

SPECIALIZATION IN THE LAW SCHOOL CURRICULUM

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I shall make no attempt, within the limits of this short paper,¹ to draft a plan for a specialized curriculum, nor even to answer dogmatically the question—should the law curriculum be specialized or should it not? The subject is a very large one, and it has not yet been debated to the point where either attempt can usefully be made. I shall rather confine myself to an effort to define the problem and to suggest the considerations upon which it seems to me the solution must depend.²

“The Law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties.” So said John Chipman Gray in his now classic lectures, “The Nature and Sources of the Law”.³ It is possible to formulate a still more pragmatic definition, *i. e.*, that law is that system of ideas about man’s relation to his neighbor and to government by which any person exercising judicial power over another is, at any given moment, actually controlled. Whatever may be the faults of this definition—and we shall come to them in a moment—it is, I think, the only definition which corresponds to any discoverable fact. To the practical trial lawyer the law is whatever his honor can be induced to make it; to the office lawyer the law is whatever the latest decision of the court of last resort lays down.

It is evident, however, that this definition of law is self-destructive, for no two men ever have quite the same system of ideas about man’s relations to his neighbor and to government, nor does one man ever have precisely the same ideas about these matters on any two successive days. For a community to base its conduct on the assumption that law is whatever anyone with power enough sees fit to make it is to end either in tyranny or anarchy, and the abandonment of the very concepts of government and of judicial power. Why is it that a definition which correctly states the fact is unworkable in practice? How reconcile the fact that our legal rights and wrongs are actually determined by the variable judgments of individuals with the necessity of conducting ourselves as if this were not the case? The answer seems to be that law is not merely a state of facts, but is also an ideal; and

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² For a much more thorough and scholarly discussion of the problems touched on in this paper, see Turner, *Changing Objectives in Legal Education* (1931) 40 YALE L. J. 576.

³ GRAY, THE NATURE AND SOURCES OF THE LAW (1909) § 191.

that it is by the pursuit of that ideal that civilization is maintained. There persists in man from generation to generation the dream of a system of ideas about his relations to his neighbor and to government so uniform and impartial that every citizen may find therein his safety, so clear and simple that it can readily be understood by every one, so just and flexible that it will always correspond exactly to the needs of the community which it controls. The effort to keep the system of ideas which actually controls judicial action in harmony with this ideal system constitutes the lawyer's occupation; the great and ever-recurring difficulties of that occupation are the justification for a specialized profession of the law.

The ideal law combines too many discordant elements to be wholly capable of realization. But it can be approached in practice with greater or less closeness; and the modern industrial community has evolved a very complex mechanism for the purpose of bringing the law in action as close to the ideal as may be. In order that the law may approximate to uniformity it selects its judges from among the older members of a specially trained profession; it compels them to do their work in the light of public scrutiny; and it provides a system of appeals from their decisions to a single appellate tribunal whose mind it further stabilizes by long terms of office, an environment as tranquil as it knows how to make it, and a printed and published record of its every act. To make the law generally known, or at least readily accessible, it has evolved a class of professional legal counsellors who make it their business to observe the operation of the government, find out as well as they can the system of ideas on which it functions, and give advice to all who ask it as to how the judiciary would probably regard their conduct either past, present, or proposed. And in order that the law may be adapted to the current needs of the community, it elects legislatures to ascertain and formulate the changes demanded by the laity, and—what is perhaps still more important—a class of advocates by whom the demands of everyone who either asserts or denies the existence of a grievance are constantly dinned into the judiciary's ears. If we may compare the judiciary to a brain, or at least to a subordinate nerve center, and the rest of the community to a body, it is evident that the legal profession's function is to supply a system of afferent and efferent nerves, the legislature and the advocates informing the judiciary what is demanded of it, and the legal counselor transmitting to the community the judiciary's response. And since the judiciary is not recruited from the youth directly, but from the older members of the practising profession, the function of legal education may be stated as, *first*, to fit young men to fill subordinate positions in this nerve system; and *second*, to cultivate in them such capacities as will enable them to fill successfully positions of increasing responsibility at the bar and perhaps in the judiciary itself.

