LEGAL EDUCATION AND THE LAW-SCHOOL CURRICULUM*

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Any consideration of the future course of American legal education must proceed from recognition of a fundamental fact: the fact, namely, that the system of legal education which we have already developed in this country, and which stands embodied in the law-schools belonging to this association, represents the most original and unique contribution as yet made by the United States to educational progress in any field. No consideration of possible change or reform can proceed intelligently without basing itself on this foundation of solid achievement; and no consideration of possible change or reform is entitled to hearing unless it involves no impairment or threat of impairment to the efficiency of the structure of legal education which we already possess.

In this existing structure and the ends and purposes which it embodies we are fortunate in having a standard by which to test the promise of proposed reforms. The mere fact that a thing is new and different should give it no title to adoption; rather it should impose a burden of proof that the new thing is more in harmony with the underlying purposes and objectives of our existing legal education than is the established thing for which we are asked to substitute it. What we must ask is whether it is only something new, or whether it is really a better way than the way we are now using for accomplishing the purposes of legal education as we envisage them.

The basic question which therefore emerges at the very outset is the question of what we conceive as the major ends and purposes of legal education. Do we envisage ends or purposes at all, or are we so completely habituated to a routine that we find no room to ask what the routine is for, and feel no need of standards by which to test it? What is it that we are trying

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to do by means of the system of legal education that has been built up? What is its purpose or objective, by reference to which the validity of proposed alterations and new advances can be tested?

As a step toward facing this question it is significant to note an aspect of our existing system on which externally at least much of its effectiveness appears to depend: the fact, namely, that it is a uniform system reproducing itself as nearly as possible in more than seventy schools throughout the country. The history of the improvement of American legal education has been notably the history of this extension of a uniform system and method of teaching and a uniform offering of subjects from one school to another and from one state to another until at present the entire country is embraced within the network of a single educational system. There are doubtless those to whom this ideal of uniformity is repugnant. Certainly in an era like ours when in every direction the world is ramifying into one specialty after another, the ideal of uniformity may well be asked to justify itself. In the field of legal education it can do so on only one ground,—the ground, namely, that persons throughout the entire country who intend to seek and find employment as lawyers will be benefited in some way if during the period of their training they are submitted to substantially the same educational discipline. If this is so, and only if it is so, is it desirable to do as we have been doing and set up a standard type of legal education to serve as a model for law schools in every state.

At first sight, when we regard the condition of legal practice today, it may well be asked whether there is any such uniformity in the business of lawyers, whether to be a lawyer means any such single thing or unitary group of things, as to make desirable or even possible a uniform standardized type of legal education. We all know how many kinds of lawyers there are,—title lawyers, and trust lawyers, and insurance lawyers, and house-attorneys for various kinds of business concerns, and tax lawyers, and corporation lawyers, besides the lawyers who go into court on the civil and criminal sides. An American lawyer's business is, after all, very largely business, with some law thrown in, and what

kind of law is thrown in will depend on the nature of the business. As any particular lawyer's business takes form, whole departments and topics of legal learning pass out of his ken forever. A proposal was therefore made a number of years ago that this diversification of practice should be recognized in legal education, and that law students should definitely start out to prepare themselves to be different kinds of lawyers, at least within certain broad groups. The proposal was called a proposal for a "classified bar." It ultimately went to pieces on the ground that there is after all among the multitude of legal specialties a basic unity,—that the specialties so overlap and interpenetrate that a man cannot become a competent specialist until first of all he is a whole lawyer. It might be added also that at the student stage and even long afterwards a man can rarely anticipate the particular kind of specialty to which he will ultimately become attached and that it is usually determined by accident. In consequence it is the exceptional man who at the student stage is in a position to orient his training in the direction of any particular type of practice.

