Legal Education: Some Problems of Ways and Means*

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So much has been said and written recently about the identification of a new set of objectives in legal education that it seems time to take stock of some of the possible working difficulties which may lie ahead along this new course we are mapping out for ourselves.

Professor Jones has, in his paper, incorporated the best that has evolved in the deliberations of our Policy Committee (which meets only in the pages of the law reviews), adding to previous reports three points which will be accepted gratefully as substantial contributions. I should like now to try to sketch out an agenda for the Committee on Ways and Means.

Our consideration of the grubby details of our job can proceed from what would appear to be, if broad enough terms are relied upon, substantial agreement about three things. The first is that a substantial new content is to be added to the law school course of study of ten years ago. This new content is variously labelled as "processes," "skills," "values," "policy-making," "understanding," and "insights." Perhaps there are basic differences suggested by these labels, or perhaps only shadings. For our purposes it makes little difference. There is agreement that legal education is not to be a one-dimensional offering of informational content, and that the bringing out of the second and/or the third dimensions is going to require the inclusion of new matter in the course of study. It is the fact that *more* is to be taught, regardless of its precise nature, that poses problems of ways and means which we may profitably consider.

Two broad decisions as to method have also been made, at least to a degree warranting consideration of some of the smaller details to which the Policy Committee has perhaps not given full attention. One of these is that we can no longer accept the "case method" as providing an exclusive formula for building teaching books and preparing daily class presentations. The "problem method" has been identified as an improved technique, at least for certain courses, and other similar innovations have been recommended. There is also rather general agreement that student participation in the learning process must be broadened. Read-

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ing, listening (to us) and talking (to us) is not enough. "Thinking" is not sufficient either, at least in its old sense. There must be some degree of learning by seeing and by actual doing.

Accepting then the proposition that something more than information is now to be imparted by a new kind of student participation in a new kind of intellectual activity, what are some of the "bugs" which ought to be anticipated in moving this project from the drafting to the operating stage? It will be enough, today, if we try just to identify as many of these mechanical problems as we can, making no complete attempt to resolve them.

It will be assumed that the first problems to be considered are those which will arise in connection with the revision of the law school curricula. Virtually all of the recent proposals for a reorientation of the law schools' endeavors start from an identification of the lawyer's capacities and talents and then proceed directly to a proposed reshuffling and refurbishment of the curriculum.

Important as this matter of curricular content undoubtedly is, it may not be entirely amiss to suggest that false emphasis upon it may well prove to be one of the dangers in this renovation process. There is a deceptive appearance of logic and good sense in the thesis that a listing of the talents requisite to competent legal practice constitutes also a listing of what should be included in the law school curriculum.

The most obvious fallacy in such a thesis is of course its failure to take account of the impossibility of including in a three-year course of study opportunities for the development of *all* legal talents and capacities. Much of this job will have to be done in the course of the student's pre-legal college training. Some of the rest of it will have to be done during the period of his post-law school interneship, either formal or informal in nature. To whatever extent an attempt is made to compensate for the inadequacies in the average student's pre or post law school experience, there will be present the danger that those parts of the job which the law school can do best will receive less attention than ought to be given them.

There is a related possibility that the sudden realization of lawyer-needs which have not previously been given due attention will result automatically in attempts to formulate special, separate courses to satisfy those needs. When it was decided, at various points during the past thirty years, that law students needed exposure to the laws relating to taxation and administrative law and labor law, courses bearing those titles were added to the curriculum. It is a different question whether similar action is to be taken upon the determination that lawyers need a

fuller appreciation of the nature of their profession and the obligations upon it, or a better understanding of the legislative process, or greater facility in oral and written expression.

If I were asked to identify the essential qualities in a lawyer there would be a temptation to reply that they are common sense, imagination, and a sense of common, human decency. No one would suggest, however, that we offer courses in Horse-Sense, or in Imaginative Thought or in Doing Unto Others. Nor is the principle necessarily different when we break these qualities down into some of their elements or when we describe them polysyllabically. It may very well be a mistake, once we have isolated certain new things the law student needs, to try to teach them apart from some of the traditional informational subject matter nuclei. It may prove difficult to explore the second and the third dimensions separately and apart from the first.

