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SOME OLD FASHIONED NOTIONS ABOUT LEGAL EDUCATION ACCOMPANIED BY SOME ULTRA-CONSERVATIVE SUGGESTIONS

By LEWIS D. ASPER*

We have fooled ourselves, we have fooled our law professors, we have fooled the whole bewildered public, into the idea that the essence of our craft lies in our knowledge of the law. And knowledge of the law we do have, and we do need, but such knowledge is but the precondition of our work.

* * * * *

Let me say it again: the essence of our craftsmanship lies in skills, and wisdoms; in practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field; and then in skills for regularizing the results, for building into controlled large-scale action such doing of things and such moving of men.

* * * * *

*But we do not say this, even to ourselves. Why not? Does it seem too plain, too ordinary, too much like what needs no license via bar examination? I do not know. What I do know is that because we do not say it to ourselves we do not study our own essence as we need to, we do not train every lawyer in it, we do not have and cannot yet phrase or apply standards of minimum competence in it, we do not require entrants to qualify in it, we learn it, each one of us, only by slow unreckonable accident, happenstance or inborn artistry.***

I.

Lawyers in more than twenty states now have available to them regular, organized continuing legal education programs, joint efforts,

* Professor of Law, University of Maryland School of Law; former Director, Committee on Continuing Education of the Bar of the Maryland State Bar Association; Member of the Second National Conference on the Continuing Education of the Bar, December, 1963. The views and proposals herein are solely and exclusively those of the writer, and do not represent the position of the University of Maryland School of Law. As far as his faculty colleagues are concerned, the writer is reasonably sure that some or all of them not only will not concur, but may regard the whole thing as outrageous.

** Llewellyn, *The Crafts of the Law Re-Valued*, 15 ROCKY Mt. L. REV. 1, 2-4 (1942).

in most cases, of bar associations and local law schools. Almost all of these programs include as a regular feature courses for newly admitted lawyers designed to "bridge the gap" between legal education and the practice of law. These latter programs were among the major topics under discussion at the Second National Conference on Continuing Education of the Bar at Columbia University's Arden House in December, 1963. The final statement of the Conference, published in 1964,¹ reported the conclusion of this group of seventy-seven practicing lawyers, judges, law teachers and professional continuing legal education administrators that such a "gap" does exist, that there is an insistent need to fill it and that apprenticeship or clerkship programs have proved generally unsatisfactory for the purpose.

The gap is identified as the absence of training in the practical skills of the profession, training which the Conference suggest is "not appropriate for inclusion in law school education."² The Conference recommended the organization of programs providing concentrated and comprehensive training in skills which would follow graduation from law school and precede entry into the profession. The Statement suggests, at least, that consideration be given to making successful completion of such a course a condition of admission to practice.³

The mere fact that a strong demand has arisen for such additional training for lawyers should be of significance to both law teachers and the practicing bar. Painful though it is for a full-time teacher to admit, the demand indicates that something valuable was lost when formal legal education supplanted "reading law" or other forms of on-the-job training. Call it skill or by some other name, it is missed. Moreover, half-way measures — most particularly the required clerkships imposed on candidates in some states — have not worked. They are a burden on candidates without even roughly corresponding benefits to the profession. While in theory they should supply this elusive skill factor, the facts of contemporary law practice appear to be such that the training supplied during clerkships is narrow, limited, sometimes almost non-existent.⁴ Beyond that, it should be noted that what is true of pre-admission clerkships is true in greater or less degree of many other forms of auxiliary legal training available to law students and recent graduates. Clerkships to judges, for example, are plums for recent graduates and properly so because of the experience and training they provide. Extended clerkships, however, and prolonged careers as bailiffs may well become cumulative and repetitious, diminishing in training value as the student or graduate concentrates repeatedly

1. NATIONAL CONFERENCE ON THE CONTINUING EDUCATION OF THE BAR, TOWARD EXCELLENCE IN CONTINUING LEGAL EDUCATION (1964) (hereinafter cited as NATIONAL CONFERENCE).

2. Final Statement of the Second National Conference on the Continuing Education of the Bar, 32 U.S.L. WEEK 2307 (Dec. 24, 1963).

3. *Ibid.*

4. A Committee appointed by the New Jersey Supreme Court to study the required clerkship system in that state found that:

1. No uniform standards of skills were available to all clerks.
2. No real standards existed for governing the teaching and employment relationship between preceptor and clerk.
3. The economic burden of clerkship was placed on those least able to afford it — the beginning lawyers.

Jarmel, *The New Jersey Skills Training Course*, 17 J. LEGAL ED. 432 (1965).

and continuously on one corner of the legal process. *A fortiori* part time student employment in busy law offices.

Only a minority of the Arden House conferees could claim any experience with the kind of program recommended. The models offered for examination and discussion included the elaborate program offered in Toronto,⁵ the 10 week course which has long been in operation in Wisconsin⁶ and the plans for the 12 week course offered in New Jersey for the first time during the summer of 1964.⁷ Even with these models to work from the Conference had neither time nor facilities to draw up a curriculum or make definitive suggestions on methods to be used. All the Conference did, in the last analysis, was express agreement on the need. There was almost unanimous agreement among the lawyers, judges and teachers present that there is a big hole in the training of young lawyers resulting from the absence of carefully planned and supervised exercises in doing what lawyers do rather than merely examining the consequences of what some lawyer has done.

The Conference statement is significant in one other respect. It is addressed to the profession and, therefore, takes the position that it is the duty of the organized bar to take steps to correct deficiencies in the training of young lawyers. By necessary implication it charges the profession with responsibility for the competence of all of its initiates and is a disavowal of the position that lawyers need only concern themselves with the competence and professional standards of their own employees and associates.⁸ Implicit in this position is recognition of what all know to be true: That in any jurisdiction there

5. For admission to the bar in Ontario, in addition to obtaining an LL.B. from an approved law school, the candidate must complete 12 months of apprenticeship with a solicitor practicing in the province and a six month teaching period that commences immediately upon completion of his apprenticeship. The faculty of this extended course is made up principally of lawyers but also includes judges, social workers, police, government officials, psychiatrists, newspapermen and accountants. Roberts, *The Bar Admission Course in Ontario, Canada*, NATIONAL CONFERENCE, *op. cit. supra* note 1, Appendix D (1964).

6. The State of Wisconsin admits graduates of state law schools to practice without a bar examination. The State University law school, however, requires its graduates either to clerk for six months or to complete successfully a 10 week summer course in what are conceived to be the elementary skills of the general practitioner. The course is taught by law teachers, lawyers, judges and representatives of various government agencies. Jarmel, *Special Educational Needs of the Newly Admitted Lawyer 25* (mimeo), Working Paper for Second National Conference on the Continuing Education of the Bar.

7. The State of New Jersey offered a 12 week skills course as an alternative to the required six month clerkship for the first time in the summer of 1964. The course was a combination of skills, lectures, demonstrations and problems which followed substantive review lectures in selected fields. The course was offered prior to bar examinations, so that it was designed to serve as a bar review course as well as skills training. Reportedly, this was not an entirely happy combination of objectives. Jarmel, *Report on the New Jersey Skills Training Course*, NATIONAL CONFERENCE, *op. cit. supra* note 1, Appendix E (1964).

8. A special concern of the Arden House Conference and of other interested individuals is the young lawyer who leaves school and immediately goes into practice on his own. It does not appear to be true that most law graduates enter into associations with older and experienced lawyers who bring them along slowly until they are ready to fly alone. Professor Walter Gellhorn of Columbia University reports that even in New York, with its concentration of large law firms, about seventy percent of the lawyers engage in solo practice and set up that way not long after graduation. Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL ED. 1, 13 (1964).

is an inescapable reciprocity between the standards and quality of the training young lawyers receive and the standards and quality of the bar in which they take their positions.⁹

The idea is an exciting one. In moments of optimism one can see a possibility that such programs might replace in substantial part the ubiquitous, small-bore "bar review" courses, or even ultimately be incorporated into the whole process of testing competence for the profession. At their very best such courses might be an important step toward the objective urged by Professor David F. Cavers of the Harvard Law School 16 years ago, that of providing "continuity in the processes of education between law school and law office,"¹⁰ and in that respect help bridge the gap so often existing between law teachers and practicing lawyers. There is reason to believe the Conference Statement will receive careful and thoughtful attention in a number of states. Organized continuing legal education activities have increased dramatically since the first Arden House Conference on the subject in 1958. In most if not all states where such programs have been given a reasonably full trial, bar associations are persuaded that they are among the most significant services the associations can offer. And as noted above, in almost all states where continuing legal education has received careful study, the special needs of newly admitted lawyers have come in for particular attention.

