**Some Thoughts on Legal Education**

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**Q.** What should the student come away with at the end of three years at the law school?

**A.** What the student primarily, although by no means exclusively, should bring away from law school is a set of skills in finding out what the law is. If you asked a layman what a lawyer’s function was, he would probably seem both mystified and skeptical. He probably assumes that when he comes in with a problem the lawyer nods and looks wise, and then as soon as the client has left, the lawyer goes to a book and looks up the answer, writes it down and charges him $500.

But if you think about it, it is really very difficult to find out what a person’s rights and liabilities are. When a layman comes in and states a problem there’s first the question of characterization, relating the factual statement to some legal concept, what in the first year examinations is the problem of identifying issues. It’s fundamental, because problems don’t come labelled with legal tags. The layman, the client, doesn’t know what legal concept he is invoking; this makes relating the factual statement to a legal concept a difficult and challenging task, something that requires drill and practice.

Once you have the relevant concept in mind, it is still not at all obvious what the client’s legal rights are. Oliver Wendell Holmes said that what he meant by law was a prediction of what the courts would do. That’s the operational definition from the standpoint of the client. He wants to know what will happen to him and what he will get through the legal process. For the lawyer to make a prediction, he has to draw inferences from what the legislature has said, what courts have said in the past, and how courts have decided similar cases. Since very often the question the lawyer is confronted with has never arisen in precisely that same form before, the lawyer has to guess how a court that has decided a similar question would decide his.

These two skills—identifying legal questions and then predicting how courts will react to a question that hasn’t come up a hundred times before—seem to me of the essence of legal training; and they are real skills, which laymen lack. Non-lawyers can give advice on certain questions, as for example income tax services do. But with any case that has elements of novelty, the layman will not know how to relate the facts to legal issues, will not know how to make a prediction as to how the courts will react, and will not even know where to look for evidence of courts’ likely reactions in opinions, statutes, or hearings. Acquisition of these skills is most clearly related to the first-year courses because there the students’ unfamiliarity with skills is most pronounced and the teachers’ function in drilling them in the skills most obvious.

**Q.** What classroom methods do you consider most effective in teaching legal skills?

**A.** To attempt to communicate these skills in lectures would be futile. The lectures would impart a body of concepts, of principles, but wouldn’t help the student, as a lawyer, in taking facts given him by a client and finding the applicable legal concept in the vast body of doctrines and rules that he had learned; nor would they help the student with predicting how courts would decide. Law school classroom teaching, especially in the first
year, is a kind of drill in the sense that the teacher, by his questions, tries to compel the student to learn by doing. Some of the drill is designed to make sure that students can read cases. Reading cases isn’t like reading novels. One of the basic elements in predicting how courts will decide a new case is to find the rule that is latent in the existing case. It may not be well stated by the judge. It may not be stated at all; there may just be facts and a result. Law teaching involves a process of questioning the students about their reading, putting to them new factual variations on the case and asking the student whether this changes the result.

This is imitative of what happens in the real world too. A client comes in and states a problem. You look up the relevant cases once you have identified the issues, and find that they deal with different factual situations, and the question you must decide is how the court is going to react to the new situation. When the teacher puts a question to you as a variant of what happened in a case you have read, it’s to give you an opportunity to practice figuring out what the reaction of the court will be to a variant. The examination process, when it is properly implemented, gives the student an artificial, but nonetheless useful and concentrated, opportunity to practice the essential legal skills.

Q. Students have stated that what you described as “drill” is actually a form of intimidation, in which professors are trying to put them through the equivalent of a fraternity hell week. That is, students have to go through the indoctrination period and suffer like everyone else did before they can become a member of the club. Do you think that there is any truth in this, and if there is, what educational purpose does it serve?

A. I think our faculty is basically a group of pussycats as far as intimidation is concerned. A Grant Gilmore, a Harry Kalven, a Phil Neal is not out to intimidate. What is true is that the atmosphere of a class of 150 or 160, or now 180, is inherently intimidating. If a student makes a stupid comment in a class like that, he may feel foolish or embarrassed in a way that he wouldn’t if he were talking in a small group. There is really nothing, it seems to me, that the teacher can do to eliminate that problem, even if he doesn’t comment upon an answer.

Q. But how much is there of asking the unanswerable question, a stump-the-student type of thing, which is what some regard as a futile intellectual game that doesn’t have beneficial or constructive results?

A. There are some questions where the teacher doesn’t know the answer. I don’t know why it’s inappropriate for him to ask it of you. There are other questions which are simply very difficult questions, and what the teacher is trying to do is stretch the analytical power of the students. After all, the teacher is aiming the question not at the one person whom he calls on but the whole class. If he asks a person a very difficult question and does it in a way that does not imply that failure to answer will mark the student as a cretin, I don’t know why it should be a source of unhappiness.

I know that some students last year said that they sensed a trace of hostility on the part of the teachers. I don’t think it’s true. It may be that teachers expect more of students than it is reasonable to expect and are disappointed. Perhaps they have standards of preparation that are excessive. But the notion that there’s a deliberate or implicit policy of intimidating students and showing who is boss is not true.

