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Getting the Law School Down to Where the World Is

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GETTING THE LAW SCHOOL DOWN TO WHERE THE WORLD IS

Legal education in the United States today, at least when judged by outward manifestations, is the healthiest it has ever been. There are more schools with more resources, larger and better faculties, and more and better students. Yet inwardly legal education, like America itself, is puzzled and uncertain about its present and its future.

What are the attributes of a good lawyer? How should a curriculum be structured to teach those attributes that are best taught in an educational setting, as distinguished from the apprenticeship experience of the initial years of legal employment? And to what extent should the law school be a research institution producing new knowledge about law and legal institutions, as distinct from a professional school that is vocationally oriented?

These questions bring to light two current trends in legal education—its outreach toward the university and toward the profession. In the past, law schools, even if part of a university, were isolated from their academic counterparts almost as if a moat surrounded the law school. The law school was apart, its curriculum was self-contained and its students had little to do with students elsewhere in the university. The faculty's contact with colleagues in other units was generally limited to social contact in the faculty club or the swimming pool. Indeed, legal education was often premised on the notion that "you should forget everything you learned before you came here; we're starting from scratch."

This isolation of the law school from the rest of the university has been breaking down gradually for many years, in some schools earlier and more extensively than in others. The desirability of this movement toward other branches of the university should be readily apparent.

Law is not an isolated discipline but a practical art that connects with every field of human endeavor. Because it deals with everything that mankind does as an organized society, it necessarily embraces philosophy, history, economics, psychology and technology.

The law graduate today needs a solid foundation in fundamental skills of legal analysis and legal reasoning. Basic information about legal institutions and concepts—a substantive and procedural map of the legal universe—is also essential. In addition, the law graduate should be an intellectually curious person who has a broad perspective on the possibilities and limits of human life in organized communities.

Legal education should nurture the capacity to learn on one's own and to deal confidently with other professionals who advance claims of expertise in the solution of social problems. In dealing with issues at the knife-edge of social change, the well-educated law graduate should be assisted by knowledge of, and

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ability to utilize, the shared values and wisdom of mankind's humanistic tradition.

The world is complex, and broad training is necessary to deal with its complexities. Lawyers today, whether engaged in solo practice in small communities or in large private or public offices, need to understand the operation of bureaucratic institutions, modern techniques of amassing and using data and the various methods of problem solving and dispute resolution. Dealing with government regulators, handling expert witnesses, negotiating in the corridors of power—these skills are central to the work of the modern lawyer, who must also be prepared for the more traditional arts of drafting wills, contracts and deeds.

Education neither begins nor ends at law school. It builds on what came before and, if done well on solid ground, results in persons capable of educating themselves during their ensuing professional careers—persons whose vigorous intellects can imaginatively adapt the wisdom and practice of the past to areas and problems that today can be only dimly foreseen.

OUTREACH TOWARD THE LEGAL PROFESSION

Legal education is becoming more intellectual; it is also becoming more practical. It is reaching out more and more toward the legal profession. When I reflect on my own legal education only twenty years ago, I am amazed at how divorced it was from what lawyers do in counseling, negotiating, drafting and trying cases. The actual operation of legal institutions other than appellate courts, especially the Supreme Court of the United States, rarely intruded into a curriculum that was largely abstract, doctrinal and theoretical.

While the law curriculum still stresses powers of analysis and continues to teach basic theory and concepts, it reflects increasing concern on the part of law teachers with "law in action"—the development and imparting of new knowledge by comparing the day-to-day operation of legal institutions with their theoretical role. This development, coupled with the growth of clinical legal education discussed below, has enriched the law curriculum immensely.

Law schools now place far more emphasis than in the past on skills other than those of case analysis. Fact gathering, drafting, interviewing, counseling and litigating have been incorporated into the curriculum, and greater efforts are made to put knowledge to work, that is, to make it operational. It is one thing, for example, to recite a subtlety of the hearsay rule and quite another to recognize its application in the hurly-burly of a trial and to make a proper objection.

True understanding of any art or craft requires not only theoretical knowledge but also the ability to put ideas to work in a professional context. This outreach to the profession in the form of a broader conception of the skills, information and attitudes that should be taught in law school also has the effect of giving dimension, life and reality to issues of professional responsibility. These enjoy greater prominence in legal education than ever before.

This article is based on Dean Cramton's 1974-75 Annual Report.