What intellectual equipment does a young man need in order to fill a subordinate position at the bar effectively and to rise to increased responsibility as opportunity affords? *First* and always, of course, he must have a thorough grasp of the main general ideas about man's relation to his neighbor and to government which are common to all the members of the judiciary and by which their official action is controlled. *Second*, since he is to act as messenger and interpreter between the judiciary and the laity, he needs to acquire that facility in apprehending and expressing thought which characterizes good middlemen of every kind. *Third*, if he is to become effective as an advocate, he must thoroughly understand procedure, that is, he must have a clear idea of the methods by which, and the conditions under which, judicial business is carried on. *Fourth*, if he is to become either a good advocate or a wise and safe adviser he must know something about the industrial, social, and business problems with which his clients are confronted and to which, as a lawyer, he will be asked to apply the law. *Fifth*, if he aspires to achieve leadership—and the choice of law as a profession is still some evidence of that ambition—his education should give him the foundations of a philosophy of human society and of life.

This, truly, is a large order to be filled in three short years of teaching. Manifestly, no school can supply it all. The wisdom of specialization in the law curriculum turns upon two questions: *First*, what parts of this order are we now supplying? *Second*, would any plan of specialization enable us to supply either more or better selected parts?

The answer to the question what parts of this order are we now supplying seems to me to be reasonably clear. We are doing a good job at supplying the first two items and a poor one at supplying the last three. The ordinary three-year law curriculum gives the student a very fair acquaintance with the ideas about man's relation to his neighbor and to government which now control the judiciary's action—probably as good an acquaintance as the conditions of an academic environment permit. The case system of instruction, at least where the school is a good-sized one, gives the student a facility in apprehending and expressing unfamiliar notions which—if it cannot be called high by any absolute standard—is at least high relative to that of the community he is to serve. But it does not, I think, involve any serious exaggeration to say that most of our students, on graduation, know little or nothing about how to conduct a lawsuit; that most of them have only the haziest ideas of the industrial, economic, and business problems of their prospective clients; and that if more than a few lucky ones have laid the foundations of a philosophy of human life and of society it is in spite, rather than because, of the legal instruction they have received. The case for a specialized curriculum rests, I take it, on the belief that thereby these defects in legal training can, to some extent at least, be remedied; that if the student's

attention is focused on a narrow group of legal problems a better grasp of these problems in all their bearings can be achieved. The arguments against specialization are that the three-year curriculum is already full to overflowing, that any specialized training we can give will be at the expense of that broad grasp of the whole legal system which should be the common heritage of every lawyer, that you can't teach practical wisdom in a law school anyway, and that students do not know enough about their futures to select a specialty wisely in any case. Before plunging into debate upon these issues or attempting to weigh the conflicting arguments, we should first pause long enough to get a clear idea of just what we are now doing with the three years our students trust us to spend for them, and just what changes the idea of specialization in the curriculum implies.

The curriculum now prevailing in the great majority of law schools is made by cutting the law into some twenty or thirty pieces entitled courses, and arranging these in a sequence based roughly on their fundamental character, their difficulty, and their practical importance in the affairs of life. The size and shape of the different pieces has not, as a rule, been planned by anybody; like the well-known Topsy, they "just grewed". Some of them, like property and contracts, reflect popular notions about man's fundamental relations to his neighbor. Some, like torts, reflect professorial efforts to achieve a synthesis. Some, like equity, reflect what was once the judicial organization of Great Britain. Some, like taxation, security transactions, or insurance, reflect a demand for instruction in some specialty. And some, like quasi-contracts, reflect the scientific curiosity which occasionally leads a brilliant lawyer to seek for truth outside the trodden path. The teacher of law, when he starts out in his profession, is given one or two of these accidentally determined courses and told to teach them, which means to him that he must learn as fast as possible everything that anyone else has ever said about them, and then add to this learning some fresh critical comment of his own. Having done this, and thus established himself as a person competent to teach his subjects, he is naturally reluctant seriously to undertake a new one because this would involve the necessity of mastering a whole new mass of learning and sacrificing the hard-earned opportunity to do some original thinking for himself. His ambition and creative talent therefore lead him to assert himself through the medium of his course. He publishes essays in law reviews disputing the dogmas of his predecessors, re-argues the merits of exceptional cases, and publishes case-books in which the boundaries of his subject and the number of problems dealt with in it are periodically enlarged. His reputation has, by this time, become identified with his subject, and his course in it cannot now be dispensed with nor can its content be cut down. If, by good luck, industry, or imagination, he has learned something about the social, industrial, or business problems most closely

