What Changes are Practical in Legal Education?

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We are considering this afternoon the law practice of the future. Judge Rutledge has spoken of the changing conditions which practitioners must face. Mr. Henderson has discussed the respects in which law graduates are unprepared for practice. What should the law schools do about it?

The task of the law schools in a period of rapid change is not easy. It is not merely a problem of adding new courses or of attempting to keep courses up to date. The fundamental problem is one of bringing students to an understanding of the very meaning of change in the law. Such an understanding is achieved only as students develop insight into the nature and function of law, the relation of law to social policy, the theory of precedent, and the relative functions of courts and legislatures. In short, the changing law has forced us to give attention to legal philosophy.

It was natural that law schools should largely ignore philosophical problems in the period of stability which ended with the last war. The pattern of legal education at the turn of the century reflected a view of the law as a fabric of rules and principles reasonably consistent and affording a fairly adequate basis for predicting decisions. Work remained for scholars, of course, in expounding and restating the law and for judges and legislatures in removing minor inconsistencies and defects. There were, to be sure, legal philosophers who discussed what law is and its place in the study of society. But courses in jurisprudence were usually reserved for graduate students, for prospective law teachers.

We have been conscious for a long time that this is inadequate training for the lawyer in a period of rapid change in legal doctrine and administration; but inertia and confusion of purpose long delayed appropriate changes in legal education. As a result, many lawyers reflect one of two unsound attitudes toward the changing law.

The first of these is what Chief Justice Stone described as an attitude of “futile resistance to the inevitable,” of “nostalgic yearning for an era that has passed.” Similar attitudes have appeared, of course, among lawyers in other countries and in other periods of change. Attacks by British lawyers on the work of Lord Mansfield have a familiar ring. One of these complained that “Instead of those certain positive rules by which judgments . . . should invariably be determined, you have fondly introduced your own unsettled notions . . . of substantial justice.”

I am not implying, of course, that every change in the law is desirable or that lawyers should not oppose changes which they believe unwise. But too often dislike of change in law and practice prevents a lawyer from understanding what is actually taking place and the forces responsible for the change. To quote John Foster Dulles, change and uncertainty “is naturally disturbing and upsetting to lawyers and tends to create in them a sullen resentment which, unless overcome, will largely disqualify them from effectively representing their clients.”
At the other extreme is the lawyer who takes the cynical position that the law is nothing but an argumentative technique. The classic statement of this attitude is the book “Woe Unto You Lawyers” by Professor Rodell of Yale. Rodell’s position, in his own words, is that the law is nothing but a high-class racket, that the whole of the law is a hoax, a balloon, a lot of empty words. In view of the general skepticism of the past decades, it is not surprising that many young lawyers and law students have been strongly influenced by views such as these.

How are students to be made immune to the development of these attitudes? Many law teachers have come to realize that the study of the philosophy of law may furnish an effective antidote. At Chicago, we introduce the study of legal philosophy in the first year. We think that it is important for students to face and discuss the basic questions about the function of law in a changing world before his approach to the law has too far solidified. Whatever the differences on matters of detail, there is wide agreement on the proposition that increased emphasis on the theory and philosophy of law is a most practical step in current legal education.

A second change which has become a practical necessity is increased attention to legislation. This does not mean that students should learn quantities of statutory law or that courses in legislation should be made compulsory. But in the study of many fields of law, more attention must be given to statutory developments. I do not think that it is practical to teach corporation law, for example, without requiring each student to become familiar with the use of the general corporation law of his own state. Only by constant practice does a student become skillful in the art of reading and applying complicated statutes, and we all know that this is an irksome task, one which we neglect all too readily.

The third practical change in legal education is dictated by the fact that some of the most troublesome of recent changes are in the economic organization of the country. No lawyer is ready to meet them unless he has an understanding of economics. There is, of course, nothing new in the recognition of the close relation between law and other social sciences. Almost fifty years ago Mr. Justice Holmes said, “I look forward to a time when . . . we shall spend our energy on a study of the ends

1952-53 Research Program in Law and the Behavioral Sciences is established.
The Joseph Henry Beale prize for excellence in the first-year writing program is established.
Beecher Hall becomes the Law School Residence.
The Law School’s 50th Anniversary Dinner is held on December 19, 1952.

1953-54 Brainard Currie, Philip B. Kurland, Jo Desha Lucas, and Hans Zeisel join the faculty. The Jury Project begins.
Expansion of the Comparative Law Program leads to establishment of the M. Comp. L. and D. Comp. L. degrees.
The LSAT is now mandatory. Professors Walter Blum and Harry Kalven publish The Uneasy Case for Progressive Taxation; Professor William W. Grosskey publishes Politics and the Constitution in the History of the United States. The Ernst Freund Lectureship is established.