II.

The Conference Statement focuses on "areas of instruction centering in practical skills which are not appropriate for inclusion in law school education" and adds, "Instruction in these areas should be provided by the profession."¹¹ If this statement is taken too literally by law teachers, there is a danger that the recommendation will be seriously misunderstood. If it is read as acceptance of a clean distinction between legal education and training in the "practical skills" of the profession, then the promise of the proposed program will be seriously diminished. Insistence on this distinction has in the past hindered development of the "continuity in the processes of education" urged by Professor Cavers. Continuing to insist upon it will discourage the collaboration between experienced teachers and experienced practitioners that could mean so much to improvement in the training of young lawyers.

It seems fair to say that the Arden House Statement lines up in opposition to those who urge that law school time should be given to how-to-do-it sessions calculated to familiarize students with what are conceived to be the routines or techniques of practicing law.¹² At the same time it would be a mistake to regard the recommendation as an

9. The emphasis here is on the "reciprocity." While few deny that the standards of the schools influence the standards of the bar, what is less commonly acknowledged is that the attitude of the bar toward legal education can act as a governor on what the schools can demand and get from students.

10. Cavers, *"Skills" and Understanding*, 1 J. LEGAL ED. 395, 402 (1949).

11. Final Statement of the Second National Conference on the Continuing Education of the Bar, 32 U.S.L. WEEK 2307 (Dec. 24, 1963).

12. NATIONAL CONFERENCE, *op. cit. supra* note 1, at 21 (1964).

unqualified though indirect indorsement of law schools and the current course of legal education; or to take it as evidence that the profession supports the position that law schools have only a limited obligation to see that graduates emerge with some measure of professional skill. In the Arden House discussions, formal and informal, it quickly became apparent that before the conferees could decide whether such additional training was needed, it would have to be made clear just what such training could be expected to do. It was important at Arden House and it will be important in the future for all who are interested to understand that a skills course is not a philosopher's stone that can convert abstractions to working competence in two or three months. Neither can a skills course provide the feel for the law and its ways which is a part of the equipment of every good lawyer and is usually the product of sound education plus experience. The Arden House proposal contemplates training designed to instruct the young lawyer in *how to do* a number of typical lawyer's jobs. Training him to determine *what job needs doing* in any given situation remains the function of formal legal education. Failure to insist on the distinction is to misrepresent the proposed skills training and, incidentally, to obscure certain facts about law school education.

Practicing lawyer members of the Conference had plenty to say about the shortcomings of young lawyers, but most of the complaints reflected not lack of skill but fundamental deficiencies in education. There was less concern with the young lawyer's ignorance of matters of particular detail than with the fact that he so often comes to the profession with an incomplete, even faulty, conception of what is involved in "lawyering." It was said that the young lawyer frequently has trouble identifying legal problems when they come at him in twos and threes; that having identified and analyzed a problem, he is often without any idea what to do about it. It was said that he often has to be told, almost as if for the first time, that in a law office "seeing the issue" is not enough — that clients want something done about their problems and come to lawyers for the doing. If these complaints are legitimate ones, it means young lawyers come out of law school and into the profession without fully understanding what a lawyer does for a living. In this regard they certainly lack something practical, something which is as much skill as it is knowledge. It is not, however, a deficiency which can be corrected in a 10 week skills course. Indeed, there is a serious question whether, absent real understanding of the demands the profession will make, a concentrated course in how to do certain jobs skillfully can be taught at all.

The Arden House proposal, then, contemplates *only* a short, concentrated post-graduate course designed to give the new lawyer familiarity with the places, the machinery, the forms, the tribunals he will use and, as far as possible, with the shape and substance of the transactions most likely to be committed to his care during the early years of his practice. The proposal suggests that the instruction should be provided by practicing lawyers, and those who have had experience with such courses add that the instruction should include exercises with carefully prepared problems and not be confined to lectures. The subject matter would be limited to the law of the jurisdiction and

emphasis placed on doing what has to be done.¹³ It is vain to expect that such an abbreviated program can devote much time to the critical initial step of determining *what* should be done in a given case.

On the hopeful assumption that serious efforts will be made to accomplish the Arden House recommendation, one may foresee even more extensive benefits for legal education generally. The proposal suggests expanding legal education, not making substitutions in what is presently offered. With that as an objective an occasion is presented for collaboration between law teachers and lawyer-tutors in planning this expansion — collaboration in place of the periodic guerrilla warfare which in the past has forced representatives of both groups to take positions they couldn't possibly defend if really put to it. It would be a relief to have it settled once and for all that membership in a learned and responsible profession should involve something more than know-how¹⁴ and, at the same time, eliminate the prissy notion that "the law" is pure and serene while practice is something faintly disreputable that lawyers do with it.¹⁵

If skills or know-how training is to be consigned to a separate and distinct phase of legal education, what is the full significance of this development for the law schools? If the criticisms and comments heard at Arden House are typical and legitimate, then it would seem that the bar's objections are not always and necessarily directed to emphasis on content at the expense of skill, but rather to what it conceives to be some fundamental deficiencies in the content itself. These observations are not new. They have been heard, not only from practicing lawyers but from some of the ablest law teachers for a number of years: Too large a proportion of law teaching encourages students to see the law as a plane surface — flat, two-dimensional, presenting but a single aspect. It is an old refrain: excessive reliance on appellate reports as the only respectable teaching materials produces an idea of the content of the law totally removed from any view a lawyer would take in the ordinary practice of his profession. No one has illustrated this better than Professor Cavers in his analysis of the mythical case of *Eks v. Wye*.¹⁶ Without purporting to exhaust the possibilities, he offered 17 different views of the case which might at one time or another appear to a lawyer. In then considering which or how many of these views would appear to a student reading the report of the case in a casebook he concluded ruefully,

13. *Id.* at 25-27.

14. Not only does the skills-and-techniques conception fail to furnish any intelligible guide for organizing legal education, but the attempt to apply it seriously threatens to forfeit the most valuable feature of the American case method of instruction, namely, an impersonal absorption in problems. It converts what ought to be a disinterested exploration of issues into an exercise in self-improvement. It abandons the university tradition in legal training for something that smacks of Dale Carnegie or Charles Atlas.

Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL ED. 189, 191 (1948).

15. Teachers are sometimes tempted to think that what they are communicating to students is the eternal verities while what comes to the young lawyer in practice is merely routine and sometimes tricky technique. At best, of course, this is only a conclusion, and it may be pretentious nonsense. See, e.g., McClain, *Legal Education: Extent to Which "Know-How" in Practice Should Be Taught in Law Schools*, 6 J. LEGAL ED. 302 (1954).

