

February 1925

The Law Teaching Branch of the Profession

William Draper Lewis
American law Institute

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Legal Education Commons](#)

Recommended Citation

William D. Lewis, *The Law Teaching Branch of the Profession*, 31 W. Va. L. Rev. (1925).
Available at: <https://researchrepository.wvu.edu/wvlr/vol31/iss2/3>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.

THE LAW TEACHING BRANCH OF THE PROFESSION*

WILLIAM DRAPER LEWIS**

The law teacher in the United States is now a member of a distinct branch of the legal profession.

For the existence of a profession, or a distinct branch of a profession, there must be a group of persons who adopt as a career the performance of a distinct service recognized as requiring a special preparation in which intellectual elements predominate. Therefore, by a law teacher I do not mean a lawyer who leaves his office one or more times a week to conduct law classes, or even the practitioner or judge who is said to "devote a great deal of his time to law school work." Such persons are no more members of the law teaching branch of the profession than the law professor who occasionally appears in the appellate courts to argue cases involving his specialty is a practicing lawyer.

The very existence and objects of this Association and the fact that nine-tenths of the representatives of the law schools present here today regard the career of a law teacher as a distinct career and are devoting themselves to it as an exclusive occupation is conclusive proof that in the profession of law in the United States there is no longer merely the judge and the practitioner, but that there is the judge, the practitioner and the law school teacher.

This rise of this new branch of the profession is the most important institutional change which has taken place in the law during the past forty years. It has already produced profound changes in our ideas of an adequate preparation for the Bar. Then, too, the fact of the existence of a considerable body of persons who devote their lives to work, which requires specialized legal knowledge necessarily involving a somewhat different approach to questions of law and its improvement than that of the judge and the practitioner, is pregnant with the possibility of profound effects on the future development of all our legal thought.

The guarantee that this new branch of the profession is as permanent as "permanent" things in this world of changing social

* President's Address, 1924 Meeting, Association of American Law Schools.

** Director of the American Law Institute.

forces can be, lies in the fact that the "law school" has reached its present position as a result of those conditions in our economic and social life which the whole trend of our development as a nation is constantly accentuating. The very growth of America in wealth and population, the increase in the complexity and importance of our domestic and foreign business transactions, the intensity of the life necessarily led by those who strive for leadership at the bar, together with the increase in the number and weight of their responsibilities, and the way in which our law is expressed and developed by a Federal jurisdiction and forty-eight state jurisdictions, all combine to make it impossible for the great majority of the ever increasing number of those desiring to be trained in the law to receive a training at all sufficient in the lawyer's office, and for any to receive adequate training except in those schools which are manned by teachers who make the scientific examination and exposition of the law their life work.

The recent resolution of the American Bar Association to the effect that all who would come to the Bar should come from these schools merely tends to hasten that which is inevitable. Furthermore, if in America we have not lost our capacity to meet new conditions, it is also inevitable that the law schools will come under professional or public regulations to insure their maintenance of reasonable educational standards. And one of the most important of these standards is that the members of the faculty, with only unimportant exceptions, shall be devoting the great bulk of their time to special topics. Today the very great majority of those coming to the bar pass through some kind of law school. We face an early tomorrow when all who would be lawyers will pass through schools which provide faculties composed entirely of members of the teaching branch of the profession; that is of persons who have adopted the teaching of law as a career. Such teachers, not the able judge or the successful practitioner, are now in great part responsible, and soon will be exclusively responsible for the training of those who administer and develop the law in our courts. For this reason alone the ability of the law school teacher of today, and still more the ability of the teacher of the immediate future, is a matter of national importance.

There is, however, another reason why our law school faculties should have men whose ability equals that of our leading judges and practitioners. Each practicing lawyer has duties to the court and duties to his clients, as the words of his oath of admission to practice usually attest. The judge has the official du-

ties of his office. But in addition to these individual duties are what may be termed the public duties of the legal profession as a whole. These center around the duty of those learned in the law as a class to strive to improve the law and its administration in matters on which their peculiar training, knowledge and experience give them a right to speak.

Now the present condition of the law and the conditions which surround active practitioners and hard-worked judges make it impossible for either, either individually or collectively, to fulfill adequately these public duties to improve the law and its administration without the cooperation of the specialist. Except in rare instances, we cannot, among practicing lawyers or among our judges, find men who at once combine a thorough mastery of some one subject, the time, and the point of view which comes from an aloofness from the special interests of any one class or community. The combination, if it is to be found anywhere, is to be found among the members of our law school faculties. Yet men possessing such a combination of knowledge, time and point of view are a necessary element in the constructive improvement of the law and its administration.

