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SCHOOL OF LAW
NORTH CAROLINA COLLEGE AT DURHAM
LAW REVIEW



IMPACT 1967: PROSPECTING FOR THE NEGRO LAWYER AS SOCIAL ARCHITECT	Alfred T. Lile
EMINENT DOMAIN AS IT RELATES TO HOUSING DEVELOPMENTS	Barbara A. Edwards
THE TWO FACES OF PALSGRAF	Vincent P. Maltese
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DURHAM IS DEAD--THE NEED FOR A UNIFORM TEST OF CRIMINAL RESPONSIBILITY IN THE FEDERAL COURTS OF APPEALS	Zollie Richburg
THE NEGRO AND THE LEGAL PROFESSION: A STUDY IN COMMITMENT.	Maynard H. Jackson
PRACTICAL TRAINING IN LAW SCHOOL	Milton E. Johnson

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DEDICATION



DR. ALBERT LOUIS TURNER

DEAN, 1943-1965

DEAN EMERITUS ALBERT LOUIS TURNER was born in 1900 in New Orleans, Louisiana. Upon completion of high school, Dean Turner received the A.B. degree from Western Reserve University and the LL.B. degree from Western Reserve University Law School. He later received his M.A. degree and Ph.D. degree from the University of Michigan.

Dean Emeritus Turner joined the North Carolina College Faculty in 1941. During the school year of 1943-1944, he served as Acting Dean of the College of Arts and Sciences.

In 1943, Dean Turner was appointed Dean of the School of Law succeeding the late Dean M. T. Van Hecke, who had headed the school since it was established in 1940. Under his direction, the School of Law increased its library standards to meet those set by the American Bar Association and the Association of American Law Schools, and earned full accreditation by the American Bar Association in 1950.

Dr. Turner is the author of a number of articles on legal and educational topics. He is a member of the Order of the Coif for his high attainment in the study of law.

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IMPACT 1967: PROSPECTING FOR THE NEGRO LAWYER
AS SOCIAL ARCHITECT

Alfred T. Lile

Over the entrance to the Supreme Court Building in Washington, carved in stone, are the words "Equal Justice Under Law." We would like to believe that it is in all respects a reality in our land, but as we see before us evidences of injustice, we are forced to the conclusion that those words represent our goal and not the accomplishment of our times.

--Earl Warren

One of the most significant features of a creative and progressive social evolution is the growing and salutary importance which a conscious and rational technique¹ tends to assume in social life. Negro lawyers are less and less prepared to let the wheels of social advancement roll on without their active interference. In keeping with the scientific spirit of the times, they feel more and more dissatisfied with experiences based upon individual whims, or upon preconceived legal, philosophical, moral, or social generalizations.

It is our further observation that the consistent and meaningful results attained by the rational techniques (scientific technique) of the brain men in the material world beckon Negro legal social architects to apply some analogous modus operandi to social change. Man's signal success in controlling nature advances our confidence that the Negro can actively influence the social world in a similar fashion. The Negro lawyer's past Achilles' heel in this area is due, not to any fundamental limitations of the reasoning process, but often to his not facing up to the reality of the problem.

While it is realized that nature can be controlled, changed, or treated in the scientific manner, social change in terms of such approaches as the architectural tools of legislation and "moral suasion" also can be approached in the scientific manner.²

Perhaps the oldest and most persistent form of architectural methodology used to change societal structures is

"ordering and forbidding." The alembic of this technique is to meet an "Impact 1967" crisis by arbitrary acts of the will,³ and punishing infractions of the willed decrees by using arbitrary physical force.⁴ The primary fallacy inherent in this strategy of social architecturing is that it often fails to try to find and remove perturbing causes of social unrest.⁵ An example pertinent to this thesis is the typical legislative procedure so rampant in our court systems today.

To be sure, it often happens that the legislative and judicial process brings about effective results. But still, because the actual cause of the social crisis itself is unknown, it cannot be controlled or solved by legislation and court decree alone.⁶

Another fallacy, in addition to the legislative one, one that the Negro lawyer as social architect would do well to avoid, is the planless empiricism of the "common sense" method. This technique tries to get at the real cause of a social crisis by a rather haphazard selection of various possibilities, directed only by the thrust of a rough and popular reflex action. The chief underside of this fallacy has been seen by most of us in some form or the other. Perhaps the best illustration is the latent and manifest supposition that we know "social reality" because we live in it, and that we can validly assume things and relations as certain on the basis of our everyday acquaintance with them. The feeling here resembles that ancient assumption that we know the physical world because we live in it, and, therefore, we have the right of generalizing about the world without special organization and thorough investigation, on the basis of just plain "common sense."⁷

Actually, however vast an individual's sphere of practical acquaintance with social reality may be as compared with others, and no matter how many times this virtuosity has been recast, it is always limited and constitutes only a small part of the entire complexity of social facts. His social awareness usually extends over one society, and often over only one class of that particular society. This we might call the "outside limitation" of the individual. Due to the fact that among all his experiences, perhaps the larger part is left unheeded, and never becomes a basis of common sense generalization (we call this the inside limitation) we feel the individual is not an expert in societal activity just

because he happens to be a member of a particular society.

Granted the Negro lawyer as social architect must have some way in the scheme of things to judge social facts, otherwise how could he serve as a catalytic agent to change the structure of society. The truth of the matter is that our personal judgments are only a rough approximation of reality and mixed with an enormous amount of error. Therefore, it is hoped the strategies, methods, and techniques of the legal architect will be geared to a more objective excellence in his blueprint for developing social change, for the "common sense" techniques of "I know society because I live in it" stretches credulity too much to be adequate. Especially significant in the "common sense" method is the idea of "I know Negroes because they work for me," or "I know white folks because I mix with them." The awareness of some that Negroes are "satisfied" in their present plighted state of societal deprivation because "my colored maid and my colored chauffeur said so" is an insight gained at the expense of reality. Does it not occur they might have feared their employer would dismiss them had they spoken otherwise? Even if the Negro maid and chauffeur parents were satisfied (since most of their lives were spent in a restrictive society), does it automatically follow that their offsprings will spontaneously develop the same attitude?

These fallacies, as stressed earlier, are not always due to a lack of theoretical ability or serious scientific training on the part of the lawyer striving for healthy social change. Rather, they seem to be the consequences of a refusal to recognize and meet the problems as they are. If we are willing to frankly and earnestly appraise the injustices extant in social activity, and to admit that present methods of social architecturing are no longer adequate, and to replace them gradually by more efficient ones, a good investment will be made for all concerned. But a radical adjustment from the old to the new requires the use of time, doesn't it? This time element, writes Edmond Cahn, "may be made into an ally or an enemy, depending on the experience and judgment," and scientific acumen "one brings to the occasion."⁸

If Negro lawyers as legal architects are to issue us forth from our present social commitment to one of advanced worth, they must, as in the physical sciences, be able to foresee future situations and prepare for them. Not only must they be in constant preparation for future crises that

time's neutral ingredients will bring, but they must have in stock a large body of secure and objective knowledge capable of being applied to varied social situations as the need arises.

Thus far we have proceeded as though the reader and writer were in good agreement concerning what can best be done in the Negro lawyer's intelligent participation towards directing the path of the social order. But before he can seek to improve the present proximations of justice, he must attain some fairly clear conviction as to what goals his scientific architecturing process should be geared. His considerations may take shape in various forms. Certainly though, intelligent and practical thought about improving the social fabric should begin with something akin to the assumption that: "Meaningful architecturing is architecturing that is good for genus homo in his society and in his world."

While it may be difficult to deduce specifics from a formula so general, it does help one to think in some degree systematically about how law can be shaped scientifically toward truly social ends. It is hornbook law to say the Negro lawyer's problems of law-and-society will rarely present single issues. In fact, many values will surely be involved. Yet, is it not true that he needs the scientific temper to face his problems, for is not a measure of the systematic an alternative to stagnation and chaos? The Negro lawyer as architect if he is to give purposeful thought as to the route he must take in present-day law, he must also give purposeful thought as to the direction and path of past-day law. The essential thing is not to slough off all the past social architecturing simply because it has out-lived its usefulness. Data have shown that much past social architecturing is pretentious, ineffective, and conspicuously unable to meet present and future patterns of social growth. However flickering and unsure past social architecture has been, its work has soundly validated itself as beginning rungs on the ladder of social development.

It would not be surprising if the reader concluded, up to this point, that the Negro lawyer has not participated as a social architect in the past. His relationship in such matters, to be sure, has been, with some exceptions, largely limited. How then can he be expected to submit his unique blueprint for the fashioning of American social culture? We suggest a minimum of incidents in which he may participate

with "optimific" relevance.⁹

1. If the Negro lawyer-architect believes a statutory or constitutional provision emasculates the sense of communal justice, his legal tools of architectural construction should measure and posit the justice of alternative provisions or amendments.

2. In his actions to gain right and justice, the "Impact 1967" Negro social architect will see that his new ideas (off-springs of scientific inventiveness) will "find readier acceptance when they" do not have to "break through the disciplined phalanx of absolute principles" engineered by his predecessors.¹⁰ No longer should he be guilty of an atavistic throw-back to the old outlook on things. To his new-time scientific perspective, the festering, polluting underside of the old-time outlook should be cannon fodder for ultimate disposal. No longer should he quietly and passively assent to legislative approval of statutes too extravagant, or too scant with the public's money. His utility of reflective reasoning, assimilative genius, and racial pride should take to task the foreign office whose aggressive financial aid activities in certain Caucasian affairs, is not at least duplicated in black nations' affairs.

3. As a reserved pragmatist, seeking the existential ends of justice, he sometimes will find it necessary, like the Prophets of old, to cry out for what Sara Toll East calls "mighty diastrophic change."¹¹ Directed by a rational technique, he will not be apologetic for his tireless activities of emancipating minority groups from the extra-legal taint of segregation served upon them by an acquiescent white society. Lynching, unequal poll tax decrees, humiliating marital laws, and all the other communal consented segregation laws imposed as it were in apostolic succession--to his way of thinking, should go! His searchlights of justice-motivated convictions are constantly scanning our present laws. Our ex post facto laws of the past, the law abolishing imprisonment for debt, our present social security laws, laws on marriage, taxation, wills, and criminal procedure--and unaccountably more--are continually examined by use of the prevailing concepts of scientific method.

Even though the lawyer-architect may be somewhat of a scientific-computer machine, deducing his results from precedents, and statutes, his architectural methodology takes a

wayward turn when societal conditions demand abandonment of stare decisis. Although true, it is not always obvious to the uninitiated that our laws are often founded on precedents in prior cases. Yet, time and peculiarity of circumstance render no two cases entirely alike. Often the lawyer must compete with his contemporary advocate in trying to convince the judge his case differs enough to justify a decision that will unquestionably play a vital part in modifying the social index.

4. In participating with "optimific" relevance, the Negro lawyer, armed with the hefty weapons of scientific method will find himself involved in issues of burning, fighting concern. The incidents that will try his rational technique, as well as his faith, will often be those issues whose legal resolve will result in social upheavals upsetting to the equilibrium of the daily lives of many persons. Should he resign himself to token involvement just because his legal stresses and strains result in social upheaval? There is fruit here for much discussion, debate and chancey guess. The answer is that if he does not act, his inaction may result in a deeper restlessness in the structure of society to have its laws modified or changed. As legal architect, his struggle for creative social balance is often tested by that historical enigma of law called statutes. Early in his legal training he learned that primary terms in statutes are sometimes vague. As legal architect, he must trek the wilderness country of their applicability to the contemporary scene. Vagueness, some hold, was intended so the triers of law could have elbow room in concretizing the general to the specific. His architectural advocacy must prove to the judge that the unclear commands of vague statutes must always be subsumed under the clearer principles of public policy and social justice.

Concluding consideration to be added to the scales of this treatise is that scientific method has never pretended to be the mouthpiece of divinity. It neither consciously nor intentionally tries to place in relief the idea that this rational excursus is the panacea for what ails our society. While scientific method cannot ascertain the vastness of the content of "just laws for everyone," it can illuminate the expansiveness of the germinal ideas within these laws. If the Negro lawyer, as social architect, is to make an impact upon year 1967 . . . and those yeared expanses beyond, he must bring the work of law in society into clearer, earthy

working focus. His burden can be made infinitely lighter, and society's incertitudes smoother by the enlightening and liberating persuasiveness of a rational technique.

It is not known with exact thoroughness how this may come about; the clearest thought we have about it is that even though the efforts of Negro legal architects in the past may have been ritualistic, formal, and basically for monetary gain, presently another vision is entertained. It is assured that while this vision may never be found by the prospector, one thing is certain, it can never be wholly lost. Dr. Martin Luther King, Jr.'s witness that we are children in history, and Howard Thurman's insight that we must "bend with the wind to keep living,"¹² these exhortations meet the Negro "Impact 1967" legal architect right where he stands. Many in his rank are interested in leaving their mark on history but have inadequate scientific techniques to ground the practical outlets of their energy. Others are trapped in the indifference that has encased the legal profession for such a long time. If Negro legal minds are to make real progress as architects of the social world, they must be aroused and made aware of the necessity for rational technique. The job they have to do, the organizations through which they must work, the goals towards which they must strive, all these must become their preoccupation in Impact year 1967--and beyond.

Footnotes

1. A scientific method of approach.
2. The best related contemporary discussion known to me, that is presented both vigorously and sympathetically, is the contribution of Alfred T. Davies, "Law and Morality in Race Relations," Christian Century (October 13, 1965), 1256-1258.
3. The rationale for this position is that the legislative procedure can give clear notice to everyone that after a certain date, rights and obligations will be changed in a certain way . . ." Law and Sociology, ed. William M. Evan (New York, 1962), p. 84.
4. Most theories of law either expressly assent, or impliedly assume that a distinguishing mark of law consists in the use of coercion or force; i.e. police, troops, dogs, fines, etc. A justifiable criticism of this position

is that of Lon L. Fuller, in The Morality of Law, New Haven and London: Yale University Press, 1964, pp. 95-151.

5. Lon L. Fuller is very forthright at this point. "What law must foreseeably do to achieve its aims is something quite different from law itself." op. cit., p. 108.
6. Ibid., pp. 91-98. Thomas A Cowan is relevant at this point. He seems to feel the legal discipline and the social science enterprise go their respective ways, ignorant of what each has to offer the other. Since each ranges over vast areas of human behavior, the salient factor of law need not go its way in ignorance of what social science may contribute to its understanding of causes of social crises.
7. An argument applicable here, though on a different topic, is associated with the name of D. Elton Trueblood. For a fuller statement of his position on the validation of human theories, see David Elton Trueblood, Philosophy of Religion (New York, 1957), pp. 17-18.
8. The Moral Decision (Bloomington: Indiana University Press, 1956), p. 277.
9. A concept used by Joseph Fletcher to mean optimum relevance. Situation Ethics (Philadelphia, 1966), p. 61.
10. Law in American Society, ed. Sara T. East (New York, 1963) p. 22.
11. Ibid., p. 112.
12. Deep Is the Hunger (Evanston, 1951), p. 13.

