

A Practicing Lawyer Looks at Legal Education*

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After a man has been liberated *a vinculo matrimonii*, propriety forbids him to look at his former spouse with an eye too admiring or to comment upon her shortcomings too freely. By the way, if any of you here are not trained in the law, that means that I was divorced from the lady by a decree which became final about 12 years ago. Such a person must speak discreetly who would comment upon the character or present appearance of an old love. If someone else has provided her with a new hat, or a new fur coat, he perhaps had better not publish his views of such habiliments whether they appeal to his taste or not.

Nevertheless, this appears to be my assigned task. So with a bow of apology to my former colleagues and to whom else it may concern, I am going to take the plunge. As a further premise to what I am about to say let me remark that everything that I have set down in this manuscript of mine has been said this afternoon. All I can do is to say it rather feebly in my own way.

I suppose legal education is not alone in its continuing search for objectives and methods. I seem to have heard, or read, somewhere that all educators, whether engaged in general or vocational instruction, have been, and doubtless always will be engaged in this same quest. And I venture to say that if that were not so they had better shut up shop. Yet I am inclined to agree with Professor Wirtz that in an inclusive sense legal education has but a single objective. Let me put that rather in my own words than in any words that were used this afternoon: I would say the objective is to turn out men (and women) prepared to become good lawyers. I say "to become," because I have always felt, perhaps wrongly, that good lawyers do not emerge complete from the law school, or the bar examinations. They don't spring full-panoplied from the brow of Jove as Minerva was said to have done. Of course here we raise the question of internship which was discussed this afternoon. I do not want to enter into that discussion, but my general attitude will, perhaps, reveal itself as I go along. I should say that the total educational process that precedes formal entry into the

* Remarks at the Seventy-Fifth Anniversary Symposium on Developments in Legal Education, The Ohio State University, May 6, 1949.

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legal profession is to the profession itself as the period of gestation is to life itself, and that the function of legal education and what precedes can be accurately characterized as that of development rather than that of tutelage.

Nevertheless, as the human embryo develops all the physical potentialities of the child, so education from the point of view that I am discussing the subject should develop the mental potentialities of the man; and professional education, in particular, has the function of developing those special potentialities — and here I come to internship — which, when exercised and matured in the actual practice, will furnish the kind of product that society has a right to expect of the legal profession. So in that sense we are not so much concerned, perhaps never have been, with a new objective of legal education as we are with new ideas as to the characteristics of a good lawyer. For that is what we are after. That may be but another way of saying that we are searching not for an objective but rather for objectives, a plural concept.

I am obliged to agree, of course, as we all are, with Professor Jones when he says that we have long since given up the idea that the attainment of an encyclopedic knowledge of the law is something to be expected of the law school graduate, or of the law school faculty, or of the Supreme Court, or of anybody so far as that is concerned, notwithstanding the alleged usefulness of the maxim that ignorance of the law excuses no one. I see no particular shift, from the point of view from which I am speaking, from the recognition of the fact that the so-called "legal mind," or the ability to reason and think legally, is about all that can be claimed for the case method of instruction, or any other method, if you please, so far as student mastery of the law, as it is, may be concerned. However, I would like to put the case for what has been called this afternoon "case-law skills" or "legal skills," a little more broadly than I understood it to be put. I should say that the case method or any other good method of instruction in law is something that is devised — and I think the case method is well devised — to develop an awareness of the existence of the legal problem and the approach to a solution. It is not essential, as I see it, that even a good practicing lawyer should *know* the answer to his clients' every predicament; but he should know what kind of a predicament it is. He should have a first impression about the legal rules which govern; and he should know how to go about it to verify or correct that impression and advise his client as to what his rights, his duties, his liabilities, and all the rest of the catalogue may be. It is because I believe that is the most important thing the law school can do for its graduates that I look with favor upon the development of teaching materials which I have observed as taking place since

I quit trying to teach. I refer to something that can be summed up in the change of the title of most books that are published from, for example, "Cases on Equity" to "Cases and Materials on" — well I wouldn't call it Equity — it would be something else now — but cases and materials on something. I have seen some of these books, some of them in print and some of them for special use in mimeographed form, and I have been impressed. I must say some of the materials didn't impress me so much but the idea did. Yet these newer books do little more than the instructor, using the older type under the case method, was wont to do by changing the facts and assuming absurd premises in order to get his students to discuss and think about the topic under consideration.

I agree, too, with the point which was greatly emphasized this afternoon, that the law schools would do well to lay stress upon legislation. I do have the same kind of doubt I believe Professor Wirtz expressed as to whether or not it is necessary in the law school, or as a part of the law school task, to deal with how statutes are made. I've had some practical experience, in fact a good deal, on the side of statute law and legislation. I think it is true that too many practicing lawyers, whether as a result of training in the case method or not, don't really believe in statutes in the sense that, unless they can find a case construing a particular statute, they are skeptical, it seems, of its very existence. They seem to have about the same attitude toward a statute that a patent lawyer is said to have toward a patent, namely, that it is no good until it has been adjudicated — a statement which by the way is becoming truer every day.