16. Cavers, *supra* note 10, at 397.

Probably the students will adopt none of these viewpoints. In all likelihood the problem of significance will not occur to them, for they will have only to decide what *Eks v. Wye* 'decided,' not what should be done or not done in the light of that decision. They are dealing with a question abstracted from actuality, in which no one other than a law student would be interested except as a part of some other question calling for decision and action.¹⁷

We teach a student to read and analyze a case (or even, in some few cases, a statute), and come out with a "holding." But there, too often, we leave him, with only the most fragmentary idea of what he is going to do with this "holding" now that he's got it. Plainly, he is not yet ready for training in *how* to use this bit of knowledge skillfully, because he doesn't know *what* use he may be required to make of it. In Professor Cavers' analysis, before there can be effective training for skillfulness in the practice of a lawyer's skills, there must be understanding of the skills a lawyer must have.¹⁸ In broad outline, the whole process of preparation for the legal profession involves at least three elements: Knowledge,¹⁹ understanding of the jobs a lawyer must do which will require use and application of that knowledge, and training which will prepare a lawyer to do these jobs skillfully. Failure to distinguish the second and third of these elements has confounded discussion of legal education for years. Continued failure to do so will seriously threaten the chances for success of the Arden House proposal. Communication of knowledge and understanding of a lawyer's skills must remain the function of the law schools. No skills course will have the time or resources to undertake this part of the process, nor will it be possible to give effective training in skillfulness except on a solid base of understanding. Communication of knowledge we in the law schools do reasonably well, too well, perhaps, to the extent we insist on transmitting masses of detail that students can't possibly retain. Our techniques for communicating understanding of lawyer skills need some work, and there is a strong possibility that lack of understanding of lawyer skills, not lack of skillfulness in lawyer skills, is the "gap" that so many have been trying so hard to fill.

III.

When one considers the enormous variety of jobs lawyers are called upon to do, he must at first despair of producing any curriculum or plan which could provide "understanding" of all of this activity. There is no single form of advocacy or counseling, no uniform technique of negotiating nor all-purpose style of draftsmanship. It is as vain to try to teach understanding of skill by particular skill as it is

17. *Id.* at 399.

18. *Id.* at 396.

19. The current preference for method over content should not blind us to the fact that those who talk content often have something important to say. Methodism, even in the non-ecclesiastical sense, can be carried to excess. There is need to recall that the slogan, "We teach men to think," has been the last refuge of every dying discipline from Latin and Greek to Mechanical Drawing and Common-Law Pleading.

Fuller, *supra* note 14, at 190.

to try to stuff a student with all the knowledge he will need. There are, however, certain fundamentals which are a part of the equipment of every good lawyer. Training for the profession must involve getting a grip on these fundamentals. The difficulty is that they defy definition or cataloging. The best law teachers, like the best lawyers, know what they are and on occasion come close to describing them, almost without trying. Witness the following by the late Karl N. Llewellyn:

Some students seem to me to be "whole"—seers or "whole"—feelers — "situation"—minded. They feel patterns, they almost automatically "correct" a concrete situation into comparison with its appropriate working pattern, and come out with a quick sensitivity as to whether and where the concrete situation is typical or non-typical, to which of the seen or felt factors in it tends to dominance, to what the movement—"strain" is and whither that strain leads or drives.

* * * * *

The more frequent type of student has to *build* his wholes more slowly and on a lesser scale, has to *work* his way into them and into feel for them, skill with them. He needs "rule" and "principle" and skeleton and repeated, painful, experimental doing until he slowly gets this or that skill organized and "worked into" him.²⁰

It is submitted that the "situation-sense" described in the first quoted paragraph is something every good lawyer has — it may be the sum of everything he has — and that providing law students with the means of acquiring a "situation-sense" must be a conscious objective of legal education. The second quoted paragraph contains some sound advice on how to go about it. The heart of the process is "repeated, painful, experimental doing"; but doing requires raw materials and raw materials for a law student must include the rules, principles, norms, concepts, prototypes which make up the content of the law.

We are interested in rules and principles then, in part at least, as means and instruments of understanding and must ask, understanding of what? To say understanding of "the law" will only start more arguments. It is safer and more productive to state as an objective of legal education the directing of student efforts toward understanding the function of a lawyer as "a participant, and usually the most active and responsible participant, in two basic social processes: adjudication and legislation,"²¹ the two fundamental processes through which we try to adjust a staggeringly diverse assortment of competing interests. Let us first recognize, and acknowledge as a defect in legal training, that to many of our students adjudication and legislation mean simply courts and congresses. Dimly perceived, if at all, is the understanding found in Professor Fuller's descriptions which include, in the first of these processes, "all forensic methods of deciding disputes,"²² and in the second, "the lawyer in his rule-creating, structure-giving rôle."²³ If,

20. Llewellyn, *McDougal and Lasswell Plan for Legal Education*, 43 COLUM. L. REV. 476, 478 (1943).

21. Fuller, *supra* note 14, at 192.

22. *Ibid.*

23. *Ibid.*

indeed, adjudication includes not only all levels of litigation in courts but also the functions of administrative tribunals and informal arbitration, and in addition, office counseling on prospects of lawsuits and negotiation of settlements; and if legislation includes not only conceiving and drafting statutes, but also negotiating and drafting contracts, franchises and collective bargaining agreements, and in addition, planning and drafting of wills, voting trusts and corporate charters, then the student whose education has been disproportionately larded with appellate reports has been exposed to the merest fragment of these processes in which the lawyer plays such a vital part. More serious, the advanced student who has more or less mastered law school technique may read his cases, even brief them, and reduce them "to propositions of law unlike Restatement blackletter only in the relative inaccuracy of their formulations"²⁴ while enjoying only the slightest intimations of the situations which produced the occasion for exercise of the adjudicative machinery. He is in the curious position of having answers for what are, for him, as yet undetermined questions.

An illustration may help clarify what is here meant by "understanding" — in this instance, understanding of adjudication as a social process for the adjustment of competing interests — and also provide a basis for judging whether this kind of understanding is being offered to law students. In February, 1965, in *Schipper v. Levitt & Sons, Inc.*,²⁵ the New Jersey Supreme Court departed from the "traditional rule" that warranties in the sale of real estate are not to be implied and held liable for negligence and breach of implied warranty the builder and seller of a development house who installed a water heater without a heat control unit, though he knew of the danger thus created. The Court's authority, if that's what it was, for this change of direction was *Henningsen v. Bloomfield Motors, Inc.*,²⁶ New Jersey's all-purpose contribution to the jurisprudence of product liability. It seems fair to say of counsel for plaintiff Schipper that he was one who understood that the "traditional rule" was an adjudicator's response to a situation with certain distinct characteristics, a choice between identifiable competing interests; and that the situation with which he was confronted presented different characteristics, offered a choice between different competing interests and, therefore, might well call for a different response. He was one, in Llewellyn's formulation,²⁷ who felt a pattern and "corrected" the concrete situation into comparison with its *appropriate* working pattern, who saw which of the seen or felt factors in it tended to dominance and what the movement—"strain" was and whither that strain was leading or driving. He was one with the situation-sense to apprehend that whatever the answer provided by the traditional rule, the question presented by the sale of a mass-produced development house under a no-changes contract was a *Henningsen* kind of question.

24. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449, 452 (1943).

25. 44 N.J. 70, 207 A. 2d 314 (1965).

26. 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960).

27. *Supra* note 20 and accompanying text.

The approach of counsel for the plaintiff to this particular adjudication situation was skillful by any definition or standard. It was a compound of thorough knowledge of rules and principles which might apply, understanding of the interests and considerations that had produced those rules and principles and sensitivity to fact elements in the immediate situation which would act persuasively on the tribunal charged with making the choice. Quite clearly this kind of skillfulness is not going to be given to young lawyers in a 10 or 12 week post-graduate skills course. The discouraging thing is that there frequently prevails among teachers and lawyers alike the idea that this is something that cannot be taught at all, that this is something that will just have to "come with experience." The position of the Arden House group is that this waiting period while the young lawyer learns his trade is a luxury the profession cannot afford. A *Schipper* case — a complaint by the aggrieved purchaser of a modest development home — is just the kind of case which might easily be brought to the young and presumably modestly priced lawyer. If the young lawyer has nothing to draw on but his formal training and if that training consists of a partial catalog of rules and principles fortified with a little legal bibliography, his study of the problem would probably carry him no farther than the traditional rule, and that is not far enough. Without purporting to prophesy on the future persuasive effect of *Schipper* — the case is, of course, used merely as an illustration — one can say that anyone in the position of Schipper deserves at least to have the traditional rule re-examined in his case. It will not be so re-examined unless his lawyer insists upon it, and his lawyer will not insist upon it unless he is capable of the kind of mind-stretching effort that leads him to arguments and alternatives drawn from all available sources of principle and authority and leads him away from rule and principle mechanically applied.

