PROPOSALS FOR REFORM OF LEGAL EDUCATION *

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Legal education has been holding a mirror to itself and has come to acknowledge its imperfections. Hardly a major law school is not today in the throes of a curricular reexamination. There is an increasing sense of dissatisfaction, an increasing willingness to probe hitherto unchallenged premises about what lawyers should do and how they should think, and an increasing receptivity to proposals for reform. The sources of this development are several. Today's law students are, on the whole, brighter, more outspoken, and more impatient with social injustice and institutional inertia than their predecessors. These qualities cannot help but render disastrous a "business as usual" attitude on the part of legal educators. The legal profession itself has insistently voiced the refrain that legal education must offer more comprehensive instruction in the practical arts of lawyering. Finally, legal educators have independently found their own incentives for curricular reform. Although it might have been possible in the not too distant past to nurture the idea of teaching all that was worth knowing about the entire corpus juris to each of our students (witness the substantial dosage of required courses), the "law explosion" wrought by our complex social and technological environment has forced most of us to dismiss that idea as illusory. It has also brought the realization that much traditional legal research is unresponsive to the demands of our time. Library research and analysis of primary legal materials remain important, but there is increased need for the researcher who systematically seeks out social or institutional ills amenable to cure through the legal process, or who studies the effect of the law upon the social conditions it is designed to regulate. To meet this need, educators are bringing into the area of legal concern problems heretofore ignored: environmental pollution, health services, school administration, and community development.

It is easier to identify the sources of discontent than to prescribe the cure. Various proposals for curricular reform have been suggested, and I shall try briefly to catalogue them. As with most contemplated institutional reforms, there are attendant risks. Some proposals require the law school to venture into untried subject matter areas and teaching techniques which may result in only a limited educational "payoff." Some may arguably impinge on academic freedom by limiting the

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teacher's privilege within a course to select the substantive legal problems to be studied and the pedagogical techniques to be employed in studying them. Almost all involve the consumption of human and financial resources considerably beyond those available to today's law school.

A. *Clinical Work*

Perhaps the most widely publicized reform—dramatized at least twice weekly on network television—is so-called "clinical work." The term obviously derives from the medical schools, where the student ministers to real people with real health problems. There are many variations on the clinical theme. At one extreme the student renders service on an ad hoc basis to particularly needy clients. At the other extreme he works as a law clerk to an appellate judge or as an observer in an administrative agency, an experience thought to warrant the designation "clinical" by virtue of its locus outside of the law school and its involvement with working legal institutions. The exposure may be as brief as the equivalent of a two or three hour classroom course or as extensive as a full semester away from the law school. The values are thought to be several: exposure to new and challenging legal problems; training in the skills of counseling, interviewing, and negotiating; an opportunity to contribute to the cause of legal and social reform; and exposure to problems of legal ethics and to broader issues of professional responsibility. The risks are also several: the student's involvement in frequently repetitive and unchallenging ministerial chores of little educational value; the expenditure of substantial amounts of faculty time in the supervision of such activities; the arguably unseemly affiliation of the law school (to the extent that the clinical work has a law reform feature) with a controversial social "cause" or faction. It will, I believe, be some time before law schools, by experimenting with different forms of clinical programs, will be able to maximize the benefits and minimize the costs of this form of legal education. It is therefore just as unwise to delay the implementation of a clinical program merely because there are risks and uncertainties which can only be eliminated by some period of trial and error as it is to rush headlong into a clinical program merely for the sake of offering "relevant" education to our students. I believe that in the long run we shall gain much—regarding both substantive learning and pedagogical technique—from the thoughtful use of the clinical method of instruction.

B. *Skills Training*

Closely related to clinical programs are proposals for skills training. We have developed the phrase "thinking like a lawyer" as shorthand for a bundle of analytical skills, typically a sharpened sense of relevance, a concern for nuances of fact, a skepticism of the unsupported generalization, and a capacity for accurate self-expression. But these skills, so sharply honed over three years of law school, represent only a small

fraction of the lawyer's arsenal. Classroom discussions frequently focus on the question "What are the arguments for each party?" while the lawyer in the "real world" is confronted with questions of quite different magnitude: "Can our client implement this plan of action?" "How should this transaction be planned in order to effect the desired object?" To function effectively as a member of a law firm, as corporate counsel, as government administrator, or as legislator, the lawyer must be able to elicit information, to divine an appropriate policy goal and propose alternative means of securing it, to resolve disputes by negotiation and mediation, and to draft documents with precision and foresight. Our law schools make some attempt to communicate these arts to our students, but, say the critics, the attempt is all too meagre.