Or, to put the matter in another way, if the lawyers of America are to play well their necessary part in the adjustment of a legal system of justice to the needs of life, a very considerable body of able legal specialists, with a high sense of the public duties of the legal profession, is as important as the existence of able practitioners and judges.

It is for these reasons that I wish to call your attention this afternoon to some of the conditions, and especially to one condition, which must exist if men of real ability are to be drawn in sufficient numbers into the teaching branch of the profession. The numbers of this branch of the profession, as compared with the other branches, will naturally always be small, but no equal number of professional men will have greater responsibilities nor greater opportunity for good or evil.

The first condition necessary to attract men of big calibre to teach law is the assurance of a reasonable financial return. An individual of high type, visualizing a life of service, may voluntarily face narrow poverty, or even want, but such conditions or anything approaching them can hardly be made a basis for the upbuilding of a regular profession on the members of which will fall large and responsible duties. All this is self-evident and generally recognized. I shall, therefore, content myself with pointing

out two things in respect to the proper interpretation of what is a "reasonable financial return."

The young man who enters upon the career of law teacher is from the start and throughout his life relieved from the anxiety and strain which falls on those who are dependent on incoming business for their support. On the other hand, it is practically impossible for the law teacher to obtain large financial returns. We may be certain that the young man whose heart is set on "great riches" will not be happy as a law teacher, he had better not be a lawyer at all. Still, the prospective income for teaching law, to be reasonable from the point of view of a young man who feels that he has real ability and the possibility of a successful future in the practice of the law, must assure him that he and (usually later) his family will at the very least have the economic means to mingle socially with other educated persons in his community, and he must have the assurance of power to save.

Again, the prospect of a "reasonable financial return" should give him assurance that, if he reaches the highest places, reward in which some financial element is involved will be his. Let me give you an application of this principle. No university policy could be more justly subject to censure than one which would make it impossible for a professor of law to do anything, except to compile case books or to write treatises, for which he would receive financial reward, or which would seek to cut down the salary of a professor receiving remuneration for outside work on the assumption that any outside work involving remuneration affects adversely the value of the services which he renders the law school. If the value of a teacher's instruction is actually lessened by outside work, if the outside work is actually interfering with work necessary to make him an acknowledged expert in his specialties, then the work itself, irrespective of the sum paid for it, should be anathema, if not, the increased earning power of the teacher should be regarded by the university authorities as not only fortunate for him, but as tending to remove a serious obstacle to the attraction of young men of ability to the law teaching profession. The Council of The American Law Institute and the authorities of several of our leading law schools, whose professors are working for the Institute, have to their credit that no one has suggested that a saving could be made by the Institute or by the law school, if both institutions were to combine to pay the professional salary and no more to professors of law who are asked by the Institute to give time which might be spent in writ-

ing to a restatement of the law of the topics on which they are specialists.

The second condition necessary to attract men of ability in sufficient numbers to the teaching branch of the profession is opportunity for original research. The verb "to teach" may indicate one of many modes of action. A teacher may be a mere drudge—a waiter serving the same intellectual menu to successive classes, or he may be an explorer guiding his students each year to new as well as to old discoveries, many his own. We all know from personal experience what the student receives from each of these two types of teachers, and the difference in what he receives. Our law schools, to function efficiently, must be manned by explorers, not drudges. The profession, to meet properly its public duty to improve the law, needs scholars who not only instruct in fundamental legal problems, but who seek for them and wrestle with them. A teaching schedule that makes the professorial chair a bench for the accommodation of many topics is not a condition compatible with the occupant carrying on explorations. He has so many fields to cover that there is not time to do more than show his students the things in them discovered by others. An opportunity for original research and constructive thought does not exist. Such a life may satisfy the stupid man or the intellectual trifler, but it has no attraction for the young man who would do a man's work in the world.

As in the case of the condition first mentioned for attraction of the right sort of men to the teaching branch of the legal profession, there is general recognition of the second condition. Of course, conditions in respect to remuneration, hours and the amount and variety of classroom work required of the professor are not ideal in all the law schools, even in all the schools belonging to this Association. Perhaps an all-wise Providence has perceived that man, and even law school professors, as well as dogs, may be really benefited by a few fleas. But the recognition of a necessity that a condition should exist is necessary before we may even begin to hope that it will exist. It can be said, however, that in several law schools belonging to this Association the professors do have reasonable remuneration and are given an opportunity to make themselves masters of their respective subjects. That one is able to make such a statement is the highest praise that can be given those in responsible control of the universities where these conditions exist. The rise in price of the past decade, coupled with the fixity

of returns from trust funds, have not made the task of boards of directors of educational institutions an easy one.