1954-55 The Supreme Court Seminar is added to the curriculum.
Annual Alumni Fund raises $75,000.
Student Moot Court Committee is established to oversee the Hinton Moot Court Competition.
First moves are made to raise funds for a new building.

1955-56 "Scandal" in the Jury Project—Professors Harry Kalven and Edward Levi are charged with invasion of jury room privacy.
Student enrollment exceeds 300 for the first time since World War II. C. R. Musser and Henry C. Simons Memorial Lectureships are established.

A Law School dance in 1961
1956-57  
Francis A. Allen and Nicholas delBelleville Katzenbach join the faculty.  
Faculty wins the "quintennial" faculty-student softball game 19-18. They had lost the previous game in 1952 64-12. 
Law Students Association holds coffee hours in Beecher Hall.

1957-58  
Cornerstone for the new Law School building is laid by Earl Warren and Lord Kilmuir.  
The Edwin F. Mandel Legal Aid Clinic is established.  
The Law School Residence moves to Burton-Judson Courts.

1958-59  
The first volume of The Journal of Law and Economics is published.  
The Law Revision Program works with the Illinois Legislature on new legislation.

1959-60  
Stanley Kaplan '33 and Leon Liddell join the faculty.  
The new building, designed by Eero Saarinen, opens on the South side of the Midway.  
Vice-President Richard M. Nixon dedicates the building on October 5.  
The Floyd R. Mechem Scholarship is established.

1960-61  
The Supreme Court Review begins publication.  
Tuition exceeds $1,000 for the first time.  
Professor Karl Llewellyn publishes The Common Law Tradition.

sought to be obtained and the reasons for desiring them. As a step toward this ideal it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made. For the rational study of law, the black-letter man may be the man of the present, but the man of the future is the master of statistics and the master of economics."

Until recently we have gone on the theory that the student can learn his economics in college and his law in law school, and that the inter-relations will take care of themselves. It is not surprising, of course, that the synthesis has never taken place.

Our failure to develop the inter-relations between economics and law has not only handicapped our study of modern legislation but it has also impoverished our understanding of familiar doctrines of the common law. Take, for example, the elementary rule making an employer who is entirely without fault liable for the negligence of his employees. Even Holmes referred to this liability as wholly anomalous. He found in it only a survival of the ancient absolute liability of the head of a household or a fiction of identity of master and servant. Surely a more satisfactory understanding of the doctrine is to be reached in the light of the general theory of a competitive free-enterprise society.

In such an economy the productive activity is directed, of course, by the decisions of business men. And, if an industry involves special risks that outsiders may be injured by negligent employees, it would seem desirable to force business men who contemplate entering the industry to take this factor into account. If the prospective returns in the business are not high enough to cover the cost of insuring compensation for such injuries, from the social point of view the business should probably not be undertaken. In other words, we may understand the imposition of liability as an effort to assure that business decisions are responsibly made in the light of all the social costs of the enterprise. Without such liability, industries in which risks are relatively large would tend to be extended uneconomically. Freedom from liability would operate as a subsidy.

It has not been easy, of course, for the law schools to arrange programs through which the study of economics and related subjects may illuminate the understanding of law. A few schools, including the University of Chicago, have developed combined four-year programs including courses in fields such as economics.

Another mode of attack upon the problem is through the development of courses in which legal and economic aspects of critical problems are studied together. Let me take as an example the course in Law and Economic Organization to which students at Chicago devote half of their time in their senior year. For the first two months the work consisted of concentrated study of the anti-trust laws and of labor law in the light of the theory of prices and wages.

The next two months were devoted to a study of the marketing and employment problems of the steel industry. After an introductory view of the history of the industry and its major units, the study was organized around three alternative lines of governmental policy. These three policies might be described as the "let well enough alone" policy, the policy of "enforced competition," and "combination-with-regulation" policy. The steel anti-trust cases and the court and trade commission cases dealing with the basing point system of prices were studied in detail.

The work of the second half year was directed toward depression problems. Bankruptcy and corporate reorganization were studied as types of legal machinery for dealing with the problem of failure in a profit economy. The study included an effort to examine the various economic roles which the law of insolvency administration might be expected to fulfill, in guiding the allocation of resources, facilitating the transfer and abandonment of invested capital, and permitting the continuance of over-capitalized enterprises.

