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.

LEGAL EDUCATION: CONVICTIONS AND PERPLEXITIES

There are intimations today that the mind of the law teacher is disturbed and that he is beginning to wonder what makes the legal education clock tick. If that be true I wish, at the outset of what I have to say, to make my position clear. I have been devoting myself to legal education for a number of years, and I believe law teachers are doing a good job. Besides, I long for security and do not wish to be annoyed by tantalizing ideas. The trouble is that I suffer from a repressed but perhaps a false sense of guilt. And, moreover, a pixy that is making impudent remarks is hovering about me. I want to make a clean breast of my anxieties and by so doing perhaps find that peace and security I so much desire.

In the first place I have some misgivings over what is meant by the expression "legal education." We appear constantly to imply that legal education is something that is confined to a law school. I suspect that I am talking about a matter that is quite irrelevant, but I keep thinking that getting a legal education, properly conceived, is an undertaking for a lifetime, and that the period a prospective lawyer spends in a law school is but a phase of a lawyer's education. The answer seems to be that the subject thus broadly conceived is not our concern. The doubt that assails me is that we will not come to a full understanding of what is involved in legal education, and—of particular interest to the law teacher—we will not come to an understanding of the law-school phase of that education, until we take this over-all view of the subject.

Why is it important that we take this broad view? The persistent voice that is annoying me is saying:

> Now get this: you who are teachers in the law schools touch the prospective lawyer's life only for a brief period of three years. What you do for him in those years is your peculiar assignment. Just remember, though, that the education the neophyte gets in those years is not an isolated experience. It is a phase and only a phase of his total education, wedged in between his pre- and his post-law-school years. Viewed in that light, you law teachers cannot get proper perspective on your assignment until you know much more than you now know

> about what use your students made of their time before they entered law school, and about what they do after they leave law school.
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> What is more, it is your responsibility to know a great deal more than you do about what should be packed into the law-school years of the neophyte's training. And, finally, if you are worth your salt, you should know what to undertake in a law school, and what to leave alone.

Unless someone sets me straight, the voice I am hearing will have me convinced that the absurd ideas it is implanting in my mind have meaning. A good lawyer recently remarked that a lawyer's education begins in grammar school. Perhaps it begins even earlier than that. I have no desire to mark the exact point. What concerns me is that a conviction is about to be lodged in me that the skills a student masters in his pre-law-school years and the value judgments he then learns to make have a most important bearing on what sort of lawyer he will become. It is then that he learns to read and write. And let no one doubt this: the individual who cannot master the art of expression has no business trying to become a lawyer.

During these formative years the young aspirant to the law should also learn to use his mind—learn how to think and how to think discriminatingly. We in the law schools pride ourselves that it is we who teach students how to think. It is true, with the fact diet we feed them, that we give them an opportunity to show whether they can do discriminative thinking. It may even be that we help them in polishing up their thinking machinery. "But make no mistake," comments my little friend, "if you are handed a sow's ear, you cannot make a silk purse out of it."

Too, it is in the pre-law-school period that the student, if he has that inquiring mind that any candidate for the profession should have, is extending his intellectual horizons, and is storing away in his mind lessons of history and observations on the current social and economic scene—all this in his pre-law-school years, but all a part of his legal education. I have been reading a book by Abraham Flexner.[1] He speaks of the lawyer as a "social physician." He urges "that academic training be so organized as to realize the intellectual and cultural values of the practical or professional discipline or activity which will come next." He proposes a pre-law-school program for law students, and draws as a parallel "the specific requirement in science set up by the Johns Hopkins Medical School a generation ago." This requirement at Johns Hopkins was the forerunner of a revolution in medical education. "All this makes sense," whispers my tormentor; "why do not law teachers do something about it?"

There will be those who will doubt the validity of these premises. Just to make this a friendly affair, I am prepared to concede it is not unlikely that I will be singing in their choir at least part of the time. Education has many facets and is exceedingly complex. How are we law teachers to get perspective on so broad a conception of the subject? It would seem clear that we are not likely ever to get that perspective so long as we keep our eyes glued in a casebook. Suppose we were to try a new approach. Might we get somewhere if we were to set out to discover what lawyers actually do

[1] A MODERN COLLEGE AND A MODERN SCHOOL (1923)

or should be able to do, and work our way back from that vantage to a program of education? I do not mean that we should find out merely what legal controversies lawyers handle. That, to be sure, would be part of our study. I mean something more basic than that. I mean what skills lawyers are called upon to exercise, and what value judgments they must make.