The third condition necessary to attract men of the right kind as teachers of law, (and this is the condition which I wish especially to call to your attention) in contrast with the other two that I have mentioned, has not received general recognition. In fact, it can be said to have been but recently perceived and dimly by the representatives of the schools attending the meetings of this association. The condition is simply the prospect of an opportunity to come into legal working contact with those in other branches of the profession.

Put yourself in the place of a young man coming to the study of law. He usually does not dislike study, but is he looking forward to a life of cloistered research? Is it not true that the profession of the law makes its appeal to the young man who wants to carry on his life work, not only in contact, but in "contest contact" with others? Law is one of the social sciences. Its rules are applied to the relations of men in our work-a-day world. The practicing lawyer and the judge are engaged in "helping turn the wheels," they are performing services which meet man's instant needs, and furthermore, they are performing these services by cooperating or contesting with other members of the legal profession. It is this kind of life that the law student visualizes. The picture has attraction for him. It is his reason for deciding that he wants to be a lawyer. If we are to turn from practice to law teaching a sufficient number of young men of ability to carry on efficiently the work of the teaching branch of the profession, the life of the law teacher must contain elements not wholly dissimilar to the cooperative and contestual elements in the life of the practitioner or the judge.

I am convinced that it is possible to do this. I am aware of the fact that the law schools whose faculties were composed of prominent practitioners and judges, who took a few hours from occupations, which to them were more absorbing, to read law lectures to future members of the Bar, were so obviously inefficient that the opinion that a law school professor should have no contacts with the court or other work of the practitioner has been widely accepted as axiomatic. And it is axiomatic that a young man entering the teaching branch of our profession should drop all thought of clients and should in the beginning refrain from practice in any form. His sole object should be to make himself a master of his subjects. He does not become a specialist in Torts or Contracts

or any other topic of the law by being appointed a member of a law school faculty, but rather by laborious research and much close analytical reasoning. But when as a law professor he has attained a real command of his subject, then the fact that the practitioner may seek his advice and that he may have opportunity to appear in appellate courts is desirable from many and probably from every point of view. The appearance in the argument of a case of a specialist in any branch of the law under consideration at the moment is no mean aid to courts. The greater the knowledge of counsel of the legal issue involved, the more helpful is the argument, and occasional employment in appellate court work is beneficial to the teacher. The necessity of clear and precise articulation of issues and arguments to hold the attention of men more mature in the ways of the law than are students must obviously have a reflex effect on the effectiveness and value of the quality of a man's teaching. Quite apart from the incidental monetary reward, the recognition by the practicing bar of the practical value of his services is a satisfaction which can be balanced against the possible sacrifice made by the law teacher in abstaining from the active practice of the law.

However, the most interesting and the most socially helpful way in which the law school professor can be brought into professional working contact with the leading members of the other branches of the profession is in that work through which lawyers fulfill the public duties of their profession. These duties fall not on individual lawyers, but on the whole profession, as an association of those learned in the law, to improve the legal system of justice by bringing it into closer adjustment with the needs of life. As I have already pointed out, it cannot be performed without the existence of a very considerable body of able legal specialists. You will note that I said that the characteristics and conditions essential to fundamental specialization are found with any certainty only among the faculties of our leading law schools, but you will note also that I did not say that in the law school faculties would be found all that is essential for the improvement of the law.

True it is that the profession cannot perform its public duties without the cooperation of highly trained experts in different branches of the law. This the modern law school alone can supply in America today. I have already emphasized that law is a social science. The expert is necessary to its improvement, but the training and peculiar experiences of the judge and of the practi-

ing lawyer are equally necessary. Indeed, the whole matter comes to this: A close professional working contact between the leading judges, law professors and practitioners is essential if the legal profession is to fulfill its public duties and play its proper part in the improvement of our system of justice.

It is indeed most fortunate for our schools that we have this condition of interdependence of the different branches of the profession. The practitioner and the judge must secure his training from the schools; the schools, to be adequate for their work, must be manned by men of high ability who have deliberately chosen the career of the teacher of law rather than that of the practitioner or judge; to maintain such schools, leaders of the teaching profession must have an opportunity to come into working contact with their professional brethren in practice and on the bench; finally, this opportunity is itself a necessity if the profession is to perform its public duties.

The best hope of the future for the teaching branch of the legal profession is that the necessity for its existence does not rest alone on the needs of future generations of law students, but that it also rests on the need for the profession to perform its public duties as promoters of the improvement of justice.