While experiments such as these appear to have great promise, it is by no means clear what sort of changes in legal education will most effectively enrich
the study of law. In this connection I should like to urge that the experimental character of the present stage of legal education should be kept in mind by state authorities in framing their requirements for admission to the Bar. There has been a tendency in some states to phrase the rules in a rigid form which might check some of the most promising experimentation.

I have been speaking of changes in legal education made necessary by the changing law and practice. But what of the criticisms that law school training should be more practical, that graduates are turned out unprepared to practice law? They have studied the law of torts but they know nothing of what it means to prove or defend an accident case. They know the rules on offer, acceptance, and consideration, but they act as though they had never seen an actual contract. They have studied the law of pleading, but they do not know how to draft a simple complaint. They can recite rules of evidence, but they know nothing of examining a witness. They are innocent of the arts of negotiation and are baffled by the task of investigating a complicated question of fact. In sum, the only thing for which they are trained is the briefing of questions of law, but even here they are of little use for the memoranda they write are neither clear nor persuasive.

We cannot sidestep these charges. If we are honest we must admit that law schools do not turn out graduates ready to practice law. But if I may believe a leading doctor with whom I spoke this summer, our profession is not unique in this respect. In his opinion, when a medical student receives his M.D. and finishes his internship, he is only just ready to begin the study of medical practice.

Not only is it impossible for law schools to turn out graduates fully prepared for the work of the Bar, but it is a serious mistake for them to try. This does not mean that law schools are not concerned with the actual problems of practice. We must of course see it that law is studied as a working system, and that rules of law are considered not as ends in themselves, but for the purpose of their application to practical situations. This is largely a matter of the personnel of our faculties. As our vigorous and candid chairman put it in a letter to me some two years ago, we must see it that our law teachers are not "theoretical asses who don't know a practicing lawyer from a billy goat or who have no con-

1961-62
Kenneth W. Dam '57, Kenneth Culp Davis, Phil C. Neal, and Dallin H. Oaks '57 join the faculty.
The first Glass Menagerie, caricatures of the faculty by David Rothman '62, is published.

1962-63
Phil Neal is appointed Dean; David P. Currie joins the faculty.

1963-64
The Annual Alumni Fund passes $100,000 for the first time.
The Peasner sculpture in the reflecting pool is dedicated on June 10.

1964-65
R.H. Coase and Norval Morris become members of the faculty.
A Conference on "Problems of Urban Renewal" takes place, the first scholarly conference with papers presented by students.
Tuition is raised to $1500, ten times the original cost in 1902.
A quarterly law student newspaper, The Reporter, begins publication.
Professor Harry Kalven publishes The Negro and the First Amendment.

1965-66
Grant Gilmore and Edmund W. Kitch '64 join the faculty.
Law and Psychiatry seminar is instituted.
The Center for Studies in Criminal Justice is established.
The Julius Kreer Professorship in Law and Criminology is established.

The 1963-64 Law Student Association Board. L. to r.: Frank Grazioso '64, Nicholas Bosen '66, James McNamara '64, Alec Bouxsein '66, Steve Barnett '66, Jewel Naxon (Klein) '66, Daniel Kearney '65, Thomas Ross '64, Alan Orschel '64 (President), Elizabeth Ellenbogen (Welch) '65, Bruce Ennis Jr. '65, Harry Crandall '64, Peter Messitte '66, and John Ward '65
1966-67  Gerhard Casper joins the faculty.
         Trial Practice seminar is established.
         Student Legal Aid Association is established.

1967-68  Franklin Zimring '67 joins the faculty; Adolf Spružes is appointed Foreign Law Librarian.
         The Harry A. Bigelow Professorship is established.

1968-69  Edward Levi is appointed President of the University.
         New courses on Law and Urban Problems, Problems of the Urban Ghetto and The Selective Service System are taught.
         Tuition passes $2,000.
         The Summer Quarter program is abolished.
         Free, a student newspaper, begins publication.
         Professor David Currie publishes Federal Courts: Cases and Materials.

1969-70  Richard A. Posner joins the faculty.
         Law Women's Caucus is founded.
         Professor Bernard Meltzer publishes Labor Law: Cases, Materials and Problems;

Deputy Attorney General Ramsey Clark '50 visited the Law School in 1965 and spoke to students.

ception of his mental processes, his problems, his clients, or the function that he has to perform."