Professor Jones has referred to the advisability of setting our instruction in a context of "lawyer situations." Taking, for example, the matter of legal ethics, there is the consideration that when a lawyer encounters a problem of ethics it will invariably be in connection with his handling of a particular subject matter. Is it more effective to arrange a lecture on the iniquities of champerty, or to take occasion to consider at various points in perhaps every course the justification of counsel's having brought particular cases to the courts? Is there a better way to protest against professional bias in favor of the status quo than to develop, in the Labor Law course, the nature of the Norris-La Guardia Act as a reprimand, by the body politic, of the unconscionable collaboration between bench and bar in the use of the injunction? The fullest understanding of the legislative process would seem most likely to develop from adequate treatment of the legislative aspects of every field of the law the student considers rather than from a study of "a process" as such.

It is not to be disregarded that students come to the law school already used to courses built around a grouping of informational content. Perhaps this means that they will seek only this particular content in any course offered them in orthodox outline and that they will pay no attention to the interlarding. The alternative danger is that if a course is presented along entirely unfamiliar lines, with no familiar type of skeleton discernible, that they will conclude that there is nothing there at all.

The recent decision in a number of law schools to include a course in Legal Writing brings into focus both the question of whether the law school should try to develop *all* legal talents and that of whether those which it does decide to emphasize should be the subject of special courses. No one would question

the essentiality of effective writing as a lawyer skill. Yet something more would appear necessary to establish the wisdom of the law schools' offering courses in composition. Is effective writing more important to the lawyer than effective speaking? Are we also to include courses in public speaking, and in money and banking, and in American history?

It is no sufficient answer to say that if we don't give these students practice in writing they simply won't get it. Why not, if we find them deficient in this respect, send them over to the proper departments in the college and require them to do this work there? Or why not give them a law school entrance examination in composition, and deny them admission if they fail to measure up? There is undeniably a type of thing which we alone are in a position to offer, and we have only limited time in which to offer it. It is agreed that this is a broader type of thing than we have traditionally thought. But the boundaries are only being revised, not destroyed. Unless it can be shown that we are better writing teachers than our colleagues who are trained in that field, our offering courses in writing doesn't make sense. The miasmal prose of most legal documents and the obfuscation of too many leading articles in the law reviews leaves obvious room for question as to our superior editorial capacities.

Reliance is sometimes placed on the argument that it is *legal* writing we are going to teach. Is legal writing essentially different from other writing, or is it only its corruption that has made it appear so? Perhaps there are opportunities to so integrate a writing course with certain subject matters that no precious time is lost and some net gain is realized. The University of Chicago faculty reports substantial accomplishment along these lines. Yet this has apparently proved an almost herculean task and one which most of us will probably be unable to perform. Already those schools which are trying out this legal writing idea are experiencing great difficulty in getting teaching fellows and faculty assistants to take over this arduous job. It may well be one of the "bugs" involved here that comparatively few men will be willing to devote the required time and energy to the development of subjects which permit no direct contribution to some recognized area of the law, as an incident of their pedagogical endeavors. I am frank to confess my personal adherence to the institution of a Legal Writing course at my own school. Equal candor prompts, however, the recognition of the possible reflection here of the fallacy that the identification of a legal talent in itself warrants the setting up of a new separate course in the law school devoted exclusively, or at least primarily, to developing that talent.

None of what has been said will be properly interpreted as calling into question the desirability of integrating the law school curriculum with the conclusions which may be reached as to what are the capacities of the good lawyer. All who are familiar with the recent report of the Curriculum Committee of the College of Law here at The Ohio State University must be impressed with the job which has been done of preparing a chart of specific obligations, so that the instructors handling certain specified courses are charged with emphasizing matters which it has become the general habit for everyone to leave up to someone else. This report represents the most significant advance I have seen in this whole field, leaving me entirely willing to accept the obvious judgment of our Pennsylvania Railroad engineer last night that it was coal he was carrying, with Newcastle the point of consignment. This report, along with one or two others appearing in the past three years, makes it clear that it is possible to assume that not all law school faculty members consider themselves as the holders of vested interests in courses whose metes and bounds are sacrosanct.

