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Social Science and the Future
Law School Curriculum

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WHERE can social science be relevant if we are thinking of curriculum revision? Some of the obvious places have already been noted in earlier papers, and the evidence seems to be that moves are afoot in those directions. For example, what constitutes evidence and proof? What is the social science methodology of coming up with a verifiable statement of fact or relationship? There has been argument from time to time as to how much of this training the lawyer ought to have, because it may inhibit him in his adversary role. He may not really want precise scientific accuracy if that is against his client's interests. One still has to recall that there may be a difference in what the lawyer as a practitioner thinks of as evidence and legal proof as distinct from social science proof. It may be acceptable for him to tolerate both of these systems of truth and keep them in mind, but as a practitioner, he ought not to confuse them.

Another area which I think is of considerable interest to social scientists and lawyers is that of studies of the legal profession itself. By virtue of various commercial and noncommercial enterprises in the legal field a good deal of statistical information is available about lawyers. Missing, however, are many things of a subtler variety about the practice of law — such as, what does the law-man really do with his time? What are the proportions of trial work to negotiations, to office paper pushing, to public relations, to serving on boards, and to doing a variety of things which are not the practice of law, but rather are efforts to bring business to the firm? This latter activity is a valid function. Much of the voluntary service in the United States on boards of trustees, on fund-raising campaigns, and so forth, does come from this highly-educated portion of the community.

A side comment should be made with reference to the legal profession. Dean Yegge spoke about the lack of calling on the part of the legal profession. Perhaps it is more that the training in law is more directly used by the trainees as a stepping stone to some other career than is common in other professional fields. Moreover, there may be among lawyers an excessive orientation to where the

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money is, rather than to where the need is, which may not be the same place.

It seems that if we want people who have some sort of an orientation to the fraternity, and particularly to a sense of having a high calling, then some of the things such as the history of law, even going back to its medieval origin in terms of the common law tradition, may be professionally valuable, even though they may not have any great current relevance, because they illustrate the identity of law with a continuing tradition in a high calling. Perhaps this is a subtle point, but a very important one.

What is the expected output of a legal education? A fairly high proportion of people can pass the bar in some jurisdiction, but surely that does not justify a three-year curriculum. It is not what the framers of educational programs had in mind as the mature output of professional training. What should professional training be? Certainly not the use of the human mind as a very inefficient data-storage and retrieval system, particularly since the data waste very fast and spoil quickly. Rather, what is desired is a set of habits — habits of mind.

First it is important to develop the habit of humility, of finding out, of not being certain. The medical fraternity has developed with high skill an air of assurance in dealing with clients, however uncertain they may be. The legal fraternity, in dealing with a client who desperately wants assurance that the odds are in his favor, will tell him that it seems to be this or that, but that if a certain judge is assigned, it would be better to negotiate and not go to trial. Thus, the client is left with a great air of uncertainty. Thus, we have to train clients. Often the problem of professional practice is that the clients will not play their role right. This habit of humility, which is kind of forced on lawyers in our particular legal system, is one which should be expected, and, on the whole, is an admirable trait.

The second habit is that of continuous learning. If information spoils rapidly, then the problem is to keep at it and to keep finding out what is going on and not assume that simply because one has an LL.B. or a J.D. and has passed the bar, that now he is for all time qualified to practice law. Professional obsolesence will set in in the legal practice at least as fast as in other fields over the coming years, and may be really severe if the individual does not approach his profession as a lifetime of learning rather than a lifetime of practice of things once learned.

Thirdly, the lawyer is a problem solver, as any professional who is helping clients is, in some degree. He wants to solve the problem for his client, whatever that client may be, a public agency, a con-

stitutional convention, a corporation, or a hapless person accused of some misdemeanor or crime.

It does not make much difference what the substantive content of the legal curriculum is if the consequence of that content is the development of these sets of habits. A problem-solving course in medieval law would be better than a "hornbook" or "black letter" law course on some current field of legal specialty.

Aside from the business of social science methodology, where else can social science feed in, if not precisely into the legal curriculum, or at least into the legal university community, into the interaction of specialists as researchers, or into seminars?

One major area is the increased importance of the invention of organizations and new organizational forms. Organizations in the private sector are imitative of one another. One looks at another's organizational chart and says, "Yes, with but a little tinkering we can adapt that for our purposes." Increasingly, private organizations depend on the advice of organizational specialists, people who are specially trained in administrative science, theory of formal organizations or similar areas. Public organizations, on the other hand, are mainly the outcome of legislative processes which are dominated by lawyers. This means that whatever public organizational inventiveness is being exhibited is the outcome of people who are not necessarily well trained either in organizational theory or in the ways in which one can adapt various organizational forms to do particular functions and purposes.

Lawyers, as legislators, or occasionally in administrative and similar agencies, are experts at rule-making, but not necessarily experts in estimating the probability that the rules will be obeyed or that they will in fact accomplish their purpose. Here is where a juncture of skills is appropriate.

The social scientist may be able to say, "That's a very interesting rule, but in view of X, Y and Z — the probability that that rule is going to get you where you want to go is not very high. Let's try it another way. Let's try it in a different formulation."

It is also true that lawyers are not highly enough trained, or their habits of mind well enough equipped, to do sequential problem solving. They tend to set up organizations and say, "Well, this is the way we're going to go about this," rather than thinking in terms of a sequence of steps in order to arrive at an outcome. They may get less help from the social scientists than they had good reason to expect, because the latter are not very good at it either. Therefore, we need to pay attention to what is currently called systems analysis, a concept which has been developed primarily in the engineering

field, but which is now being used in a variety of areas of concern both to regulate human order and to solve social problems.