This, then, should be the focus of training lawyers for participation in the process of adjudication: mind-stretching, resourcefulness and the discerning use of the raw materials of the law for the just and orderly adjustment of competing social and personal interests. This is the part of the whole process that cannot, at least in the foreseeable future, be committed to cybernetics and advanced techniques of data retrieval.²⁸ Can this be taught? Professor Cavers argues compellingly that this is the only thing that can be taught.

The problem of understanding legal materials is essentially one of appreciating the significance they have for the lawyer when he is seeking to resolve the various questions that he is called upon to answer. What, in a given situation, may be the bearing of a given case (or statute, contract, or theory) on a decision that the lawyers must reach * * * The Philosophy of "So What"?²⁹

28. It is really no answer to point out, as is undoubtedly the case, that teachers have been warning students for some time now about a "trend" toward decisions like *Schipper*. The question is not whether a student has been warned of a specific possible development, but whether he has come out of his education with a posture of mind that equips him to anticipate any development in any field at any time.

29. Cavers, *supra* note 10, at 396.

Learning acquired without regard to significance, he suggests, may prove to be an over-simplified conception the young lawyer must unlearn before he can do a lawyer's job.³⁰

All of these factors take on even greater significance when we consider the problem of training lawyers for participation in the process of legislation, "the rule-creating, structure-giving role." It is here that the discussion of the relative places of knowledge, understanding and skill becomes most confused and contradictory. Skills enthusiasts are inclined to include negotiation and draftsmanship among the subjects to be offered to law students on a how-to-do-it basis and to suggest that a list of elementary or minimum skills would include such things as How to Work Out an Estate Plan, How to Prepare and Probate a Will, or How to Form, Operate and Dissolve a Corporation.³¹ The suggestion fails to appreciate that negotiation and drafting are simply coordinate parts of the process of legislation and completely beyond the "skill" of one insufficiently trained to understand the rule-creating, structure-giving character of what he is doing. It stresses technique over thought and may leave the student with the unfortunate impression that what he should take out of his legal education is a book of forms and a bag of tricks that he can thereafter employ uncritically for the length of his professional life. Legislation is a far too subtle and complex process for that.

On the other side, neither is schooling in rule and principle sufficient training for this difficult and increasingly important lawyer function. Conventionally, the student gets his rule and principle from appellate reports, from and in a litigation context. But the function of the lawyer in such a setting and the impression the student gets of the lawyer's part in the adjudication process is very different from what it must be in the process of legislation. In contract adjudication, for example, the emphasis in the first instance is on enforceability — on definiteness and certainty and mutuality and the like. In matters of interpretation it is the job of the lawyer to be purposeful and one-sided in his reading and construction. In contract negotiating and drafting, however, the lawyer may find that strict enforceability must be subordinated, as often as not, to the objective of obtaining a workable arrangement. Purposeful one-sidedness is out of the question if the situation is truly a negotiation as opposed to one of the various forms of contracts of adhesion with which we are perhaps only too familiar. Indeed, one of the most telling criticisms of young lawyers is that their disproportionate absorption with adjudication has made them too contentious to carry out other lawyer functions effectively.³² Many lawyers can testify that the young man (or the older one who has never learned any better) unbendingly committed to getting an enforceable agreement protecting his client in all contingencies can be a nuisance at the negotiating table.

This, however, is an essentially negative consideration, and it is the positive demands of the process of legislation that need the most

30. *Id.* at 401.

31. Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?*, 38 A.B.A.J. 907 (1952).

32. *Id.* at 909.

careful attention of those responsible for training young lawyers. Consider the full meaning and implications of "rule-creating and structure-giving" in the negotiating and drafting of a long-term supply contract for raw materials, a franchise agreement or a contract for the design and installation of complex industrial equipment. Whereas in an adjudication situation counsel can concentrate on a difficulty which has arisen, here his job is to anticipate all those which may arise and provide a workable scheme for their orderly resolution if they do arise. He must coordinate the efforts and accommodate the demands of technical men, financial men, marketing men and administrative men — on both sides of the table. He won't be expected to have answers to technical, financial and marketing problems, but he will be expected to ask the questions which will reveal the existence or possibility of such problems and thus insure that they will be provided for. He will prepare the first draft for everyone to shoot at, and he will be the last to initial the final draft by which all interested parties expect to live. He will be at the center of this process by which private parties legislate a private legal system for the regulation of certain of their rights and duties. He will be in that position because that's the way it is in modern law practice.³³ His skill in planning and negotiating a workable, practical arrangement which is also acceptable to the interested parties must be matched by his skill in reducing the arrangement to clear, accurate prose that not only represents the intentions of present interested persons but also will speak clearly and unambiguously to other persons, not now present, months or even years later. Such skill cannot be taught as a matter of legal mechanics. It comes as the product of a capacity to absorb, comprehend, coordinate and synthesize principle, factual data, and, above all, understanding of what it is all this activity is designed to accomplish.

The demands on a lawyer's legislative capacities may be even greater in activities such as will drafting, where representatives of competing or potentially competing interests are not even present to state and defend their own cases. Borrowing Professor Fuller's engaging figure, "Such a draftsman is not like a man playing solitaire, but more like a player who plays in turn each of the hands in a bridge game."³⁴ A lawyer is not performing the service his clients have a right to expect if he thinks only in terms of producing something that will pass muster in probate proceedings.

33. The lawyer is today compelled to participate in decisions that represent a synthesis of many factors, of which legal rules are often only a part, and sometimes a very subsidiary part. . . . Lawyers in private practice have put up a sort of rear-guard action against making what they call "business decisions," but they have lost the battle.

* * * * *

These decisions are not arrived at by the lawyer independently, but in consultation with men of different training, who bring to the conference table distinct contributions that must somehow or other be fused into the final solution. Often, the lawyer is the man who presides over that process of fusion. Here, then, is a process into which he must be initiated and started off right in law school. He must learn what is involved in deciding not what legally can be done, or what action will be legally effective, but what should be done, all things considered, when all points of view have been drawn into account.

Fuller, *supra* note 14, at 201.

34. *Id.* at 197.

IV.

It bears repeating that one of the most important functions of education for understanding is to impress upon students that lawyers are "doers" and that one not trained to think in terms of doing is not trained at all. Legal problems require solutions, not yes or no answers — even yes or no answers with reasons, blue-book style. A client in trouble does not usually need a lawyer to tell him he is in trouble, nor will he pay very handsomely for being told what he did wrong and how he might have prevented the difficulty. What he is looking for is someone to help him make repairs or salvage some of the wreckage. A client told that "the law" prevents him from doing what he wants to do is not usually prepared to drop the matter there; he will want some help in determining what he can do, from someone capable of understanding his needs and objectives and resourceful enough to help him design and execute a proper method of satisfying them. A student whose problem analysis has never gone beyond, "I think the court should have . . ." or "The court held . . . and I agree with the court" has no sense at all of the immediacy and urgency with which legal problems present themselves to lawyers. What he needs, and desperately, is some exposure to legal problems that come to him, "Here is something that has to be done, and I have to do it."

This sense of urgency, this appreciation of legal problems as something calling for thought and action on the part of the lawyer is the quality that went out of legal training when law schools supplanted law offices as the principal training ground. The present question is, How can we recapture this quality without sacrificing the unquestioned advantages of comprehensiveness, scholarly objectivity and perspective which accompany (or should accompany) the university education of lawyers? As Professor Walter Gellhorn of the Columbia Law School has recently pointed out, law teachers have been exploring the uses of "functional" legal education for more than thirty years.³⁵ The proposals have ranged from the stimulating but somewhat frightening proposals of the late Judge Jerome Frank³⁶ that law schools build their teaching around legal clinics to the more modest but still exciting suggestions of Gellhorn³⁷ and Llewellyn³⁸ that students be taught (or

35. Gellhorn, *supra* note 8.

36. Frank, *Both Sides Against the Middle*, 100 U. PA. L. REV. 20 (1951).

37. No effort is made here to summarize Professor Gellhorn's comprehensive program. For this writer the most interesting aspects are proposals for new and different text materials for second year students, books that would put a hard core of subject matter before the students in an organized, systematic text form; texts which would suggest questions as well as answers and provide materials for an attack on such questions. Class time would be spent, not rehashing the text, but in working on problems distributed to students in time for them to think about them and work them out on their own. With this preparation third year students would be in a position to pursue more intensive research and seminar work. Gellhorn, *supra* note 8.