Yet it may still be questioned, in general, whether the implementation of the various proposals for reorienting legal education are properly considered primarily a matter of curricular revision or properly made the subject of the exclusive jurisdiction of faculty committees charged with responsibility only for developing a line-up of law school courses. The problem is obviously broader than that, and the attempts to meet it by curricular manipulation are likely to be self-defeating. Part of the answer would seem to lie in requiring the student to fill in some of his gaps by work outside of the law school. Part of it may well be the development of programs of post-graduate education, sponsored perhaps by local bar committees with a nearby law school faculty helping out where it can. If the best way to emphasize the legislative process, or the adjudicative process, is by a change in the way a number of courses are presented, then it will be a mistake to include a new course in the curriculum just because the committee in charge happens to have authority to recommend new courses but none to change the habits of individual instructors. That there has been a dietary deficiency here is relatively obvious, but it is not entirely clear whether the need is for new foods or, rather, for fresher vegetables instead of the canned variety. Perhaps our problem is that of continuing to serve bread, but with the wheat germ restored.

Let's assume, now, that we have, after due consideration of all the factors involved, decided upon certain second and third dimensional additions to our course of study. There is to be a new

course in Legal Writing, and another, despite the objections of some, in Legislation; particular emphasis is to be placed in certain of the traditional courses upon the broader obligations of the legal profession, and in some of the others a substantial amount of time is to be devoted to training in specified skills and to a consideration of certain "value" standards. Our next job will be to see to it that what is already something of an anomaly in our system does not become, as we seek to establish a new set of pedagogical emphases, a destroying weakness. I refer to our examination system.

It is a fair guess that the written examinations we have been giving have, more than anything else, resulted in a student emphasis on informational content which in theory we have for some time protested. There can be no question, moreover, but that the nature of almost all state bar examinations has not only made this emphasis on the part of the students virtually inevitable, but has to some extent made our own instructional efforts a continual compromise between what we think we ought to teach and what we know our students have to have to "pass the bar."

This problem is manifestly going to be worsened if we decide now upon a greater emphasis on such things as values, insights, processes and skills. It is obviously easier to examine a student on his superficial mastery of a body of information than it is upon his development of facileness and upon his real understanding of certain values, ethical standards, and processes. Yet if our examinations, and the bar examiners', fail to make a display of such facileness and understanding a condition of passing a course we may as well recognize that our efforts in these directions will have virtually no effect upon the lower ninety percent of our students. This is the point at which we have to decide whether what we are proposing is rugged training in these new qualities, or only an exposure to them which will benefit almost exclusively those superior students who need it least, if at all. Are we willing to say to Mr. Mediocrity after we have read his paper in Contracts, or at the end of his three years: "Yes, you know the cases and the rules well enough to pass the bar exam and to practice law, but your paper makes it plain that you have no sense of professional obligation, that your sense of values is still at a high school level and that any document you draft will be more likely than not to end up in litigation; therefore, we are failing you?" Unless the answer to this question is "yes", we had better proceed in this matter recognizing that our effectiveness will remain at approximately a missionary level.

Yet even if the answer to this question is not "yes", and that is probably the case, there are obviously some things we can do

to fit even our anachronistic examination system to the new demands. One or two questions on each examination can be plainly phrased to evoke value judgments. We can require the submission of written work which will reveal at least the extreme cases of ineptitude in the skills of persuasion and expression. Some form of oral examination can be devised to determine qualities and capacities no written examination will ever reveal. Recent experience in Pennsylvania and New Jersey indicates that the bar examiner's attitude is not invariably adamantine, and that these boards may be expected to go somewhat beyond the testing of the applicant's ability to memorize black letter type. Last year's Iowa bar examination is reported to have included three exercises in statutory draftsmanship.

