COMMENT

THE LAW SCHOOLS' RESPONSIBILITY FOR TRAINING PUBLIC SERVANTS*

WALTER GELLHORN†

IN MAY of 1939 there were 5,368 legal positions in the service of the National Government. It is difficult to attach the adjective "normal" to any period within the past decade, or to conceive that conditions of any particular previous year will soon be duplicated. But if any recent year was normal, 1939 may lay as much claim to the title as may any other. The "defense effort" was barely beginning to stir; the early fervor of the New Deal had abated; the decision as to the third term had not yet been made, and there was little movement in the way of building new agencies or expanding old ones; the "economy bloc" was in the saddle and retrenchment was the order of the day. With the figures for 1939 in mind, therefore, one can hazard the somewhat conservative guess that in "normal" times there will be between five and six thousand lawyers doing lawyers' work for the Federal Government. In addition there will be a very substantial number of other lawyers, both old and young, who occupy positions not classed as "legal," though they will be using their professional skills in related areas. There will be, for example, the men and women who serve on administrative staffs, such as the regional organizations of the National Labor Relations Board; there will be those who, through the various branches of the Federal Security Agency, seek to manage the increasingly complicated joint enterprises of the state and National governments; there will be the officers of the Federal Bureau of Investigation, whose work often resembles the prosecutor's task more closely than the detective's; there will be the lawyers who share in planning and executing vast enterprises such as those of the Tennessee Valley Authority; and, of course, there will be the lawyers who are themselves the law-givers, as members of Congress, as judges, or as important officers of administrative agencies which promulgate regulations or adjudicate controversies. To all these must be added the uncounted number who perform the legal

* This paper was read at the Thirty-ninth Annual Meeting of the Association of American Law Schools in Chicago, Illinois, on December 29, 1941.

† Associate Professor of Law, Columbia University; Regional Attorney, Office of Price Administration.

work of the several states and their governmental subdivisions—over 550 lawyers in the Corporation Counsel's Office in New York City and nearly 300 in the New York State Department of Law alone. It is estimated that the National Government itself will annually need some five hundred recruits to fill vacancies in its legal positions in "normal" times; the average number of new appointments to legal staffs during the three-year period 1936 to 1938 was 633.[1] In 1940 there were slightly fewer than eight thousand admissions to the bar. If the ratio between recruitment and bar admissions remains fairly constant, the most cautious prediction would be that one out of every fifteen or sixteen members of the bar will sooner or later be a federal lawyer with an official rather than a private practice, and that a still greater number will be employed in one capacity or another by the national, state, and local governments.

Should the law schools, recognizing that many of their graduates will become "government people," offer *special* training programs for would-be public employees? I doubt that they should.

None of us supposes, I daresay, that because a student has been exposed to a course in a particular field he will necessarily (or even probably) be competent in that field. Nevertheless, there exists in the country at large what President Seymour of Yale has described as "a general, if not universal, assumption that whenever preparation for a specific service or qualification is necessary, a course taught by a professor will serve to meet the necessity."[2]

[1] It is interesting to know that the recent graduates drawn into the federal legal service are typically students of high standing. In the period January, 1935, to March, 1939, 42 per cent of all appointees to junior attorney positions (salary, $2,000–$2,600) had ranked in the first fifth of their respective law school classes; 28 per cent had been in the second fifth, 18 per cent in the third fifth, 9 per cent in the fourth fifth, and only 3 per cent in the lowest fifth.

[2] Seymour, The University Curriculum in Its Relation to the Public Service, 24 Bull. Ass'n Am. Colleges 201, 203 (1938). President Seymour adds that this is "surprising, because the *genus* professor is on the whole held in rather lower esteem in this country than in others . . . . ; unfortunate, because the assumption of the mystical power of a course taught by a professor relieves the student under preparation from the major responsibility and throws it on the professor who is doing the preparing. . . . ." And compare the statement of Roscoe Pound: there is "a general assumption that education is a process of acquiring information and consequent tendency to stuff programs of professional education with a maximum of informational topics with which, it is felt, the ideal lawyer should be acquainted. It cannot be insisted upon too strongly that education is not primarily, nor indeed except incidentally, the acquisition of information. There is a widespread idea that no one may be expected to know anything unless it has been formally taught him; also that, if it has been formally taught him, that fact guarantees his grasp of it. The corollary is that a law school should give formal instruction in everything which an ideally prepared lawyer could conceivably need to know. Nothing could be more fallacious. Few things are more ephemeral than information." Pound, What Constitutes a Good Legal Education, 7 Am. Law School Rev. 887, 888 (1933).

