COMMENTS

The purpose of this department is to afford an opportunity for informal exchange of ideas on matters related to legal education. Typical comments will range from about 1200 to about 3000 words in length, and may either advocate innovations in curriculum or teaching method or respond critically to previously published material.

"SKILLS" AND UNDERSTANDING

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An aptly devised poll of law teachers would, I am sure, disclose considerable agreement that legal education should concern itself with the lawyer's skills much more than heretofore. But I suspect that the same poll would also reveal extensive disagreement as to the reasons why, and the ways in which, this objective should be pursued.

Of course, one could safely predict disagreement in defining the skills. In passing current, the term "skills" has been little burdened by the luggage of particularization.[1] When those of us who have not yet done so come to examine closely and sort out the facts to which we have applied the symbol, naturally we shall find that we haven't all been talking about quite the same things. But, in this case, consequential differences in objectives are not likely, I think, to turn on such questions of definition. They are more likely to stem from another ambiguity which the term conceals. This deserves some attention; the term is one we must be prepared to live with.

When we speak of the lawyer's skills, I believe we often have in mind simply the tasks which the lawyer must perform, with little concern for the level of proficiency displayed in their performance. "Drafting," we say, "is one of the lawyer's basic skills," and then, without consciousness of possible self-contradiction, we go on to deplore the low estate of legal draftsmanship.

On the other hand, I think there are also many times when the qualitative connotation of "skills" is clearly uppermost, when we are referring not simply to a kind of job that lawyers can and do perform, but rather to the ability to do that kind of job expertly. In other words, we are referring primarily to lawyers' skillfulness.

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1 The AALS Committee on Teaching and Examination Methods was obliged to break much new ground when, for a general meeting of the Association in December, 1947, it undertook to prepare an analytical list of lawyers' skills. The list, reflecting largely the work of Professors Henry Weihofen and Frank Strong, is discussed in HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 75–80 (1947). Given our oft-repeated claim that we teach our students "to think like lawyers," the store of published writings which consider how lawyers think is surprisingly scanty. Clarence Morris' volume, HOW LAWYERS THINK (1937), is less comprehensive than its title may suggest.

There is enough of each ingredient in "skills" to divert attention from the fact that a choice may be involved when we call for more emphasis on lawyer's skills in legal education. Do we mean only that law students should become better acquainted with the jobs lawyers have to do, or that we should go further and seek to train them to exercise the lawyer's skills skillfully?

For reasons that I shall note later in this comment, I am persuaded that the second of these alternatives states an objective that the law schools probably cannot achieve and in any event should not pursue. I have therefore found myself drawn to the first alternative. Certainly, it is possible of attainment. We can, if we choose, give law students experience in the unskillful exercise of lawyer's skills.

Is this one of those ideas which, when we think about them, we call unthinkable? How could any law school have the hardihood to set out to train its students to exercise skills but not skillfully?

I agree; the last question is rhetorical—but only so long as the goal of the study of skills is conceived to be *training*. This is not necessary. If, instead, the objective of such work is recognized as *understanding*, it then becomes possible to defend the proposition that the law student's education should give him some experience in the various jobs that a lawyer has to perform without at the same time undertaking to make the student expert in all or any of them.

To the question, "Understanding of what?," I should be tempted to respond, "Understanding of the adjudicative and legislative processes," and incorporate by reference that illuminating paper by Lon L. Fuller which appeared in the preceding issue of the JOURNAL.[2] However, I shall take instead a simpler position: the study of skills will promote understanding of the legal materials which traditionally the law student has been called upon to study.

The problem of understanding legal materials [3] 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 lawyer must reach? The problem of significance in this sense is persuasive and commonplace, and hence is both important and neglected. It calls for a Vaihinger. Indeed, a title awaits him—and in American: The Philosophy of "So What?"

Questions of "So what?" possess peculiar importance to the lawyer because he, *par excellence*, is a man of decision and action, a fact we tend to overlook in our preoccupation with the analytical and deliberative aspects of his work. Each non-routine operation of the lawyer is likely to involve him in a series of decisions as he determines upon action calculated not only to resolve the issues immediately before him, but also favorably to predispose, so far as practicable, all those future questions that he can foresee may be

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

3 I shall use "legal materials" to refer to judicial and administrative decisions, statutes, regulations, contracts, deeds, and other legal instruments, and also to the theories of legal writers. Of course, greater emphasis on lawyers' skills would increase the attention devoted to the non-case materials.

implicated in his present action. He must, therefore, constantly examine legal materials in relation to the various uses to which he may wish to put them. Do they advance or impede his plans; to what extent can they be adapted to his purposes, to what extent disregarded? Like the architect and builder, he must know the limits of load and tension that his materials will bear. Especially is this true when questions of social policy are at issue.