EMINENT DOMAIN AS IT RELATES TO HOUSING DEVELOPMENTS

Barbara A. Edwards

As the demand of land comes closer to the supply the role of the law becomes more and more apparent. The American people, with their great faith in law as a healer of the ills of society, are already bringing pressure for various changes in the existing concept. The eminent domain doctrine is one which gives the sovereign power to take and use private property for a public use. This paper will concentrate on the sovereign's use of private property for housing developments as public use. In addition, it will analyze the exercise of this doctrine, in terms of the benefits it provides for the public, especially through housing developments and the alleged disservice to those private property owners who claim to be deprived of their property rights.

It is a well-known fact that today's housing problem is crucial, especially for the poor. As a result, the sovereign in many jurisdictions have seen fit to provide the necessary housing for those in need. The exercise of this doctrine has met great opposition from many. The private property owner particularly feels affronted and sometimes deprived of his property rights. The Fourteenth Amendment of the United States Constitution is frequently referred to as the law which protects the private property owner's rights. There is no court that will deny that the private owner's rights are protected by this Amendment. However, most courts will point out that this right is limited by the sovereign's power to exercise the right to take. Observation of today's community, particularly the housing situation, raises questions about the public profits and accommodations rendered by the exercise of the eminent domain doctrine.

"The right of eminent domain," said Justice Story, "is usually understood to be the ultimate right of the sovereign to appropriate, not only the public property, but the private property, of all citizens within the territorial sovereignty, to public purposes."¹ Thus the sovereign has the highest and most exact interest in property. "The eminent domain doctrine allows the sovereign to use this property whenever the public's interest requires it for improved conditions of health and welfare."²

The present century has seen the former dominion of the property owner give way to what may be termed a division of property ownership, as between individuals and the community. It is pertinent to point out that the law of eminent domain developed during the days when the nation's greatest asset, was our apparently limitless land resources. Before the passing of the Frontier, it might realistically be said that an individual was aggrieved by a taking of his property only insofar as the question of compensation was concerned. It is also fair to say that, until relatively recently, only the person whose land was taken, was normally injured by the exercise of eminent domain power.

In the present day American society, the picture is a different one. Land is no longer available in pristine abundance and it is not accurate to assume that the individual who is given the theoretical market value of his property will readily be able to obtain other property of comparable value. It has been pointed out that the eminent domain doctrine has been used consistently more in modern times than before, because of the lack of adequate space and the increased need for more use of that property which is available for the use of the public.

The first case in the Supreme Court involving the question of whether a taking was for a public use was Shoemaker v. United States (1893).³ It arose out of a proceeding for the condemnation of certain lands for the purpose of establishing a public park in the District of Columbia. The high bench was, without difficulty, able to sustain the taking on the ground that land acquired for such park was plainly being taken for a public use. What is of interest today, however, is not so much that obvious holding, as the fact that the Court, at the very outset of its opinion, could assert: "In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park . . . would have been regarded as a novel exercise of legislative power."⁴

The happiness of a state consists in a balance between authority and liberty. To describe the interplay between authority and liberty in these terms requires acute perception. One must recognize that both are essential elements in the functioning of any polity and that their coexistence must somehow be reconciled.

Our relationship with things is closely entwined with the maintenance of our individuality. William Shakespeare said,

in the Merchant of Venice, "You take my life when you do take the means whereby I live."⁵ In truth, as Justice Field said, while dissenting in the Sinking Fund Cases, "All history shows that rights of persons are unsafe where property is insecure. Protection to one goes with protection to the other; and there can be neither prosperity nor progress where this foundation of all just government is unsettled."⁶ The moment the idea is admitted into society, that property is not as sacred as the laws of our society proclaim it to be, anarchy and tyranny commence.

From contemporary experience, we can see all too clearly what the result is for personal liberty when rights of property are abrogated. A society in which both person and property were to be given their fullest expression is what the framers of the United States Constitution contemplated. They realized what too many of their descendants have neglected to remember: that personal rights and property rights are the two faces of a single coin--which is the specie of the free society. "Both human rights and property rights are foundations of our society."⁷

The limitations on private ownership is founded on political rather than historical foundations. It arises out of the conflict between the interest of the people in public projects and the principle of indemnity in the landowner. Reconciliation cannot be attained between a sovereign's power and an individual's rights until the law determines the proper place of each and partitions the field between them, not completely to exclude one or the other. The attainment of a stable society can be manifested through a proper balancing of power and rights, as courts determine whether the constitutional system is a safeguard of the interest of an individual who is a member of the general public. Due process has been applied by the Supreme Court in countless cases during the past half century. In applying this guaranty of due process, the courts demand that a sovereign give a reasonable relationship between a taking of an individual's property and the public's welfare.

One fundamental limitation in the exercise of the eminent domain power is that a sovereign cannot take without just compensation to the property owner. The just compensation is determined by the market value of that particular area, at the time of the taking. Another limitation upon the right of eminent domain is that property can be condemned only for a public purpose. The law related to these limitations now

stands as follows:

The United States Constitution, Amendment XIV, §1, provides that no state shall deprive any person of life, liberty or property, without due process of law.

This Amendment was ratified in 1868 and construed in 1896 to prohibit states from condemning land without giving just compensation.

Many state statutes provide that a property owner can appeal any action taken regarding his property, if he feels that his constitutional rights have been violated. It must be pointed out that the appeal must be based on the law as provided in the aforementioned Amendment.

The Constitution is more than a framework of government; it establishes and guarantees rights which it places beyond political abridgment. Mere provisions for the rights of the individual do not, at the same time, automatically place those rights beyond the reach of governmental power.⁸ Taken literally, the term "due process" relates to the mode of proceeding which must be pursued by governmental agencies. Due process of law, in this sense, denotes proper procedures: regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding.

"Due process . . . has represented the balance which our nation, built upon postulates of respect for the liberty of the individual, and has struck between that liberty and the demands of organized society."⁹ Due process prevents the states from using their power as a mere guise for the deprivation of constitutional rights. Though Justice Field declares, "This power rests with them, it cannot be admitted that, under the pretense of providing for the public health or public welfare, they can encroach upon rights which those amendments declare shall not be impaired."¹⁰ The power must, in other words, be used only to secure the public purpose for which it exists.

The use and purpose for which property is taken is, in large part, academic, in view of the broad range now given by the courts to the concept of public use or purpose. The courts have been obliged to recognize that the need of the twentieth century society to acquire property is not

necessarily as limited as that of its agricultural predecessor of a century earlier. The development from the narrow conception of public use to the broad view which equates it with public welfare has mirrored the development of the modern society itself. "As might be expected," a state court pointed out, "the more limited application of the principle appears in the earlier cases, and the more liberal application has been rendered necessary by complex conditions due to recent developments of civilization and the increasing density of population."¹¹

There has been serious question about the public nature of housing, slum-clearance, and urban development, when the employment of eminent domain power is an adjunct to private enterprise. The Congress enacted the National Industrial Recovery Act in 1933, which contained provisions granting the government the right to engage in housing, slum-clearance, and urban development.¹² This provision made it possible for city planners to have great influence in determining how the eminent domain doctrine is to be used.

Public housing has been historically viewed as a public use for diverse political reasons. In the 1930's public housing was intended for families who voluntarily sought to improve their housing but could not afford private rentals. While this group of people was regarded as dependent, some housing authorities accepted public assistance recipients to a limited extent and other housing authorities would not accept any. In the 1940's, the program was redirected to provide housing for war workers. Following the Housing Act of 1949, public housing was oriented again to poor families with a difference, partly because post-war amendments gave priority to families having the most urgent housing need, to the aged, and to those displaced by urban renewal. This third generation in public housing contains a high concentration of depressed, untutored, and dependent families. The hard fact is that profit making incentives run counter--so far as the maintenance of housing is concerned--to the best interests of the poor. Condemnation procedures are combined with the peculiarly vulnerable situation of those who are poor having to pay the most profit for the worst housing.¹³

The most serious political distortion of planning occurs at the site selection stages where sites offered by the local authority must be evaluated in terms of the racial composition of the prospective project occupants. In many communities,

racial minority groups are land-bound within areas restricted by the existence of racial covenants on underdeveloped as well as developed areas. The result is excessive overcrowding in the slum and blighted areas with which the basic purposes of the low-rent public housing program are concerned. Repercussions upon the program are extensive obstacles to the location of racial minorities outside of the areas to which they are restricted necessitates site selection for developments to house such groups within these inordinately overcrowded areas.¹⁴ At the same time, the excessive overcrowding tends to increase the cost of the land. Moreover, there is the danger of increasing the density of other restricted and overcrowded areas which must absorb the racial minority group families temporarily or permanently displaced from similar areas by public housing developments. In many cases, alternative housing cannot be provided at all without demolition of units already occupied and desperately needed as the only shelter available to the racial minority groups.

The city planners, in their concentration upon the physical and financial aspects, have succeeded thus far in escaping the issues related to eminent domain (a thing they do at real peril to the announced objectives of city planning). Those public agencies and institutions concerned with development and operation of housing cannot even pass the discussion stages before they are confronted with the complicated necessity of finding more space for more people.

Housers and city planners have a choice of two courses of action. They can attempt to treat each taking of property as an individual case, or they can approach the problem by planning for the total community. The latter approach is more in line with those concerned with city improvement and urban planning. In using the latter approach, city planners can concentrate upon establishing a more democratic use of the eminent domain doctrine.

The eminent domain doctrine when used for the purpose of housing development has often carried a threat to good housing. It has been used as a guise for displacing minorities from desirable areas, and it has frequently been the instrument for breaking up established neighborhoods. Finally, and equally disastrous, the doctrine has been used to reduce, even further, the already inadequate supply of living space.

Recent developments in Washington, D. C., illustrates how

the eminent domain doctrine was used as an instrument for reducing the land space available. This result was accomplished, according to the Interim Report of the Study Committee of the Emergency Committee on Housing in Metropolitan Washington, through the displacement of residents incident to the development of public and private housing and related facilities. Most of the land involved was acquired by public bodies in accordance with studies and recommendations of the planning agencies. These same public agencies controlled the condemnation procedures but took no responsibility for seeing that adequate living area and facilities were provided for the people displaced.¹⁵

T. H. Reed, a leader in the movement for metropolitan government, said that "City planners, political scientists and lawyers . . . have poured out millions of words . . . on the same theme, but frankness requires me to say that so far we have accomplished little more than a world's record of words used in proportion to cures effected."¹⁶ This lack of accomplishment is indicative of underlying political complexities which are seldom appreciated fully by the proponents of plans for metropolitan consolidation and other forms of urban integration.

A common complaint is that the legal powers of the cities are insufficient to permit effective administration of housing programs. Those who make this complaint demand that cities be given a greater degree of home rule. Despite the demands for greater home rule by city officials (which in many cases is less a program than a slogan), and despite the genuine impediments to discretion that exist in many places, examination of statutes and constitutional provisions demonstrates that some states have endowed their larger cities with powers adequate to enable them to carry on effective housing programs. At the end of 1957, forty-six states had enacted legislation permitting local governments to participate, completely or partially, in Federal housing and urban-renewal programs.

In a recent report, the Urban Renewal Study Board of Baltimore observed that the city has very broad and comprehensive powers with which to carry out the urban-renewal program. These powers were not described in legislation related to urban renewal, because the legislation was enacted prior to the time when the concept of urban renewal emerged.

Oscar C. Brown of Chicago, formerly manager of the Ida B. Wells Homes and Attgelt Gardens, has made an interesting proposal to facilitate maximum participation of present occupants of areas to be redeveloped. In addition to the steps needed to assure their acceptance as tenants, his proposal is intended to provide for present occupants taking part as developers. This would be facilitated by the organization of redevelopment corporations by present occupants of areas to be redeveloped. Such corporations would have preference for land acquired for redevelopment, thereby offering present owners as well as tenants an opportunity to remain in the area.¹⁷

There is ominous significance in the use of the eminent domain doctrine today because it is a direct causal factor in the population movements that threaten to make many central cities into lower class ethnic islands. These islands exist because the people who live in them have low incomes and because they are excluded, frequently by illegal means, from other sections of the cities and from the suburbs. The consequences of this movement on the cultural, political, and business life of the nation are undesirable. In addition, "the exercise of eminent domain power has made certain areas unattractive to upper and middle class groups and in many instances has forced the poorer groups to live in areas which they cannot afford or want."

In non-partisan Milwaukee, Mayor Frank P. Zeidler recently complained that "influential suburbanites--leaders of industry, of business, and real estate, and of the press; presidents of utilities; attorneys; and trained technical persons and especially through the county government and state legislature--have exercised an almost compulsory power on the city through the use of the eminent domain doctrine."¹⁸

While a sovereign takes private property for public use it is sometimes questionable as to whether the public will really profit from this action. The use of the eminent domain doctrine has been an integral part of the movement toward progressive housing developments. Though the housing situation has improved generally, its benefits are grossly distorted. It appears that the sovereign has directed its efforts to the treatment of the effect of housing problems rather than the cause of them. Many of the housing problems are instances of injustice; and it is inequality that must be transcended. These same disunities mark the availability of land and its use--the neighborhood, town, or city in which the public

lives.¹⁹ Piecemeal solutions disrupt each other. What appears to be an advance here is merely a regression there. So, one cannot infer progress from the multiplication of agencies of planning, or from the gradually increasing scope that may be permitted to each of them. Despite the use of the eminent domain doctrine or because of its use our communities are environments of dislocation and decay, alternating localities of affluence and disintegration, in which housing deficiencies are made more loathsome by surfeit of "power to take" and housing developments rendered functionless by the absence of reasonable or purposeful objective. Within this general formlessness, individual institutions carry sophisticated and comprehensive programs of planning in which they turn the public chaos to their private advantage. However, the social whole is left to "automatic" devices in the belief that undirected individual activity under the impetus of its own competitive self-interest will automatically satisfy community needs. Such institutionalized fragmentation is anathema to a community.²⁰

This is another point of fundamental antagonism between communal demands and individual rights. The wresting of power from private hands proceeds in an uneven and uncoordinated progress whose gains are often more illusory than real. As we have already seen, the areas progressively won for public use are isolated from each other, and still under the pressures of that remaining autonomous power which aims to bend the public realm to its own device.

Though there is no cure-all for the problems springing out of the eminent domain doctrine, cooperative efforts can go a long way toward mitigating the effects of procedural awkwardness. What starts out piecemeal may develop into some approximation of genuine use of the powers afforded by the eminent domain doctrine.

The location of low-cost housing is a most complex problem because the interests of the occupants of the housing must be considered along with that of the residents of the area surrounding the site. The problem should be resolved to the best interest of the entire community after listening to all who wish to be heard, and careful study. The upkeep of low-cost housing can be reduced by good planning, which will at the same time lessen the need to "take more property" under the power of eminent domain. New low-cost housing should be built on the available land before clearing the present slum

areas, but everything possible should be done to prevent the building of the slums of tomorrow under the guise of low-cost housing today.

Conclusion

We have seen the great demand of land for housing create unusual difficulties, mainly because the sovereign has seen fit to use its eminent domain power in an effort to ameliorate the housing deficiencies. This problem is increasingly becoming the concern of various communities, and especially those parties directly involved. These parties can be narrowed down to: (1) the sovereign--the party who takes private property for public use; (2) the private property owner--the party whose land is taken for public use; and (3) the public--the party for whom the property is taken. As one examines the relationship of these parties it can be noted that the imbalance of supply and demand (property for housing) has a direct causal connection between the imbalance of the sovereign's power and the individual property owner's rights.