38. Professor Llewellyn also was interested in developing texts which would provide students with factual and historical and social information essential to understanding of the problems they are learning to deal with. Since this is the most economical method for communicating information, the texts should free teaching time for developing and consolidating what has been learned. See Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV. L. REV. 775 (1941); Llewellyn, *supra* note 20.

required to learn) *fundamental* information, then provided with an opportunity to put it to use. Somewhere in between, perhaps, is the Fuller-Cavers position that the effort to supply information without direct, pointed and insistent reference to function is a defect not of detail but of "basic orientation" in legal education.³⁹

Common to all of these proposals is what is usually referred to as the problem method, the technique by which the student is thrust, more or less cold, into the middle of a legal problem and asked to provide a solution. At its most elaborate (and at its best) the student is asked to *do* whatever solution of the problem requires — write a memorandum of law, draft a contract or trust instrument, prepare a will, etc. In so doing, of course, he will be required to acquaint himself and take account of pertinent case precedents, statutes, administrative regulations or even, conceivably, other relevant private instruments. It is a technique by which the student, hopefully, "learns law" and at the same time acquires some skill in execution. Those who see no occasion for large scale reforms in lawyer training protest that except for the practice of skills provided by drafting, etc., this method provides only what can be expected from conventional case method in the hands of a duly and properly Socratic law teacher. The defect in the argument is that it isn't true. The fact is that Christopher Columbus Langdell might have difficulty recognizing his child in its present form. Sad to relate, case method has been polished, perfected and institutionalized to a point where we have lost sight of the fact that,

It is not the judicial decision which is the essence of the "case"; it is instead the concrete *problem-raising situation* — so that, as I see it, any introduction of the so-called "problem-method" into law teaching is really but an expansion of the essential merits of *case-teaching*, an expansion obscured only by a current mis-emphasis upon the idea of a "case" as being at best the official report of a judicially decided cause.⁴⁰

Casebooks become fatter with every edition, and new editions seem to come with increasing frequency. The fattening, as often as not, is in the form of text-notes and note cases designed primarily to increase the amount of knowledge and information pressed upon the students until, in Professor Gellhorn's devastating description, "The swelling resembles that of lungs threatened by suffocation. Students acquire an over-stuffed feeling. They gag rather than swallow when more nutriment is offered them."⁴¹ What is worse, the emphasis continues to be on answers or new answers or trends or developing new answers with insufficient attention directed to the fact that usually it is the questions that are new, new questions presented by problems evolving

39. Professor Fuller, in particular, urges that the focus of law teaching should be on the two basic processes of adjudication and legislation; that there should be concentration "on the major ways in which legislation and adjudication function in our modern society, and let knowledge of rules become an unplanned by-product." Fuller, *supra* note 14, at 197.

40. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL ED. 211, 217 (1948).

41. Gellhorn, *supra* note 8, at 4.

out of changed and changing circumstances. Every new casebook and every new edition of an old one promptly produces its own group of camp followers — the cans, cribs, briefs and purples (culminating in that ultimate absurdity, the Teacher's Manual)⁴² which could not, repeat *not*, thrive in a system where the appellate report was used only or principally as a "concrete problem-raising situation."⁴³ And semester after semester, year in and year out, teachers end up bitterly disappointed with the only tangible evidence they have of the fruits of their efforts, a stack of mangled intelligence enclosed in blue covers.⁴⁴ What to do?

There is force in the Gellhorn position that the first year curriculum, in general, needs relatively little tinkering,⁴⁵ although course by course more work could be done on isolating fundamentals and reducing instruction in details. But quite early in the second year, casebook method begins to repeat itself unnecessarily and produce that student boredom about which all teachers complain, while giving insufficient attention to who and what it is that is doing the boring. It is here that problem work, "doing" work, should be introduced on as large a scale as the resources of the school allow. A good deal of it is being done now in specialized fields — taxation, estate planning, land use — but the real profits are those that can be gained from problem work designed, not to increase specialized knowledge, but to increase full appreciation and understanding of the fundamental processes of the legal system. (This is not to suggest that the specialized problem courses, intelligently conducted, do not give students such appreciation and understanding. They do, without question.)

What follows is fragmentary and intended only to suggest the kind of problem situations and problems that could supply the basic training needed.

A. *Contract Drafting.* The starting point in all cases would be acquainting the students with the aims and objectives of the parties;

42. The Teachers Manual for one of the leading Contracts casebooks has carried the following caveat through at least two editions: "However, this outline is not a treatise, and it cannot be used as a substitute for reading the cases and notes." (Emphasis supplied.) When one considers that this Manual is jealously guarded and made available only to those who have adopted the book — that this is a warning directed not to students but to *teachers* — then one gets an uncomfortable feeling that something must have gone wrong with the casebook method of teaching.

43. The reaction of some Maryland students to the introduction of the Uniform Commercial Code provided a disheartening example of the thesis here stated. "Why," they complained, "do we have to read pre-Code cases when they are not 'the law' any longer? Why don't we just study the Code?" Never mind that they were abysmally ignorant of the most elementary commercial transaction, to say nothing of the kind of problems that might arise in such a setting, there was now new law replacing old law and reading cases was just putting them to the unnecessary trouble of learning old law. Deep into their second year, cases remained nothing more than a peculiarly resistant form of subject matter.

44. Every law teacher who has ever mentioned the matter to me has testified to the depression of spirit, the black sense of discouragement, which assails him when, each January and June, he sees his teaching mangled in the blue books. I doubt that my informants can feel any worse than I do at these times.

Yet the grip of tradition is strong. We accept the stark mediocrity in performance to which our C and D grades testify as a sort of arithmetical necessity, not as displaying the limitations of our casebook system.

Cavers, *supra* note 24, at 452.

45. Gellhorn, *supra* note 8, at 4.

what each has that the other wants, some general idea of what each is willing to give up in order to get from the other what he wants. Then set them to work negotiating and drafting an arrangement which will accomplish the respective objectives. All participants would work on the same problems, though teaming or some other physical arrangements might be made as a matter of convenience. Initially, student efforts may require a good deal of guidance and prodding from the presiding teacher or teachers,⁴⁶ but that would be a part of the learning.

1. Anyone familiar with Professor Fuller's handiwork as a case-book compiler will remember the "fish-glue" problem presenting a situation in which one party is in a position to supply the other with essential raw materials on very favorable terms if the other is prepared to make a substantial necessary capital investment.⁴⁷ The supplier fully expects to have the raw materials available for an unlimited period, but is unwilling to give an iron-clad guarantee to this effect. The planning, negotiating and drafting of this agreement might readily provide a whole semester's work for a contract drafting problem course. On just the one phase of the problem referred to, the student would have to educate himself on the uncertainties of lost profits and other business losses as provable items of damage, the difficulties of planning a workable and enforceable liquidated damages clause in a complex contract situation and the availability of flexible pricing techniques as a possible legislative solution to the problems uncovered.

2. Planning and drafting a standard form of franchise agreement for a manufacturer (of automobile parts or small appliances or soft ice cream) who is relatively new and small in a highly competitive market and who believes that dealer "loyalty" will be essential to his success. If in his initial attack on the problem the student trips over the antitrust laws, what better way to teach him that there is a lot of law in the world and that not all legal problems wear labels on their sleeves? This, of course, is also the classic situation for demonstrating that workability and strict enforceability are not always compatible.

3. Planning, negotiating and drafting a separation agreement or divorce settlement. At its center such a document is a piece of private legislation used by private parties to substitute one legal relationship for another. As much as the most complex commercial arrangement, it requires thoughtful evaluation and analysis of the interests and needs of principals, affected children and, if you will, the community in general. It is rule-creating and structure-giving in its most meaningful sense. If such things as tax problems enter in, fine! This may be one of those golden, all too rare, opportunities to convince students that there are some situations where even tax considerations should be subordinated to the purpose for which the agreement is to be made in the first place.

