

Denver Law Review

Volume 50
Issue 4 *Symposium - New Directions in Legal
Education and Practice*

Article 10

March 2021

Innovation and Accreditation in Legal Education: Compatible or Polar?

Michael H. Cardozo

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Michael H. Cardozo, Innovation and Accreditation in Legal Education: Compatible or Polar?, 50 Denv. L.J. 505 (1974).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

INNOVATION AND ACCREDITATION IN LEGAL EDUCATION: COMPATIBLE OR POLAR?

BY MICHAEL H. CARDOZO*

Only the bold, and some would say ignorant, dare to defend legal education as it is generally conducted today. Innovation is the word of the hour, as it is in all of education. Even a federal administration devoted to budget cutting provides funding for innovation through the National Institute of Education, a research arm for the Office of Education.¹ I think the clamor for innovation in our law schools misplaces the emphasis, however, and I have challenged Ralph Nader on this point in public print.² Harrison Tweed's writing on the wall of the house of the Bar Association of the City of New York supports his high opinion of lawyers by stating that "they stack up well against those in every other occupation or profession."³ Law teachers likewise stack up well against other kinds of teachers. The reason they "stack up" so well is that the product of their work is so well qualified for their careers. The graduates of our law schools have acquired the capacity to advise, to draft, and to innovate whenever the society around them has developed new demands for guidelines, controls, and methods that will work. The New Deal of 1933 and the Great Society of 1968 were planned by many but the design was drawn by lawyers;⁴ the dismantling of 1973 promptly became a contest among constitutional authorities. This view of the influence of lawyers and of their effectiveness in a changing society has its dissenters, of course,⁵ but it is supported by my observation. Nonetheless, despite the competence of the products of our legal education of the past few generations, there is persistent turmoil in the legal profession over the best way to train those who would become lawyers.

Typical of the critical observations is Charles Meyers' statement in 1968 that "legal education is too rigid, too uniform, too

*Executive Director, 1963-1973, Association of American Law Schools; Member ALL-ABA Joint Committee on Continuing Legal Education; A.B., 1932, Dartmouth College; LL.B., 1935, Yale University.

¹OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, SPECIAL ANALYSIS, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1974, at 106 (1973).

²THE NEW REPUBLIC, Nov. 8, 1969, at 32-33.

³Manning, *Introduction: New Tasks for Lawyers*, in *LAW IN A CHANGING AMERICA* 11 (G. Hazard ed. 1968) (quoting Harrison Tweed).

⁴*Cf.* C. HORSKY, *THE WASHINGTON LAWYER* (1952).

⁵*See, e.g.*, Stolz, Book Review, 21 *STAN. L. REV.* 198 (1968).

narrow, too repetitious and too long.”⁶ He suggested some changes, but predicted that law schools would be reluctant to embark on them “not so much from a natural resistance to change as from a quite understandable fear that whatever may be gained will not be worth the sacrifice of traditional values that the changes will require,” *i.e.*, the development of precision, clarity, and accuracy of thought.⁷ His report has been followed by at least three other penetrating studies, all suggesting that the time for change is at hand.⁸ This article will not consider the need for or the value of the proposed changes, as they are fully covered elsewhere. I will, however, make a passing comment on the significance of innovation in legal education since the effect of accreditation on innovation is significant only to the extent that innovation itself is significant.

Scattered throughout the literature on legal education is an effort to define the mission of law schools.⁹ Although some recognition is given to the need for acquainting students with the history, philosophy, and rationale of the rules of law, respectable writers seldom say that the mission is to produce students who “know the rules of law.” Much more often we are told that the mission is to teach students “how to think like a lawyer.” To some commentators this means “to think like a new breed of lawyer,” one who is more interested in “the needs of people” than of “corporations and government apparatus.” A reader would be justified in interpreting the concept of “thinking like a lawyer” as teaching students how to recognize the kind of question presented by a set of facts and then to know where to seek solutions to the problem. In other words, they are being taught *how to do* something rather than precisely *what to do* in every circumstance. I would not be the first to be reminded of the function of swimming coaches over the years. The uninitiated might think that a swimming coach would be most successful if he could show his charges the most effective arm strokes and movements with the legs and

⁶*Report of the Committee on Curriculum*, 1968 AALS PROCEEDINGS, Part One, Section II, at 8 [hereinafter cited as 1968 PROCEEDINGS].

⁷*Id.*

⁸*Training for the Public Professions of the Law*, 1971 AALS PROCEEDINGS, Part One, Section II; H. PARKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* (1972); *CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE* (E. Kitch ed., Univ. of Chicago Conf. Series No. 20, 1970) [hereinafter cited as Univ. of Chicago].

⁹*Report of the Curriculum Committee*, 1963 AALS PROCEEDINGS, Part One, 81-143; Kinoy, *The Present Crisis in American Legal Education*, 24 *RUTGERS L. REV.* 1 (1969); Address by Bayless Manning, *American Legal Education: Evolution and Mutation—Three Models*, Western Assembly on Law and the Changing Society, June 15, 1969.

feet. However, the master swimming coach of them all, Robert Kiphuth, paid little attention to the strokes and kicks. To him, everything was body building and physical training. The success of his methods is demonstrated by the record-shattering performances of the swimmers of the present day, all of whom train on a scale that was never dreamed of during the heyday of Johnny Weismuller. They are being trained to perform like swimming machines, just as law students' minds are trained in the mold of those who have the "lawyerly attributes."