I have said that it is possible to bring the law school teacher who has attained the position of an acknowledged specialist in one or more topics of the law into professional working contact with the leaders of the bench and bar and thus to fulfill the third condition which must exist if men of high ability are to be attracted in sufficient numbers to essay the career of the law teacher. The use of the term "possible" contains at least an intimation that the condition desired can, but does not now, exist. This implication was intentional because more than an approach to what is not only possible, but, under wise direction, more than probable within the lifetime of many here, has not been attained.

In speaking of the future, I do not desire to overlook the progress which has been made in the last twenty-five years. A few of you here are old enough to remember that in the members of the then recently organized Commission on Uniform State Laws who were drafting the Uniform Negotiable Instruments Act, not only made the selection of the draftsman outside the ranks of the teachers of law, but the Commissioners did not regard it as important that such a man as the late Dean Ames of the Harvard Law School, who had taught the subject for many years, need be consulted before its official publication. Such a thing would be

impossible today. The draftsmen of all the other commercial acts put out by the Commission have been law school men, while leading teachers of law have for many years acted with representative judges and lawyers as Commissioners from their respective states.

What is true of this important nation-wide movement to improve the law is also true in almost every state. There is ever increasing recognition of the desirability of securing the cooperation of bar association, courts and law teachers whenever a statute or code dealing with substantive or procedural law is to be drafted; the teachers supply the specialized knowledge necessary to the production of the preliminary draft and the judges and practitioners the necessary practical criticism and suggestion for its improvement.

An organization which has done most useful work in laying the foundations for the improvement of the organization of our state courts, the American Judicature Society, has carried on its work by the cooperation of law school professors, judges and practitioners.

Finally, we have the recently formed American Law Institute, an Association founded by all three branches of the profession to act as a permanent organization for the improvement of the law and now engaged in the restatement of the law—a work which may be shortly described as the clarification of our common law with a view to the greater certainty of its application. A person called the "Reporter" is primarily responsible for the production of successive drafts of the restatement of the law of subjects such as agency, contracts, torts or conflict laws. He must almost of necessity be a law school man, for outside of law faculties men rarely arrive by years of work at a position of acknowledged authority on fundamental topics, but we find among the Advisers who sit around a table with the Reporter and discuss the draft prepared by him section by section, not only other law school men in the same specialty, but judges and lawyers of high standing; while the Council and general membership of the Institute, through which a draft of any part of the Restatement must pass before final official publication, are bodies in which each branch of the profession is represented by its leading men from different parts of the country.

Thus, not merely by such learned treatises as Wigmore on Evidence, Mechem on Agency or Williston on Contracts, authorities in any court, not merely by the constantly increasing use by the courts of the legal articles in our law magazines written by pro-

fessors of law, but by the opportunity to plan an important part in the improvement of legal justice, by work done in personal contact with the foremost men from other branches of the profession is the career of the law school teacher acquiring elements of attractiveness for the highest type of able men who come to our law schools. All this has been the result of the development of the past twenty-five years. The legal working contacts established between leading judges and practitioners on the one hand, and leading law school men on the other, have for the most part been along lines of cooperation for the improvement of the law. This indicates the direction along which further progress can be made. Therefore, I hope we may have this afternoon some discussion on two matters:

1. What are some other directions in which the special knowledge of the law teacher may be made available for the improvement of the law through cooperation with the other branches of the profession?

2. Would it help various enterprises now going forward for the improvement of the law, or would it stimulate and wisely aid to direct further cooperation between the teaching branch of the profession and the lawyer and judge to establish a permanent center, which would be a meeting place for those individuals and associations interested in the advance of our legal knowledge or in the direct improvement of law, and to some extent be a place in which work to these ends could be carried on?

I shall leave the introduction of the discussion on my first question to the distinguished leader of the American Bar and President of The American Law Institute, who is to follow me, concluding my own remarks with a few words by way of introduction to the discussion of the second question.

The second question which I proposed for your consideration is one that has been called to your attention more or less for some time in discussion about a "juristic center." I confess I dislike the term "juristic center." Perhaps my dislike is due to my once having received a bronze medal for being a jurist. I have never understood why I was given that title or what the other bemedalled jurists and I were supposed to be or do. I shall, therefore, speak here of a *legal center*.

Unless I misunderstand what I have heard and read concerning the prior discussions of this matter, it has been approached as a project intended primarily to stimulate legal research, and to afford an opportunity for an exchange of ideas between law teachers

at round table conferences, such as we have at this Annual Meeting, extended over a considerable period.