THE CASE METHOD REMAINS

The basic technique of legal education has proved remarkably durable. The case method of instruction, usually in a "Socratic" question-and-answer format with a large class, has dominated law teaching since Langdell pioneered it nearly a century ago. The reasons for the longevity and popularity of the case method are several: its pedagogical effectiveness, particularly in comparison to lectures; its usefulness even in large classes, and thus its low cost; and, perhaps most important, its adaptability to differing intellectual currents and differing conceptions of the law.

Recent emphasis on the lawyer's diverse roles, however, is leading to a major change. Many law teachers are now seeking to train students in skills other than those involved in case analysis. Most schools are providing "role experiences" in clinical programs or simulated practice situations, forms of training designed to develop capabilities other than case analysis. Two of the most important concepts in current thinking about the law curriculum arise out of emphasis on broad-ranging skills training and on adaption to different professional roles.

The case method of instruction, originally conceived as "clinical" because it exposed students to the "living law" rather than abstract theory, is facing a challenge today from clinical methods of instruction. This revival and improvement of ancient methods of training lawyers in the law office now offers legal education the opportunity to achieve a more perfect balance between practicing skills and analyzing cases.

The educational transition from law student to lawyer should encompass not only required skills and substantive knowledge but also the more complex dimensions of emotional reaction, ethical behavior and leadership capabilities. Today we have provocative but inconclusive findings suggesting that the law schools are doing an incomplete job of preparing prospective lawyers. Some recent law graduates report a kind of "reality shock" on entering practice, which presumably reflects a gap between their formal education and the demands of actual law practice.

The formal and analytical training of law school has not prepared them for important aspects of the roles a lawyer must perform, and their self-image suffers as they are forced to confront their own ignorance and confusion before clients, employers and friends. Clinical education offers opportunities to overcome these deficiencies.

IS CLINICAL LEGAL EDUCATION NEEDED?

A number of objections are commonly voiced about clinical legal education. One is that participation in the handling of cases teaches only skills or knowledge that can be easily and efficiently acquired during the early years of practice.

Sometimes this argument takes the form of denigrating the value or intellectual substance of the skills and knowledge involved; on other occasions it is a more sophisticated argument that the limited resources of law school are best employed in

imparting skills and knowledge that cannot be easily acquired during the apprenticeship years. No effort is usually made to consider the nature and adequacy of apprenticeship experiences to which law graduates are now exposed, and arguments of this character are often premised on caricatures of clinical training (e.g., learning on whom to serve papers and where the courthouse is).

A second objection to clinical education is that it diverts educational resources to ideological and social purposes. There is a fear that the clinical program will have a bias because its clients normally are drawn from one segment of society—the poor—and that the service objectives will conflict with educational goals. While there are problems in clinical programs that are limited to the provision of legal aid in civil cases to indigents and are manned by zealots, these limitations are neither necessary nor inherent.

Moreover, the service function of a clinical program need not be in conflict with the educational mission. A private law school should not engage in a clinical program for the purpose of providing service to indigents; that is a diversion of limited educational resources to improper purposes. But the fact that service is incidentally provided by a program designed to serve educational objectives is a plus rather than a minus. Thus I believe that the justification for clinical education must be made on educational grounds.

A third objection to clinical education is that it may displace or interfere with traditional instruction in large classes or small seminars by siphoning off students or limiting the number of traditional courses to which a student will be exposed. Given the limitations on coverage that now exist and the modest level of student interest and involvement in some second- and third-year courses, this objection is not persuasive.

We do not prevent students from concentrating their course elections in a particular area, even if that means a tendency toward "perspective" rather than "bread and butter" courses, or vice versa. But wholly apart from these difficulties, the traditionalism of law students and their often overzealous desire to be prepared on bar examination subjects are likely to assure that basic courses are well attended.

A fourth objection to clinical education is its cost, which is said to be much greater than traditional methods of instruction. On this point the recent work of Peter Swords of Columbia is persuasive. Swords demonstrates that, although clinical education is more expensive than large-class, "Socratic" teaching, its costs are roughly equivalent to the small-seminar instruction heavily featured during the second and third years at the better law schools.

He concludes that any school that can afford a seminar program can afford a clinical program and that the choices must be made on educational rather than economic grounds. I fully agree, although the problem with any new program is that it must compete for new resources since existing faculty and staff can only rarely be redeployed to new fields or methods of instruction.

A fifth objection to clinical education, and the one I think is the most serious, rests upon a doubt that it contains a sufficient intellectual component. Individual cases may present difficult and challenging problems, particularly when they have the novelty and freshness of the young lawyer's initial case; but is there a sufficient opportunity to generalize on these experiences and to develop an understanding and mastery of knowledge, skills and competencies that are vital to a lawyer's training (and best taught in law school rather than during the initial years of practice)?