4. Negotiating and drafting a collective bargaining agreement, reproducing as nearly as possible a bargaining situation in which the parties are working against the pressure of a threatened strike that neither side wants. As Professor Fuller has pointed out, there is no

46. Who the teachers should be for this kind of work is discussed, *infra*, p. 293.

47. FULLER & BRAUCHER, BASIC CONTRACT LAW 252 (1964).

better problem setting for a demonstration that the processes of negotiating and drafting frequently make radically different demands, neither of which can be acquired or even understood in the abstract, and neither of which will come as a natural by-product of schooling in the principles of labor law.⁴⁸

Construction contracts, employment contracts, sales contracts; long term, short term, one shot — the possibilities are unlimited and all in one way or another will provide some specific knowledge and a lot of very broad, intensely usable insight and experience. What the student gains from such exercises is easily transferable to planning and drafting of other kinds of legislative instruments, not excluding statutes, if the occasion arises. What he learns is dealing with a certain common kind of lawyer problem from the front end — the shaggy, unlabeled, frightening front end — and he learns it the only way he ever will, by getting into it.

B. *Commercial Transactions.* No area of the law is better suited for teaching the lesson that there are many things which the law allows that must be thought of, planned and provided for at the proper time or be lost for good. No area of the law is better suited for demonstrating that there may be several "legal" solutions to a problem but that some of them may be ponderous, expensive and inefficient while others are economical (of time and money) and appropriate.

1. There would be lessons upon lessons to be learned by students required to plan and execute, in order, secured financing arrangements for:

- a) A small, beginning manufacturer with a good idea and good prospects but severely limited resources;
- b) An established, well-heeled manufacturer who wants to add to his heavy equipment without dipping into working money;
- c) An established manufacturer whose costs are primarily labor and materials, whose capital investment is small and who always operates on a tight margin.

2. There would be opportunities for some really imaginative work on evolving financing techniques, such as the widening use of leasing of equipment, vehicles and even real property.

3. In problems revolving around planning and negotiating arrangements with and among creditors, there would be opportunities to sharpen students' understanding of the process of adjudication in its most comprehensive sense — the methods and techniques of adjustment of interests in those situations wherein the last thing anyone wants is resort to legal sanctions.

C. *Business Organization.* The idea persists that creation, operation and dissolution of business organizations is something that can be taught as sort of a standardized skill. As already noted, this approach

48. Fuller, *supra* note 14, at 196-97.

overlooks the fact that these are basically legislative operations and often tightly regulated legislative operations at that.

1. Perhaps the best way to show a student that organization of a business is rule-creating and structure-giving is to start him off planning and drafting a partnership agreement. Confronted with a situation in which there is no limited liability for a shield, in which partners' contributions may vary in kind as well as in value, and in which contract principles and agency principles operate at nearly full strength, the student will have to face the fact that there is no standard form or all-purpose model he can lean on. He can be forced to think out rights, duties, powers and liabilities in all contingencies and to provide for them in clear and specific terms.

2. Problems that require a student to understand and make use of stockholder suits, derivative suits and other assorted weaponry of intracorporate differences will also contribute to his understanding of the fact that in many important respects the operation of any business arrangement involves adjustment and reconciliation of competing interests of managers, employees and owners.

3. Problems of formation, "going public," dissolution and merger can be used to demonstrate that the most careful attention to formal requirements for such actions is no protection against Blue Sky, anti-trust or tax disasters. More important, such work can help a student appreciate for all professional purposes that he has not really thought out any legal problem until he has shaken every bush and asked himself all the critical questions.

D. *Adjudication.* Presumably, the law student's first exposure to the process of adjudication comes in moot court. Presented with a prim little statement of facts from which ambiguities have been rigorously excluded and in which all real questions of fact have been asked and answered, he is required to research, brief and argue an appeal. It is a most useful exercise in research and writing, but it contributes very little to a student's understanding of the process of adjudication. This is not a rap at moot court. Exercises in research and writing are just what a first year student needs as early as possible, and practice in synthesizing and working up case and statute materials on his own, done conscientiously, can inform and quicken all of his studies. If, however, his subsequent advanced work with the process of adjudication proceeds from the same kind of materials, then moot court training is simply being repeated, and the student remains innocently unaware of the nagging, aching strains that accompany almost any employment of the process of adjudication, of the difference in demeanor of "facts" as they appear in an appellate report and as they first present themselves to a lawyer,⁴⁹ and of

49. The isolation of a single phase of the adjudicative process from the process as a whole not only leaves many things untaught, but distorts and falsifies what it teaches. It conveys to the student almost no insight into the subtle issues involved in the proof of facts, for example. The appellate report usually presents a parched skeleton of the facts which lawyers connected with the case sometimes have difficulty recognizing as a description of the situation with which they struggled for so many months. One of the permanent problems of the law and of advocacy has to do with that most perilous of human operations; attempting to transmit intact a set of facts from one human head to another. The appellate-

“the tension that always exists between paper rules and the actual administration of justice.”⁵⁰

1. Professor Fuller suggests that training for understanding of the function of adjudication should start with the simplest known *process* designed for that purpose, the process of arbitration.⁵¹ More or less free of rules of procedure and evidence or rules of substantive law that demand observance, participants in the process of arbitration can focus without apology on the purpose for which any adjudication is intended — reconciliation of opposed interests. Acting on this suggestion, problem work designed for understanding of the process of adjudication might start with the simplest arbitration problem:

- a) Commercial arbitration of a dispute arising out of non-performance of a contract; non-performance prompted at least in part by a severe, unexpected turn of the market. The problem would be a completely individual one in that the award would affect only the disputants.
- b) The next step up might be arbitration of a grievance under a collective bargaining agreement wherein the solution may be expected to produce radiations, however unofficial and non-authoritative, affecting subsequent action on similar grievance claims.
- c) The Fuller proposal would include such elements as an arbitrator who goes beyond the terms of the submission and decides issues not presented by the parties, or who makes independent fact investigations out of the presence of the parties. Forcing the student to consider the propriety of such actions by an adjudicator in a simplified adjudication setting will contribute to his “fundamental insight into the purpose of pleadings” in the first case and his “fundamental insight into the whole adversary system” in the second.⁵²

2. It is extremely difficult to reproduce a trial situation artificially, particularly a trial situation which rests heavily on oral testimony. It is difficult because it requires enormous expenditure of time and resources to create a trial situation that puts the student to work investigating, analyzing, cross-checking and preparing the data which make up the facts of any adjudication problem. The question is, however, whether the expenditure should not be made if students are to learn that “facts” in a case are the work-product of lawyers. Even a small school should think about making a start on training for the kind of problem analysis required of lawyers in this, the most important and sensitive stage of

case method gives little inkling of the existence of that problem, much less any understanding of the measures that may be taken toward solving it. *Id.* at 193.
50. *Id.* at 196.

51. *Id.* at 198. To avoid over-simplifying and thus mistating Professor Fuller's suggestions, it must be pointed out again that his plan contemplates a change in the basic orientation of formal legal education. In his scheme arbitration problems would lead off the course on introductory procedure, so that all subsequent study of procedure would build on this understanding of the function of the process of adjudication.

52. *Id.* at 199. See note 51 *supra*.

conventional litigation. There are exercises in analysis of adjudication problems that can be undertaken even while the small school plans a deployment of resources that will provide experience in the trial process.