This means that whenever an innovation in mind training has been developed, law schools must be free to adopt it. There may be controversy over the probable effectiveness of the innovation. If the faculty of a law school, however, is not free to try the new methods, the charge of excessive rigidity and uniformity will be justified. Consequently, it is important to consider whether any part of the process is an impediment to innovation, and, if so, how it can be dealt with.

Innovation in a law school may be impeded by many minor factors, such as innate conservatism among lawyers, lack of adequate funding, anxiety over passing a rigidly uniform bar examination, and so forth. The most obvious potential impediment, however, is the process of accreditation. This process will not be described in detail here, as its procedures can be found elsewhere.¹⁰ It is enough to say that the American Bar Association (ABA) accredits law schools on behalf of the practicing lawyers, the Association of American Law Schools (AALS) performs a comparable function on behalf of the academic community, and both organizations are themselves "accredited" by a non-governmental body known as the National Commission on Accrediting. In addition, the Office of Education maintains an "approved list" of accrediting agencies, a list that determines feast or famine for institutions seeking governmental funding of any kind.¹¹ Consequently, not only is the validity of the degree for further education or for admission to bar examinations at stake, but also the quality of the education available in a law school may be seriously affected by the interposition of a federal agency in the accreditation process.

At every turn, a law school or law teacher contemplating innovation encounters questions based on the standards pre-

¹⁰M. Cardozo, *Accreditation in Legal Education*, 49 CHI.-KENT L. REV. 1 (1972).

¹¹Nationally Recognized Accrediting Agencies and Associations, 34 Fed. Reg. 643 (1969).

scribed by the accrediting agencies.¹² If a clinical program or some other kind of "off-campus study" is projected, the school encounters the requirements of study in the classroom and "in residence." If a school has some kind of "work-study" program or the so-called "cooperative plans," an added problem arises over the requirement that most of the classes be conducted in the daytime and particularly in the afternoon period. While it is true that many of these standards were adopted for purposes other than to discourage the kinds of innovations teachers propose, concern over the effect that nonconformity with standards may have on accreditation may indeed be an impediment. I think the accrediting agencies in law, however, could dispel that concern with a demonstration of the facts.

The literature of accreditation deals constantly with the need to protect society from institutions offering "academic programs that are superficial and shoddy."¹³ Frequent references are also made to the obligation of the educational community to enforce its own minimum standards in the interest of the welfare of society. The references to social responsibility, social needs, and the demands of society recur constantly in statements about controls and restrictions needed to protect the public from unscrupulous purveyors of courses and degrees that have no substance. Seldom is there any reference to a social responsibility for accrediting agencies to protect innovative programs from the constriction of conformity. Indeed, this silence has led students of the subject to look upon the accreditation process as "a barnacle to educational development" and "an intrusion into academic freedom."¹⁴

This is deplorable. If the critics are right, the many criticisms of the accreditation system are justified. If they are mistaken, then the system has not been effectively described or accurately observed by those most concerned with its effects. In legal education, the latter conclusion is closer to the fact. The two agencies involved do not deserve to be blamed for the uniformity, rigidity, and narrowness of which Charles Meyers has complained.¹⁵ If the law teachers believe that the AALS or the ABA are to blame, they have been misled.

¹²The Association of American Law School Bylaws and Regulations are published in its proceedings. *E.g.*, 1971 AALS PROCEEDINGS, Part Two, at 210-34. The American Bar Association Standards are published periodically in separate pamphlets by the American Bar Association headquarters in Chicago, Illinois.

¹³*See, e.g.*, F. DICKEY & J. MILLER, A CURRENT PERSPECTIVE ON ACCREDITATION 56 (1972) (quoting W. Selden).

¹⁴*Id.* at 57; *cf.* THE CHRONICLE OF HIGHER EDUCATION, Jan. 15, 1973, at 1.

¹⁵*See* 1968 PROCEEDINGS, at 8.

I believe that it would be difficult to show that any bona fide innovation, supported by the faculty of a law school, has been stillborn because of disapproval by either agency after due presentation and defense in the proper forum. This admittedly is an impression based on observation, not a conclusion supported by my research. Three extensive studies of the historic course of legal education, however, bear out this impression. Robert Stevens has reviewed 100 years of American legal education; Jerold Auerbach has commented on the relations between law practitioners and teachers in the period after the AALS was established; and Preble Stolz has described the forces advocating and opposing clinical legal education in the law school context.¹⁶ None of these have shown that the accreditation process has inhibited innovation. Stevens lists a number of barriers to such innovations as law teachers might espouse: student disinterest; faculty insistence on independence; scorn of most forms of legal scholarship by the practicing profession; and problems of funding. While he has noted that the "ultimate control" by bar admission authorities over law school curricula and practices encourages the "march toward uniformity," he nowhere blames the accrediting activities of either of the recognized accrediting agencies. Auerbach describes the history of the relations in legal education between the teachers and the practitioners as essentially a "fight for higher standards," such as better pre-law school training, full-time study, better teachers, and longer law study. The question of teaching technique and curriculum content has not been a significant part of that struggle. The contest, incidentally, seems to have been won by the advocates of improvement rather than those who would have allowed the profession to travel a divided path with some lawyers, who would handle the less "prestigious and lucrative" practice, trained in admittedly poor (night) schools, and others trained for the elite part of law practice in good (day) schools. Today both full-time and part-time legal education have been recognized as capable of producing the one kind of lawyer society should have: "prepared for all roles that lawyers play."¹⁷ Stolz says that the acceptance of clinical innovation,