More zealous advocates of highly practical skills training go further and argue that our law schools should produce graduates competent to examine titles, institute and prosecute suits, prepare individual, partnership, and corporate tax returns, work out estate plans, form, operate, and dissolve various forms of business organizations, manage a law office, handle clients, and determine appropriate fees. Rather than argue that contention at length, I simply observe that law school is only a small (albeit a rather significant) part of a lifelong career in learning the law and that its resources should be devoted to those things it can do best. The kinds of technical skills just enumerated, if they should be formally taught at all, can be better taught by members of the practicing profession through the medium of continuing legal education programs.

C. *Interdisciplinary Study*

A charge frequently leveled at traditional legal education is that it is unduly preoccupied with the study of appellate decisions and other "strictly legal" materials. In our complex society the lawyer cannot content himself simply with the post hoc analysis of cases and statutes. He must come to grips with the learning of the economist, the statistician, the sociologist, the psychiatrist, and the historian. The policymakers in Washington who in earlier days would turn to lawyers for creative suggestions about the direction of social and legal reform are placing increased reliance upon those versed in the new insights of systems analysis, cost-benefit analysis, decisionmaking theory, organizational and public policy studies, and economic and social statistics. All this is a far cry from the concerns of Williston and Corbin and even of their more modern counterparts, the draftsmen of the Restatement Second of Contracts and of the Uniform Commercial Code.

The introduction of interdisciplinary study will entail a great deal of effort on the part of law schools: compilation of useful teaching materials will be difficult and expensive; administrative problems will be aggravated; there will be difficulty in finding lawyers competent in some field outside the law, or nonlawyers willing to break away from

the routine of their respective disciplines and learn about the problems and thoughtways peculiar to the legal profession. Notwithstanding these difficulties, reformers argue that experimentation with interdisciplinary programs is essential if law schools are to continue to offer stimulating and valuable instruction. A number of law schools, through joint degree programs, have formalized links with business schools within their universities, and at least two law schools—Harvard and Pennsylvania—have established a link to centers for the study of public policy analysis, drawing heavily upon the mathematical, economic and political sciences. In my judgment, the burden which these joint programs will have to carry in the future will be the giving of some meaning to the "inter" in the term "interdisciplinary." The task will be truly to meld the learning of the two or more disciplines, rather than merely to permit those disciplines to coexist proximately in mutual ignorance.

D. *Individual Instruction*

Our students are products—or victims—of a system of mass education. College enrollments have mounted in recent years, and the latest figures show that American law schools are filled to capacity and, for lack of adequate progress in the establishment of new schools, will have to turn away qualified applicants or construct new buildings. Among all forms of graduate education, law school education is unusual for its high ratio of students to faculty. Many of our students lose their sense of involvement in the educational process, and many educational reformers have thus championed increased use of seminars and other small-group teaching methods. The use of such methods should invite greater student preparation and participation as well as experimentation in both subject matter and pedagogical format. But careful consideration must also be given to the cost of individualized instruction—the need for additional faculty and, more importantly, the time lost for scholarship as increased resources are devoted to the classroom.

E. *The Two-Year Law School*

There is a rather substantial movement among legal educators for the introduction of a two-year professional degree program. It is suggested that the core of legal learning—that is, an introduction to our legal institutions, to the skills of case analysis, and to basic subject matter—can be effectively communicated in two years, and that the third year is typically spent in the pursuit of more substantive learning through cases, a process which pays slim dividends indeed. The information gained at the cost of thousands of dollars in tuition and fees and a lost year of professional earnings and training will soon be forgotten (assuming the rather indifferent third-year student ever to have mastered it), or will quickly become obsolete.

Unless legal education is drastically revamped to make the third year progressively illuminating and challenging (perhaps through some of the reforms described earlier), I am convinced that law school could end after two years with no perceptible loss to students or the profession. Indeed, the profession might gain if, as some believe, many able prospects for law school are deterred by the time and money demands of a three-year regimen. Surely our students have learned quite enough about case analysis after two years of it. If not, the theory of diminishing returns suggests that a third year will add little to their mastery. And I believe that we can, by streamlining our course program, communicate to our students enough basic substantive knowledge to enable them to classify a legal problem into its appropriate niche and then draw upon the available research tools. After all, we have always conceded that while our graduates may not know all the law, they do know where to find it. To the extent it *is* thought important after the first year simply to transmit information about legal institutions and subject matter, it can be done far more efficiently through lectures, readings, and soon enough by teaching machines.