Understandably, the parties concerned have relied upon the law as a means to resolve this imbalance. The basic or fundamental law is the United States Constitution, which was designed to offer equal protection to all parties. Thus the present state of the law has not on its face provided for reconciliation of the imbalance. Up to now the American society has tolerated this situation, after being convinced by politicians, city planners, and lawyers that community progress should not be sacrificed for individual rights. In a sense, community progress has been attained and this progress has enhanced progressive developments in its population. Now that we have a more sophisticated society, it is able to assess the real value of continued taking of private property for public use. Much of the population is resisting this continued taking, and there have been many presentations of reasons for the same by representatives of the opposers who make consistent reference to negative illustrations of (1) how the eminent domain doctrine has been used; (2) those who have benefited; and (3) those who have been deprived by this process. It is believed that the use of the eminent domain doctrine initiates a vicious cycle which ultimately results in the very kind of situation that it is supposedly designed to eliminate.

As we look around us, it is obvious that the doctrine has

been effective in creating housing, but at the same time is gnawing away at our democracy. The democratic philosophy of our country will have little meaning if this imbalance between our government and its people persists. Thus, the eminent domain doctrine should not be used unless there is a greater participation of all mutually dependent elements of a given population. This kind of participation is needed if we hope to gain a more effective resolution of the housing problems through the exercise of the eminent domain doctrine.

Footnotes

1. Charles River Bridge v. Warren Bridge, 11 Pet. 420 (1837).
2. Shelton v. Shelton, 83 S.E. 2d 176 (1954).
3. Shoemaker v. United States, 147 U.S. 282 (1893).
4. Ibid., p. 297.
5. Merchant of Venice, Act IV, Scene 1.
6. Field, J., dissenting in the Sinking Fund Cases, 99 U.S. 700 (1879).
7. John F. Kennedy in 1963 message calling for extensive civil rights legislation. The New York Times, June 20, 1963, p. 16, col. 3.
8. W. Corwin, The Constitution of the United States of America: Analysis and Interpretation 361 (1953).
9. Fertilizing Co. v. Hyde Park, 97 U. S. 659 (1878).
10. United States v. Gettysburg Electric Ry. Co., 160 U.S. 668 (1896).
11. In re Kansas City Ordinance, 252 S.W. 404 (1923).
12. A. Schwartz, An Introduction to American Administrative Law, Chapter 2 (2d ed. 1962). 48 Stat. 195, c. 90, June 16, 1933.
13. J. Faulkner, American Economic History (Cambridge, Mass.: Harvard University Press, 1948), 8th ed. 1960, p. 243.

14. Louis Hartz, "Economic Policy and Democratic Thought," 48 Harv. Law Rev. 592 (1956).
15. Edward C. Banfield, "The Politics of Metropolitan Area Organization," Midwest Journal of Political Science, Vol. 1 (May, 1957), pp. 77-91.
16. Robert C. Weaver, "Housing in a Democracy," Annals of the American Academy of Political and Social Science (March, 1946), pp. 95-105.
17. Morton Grodskins, Government and Community Development (New York: McGraw Hill Book Company, Inc., 1958), pp. 78-79.
18. Frank P. Zeidler, A Course of Action for the City of Milwaukee for 1956 and the Following Years, multility, undated.
19. Daniel Bell, The End of Ideology (New York: Collier Books, 1961), p. 233.
20. James Willard Hurst, Law and the Conditions of Freedom (Madison: University of Wisconsin Press, 1956), p. 28.

THE TWO FACES OF PALSGRAF

Vincent P. Maltese

This research paper seeks to bring together the views expounded by various authorities on the famous Tort law case, *Palsgraf v. Long Island R.R.*¹ Before the *Palsgraf* decision, writers and judges had relied almost unanimously on the holding of the leading English case, *Smith v. London and S. W. Ry.*² in defining liability for negligence. Then came the *Palsgraf* decision. The facts of the *Palsgraf* case are relatively simple to understand. The reader is confronted basically with a situation such as this: A, who is negligent in relation to B, by the same act injures C in an unforeseeable manner. The facts are simple yet *Palsgraf* is cited in almost all negligence cases. Why? Let us take a look.

A railway guard in assisting a passenger running to catch a departing train, knocked a package from the passenger's arm. An explosion followed, the package having contained fireworks. The railway guard was ignorant of this fact. The concussion knocked over some scales standing a considerable distance away, and in falling they injured the plaintiff, Mrs. *Palsgraf*. Mrs. *Palsgraf* brought an action against the railway company for the negligence of its servant.

The trial court held for Mrs. *Palsgraf*. The Appellate Division affirmed the lower court's decision. The Court of Appeals of New York, however, reversed the decision by a 4-3 margin in favor of the railroad company.

Mr. Justice Cardozo spoke for the majority of the court. Cardozo and the majority of the court concluded that defendant's conduct was not a wrong in relation to Mrs. *Palsgraf*. Cardozo said, "The risk reasonably to be prevented defines the duty to be obeyed, and risk imports relation; it is risk to another or others within the range of apprehension."³

It is safe to assume the majority of the court was dealing with the problem as one of duty. According to the majority the defendant owed a duty to the boarding passenger and to others who might have been prejudiced by such conduct as a result of the incidents against which such duty gives protection, but owed no duty to the plaintiff, Mrs. *Palsgraf*,

against the hazard which transpired.

The majority of the court believed that negligence "is a relation between particular persons, those within the risk of harm from the negligent act. It is not a wrong to third persons outside the sphere of foreseeable risks, therefore, they cannot recover even though they may have been injured by the negligent act. The defendant's conduct was not a wrong towards the plaintiff merely because it was a wrong towards the boarding passenger."⁴ The majority thought the question of duty should be determined by the court, not by the jury.

The minority of the court, speaking through Justice Andrews, assumed a duty and insisted that the plaintiff was entitled to rely upon its violation. The dissent further insisted that coupled with the question of duty was the question of proximate cause and that both questions should be decided by the jury.

Andrews thought there had to be a line drawn as to whether or not Mrs. Palsgraf could recover for her injuries. He thought the jury ought to perform that function, or at least "that the court could not say as a matter of law that it could not be so drawn to allow a recovery."⁵

Andrews, stating the minority contention, said: "Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone."⁶ Under Andrews' approach, the defendant is liable for those subsequent events of which the impact is the proximate and natural or direct cause.

Viewing the facts of the Palsgraf case and those of the Smith case, it is hard for me to reconcile the two decisions. The Smith case has been cited with approval by Beven, Street, Bohlen, Jeremiah Smith, and many other writers on the question of liability for the unforeseeable consequences of a negligent act. Let us try to compare and contrast the two cases if we can.

During an exceptionally hot summer the defendant's workmen trimmed a hedge bordering the railway line and allowed the trimmings to remain in heaps. A fire, probably ignited by a spark from an engine, broke out in the heaps, spread across a stubble field and over a road, and was carried 200 yards by a high wind to the plaintiff's cottage which was completely

destroyed. The trial court held for the plaintiff and that decision was affirmed by the High Court.

The majority of the court held that there was "sufficient evidence of negligence on the part of the defendant in relation to the plaintiff."⁷ In essence, the majority said that the defendant should have foreseen possible harm to the plaintiff. Justice Brett, speaking for the dissenters, said that the defendant was not negligent to this particular plaintiff, although the act of leaving the inflammable heaps might have been negligent in relation to others. The plaintiff was not foreseeable. How many reasonable men would contend that a fire, started from sparks from a passing train, would ignite a heap of trimmings, spread across a stubbled field, cross over a road, be carried some 200 yards by a sudden high wind, and burn a person's cottage?

In both cases there were negligent acts: in Palsgraf, the railway guard negligently grabbing the passenger's arm, knocking the package to the ground; in Smith, the railway company allowing trimmings which were dried out and inflammable to remain along the tracks where trains passed daily emitting hot sparks. In both cases the plaintiffs were injured as a consequence of the negligent act. In both cases the defendants could not reasonably foresee any injury to the plaintiffs, but were negligent as to others.

Why different decisions? Why in the Smith case, was the defendant liable to the plaintiff, even though, owing to the distance of the plaintiff's cottage, no reasonable man would have foreseen that the plaintiff's cottage might be destroyed? Why was the defendant in the Palsgraf case held not liable for negligently knocking the package out of the passenger's arm and causing the explosion which injured the plaintiff situated some distance from where the act took place?

To the writer's knowledge there is only one logical reason why the New York court and Cardozo departed from the Smith holding. The New York tribunal concerned itself with the question, "WHERE DOES LIABILITY STOP?" Liability in the Smith case was found on the basis of direct causation. Direct causation may go too far. It draws no satisfactory and clear line. Sometimes direct causation can lead to fantastic and unbelievable occurrences too remote to be reasonably imagined.

A train could emit sparks resulting in a fire that

destroys a person's home, and the fire, carried by sudden high winds, could successively destroy neighbor's homes⁸ and possibly a whole town. The defendant's negligent act, if established to be such, is certainly the direct cause of the town's destruction. The results, however, seem too fantastic an occurrence to hold one defendant liable for the losses sustained by all the inhabitants of the town.

The first problem in Palsgraf one must face is the significance of "duty." It means "an obligation to which the law will give recognition and effect, to conform to some standard of conduct toward another."⁹ All courts agree that a duty must arise out of some "relation" between the parties, but what that relation is no one has ever succeeded in defining. It is up to the court to say if there was a duty owed to the plaintiff by the defendant. Mrs. Palsgraf bought a ticket for the defendant's train. She was waiting on defendant's property to catch it. The court could have easily found that the defendant owed Mrs. Palsgraf a duty by simply saying so.

The term duty in a legal formula performs a function similar to the letter X in an algebraic formula--what does X equal? The term negligence or violation of duty performs the same function of the letter Y--what does Y equal? One is for the judge, the other for the jury. Both are unknown quantities.

The court's function indicated by the inquiry as to duty, is in its final analysis, the question whether the case demands the concurring judgment of a jury in its determination. If it does not, the court simply says there is no duty, as the majority said in Palsgraf. If the court, however, is not so satisfied with its own conclusion then it will submit the case to the jury as in Smith, if the evidential data warrant so doing. This marks the difference between Cardozo and Andrews in the Palsgraf case.¹⁰

A second problem is that of "foreseeability." "Duty does not always coincide with the foreseeable risk."¹¹ Was the damage reasonably to be foreseen by a reasonable man in defendant's position? The plaintiff has been hurt and someone must bear the loss. Essentially the choice is between the innocent plaintiff and a defendant who is admittedly at fault. "If the loss is out of all proportion to the defendant's

fault, it can be no less out of proportion to the plaintiff's innocence. If it is unjust to the defendant to make him bear the loss which he could not have foreseen, it is no less unjust to the plaintiff to make her bear a loss she too could not have foreseen, and which is not even due to her own negligence. In these cases there is no justice to be had."¹² The problem of foreseeability is not a new one. Courts have already considered it in terms of duty as well as proximate cause.

The question to which Cardozo and Andrews devoted most of their argument was whether negligence can be transferred—that is, whether negligence toward the man running for the train can be transferred to Mrs. Palsgraf so as to give her a cause of action against the wrongdoer. Cardozo said no. He said, "The plaintiff must sue in her own right for a wrong personal to her, and not as a vicarious beneficiary of a breach of duty to another."¹³ Andrews said Mrs. Palsgraf could rely on defendant's violation of a duty to the boarding passenger and that the question is one for the jury to decide.

A fourth problem involves the question, "where does liability stop?" Andrews uses direct causation. The guard knocked loose the package, its fall caused the explosion, the explosion knocked over the scales, the scales hit the plaintiff. Nothing intervened. It is not, however, an entirely satisfactory test. It draws no clear line and it can go too far. Cardozo simply says, if the plaintiff is not within the circle of the foreseeable risk, she cannot recover.

A fifth problem and an important one is social policy:

Whether the defendant in such cases should bear the heavy negligence losses of a complex civilization, rather than the individual plaintiff. Because these defendants are in a large measure public utilities, governmental bodies, industries, automobile drivers, and others, who by rates, prices, taxes or insurance, are better able to distribute the loss to the general public, many courts may reasonably consider that the burden should rest upon them, and experience no great difficulty in finding a 'duty' of protection.¹⁴

Conclusion

The Palsgraf case forsakes "proximate cause" and states the issue of foreseeability in terms of "duty."

The Palsgraf case has become hopelessly entangled with other rules, and other legal policies. The case has been cited in cases in which a statute is intended to protect only a particular class of persons, or to guard against only a particular risk or type of harm.¹⁵ It has been cited in holding that a railroad's duty towards drivers at crossings does not extend to its employees.¹⁶ Palsgraf has been relied on in holding that a contract obligation does not extend to third parties.¹⁷ It has been relied on in holding that a plaintiff, who is himself in a position of safety, cannot recover for mental shock and injury brought about by the sight of harm or peril to another person within the danger zone.¹⁸ The holding that duty in a negligence action extends only to those within a definite area of danger has obvious merits. It simplifies the problem and facilitates administration by restricting the defendant's responsibility within some reasonable bounds. It is also more consistent with the basic theory of negligence, that of creation of an unreasonable risk.

There are perhaps three factors which should be considered in determining whether Cardozo's or Andrews' approach is to be preferred. First, which view is more consistent with our sense of justice in the particular case? This is a difficult question to answer. Courts rarely discuss it. Second, which view is more consistent with the underlying theory of negligence? The defendant's act was wrongful only because it created a risk--an unreasonable risk of harm to the package. "Seldom have the courts, except as to consequences immediately following the tortious impact, extended liability beyond the field in which there is an appreciable risk of harm."¹⁹ Cardozo rationalizes the results making them consistent with the fundamental concept of negligence. Andrews' approach is contra to the great weight of American decisions. Third, which of the two approaches can be more easily applied? It would be difficult to apply Andrews' directness test. "Those using this test are merely playing with a metaphor; if directness connotes the comparative absence of external forces not set in motion by the defendant, it is not responsive to the decisions, either as a test of inclusion or exclusion."²⁰

Cardozo's "risk concept" has a meaning as adopted by the

Restatement.

In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other individually, or to a class of persons--for example, all persons within a given area of danger--of which the other is a member. If the actor's conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that it causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.²¹

Prosser feels that in a case like *Palsgraf*, in which judges disagree, then the case should go to the jury. "Surely if reasonable men disagree a jury should decide the question of fact."²²

Palsgraf v. Long Island R. R. will be cited many times more. It will even be more so the subject of discussions and debates. Some will follow the FACE which Cardozo displays, others will follow the shadow of Andrews' FACE. One thing is for sure, as Mr. Prosser states, "*Palsgraf* did one thing for certain. It submitted to the nation's then most excellent state court a law professor's dream of an examination question."²³

Footnotes

1. *Palsgraf v. Long island R. R.*, 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928).
2. *Smith v. London and S. W. Ry.*, L.R. 6 C.P. 14 (1870).
3. *Palsgraf v. Long Island R.R.*, loc. cit.
4. Goodhart, "The Unforeseeable Consequences of a Negligent Act," 39 Yale L. J. 39 (1930).
5. Green, "The *Palsgraf* Case," 30 Col. L. R. 789 (1930).
6. Prosser, *The Law of Torts*, pp. 292-96 (3rd ed., 1964).