One thing I have noticed, though, is a good deal of gratuitous cruelty on the part of students. Last year’s first-year class victimized several students; they just wouldn’t let them alone. It got to the point that whenever Mr. X or Miss or Mrs. Y would open his or her mouth there would be boos and catcalls. Also, what’s very funny to me standing in front of the room is watching the faces that a student who is reciting doesn’t see. While he or she is talking innocently you occasionally see amazing facial contortions. Every once in a while whenever you’re dealing with a group of people over one hundred you have the sense of an unpredictable mob. Will they rush up and tear one of the students limb from limb? At those moments when the students are booing or hissing or laughing derisively, you wonder if you’re in control. I don’t suggest this is common, but it is there; I suppose it is a product of the tension among the students. Another thing is that law as a profession seems to draw people who are very aggressive and competitive and really want to prove themselves.
These seem to be endemic attributes of legal education. When I was a student at Harvard Law School, Harvard had the reputation of being unbearable, and the students were supposed to be a really unattractive group; you went there to see whether you could endure. You heard a lot of talk about people committing suicide or stealing each other's notes. But when I was a student it just didn't occur to people to vocalize their unhappy feelings. That is changed and that's why you get the impression there is greater disaffection now. I think it was always there.

Q. Isn't that a pretty terrible way to spend a year?
A. The first year at Harvard was a grim year. I thought it was on balance a very good experience. It was tough but a very good drill. The question is whether something like that inflicts psychological damage on the people that don't do well that is greater than the corresponding gain. I don't know.

Q. Do you think there is anything that can be done to alleviate this tension and hostility?
A. I'm not sure there are any structural changes that would have much impact on morale. The problem goes deeper than grading, certainly. Part of the problem is that students tend to have had very successful college careers and then they come into a law school environment in which they're put into the position of starting over from scratch, learning a new technical skill. They find that their success in college doesn't necessarily presage success in law school. They find that legal ability is not the same thing as general intelligence. It is distributed unevenly and some think inequitably. There will always be people in the first-year class who do very well without doing very much work, or successfully concealing the work they do, while a lot of other students will be very industrious and not do well and not understand why. If this were a music school they would accept the fact that talent in a particular field is a very peculiarly distributed thing.

Reading the exams in the torts course last year I was surprised at the dispersion of the exam performances. I guess it's not fair to compare the best paper in the class with the worst paper in the class, but even if you compare the tenth paper from the bottom with the tenth from the top, the dispersion is very large, and that bothers me. Even though everybody who is admitted has pretty good credentials and capacity, when it comes to writing exams, the students indicate quite different abilities to master the skills that are taught in the course. This may be something that evens out after three years; maybe when you test people after two quarters you give an unfair advantage to people who have gotten the trick of it sooner.

Q. If you were law school czar, what changes would you make in the law school curriculum?
A. I think the first-year curriculum and methods are satisfactory in the sense that no one has suggested an attractive alternative. But what I would like to see is a second- and third-year curriculum that is revised in two directions. One direction would be to give students courses that would be a lot closer to the problems of practice, and yet treat the problems with a depth that the student wouldn't get if he were just farmed out to a law office. An example of such a course is the business planning course that Mr. Kitch gave last year with two lawyers from the Kirkland & Ellis firm. They dealt with the kind of problem you often get in a law office, a problem that does not fit nice subject matter categories and therefore would not arise in a typical law school course. Mr. Fiss did the same thing in his land development course. Both of these courses seem to me promising developments in making law school more practical, realistic and concrete. We have also attempted in the Bigelow program in recent years to give problems that will provide a realistic counterpoint to the rather abstract classroom experience, and thus give the students a better feel for what the problems of law practice are like.

I would also like to see more courses that provide a different type of intellectual rigor from what you get by reading cases: courses that bring in the social sciences more systematically, that give the students more perspective on the legal system, that acquaint them with the impressive intellectual traditions of the law such as the history of legal thought. It might help if in areas where there is a strong faculty interest, such as legal history and government regulation of business, to encourage students to do more substantial independent research, and for more credit, than is customary at present.

Q. Is there, and should there be, any room in the law school for people who are not planning to practice law?
A. Yes, there should be, and it's one reason why a somewhat different type of course should be available. There are new careers opening up in law-related areas. For instance, judicial administration is a burgeoning area because courts are administered in a very archaic way. Perhaps as a result of the growing academic reputation of the Law School, we are beginning to get students whose interests in the law are more intellectual than practical; as we get more of these people we should offer a more diversified program.

The Charlotte-Mecklenburg Case
continued

Local agencies are today free to institute the appropriate measures to correct segregated patterns of student attendance. There is no suggestion in Charlotte-Mecklenburg that such voluntary remedial measures need be predicated on the discovery of past discrimination. Indeed, this term the Supreme Court invalidated two statewide "anti-busing" laws, one in New York16 and the other in North Carolina,17 that would have impeded the efforts of local school boards to correct racial imbalance. Moreover, Congress need not wait until the Supreme Court declares a practice a violation of the equal protection clause before requiring (or inducing) local authorities to correct it. Cases such as Katzenbach v. Morgan18 and Jones v. Alfred H. Mayer Co.19 indicate the lengths to which the Court will go to indulge and even to encourage congressional activity on behalf of the cause of racial equality. Under the Civil War amendments, Congress is free to enact a rule of law that would require (or induce) school boards throughout the country to take reasonable steps to eliminate segregated patterns of student attendance—without regard to proof in each instance of past discriminatory practices and their contemporary vestiges. Such legislation can be predicated on a judgment about the inequality that arises from a segregated pattern of student attend-