related to his specialty, this knowledge cannot be fully imparted to his students, because to do so would involve crowding out of the course some legal doctrine which he teaches, and which the students must be given at any cost. If some ever-recurrent problem of human intercourse and judicial administration is dealt with in his course and in two others also—each time with a different verbiage and probably with a different doctrinal result—it cannot be cut out of any of them because that would spoil the symmetry of the course. The result of this process in the aggregate is a steady proliferation of legal learning and legal doctrine, a gradual increase in the number of courses and in the number of problems dealt with in each one of them, a steady increase in the burden placed both on the teacher and the student, and the gradual loss amidst the drifting clouds of detail and of doctrine of that vision of a uniform, intelligible, and righteous jurisprudence the perpetuation of which is the chief justification for university instruction in the law. In short, although we do not offer a specialized curriculum to our students, we already have specialized teachers each of whom strives to impart to his students as much of his special learning as he can. We already do more than teach the fundamentals—we go a long way into the more technical details. The question, then, is not so much shall we specialize our teaching, as are we now specializing it in the best and most productive way? Is it not time to stop and reflect a little upon what the true nature and purpose of specialized professional education is?

I venture at this point to claim the advocate's privilege of calling an expert witness to matters not within the everyday experience of the court. In his contribution to "Living Philosophies", Mr. Lewis Mumford says:⁴

"Instead of the one-sided practical activity fostered by the ideals of the utilitarians, and abetted by our modern technology, with its intense specialization, I believe in a rounded, symmetrical development of both the human personality and the community itself. . . . That specialization leads inevitably to efficiency is a specious argument; for as there is, in Ruskin's words, no wealth but life, so there is no efficiency except that which furthers life. Moreover, this argument takes no account of the mountains of useless arid work that are accumulated under our present habit of specialization; and it gives to this practice the sole credit for gains that are due to quite another technique, namely, cooperative intercourse and association. The metaphysical case against specialization is even more overwhelming. We live in a world where no single event exists by itself; but, on the contrary, where every event is organically conditioned by its environment. If one attempts to deal with any little segment in isolation, one is dealing with a temporary abstraction. One begins, indeed, to learn a little about the things that are closest to one's interest only when one has traced out their interrelationships with that which may, apparently, lie far beyond."

⁴SIMON AND SCHUSTER, *LIVING PHILOSOPHIES* (1931) 215.

In this short passage, I think, lies the key to our whole problem. Civilization results from the division of labor among men engaged in cooperative intercourse and association, and the specialization which it demands is not specialization of the understanding—which insulates the individual from his fellows and ends in the dissolution of society—but rather specialization of function and of skill. Since law is one of the means by which society is held together and the cooperation of its members rendered possible, it is essential that the education of every lawyer include a survey of our principal social institutions and a thorough grounding in the practical application to a large variety of situations of those basic principles of property, contract, and individual responsibility and liberty upon which our western society is built. I venture to assert—although it would obviously require many years to prove it—that this essential task can be done better in two years of instruction than it is now done in three. All that is necessary is a willingness to examine the contents of our present confused congeries of courses, cull out from each one of them what is of general, as distinguished from special and technical application, and rearrange the material so selected according to some orderly and coherent plan. There would then remain from each course a residue of more specialized material which would furnish a foundation for offering a wide choice of specialized courses of instruction in the third year. These specialized courses would not be aimed at the inculcation of specific bodies of special doctrine but to fitting the student to work more effectively—and ultimately to achieve leadership—in some chosen line of work. They would seek, in short, not to turn out specialists who know something that is unknown to others, but experts who can do something that other people cannot do.

Let me indicate briefly what the titles and contents of some of these specialized courses might be.