At this point we come within range of vision of the objective of legal education for which we are seeking,—that objective seems nothing short of starting a man on the way to being a whole lawyer. I hasten to add that we must realize the limitations of the objective as so defined. It has been noted, I hope, that I did not say that the objective of legal education was to *make* a man a complete lawyer, but only to *start him on the way* to being a complete lawyer. We shall have to add furthermore that under conditions of practice today no lawyer ever arrives at this goal of completeness toward which his legal education is supposed to start him. Perhaps it would therefore be better to revise our method of stating the objective of legal training and say that it is not to start a man on the way to being a complete lawyer, but rather to start him on the way to being any variety of lawyer into which accident and opportunity may later convert him. This revised statement obviously narrows the task of legal education by eliminating an impossible ideal of completeness; but still it rests on a fundamental assumption the boldness of which is not

always explicitly recognized,—the assumption, namely, that it is possible to devise a course of legal study which will be equally useful to the student in after life no matter what type or variety of lawyer he may later develop into.

The whole existing structure of American legal education is founded on this bold assumption; and acceptance of the assumption gives us the standpoint we were seeking from which to put questions to existing methods of legal education without challenging the achievement of our system of legal education as a whole. Is the course of study which is now provided with practical uniformity in all the first class law-schools in the country the best which it is possible to devise for the purpose of supplying to the law student the things which he will need, no matter into what type of practice he later finds his way? Naturally this raises a further question: what are the things which a law student needs, no matter into what special kind of practice he will later find his way? Can a law-school supply such things? If it cannot supply all of them, what are the things it can supply?

It should be seen from the way these questions are put that there is at least one thing which a law-school ought not to be asked to supply,—namely, immediate technical competence in the kind of positions into which its graduates will at once step on graduation. It is one of the great achievements of our American law-school education that it has taught the bar and the student not to regard the law-school as a vocational training-school for law-clerkships. Such vocational training would do nothing for the student except fit him for trivial and detailed duties which he will soon work himself out of if he has ability. His law-school training should not be something which will thus be outgrown as soon as he comes to responsible professional stature; rather it should be something which will make him better able to discharge the duties of a responsible position in the profession. For this reason it cannot consist of the technical details with which the young graduate is primarily busied immediately on his entry into practice, and which were long regarded as precisely the things for which law-school training should prepare. A minor amount of such training is inevitable in the law-school; but it is inevitable

not for its own sake, or for the sake of instilling technical proficiency in the student, but for the purpose of acquainting him with what is after all an important and essential element of the legal system and of work at the bar.

In this last statement we come, I believe, on the thing which the law-school can supply to the prospective lawyer that will be of use to him in any type of practice, in any specialty or combination of specialties, into which he may later find his way, and which will be of use to him throughout his career—I mean an initial understanding of the legal system and of the work of the bar. Doubtless this way of putting the objective of a basic legal education may seem to many legal educators guilty of misplaced emphasis. I have emphasized getting *an initial understanding of the legal system;* they would doubtless emphasize acquiring *the habit of legal thinking,* becoming trained in legal methods of thought. The reason why I prefer the former method of statement is that it seems to me more comprehensive, and thus to include the latter, while the latter does not include the former. No lawyer can doubt that there is something which may be described as a legal habit of thought, impossible as it may be to define; a lawyer senses very keenly the lack of it when, for example, it is missing from a widely heralded judicial opinion. No one can doubt that this habit of thought once acquired is useful in every branch and specialty of practice; that in this sense its acquisition by the law student equips him with an essential instrument for whatever work he may later perform as a lawyer, and that in this sense the law-school, in inculcating the method and habit of legal thinking, performs an indispensable function for all who are on their way to be lawyers.

I suggest, however, that those who say that all a law-school can do for its students is to inculcate a habit of legal thought are in danger of taking an over-simple view of what is meant by legal thought. For myself I do not believe that the classroom dialectics of the case system applied indiscriminately to a number of miscellaneous legal topics chosen at random is of itself a sufficient introduction to the technique of legal thinking. It is a peculiarity of legal thought that its methods tend to vary with

different fields of subject-matter to which it is applied. Thus the technique of analysis and reasoning which apply in the law of future interests can be differentiated without over-refinement from those which prevail in the law of torts, and both methods are again different from those which apply in the various fields of public law. The sense of the appropriateness of these different mental approaches and differing methods of analysis and reasoning in different fields of law belongs to what I have called an understanding of the legal system. It would therefore seem that an orientation in the different parts of the system and an understanding of the technique and point of view appropriate to each is an integral part of the process of acquiring what may be called legal habits of thought.