- a) The practical difficulties of manufacturing a trial situation can be minimized where the evidence is predominantly documentary.
- b) The difficulty of providing opportunities for students to question witnesses does not prevent exercises in preparation of interrogatories or depositions. Here, at least, are exercises requiring the student to think through the information he will need for the prosecution of his case, the questions he must ask to get that information, the rules and procedures that control and limit his ability to get such information and the formulation of questions designed to bring the most useful responses.
- c) In this day of streamlined pleading a lawyer must be capable of using every available source of needed or useful information. Reconstruction of an opponent's case from a subpoena duces tecum or motion for an order to produce documents and records can be a useful and practical exercise in problem analysis.
- d) Litigation problems of this character may be the instruments by which students are finally persuaded that remedy is not an afterthought. The client suffering crippling unfair competition is little cheered by an award of damages after he has been run out of business. Nominal damages rarely inspire generous impulses in contract clients. But casebook *cum* bluebook pedagogy cannot be relied upon to convince students that cause and remedy are one and, for the client, the remedy is the one.⁵³

3. Little remains to be said about training for understanding of the appellate stage of the adjudication process, except this: Appeals are planned and briefs written not from pre-fabricated fact statements but from records. Yet many young lawyers who have spent most of their formal education looking at one piece or another of the appellate process still come into the profession without ever having seen, let alone worked with, a record — in all of its usually untidy grandeur.

It is necessary to repeat the disclaimer entered a few pages back. The preceding general description of problem courses and problems is certainly not exhaustive. It is intended to suggest and describe an objective: The objective of providing an educational setting in which

53. Where Practice Court machinery already exists, a vehicle, properly augmented, is available for expansion of student experience with all stages of the adjudication process. For a description of the Michigan effort to give students a coherent experience in investigating, preparing, pleading, trying and appealing a single case problem, see Joiner, *Legal Education: Extent to Which "Know-How" in Practice Should Be Taught in Law Schools*, 6 J. LEGAL ED. 295 (1954).

a student can build his own understanding that the law is not a thing but a process, a process for the orderly adjustment of divergent interests, in which the lawyer is a central and responsible actor.

V.

Even among believers the idea persists that intensive problem work is a luxury item that can be offered on a large scale only by the big schools with their seemingly unlimited resources.⁵⁴ While it is probably true that a large scale problem program is beyond the resources of a school with a 10 to 15 man faculty, it is not beyond the combined resources of such a school plus the bar it serves. It is the educational talent and resources of lawyers and law offices that have been misspent or disregarded since the law schools took over formal legal training.

A problem program will require manpower. Groups of 10 to 15 students seems to be a maximum for this kind of work. Where can the small or middle-sized school find it? First of all, in the University of Maryland catalog for 1965-66, there are at least ten elective courses that could be offered in alternate years without serious loss or dislocation.⁵⁵ Here is a supply of ten teachers who in the off years could take part in problem work. If each participating full-time teacher was teamed with an experienced, interested practicing lawyer, the result could be a teaching combination capable of the best of both worlds. The teacher presumably knows the students, what they have brought with them into law school, their most critical weaknesses, the best ways to build and exploit their strengths. The lawyer, on the other hand, knows what demands will be made on them in practice, which weaknesses will be most costly, what are the common sins of beginning lawyers. The teacher can bring to the work the habits of detached and objective inquiry vital to truly professional education. The lawyer can guard against the overdose of detachment that often obscures the fact that the law and lawyers are parts of a working system. It is clear, of course, that the lawyer member of the team cannot be the amiable practitioner who drops in weekly, if the exigencies of his practice permit, to give students the benefit of comments, observations and reminiscences off the seat of his pants. He must be engaged as a faculty member at a respectable stipend to share equally the job of designing, planning and preparing problems, of conducting class working sessions, and of reading, evaluating and commenting on the work product. The lawyer member should bring with him the same attitude he would assume toward a younger associate in his office, and he should be encouraged to bring with him problems he has on his desk if he and his teacher colleague agree that they serve the educational purposes of the work. The lawyer and the teacher together should be able to discern and anticipate problems that are just arising or perhaps just

54. Professor Gellhorn reports that at Columbia, for example, second and third year students in the year 1963-64 could choose from 38 courses and 50 seminars. Gellhorn, *supra* note 8, at 2.

55. Accounting, Admiralty, Domestic Relations, Equitable Remedies, International Law, Labor Law, Legal History, Patents, etc., Real Estate Transactions, Trade Regulation.

out of sight, and thus introduce the excitement of creative student-teacher-lawyer collaboration in unsettled and unexplored areas.

The suggestion that wider use be made of the teaching talents of practicing lawyers sometimes brings apprehensive noises from the teaching fraternity. In that connection Professor Cavers' observations are in point.

The disappointments which have generally attended the part-time employment of the practicing lawyer in law teaching have typically resulted from the fact that he was not put to work for which his experience had suited him. As adviser and critic of students who are attacking problems of the sort with which the lawyer daily deals, he can add values which the professional law teacher cannot well be expected to contribute.⁵⁶

In addition to manpower the comprehensive problem program needs working materials. Here, too, the school needs the active and extensive cooperation of the profession. One of the big shortcomings of problem work as presently conducted is that the problems, like moot course cases and examination questions, must be manufactured. As often as not this is done by a sort of mugwump process by which the teacher decides where he wants the students to end up and then builds something like a treasure hunt to get them there. The result frequently is something entirely too chaste to give students an accurate picture of the appearance and form of genuine legal problems. What is needed are real problems made up of real correspondence, real office memos, real contracts, real balance sheets, real technical bulletins, real cost analyses, real expense account sheets, real transcripts and records — as in each case may be appropriate — all in original form or as close to it as possible. Students are told that they must learn to think, talk and write like lawyers. They are never made fully aware that they must learn to read like lawyers, too, and that most of a lawyer's reading matter comes not in appellate reports but in an astounding assortment of miscellaneous documents, much of it badly written and intended for some purpose entirely different from that for which it has become important.

The school's plea to the bar will have to be, Let us in on your problems. Let us use your files where that can be done without endangering confidential relations or sensitive materials. Old closed files are frequently as good as fresh active ones for this purpose. If a law office has a file that would make a good problem, perhaps it can at least advise the school of its existence, leaving it to the problem course teachers to negotiate its use with the affected clients. Materials made available in such cases can usually be amended or disguised so that no one need be injured. With the help of the bar many viable problems can be constructed without any danger at all to client relations; problems can be built around standard forms used by banks and other financing institutions if those forms are made available and some assistance in problem preparation is given by those who know what

56. Cavers, *supra* note 24, at 459.

the problems are. In this kind of transaction a fictitious problem may still be a perfectly sound one. Karl N. Llewellyn, a man endowed with unique powers of persuasion, reportedly was successful at both Columbia and Chicago in borrowing transcripts and records for his students to use in briefing and arguing appeals. There seems no reason why these cannot be made available for teaching purposes. In some cases, what may be needed is an introduction to the client. In a contract drafting problem, for example, involving the sale of a possibly hazardous substance, students might be expected to develop questions about packaging, storing, transporting, etc. If so, they would need access to someone who can answer the questions. There are undoubtedly many ways in which the bar can aid and inform such a program. Initially such activities would call for substantial efforts by members of the bar as well as school personnel, but once a decent inventory of problems is built up, it can be kept current with relatively modest increments. The first step is for the bar to take an interest and acknowledge that the profession has a stake in legal education.

VI.

There is another reason for urging this program so strongly, a reason included with some hesitation: Teachers need it. Putting aside the old chestnut that those who can't make it in practice turn to teaching, it does appear to be true that many devoted and able teachers come to the classroom after discovering to their vast disappointment that they just don't like practice. To the extent that teaching represents a flight from the unlovely aspects of law practice, there is sometimes an inclination to remove oneself as far as practicable from that activity. Teachers can't afford to do that. As Professor Cavers has intimated, teachers cannot claim that they teach students to "think like lawyers" while denying themselves opportunities to see how lawyers think, or what changes may be occurring in the way lawyers think.⁵⁷ The danger is too much insulation. Lawyers, in common with prize-fighters and demolition experts, enjoy the advantage of prompt notice of professional shortcomings. A teacher, however, is so well protected against the consequences of his failures that opportunities for self-deception are always present. The danger is magnified when the teaching method becomes as stylized as casebook method has in many instances. Brisk Socratic dialogue between a bright third year student and an experienced teacher may prove that both understand the subject, or it may just prove that they understand each other. Out of school, the young lawyer soon discovers that lawyers don't continue to talk this language for very long and clients, of course, never did. Teachers, on the other hand, frequently miss this variety of experience and need reminding that they are training professionals who must function in the climate of law office and courtroom, not classroom. Team problem teaching as here proposed may provide a vehicle for communion with the bar which for the teacher can bring sharpened awareness of how the law is moving and what professional demands it will make on its initiates.