7. Goodhart, loc. cit.
8. Ryan v. New York Central R. R., 35 N.Y. 210 (1866).
9. Prosser, "Palsgraf Revisited," 52 Mich. L. Rev. 1 (1953).
10. Green, "The Palsgraf Case," loc. cit.
11. Prosser, "Palsgraf Revisited," loc. cit.
12. Ibid.
13. Palsgraf v. Long Island R.R., loc. cit.
14. Green, "The Duty Problem in Negligence Cases," 28 Col. L.R. 1014 (1928).
15. Flynn v. Gordon, 86 N.H. 198 (1933).
16. Karr v. Chicago R.I. and P.R. Co., 341 Mo. 536, 108 S.W. 2d 44 (1937).
17. Harris v. Lewistown Trust Co., 326 Pa. 145 (1937).
18. Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).
19. Seavey, "Mr. Justice Cardozo and the Law of Torts," 52 Harv. L. Rev. 372 (1939), 48 Yale L.J. 390 (1939), 39 Col. L. Rev. 20 (1939).
20. Ibid.
21. Restatement, Torts 2d, §281 (c), (1965).
22. Prosser, "Palsgraf Revisited," loc. cit.
23. Prosser, The Law of Torts, op. cit., p. 293.

SANE OR INSANE PROVISIONS IN INSURANCE POLICIES

J. Tyrone Duncan

Generally, the majority of courts have upheld provisions of a life or accident insurance policy excluding liability for injury or death resulting from the insured's suicide. Some earlier cases held that self-destruction while insane was not suicide within a provision against death by suicide, since there could be no suicide unless the person committing the act of self-destruction could form a conscious intention to kill himself and carry out that act, knowing its moral and physical conditions and consequences. In response to such holdings, insurance companies began to add the words, "sane or insane" to the ordinary exclusion provisions.

Apparently, the difficulty arises from the use of the term "suicide." On one hand, if one construes suicide to mean a volitional act with complete knowledge of the consequences that might result, one could plausibly argue that the insertion of the words "sane or insane" contributes nothing, since the same results would be reached without the addition of such words. On the other hand, if one considers suicide to mean only that act which caused death which was physically performed by the insured, then a different conclusion will follow.

Different courts using different approaches in deciding cases dealing with the exclusionary clause have reached different results. Some courts have held that when a policy of insurance excludes liability for death resulting from suicide, sane or insane, or uses similar language, it is not necessary that the insured should have been able to realize the moral nature and quality of the self-destructive act from which death resulted. According to this approach, recovery should be denied when death resulted from intentional self-destruction even though the insured may have been so insane as not to be able to appreciate the nature of his act. See *Bigelow v. Virkshire Insurance Co.*, 93 U.S. 284 (1876); *Union Life Insurance Co. v. Hollowell*, 14 Ind. App. 611 (1896); *Aetna Life Insurance Co. v. McLaughlin*, 380 S.W. 2d 101 (1965).

In the *Hollowell* case, supra, the court held erroneous an instruction by the trial court judge to the effect that a provision that self-destruction, whether sane or insane, avoided the policy, did not apply unless the poison was

deliberately and willfully taken by the insured with the intent to commit suicide. In rejecting this instruction by the trial court judge, the appellate court stated all the insurer was required to prove was that the poison was taken with the intent to commit suicide. The court added that the conscious and voluntary act by the insured in taking the poison with the intent to take his own life was sufficient to defeat a claim for recovery, whether the act committed was deliberate or not.

In the *McLaughlin* case, supra, an action was brought by the insured's widow under an accident policy which contained a clause excluding liability for any loss cause by "suicide, sane or insane." The trial court's definition of suicide was such that required the deceased to have understood the nature and probable consequences of his act. The Supreme Court of Texas reversed the lower court's judgment and remanded the case to the trial court. The court held, *inter alia*, that in order for an act to be suicide, sane or insane, it was not necessary for the deceased to have realized the physical nature and consequences of his act, nor for the deceased to have had a conscious purpose to take his own life. The test used by the court was whether the act was one which would have been regarded as suicide in the mind of a sane person. Such a test appears to be more favorable to the insurer than to the insured.

A second approach utilized by some courts involves those cases in which no mention is made as to the degree of comprehension which the insured must have in order that his self-destructive act be suicide, sane or insane. In these situations the courts have held that suicide or self-destruction by an insured falls within the exclusion provision of the policy that bars recovery. See *Equitable Life Insurance Co. v. Herbert*, 37 Ind. App. 373 (1906); *Attorney General v. Colonial Life Insurance Co.*, 80 N.E. 455 (1907); *Weber v. Guardian Life Insurance Co.*, 2 Tenn. App. 624 (1926); *Lincoln Petroleum Co. v. New Life Insurance Co.*, 115 F. 2d 73 (1940).

In the *Lincoln* case, supra, the claimant brought an action on life insurance policy excepting coverage for death through self-destruction, whether insured was sane or insane. Evidence tended to show that on the night of the insured's death he had been drinking heavily and was intoxicated. The court held that the provision excluding claimant recovery barred recovery on the ground that death was due to self-destruction, regardless of whether the mental faculties of the

insured were affected at the time by alcoholic drink.

A third approach used by some courts involves those cases in which death was the result of an accident. These courts held that when death was the result of an accident, which resulted from the insured's own act, such was not within the scope of the policy provision excluding or limiting liability when the death resulted from suicide, sane or insane. See *Edwards v. Travelers' Life Insurance Co.*, 122 U.S. 457 (1884); *Spruill v. Northwestern Insurance Co.*, 120 N.C. 141 (1897); *Thaxton v. N. Y. Life Insurance Co.*, 143 N.C. 33 (1906); *Parker v. New York Life Insurance Co.*, 188 N.C. 403 (1924).

In the *Edwards* case, supra, a provision that the policy shall be void if the insured "shall die by suicide, whether the act be voluntary" was held not to apply when the insured, a sane person, killed himself by accident. In the *Spruill* case, supra, the court held that death by accident or mistake does not automatically thrust the case within the exclusion clause of the policy, "since there must be at least physically some suicidal intent." In the *Thaxton* case, supra, a provision excluding liability if the insured "die by his own hands or action, whether sane or insane, does not include a killing by accident, even though the act of the insured could have been the unintended means of causing death." It was held in the *Parker* case, supra, that the exclusion of self-destruction, whether the insured be sane or insane, did not exclude liability for death by accident, even though by the insured's own act.

A fourth approach used by some courts is commonly known as the Kentucky rule. Courts adhering to this approach have held that if the insured was in such a mental state that he was not able to appreciate the physical nature and consequences of his act, which resulted in his death, the death did not fall within the exclusionary provision. See *Christensen v. New England Mutual*, 197 Ga. 807 (1944); *Bullard v. Metropolitan Life Insurance Co.*, 127 S.E. 75 (1924); *Wharton v. New Life Insurance Co.*, 178 N.C. 133 (1921).

The court in the *Christensen* case, supra, found that a life insurance policy provided for a limitation of liability if the insured died by his own hand, sane or insane. The insured died by jumping from a sixth-story window to escape from imaginary enemies; the insured did not realize that his act of self-destruction would cause his death. The court held that

the insured must have intended to take his own life in order that his beneficiary be excluded from recovery. In the Bullard case, supra, the court held that the jury had been properly instructed that the burden of proof was on the insurer to show that death was not the result of natural or accidental causes. The insurer must show that the insured died by his own hand from taking a drug with the intention of destroying himself. In the Wharton case, supra, the court said that there is a presumption of law against the insured having committed suicide, so that the burden of proof is on the party asserting suicide.

A fifth approach taken by many courts is that in order for the insurer to avoid liability under an exclusion provision, it need not be shown that the insured had the mental capacity to realize the consequences of his act or to form a conscious purpose to kill himself. See *De Gogorza v. Knickbocker Life Insurance Co.*, 65 N.Y. 232 (1875); *Riley v. Hartford Life Insurance Co.*, 25 F. 315 (1885); *Gavin v. Des Moines Life Insurance Co.*, 126 N.W. 906 (1910); *Parker v. Aetna Life Insurance Co.*, 232 S.W. 708 (1921); *Spruill v. N. W. Life Insurance Co.*, 120 N.C. 141 (1897).

In the *De Gogorza* case, supra, the court held that the provision "die by his own hand or acts, sane or insane," applied even though the insured was mad or insane. Thus the mere act of self-destruction, although involuntary, was a bar to recovery under the exclusion provision of the life insurance policy. In the *Riley* case, supra, the court held that the phrase, "felonious or otherwise," in the provision of policy is equivalent to the words "sane or insane." Therefore, the court ruled out all testimony as to the condition of the mind of the insured when he committed his fatal act. The assumption was apparently that the insured intended to take his own life. In the *Gavin* case, supra, a provision made the policy void if the insured "die by his own hand or act whether sane or insane." The court observed:

The cases generally make a distinction between suicide and self-destruction when insane suicide includes the moral element of intentional self-destruction, while an insane man may commit the act without the presence of such moral element.

In the *Parker* case, supra, the court held that in order to be suicide at all, death must have been intentionally and not accidentally, inflicted upon himself by the deceased. In

the Spruill case, cited earlier, the North Carolina Supreme Court said:

As the expressions "committed suicide and died by his own hands" were held synonymous, the words added thereto, "sane or insane" are regarded as equally synonymous and intended to protect the insurer from all liability where suicide whether sane or insane, regardless of the degree of insanity. . . .

The sixth and final approach suggests that recovery will be denied under an exclusion of "suicide, sane or insane" or other equivalent language, if the only showing is that the self-destructive act resulted from an irresistible impulse by the insured. See *Columbian National Life Insurance Co. v. Wood*, 236 S.W. 526 (1922); *Brower v. Supreme Lodge Nat'l Reserve*, 74 Mo. App. 490 (1898); *Adkins v. Columbian Life Insurance Co.*, 70 Mo. 27 (1879).

In the *Wood* case, supra, the court drew a distinction between lack of intention on the part of the insured to kill himself and an irresistible impulse to do so. The court recognized that it was impossible to realize such an intention; therefore, the suicide clause with the words "sane or insane" would not apply. The court added that an irresistible impulse of an insured to kill himself, which he cannot control, does not prevent the application of such provision excluding liability.

In the *Brower* case, supra, the court disapproved of an instruction which placed on the insurer the burden of showing that the death was a result of the insured's own voluntary act done for the purpose of taking his own life.

Summary

As indicated earlier, courts using different approaches in dealing with the exclusionary clause have reached different, and sometimes shocking, results. Six different views are listed below.

According to the first approach, recovery should be denied when death resulted from intentional self-destruction, even though the insured was so insane that he was unaware of the nature and physical quality of his act.

According to a second view, the degree of comprehension of the insured at the time of his death has been held to be immaterial. This approach, along with the first approach, appears to be unduly harsh, since the state of mind of the insured at the time of his death has no bearing on the outcome of the case. Apparently, proponents of this school of thought subscribe to a strict construction of the exclusion provision of the policy. In other words, if an insane person takes his own life, his beneficiary or claimant cannot recover on the policy because of the exclusion provision barring recovery.

According to the third approach, if a person, sane or insane, destroys himself by accident, the exclusion clause of the policy does not apply; therefore, the beneficiary of the insured may recover in the amount of the terms of the policy.

According to the fourth approach, known as the Kentucky rule, courts have held that if the insured was in such a mental state that he was not able to appreciate the physical nature and consequences of his self-destructive act, death does not fall within the exclusionary clause. Thus, the claimant may recover for the insured's death. The third and fourth approaches appear to be sound and fair to all parties concerned, since there is a presumption in law that a man will not take his own life.

According to the fifth approach, the courts have held that it was not necessary to show that the insured lacked the mental capacity to realize the consequences of his act or even for a conscious purpose to kill himself.

According to the sixth and final approach, if the insured at the time of his death suffered from an irresistible impulse to take his own life, his claimant cannot recover because of the exclusion provision in the insurance policy. The author, for the same reasons advanced under the second approach, disagrees with the fifth and sixth approaches used by the courts. However, it should be noted that each case should be determined according to the particular facts of the case.

DURHAM* IS DEAD--THE NEED FOR A UNIFORM TEST OF
CRIMINAL RESPONSIBILITY IN THE FEDERAL
COURTS OF APPEALS

Zollie Richburg

"Or have we eaten on the insane root
that takes the reason prisoner?"

--Macbeth: Act I, Scene III

Man's search for a test of criminal responsibility is almost epochless. Once he found a workable test, he was reluctant to relinquish it. Maybe his reason was that it was wiser to bear the ill he had, no matter how zany the ill was, than fly to another he knew not of.

The purposes of this article are: (1) to present a history of the insanity defense in the federal courts, including the Supreme Court; (2) to give a brief history of the insanity defense used in the English courts; and (3) to list the present tests used in the different circuits.

Few would question the statement that Durham was welcomed in the criminal field as far as criminal responsibility was concerned. But it is dead, and its elegy was either joyful or sad, depending upon the circuit.

Durham's epitaph cannot be written yet, because it is only dead in the Federal Courts of Appeals, not in some state courts.

Durham enabled the lawyer to do more than he had been doing previously. But due to certain legal technicalities and canons, he is still hindered in his work.

"The lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."¹ Not infrequently, an attorney who

*Durham v. United States, 94 U.S. App. D. C. 228, 214 F. 2d 862 (1954).

defends a person accused of crime may be faced with the difficult task of preventing the prosecution and the court from learning that his client has a valid defense. For example, the Code of the District of Columbia² provides that any person who has been acquitted of crime by reason of insanity shall be confined to a hospital for the mentally ill.

This places the attorney and the client in an unusual predicament. If the client pleads "not guilty by reason of insanity" and is acquitted, he may spend the rest of his life in a hospital for the mentally ill. There is no law telling how many years a person has to stay in such a hospital. In most cases, the prosecution will accept a guilty plea of a lesser crime to avoid the "not guilty by reason of insanity" verdict. The attorney can and in most cases thinks he should avoid the insanity defense. But he ethically cannot present another defense if a defendant admits his guilt.

The attorney presents the only ethical defense he knows--the insanity defense. Whether this defense will avail the attorney or defendant anything depends upon the circuit he is in.

Contrary to what many people believe, insanity as a defense had its genesis in the fourteenth century.³ The M'Naghten rule,⁴ or the right and wrong test, was born four centuries later. Between M'Naghten and the first test lies the "Child of fourteen years test."⁵ The "Child Test," which seems to be much more liberal⁶ than M'Naghten, was formulated in the seventeenth century.⁷ Briefly stated, the test is what would a child of fourteen have done.⁸

The M'Naghten rule, which is presently the test used in the majority of American jurisdictions,⁹ is not a novel test. In part, M'Naghten was built on the "good and evil" foundation.¹⁰ The M'Naghten rule, which a recent Royal Commission (1949-1953) of its birthplace repudiated,¹¹ would soon creep into the federal courts.¹²

' Another test used in England was the "wild beast test."¹³ In order for an accused to be exempt from responsibility, he "must be a man that is totally deprived of his reason and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast."¹⁴ This test has been completely and totally abandoned.

It seems as though England had so many tests for insanity, even she was probably confused as to which to apply.