In this connection it seems not out of place to stress a point perhaps not always sufficiently considered in discussing or applying the case method of teaching,—the fact, namely, that the degree of satisfactoriness with which that method is applied depends in great part on the amount of knowledge external to the cases immediately under discussion which is brought to their consideration by students and professor. The satisfactory application of the case-method involves, in other words, more than the evolution of logical categories of analysis from the inner consciousness of the participants in the discussion,—it frequently involves bringing the light of outside information to bear on the situations under discussion. It is from this outside information that fruitful categories of analysis and criticism are supplied rather than from the dialectic subtlety of minds swept and garnished.

If this be so, it would seem that acquisition of information by the student cannot be wholly eliminated or even minimized in framing a law-school curriculum, no matter how much we may stress the element of training in analysis and legal habits of thought. The informational side of legal education has tended to fall into bad odor because it is easy to identify it with the type of teaching which prevails in what are called "cram schools." A little reflection should suggest that this identification is overhasty. Because we do not happen to approve the kind of infor-

mation which is supplied to students in certain schools or of the way in which it is supplied, we should not close our eyes to the essential place which knowledge and information hold in all processes of fruitful thinking. It would seem obvious that a man cannot do much fruitful legal thinking unless he knows a good deal of law, and consequently that one of the things which the law student must do in acquiring legal habits of thought is also to acquire as much knowledge of law as possible.

Obviously the type of learning to which I have just referred is something different from a body of information mechanically put before students with the sole idea of its being immediately and practically useful to them in their early years of practice. What I refer to is information which will enable a student to see more deeply into the processes of legal thinking, to understand more competently how and why law has come to be what it is, to grasp with surer touch the policy and spirit of different departments of law, in short, to view law not in a rule of thumb spirit, but intelligently and understandingly and in the best sense of the word "scientifically". To reach this result the student must, however, definitely set out to get information, and he must be put in the way of getting to know his way about the legal system as a whole.

This problem of introducing the student to the legal system is the problem of the law-school curriculum. If the case method were of itself sufficient to supply the student with all that he needs by way of legal education the variety and subject-matter of courses taken by the student would be altogether immaterial. Many legal educators apparently lean to the view that they are immaterial. On the other hand the development of the law-school curriculum during the past fifty years has recognized the importance of subject-matter. Gradually courses have multiplied, new subjects have been introduced, and an effort has been made to represent every possible field of law by an offering in the catalogue. What has resulted is that if a student desires an introduction to any particular field of law it is there for him to obtain at the price of taking a course. The question, however, may be raised whether the mere multiplication of courses and the mere repre-

sentation of all fields of law in the catalogue will, without more, accomplish the objective of introducing the student to the legal system in the sense in which such an introduction will be of the greatest value to him. We here come to grips with the interesting problem of whether it may not be worth while at the present time to scrutinize the standard curriculum of our American law-schools with a view to a possible modification in a very limited and definite direction.

The multiplication of course-subjects in our law-chool curriculum has reached the point where the student can take only a selection from the total number of courses offered. This means that he must definitely omit certain topics or fields of law from his law-school studies. The result practically everywhere is that the selection which students make is dictated by a directly vocational motive,—the students select courses which they think will provide information immediately useful in practice or useful at least in passing bar examinations. In consequence a certain list of courses tend to monopolize the time of law students throughout the country during the second and third years of their law-school work. These courses lie almost exclusively within the fields of contract and property law,—courses in bills and notes, agency, sales, trusts, suretyship, mortgages, partnership, future interests, wills, and the like—all vitally important and necessary subjects in which no law student should miss the opportunity of becoming oriented during his law-school course. Recognizing, however, the indispensable character of these subjects, the question arises whether, from the standpoint of sound legal education, it is necessary or wise to allow them as at present to practically monopolize the attention of law students, or whether it is desirable and possible to find a way of adjusting their claims to claims of other departments of the law which are now virtually excluded.