The temptation to act upon this assumption and to expand the curriculum by adding new courses is often a powerful one. There is perhaps no more effective device for creating the appearance of progress.[3] But the continual subdivision of broader areas must in actuality prove self-defeating. To be sure, intensive study within the subdivisions may be rewarding. The danger is that the time necessarily consumed in that study may become disproportionate to the gain, if—as seems inevitable—it excludes the student from acquaintanceship with the implications of interrelated subjects. The accumulation of courses, particularistic, factual, descriptive in nature, may assure the production of well-informed technicians, but it does not guarantee that they will be well-educated and resourceful lawyers.[4] The role of the law school is not so much to give knowledge to its students as it is to enhance their capacity for recognizing problems and for commencing to attack them. Legal training should prepare the student "to seize the significant, even though he may not yet understand it, and to hold it at least long enough to call for assistance."[5]

In saying this, however, one does not imply that the substantive content of the law school curriculum is inconsequential. On the contrary, it

[3] Compare the caustic paper of Wayne L. Morse, Training for Public Administration, 8 Am. Law School Rev. 1049 (1938), which suggests certain parallels between the contemporary efflorescence of schools of public administration and the creation of schools of business in "the golden era of the nineteen twenties."

[4] Some years ago the present Chief Justice of the United States touched upon this matter. Present-day problems of legal education, he asserted, arise from "our traditional attitude toward the law as a body of technical doctrine more or less detached from those social forces which it regulates." While we have come more and more to recognize that "law is nothing more than a form of social control intimately related to those social functions which are the subject matter of economics and the social sciences generally," this recognition has not "up to the present time produced any noticeable effect upon the organization of law school work. For more than thirty years the only substantial change in law school curricula has been the addition from time to time of new courses to cover some new field into which law has expanded with the growing complexity of modern business and economic life." So we added more and more courses, and the instructor wanted more and more time to be devoted to each course—"until at last we are beginning to realize that the logical outcome of it must be that ultimately students who come to us to be trained as lawyers must remain with us for most of their natural lives in order to be trained properly to begin the practice of their profession." Stone, The Future of Legal Education, 5 Am. Law School Rev. 329, 331 (1924).

[5] Graham, Education for Public Administration 61 (1941). Note also Mr. Graham's statement: "A fourth quality needed by persons going into public administration of any type .... is the habit of recognizing, analyzing, and concentrating upon a problem so as to formulate decisions in the light of all available evidence..... The danger is that this trait will operate only in a narrow field and that equally serious problems which do not fall wholly within a discipline will not be appreciated or, if recognized, will not be seen clearly. The person going into an administrative career needs to have generalized the habit of recognizing and concentrating upon problems. He must have learned to recognize administrative as well as technical problems." Ibid., at 47.

is in the law school that the student can most effectively build the foundations for his own later contributions to legal progress. In recognition of this, modern law schools have expanded their work (under a variety of course names) in such subjects as Constitutional Law, Public Control of Business, Administrative Law, Industrial Relations, and Legislation—all of which, it is assumed in the present discussion, have an established place in existing curricula. The question is whether this is enough. If the professional man is to be more than a mere routinist, he must, as George Graham has well said, "get some impression of the nature and scope of human experience related to his field of activity. If his university survey of the scene is not systematic, probably his inquiry into it will never be systematic. If his view of the field is not broad, probably he will always have a limited perspective. If in the university he does not get an appreciation of the interrelations and unity of knowledge, he may always disregard significant elements in his problems. If his university education has not taken him back through the chain of events toward first causes, he may always be content to be ignorant of his ignorance. The student must have made at least a speaking acquaintance with the sciences related to his career while in the university if he is to be a constructive influence as well as a practitioner in his profession."[6]

Unless many new courses are to be added to present offerings, how can this background of understanding be produced? The answer is, of course, that existing courses must be made to reflect (if they do not already do so) the problems which are of major moment.[7] No instructor compresses within the confines of a single course every topic which may be comprehended by the course title. Inevitably the content is a selective one. What is now needed, in my estimation, is not new courses, but new selections within courses. In many branches of law school work this is taken wholly for granted. A course in Taxation, for example, is expected to shift emphasis somewhat as novel tax policies create additional problems. A course in Labor Law is no longer likely to limit its scope to court cases concerning labor disputes, after a National Labor Relations Act has produced a new though related set of issues. A course in Trade Regulation

[6] Ibid., at 61.