The answers here are far from clear, but the problem is obvious. This new emphasis and these new courses are going to be only gestures unless we gear our examination system in with the purpose we seek to accomplish by it. Unless we express the courage of our new convictions to the extent of "testing" in this area as rigorously as we do in the informational area, Mr. M. is not going to pay much attention to our inspirational efforts. Should we find ourselves tempted to dismiss this problem on the ground that the examination system doesn't make sense; anyway, let's be honest enough to recognize that such an attitude is only rationalization so long as we go on using this system to cover most of what we teach. If this year's examination in what is offered as a "three-dimensional" course is confined to problems in case analysis, it is case analysis and not legal institutions or the adjudicative process or legal ethics in which most of next year's students in that course will prepare themselves.

Turning now to the matter of teaching materials, let's recognize that we will only be fooling ourselves so long as we try to teach a three-dimensional course from an old one-dimensional case book. Most of us lack the forensic art of persuading students that something is important even though there is nothing whatsoever about it in the book. The common assumption is, of course, that all printing presses are set up on the slopes of Mt. Sinai, and that the true doctrine is dispersed only through this medium. A good many students are possessed of better visual than auditory perceptiveness, and it is in any event "the book" which is reviewed as the semester goes on. Most student notes on the classroom discussions are poor and it is only in the rare case that our extempores are effectively designed to make a lasting impression.

The more important point here, however, is that unless we go through the painstaking, stimulating process of working up

new sets of materials, we are never really going to develop anything more than relatively ineffective collections of class-room footnotes reflecting the general, but only the general, orientation we have in mind. Our own experience at Northwestern with what seems to us the very worthwhile attempt to integrate groups of related courses has thus far been disappointing because of the seeming impossibility of working up the new materials which the program envisages and requires for its full implementation. There is the further consideration that no amount of broad thinking by the policy committee or by the local curriculum committees is going to prove the feasibility or practicability of a new or a substantially revised course. Nor will that test be properly made by trying the new course out if materials prepared for a different course are used. The only process for making that determination is the process, involving preferably the participation of several people, which is gone through when there is the challenge of actually building the materials for a new course.

It is perhaps worth noting, too, that these innovations probably have as one of their necessary consequences a substantial diminution in the present practice of wide usage of one or two casebooks in each field. It may be assumed that a given book will be relatively satisfactory for use wherever the course in Torts is taught so long as it is the rules of Torts, the informational content, which is stressed. But in the Ohio Committee's report, the Torts course is to be the one in which an insight into Legal Institutions is to be provided, the objective being "to afford an awareness of the institutional pattern of legal systems; to impart a grasp of law's basic institutions in their evolutional context; to instil an appreciation of law as a learned profession and of its basic traditions." It is a fair assumption that whoever teaches a Torts course specially designed to emphasize the growth and significance of legal institutions will have to prepare a special set of teaching materials. Now suppose it is decided at the University of Cincinnati that there should be special emphasis upon Legal Institutions, but that it should be in the Contracts Course; and then at Western Reserve the decision is to do this job in the Procedure course, and to use the Torts course as the place to develop what the Ohio State Committee identifies (in connection with another course) as insight into Legal Method, rather than Legal Institutions. The decision in each case will probably reflect primarily the interests and capacities of particular members of these faculties who will be teaching these courses. Yet it would seem clear that different materials would have to be used for each of these courses at each of the three schools. It is too obvious to justify belaboring it that the payment of anything

more than lip service to these principles of enriching our courses of study is going to require that a lot more time be spent on the preparation of specialized, and perhaps localized, teaching materials.

There is at least some justification for suggesting that it should be adopted as a working rule that no faculty member will be expected to teach one of these vitamin-added courses unless he is given a full semester, free of other teaching duties, to prepare special materials, with a full-time secretary to assist him in the necessary paper work. It will only kill these plans, full of merit as they are, if an attempt is made to carry them out before arrangements are made which will permit something more than improvisation in the preparation of teaching materials. We are notoriously identified as a group of dreamers. This is at least in part because academic administration fails to take account of the practical necessities which are essential to the making of dreams into realities. A corporation will put a scientist with a promising formula off in his laboratory for years just in the hope that he may be able to prove out his hypothesis. The ideas teachers have must be developed in their spare time, most of which will have to go to the handling of details which would, under any business-like system, be handled for them.