The one thing that the law schools can do with some effectiveness is to give a thorough groundwork in the general principles of law and in related bodies of knowledge. But they cannot do this task well if major emphasis is placed upon the immediately practical aspects of law work. In other words, it is not practical for the law schools to attempt to give instruction on the how-to-do-it level. It is a mistake, I think, to offer courses in bankruptcy practice or probate practice. An in the important field of taxation, what is the most practical type of course? Should law schools attempt to present a detailed survey of regulations and rulings, or is it more practical in the long run to focus the study upon major tax problems against a background of the economics of taxation and government finance?

There is something to be said for the proposition that the most practical education is the most theoretical. My own opinion has changed considerably in the past ten years. Some years ago, I gave a course in the reorganization of corpo-
rate and real estate bond issues. At the time, I was also practicing in this field, and I attempted to reproduce for my class the problems with which I was struggling downtown. I proceeded to swamp my students with unreported decisions and opinions of counsel, with deposit agreements, plans of reorganization and letters of solicitation, with practical techniques for dealing with the recalcitrant minority and the strike-suit lawyer. I think they enjoyed the course. It gave them the exhilarating illusion of dealing with real and current problems. They felt that they were learning something which they could really use as soon as they got out of school. But I have little doubt today that I was cheating them. In my zeal for presenting the latest "dope," I had, to be sure, given them some insight into the persistent problems in the field. But how much more valuable would my course have been if I had omitted many of the questions of temporary practical importance and developed the place of the subject in the economics of corporate enterprise.

It is not only that the time is insufficient for both basic theoretical discus-
sion and instruction of an immediately practical sort. A more serious difficulty is that with most students, the latter type of instruction defeats the former. After imbibing the strong drink of practical instruction, few students have a taste for the subtler flavors of basic principle.

There is one lawyers' technique, however, which the law schools should and can do more to develop. This is the art of writing. We may perhaps place upon the colleges some of the blame for the serious illiteracy of law-school graduates, but the law schools must accept their share. Many schools are making serious attacks upon this problem. Written work of various kinds is found increasingly among law school requirements.

At the University of Chicago, for example, the training in writing begins in the first year. Entering students are divided into small groups under the leadership of a faculty member or a graduate tutor. Topics are assigned for individual investigation and the reports are returned with written criticisms which are discussed in great detail in lengthy individual conferences. Students are required to rewrite their papers, often two or three times. We are convinced that only by some laborious process such as this can students learn to organize legal material and to express themselves clearly and persuasively.

I have suggested that much of a lawyer's education must follow his graduation from law school. Some of it will come, of course, from his associates in practice and some, we regret, through mistakes at the expense of his clients. But the work of this Section in connection with legal institutes and practicing-lawyer courses testifies to the need for formal post-graduate education for the practitioner. I should like to conclude with one point with respect to the relation between law school studies and this post-graduate instruction.

I think that there is need for three types of institutes or courses for practicing lawyers and that a clear separation of these types would contribute much to the whole program. In the first place, practicing lawyers have shown an interest in what the doctors call "refresher courses,"—general lectures, refreshing their recollection of material studied in school and bringing them up to date as to developments since graduation. In the second place, there is a call for detailed technical instruction in specialties for lawyers with considerable experience in the field. Both of these types of institutes or courses are to be distinguished from the kind of instruction needed by the young lawyer recently out of law school. I should like to see courses in the practical aspects of law work organized expressly for the "green" practitioner. Local bar associations should, I believe, take the responsibility for the organization of such instruction. In this type of teaching, the experienced practitioner, if he is also interested in education, can be much more effective than a law school professor. If such post-graduate instruction were generally available, the law schools would be relieved of much of the pressure to introduce such courses into their programs. The proper tasks of the law schools would be clarified and the energies of faculty members released for the performance of these tasks.

1970-71
Gary H. Palm '67 joins the faculty as Director of the Mandel Legal Aid Clinic. The Black Law Student Association is established. The Clifton R. Musser Professorship in Economics is established.

Professor Philip Kurland publishes Politics, the Constitution and the Warren Court.

1971-72
John H. Langbein joins the faculty. The Journal of Legal Studies publishes its first issue. The number of students exceeds 500 for the first time in more than 40 years.

1972-73
Spencer L. Kimball joins the faculty.
Professor Soia Mentschikoff becomes the first woman president of the Association of American Law Schools.

1973-74
Richard A. Epstein and Geoffrey R. Stone '71 join the faculty. Loop Luncheons begin. The Karl N. Llewellyn Professorship in Jurisprudence and the Harold J. and Marion F. Green Professorship in International Legal Studies are established. Professor Richard Posner publishes Economic Analysis of Law.