There is great force to the view that learning by doing reinforces and motivates other forms of learning. An imaginative and skillful clinical teacher in a major law school should not be viewed as a technician or a nuts-and-bolts person but as an intellectual who can distill and synthesize experience into concepts, theories and new knowledge.

The affirmative case for clinical education rests in large part on the interest, excitement and power of learning that involves the student's emotions and requires that the student make knowledge operational. It is one thing to have a cognitive perception of an idea and quite another to put it to work. And the excitement that future professionals get out of putting themselves in a professional role—after all, that is why they came to law school—not only advances understanding of that professional role, and thus acculturation as a lawyer, but stimulates self-teaching that may spread to other courses in the curriculum.

We are all familiar with the "walking wounded" of law school—highly qualified students who put their utmost effort into the competitive struggle of the first year and "fail" in their own eyes because they did not achieve high grades or law review, who are bored or alienated by the repetition and lack of challenge of some large-class instruction, and whose minds and energies are never again engaged as they drift through the remainder of law school.

A good clinical program offers the possibility of reinvigorating the intellectual involvement in law school of such students; to the extent that it does so, it is an invaluable addition to the law curriculum. Clinical education, in the broad sense used here, encompasses not only new types of skills training but such old ones as trial advocacy courses, moot court, and law review research and writing experiences.

A MODEL CLINICAL PROGRAM

What would a model clinical program look like? I suggest, with great tentativeness, the following principles and structure. Clinical legal education must be highly structured, well supervised, and integrated with the rest of the law curriculum. I do not envision clinical education as an add-on that comes late in a student's law school experience, has little relation to the majority of the student's work, and is taught by individuals without qualifications sufficient for regular faculty appointments.

Indeed, it is my belief that the development and evolution of clinical teaching, with its opportunities

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Nevertheless, even armed with accreditation reports demonstrating great need, legal educators may be reluctant to engage in lobbying efforts. Many academics seem to view lobbying as a rather vulgar occupation. And there is the presumption among faculty members (voiced frequently enough in this magazine) that law professors know what is best for legal education; there is a certain amount of disdain for practitioners and others who presume to criticize law school education; and the implication often is that professors ought to be *approached* for consultation, not expected to go out to present their case.

Such attitudes are dangerous and have to be overcome. Lobbying is, after all, an organized form of expressing public needs to legislators; rightly conducted, it is effective, necessary and proper.

And law faculty and administrators must recognize that they are not the only persons who feel they should have a say in the operation of legal education—and who have a legitimate interest in what happens in law schools. Judges, practitioners and organized bar groups are making greater demands on legal education. Consumer groups want a voice in how lawyers are trained. Students have opinions and ideas, some of which get listened to and implemented.

It is clear that legal education is no longer (if it ever was) the private reserve of the law professors. Now, faced with growing demands and responsibilities, it is high time for legal educators to act in their own self-interest as well as with a large measure of considered altruism on behalf of the bar and the public. They are in a unique position to guide the future of legal education. To fail to do so means certain isolation from the outside forces that already wield influence over the law schools and who use public persuasion—and lobbying—as major tools.

The danger of inertia is that law schools may jeopardize their autonomy. They may be taken over and dictated to by those forces that see themselves as also having a stake in law school education—and whose only advantage over professional legal educators is that they were motivated enough to act.

ALL IS EXCUSED

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our time seem to be running toward a no-fault guilt-free society. One might say the virtues of responsible choice, paying the penalty, taking the consequences all appear at low ebb today.

On the rising tide are the claims of the amnesty outlook and the pardonable offenders. Having witnessed myself the special treatment of public figures like Richard M. Nixon, John N. Mitchell, Lieut. William L. Calley Jr. and numerous unindicted Watergate coconspirators, I can understand—although scarcely condone—my students' reaction to the guilty leaders of an earlier time.

Do I overinterpret when I surmise that they were only reading into their understanding of Nazi Germany some of their own current preoccupations, cynicisms, fatalisms? At any rate I believe now my course became for some students a kind of projection screen for their own moral struggles and dilemmas.

Some day soon I'll be teaching the same course again. But not in the same way. Next time I hope to stress more strongly my own belief in the contingencies, the open-endedness of history. Somehow I have got to convey the meaning of moral decisions and their relations to significant outcomes. Most important, I want to point out that single acts of individuals and strong stands of institutions at an early date do make a difference in the long run.