The problem of the significance of legal materials is of critical importance to the student of law as a system of social controls. In approaching given legal materials as evidencing the social norms and sanctions he is examining, he, too, must ask, "So what?" Moreover, he must often concern himself with the answers to that question found by the practicing lawyers, since frequently their answers determine the social significance of the legal materials with which they deal. Consider, for example, the significance of a rule that the bar deems unenforceable because of difficulties of proof.

If the problem of the significance of legal materials is recognized as integral to the jobs that lawyers do, it may be superfluous to argue the potential value of the study of the lawyer's skills, even though such study stops well short of training the student to exercise the skills skillfully. I am reluctant, however, to leave the problem of significance without an illustration. Accordingly, at the risk of elaborating the obvious, I shall follow through the stages of one hypothetical litigation to note the diversity of ways in which a lawyer may be compelled to look at a single reported decision.[4]

For my example, I shall call upon an attorney who does yeoman service in my courses, one L. L. Bee of the city of Langdell, Ames. I shall confront him with the case of *Eks v. Wye,* decided by an intermediate court of appeals in Ames in 1905, cited half a dozen times since, usually distinguished, never squarely applied.

Mr. Bee's concern with the *Eks* case springs from the fact that, if the case is still alive as a precedent—an arguable proposition—then, arguably, it would invalidate a provision that he wishes to include in a contract he is drafting. Mr. Bee is satisfied that the negative of both conditions is the more probable, but as a draftsman he must reckon with the contingencies that the other party (1) will fail to accept his forecast of judicial action and (2) will be right. These present more than a problem in drafting; he must be prepared also to deal with possible repercussions of the *Eks* case in negotiations after his contract draft has been examined by counsel for the other party.

Mr. Bee's client concludes that the interests at stake make it worth while to run whatever risks *Eks v. Wye* may involve after the contract has been carefully drawn to minimize them. But, though the other party acquiesces and signs the contract, controversy later develops and litigation threatens. Obviously, as negotiations for settlement begin, Mr. Bee must make a third set of reckonings. The hypothetical controversies that he postulated before have now been crystallized in an actual situation; his reckoning must be predicated on the specific pattern of certainties and uncertainties it presents.

[4] Examples could as readily have been provided in which the legal material under consideration would be not a case but, say, a contract or a regulation, and the questions involved would relate not to litigation but to planning and executing a series of business transactions or a governmental policy.

The settlement breaks down (they don't settle readily in Ames, I find), and trial impends. Mr. Bee reworks *Eks v. Wye* a fourth time with a variety of objectives in view: for suggestions as to the facts to be ascertained in advance of trial and for guidance in deciding questions of pleading, trial tactics, and requests to charge.

And so to trial and a judgment for the other party. *Eks v. Wye* has commanded the trial judge's allegiance in a series of rulings contrary to Mr. Bee's contentions. Now arises the question of appeal (with negotiated settlement a possible alternative), and, with each of these alternatives in view, *Eks v. Wye* is examined a fifth time—but for the first time in relation to a record.

Settlement having failed, appeal is taken—to the same court that decided *Eks v. Wye* years ago. Now Mr. Bee must resolve questions (heretofore considered more generally) of just how to handle the *Eks* case in his appellate brief and oral argument. For a sixth time, therefore, Mr. Bee studies the case with a fresh problem before him, and a new set of decisions to make.

His efforts are in vain; the intermediate court does not disavow its offspring. It upholds the trial court and cites the *Eks* case with approval. A whole succession of new problems now confronts the defeated Mr. Bee and his dispirited client. Settlement on hard terms? Petition for certiorari? If granted, how to overcome the mistaken views of the courts below? The rehabilitated *Eks v. Wye* must be examined for a seventh time with the decision of these particular questions in view. They are necessarily different from those Mr. Bee has heretofore resolved, however many elements in common they possess.

Finally, and with regret, I must report that the Ames Supreme Court persists in disagreement with Mr. Bee, leaving him sadder and wiser and his client rather less affluent.

The seven stages through which Mr. Bee has been carried have, of course, their counterparts in the labors of opposing counsel. However, at each stage, *Eks v. Wye* will have a different significance for him than for Mr. Bee. And, as if fourteen separate significations were not enough, the case has become of consequence to still other persons, for whom its significance is still different.