From a narrowly vocational standpoint there is no room for doubt that the existing monopoly of the law student's attention by courses of the kind which I have named is fully defensible. That is to say, in these courses the student does pick up a variety of concrete information for which he is more likely to have direct use in practice than he would have for any other information with

which he might be brought into contact. If, therefore, we conceive the function of the law-school as that of supplying the student with information immediately useful, there is no ground for raising any question about the existing situation or for feeling that there is any room for improvement. However, almost the one thing on which legal educators seem agreed is that it should at least not be the primary function of legal education to supply students with information which will be immediately useful to them in practice. They seem agreed that the purpose of legal education must be broader and deeper than this; and if they are right in so thinking, then it would appear that a serious challenge is thrown down by the fact that the bulk of the students' last two years in law-school is expended in work which is elected with an immediately practical objective to the exclusion of their forming even a preliminary acquaintance with other significant branches of the legal system.

It is this fact that there are whole areas of the law with which under the present system the majority of law-school students never even form a bowing acquaintance that causes the problem and the difficulty. There can be no complaint that the student should wish to orient himself in fields of law like bills and notes, agency, sales, future interests, partnership, and the others which I have enumerated. Of course he should; the problem arises because, if he wishes to do this, he must, as matters now stand, give up the opportunity of making an initial acquaintance with such widely different topics as family law, public utilities, taxation, labor law, corporate finance, administrative law, international law, and the whole vexed question of procedure and procedural reform, civil and criminal. Of course, it is not nearly so likely that the young lawyer will be called on to deal in his practice with cases drawn from these latter fields as from the standard commercial subjects. However, this is precisely one of the arguments for introducing him to them during his law-school work, if we do not adopt the narrowly vocational concept of legal education. In other words if the objective of the law-school curriculum is not to cram the student with information available for immediate use in practice, but rather to introduce him to the legal system

as a whole, there would seem every reason why his time should not be monopolized by courses chosen because of their practical subject-matter to the exclusion of other departments of law wherein the problems involved and the method of approach and reasoning differ so importantly from the commercial branches that a lawyer who is trained exclusively in the latter subjects is never likely fully to understand the former. In other words, are we really providing for students that introduction to the law as a whole which is the only sound objective of a legal education if in fact we make it practically impossible for them to obtain, in the course of their training, an introduction to important branches of the law which, without such an introduction, they are never later to understand?

If the view is taken that from the sheer standpoint of available time it is not possible to introduce the law student to the fields of law just mentioned and at the same time permit him to acquire vitally necessary practical knowledge in the fields of contract and property law, a downright dilemma appears presented between what may be called the vocational and the educational attitudes towards legal education. If, however, we are willing for the moment to adopt something approaching the vocational point of view, I believe that it will paradoxically enough solve this dilemma. The vocational point of view insists that students shall take courses like bills and notes, agency, sales, suretyship, etc., because of the utility of such courses for actual practice. This is the reason and excuse for these courses and not their special fitness for training the mind or revealing the basic processes of legal thinking. If this purely practical point of view be sustained, the question at once arises as to whether these courses are not under the existing system permitted to consume a much larger amount of classroom time than they would be entitled to if their dominantly vocational value were definitely recognized as their chief excuse for existence. In other words is it not possible so to compress some of these courses as to leave room to introduce the student to other kinds of subject-matter to which he must be introduced if he is to visualize the system of law as a whole?

On this point I have said in another place: [1]

> "The principal objection to compressing the subject-matter of courses is a pedagogical one connected with the use of the case-method of teaching. This method, if exploited to its full possibilities, requires an ample amount of class-room time to develop a single point, and the total number of points that can be covered in even a full year's course is therefore severely limited. This slowness of progress means that the students are having constant practice in legal analysis. Its justification, in other words, consists in its value as a training exercise in legal habits of thought, which is bought at the price of reducing the amount of law to which a student can be introduced in a given time. The practical question is to determine the point at which this price becomes too high to pay. In other words, one might well ask in the case of a subject like sales whether it would not be advantageous to reduce the total number of points in the course which are developed by full case analysis in order to bring the course within shorter compass, and rely on developing the remaining points by discussion incidental to those points which are developed directly by means of the cases. This is what is to some extent actually done in all courses in view of the fact, . . . that every course-subject contains at least enough material to fill out several courses of a full-year's length. If some of the courses, like sales and bills and notes, for example, now usually given in the second year of the law-school curriculum, were to be compressed in this way into shorter compass it would be possible for the student at the end of his second year to have covered most of the 'indispensable' subjects except two or three, such as corporations and conflict of laws, which would have to be taken in the third year. This would leave a much larger amount of time than at present for the student to distribute in his third year among 'elective' courses."