The Conduct of Litigation: A year devoted to the comparative study of different systems of pleading and procedure, the practical applications of the law of evidence, the division of function between court and jury and between court and referee, and the operation of different methods of appellate review. Can it be doubted that specialized instruction of this sort, if continued for one generation, would raise the standards of advocacy and of the administration of justice in every part of the United States?

Commercial Law: A year devoted to the study of the legal mechanism by which our day-to-day economic life is regulated, including a correlated study of negotiable paper, banking, security transactions, merchandise insurance, agency, sales, and manufacturer's responsibility for his product. The material for such a course is already available in a large number of law schools. Would not its correlation in the manner suggested tend to make the daily operation of our commercial and economic system far less of a popular mystery than it now is?

Property Law: A year devoted to the correlated study of our more fixed and permanent legal relations, the bony structure of society, so to speak. This would include a study of the large industrial corporation, the holding company, the trust company, express trusts, future interests, life insurance, inheritance taxation, and connected matters. The material for such a specialized course is already available in abundance—the will to organize and give it is all we lack.

Public Law: The legal theory and structure of our municipal, state, and federal governments from top to bottom, including taxation, municipal corporations, constitutional and administrative law. Here, surely, is a field large enough for any ambitious teacher looking for new worlds.

Disciplinary Law: The whole range of crime from murder to passing a red light on a corner, police methods, methods of trial, methods of punishment, the reform of the criminal, the whole science of criminology and penology. A beginning has been made already in the unification of this field, but a lifetime's labor is still waiting to be done.

It should be emphasized that these specializations, although they are narrow in the sense that each aims to fit the student to discharge a special function, are yet broad in the sense that each requires him to study that function in its relation to the whole structure of society and to the purpose of human living as a whole. No one, I think, could devote a whole year to the study of any of these specialties without strengthening his grasp on the principles which govern all human relations under a regime of individual responsibility and liberty or laying the foundations for his own permanent philosophy both of society and of life. And because each of these specializations is related to some special function into which the practicing bar already shows some tendency to divide, a student could select his specialty—as now he cannot—with some intelligent view to the immediate demand for his services and to the career to which it might lead.

Is such a specialized curriculum as this a practical possibility? I have already suggested that all the legal principles which are really fundamental to the conduct of law practice can be compressed into a two-year curriculum, with a gain in the effectiveness of instruction, whenever an organized effort is directed to that end. Are the teachers able to teach such broad functional specialties as those just indicated in the manner in which they should be taught? Here again the answer is affirmative. All that is necessary is to pool the resources which we have. All over the country are men with specialized knowledge of various aspects of the social sciences, knowledge acquired with great pains and labor, of which they do not feel able to make any adequately fruitful use. It needs only to correlate and organize this learning to make possible many of the specialized courses which I have supposed. Many universities have economists and lawyers enough upon their faculties

to offer, after a year or two of planning, excellent courses in the specialties of commercial law and property law which I have pointed out. Many could offer excellent courses on public law through the cooperation of their government departments with the law school. The specialized courses on criminal law and the conduct of litigation would be more difficult, because we as lawyers have so long neglected the cultivation of what should be our own characteristic fields. But these offer promising fields for teachers who want to do something significant, and escape from repetitive routine. And the enterprise would not be interesting if it were too easy. The lifting of our profession from its present position of upper servant to business and political ambition, and its restoration to its rightful place as the guardian of justice between citizens in every aspect of their mutual and complex relations is a task large enough to absorb the energies of a whole generation of law teachers and great enough in its potential consequences to justify any effort it may involve. The time has passed when the Anglo-American legal system of ordered individual initiative could boast itself the acknowledged leader of all the legal systems of the world. Today it is confronted with competing legal systems, some of them founded on radically different theories of society, confident, aggressive, challenging its supremacy on every hand. At the same time it seems to have lost much of its former grip on its own fundamental principles and its confidence in itself. The American lawyer's present task is nothing less than the recreation of those principles in terms which will make them applicable to twentieth century conditions and bringing them into effective application to all the problems which lawyers have to deal with, and under all the conditions in which law practice is carried on. In this task, law teachers can, if they will, play a major part. If we approach this task in the same spirit of creative effort in which our fathers laid the foundation of the nation, cheerfully departing from the habits of the past while yet drawing on it for the rich resources which it has to give us, we shall not fail.