In considering M'Naghten and the reason behind her, "Her" is used deliberately to indicate that M'Naghten was the True Eve of all insanity defenses. Necessity, being the mother of all rules, doctrines, and inventions, created M'Naghten. It was not necessary for society to have her. But society could not stand to see a defendant go free when he assassinated a famous personality. In other words, its creation was due to the assassination or attempted assassination of famous personalities. And the nemesis it tried to create did more harm than good. These facts will verify the supposition that had there been no assassination or attempted assassination of famous personalities, there would have been no M'Naghten.

The M'Naghten rule, as it has become known in the criminal field, should be called the Oxford rule.¹⁵ Oxford unsuccessfully tried to assassinate the Queen. The House of Lords repudiated all of the previous insanity tests and created the right-wrong test,¹⁶ which was adopted three years later in M'Naghten without an iota of change.¹⁷ M'Naghten was no more nor less a reiteration of Oxford.

M'Naghten believing one Drummond, secretary to Sir Robert Peel then Prime Minister of England, was Sir Robert, shot and killed Drummond as he rode in the carriage which normally would have been occupied by Sir Robert. But for the fact that Sir Robert chose to ride in Queen Victoria's carriage because of her absence from London, M'Naghten's plan to assassinate the Prime Minister was unsuccessful.¹⁸ The ending need not be told.

As far as American federal courts are concerned, M'Naghten was never used until 1882.¹⁹ Guiteau pleaded not guilty by reason of insanity for the assassination of President Garfield. The Court for the first time adopted M'Naghten and rejected the moral turpitude test established in 1818.²⁰

Probably the first federal case decided in the United States dealing with insanity as a defense was *United States v. Clark*.²¹ The Court here charged the jury that if a person "was in such a state of mental insanity, not produced by the immediate effects of intoxicating drink, or not to have been conscious of the moral turpitude of the act, they should find him not guilty."²² The words "right" and "wrong" were not

used anywhere in the case and the test seemed to have been moral turpitude. This test, however, was not mentioned in any other reported case.

The next case, *United States v. Holmes*,²³ which is a favorite among criminal law students, occurred in 1858. Since the insanity defense had been promulgated in the federal courts, this was the first reported case in which the word "wrong" was used. But here Holmes' sanity was really not at issue. The question, which was strictly a legal and moral one, was whether a man would be justified in killing a small number of people to save a larger number. The ending will be pre-termitted; it has been told many times. In essence, the insanity defense, though raised, was dictum.

One year later in *United States v. Sickles*,²⁴ the court spoke of the right-wrong test. However, *M'Naghten* was not given approval and neither was it cited. The federal courts, as far as the insanity defense was concerned, worked like a pendulum. They used any test swinging in their direction.

American courts were not lacking in English precedents for a test of insanity.²⁵ Because of convenience, easiness, and self-explanation to the jury, *M'Naghten* was probably selected; also, the assassination or attempted assassination of famous personalities.²⁶

In 1882,²⁷ *M'Naghten* was wedged into the federal courts and there it was given imprimatur. "Whether the inability to resist wrong by one having an actual knowledge of the difference between right and wrong, is such a mental disorder as would constitute a defense to the crime of murder, query."²⁸

The right-wrong test was reaffirmed in *United States v. Lee*.²⁹ The Court said that "the barbarous manner in which a homicide was committed does not of itself furnish any basis for the defense of insanity."³⁰

The right-wrong test remained in the District of Columbia until 1929,³¹ when the Court approved the irresistible impulse test. This test, although it was dictum at the time it was enunciated, is traceable to 1840, three years prior to *M'Naghten*, and can be found in *Regina v. Oxford*.³²

Here it was stated that if a person "was laboring under some controlling disease, which was in truth the acting power

within him which he could not resist, then he will not be responsible."³³

The irresistible impulse test was not long lasting. In 1954, it too was given a decent burial in *Durham v. United States*.³⁴

In 1951, the same evidence rule was created in *Tatum v. United States*.³⁵ Briefly stated the rule is that once the defendant has put forth "some evidence" of insanity, the judge must instruct the jury on this issue. In *Tatum*, the defendant did not plead not guilty by reason of insanity, but simply said he "remembered nothing of what happened at the time the offense was committed."³⁶ The Court held that this constituted "some evidence."

A very unusual case dealing with the rule is *Lehron v. United States*.³⁷ The defendant and her companions shot five Congressmen from the House gallery. They unequivocally refused to assert the insanity defense at their trial. On appeal, however, they contended that (1) the very act of shooting up Congress, (2) abnormal calmness of three defendants, (3) the hysterical behavior of the lady defendant, and (4) the fact of belonging to a minority group constituted "some evidence" of insanity. The Court, of course, did not accept this theory.

In *Clark v. United States*,³⁸ the defendant said he was "crazy" once and "insane" or "insanity" thrice. This was held not to constitute "some evidence."³⁹

What constitutes "some evidence" is a question of law.⁴⁰ The necessary quantum of evidence is doubtful. One writer has suggested that it [some evidence] "lies in a factual no-man's land, somewhere between 'reasonable doubt' and 'mere scintilla.'"⁴¹ One thing is certain, "some evidence" is not as strong as a reasonable doubt. The federal courts refused to accept the view adopted by some state courts⁴² that the accused has the burden of introducing enough evidence to raise a reasonable doubt of his sanity.

The "some evidence" rule is not a test of sanity, but is a test of evidence. It may be stated by way of a question. Did the defendant put forth enough testimony, as would require an instruction of sanity? This legal technicality can aid defense counsel in many respects.

This rule not only aids the defense counsel but it also helps the prosecution. It does not matter who raises the sanity issue, once it is raised, the court must instruct the jury.⁴³

It is doubtful whether any case stirred more comment and controversy than *Durham v. United States*.⁴⁴ The rule should be called the Pike rule, because it was first enunciated in *State v. Pike*,⁴⁵ eighty-five years before *Durham*. Anyway, what is in a name? Any name other than M'Naghten or irresistible would sound much better. The *Durham* rule has been rejected in many federal and state courts.⁴⁶

The rule as stated in *Durham* is "that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect."⁴⁷ "Disease is a condition which is considered capable of either improving or deteriorating." And "defect is a condition which is considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."⁴⁸

The *Durham* rule has undergone a mutation, not a revolution, in some circuits. Even the circuit which created *Durham* extended it in *Whalen v. United States*.⁴⁹ The Court said that if a defendant "does not know what he is doing or cannot control his conduct or his acts are the product of a mental disease or defect, he is morally blameless and not criminally responsible."⁵⁰

Due to dicta uttered by the Supreme Court,⁵¹ the circuits have taken contrary views on the insanity defense.⁵² Davis (1), Davis (11), Hotema, and Matheson represent the (1) burden of proof, (2) trial court's charge, (3) sufficiency of the jury charge, and (4) requested instructions, respectively.

The Second Circuit completely disregarded *Durham* in *United States v. Freeman*,⁵³ and accepted the test given by the American Law Institute.⁵⁴ "A person is not responsible for criminal conduct if at the time of such conduct or a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirement of law."⁵⁵

This test was adopted in *Wion v. United States*,⁵⁶ with the addition of the word "knowing"⁵⁷ to "appreciate."

Whether the addition of the word "know" will aid the defendant may be a moot question, but "know" means to "apprehend immediately with the mind or with the senses," and "appreciate" means to "evaluate highly or approve warmly often with expressions."⁵⁸

Another post Durham test is that if "as a result of mental disease or defect [the defendant] lacked substantial capacity to conform his conduct to requirements of law which he is alleged to have violated,"⁵⁹ then he is not criminally responsible.

There are eleven Circuit Courts of Appeals.⁶⁰ These circuits have accepted a new test--or extended Durham: District of Columbia Circuit, extended;⁶¹ Second Circuit, accepted new test;⁶² Third Circuit, accepted new test;⁶³ and Tenth Circuit, accepted new test.⁶⁴ These Circuits either adhere to M'Naghten or the irresistible impulse test: Fourth Circuit, M'Naghten;⁶⁵ Fifth Circuit, irresistible or M'Naghten;⁶⁶ Sixth Circuit, irresistible impulse test and M'Naghten;⁶⁷ Seventh Circuit, M'Naghten;⁶⁸ Eighth Circuit, M'Naghten;⁶⁹ and Ninth Circuit, M'Naghten.⁷⁰

Using the Erie doctrine,⁷¹ some Circuits feel they must abide by the state law of insanity. This is undoubtedly the reason that they have taken contrary views. This view, however, is unfounded, since the courts of the United States "have inherent judicial power to rule on the law of insanity."⁷²

A careful review of the different circuits reveals that not one follows the Durham rule anymore. Durham, once considered king of the insanity defense, is dead in the federal courts.

The post Durham cases, although oases in the desert of law pertaining to criminal insanity, have added nothing to the scales of justice. They have done no more than sweep the dust farther under the rug of justice. "[T]he American Law Institute test is essentially M'Naghten plus irresistible impulse recast in modern terminology, changing the archaic terms."⁷³ The post Durham tests are in essence a judicial play with words.

The Supreme Court should never be required to answer all questions presented to it. But when lower courts take

contrary views on an issue the Supreme Court should answer that question.

It is absurd, though it is often the case, to say that defendants, suffering from the same mental diseases or defects, will not be accorded the same treatment. A defendant in the Second Circuit who did not "appreciate" the wrongfulness of his conduct will be found "not guilty by reason of insanity." A defendant in the Fourth Circuit who did "appreciate" the wrongfulness of his conduct is subject to be found guilty.

Despite inconsistent results among the Courts of Appeals,⁷⁴ the Supreme Court has consistently refrained from granting certiorari to consider the issue of criminal responsibility.⁷⁵ The question was squarely presented to the Court in all cases. It has been suggested that the Supreme Court's refusal to give a test is more than mere coincidence. The Supreme Court wants the Circuits to develop alternative tests before making a definitive ruling.⁷⁶

The Circuits are seeking a proper test of criminal responsibility. Although these are dicta in several Supreme Court cases,⁷⁷ the reports are actually barren of any holding on criminal responsibility.

One day the Supreme Court will answer the question and state a test to be used. It would not be surprising if it holds that to punish an insane person, who did not appreciate the wrongfulness of his conduct, would amount to a denial of "due process of law."

Conclusion

The three-fold purposes of the criminal law are rehabilitation, deterrence and retribution. To punish those who are mentally incompetent serves no rehabilitative function. You do not deter one mentally incompetent by punishing another. Retribution from one who is mentally incompetent is a sadistic form of revenge.

Durham is dead and the criminal law is in need of a test for criminal responsibility. M'Naghten, "a formula quite color-blind to any gradations between black and white,"⁷⁸ is not the answer. The appreciable test as stated in Freeman⁷⁹ may be the answer but there is a question of understandability.

The jury will have a difficult task trying to understand the test. Psychiatrists cannot determine criminal responsibility, because they would be taking over the job of the law.

With the Circuits taking contrary views, the Supreme Court should act. It would almost be a dereliction of its duty and a mockery of the inscription on its building, "Equal Justice Under Law," for it not to act.

"If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method is neither good morals nor good science nor good law."⁸⁰

The criminal law is an expression of the moral sense of the community. Is it morally right to punish a person who does not appreciate the wrongfulness of his conduct? It is time for the community to stop looking for revenge, which is only indicative of the fact that it has "eaten on the insane root that takes the reason prisoner." Let the quest for justice become the guiding light to the realization of those ideals embodied in the concept of law, which countless jurists and lawyers through the ages have sought to effectuate.

Footnotes

1. Canon 5, Canons of Professional Ethics (1957).
2. D. C. Code Ann. Sect. 24-301(d) (Supp. VIII, 1960). A code of this kind seems to be unconstitutional. Acquittal via insanity is conditioned upon mandatory confinement. See Halleck, The Insanity Defense in the District of Columbia - a Legal Lorelei, 49 Geo. L. J. 294 (1960). This type of mandatory confinement seems to be unconstitutional in that it is a bill of attainder, cruel and unusual punishment, and a taking of liberty without due process of law.
3. Glueck, Mental Disorder and the Criminal Law, 125 (1925). See also Moore, Jr., "M'Naghten Is Dead - Or is it?", 3 Houston L. Rev. 58 (1965).
4. 10 Clark & F. 200, 1 C. & K. 130, 8 Scott N.R. 595, 4 St. Tr. (N.S.) 847, 8 Eng. Rep. 718 (House of Lords, 1843) [hereinafter cited as 8 E.R. 718].

5. 1 Hale, Pleas of the Crown, 15 (1847). Hereinafter referred to as the "Child Test".
6. The term "liberal" is used advisably to denote only the test gives the defendant a better or a right to assert a better defense.
7. Supra note 5.
8. "Such a person as laboring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony." 1 Hale, Pleas of the Crown 30 (1847).
9. See Perkins, Criminal Law 751 (1957); Wingershy, Clark and Marshall, Crimes 344 (1958).
10. Hawkins, Pleas of the Crown 1-2 (7th ed. 1795): "Those who are under a national disability of distinguishing between good and evil, as infants under the age of discretion, . . . are not punishable by any criminal prosecution whatsoever." Emphasis added. This was not a departure from the "child test," supra, notes 5 and 8, but an enlargement of it. Right-wrong was later substituted for good-evil, and the "child test" was dropped. Supra note 3 at 142-52.
11. Wingershy, Clark and Marshall, Crimes 339-40 (1958).
12. United States v. Guiteau, 12 D.C. (1 Mackey) 498 (1882).
13. Arnold's case, 16 How. St. Tr. 764 (1724).
14. Ibid at 765. Emphasis added.
15. Regina v. Oxford, 9 Car. & P. 525, 173 Eng. Rep. 941 (1840).
16. Ibid at 949.
17. 8 E.R. 718 (1843).
18. 8 E.R. 718 (1843). "But, by an accident of history, the rule of M'Naghten's case froze these concepts (phrenology and monomania) into the criminal law just at a time when

they were becoming obsolete." *United States v. Freeman*, 357 F. 2d 606, 616 (1966). "M'Naghten's case could have been the turning point for a new approach to more modern methods of determining criminal responsibility. But the Queen's ire was by the acquittal and she was prompted to intervene. Mid-19th Century England was in a state of social upheaval and there had been three attempts on the life of the Queen and one on the Prince Consort. Indeed, Queen Victoria was so concerned about M'Naghten's acquittal that she summoned the House of Lords to 'take the opinion of the Judges on the law governing such cases.' Consequently, the fifteen judges of the common law courts were called in a somewhat extraordinary session under a not too subtle atmosphere of pressure to answer five prolix and obtuse questions on the status of criminal responsibility in England." *Ibid.* at 617. An excerpt of an address of the Lord Chancellor to the House of Lords goes like this: A gentleman in the prime of his life . . . was murdered in the streets of this metropolis in open day. . . . He (M'Naghten) has escaped with impunity. Your Lordships will not be surprised that these circumstances have created a deep feeling in the public mind." . . . Glueck, *Mental Disorder and the Criminal Law* 164 (1925). For a vivid account of M'Naghten's trial, see Guttmacher and Weihofen, *Psychiatry and the Law* (1952). See also Biggs, *The Guilty Mind*. Harcourt, Brace and Co., 1955.