57. Cavers, *supra* note 10, at 395, n.1.

A teacher cannot afford to think of himself solely as a teacher whose subject happens to be law. He must also be a lawyer whose principal professional duty is the training of other lawyers.

Ideally, a comprehensive problem program would permit every faculty member to take part at least once every two years. More ideally (if such a condition is possible) each faculty member would undertake problem work in fields about which he knows as little as possible; contracts men dealing with problems of procedure, public law men wrestling with the intricacies of real property problems and so on. If this sounds like the lame leading the halt, it shouldn't be. What a good lawyer brings to any problem, familiar or unfamiliar, is primarily his situation-sense, his feel for the way the legal system functions. Problem work offers an opportunity for the teacher to keep his own situation-sense tuned up.

Finally, problem work provides the faculty with a check on itself. If teachers believe they can separate the lawyers from those who don't have it in the super-heated and contrived circumstances of an examination, how much more successfully must they be able to make that judgment in a setting where the student can extend himself, proceed at his own pace and compensate for lack of natural talent with greater effort. What is even more, in such work there would be an opportunity to try corrective measures rather than relying exclusively on the axe. It might be refreshing to experiment with guiding a student's efforts at working up understanding and skill, as opposed to offering him a single three hour shot at proving himself or "off with his head!"

VII.

What can a post-graduate short course, such as that proposed by the Arden House Conference, add to the education and training program described? In the first place "skills" or "skillfulness" may be the wrong words to indicate the objectives of this additional training. It may be more to the point at this stage to concentrate on making the recent graduate a reasonably *knowledgable* member of the profession, one who can function with a fair measure of efficiency. Until the young lawyer has acquired an elementary familiarity with the routines of the legal process, he will waste time and effort with resulting loss to him and his clients. There is, therefore, nothing mean or disreputable about an effort to introduce him to the courthouse, the zoning commission, the liquor board and the workmen's compensation commission. He can act not only more quickly but with greater confidence if he knows what forms he must use, where and with whom he is to file them and when. He can deal more intelligently with his clients if he knows how the various agencies of the legal system operate and how long it takes them to process a matter.

Secondly, the short course can supply short, intensely practical exercises or drills in doing what legal education, hopefully, has taught needs doing in specific situations. If the young lawyer's education has taught him fact analysis and evaluation in a dispute situation, the short course can supply drill in combining substance with procedural rule

and proper form to start the legal machinery operating in a simple negligence case, a simple contract case, a simple compensation case, etc. The emphasis is on the "simple." At this stage, if the fact situations are made too complex, there is a temptation to slide into broad review of substantive law and sharp focus on functioning may be lost. There are other kinds of lawyer activities in which the short course can add drill in the practical routines of doing to the understanding that law school education is to provide. If law school has given training in the essentially legislative character of will drafting, the short course can offer a refresher in statutory requirements for validity and, in addition, drill in the mechanics and formalities of probate and administration. To law school training in the legislative character of organization of a business, the short course can again add refreshers and drill in satisfying the formal statutory requirements of such activities. Other subjects roughly grouped in this class might be presented almost entirely as a matter of mechanics: How to attach a mechanic's lien; how to foreclose a mortgage; how to have a client released on bail; how to institute post-conviction proceedings; how to commence (or resist) an eviction proceeding, etc.

The third broad grouping of subjects in the short course can be aimed at providing a comprehensive view of the shape and substance of certain common proceedings. These subjects in many instances might be presented in a combination of relatively economical teaching techniques, including extensive prepared materials for outside reading plus demonstrations, followed perhaps by simple problem exercises to test comprehension. Domestic matters seem susceptible to such treatment (uncontested and contested divorce proceedings, desertion and support cases, custody cases), as well as simple bankruptcy proceedings, small claims matters and proceedings before magistrates. Also in this group might be included some essentially legislative activities such as the purchase and sale of a small business and real estate closings. To the extent that these last mentioned involve the unavoidable combination of legal advice and business advice, it may be that the best thing the short course can do is introduce the technique of the checklist, complete with models, to reinforce the young lawyer's understanding that he must ask the questions.

Finally, there are some matters in which the short course can and will operate primarily as a check on education. For example, "How to search a title" may provide a small exercise in mechanics but not a very illuminating one if the young lawyer doesn't understand what he is searching for in the first place. What it can do is reveal deficiencies that will have to be corrected before a client can be served properly. It can show the subject what he doesn't know. Indeed, this kind of side effect may appear throughout the exercises of the short course and, for a conscientious student, be one of the most important benefits of the program. If he is well educated and trained, he can fill gaps without difficulty. If he is not well educated and trained, he won't know a gap when he sees one.

It is obvious that planning such a short course must be undertaken principally by the practicing rather than the academic side of the

profession. It is possible, however, that the lawyers and teachers who contribute to a well conceived problem program in a law school will emerge from that experience well equipped to contribute as well to this final stage of formal training for the profession. There is no doubt that an enormous expenditure of time and effort will be required to prepare materials and provide talent for such a program. It will be costly but not impossible. It is the position of the Arden House Report that this is an expenditure a learned and responsible profession must be prepared to make.

VIII.

It bears repeating that there need be nothing narrow or earth-bound about the over-all scheme proposed. It is true that nothing is worse for the profession and the society it serves than toleration of educational processes that offer vocational training rather than professional education. But this is not what is proposed. Functional training in law school and after is designed for and can give meaning to learning through awareness that rules and principles operate in a setting of palpable expectations and disappointments, genuine pain and deprivation. If, as appears to be true, the most persistent complaint against the profession is that of client neglect, then this would seem to be a critical problem of professional responsibility. It may be that the way to attack this problem is never to let our new members forget, from their first year in law school, that the practice of law is not just an interesting and sometimes profitable way to earn a living, but a commitment to assume responsibility for the lives, liberty and property of members of the community, and that mistakes, indifference and carelessness can hurt people.⁵⁸

Beyond that, there is reason to believe that functional training contributes to the development of professional pride. A well executed memorandum of law or moot court brief, accompanied by commentaries recognizing its excellence, are a source of pride and satisfaction even to a beginning law student far exceeding what he gets from a letter or number grade on a transcript. A sense of professional pride or even professional fastidiousness is likely a better stimulus to responsible professional performance than the most eloquent exhortations.

Whenever I write or talk about this subject, I recall a young man, a graduate of one of the best law schools, who entered a

58. In September, 1965, after this article was substantially completed, the writer was privileged to attend the Asheville Conference of Law School Deans on Education for Professional Responsibility as Dean Cunningham's representative. The stimulating discussions enjoyed on that occasion suggested the possibility that this article might be expanded to include consideration of the ways in which law school participation in programs sponsored by the Office of Economic Opportunity, for example, might supply some of the needed functional training. This temptation has been resisted for two reasons. First, while there is ample reason to believe that "Poverty Program" work by law students may contribute significantly to a student's sense of professional obligation to the community, there is also reason to believe that the training value of such work may be limited. Second, law schools must remain responsible for insuring that the educational program serves its full function. Law schools must be wary of regarding defender projects, neighborhood law office projects and the like as convenient surrogates for the practical or functional training of law students.

New York City law firm when I did a decade and a half ago. He was asked in connection with a massive antitrust proceeding, to prepare a memorandum on the significance of a large group of contracts for the sale of "bunkers." He prepared a splendid looking document noting every subtlety of language and attending to every apparent digression from usual terms. But the first question the partner in charge asked him was "What's a bunker?", and the young man didn't know. He didn't last long — he suffered the indignity of being fired from his first job inside of a couple of months. It seemed he just couldn't learn, or learn fast enough, to ask himself those questions before someone else did. In a sad sort of way my young colleague for such a brief time represents the objective I am urging here — a program of professional education that doesn't produce graduates who don't know enough to ask themselves, "What's a bunker"?