A gifted and skilled advocate, now a judge, Sir Norman Birkett, has given us his observations.[2] He spoke about the advocate and the trial of cases. The advocate, he said, "must be not only a man of character but a man of culture." Knowledge of the law is essential but of itself is insufficient. There must be "the cultural background out of which springs the serene mind, the subtle understanding, the insight, that which differentiates man from man." Good, but an important trait is still lacking. The lawyer must cultivate words; he must be a master of expression. In Sir Norman's language, it is important for the advocate "to cultivate words, to select the right words, to put them in the right order, to know something of their meaning, of their association, of their sound." From another approach Dr. Esther Lucile Brown has given us a study of the lawyer in public service.[3] An examination of that subject has been long overdue. The emerging survey of the legal profession should give us much grist for this mill. "Do you begin to see," taunts the little voice, "that the subject of legal education is something much more vast than that which is contained in a casebook or even in a whole series of casebooks? You are missing the significance of the full implications of your job when you wash your hands of those phases of a lawyer's education that are not contained in a law-school curriculum. You should be prepared to tell the young aspirant to the profession what skills he should master and what fields of knowledge he should emphasize in laying a cultural background for the practice of law. And what is more, you should admit to your law schools only those individuals who have shown a clear indication that they are educable for the law."

My disturbing little pixy also tells me that we law teachers have been a bit doltish in relation to the law-school training we are giving our students. At this point I shall have to take issue with him. We have done a pretty good job. Perhaps our good performance is owing, at least in part, to a fortuitous circumstance that placed in our hands an excellent teaching device, the so-called "case method" of instruction. What we may be missing are the full implications of this device as an instrument of education. I venture the thought that it has numerous gearshifts that most of us have not learned to operate. Many of us, I suspect, have just trundled along, day after day, case after case. Oh, it is not as bad as that. Some of my fellow-teachers are doing a splendid job. Surely, we have all emphasized discriminative thinking, the setting up of principles, and the application of principles to facts, and facts to principles. Excellent, but have we all been giving adequate attention to the social and economic setting in which a given case was decided and have we appraised it further in the context of the changing panorama of our day?

2 *The Art of Advocacy: Character and Skills for the Trial of Cases*, 34 A.B.A.J 4 (1948).

3 LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE (1948).

It is to be noted that the law teacher is today awakening to the implications of the diverse factors touching legal education involved in a law-school program, even though that awakening is still restricted to a few pioneering individuals. A thoroughly provocative report on the present law-school program as an effective instrument of education was made to the Association of American Law Schools in 1944 by its Committee on Curriculum, of which Karl Llewellyn was then the chairman.[4] Published as it was during the war years, this analysis has not received the attention it deserves. The report points out that the traditional case method "shows its major classic values to have lain in the effective inculcation of a considerable number of technical skills in the handling of case-material." While commending these values, the Committee challenges their effectiveness under present conditions. It argues that it is now necessary to sacrifice "a material percentage of the current and ever-widening class-coverage of 'law' subject matter to a more articulate and sustained drilling in the skills," and it maintains that the skills "to be learned (by doing) have themselves grown materially more complex since the classic era of case-teaching."

It is likely that we case-law teachers, as this report implies, have failed to sense what a delicate teaching device cases are, and that while we have made use of cases, we have done so, perhaps, with an unawareness of their full potentialities for the inculcation of professional skills. There are, indeed, many skills to be learned through case instruction, but there also are, argues the Committee, "basic skills not adequately provided in the case-teaching tradition, notably statutory construction, appellate advocacy, simple counselling, and simple drafting." Legal education, the Committee insists, "is in proper essence and purpose a training for work as a lawyer," and to that end "knowledge of the law is only one of the needed lines of training."

Another stimulating report was issued by the Committee on Curriculum in 1947. That Committee projected a symposium on the subject, "Purpose, Program and Method in Legal Education." The event of that symposium is so recent in our memories that I shall not comment on it, except to emphasize one phase of the outline of the discussion. Under the heading, "What are the aims and objectives of legal education?" six questions were proposed, namely: "(1) To orient the student in relation to the problems, materials and methods of the law? (2) To fortify the student with as much basic information as may be essential to a working knowledge of the law? (3) To practice the student in the more important craft skills of the law? (4) To instruct the student in the nature and scope of the law as a system? (5) To inculcate an understanding of the social background and of law's relation to its purpose? (6) To cultivate sensitivity to professional responsibilities and an appreciation of the lawyer's place in society?" "Now you are beginning to get somewhere," exults the little voice; "why have you law teachers waited so long to ask these questions? I must say, though, that I was a bit disappointed in the discussion those questions provoked."

I am trying to shut up the impudent little fellow but he still will not leave me alone. "You will remember," he persists, "what I told you, that legal education is for the lawyer a lifetime undertaking. After law school and the passing of his bar examination, the lawyer yet has most of his life before

[4] HANDBOOK OF THE ASS'N OF AM. LAW SCHOOLS 159 (1944).

him. You can expect that his legal education will continue in his post-law-school days. A program of post-law-school education of vast possibilities for the lawyer is now in the process of developing. You law teachers should have a part in shaping that program. But whatever you do about that, take heed that you pack into your law-school programs only those things that you are prepared and competent to teach. You can assume that your students will get the remainder of their education from another teacher, the hard one of experience."

The voice grows fainter and subsides. I am alone with my reflections and am seeking to make appraisals and to adjust my thinking. One observation seems clear: I have not yet found that serenity and peace of mind I long so much to have. Perhaps, after all, life is more interesting when we are disturbed with the notion that we have problems to solve.

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