Mr. Bee's litigation has been watched with interest by his client's trade-association counsel. As he observes the cobwebs brushed off *Eks v. Wye* he begins to worry. That decision may have broader implications. So he, too, studies the revitalized opinion, with a view to a long talk with the chairman of the association's committee on legislation. I shall not, however, pursue the sequence of appraisals and reappraisals of the *Eks* case which this conference portends.

At Ames University, *Eks v. Wye* has also won attention. The law review editors spot Mr. Bee's case at the intermediate appellate level. Now, of course, the editors do not look at *Eks v. Wye* in the way either Mr. Bee or his opponent looked at it at any stage in their litigation. Rather the editors view it with something of the disinterested aloofness of the bench (for whom, I should add, the *Eks* case has also yielded a set of distinctive significations). The editors, however, form a bench that precedent binds lightly, and they

have no paternal ties to *Eks v. Wye*. Accordingly, both it and the recent Ames decision upholding it are exposed to criticism on grounds of social and economic policy, vaguely articulated but reinforced by the citation of a case in 37 South Dakota and another from the Exchequer Chamber.

In the meantime, discussions with the review editors have awakened the interest of the Contracts teacher at the Ames University Law School in the *Eks v. Wye* problem. So in due course the opinion in that case, accompanied by the new decision of the Ames Supreme Court, goes into the mimeographed materials with which the teacher is striving to bridge certain deplorable gaps he finds in the casebook.

It is through this medium that the Ames law students will come to meet *Eks v. Wye*. They will abstract it conscientiously against the next day's class. They will extract a holding from the opinion, and they will regard that holding as the Law. But for them what will be the significance of the case or the proposition they distill from it? In the context of what decisions to be made and action to be taken will they view it? Will they appraise it as Mr. Bee did when, say, he was drafting the contract and advising his client? Or will they look at it as Mr. Bee or his adversary saw it pending the argument of their case in the Ames Supreme Court? Or as the trade association counsel viewed it? Or as the law review editor? Or as the law teacher, patching up his casebook?

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 part of some other question calling for decision and action.

Now it is true that in the classroom the teacher may ask a student to make impromptu one of those decisions with reference to *Eks v. Wye* over which Mr. Bee and his adversary labored. Or the teacher may point out the significance that the case would be likely to have for either or both attorneys at this or that juncture of their controversy. Sometimes the teacher's tendency to raise such points may be so persistent that the more perceptive students will come to think about them in preparing for class.

Since, of course, it would be impracticable in class to appraise all the cases deserving of study from all or even many of the standpoints from which their significance may have to be gauged in practice, doubtless we must continue to rely largely upon this combination of occasional "what-would-you-have-done" questions with professorial asides and allusions. But consider how much more effective the combination would be if, at some other points in their study, the students exposed to it were being called upon to perform some of the lawyer's jobs which daily require him to make up his mind as to significance of legal materials and to act on the basis of his decision. In thus experiencing the painful but stimulating business of decision, the students would begin to gain insight into problems and processes well before they could hope to acquire skillfulness in action.

Whatever its declared objectives, much of the current experimentation in acquainting law students with the lawyer's skills does compel the students to confront problems of decision and action of the sort that confront the lawyer,

and so inevitably brings them to deal with questions of "So what?" [5] Thus made sensitive to such problems and conscious of their importance, the law student is likely to become increasingly aware of them in the materials he studies in non-experimental courses. The experimental work therefore gives promise of enriching the whole program of study.

Unfortunately, the realization of this promise is threatened by two dangers. One is the danger that the quest for greater understanding will be subordinated to an attempt to produce virtuosos in some or all of the lawyers' techniques. The other is the danger that the students' continuing want of skillfulness in those techniques will convince teachers and students alike that the study of skills is not worth while.

These hazards bear consideration, and I think this should begin with a proposition that has attained the status of a saw among law-school deans and professors, one long used to squelch alumni who make bold to suggest a little more emphasis on the "practical." "The Law School can't teach everything," the proposition runs, "so we have to leave to the law office the things the student can learn better there."

It is too bad that this saw has always seen service as a terminus rather than as a starting point for discussion. It is valid in its recognition of the facts that legal education must continue beyond graduation and that the law office is better equipped than the law school to do some parts of the educational job. Yet its implied invitation for searching inquiry into the respective roles of law school and law office has been little heeded. On the contrary, we have tended to take the present division of labor pretty much for granted.