Just a brief word about the use of the "problem method," apparently already widely accepted as part of this evolution in law school teaching methods. The assumption is apparently being made rather generally that some courses rather than others should be problem courses. "In the third year," the Ohio State Committee reports, "the student should be ready for training in solving legal problems." It is then proposed that the third year courses should be presented on the problem-method basis. I wonder whether there isn't justification for thinking rather of certain *parts* of various, possibly even all, courses as being perhaps benefited from at least experimental use of these problems. Most courses would seem likely to include certain portions where straight textual treatment would prove most economical and effective, others where a traditional pattern of appellate court opinions would best serve the pedagogical purpose, and then still others where a set of "problems" would be most stimulating. It may well be a mistake to develop our thinking about this new technique in terms of applying it either as an exclusive technique in a particular course, or not, in that course, at all.

Finally, in what is at most only an illustrative listing of the problems this new approach presents, is the question of whether the type of course now contemplated can be effectively presented to classes as large as those now characteristic of most law schools.

A good many of us think we have been trying to teach something more than straight informational subject matter for some time now. Perhaps there is something beyond rationalization in the feeling that one of the difficulties in doing so has proved to be the impossibility of broadcasting on 150 or 200 wave lengths at the same time.

The "socratic" technique which is the hallmark of the law teacher had its identified origin in the conversations the philosopher held with his students as he sat with them at the foot of one of the arches or in the gardens in Athens. Those groups were small; Plato's dialogues reflect the conversations of a group of intimates. Most of them had similar interests and probably substantial equal intellectual capacity and background for these discussions. The circumstances were such that it may be assumed that all followed the discussion closely, each being free to break in if the point being made started to float out of the realm of his comprehension. There are few today who would quarrel about the efficacy, under those conditions, of the teacher's asking questions instead of "laying out" the information he thinks he has.

We have all sat in large law school classrooms where for at least a few minutes a master teacher carried a small host of students along with him in brilliant and illuminating "socratic" discourse which stimulated even the thinking of those who did not participate vocally in the conversation. But invariably then, and before long, the questioning shifted to someone less prepared for it than most of the others, or perhaps to someone else so much better prepared that few could adequately comprehend what followed. Most of the listeners' thinking stopped, and they settled back to await the master's denouement. If, in the full exercise of his technique, he disappointed them, a few would make a note to get the answer someplace else, perhaps in their own subsequent thinking; but in most notebooks a blank line or two would be left, never to be filled in.

It is not, I think, an exaggeration to suggest that the majority of students in our classrooms today find real stimulation in probably no more than 25% of the discussion in the classroom. The rest of it is with fellow students whose capacities are either so much greater or so much less that the teacher's talk with those others misses the broader mark. It takes better admissions policies than most law schools have developed to provide a sufficiently homogeneous group that discussions with any one of the 200 students will be very meaningful to most of the others. The theoretical alternative of finding teachers who can, with infinitely delicate perception, keep the discussion at that level where the largest number will at all times gain the most from it, is not a very real one —

except as Plato attributed reality to ideals which exist only as philosophical concepts.

This problem is acute enough when it is solely or primarily information we are seeking to impart or to develop as a nucleus for independent student thinking. It becomes infinitely harder as we start, or intensify, an exploration of values or an attempt at inculcating skills. The differences between each of 200 men in their standards of values and in their facileness are undoubtedly far greater than the differences in their background and capacities for digesting information. I doubt very much whether either values or skills can be learned except by full-time participation by every student in the instructional process. Values are intimate, delicate things and not something which can be passed from teacher to student in wholesale fashion. I think I can at least make a student see some justification for the values I think I hold if I have an opportunity to learn what standards he already thinks he has. Without that knowledge I expect only to ingrain his predilections more deeply by expressing a seemingly different point of view, never realizing the need for pointing out the little arch which could so easily bridge the seeming chasm between us. As for skills, there seems little question but that, even recognizing Professor Cavers' wise distinction between skills and skillfulness, they must be learned by doing, and not by watching or listening.