19. *United States v. Guiteau*, 12 D.C. (1 Mackey) 498 (1882). Guiteau is the person who assassinated President Garfield.
20. *United States v. Clark*, Fed. Cas. No. 14,811; 2 Cranch, C.C. 158, 2 D.C. 158 (1818). This case is discussed in the next section.
21. Fed. Cas. No. 14,811, 2 Cranch, C.C. 158, 2 D.C. 158 (1818). See supra note 20.
22. Ibid. [Emphasis added.]
23. Fed. Cas. No. 15,382, 1 Cliff. 98 (C.C., D. Me. 1858). See also *U. S. v. Holmes*, Fed. Cas. No. 15,383, 1 Wall. Jr. (C.C., E.D., Pa. 1842). In the latter case the defendant was convicted of manslaughter for throwing passengers out of an overcrowded boat into the high sea. In the former case, he raised the question of insanity.

24. Fed. Cas. No. 16,287a, 2 Hayes & H. 319 (1859).
25. Supra notes 15, wild beast test; 12, good and evil test; 10, 7, and 5, the child test; and infra note 32, a semi-irresistible impulse test.
26. Supra section 3.
27. United States v. Guiteau, 12 D.C. (1 Mackey) 498 (1882).
28. Ibid. at 498. Syllabus.
29. 15 D.C. (4 Mackey) 489, 496 (1886).
30. Ibid. at 495.
31. Smith v. United States, 59 U.S. App. D.C. 144, 36 F. 2d 548, 70 A.L.R. 654 (1929).
32. 9 Car. & P. 525, 173 Eng. Rep. 941 (1840).
33. 173 Eng. Rep. at 949 [Emphasis added.]
34. 214 F. 2d 862 (1954).
35. 80 U.S. App. D.C. 386, 190 F. 2d 612 (1951).
36. 80 U.S. App. D.C. at 388, 190 F. 2d 614 (1951).
37. 97 U.S. App. D.C. 133, 229 F. 2d 16 (1955).
38. 104 U.S. App. D.C. 27, 259 F. 2d 184 (1958).
39. Ibid. See Goforth v. United States, 269 F. 2d 778 (1959), some evidence established; Smith v. United States, 272 F. 2d 547 (1959); some evidence can be raised by prosecution as well as defense witnesses; Moore v. United States, 277 F. 2d 684 (1960), intelligence test score of 69 does not constitute some evidence. But see McDonald v. United States, 312 F. 2d 847 (1962), evidence of a 68 I.Q. rating, plus other evidence of mental abnormalities appear sufficient.
40. Supra, note 2.

41. Ibid. at 302. See also McDonald v. United States, 312 F. 2d 847 (1962).
42. Michigan: People v. Finley, 38 Mich. 482 (1878); Oklahoma: Moss v. Territory, 10 Okla. 714, 63 P. 960 (1901); Wisconsin: Dutley v. State, 131 Wis. 178, 111 N.W. 222 (1907).
43. United States v. Kloman.
44. 94 U.S. App. D.C. 228, 214 F. 2d 862 (1954).
45. 49 N.H. 399 (1870). See State v. Jones, 50 N.H. 369 (1871).
46. Supra, note 2.
47. Durham, U.S. App. D.C., 241, F. 2d at 874-75 (1954).
48. Ibid. at 241, 214 F. 2d at 875.
49. 346 F. 2d 812 (1965). See also McDonald v. United States, 312 F. 2d 847 (1962).
50. Ibid. at 818.
51. Davis v. United States, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895); Davis v. United States, 165 U.S. 373, 17 S.Ct. 360, 41 L.Ed. 750 (1897); Hotema v. United States, 186 U.S. 413, 22 S. Ct. 895, 46 L.Ed. 1225 (1902); Matheson v. United States, 227 U.S. 540, 33 S.Ct. 355, 57 L.Ed. 631 (1913).
52. See Sauer v. United States, 241 F. 2d 640 (C.A. 9, 1957), cert. den., 354 U.S. 940, 77 S.Ct. 1405, 1 L.Ed. 2d 1539 (1957). The Court said only the Supreme Court or Congress could modify M'Naghten. This is utterly nonsense. M'Naghten is a judge-made rule, not an Act of Congress. Absence legislation to the contrary, what the courts put together, it certainly can dismantle. See also supra notes 44 and 39, and United States v. Freeman, 357 F. 2d 606 (1966), all rejecting M'Naghten.
53. 357 F. 2d 606 (1966).

54. American Law Institute, Model Penal Code, Sec. 4.01 (final draft 1962).
55. Supra, note 53 at 622. [Emphasis supplied.]
56. 325 F. 2d 420 (1963).
57. Ibid.
58. Webster's New Third International Unabridged Dictionary.
59. United States v. Currens, 290 F. 2d 751, 774 (1961). The Court accepted only part of the American Law Institute test. Ibid. at 774, note 33.
60. 28 U.S.C. Sec. 41.
61. Whalem v. United States, 346 F. 2d 812 (1965); Heard v. United States, 348 F. 2d 43 (1965); McDonald v. United States, 312 F. 2d 847 (1962)
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64. Wion v. United States, 325 F. 2d 420 (1963).
65. Snider v. Cunningham, 292 F. 2d 683 (1960).
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73. Judge Burger, Tenth Judicial Circuit Conference, Panel Discussion--Psychiatry and the Law, 32 F.R.D. 547, 560 (June 7, 8 and 9, 1962).
74. Supra, notes 61-70.
75. The cases are too numerous to list all; these are just a few: Dushy v. United States, 295 F. 2d 743 (C.A. 8), cert. den., 368 U.S. 998, 82 S. Ct. 625, 7 L. Ed. 2d 536 (1962); Wion v. United States, 325 F. 2d 420 (C.A. 10), cert. den., 377 U.S. 946, 84 S. Ct. 1354 (1964); United States v. Cain, 298 F. 2d 934 (C.A. 7), cert. den., 370 U.S. 902, 82 S. Ct. 1250, 8 L. Ed. 2d 400 (1962); Carter v. United States, 325 F. 2d 697 (C.A. 5), cert. den., 377 U.S. 946, 84 S. Ct. 1353, 12 L. Ed. 2d 308 (1964); Sauer v. United States, 241 F. 2d 640 (C.A. 9), cert. den., 354 U. S. 940, 77 S. Ct. 1405 (1957).
76. Moore, Jr., "M'Naghten Is Dead--Or Is It?", 3 Houston L. Rev. 58 (1965).
77. Supra, note 51.
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80. Cardozo, Benjamin N., Law and Literature and Other Addresses (New York: Harcourt, Brace, 1931), p. 108.

THE NEGRO AND THE LEGAL PROFESSION:
A STUDY IN COMMITMENT

Maynard H. Jackson*

Law Day Speaker, May 1, 1967

LAW DAY - U. S. A. is a day when America pauses to recognize and, hopefully, to assess its commitment as a nation to the rule of law. At best, however, that recognition raises serious questions, and the assessment finds our commitment wanting. Thus, on Law Day - 1967, we must wonder aloud how we can help our country realize the humane and wonderful potential of its founding ethic when we face the fact that, even today, due process is still long overdue. Moreover, we find ourselves gripped with the disquieting realization that, as things stand now, the world cannot hear what America says because of what America does.

The late, eminent jurist and legal giant, Mr. Justice Benjamin Cardozo, once wrote in an opinion, "Danger invites rescue. . . . The cry of distress is the summons to relief." Since 1619, when the bowels of slave ships spewed onto the docks of Jamestown, Virginia, chained black humanity, there has echoed in America a plaintive cry of distress. Many have been summonsed to relief, but few have answered. Of those who heeded the cry, the Negro lawyer was the most enduring, the most committed. With special reference to the past thirty years, it may well be said of the American Negro lawyer that never have so few done so much for so many with so little, for so long, and for such a small return.

The American Negro lawyer asked American courts serious and probing questions which raised revolutionary concepts. Not the least among these was the question of whether the "due process" clauses of the Fifth and Fourteenth Amendments included the Negro. He asked: Is it the Negro's due that he help support a public school system that not only denies him and his children effective participation, but keeps the

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schools to which he is relegated in an inferior, overcrowded state? The courts said, "No."

He asked: Are not facilities separated because of race inherently unequal? The courts answered, "Yes."

He asked: Is it Mallory's due that he be convicted of a crime by the fruits of an unlawful search and seizure in violation of constitutional protections? The courts said, "No."

The Negro lawyer asked: Is it the Negro's due that he be denied the exercise of that right which is the very essence of democracy--the right to vote; that in heaping indignity upon indignity, this denial be aggravated by the staccato blows, insults and maltreatment of officers sworn to uphold the law? The courts said that was not our due.

Even now, the American Negro lawyer continues to ask if it is the Negro's due that he be shunted aside, locked into the more undesirable and overcrowded areas of our cities, and be required to pay a proportionately higher percentage of his income for the rental and purchase of generally lower quality property; that he be blocked by political and direct or indirect racial restrictions in his efforts to secure better housing; and whether it is the Negro's due that, as an indigent tenant in low-rent, public housing, he be summarily evicted on blatant pretext without an attempt by his evictor even to pay "lip service" to the most fundamental and rudimentary dictates of the concept of due process.

The commitment of the Negro lawyer in America historically has been, and continues to be, a commitment to effectuate the true principles of democracy. Through the rule of law, these ambassadors-without-portfolio have sought to win the struggle for an improved human condition. Our commitment dates back at least to 1844 when Macon B. Allen was admitted to the bar of the State of Maine as the first American Negro lawyer. In 1852, a Boston lawyer, Robert Morris, became the first Negro magistrate in America. In 1861, a Massachusetts lawyer, Edwin Garrison Walker, became the first American Negro legislator. In 1865, John S. Rock, lawyer, physician and dentist, became the first Negro admitted to practice before the United States Supreme Court. In 1872, Charlotte Ray, a graduate of Howard University Law School, became the first American Negro woman lawyer. In 1911, William H. Lewis of Boston was

appointed by President William H. Taft as the first Negro Assistant United States Attorney General. By 1963, Chicago's Edith S. Sampson and Philadelphia's Juanita Kidd Stout had become the first Negro women elected as judges. In 1949, William H. Hastie, for ten years a judge on the U. S. D. C. for the Virgin Islands, was appointed by President Truman as the first Negro judge on a United States Circuit Court of Appeals. In 1965, the Honorable Thurgood Marshall was confirmed as the first Negro Solicitor General of the United States.

The legacy of commitment of Charles Houston and Thurgood Marshall lives on today in the sacrificial and selfless devotion of young Negro lawyers like Howard Moore, Jr., in Atlanta and Marion Wright in Mississippi, a young South Carolina woman and graduate of Yale Law School whose legal assault upon the laws and customs of the "closed society" has been, at times, sensational. Their story has been the story of untold numbers of Negro lawyers who, despite persistent adversity, have manifested the will to live the examined life. And, the adversities have been manifold.

In addition to personal deficiencies in some Negro lawyers as a result of inferior educational opportunities and/or deprived social circumstances, he has had to cope with faults of his own people and faults of the dominant race. Convinced of his own inferiority, the American Negro historically has transferred his inferiority complex so that he sometimes conceives of the Negro attorney almost as the Calhoun of "Amos and Andy." To the Negro lawyer he has taken the crumbs of litigation, while to our white counterpart he has tendered the full loaf.

Standing full-blown at the head of the offenders has been, and frequently continues to be, the Negro businessman. What is his excuse for channeling away from the Negro lawyer, except in insignificant proportion, fees, retainers, and business opportunities which would permit the development of law firms of power, meaning and influence? It cannot be claimed validly that the Negro lawyer cannot do the job. There have been, are, and will be Negro men and women in the legal profession whose competence, ability, devotion, and creative enthusiasm lead them to vigorously represent and successfully protect the interests of their clients. No longer can we honestly ask the Negro lawyer to prosecute our unpopular causes and fail and refuse to reward him commensurately even while the smell of victory lingers sweetly.

When considered in light of the impediments and shackles born of a system of discrimination and systematic exclusion, the gains of the Negro lawyer are nothing short of phenomenal. He was often shunted aside into segregated law schools which, if for no other reason than that condition alone, were inherently unequal. Rising above that, he then found, regardless of the law school he finished, that his internship in the operating rooms of the law was thwarted by the closed doors of law firms and clerkships, doors that were locked by bigotry and chained with indifference. Entering private practice, he found, with some notable exceptions, that professional associations rejected him because he was black. Thus, all important contacts, social and professional intercourse, specialized and complete libraries and research aids, seminars and effective participation in endorsements for appointments to the bench were denied him.

North Carolina is not one of those notable exceptions. The North Carolina Bar Association, as distinguished from the North Carolina State Bar, is revealing itself to be a paradoxical anachronism. By its continued refusal to accept Negro lawyers of North Carolina into its membership, it renders the concept of "justice and equality for all" a mockery and a sham, and, thereby, contradicts the rationale of its very existence. I believe, however, that the North Carolina Bar Association will follow the enlightened course and disregard race as a requirement for membership. I hope so.

Though the unfounded attitudes of some Negroes and the American bar have often posed impediments to our entry into the mainstream of American legal life, nothing has been so insidious in its design and so crippling in its effect as the dual standard of justice to which the American Negro has been subjected. Born of ignorance and fear, nurtured by hate, existing primarily though certainly not exclusively in the South, the shroud of injustice has hung heavy on the brows of black citizens for almost 350 years. High on the casualty list was the Negro lawyer. No matter how qualified he was, irrespective of his legal skill, and regardless of the justness of his client's cause, he frequently found that justice and equity were on vacation. Nor all his piety nor wit could lure them back to their rightful dwelling place.

One point of clarification: let it be crystal clear that, but for the equal devotion to the rule of law of many of our white brothers at the bar, our lot today would truly be an

intolerable one. We have not improved in, and cannot exist in, a vacuum. Our lot is inextricably interwoven with his, our hope with his hope. There should not be uncompromising division among the ranks of those who share the common belief that if there is not justice for all, there is no justice at all.

It would not be untoward to ask at this point--why bother? Let me still this small voice that tells me, "You've got to be lawyer." I'm only 1.3 per cent of the American legal profession, so I won't be missed. Doctors and dentists average a higher income. I'm sometimes subjected to obloquy and scorn. My family life suffers, and there is no guarantee that I'll hit it big anyway. Who needs it?

We do. And, it needs us. To prevent our lives and the lives of all men of law from becoming "absurd" caricatures of meandering meaninglessness, to avoid deluding ourselves into believing that we have found a haven, we must, within the context of Albert Camus, commit ourselves to an obstinate, daily revolt against every form of the "absurd" and especially against every individual expression of the man-made "absurdities" of evil and injustice, no matter by what sophistry of high principle men seek to justify them. The very essence of this revolt, say Guthrie and Diller, is an urgent sense of human brotherhood and an attitude of comprehension. "We've got to stand for something lest we fall for anything."

To win the struggle for an improved human condition through law is an obligation to ourselves and mankind. To persevere and triumph are duties so sacred that we shall find it necessary to make uncommon demands of ourselves. We must commit ourselves to insure that every day is Law Day, and that every Law Day is an experiment in truth.

