to people of intellect and capacity to keep them in the profession. Above all, he insisted that the University of Virginia School of Law recruit able, intellectually committed scholars of the first rank without regard to their political views, the methodology of their analysis, or the subjects of their inquiry.

Monrad was a man supremely able to look beyond his own background, his own work, and his own limitations. He was prepared to hire young faculty members with degrees in economics, history, or psychology, asking only what the legal profession might learn from the person's work. Monrad's legacy, then, has been of two different kinds. First, by example, his own scholarship did as much as that of any other individual to promote justice for children. Monrad Paulsen observed that the Constitution nowhere said "except children" and that children were entitled to justice. Second, beyond his own research and writing, Monrad has left a community of scholars at the University of Virginia, whose work seeks to promote the cause of justice. Of this legacy he would certainly be proud. Nevertheless, there remains a job undone. It is clear to us that the future of scholarship requires community. This must be understood by the law faculty itself, and the community must include students and the bar. Further, the ultimate mission of the university law school demands a new commitment to debating values and to encouraging public service. Monrad did not have time for these undertakings; they are the challenges he leaves to those of us who follow.