[7] In many universities law students are eligible to take work in related fields of study, such as political science or economic theory or statistics, taught by other branches of the institution. But it is seemingly rare that adequate courses in such subjects are given for the non-specialist. This is no reflection on our colleagues in other departments; after all, law schools rarely give adequate courses for the non-specialist either. So long as this remains true, however, I doubt that the law student will profit greatly by occasional excursions into the neighboring academic jurisdictions.

would obviously be considered incomplete if it remained unaffected by recent developments.[8]

Much the same sort of addition to course content is practicable—and, needless to say, is often undertaken—in the older areas of instruction. Consider, as one instance, the subject of government contracts, which are importantly different from private contracts in formulation and in incidents. Their existence can be mentioned appropriately in Contracts and Sales. Suppose, for the moment, that to do so requires elimination or condensation of other topics now customarily touched upon in those courses. Before that deters us from treating government contracts, we must be sure that in terms of relative importance all present aspects of the courses overshadow the suggested new topic. Moreover, it is not clear that systematic exploration of such a subject as government contracts is necessary. It is perhaps feasible merely to point out their salient aspects by way of comparison or contrast with the more conventional private contractual obligations which will continue to furnish the bulk of the discussion.[9]

Similarly, the various provisions of the statutes administered by the Securities and Exchange Commission ought to find a place in a modern curriculum, not only in courses dealing with corporation finance, but in Torts as well. The Public Utilities course can ill afford to ignore the work of the Federal Communications Commission, the Tennessee Valley Authority, and the Securities and Exchange Commission in administering the Public Utility Holding Company Act. The development of land-use programs in rural areas, the expansion of federal, state, and municipal ownership of land for housing and similar social purposes, the movement from zoning regulations to affirmative community planning are matters which cannot be wholly overlooked in Property courses.[10]

If, as new topics such as these emerge, they are synthesized with existing legal doctrines, the law graduate should be adequately prepared to commence his career in the government service. As at present, our stress may well be upon sharpening the analytical powers of the student. In

[8] Cf. Handler, What, If Anything, Should Be Done by the Law Schools to Acquaint Law Students with the So-called New Deal Legislation and Its Workings, 8 Am. Law School Rev. 164 (1935).

[9] Material on government contracts is readily available in conventional texts. See Shealey, The Law of Government Contracts (3d ed. 1938); cf. Graske, The Law of Government Defense Contracts (1941). In addition, of course, there is a substantial and interesting body of case law in the decisions of the Comptroller General of the United States, as well as in court decisions.

[10] Cf. McDougal, Summary and Criticism of Answers to Question 8 of the Property Questionnaire, in Report of Committee on Curriculum, Program of Ass'n of Am. Law Schools for 39th Annual Meeting 61, 72 et seq. (1941).

addition, by our selection of illustrative materials, we may suggest the ramifications of the problems with which government lawyers must deal. In short, even though we may not be able to develop extensively all the considerations which are playing a part in contemporary "public law," we may at least put the student on notice that the considerations exist.

The argument may be made that training government lawyers will thus be achieved at the expense of the numerically more important group of private practitioners. The argument is unsound. At the very heart of our problem of training officials lies this fact: the private lawyer of today cannot afford to be unaware of what the government lawyer must know. The rapid extension of government into hitherto wholly private relationships is too well understood to warrant comment. The fact that government is today a business partner or competitor or cherished customer cannot be overlooked by those who expect to serve business as legal advisers. Administrative proceedings and their attendant negotiations and litigations are not unilateral. When government law is in the making, private lawyers share in shaping the product. The private lawyer of the future, one may suppose, will have a practice which is largely colored by the very same factors which will determine the activities of the government lawyer. The government lawyer will receive training on the job and in special courses such as those offered their employees today by the Department of Agriculture, the Securities and Exchange Commission, and the Federal Security Agency. The private lawyer, if he is to be acute in his perceptions, may have to rely much more heavily upon his law school to equip him with understanding.[11] Moreover, quite apart from this somewhat materialistic consideration, much can be said in favor of training the broad mass of our graduates in this way, so that the work of official agencies may be subject to professional criticism which may be both vigorous (as at present) and balanced (as is not now always the case).[12]

[11] Compare in this respect an address by Joseph W. Henderson of the Philadelphia Bar, delivered in 1941 at a joint session of the American Bar Association and the National Conference of Bar Examiners. He said in part: "I personally feel that our law schools should see to it, *with their other training*, that students, while in their schools, if not before, should have courses covering a study of the history of our country and its political and economic trends and also an understanding of the principles of social sciences so that they may have a broad and practical background for the many and varied complex problems with which they will later be confronted; that students, upon graduation, possess a working knowledge of administrative law as it is now functioning; that they be more familiar with the great mass of statutory law—both federal and state. . . . ." Henderson, Wherein Do the Law Schools Fail to Prepare a Law Student for Practice?, 9 Am. Law School Rev. 1178, 1179 (1941).