By so doing, we can give the meaning of law an independent existence to which generations yet unborn can cling. We can help it to take root deep within the hearts of all men throughout the tomorrows of tomorrow. AND, if we do, then we, as Negro members of the legal profession, will be able to raise our collective voice and say, in the words of that Broadway song:

Everyone tells me to know my place, but that
ain't the way to play.
Why am I daring to show my face? 'Cause I've
got something to say.

Move over sun and give me some sky; I've got me
some wings I'm eager to try.
I may be unknown, but wait till I've flown--
You're gonna hear from me.

Make me some room, you people up there
On top of the world; I'll meet you, I swear!
I'm staking my claim; remember my name--
You're gonna hear from me.

Fortune smiled on the road before me.
Now listen world, you can't ignore me.
I've got a song that longs to be played.
Raise up my flag! Begin my parade!

Then watch the world over start coming up clover;
That's how it's gonna be, you'll see--
'Cause you're gonna hear from me!

PRACTICAL TRAINING IN LAW SCHOOL

Milton E. Johnson*

For many years now there have been constant and relentless pressures put on the law schools all over this country by many members of the bench and bar to put more emphasis on so-called "Practical Training." By practical training the critics refer to basic skills sometimes called "know-how" used by the practicing attorney in his everyday practice of law and professional responsibility. These critics contend that a definite gap in the preparation for the practice of law exists between the law school and the actual practice by the recent graduate. It is further contended by these critics that it is the job of the law school to bridge this gap in the preparation of the new lawyer by giving him some training in the basic skills of the profession. In this way the law schools would turn out graduates reasonably prepared to represent their clients after admission to the bar, and not a group of graduates unprepared for the practice of law as are now being turned loose on an unsuspecting public.

There are some members of the bench and bar, and a great number of educators, who take the position that the law schools are not equipped to teach the law student how to practice law; that the law schools are doing efficiently the job properly assigned to them, which is to turn out a graduate well grounded in the law. They also contend that one cannot be taught professional responsibility and that practical skills can best be learned in the practice. In other words, according to this school of thought, the responsibility of providing for the training of young lawyers in practical skills if necessary, is the responsibility of the bar, and not the law school.

This article proposes to review the opposing positions taken by different writers on the subject of practical training in law schools and to report the courses offered in the curriculum of a few selected law schools on practical skills. The writer does not pretend to have made an exhaustive study of available materials on the subject, but merely what he

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considered representative because of a limited amount of time available. Any conclusion reached or suggestions made by the writer will be based on the materials set forth in the main body of the paper and personal experiences of the writer as a young practitioner.

One of the severe critics of the law schools is Mr. Arch Cantrall of the West Virginia Bar.¹ Mr. Cantrall has stated that he feels that law students do not get sufficient training in the practical skills of a general law practice while they are in law school. Since he is of the opinion that the primary function of the law school is to train lawyers, he contends that certain basic skills of the practice should be taught in the law school.

The basic skills of the practice of law that Mr. Cantrall would have the law school teach are:

. . . to examine a title; write a deed; and other customary instruments; close a real estate deal; institute and prosecute suits, including the statutory proceedings of his jurisdiction; defend a criminal; prepare individual partnership and fiduciary tax returns; work out an estate plan; prepare and probate a will; administer an estate with the federal and state returns, etc., and form, operate, and dissolve an individual proprietorship, a partnership, and a corporation, including compliance at each of these stages with all the requirements of federal, state, and local laws, tax and otherwise, applying to a small business.²

In short, Mr. Cantrall says that knowledge of these basic and minimum required skills is necessary for the beginning practitioner, and it is the job of the law schools to furnish this training, which they are not doing.

There is no doubt that it would be desirable for any lawyer to be an expert in all of the fields of law practice that Mr. Cantrall suggests, but it is questionable whether the law school can do the job or should even attempt to do it. However, Mr. Cantrall is not alone in his belief that a curriculum consisting exclusively of theory is insufficient for the proper training of the law student. He cites the position taken by the late Arthur T. Vanderbilt,³ eminent practitioner,

legal educator, and Chief Justice of the Supreme Court of New Jersey. Chief Justice Vanderbilt, speaking on the occasion of the laying of the cornerstone of the Law Center at New York University, said:⁴

I have in mind an undergraduate school in which, from the outset, the students will be concerned not only with the principles of the law and the reasoning back of these principles, but with the know-how of putting the principles to work. The law schools of the country cannot continue to lag behind the engineering and scientific schools with their laboratory work, or the medical colleges with their clinics. It is not right that young lawyers should learn the skills required in the profession at the expense of their clients.

Legal educators in general have been concerned about the criticisms of the law schools for years. Dean Albert J. Harno, eminent legal educator, agrees that "the most vocal criticism of the law schools is that the training they offer is not practical enough and this is not true only today,⁵ but has vacillated from one period of history to another."

Some critics have attacked the case method of teaching on the grounds that it does not train the students to deal with everyday problems in the practice of law. They contend that students are not trained in dealing with facts, legal planning, negotiation, draftsmanship, procedure and advocacy. The criticism is a valid one--that there is a gap between what the young lawyer learns in law school, and the skills demanded of him in the practice of law. However, the lawyer should be more than a man learned in the skills inherent in the practice of law.⁶ Dean Harno states further, that "in the last analysis legal education has two related objectives--the training of lawyers and the improvement of the law. . . ."⁷

In fulfilling these objectives, Dean Harno suggests that educational achievement should be recurrently tested in order to determine whether the law schools are doing all that can be rightfully assigned to them. Educational achievement can be tested through symposia and institutes with full participation of the bar.

Dean Harno quotes Judge Jerome Frank,⁸ an out-spoken critic of legal education:

I maintain . . . that something of immense worth was lost when our law schools wholly abandoned the legal apprentice system. . . . I do not for a moment suggest that we return to that old system in its old form, but is it not plain that without giving up entirely the case-book method, and without discarding the invaluable alliances with the so-called social sciences, our law schools should once more bring themselves into closer contact with clients' needs and what courts and lawyers actually do. Should the schools not execute an about face? Should they not now adopt Judge Reeves' eighteenth century apprentice-school method modifying it in the light of the wisdom gained on the long detour?

As a solution to the whole problem of inadequate training of law students in practical skills, Judge Frank suggested "The Clinic."⁹ The "Clinic" would be in charge of full-time professors who have had a varied experience in the practice of law and would cover the general legal services offered by a law office. In this way, the student could get some experience doing the things lawyers do in the way they are usually done by lawyers.

There have been many other suggestions by critics as to how the law schools can teach more practical skills. Some writers have suggested a research program with reference to specific problems furnished by a faculty adviser. Others propose the use of motion pictures of trials. Still others cite the possible benefits of the teaching of practical skills in each class to the extent to which the subject is suited.¹⁰

Professor J. Henry Landman, outstanding writer, practitioner, lecturer, and law professor, states flatly that the young law school graduate is incompetent to practice his profession. He states that the problem can be solved by a thorough revision of the law school curriculum with emphasis upon the "problem method" of teaching instead of the traditional case method now used in the majority of law schools.¹¹ The alleged virtues of the problem method are:¹²

First, it improves the thinking of the practicing lawyer when confronted with a client's new problem.

Second, it discourages the student from resting on the decision of an abbreviated case but obliges

him to research the problem to corroborate or amend his temporary opinion.

Third, the bibliography in connection with the problem teaches the students the pertinent law of his jurisdiction, whether it be sound or otherwise.

Fourth, it instructs the student in legal and extra-bibliographic method which is as important as legal knowledge itself to the practitioner.

Fifth, it obliges the student to press into use other branches of human knowledge such as economics, sociology, and the like in the solution of legal problems, not only for the client representation but for his own participation in public affairs.

Sixth, it best trains young students to prepare convincing memoranda of law, which have become the grist of the law office whether it be an opinion for a client or the basis of a brief in litigation.

Seventh, it provides students with experience in written and oral English in which so many of our college graduates are regrettably deficient.

Eighth, it helps destroy the traditional departmentalization of the law which is so essential in the solution of a client's problems.

Ninth, it encourages students to respect court precedents but at the same time, invites independent reasoning for more equitable decisions.

Tenth, it tends to modernize the law of all jurisdictions which are now encumbered with obsolete and unsound decisions.

Eleventh, it is a more workable and efficient teaching technique than the wasteful case-method and permits of more law school time for revisions and modernization of the law school curriculum.

The critics appear to be in agreement that many of our young law graduates are not prepared to practice law--that much of this deficiency is due to the inadequacy of the law

school curriculum. But they do not seem to agree on the solution. Professor Landman frowns on apprenticeship as a means of learning the practice of law. He says that apprenticeship does not offer sufficient generalization and has proved to be a failure.¹³ Professor Landman suggests that if the problem method is used instead of the case method, the time saved could be devoted to training students in the preparation of standard legal instruments; to examining complete trial files; and to visiting actual trials in the court, all under the supervision of law professors required to engage in the practice of law, or obliged to take periodic sabbatical leave of absence to learn the practical application of the law.¹⁴

Another major criticism of the law schools is that they do not give adequate training in "Legal Responsibility."¹⁵ Several critics in this area contend that many law graduates are not aware of the lawyer's public role. In the list below, you will find a summary of some of the aspects of a lawyer's responsibilities. These have been characterized as the public role of the lawyer:

- (1) Responsibility to command and exert the utmost competence in the interest of the client.
- (2) Duty of probity in the affairs of clients, court, and fellow-lawyers.
- (3) The preservation of the integrity of the judicial process, and other forms of social order.
- (4) Responsibility and integrity of lawyers as community leaders on the national or world stage.
- (5) All-right conduct on national or world stage.
- (6) The ultimate source of right conduct, whether in secular terms or divinely given law.

All lawyers should use their abilities to improve the profession, the courts, and the law. They should be prepared to act as leaders within their sphere of influence and should be prepared to answer the call of public service when it comes.¹⁶

Whether or not legal ethics can or should be taught in

the law school is a debatable question. Some persons take the position that morals cannot be taught at this level, if at all, and that lawyers should not require more training for civic responsibility or good citizenship than any other educated person.

The writer takes a somewhat different view. He is of the opinion that there are many things reprehensible for a lawyer to do that a lawyer might consider quite correct from a purely moral point of view.

For example, what would be morally wrong with a partnership composed of a lawyer and an accountant? Indeed, why not place a blazing neon sign in front of the lawyer's office advertising his services as the best in town with the lowest rates? The average layman would find nothing morally wrong in these actions, but the legal profession would not permit such practices. It is the opinion of the writer that one can learn and should be taught what is considered to be technically unethical by secular law, and avoid pitfalls where his moral judgment might not protect him.

It may also be argued that a thorough knowledge of the complete role of the lawyer should enlighten and in many cases inspire some students without other stimuli to greater heights in service to his fellowman.

In summarizing the criticisms of the law school, we may say that, in general, the schools are really teaching "how to teach." The young graduate, when he leaves law school, is prepared to be a justice of the Supreme Court, but it takes years of experience before he learns to be a trial judge or a lawyer.¹⁷

Legal educators, and members of the bench and bar are by no means in full agreement with the critics who say that the law schools are not doing their job. Many writers have expressed strong views in defense of the law school's curriculum and the training offered. Among those has been Dean Harlan F. Stone.¹⁸ As far back as 1911, Dean Stone expressed some concern about the proper functions of the law school when he pointed out that the law school "necessary by contract emphasizes those functions of legal training of lesser importance, or which possibly do not belong to the law school at all." In the early days of legal education it was entirely by apprenticeship. This consisted of reading law in a law office

along with on-the-job training. When the law schools first appeared on the scene, law school training was in conjunction with law office training. Finally, the law school supplanted the law office as an instrumentality for legal instruction because of its superiority in certain directions.¹⁹

The law office and the courtroom are still considered by many persons to be superior agencies for legal training in the practical skills of the legal profession. Those who share this view will probably agree with Dean Stone's statement that "If . . . we attempt to do what the office can do better than the law school at the expense of the training which the law school can do better than the office, there is always danger of economic loss, not to say of wasted opportunities."²⁰

The lawyer of today spends the bulk of his time as counselor, draftsman, negotiator, and planner. Only a relatively few of the profession now devote themselves to court procedure and the trial of cases.²¹ A student that is likely to become a successful lawyer has the ability to bridge the gap from law school to practice, some educators say. Dean Harno put it this way: "An outstanding quality of the successful lawyer is his capacity for adaptation to new tasks and his ability to educate himself to meet constantly changing demands."²²

Judge Charles E. Clark, former Dean of Yale Law School, made a good case for the law schools when he said:²³

I regard the repetitive attempts to coerce law schools offering so-called practical training as at best curiously naive, and in general at odds with sound concepts of legal education. Such attempts might be dismissed as a comparatively harmless and not unusual professional baiting of the schools except that law deans and professors are acutely attuned to professional criticism and hence may be led to waste their substance in doing what they cannot do effectively and what if they could, would not be pedagogically worthwhile. . . . I shall argue that law school training is now efficient more so than other types of professional education; that there is no real basis for the criticism implicit in this pressure for practical training; that the latter is limited, partial, and fragmentary at best; and that the present-day legal education in

problem analysis and exposition and in thorough documentation of sources is much more important and valuable as well as more within the practical competence of the schools.

In a direct answer to the charges made by Mr. Cantrall that more practical training should be given in law schools, Dean McClain, formerly of the Duke University Law School takes the position that the law schools are offering enough practical training and that they should not be expected to do the whole job.²⁴

According to Dean McClain, law schools can and should give considerable practical training and they are doing so. Since law schools cannot do the complete job, it has often been suggested that some probationary period or apprenticeship be entered upon before taking the bar. Pennsylvania, Rhode Island, Vermont, and New Jersey have such a requirement.²⁵

In order to fulfill part of its obligation to offer students practical training, Duke University Law School operated a legal aid clinic with student participation for twenty-two years before it was discontinued a few years ago.²⁶

In picturing the future role of the law school in legal education, Dean Griswold, of Harvard Law School, quoted Dean Beale²⁷ as saying:

. . . law is not merely concerned with the past and present. As the science of right, it is progressive, always open to betterment, always testing its results in the scales of justice, always looking forward to a juster (sic) world which is to come through improvement and growth. It has a place for enthusiasm of the reformer and the prophet; for its constant efforts as we have seen, is not only, by investigation to discover the truth, but by prophetic persuasion to bring it to pass. It is at once, historian, economist, philosopher, scientist, and seer.²⁸

Further outlining the future in legal education, Dean Griswold suggests that there will be a change in subjects and problems of law from time to time. To cope with this, law schools must teach background, method, tradition, and approach.²⁹ This is necessary because the law a student

learns in law school is not likely to engage the student's attention when he becomes an experienced practitioner. It is quite likely that the legal profession will tend to depend more on theory than authority--the civil law approach.³⁰ However, it would appear that Dean Griswold also believes in some practical training when he proposes a continued struggle with practical education and research in what actually happens in a law office.³¹

After considering both the criticisms and defenses of the law schools as set out in this paper, perhaps it would be interesting to give some idea of what the law schools are now offering in practical training. The writer investigated the stated curricular offerings of six selected law schools to determine the extent to which practical training is made available to their students. It is the opinion of the writer that the law schools selected represent a cross section of the better law school, and will reasonably reflect the trend in legal education. The law schools investigated, and their offering in so-called practical training (as interpreted by the writer) are set out below.