In short, a legal center has been visualized as an institution created for and conducted exclusively by the law school profession. On the other hand, the way in which I have put the question assumes that the main thought, not necessarily the sole object, of the Center is to increase the ability of the legal profession to fulfill its public duty to improve the law and its administration, and it further assumes that the cooperation and professional working contact between the leading professors of law and the foremost men on the bench and in practice is essential to this end. I hope some discussion may be had this afternoon as to whether I am right in making these assumptions.

The object of the center will necessarily affect the answers to questions of detail concerning it, but assuming that the object should be the one indicated in the form of any second question, there are several matters connected with its organization and establishment which should be carefully considered before any attempt is made to realize the idea. Let me suggest some of these questions:

First, there are those questions which affect the physical characteristics of a legal center:

(a) Should it afford accommodations for the meetings of legal associations; and, if so, what associations?

(b) Should it provide accommodations for the executive offices of legal associations; and, if so, what associations?

(c) Should it supply library and other facilities for the prosecution of the legal work of any existing learned legal associations; and, if so, what associations?

(d) Should it supply facilities for the carrying on of a graduate school?

Second, there are those questions which affect the location:

(a) Entirely apart from any organic connection with an existing law school, should it be established so as to identify it physically with an existing law school?

(b) Should it be established at the National Capital?

(c) Should it be established in any of the large cities?

(d) Should it be established in a suburban or country location?

Third, there are those questions which affect the promotion and the organization:

(a) Should it be promoted primarily by this Association, or by the American Law Institute, or by The American Bar Association?

(b) Should it be promoted by any possible combination of these associations, or by their union with other associations to create or to suggest the creation of a new organization to control the center?

(c) Should the organization controlling the center carry on all the work at the center, or should the center be primarily a place where existing legal organizations could carry on many, if not all, of their activities?

I have no desire to attempt this afternoon to make any answer to these questions. In my own thinking on the desirability and the possibility of the establishment of what I have termed a legal center, I have not advanced beyond the point of interrogation. I have brought up the subject here because I have a feeling that in the conception of a legal center as a coordinating factor in legal professional activity to improve the law and its administration—an outward and visible sign of a real cooperation between the schools, the bench and the bar to promote justice—there is the germ of an idea which may develop into a clear picture of something which will be of great value. However this may be, I am certain that whatever the place, the proper character and the organization of such a center, its success is dependent on the extent and the character of American legal scholarship.

The future of American legal scholarship, its extent and character, is in the hands of those who direct the law schools belonging to this Association. If our law schools are content to teach only those subjects which are immediately useful to the practitioner in the first years of his practice, and to confine their researches in such subjects to the authorities the student can cite in court, then no matter how thorough the teaching within these limits, the American legal scholarship will not be equal to the task of helping to adapt law to the needs of life. In a world forced by man's remarkable progress in the effective practical application of new scientific discoveries, to make constant international and internal industrial and social re-adjustments, we need law schools controlled by men whose vision is wider than the rather narrow limits of the present curriculums. It is of course time that the law school that does not provide the law student who seeks to become a practicing lawyer with the technical knowledge and training he needs will fail as it deserves to fail. But the day when a law

school is regarded as a place where this is done and nothing more should be brought to a close. To develop a good training school of legal technique was the task of the generation of law professors now passed or nearing the retirement age. Twenty-eight years ago I became Dean of one of the oldest schools in the country. It did not have an organization or a place in which law or anything else could be adequately taught. My task and the task of all other Deans of that day was to build up a faculty capable of training law students in the fundamental principles of common law and the right methods of legal reasoning. The law school of tomorrow should be an institution which, while in no wise lessening the excellence of the preparation which it affords to the future practitioner, will, as a matter of course, also be an institution in which in addition to a knowledge of our common and statute law, will be given courses in all other subjects on which a proper adjustment of law to modern life must rest—such subjects, for instance, as Comparative Law, International Law, Improvement in Procedural Law, Penology and recent development in Administrative Law; it must be an institution, too, which will not only carry on researches in legal history, but investigations as to the practical operation of existing law and administration. Is this view of the American law school hopelessly beyond the possibility of attainment by the great majority of schools, members of this Association? I do not think so. I have seen too much progress in legal education in the last thirty years not to believe in still further progress. There is more than one school in the Association which in a few years can, and I believe will, become the home for the development of creative legal scholarship along lines not now taught in any school. The great law schools of today will become the far greater and broader schools of law of tomorrow. We have no reason to be pessimistic about the future. The teaching branch of the legal profession is just entering on its kingdom.