What is different about what the Systems Development Corporation, the Rand Corporation, Arthur D. Little, Stanford Research Institute, or a variety of these places are doing from what, say, the well-trained social scientist is doing? Two notions of innovation have evolved, both of which are worth comment.

The first is the assumption that consequences have consequences; that is, that one is not doing a once-for-all set of problem solving. Rather he should look down the road and then back up and say, "All right. What would we have to do and what would that mean?" so that he gets the concept of lead time of first inputs, and the consequences of that leading on to some others. Sociologists generally do not think that way, and neither do lawyers on the whole. It is a very important part of organizational inventiveness and of social problem solving to have that perception which tells one that what he is dealing with is a sequence of moves and not simply a once-for-all solution.

The other notion which has evolved is that in the problem-solving development of a systems analysis, if there appear to be some factors on which one does not have good evidence, to say nothing of measurement, but which he yet believes are important or might be important to the outcome, the analyst assigns arbitrary values to them rather than not accounting for them. He is willing to settle for bad data, to settle for a plus or minus rather than a real quantity, or to settle for an arbitrary value. This often means that he comes out with less than highly precise on-target solutions, but they are likely to be better solutions than if one had not accounted for these things at all. Perhaps people not trained in all of the rigors of social science methodology have a slight advantage over those who think that one has to be rigorous in problem-solving or it is not worth doing at all, which, in the real world, may mean that he does not do it at all.

Systems analysis is a great bundle, and not a very homogeneous one, of what goes on. Operations research, linear programing, game theory, and cost-benefit analysis are also essentially in this mold of problem solving in a sequential series.

Another area not unrelated to what has just been discussed is social science's relevance to legal training and legal practice, and the use of law as an instrumentality of change. Twenty years ago this statement might have had some shock effect. It has none at all at the moment with most of the legal fraternity, certainly not with professors of law. The notion that law is purely a conservative force has been pretty generally abandoned. If it has not, the profession had better re-examine those antiquated notions and get some of them out of the practice. The articulation of social goals, including

new ones, seems a proper joint venture for the person who thinks in value terms and the person who thinks in instrumental terms, together with those people who may have some expertise at identifying goals on the basis of popular concern — people who know how to determine what the democratic goals of a society might be.

More and more our society is going in for planning, for a deliberate shaping of the future, and for stating future goals as to what the year 2000 will be like. How can it get there? This question applies not only to the articulation of these goals and the articulation of the social instrumentalities for achieving them, but also to thinking sequentially, and therefore not simply in terms of precedent and of the restraints on the system.

A helpful conceptual distinction is between teleology and teleonomy. Teleology is the description of a future goal and the behavior oriented to achieve that goal. Teleonomy consists of predicting that part of the future which probably cannot be controlled and making prior ameliorative or adaptive adjustment to that state of affairs.

In the dynamics of social inventiveness the effort is constantly being made to increase the teleological capacity and to reduce the effect of teleonomy of future states. Society has an extremely small power over the effect of both death rates and birth rates on the labor force, short of inhumane measures. The labor force of the year 2000 is pretty much at hand and its age structure is going to be highly predictable with very little margin of error, short of catastrophe. That can then be taken as a given factor with regard to a whole variety of other kinds of plans and implementation, such as urban congestion, demand for schools, labor input, and various kinds of economic production. This is not then a teleological state of affairs. There are going to be too many people, but no one is going to prevent that. Thus, the attempt is made to take such action as can be taken, or to take that fact as a parameter, or essentially as a datum.

Finally, let a challenge for joint social science and legal problem solving be put forth in reference to the national scandal of automobile insurance. If you have Blue Cross-Blue Shield Insurance, approximately ninety to ninety-three percent of the premiums paid for that insurance are returned to the insured population. In the case of automobile insurance, the percentage is perhaps thirty to thirty-two. The rest of the money goes to the profits of insurance companies, to claims adjustors, notably to tort lawyers, trial lawyers, to court costs and to the support, in part, of a fair proportion of trial court judges. One looks at that combination of interests, which have positive interests in the preservation of this wicked system, and he finds that it is a very difficult problem to solve. If one were thinking

in terms of systems analysis he would say, "Well, we may not be able to get ultimate causes, but where would we start?"

The basic problem obviously is the automobile accident. Thus, we need to know what can be done about the hardware technological problems, or about the psychological, or the sociological problems in reference to the accident rate. Perhaps one needs to ask if there are alternative ways, as has been proposed, of settling claims. Usually the analogy with workmen's compensation is the one that immediately gets into the conversation. Surely there must be other comparable alternatives to the handling of this problem which is clogging our courts and which, incidentally, supports probably the poorest segment, in terms of training and talent, of the legal fraternity.

The settlements are likely to be not only unjust in the gross, but it also appears that they are regressive. Those people who can best retain competent counsel and hold out for a just settlement are the ones who are getting just settlements. Others, who have no credit at the hospital or with their physicians and who do not have a variety of other amenities, including the capacity to identify an attorney, to say nothing of affording one, even if only on a contingent fee basis, are likely to be the ones who will take a quick settlement offered by the insurance companies. Again, a serious matter of social policy is involved.

Here, then, is an area where, recognizing the problem of the legal fraternity turning on part of its own, legal skills are absolutely requisite. One can see that a variety of other skills are requisite, not all of which are in the social science field. Some of these skills are in the technological area, such as, for example, electronic control of traffic and remote controls which prevent rear-end collisions, not because the driver has been educated not to tail-gate, but because the car will not tail-gate. It seems that the systems development approach is the only way in which one is going to get this type of problem ameliorated, to say nothing of resolved.