These electives at present include the various legal topics of a primarily non-commercial and non-property character for which there is at present no room in the student's schedule.

I do not believe that compression in the manner suggested is validly open to the objection that it means lowering the standard of teaching. It is only compression of the same kind which

[1] J. Dickinson, *Making Lawyers* (1929) 8 N. C. L. Rev. 367, at 384.

we already have to practice to bring any topic of law within the limits of a full year's course no less than of a half year's course. To be sure, its successful application would doubtless require skill, but so does every other part of teaching activity. The point of doubt, therefore, seems to me not the difficulty of compression, but rather, whether the effort would be repaid by the result,—whether the new material for which an opening would thus be made in the curriculum is really important enough to justify making the effort of disturbing the curriculum as it stands. On this point there is ground for possible difference of opinion.

No doubt the idea of creating more room in the professional curriculum of the law-school for topics like administrative law, problems of procedural reform, corporation finance, and international law, will seem to many hard-headed lawyers and hard-headed law teachers an unnecessary and impractical sacrifice of the useful to the merely ornamental, of the practical to the purely theoretical. In this connection it is therefore interesting to hark back to an age which may not have been quite so practical as our own, but whose constructive achievements challenge comparison with ours, and to invoke the examples of Blackstone and Kent. Blackstone devoted more than 25 per cent. of his Commentaries to theoretical and public law subjects and Kent devoted almost 30 per cent. to the same topics. One of the valuable results still to be obtained from reading these classic treatises which helped to form so many great lawyers is the feeling that one brings away from them that property law and commercial law are not the whole of law, but are only parts of a system which embraces within its scope all the fundamental problems of human and social relations and of human organization and society. Insofar as we close the shutter to the prospective lawyer on all but the technical, commercial aspects of law we not merely degrade law from a profession into a mere means of livelihood, but we also impair the vocational fitness of coming generations of lawyers to deal with the largest and most important problems which under our system of government devolve upon the bar. Thus at present it is probably true in my own field of constitutional law that there is more misinformation and unsound thinking

about constitutional questions among members of the bar as a class than among almost any other class in the community. Not merely has the average lawyer never obtained a grasp of the nature of the issues and methods of reasoning appropriate to that field of jurisprudence, but he constantly intrudes into the consideration of constitutional questions attitudes and habits of thought derived from altogether different departments of the law; and this in spite of, or perhaps because of, the fact that constitutional law is the single public-law subject which the curriculum makes it possible for most students to study in law-school.

It is not, however, primarily in the interest of public-law subjects, important as those may be, that consideration is here proposed of a possible modification of the curriculum. Perhaps even more important is the desirability of bringing the student into contact with other non-commercial fields of law—with labor law, with legislation under the police power, and most importantly with fundamental problems of procedure and procedural reform which make it necessary for him to assume a critical, legislative attitude toward the law, and view it from an independent vantage point as a social instrumentality,—not merely as something to be learned, and used as learned, but as something to be analyzed and reflected on and weighed and judged. If it be said that this is not the attitude toward law which should be inculcated in law students, the answer is that then our whole system of legal education has been pointed in the wrong direction during the fruitful half century just past, and that we should as rapidly as possible convert our law-schools into cram courses for bar examinations. If we have been right in the direction our legal education has been taking during the last fifty years, and if the sound objective of law-school training is to give future lawyers an education rather than merely fill them with vocational information, then it would seem that the time has come for room to be made for a return to a broader type of legal education than the present set-up of the curriculum permits.

In any proposal for tinkering with the curriculum, however, it is not merely legitimate—it is essential—to inquire how much havoc the tinkering will work in the established situation. The cur-

riculum is in and of itself a large part of what a law-school is, and to that extent the more or less standardized curriculum at present prevailing in the law-schools of this country is an important constituent element of our existing system of legal education. It is therefore well to recur to the *caveat* which I filed at the beginning of this paper,—namely that no consideration of reform should be given serious hearing unless it involves no threat of impairment to the efficient structure of legal education which is already functioning. Can it be said that such an alteration in the curriculum as we have been considering would involve an impairment or disturbance in the existing system?