To whatever extent there may be substance in this suggestion that the size of the class units affects the effectiveness of our teaching, it means that the implementation of these new plans will necessitate some changes in our present concepts of a workable faculty-student ratio. Using round figures, and loose descriptive terms, a limit of 50 to 75 students in the "informational" course taught primarily on the casebook method would seem to me essential, with no more than 30 or 40 students in the courses where a problem-method approach will be followed to a substantial degree, and perhaps only 15 or 20 students in those courses (such as Legal Writing) where a substantial degree of actual practice or doing is required. This means, if my arithmetic is correct, a ratio of one faculty member to about 20 students, or one to 25 or 30 if it can be assumed that some increase could be made in what is today generally considered a normal teaching "load" for an instructor. It is to be noted that the Law School Association last year declined to set a maximum ratio of 50 students to one faculty member, so that the accepted ratio remains today a forbidding 100 to one. Long live the law school factories, with their assembly lines!

There is time here only to note very briefly the possible ways of meeting this smaller teaching unit problem. One is to increase the size of the law school faculties. The economics of such a sugges-

tion are not so formidable as they seem if special consideration is given the possibilities of an expanded use of teaching-fellows and part-time teachers from the local bar. There is also the possibility of restricting our curricula very largely to required courses. Finally, there is the possibility of our developing admissions programs which will reduce substantially the present wastage in faculty and student man hours and years which results in every case in which a man is failed.

If it be suggested that any program of reducing student-faculty ratios is impractical in that it disregards established university administration attitudes, this simply illustrates again how broadly this whole problem must be approached. The medical schools have managed, some way, to correct these attitudes. What a job we could do if we could persuade the powers that be to invest as much in each law student as they do in each medical student! Is there a basic difference? Or is it only that the world's social needs are so much less tangible than people's demands for physiological ministration? Is the obligation of the university to society in the various fields measured by the spectacular and tangible quality of the research feats which can be performed by the different faculty units?

If the trouble with these questions is that they ignore the crasser facts of university administration, involving institutional survival, then let's move down a level and talk plain dollars and cents. The support of private institutions undoubtedly comes in large measure from the alumni of the graduate schools, with the law school graduates bearing substantially more than their pro rata share. If the records should reveal this assumption as false, the fact remains that it could be made to be true, for on an ability-to-contribute basis the lawyers stand high. Is it not a reasonable assumption that a law student who graduates from a school where he was treated as an individual will be infinitely more anxious to make a tangible contribution to the maintenance of that institution than will one who was never permitted to emerge from the anonymous status of a seat number? There are reasonable grounds for believing that it would take no more than ten years to amortize fully the added expense of allocating 5% of a law school faculty member's time to each of 20 students instead of 2% to each of 50 or 1% to each of 100. That there are parallel considerations in the case of state supported universities may be adequately suggested by simply noting the fact that the majority of state legislators, including the membership of the educational and appropriation committees, are law school graduates.

This is unpleasant talk. But the unpleasant fact is that all of our planning for a fuller and richer system of legal education is likely to prove sterile unless we can in some way arrange for the

individualization of the student-teacher relationship which it demands. It must be part of this project to enlist the necessary support of those charged with administrative responsibility, either upon the basis of the interests of society in this project or upon the basis of a narrower conception of the interests of the university.

These have been random remarks, and too much in the nature of a cataloguing of the obvious. Perhaps it is a mistake to emphasize and possibly even exaggerate the mechanical difficulties of effectuating programs of revised pedagogy which hold so much of promise as do those now at the blue print stage in many of the country's law schools. It would be perhaps the more realistic approach to recognize that they cannot be expected to materialize in their projected form, but that substantial gains will be realized from thinking our job through more clearly and in our reaching even for what we cannot grasp.

There is at the same time no good reason for ignoring the demands which our architectual accomplishments place upon us now as carpenters and plumbers. There is a great deal we can do, regardless of difficulties and even restrictions, if we recognize our purpose as being not to revise curricula and rewrite "course-books," but to increase the stature of the men and women who come to us as students, to treat them as individuals rather than as receptacles. How pleasant it will be if, in this process, we discover that the teacher, too, grows more in the role of counsellor to friends than in that of oracle to audience.