Yet there is something to be said for that attitude of mind on the part of the practicing lawyer, if it does exist. For actually a statute, even the Constitution of the United States, is living law only to the extent and with the meaning that the courts give effect to it. I believe Chief Justice Hughes said something like that about the constitution. I recall in this connection a part of an opinion by Judge Shauck, who was referred to this afternoon. When the legislature had committed a terrific blunder by repealing all the statute law in effect on the subject through a legislative accident, Judge Shauck said, for the Court, that the question is not, "What did the legislature mean by what it said," but "What does what it said mean." That view, apparently, isn't shared today by some courts, who seem to take a statute as a point of departure, as it were, to exercise some attributes that have been called predilections, but I submit that Judge Shauck was right. So in a sense, the lawyer may be justified in his skepticism about a new statute. At any rate, the legislature may propose, but the courts dispose. The courts are still interpreters, if you please; they are still the lawmakers or law-

finders, whichever expression you prefer, even after the legislature has acted. Again, laying to one side a considerable mass of framework, mechanical statutes and coming to statutes that really change fundamental principles, isn't it true that the function of the statute is not to make but to amend or change law, the so-called unwritten law? If that be true, then for an adequate understanding of the function of statute law and of legislation, apart from taxation, appropriations and the like, the common law background would seem to be essential.

Now back in the dark ages when I was trying to teach at this law school we didn't—of course we could not—ignore statutes. We all gave due attention, particularly, to the Ohio statutes because this is an Ohio law school. As we encountered those statutes in developing the law of a particular course we had to consider them if we were going to do justice to the subject matter. We didn't give attention to comparative legislation, nor to what was called this afternoon, and quite accurately, the legislative process. Of course there were some courses such as Negotiable Instruments, Sales, Administrative Law and Conflicts of Law, wherein a smattering of attention to comparative statutory law was involved. But we never looked at legislation or the legislative process as an abstract subject, apart from some so-called branch of the law. Hence I am very much interested in the experiments which are being made or proposed in the direction of emphasizing legislation and the legislative process as such. Those efforts have my sympathy and yet I have some questions to raise, as some were raised this afternoon.

First, and here I am repeating something that has been said four or five times but I think it deserves repetition, the tool of the draftsman of a statute is the English language; and an ordinary proficiency in expository writing is even more essential in the case of the legislative draftsman than it is in the case of the draftsman of a will or trust instrument, a deed or a contract. For there are no statutes in the form books, unless the draftsman is copying the statute from some other state, which, of course, can be done with scissors and paste. Now I have sad memories of the English of many examination papers which I had to read. Bar examiners tell me there is not too much improvement. By the way, at the table this evening, one of our guests made the point that it is getting increasingly difficult in all branches of higher education, so far as they come under his observation, to get students to assimilate ideas through the eye by reading. They have been conditioned so long by the radio to an auditory approach to things that they don't know how to read. That may have something to do with this language deficiency that seems to me to be so deplorable. Laying aside for

a moment the question raised this afternoon, as to whether or not the student who has a language deficiency and can't write a decent paragraph should be admitted to a law school at all, I still question whether it is the business of the law school to teach English, either in a course in legislation or in a course in the drafting of legal instruments. Now please do not misunderstand me. I am all for the courses in legal drafting, including courses in drafting proposed legislation, but I think we ought to have a little better raw material to work on in that respect than some with which I have come in contact.

Perhaps the preliminary question as to whether or not you ought to let such a person into law school at all is not so easy to lay aside; here comes another like unto it. I am speaking now about the legislative process: Should a student who doesn't know, if you please, how a legislative body works be admitted to a law school? And the correlative of that question is this: Is it the business of the law schools to teach what used to be called "civil government" and now rejoices in the appellation, "political science?" I put that question the other day when I knew I was going to have to do this—I put that question to a veteran professor of political science. And I got this answer: "By all means let the law schools teach the legislative function, the legislative process, and particularly the administrative functions and processes. While we do cover the ground in our courses in the liberal arts college"—now watch this—"our students lack the maturity and background to assimilate what the law student should acquire." That set me back, as it were, on my heels. And it, of course, raises many questions about liberal education. We used to begin the study of civil government in high school, but apparently now you are not mature enough to understand it until you are a graduate of some college. It rather shocks me, my friends, that it should be true—yet I am sure this gentleman knows what he is talking about—that boys and girls can come to that stage of maturity in this country without knowing the framework of the government of the United States and its several states. If that is so, then there is certainly a need for developing somewhere in the law school curricula some emphasis, not only upon legislation as such, but also upon how laws are made.