University of California School of Law³²

1. Moot Court Program

The moot court program, the purpose of which is to develop the skills of advocacy, combines training in the preparation and writing of briefs and in oral argument of cases. (Offered in first and second years.)

2. Introduction to Law

Legal research and legal writing including the preparation of legal memoranda and appellate briefs. (Required one hour, first year.)

3. The Legal Profession

Contemporary responsibilities and functions. . . .

4. Selected Problems in Corporations and Partnerships

Includes planning-drafting legal instruments. (Two hours, third year.)

5. Trial Practice

Study in strategy and tactics in civil litigation, including trial moot court. (Two hours, third year.)

6. Selected Problems in Estate Planning

Selected problems in estate analysis and planning; tax conscious drafting of wills and trusts utilizing future interests, class gifts and powers of appointment; planning of insurance and disposition of business interest. Primary emphasis will be on individual work in planning and estate, from interview to drafting of documents. (Two hours, third year.)

It is interesting to note here that all third year offerings are elective rather than required.

University of Notre Dame School of Law³³

1. Moot Court

. . . under direction of student body. First year students are required to brief and argue at least one case on appeal.

2. Estate Planning

. . . . The various instruments useful in estate planning are studied and drafting of such instruments is required. (Four hours in third year.)

3. Practice Court

Every student must participate in at least one jury trial. Each Saturday during first semester, a complete case is tried which follows federal rules of civil procedure. Student counsel interviews parties and witnesses, and prepares and files pleadings and a trial brief. First year students are required to be jurors.

The remainder of the basic skill can best be cultivated by actual practice of the arts involved. Beginning with the second year, therefore, emphasis

is shifted from the case method to the problem method, whereby students learn law by using it in working out specific legal problems. This gives the student intimate familiarity with the library and provides intense training in the interpretation, adaptation and creative utilization of the materials he finds there.

Northwestern University School of Law³⁴

" To this end we offer training in the skills and traditions of the lawyer's craft."

1. Moot Court I

Stated cases raising legal issues of current interest are briefed and argued on appeal . . . brief writing, oral argument, and appellate procedure are emphasized.

2. Moot Court II

Used to select team for National Moot Court Competition. (Optional.)

3. Estate Planning

. . . practical problems in estate planning provide exercises in drafting and the basic material for group discussion. (Four hours, third year--restricted enrollment.)

4. Legal Clinic

Supervised field work at the Legal Aid Bureau of the United Charities or in the office of an attorney to whom the student is assigned; consultation with clients, interviews with witnesses.

Drafting and filing of instruments, appearances in court, examination of records, assistance in conduct of trial and general office work. (Required of all students not members of the legal publication boards. Work may be pursued after completion of three terms.)

5. Professional Responsibility

Essential and distinctive characteristics of the legal profession; the concept of service; the lawyer as an officer of the court; the organization of the bar and development of educational and ethical standards; a self-governing profession and its disciplinary machinery; the role of lawyers in the evolution of American institutions and organization of the community of nations. Discussions with members of the bar regarding the application of professional ideals and objectives to practical problems which arise in the course of individual and collective activities of lawyers. (One hour, required.)

6. Trial Technique

Methods of proof, preparation of facts, selection of jury, opening statements, direct examination, laying of foundation for and introduction of exhibits, objection to evidence, offers of proof, expert testimony, hypothetical questions, cross-examination and impeachment of witness, arguments to court and jury, exercises in examination of witnesses and oral argument.

The Law School of Harvard University³⁵

The school seeks as its primary purpose to prepare for the practice of the legal profession wherever the common law prevails.

1. The First Year Program of Group Work (Required--no credit)

. . . The group considers a series of problems based on the work of the first-year courses, involving such lawyer's tasks as fact-finding, counseling, negotiating, and drafting, and including in some instances questions of professional ethics. Early in the year, groups of twenty take part in preparing a case for trial, work which leads to a model jury trial tried by faculty counsel before a federal or state judge. Some written work is assigned, but primary reliance for individual research and writing is placed on the law club. . . .

2. Estate Planning (Advanced--two hours, spring semester)

Each student will be required to complete one estate plan, starting with the initial interview with the client and ending with the execution of the documents required to carry out the plan. A paper on some topic in the estate planning field is required, and substantial progress on the paper must be made before the beginning of the spring semester.

3. Trial Practice (Elective--two hours)

. . . (A)ctive participation in trial. (Description vague.)

4. The Legal Profession (Elective)

. . . History, ethics, organized bar. . . .

The University of North Carolina Law School³⁶

1. Pleading and Parties (Four hours--required)

. . . (I)ncludes drafting.

2. Estate Planning Seminar (Three hours--elective)

Individual investigation and report on problems in property, estate, trusts, future interests, insurance and tax law in relation to the arrangement and disposition of an estate during life and death.

3. Legal Writing (One-half hour--required)

Completion of research and writing case-note and opinion of counsel or a brief.

4. Preparation for Trial (One hour--required)

5. Trial and Appellate Practice (Four hours--third year elective)

Jurisdiction and service of process. Preparation of the case for trial from the standpoint of both fact

and law. Consideration of ethical problems confronting the practicing attorney. Discovery and pre-trial procedure. Conduct of trial, motions for non-suit and directed verdict. Selection and instructions of juries. Verdict and new trials. Judgments and their effects. Methods of review and disposition of case in appellate tribunal.

The New York University School of Law³⁷

. . . . (A)fter the first year, the case system of instruction is . . . supplemented by the problem method and by an increased emphasis on legal writing. Although all three methods are used in traditional courses, special problem-method seminars, drafting seminars, and subject seminars are emphasized, particularly in the third year.

Individual training in the use of law books and the law library is given to each student early in his course.

As a prerequisite to graduation, each student must evidence proficiency in the writing of law notes and legal memoranda. One law note is required in each of the first two years. The requirement for the third year is usually met by writing of a special memorandum in connection with a senior seminar.

With the co-operation of the bench and bar, a moot court system, consisting of both appellate and trial divisions, is in operation under the direction of a faculty adviser. The students are given an opportunity to participate in the trial of a case and finally to argue an appeal. The program includes the preparation of briefs in appropriate cases and visits to the courts under faculty supervision.

Students of outstanding excellence in scholarship are eligible for the editorial board of the New York University Law Review which contains leading articles on legal topics of importance, the Annual Survey of American Law, the Survey of New York Law, student notes on special problems and current cases, and book reviews. The Law Review, published eight times a year, has wide circulation among lawyers and law libraries. The experience in professional writing and editorial work makes membership on the Law Review Board a valued

honor for which competition is keen.

. . . (S)tudents with good reports are invited to participate in the work of the Legal Aid Society, a branch of which is situated at the Law Center. Under the direction of attorneys of the society, the students interview clients and aid in the general processing of each case to its conclusion.

In short, no effort is spared to give each undergraduate the maximum of individualized instruction and to make the instruction rigorous and comprehensive to the end that the graduate may be fitted for actual practice of the law and to take his place in the community.³⁸

1. Introductory Seminar (Required--two term hours)

Legal history, legal research and writing. The first-year law note. Discussion of topics and problems within the scope of first-year work to give the student additional opportunity for participation in legal argument and to increase his understanding of the legal processes.

2. Law and Society (Subject Seminar--two term hours)

A reflective study of major legal institutions in terms of social and economic conditions, with special emphasis on contemporary problems. Essentially designed to provide perspective and an understanding of the role of law in a changing society.

3. The Legal Profession (Elective--two term hours)

Legal education and admission to the bar; organization of the legal profession; legal ethics; relation of the bar to the judiciary; problems of practice including fees; the law of attorney and client.

4. Drafting Legal Memoranda (Drafting Seminar; elective--two term hours.)

Each student is assigned a number of legal problems of the type that would typically confront a young lawyer in the early period of his practice. The student is expected to find the best possible answers, which

he will present in legal memoranda. At the discretion of the student, one of these may be expanded to meet the second law-note requirement. Each student meets occasionally with his section and frequently in an individual conference with the instructor.

5. Problems in Conveyancing (Drafting Seminar; elective--two term hours)

Prerequisite: a course in estates and conveyancing, or the equivalent.

Problems involving real estate contracts; leases, searching titles, examining abstracts, title policies; closing title; imposing and removing restrictions; financing. Exercises in drafting contracts, deeds, and leases. (For lawyers without specialized experience.)

6. Problems in Drafting Commercial Instruments (Drafting Seminar; elective--two term hours)

Methods used in the preparation of contracts and other common commercial instruments. Students are expected to find the solution of various problems and to draft appropriate legal documents.

7. Trial Practice (Drafting Seminar; elective--two term hours)

A seminar on the trial of a civil law suit from original interview and pleadings to trial and final judgment; some emphasis on the technique of introducing evidence.

The foregoing data show the curricular offerings of several outstanding law schools. These offerings, in the opinion of the writer, may be classified as practical training. If we assume that this is a valid cross-section of law schools in general, then we can say that it appears that the law schools are concerned with the practical training of its students at least to some degree.

In this paper, the writer has tried to review the opposing positions taken by different writers on the question of

whether or not the law schools should place more emphasis on the so-called practical skills. He has further tried to show curricular offerings of certain selected law schools, offerings which, in his opinion, can be classified as practical training.

It seems to this writer that the validity of the arguments of those who would castigate and those who would defend the law schools on this issue depends upon whether or not the task of the law school has been properly assigned. What is the proper and reasonable responsibility of the school toward its graduates? Is it the job of the law school to merely train lawyers, or should it strive to go further, building a solid background upon which the legal scholar can deal with newer and more complex problems as they arise? In other words, should the law school place its emphasis upon training lawyers or legal scholars?

Since the law school has taken over the responsibility of the legal education of lawyers, then, indeed, it should be obliged to teach what it purposes to teach--all the necessary phases of legal education which it can practically do.

One educator and member of the bench stated this view in no uncertain terms when he said, "The first task of a great law school is to produce great lawyers. Such part of the process as they cannot induce the schools, the colleges, or the students themselves to do, they must perforce stand responsible for."³⁹

Since practical training is necessary, if the lawyer is to become skilled in using the tools of his profession, the law schools should make some provision for this training.

To what extent should the law schools be held responsible for practical training? There are some who contend that upon graduation, the law school student should be proficient in the practical skills required in a general practice of law, and that the public has a right to expect such proficiency. Others say that with the proper legal background, basic know-how skills are easily learned, and can be readily acquired by the graduate after completing school; and further, that the bar and courts can do a much better job in this area than the law school. They further cite signs which they interpret as being indicative of the fact that the trend now is for young lawyers to enter established partnerships where they can

learn know-how.

Perhaps the truth about what law schools can and should do in the matter of practical training lies at a point somewhere between the polar points of this continuum. In 1933, approximately sixty-six per cent of the practicing lawyers in this country were practicing solo.⁴⁰ It is reasonable to assume that a large number--no doubt the majority--of them started out alone. Even though the trend appears to be toward the entering of established partnerships by young lawyers, or association with older practitioner, a great many novices still start alone.

In 1956, there were 176,000 lawyers in the active practice of law in the United States.⁴¹ It is not likely that this number has decreased appreciably; in fact, it is more likely that this number has increased. Therefore, one could reasonably say that a large percentage of this 176,000 or more lawyers began practice alone, and that they received some of their practical training at the expense of their clients, unless they received enough practical training in law school to know how to protect the clients' interests, or at least recognized personal limitations and the need for referral.

The writer, having been a solo practitioner of the law, and having faced the myriad of problems which the young lawyer surely must face, is of the opinion in general as a result of the limited survey herein set out, that the law schools are facing up to their obligations to the student. All of the schools surveyed had some offerings of a practical nature, and some had greater concentration than others. By virtue of the fact that the problem method of instruction in suitable courses is being used to supplement the case method in many instances, it is further felt that the trend toward giving the student more training in the basic practical skills will be increased.

It is the opinion of the writer that some type of study should be made to determine the kind of problems frequently handled by a general practitioner. This could be used as criteria for, or at least a point of departure toward establishing a necessary minimum training program to impart the basic know-how skills required to solve these problems.

The law schools should consider seriously the necessity for fortifying the student by including in the courses, at

least the minimum training in basic skills along with professional responsibility, and should make it a requirement rather than elective. This is suggested because many students take law with no intention, in the beginning, of practicing, but subsequently, for various reasons, change their minds.

To further strengthen the law program, and to offset the contention that the law schools do not have the faculty resources to do a good job in this area because the professors are more often not practitioners, there should be some drawing upon the bench and bar for enrichment and enlightenment.

Seminars are useful means by which this can be accomplished. They should be well planned, under the direction and supervision of full-time law professors, broken down into specific projects of short duration, and should cover the necessary field.

As time marches on, criticisms will prevail, but taken in proper perspective, should lead to improvement.

Footnotes

1. Cantrall, "Law School and the Layman: Is Legal Education Doing Its Job?" 38 A.B.A.J. 907-10 (1932).
2. Ibid., p. 909.
3. Ibid., p. 908.
4. Vanderbilt, 36 A.B.A.J. 299 (1930).
5. Harno, Legal Education in the United States, p. 129 (1953).
6. Ibid., p. 147.
7. Ibid., p. 164.
8. Ibid., p. 147.
9. Ibid., p. 151.
10. Emerson and Lotcham, "Reflections on Legal Education and

- the Practice of Law," 9 W. Res. L. Rev. 435 (1958).
11. Landman, "The Curriculum of the Law School," 47 A.B.A.J. 156 (1961).
 12. Ibid., pp. 157-158.
 13. Ibid., p. 158.
 14. Ibid., p. 159.
 15. Stone, Legal Education and Public Responsibility, p. 12 (1956).
 16. Vanderbilt, "The Future of Legal Education," 43 A.B.A.J. 207 (1957).
 17. Farer, "Training the Lawyer," 47 A.B.A.J. 554, p. 58 (1961).
 18. Stone, "Emphasis of the Proper and Important Function of the Law School," 36 A.B.A.J. Rep. 768 (1911).
 19. Harno, Legal Education in the United States, p. 150 (1953).
 20. Ibid.
 21. Ibid., p. 141.
 22. Ibid., p. 123.
 23. Ibid., p. 148. Clark, "Practical Legal Training: An Illusion," 3 J. Legal Ed. 423 (1951).
 24. McClain, "Is Legal Education Doing Its Job?" 38 A.B.A.J. 120 (1953).
 25. Ibid., p. 121.
 26. Ibid., p. 123.
 27. Former Dean of the University of Chicago.
 28. Griswold, "The Future of Legal Education," 5 J. Legal Ed. 438, at 439 (1953).

29. Ibid., pp. 442-448.
30. Ibid.
31. Ibid.
32. University of California Law Bulletin, 1960-61.
33. Notre Dame Law Bulletin, 1959-1960.
34. Northwestern University Law Bulletin, 1960-1961.
35. Harvard Law School Bulletin, 1960-1961.
36. University of North Carolina Law School Bulletin, 1959-1960.
37. New York University Law Bulletin, 1961-1962.
38. Ibid., pp. 13-15.
39. Vanderbilt, "The Future of Legal Education: We Must Face the Realities of Modern Life," 48 A.B.A.J. 207 (1957).
40. Harno, Legal Education in the United States, p. 173 (1953).
41. Stone, Legal Education and Public Responsibility, p. 22 (1956).