I cannot see that anything in the nature even of a disturbance would be involved. Rather, there would be further advance in a direction in which development has already proceeded. Most law-schools already offer all the courses the desirability of which the proposal stresses. There is, therefore, no question of the elaboration and introduction of new courses. The aim is simply to broaden access to what is already available. So far as there would be any practical difficulty, it would be the difficulty involved in cutting down and compressing essential commercial and property subjects. This would, of course, require the greatest skill and care, but it is difficult to see anything radical or subversive in it unless we take the view that there is a divine right of every topic into which the law has happened to be divided to occupy exactly one full-year two-hour course in the law-school curriculum. If this rapidly hardening dogma is shaken off there would seem no obstacle in the way of adapting the teaching of a given topic to the amount of time to which the topic seems fairly entitled in comparison with other topics.

There is another standpoint from which the proposed modification seems to satisfy the test of eligibility. At the commencement of this paper I called attention to the fact that one of the basic elements in the success and effectiveness of our present American system of legal education is its uniformity throughout the country,—the fact that the same system prevails from school to school and thus forms the basis of a common educational experience, creating a common *lingua franca* between educated lawyers

everywhere. My own belief is that this is as it should be. The very diversity between the multiple types of experience and practice at the bar, so far from calling for corresponding diversity during the period of legal education, seems rather to impose upon the educational process the duty of supplying whatever unity, whatever cohesiveness, the profession is to have. From this point of view anything which would tend to disrupt and diversify and specialize into compartments the legal education of prospective lawyers would be a development to be deplored. It is in this undesirable direction that the present practice of offering more law-school courses than a student can take and permitting freedom of election among them is in danger of leading. Personally I regard as wholly sound the instinctive influx of the great majority of law students into the same courses. I am inclined to think it would be unfortunate if there were much diversity between the courses taken by different students. It would tend to destroy what should be the basic unity of the lawyer's outlook on the profession and on the legal system as a whole. The danger that thus lurks in a free election of courses would be lessened by a modification of the curriculum which would create room for a wider variety of courses for all students. While opportunity would exist for particular students to orient their work during the last year of law-school in special directions, this would not be done, as at present, at the cost of slighting the essential vocational courses which the great majority of students take. At the same time it would open to this great majority the opportunity, which they do not now have, of making the acquaintance of fields of law to which the profession needs more than ever to be introduced. The result would therefore be to redress the balance in the direction of more uniform training for all students, which is in danger of being disturbed if educational progress takes the line, as it seems otherwise likely to do, of encouraging an ever wider freedom of election among an ever enlarging offering of courses.

Furthermore, the modification is one which need in no respect disturb the uniformity of curriculum at present existing between different schools. It is a modification which, if it should

prove its feasibility in practice, would be capable of being adopted without difficulty by law-schools generally. It calls for no diversification between schools, with resulting specialization by one school in one direction and by another school in a different direction. It would thus permit the continued maintenance of the standardized type of legal education to which we have won our way after so much difficulty, and which, whatever may be its disadvantages, is the surest bulwark against the danger of declining standards and the surest guarantee of a solid foundation from which to project future progress.

It would, of course, hardly be wise for even so relatively simple a modification in existing practice to be undertaken at one and the same time by any considerable number of schools,—what has been suggested is merely that, if the modification should be regarded as having justified itself, it is of a kind which could be generally adopted. Whether or not it will be thought to have so justified itself as to become entitled to adoption on a wider scale will depend on its having been first put somewhere into practice experimentally. What we have done in the past development of American legal education has been to wisely follow a successful model. If in the present matter we would wish to act with traditional caution, the course indicated would be for a law-school which was willing to experiment conservatively, and which was in a position to disregard more radical schemes of reform on the one hand and on the other hand the pressure from the bar for more purely vocationalized training, to revise its curriculum in the direction of compressing into narrower compass that part of the second and third year work which is now devoted to topics of commercial and property law, and to fill in the openings thus created with work in other departments of law which would thus be made available to the bulk of the student body. Inconsiderable as the change might appear to be, I believe its inauguration would mark a significant epoch in the history of American legal education.