When I approach the question of methods I begin—like Professor Wirtz, to have a little trouble. I should think something could be gained by studying comparative legislation in each field of substantive law, although here we are again introducing more material into a course where already, the professor would tell you, he doesn't have the time to cover the subject matter as it now is. Administration seems to me to be an exceedingly difficult subject within which to organize a course that is anything more than a

specialized course in constitutional law. I say that on the basis of very brief, somewhat unsatisfactory experience with what others probably know how to handle. Yet in practice administrative procedure bulks very large indeed in the modern lawyer's time. Now just how to provide practice in the skills involved here—indeed just what those skills are—are questions which trouble me. Legislative drafting, I should think, would best be handled in a seminar course, or at least a small class, where the "learn by doing" methods to which reference was made this afternoon can be applied. For example, let the group sit as a legislative committee, with selected individuals appearing as proponents and opponents of a bill drafted by the proponents, and let the members of the committee be required to offer amendments to the bill and defend them. Some such *modus operandi* as that would be "learning by doing."

And now I get to the stage of policy, by using legislation all the way through on which to base this discussion, as I think was done to a considerable extent this afternoon. As to the teaching of legislative policies, as such, I have even greater difficulties. It has been my practical experience in the field of legislation that legislative policies very seldom originate with lawyers. It is true that lawyers sometimes appear before legislative committees as advocates or opponents of proposed legislation. And yet I think any legislator will tell you he would much rather deal with the client himself who is directly affected, that is a member of a legislative committee, he would rather hear such a person, than a lawyer. The layman, rather than the lawyer, makes the best witness before a legislative committee, we have been told, and I believe. So I would be inclined to minimize the importance of what might be called legislative advocacy; and I am puzzled about the advisability of attempting to develop in the law student an aptitude for assembling materials that bear upon the wisdom of a proposed legislative policy, such as statistical materials, and economic, sociological, and other data. We remember that Mr. Brandeis signed the brief in *Muller v. Oregon*, but he didn't write it. Josephine Goldmark wrote that brief or that part which attracted the most attention, although I have no doubt that Mr. Brandeis conceived the idea and directed the compilation of the material. So, while a lawyer needs to appreciate how the political forces that shape legislative policy are marshalled, and how the arguments and factual materials that must be brought to bear can be arranged and presented, he had better remember that in legislative work as well as in trial work he needs witnesses. He can't do it all himself.

Here I digress and return to the subject of Administrative Law, about which so much was said this afternoon. There the practi-

tioner must indeed be prepared, I think, even more thoroughly than in the field of legislative policy, with what might be called and was so called to some extent this afternoon, non-legal material. I am reminded of the definition of a public utility rate case which was given by a distinguished former member of a supreme court of an adjoining state, who had a large experience in the trial of such matters. "A rate case is a proceeding in which the witnesses argue under oath and the lawyers testify without being sworn." These are some of my random doubts and questions about imparting the skill of policy making. I confess that I am somewhat at sea.

I am thoroughly in sympathy with the proposal to give new emphasis and direction to the standards and functions of the profession. Certainly the kind of instruction in so-called "legal ethics" that obtained back in what may be called my day has been inadequate. Someone was telling me about a professor at Harvard University, not too long ago — by the way, this professor plays the accordion too, so maybe you know who he is — who interrupted his class to announce, "Gentlemen, according to the law or requirements of certain states," naming Ohio among them, "this law school must certify that you have had instruction in the Canons of Ethics of the American Bar Association. Gentlemen, you will find those canons of ethics at such and such a place in the library; in another place you will find the reports of committees and decisions of cases. We will now certify that you have had instruction in legal ethics. Returning to the subject of future interests, etc." All I can do here is to endorse all that I have heard this afternoon with reference to objectives and methods of instruction having to do with the function of the lawyer as a member of a profession. Of course, the bar associations are actively engaged now in the very thing that was mentioned in the course of the discussion this afternoon and I am sure they are fully aware of the necessities of the case. I see in the room the president of the Columbus Bar Association and those of us who attend the meetings of that Association know that attention is given there, just as Dean Rowley said it was being given in Cincinnati, to these very things. All of which reminds me that what we are talking about here, legal education, is a continuing process, as I see it. If a practicing lawyer ever feels that his legal education is complete it is time for him to quit, too. So the profession itself has a function to play at this point.

So far as values are concerned — and this seemed to be perhaps the most esoteric subject or issue that was raised this afternoon — I don't have so much trouble with that. I had thought that the case method of instruction, with its criticism of what appeared in the books, and certain courses which need not be mentioned, were well calculated to subject legal rules to the crucible of criticism.

I was struck this afternoon, and I can't dispute it of course, by the statement that observation had brought out the thought that currently third year students were much less critical of legal principles and rules on what might be called ethical and social grounds, than were first year students. I can understand how that comes to pass and I think perhaps something ought to be done about it. Here I think I am in agreement with what was said this afternoon, that the development of the kind of moral and ethical values that a good lawyer ought to have is something that any instructor who is really worth his salt in any course in the law school is capable of doing without compartmentizing that particular thing. There is where, above all, I think the personal element in teaching comes in. Certainly law review experience is another wonderful instrument to this end, and certainly the consideration and examination of social and economic values underlying our legal order is an essential part of legal education.

But I still think, even after listening to the excellent papers this afternoon and to the discussion of them, that the old girl was pretty good when I used to be married to her.