This is my next assignment. Now I'm through teaching no-fault history.

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for an operational as well as cognitive exploration of basic lawyer skills and professional roles, requires a more talented and innovative teacher than the more structured and familiar case-class teaching.

These principles have several implications for the design of a clinical program.

First, clinical experiences should come very early in the law school experience and be fully integrated with the remainder of the curriculum.

Second, while certain clinical experiences should be required of all students, a variety of clinical opportunities should be available to advanced students on an elective basis, just as advanced seminars now provide an in-depth exposure to particular subject areas.

Third, the clinical programs should be supervised by a small number of regular faculty, equal to the rest of the faculty in intellectual distinction but oriented toward this more innovative learning environment, and also by a larger group of recent graduates who would serve as full-time supervising attorneys or interns.

Clinical legal education, as discussed here, is not limited to participation in an attorney-client relationship (which usually means providing legal services to indigents). That is an important aspect and should be included; but a good clinical program would employ simulation, role playing, games, elaborate written or taped "case records" and a variety of other instructional techniques.

It should also be a multitrack system offering advanced law students a number of options: (1) civil legal aid, (2) criminal defense experiences, (3) criminal prosecution experiences, (4) provision of legal

services for special groups such as prisoners, (5) legislative or administrative work for government agencies, and, it is to be hoped, (6) arrangements for participation in counseling corporate and other paying clients.

If a clinical program is well designed to achieve educational objectives, and staffed at a level that permits effective supervision and imaginative teaching, it deserves a substantial allotment of academic credit. I expect it will not be too many years before students are required to have a minimum exposure to clinical experiences of various kinds, probably beginning in the first year of law school and continuing in subsequent years.

REGULATION OF COURSE REQUIREMENTS

The relationship of law schools to the profession is an element in the recent discussion of professional certification of specialties and professional training for admission to the bar. As legal practice has become more intricate and specialized, devices to encourage lawyers to obtain advanced training and to assist the public in selecting competent representatives have been suggested.

For the most part the proposals take the form of certification arrangements that allow qualifying attorneys to represent to the public that they are certified in a particular specialty. Bar groups would rely on experience, tests, or advanced training in certifying specialists. Other lawyers would not be excluded from performing specialized legal work but could not represent themselves as certified.

The complexities of modern legal practice may require this development, but it is ironic that the areas generally mentioned (tax, labor, securities, etc.) are well defined ones in which clients tend to be sophisticated and knowledgeable.

Lawyers who have practiced in a field usually are not required to meet the same standards as newer entrants, a factor suggesting that preference for incumbents may be a danger to be guarded against as the certification movement grows.

Certification programs that depend in whole or in part on completion of required course work offer both a challenge and an opportunity to law schools. As in continuing legal education, the pedagogical experience of law teachers is likely to be especially useful if high-quality programs are to result.

A related issue, much discussed during the last year, involves bar admission requirements that are framed in terms of particular course offerings. While law schools recognize that some courses are more essential than others, they resist proposals that would require courses of specific content or length.

The opposition of law teachers to such proposals combines practical objections with pure principle. Specification of required courses involves a species of labeling in which course content may or may not reflect the label.

To the extent that content is specified, the law curriculum becomes inflexible and experimentation or change is blocked. Because of the national market for employment of recent law graduates, the requirements of a few major states can have a restrictive effect on legal education everywhere.

In addition to these practical objections, which rest on the wisdom or flexibility of particular requirements, the law schools feel that control of legal education should be left to them, working in concert with national accrediting organizations such as the American Bar Association and the Association of American Law Schools. Minimum national requirements framed in general terms leave more room for educational experimentation and progress than a multiplicity of state and local requirements.

These general views are in opposition to the tentative proposal of the Committee on Qualifications to Practice before the United States District Courts in the Second Circuit, chaired by Robert L. Clare, Esq., of New York City.

A more constructive approach, in my view, would be encouragement by the judiciary of clinical programs for law students. Relaxation of existing requirements that curtail such opportunities for law students, working under proper supervision, to get trial experience in the courts offers more promise for improvement than insistence on any rigid prescription of courses. Fortunately, the rules now adopted by the Judicial Conference for the Second Circuit have moved in this direction.

We can agree that clinical education and broadened professional training in trial advocacy are desirable. But it is one thing to offer a course and another to require most or all students to take it. Insisting upon a subject sometimes places a curse on it and also may affect quality by resulting in overlarge classes, or increase cost by requiring many separate sections.

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