[12] Consider in this connection the words of Elihu Root: "Unconsciously, we all treat the business of administering justice as something to be done for private benefit instead of treating

Needless to say, the enrichment of present courses in lieu of adding special training courses for government lawyers does not mean that no special opportunities should be opened to this group. The special opportunities should, however, come toward the end of the student's residence, when he has presumably acquired a certain breadth of background. Just as the private practitioner must see the interrelationships between his work and the problems of government, so must the official practitioner acquire the techniques and the learning which the private lawyer will possess. Once that stage of development has been achieved, the aspirant to public service may advantageously commence advanced research in the problems of government—not only in the strictly "legal" problems, but in those which relate to social and economic choices and to administration as such. I do not at all believe that office practice or the clinic should supplant the theoretical instruction we now seek to give in our law schools.[13] But I am convinced that our students should have opportunity before they graduate to give real body to the theoretical work they have been doing. An effective way for them to do so is to apply their energies to the solution of problems, rather than to mastering material set before them by their

---

it primarily as something to be done for the public service. . . . . Our political system makes such an attitude on the part of the Bar very natural and easy. With our highly developed individualism, our respect for the sanctity of individual rights, our conception of government as designed to secure those rights, it is quite natural that lawyers employed to assert the rights of individual clients and loyally devoted to their clients' interest should acquire a habit of mind in which they think chiefly of the individual view of judicial procedure, and seldom of the public view of the same procedure. It is natural that the same habit of thought should be carried into our legislatures by the lawyers who make up the greater part of these bodies; and with our governments of narrow and strictly limited powers it is natural that there should be a continual pressure in the direction of promoting individual rights and privileges and opportunities and very little pressure to maintain the community's rights against the individual and to insist upon the individual's duties to the community." Root, Public Service by the Bar, 41 A.B.A. Rep. 356, 359–60 (1916). And compare Seymour, op. cit. supra note 2, at 202–3: ". . . . it is probably more important to the life of the nation that the larger group should be broadly trained for citizenship than that the smaller should be specially trained for office holding; . . . . for the future officeholder himself a narrow technical training will not produce the qualities we desire in him." See also Llewellyn, On What Is Wrong with So-called Legal Education, 35 Col. L. Rev. 651, 662 (1935). Llewellyn asserts that every course ought "to bear, *inter alia*, on what the job in society of that branch of law may really be, and on how well the job is being performed." Yet, he adds, of course, "I hold that a lawyer's first job is to be a *lawyer*. I hold that we must teach him, first of all, to make a legal table or chair that will stand up without a wobble. Ideals without technique are a mess. But technique without ideals is a menace. . . . ." So, Llewellyn concludes, the student must acquire from his professional education some measure of ability to appraise social facts and their implications.

[13] Cf. Frank, Why Not a Clinical Lawyer-School, 81 U. of Pa. L. Rev. 907 (1933); Frank, What Constitutes a Good Legal Education, 7 Am. Law School Rev. 894 (1933).

instructors.[14] For this reason I favor giving to all students of demonstrated competence—whether they intend to be private or official practitioners—an occasion to exhibit their powers of independent analysis within an area which particularly interests them.

In sum, then, I hold that essential differences need not exist in the training given private and official lawyers, respectively. The problems which call for the services of the latter usually affect the work of the former as well. Insofar as government law involves topics not now dealt with in law schools, the schools should consider whether there is not room for their treatment within the more or less standard subdivisions of our curricula. Since the important thing to emphasize is the interrelationship of subject matters, we ought to hesitate before creating new courses which tend to separate rather than knit together. The curriculum may be enriched, however, by keeping existing courses sufficiently flexible to receive issues of newly-developed significance. Finally, after a fundamentally common course has for some time been pursued by students of variant ambitions, the individual should be encouraged to attempt independent work, through which he may focus his previous learning upon his particular aspirations.

[14] Cf. Graham, op. cit. supra note 5, at 297: "The function of research is threefold in training for public administration: first, to throw new light on unsolved problems, to provide new information and new understanding; second, to bring students and faculty into intimate contact with government in operation; and, third, to tone up the whole educational process by setting the highest standards of industry, analysis, thought, and expression."