¹⁶Auerbach, *Emnity and Amity: Law Teachers and Practitioners, 1900-1922*, in *LAW IN AMERICAN HISTORY* 549 (D. Fleming & B. Bailyn ed. 1971); Stevens, *Two Cheers for 1870: The American Law School*, in *LAW IN AMERICAN HISTORY* 403 (D. Fleming & B. Bailyn ed. 1971); Stolz, *Clinical Experience in American Legal Education: Why has it Failed?*, in Univ. of Chicago, *supra* note 8, at 54-76.

¹⁷*The AALS Study of Part-Time Legal Education, 1972 AALS PROCEEDINGS*, Part One, Section II (C. Kelso ed.).

which is not as new as sometimes thought, has been slow chiefly because of its low esteem among legal educators and the unevenness and narrowness of its earlier conception. Doubts as to its efficacy among some teachers, however, have not prevented the AALS from considering all its recent forms as conforming with the Articles and Regulations; and the practitioners who dominate the ABA Council have expressly accepted the recent trend in the revised ABA Standards.¹⁸

A change as radical as a 2-year law school, of course, would evidently not conform with any of the present standards for accreditation. The flexibility of those standards for such an innovation, however, would be tested only if it were presented as a serious plan by an institution actually intending to give it a try. I like to think that even so dramatic a reversion to a pattern common in the 19th century would be allowed a rebirth and given an opportunity to prove its present viability. Both the ABA Standards and the AALS Articles expressly authorize "variances" when exceptions are convincingly supported by proponents.¹⁹ Whether the graduates of a 2-year school would be allowed to take bar examinations would, of course, depend on the flexibility of that ultimate layer of control, the state authorities on admission to the bar.

Discouragement of innovation could be the result of some aspects of the accreditation process. Indeed, the impression that accreditation imposes rigidity and uniformity may stem from the realization that the easiest path to accreditation has been the packaging of a curriculum, faculty, building, and student body that conforms to a pattern implicit in published standards and maintained by practically every school already on the approved list. A second look at the list, however, will reveal exceptions proving the rule that "sound" innovation must not be impeded. Single schools have even been added to or left on the list despite adoption of unconventional learning programs of many kinds.²⁰ Some of these are clinical; some cooperative; some off-campus,

¹⁸Section 306 of The Revised Standards Proposed by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association, drafted in 1972 and adopted in 1973, expressly authorize some "studies or activities away from the law school or in a format that does not involve attendance at regularly scheduled class sessions."

¹⁹Section 802 of the Revised American Bar Association Standards and section 5-5 of the American Association of Law Schools Articles (Bylaws) expressly provide for the authorization of "variances."

²⁰Northeastern University School of Law in Boston and Antioch Law School in Washington, D.C., are good examples.

even overseas; or classless, exam-less, and even practically gradeless. This flexibility in outcome reflects a willingness by the active participants in the evaluative process to permit experimentation when the innovation seems to have potential "soundness."

Both agencies have maintained a standard that an approved law school shall have "a sound educational program."²¹ Sandwiched among many details about admission requirements, library size, and faculty rights, this general measure of quality injects a highly subjective element into the process. It obviously unlocks the door to innovation, since "soundness" in one period and to one group of evaluators might have seemed wildly impractical and dangerous to their predecessors. The key to an open door for innovation, therefore, is a council or committee made up of members who have receptivity to new ideas, and who will let them be tried when presented by imaginative proponents with the intellectual capability to present a persuasive case. This may be governance by men rather than laws, but at least legal educators know that laws, like constitutions, are what the judges say they are. If the judges of the quality of a law school will bear in mind a recent admonition of the chairman-elect of the accrediting arm of the ABA, the Council of the Section of Legal Education and Admissions to the Bar, the accreditation process in legal education will continue to leave open the door to innovation. Charles Kelso, in the "Introduction" to his *Report on Part-Time Legal Education* said that "creativity and educational quality are more likely to flourish in an environment where there is not too much insistence on uniformity or conformity."²² That kind of judging is not a barnacle on educational development; it is more of an invitation to innovation.

²¹"Soundness" is specified in Section 304(a) of the American Bar Association Standards and in paragraph 7 of section 6-1 of the American Association of Law Schools Bylaws (Articles).

²²*The AALS Study of Part-Time Legal Education*, *supra* note 17, at 29.