In short, I believe we can turn out lawyers with two years of professional training substantially as well qualified as they are now after three. Indeed, it is not uncommon for third-year law students to earn lower grades than second-year students taking the same courses. Those who argue that law school should stop after two years are, however, frustrated by the position of the organized bar: the American Bar Association and the Association of American Law Schools will not accredit a school offering only a two-year professional degree, and state bar examiners will not admit a student who has earned such a degree at an unaccredited school. The issue of the two-year law school demands prompt and intensive exploration by the law schools and the organized bar. Alternatively, the appropriate remedy for the "third-year decline" is not to abolish the third year but to revitalize it along some of the lines suggested above. This appears to be the course that most law schools will pursue in the near future.

These, then, are the main currents of suggested reform in legal education. Before we are persuaded that one or more of them should serve as a point of departure for curriculum changes in our law schools, we must carefully examine the underlying premises. Can we be sure, for example, that clinical work will reap the expected rewards for our students? It has been suggested that rather than giving students an exalted sense of the role of the law and of the lawyer in community service, clinical experience breeds skepticism and a tolerance of sloppy work habits. Can law schools teach skills such as problem-solving, counseling, interviewing, and negotiating, or can these be effectively transmitted only by experience at the bar? How frequently does the lawyer, called upon to deal with men versed in other disciplines, find himself unable to master new subject matter? Is the lawyer's role in

public and private policymaking really being jeopardized by management consultants, computer programmers, and the like? Can scholars of the law and scholars of other disciplines learn to speak a common language, a language which can be taught to our law students? Are there financial and human resources available to effect a shift toward highly individualized instruction? Can we successfully augment our teaching force by drawing on practitioners, teachers other than law professors, and our own students in order to meet the anticipated increased demands upon our law faculty? Can we shift without serious loss from the Socratic method of instruction to other more efficient methods, such as lectures, readings, and teaching machines? Can we produce a capable professional after only two years of law school, and, if we can, will the organized bar be receptive to a departure from the seemingly sacrosanct three-year requirement? These are only some of the problems which reformers of legal education must address.

Experience and hunch regarding many of these questions have encouraged the faculty of the University of Pennsylvania Law School very recently to approve in principle the goals of more intensive and sophisticated study of subject matter, training in more diverse legal skills, and more individualized instructional methods as a basis for possible reform of our three-year program. While the affirmation of these goals comes rather easily, their implementation is devilish. It is both depressing and consoling to the curriculum planner to realize that there is likely to be no computer which can determine how, by manipulating some twenty-five full-time law teachers and some six hundred students, to preserve what is good in traditional legal education while implementing these newly affirmed goals.

Some alternative programs do, however, come to mind. Every student might in his second year of law school choose a particular substantive field to explore in depth, and devote a substantial part of his second and third years to mastering that field. This specialized work might consist of courses in law and related disciplines, special readings and lectures, skills exercises (such as drafting or interviewing), appropriate clinical work, and small-group and individualized study programs. The object would not be simply to accumulate information about the field but rather to view it with the versatility, perspective, and sophistication which the lawyer must bring to his work. It might be possible for some few law schools, endowed with extraordinary monetary and faculty resources, to offer such specialty programs in a large number of different subject matter areas. More likely, particular law schools would find it practicable to concentrate on only a limited number of specialized subject matter areas. Some visionaries see a number of law schools joining in a consortium, with each school offering different specialty programs and with free transfer of students within the consortium for their third-year program of intensive study. Many reformers of legal education would, however, be quite disturbed by any

such trend toward "specialization" and would advocate instead the more "generalized" and "humanized" study of the law, where the emphasis would be upon the integration of traditionally disparate subject matter areas and a more systematic reflection upon the nature and functions of law.

Reform in legal education is likely to come slowly. Lawyers generally and law teachers in particular are inclined toward a careful parsing of the issues, an articulation of the pros and cons, and movement which can at best be called incremental. But movement there must be. That this proposition is becoming increasingly acknowledged is a cause for optimism in 1971. Hopefully, the end of the decade will find us with some of the answers for many of the questions which so many of us are asking at its beginning.