If, however, such an investigation were made, it would, I am sure, restrain those who are tempted to take over from the law office the task of developing skillfulness in all or most of the lawyer's jobs. To the extent that skillfulness reflects more than natural talent, it is largely the product of repeated experience, and that the law school is not equipped to provide. Moreover, a vital ingredient in the lawyer's skillfulness is his ability to perceive and respond wisely to elements in a situation that are obscure or difficult to evaluate —personality factors, for example. The law school, not being the "clinical lawyer-school" Judge Frank has envisaged,[6] can seldom fabricate situations that are apt for the cultivation of such expertness in perception, though they may reveal the character of the difficulty.[7] Again, as Professor Fuller warns,[8] absorption in training for skillfulness would divert the student from

[5] A survey that I recently conducted for the AALS Committee on Teaching and Examination Methods surprised me by the extent and variety of the experimentation it disclosed. It is reported in ASS'N OF AM. LAW SCHOOLS, PROGRAM AND REPORTS OF COMMITTEES 93 (1948).

[6] See Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303 (1947); *Why Not A Clinical Lawyer-School?* 81 U. OF PA. L. REV. 907 (1933). Judge Frank's proposals, though unlikely of realization, represent a continuing stimulus to the study of the lawyer's skills.

[7] The fact that hypothetical problems illustrative of the types of jobs that lawyers do are inadequate for the development of expertness should not cause us to undervalue them as means of inducing students to appraise the significance of the legal materials they are studying or of developing in them a better understanding of legal processes.

[8] See Fuller, *supra* note 2.

the study of objective problems to an attempt at self-improvement. The goals of preparation for a profession are and ought to be different from those of a "personal-success course."

But, though such considerations reinforce the view that the law schools have been wise in abstaining from training for skillfulness in the exercise of skills, the failure to study the division of labor is reflected in the failure to seek, in the study of skills, effective ways of assuring continuity and interaction in education between law school and law office.

Perhaps the most striking aspect of the transition from law-school work to law-office work is the abruptness of the change, tempered in the large offices by the initial assignment of neophytes to the writing of legal memoranda. Memoranda apart, the law clerk is plunged into a succession of tasks involving unfamiliar problems and processes. Moreover, as he progresses in his career, he does not find himself returning to draw increasingly upon his law-school learning. The contrary is the case; he may even have to unlearn some of the over-simplified conceptions of law and its processes that he acquired while he was learning the Law without much regard to its significance.

The study of the lawyer's skills could forge many links between school and office, even though the law schools did not purport to assume the law office's job of developing expertness. If, in his law study, a student could take part in representative law jobs, even though posed by hypothetical situations, the insights he would gain would be likely to persist when he engaged in the same jobs in practice; to change the metaphor, they would provide growing points for further development. Of course, the extent to which his student experience could render him perceptive would depend in no small measure on his instructor's own insight, imagination, and sensitivity to the problem of significance. But increased emphasis on the study of the lawyer's jobs would at the least enlarge the opportunity for instruction that would have continuing educative value.

The same change in emphasis would also enable the law schools to draw more effectively on the knowledge and talent of the practicing bar. It is a commentary on the lack of continuity between law school and law office that the schools have been able to make so little use of practitioners—in sharp contrast to the schools of medicine. The reason, however, is plain: the law schools have not been concerned with those aspects of professional work that are developed in experience at the bar. They have concentrated on questions which a recent graduate may often be more competent to answer than a distinguished lawyer at the peak of his career. Fortunately, however, as greater attention is directed to the jobs that lawyers do, ways are likely to be found to utilize the experienced lawyer: in fact, some experiments are already exploiting this generally available resource.

An invigoration of legal research will certainly result from greater continuity between school and office in law study. For legal research to remain vital, it must concern itself increasingly with the problem of significance—with questions of "So what?" In their pursuit, closer scrutiny will be required than has heretofore been given to the jobs that lawyers do. This, however, would follow naturally from increased attention in the classroom to lawyers' jobs, for, among law schools, the focus of interest in teaching has never been far from that in research.

These considerations should, I think, reconcile law teachers to the prospect that the growing experimentation in study directed to the lawyer's skills will not, at the end of three or four years' schooling, yield polished draftsmen, wise and resourceful counselors, astute negotiators, and effective advocates. Resigned to the limitations to which the new work must remain subject, law teachers may so shape it as to maximize its contribution to the student's understanding of the materials of his study and, concurrently, to augment the continuity in the processes of education between law school and law office.