THE CURRENT CRISIS IN LEGAL EDUCATION

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It is not easy to talk about the current situation in legal education without being misunderstood. The dominant methods in use are a number of variations of case teaching, the whole range of these variations being commonly lumped together under the single misleading label, "*The* Case System"; and the question of what needs doing more frequently than not takes the form of whether "*the* case system" is or is not "sound" or "satisfactory" or "adequate"—which is much like asking whether eating is the road to the Good Life. In the one case, as in the other, there seems as yet no way to the goal which does not utilize the particular means under discussion; but both "eating" and "case teaching" are terms too broad to carry any clear meaning, and each is a line of practice which, though of high utility, is frequently abused, misconceived, and turned to uses for which it is not essentially designed; and, finally, neither appears to be in itself adequate even to approach the total goal desired.

Perhaps the best way to begin is to describe case teaching. Its essence lies in the provision to all students in a class of a series of concrete, problem-raising situations—common material for group discussion, so selected and arranged that related problems can be considered together in an effort to develop principles in the course of class discussion, and to provide some exercise, in class, in the testing and application of the principles. I hardly need say that unless such principles are clear and articulate (at need) to the instructor before the case-class begins, the class becomes not teaching, but hit-or-miss experiment.

The values of this type of approach to any technical study are obvious. The concrete situation stimulates attention and gives both the individual student and the class at large something to get teeth into as well as something which makes discussion meaningful and relatively easy to remember. Broad words and ideas are sharpened against hard, clean situations. The body of common material, studied in advance by the entire class and presented during the discussion for detailed study, permits valuable training in analysis and diagnosis and in the rigorous thinking-through of the relation of any proposed "line" of solution to its application. Not the least fertile aspect is the possibility of having something in the nature of a real *discussion* class which can enlist active participation from many, and also silent participation of a whole group ranging up to two hundred or more.

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However, there have crept into current law teaching accidental features which threaten to obscure or even defeat the values available under the general method:

1. The "cases" used are commonly reproductions, more or less complete, from the official reports of appellate judicial decisions—so much so that when any other type of material is used it has come to receive a different name: "problem," or "material," rather than "case." The first limitation imposed by this practice is that the court's more or less authoritative answer is provided, in advance, along with the problem presented for study.

2. From the first difficulty flows the second, familiar to every teacher in law or out: to wit, that when students are provided with a set of answers, the job of getting them to focus attention on the techniques of solution, rather than on the answers, is difficult.

3. This evil is reinforced by the fact that law teachers themselves have fallen into a general practice of seeing the vital lines of organization of a course (and hence also of the cases to be chosen and arranged) as consisting rather of "subject matter" than of the skills of the lawyer; as consisting of bodies of rules of law to be extracted, arranged, and learned rather than as a body of principles (or even rules) of the legal crafts which have to be studied both in theory and in practice in order to develop an adequate craftsman.

It is obvious that when the answers are provided in the materials and are also made the basis of organization, the basis of labeling the course, and the most heavily stressed portion of the examination, the possibilities of case teaching are jeopardized and can even be defeated. But plainly this does not apply to the method as such, but only to its misconception or abuse.

Accepted classroom practice runs in terms of a number of familiar devices. The first—calling on a student for the "statement of the case"—is primarily directed at substituting a lawyer's (or scientist's) accurate and intensive reading of material for the typical layman's newspaper-headline style of dealing with the printed word. At the same time it seeks to develop the student's power to analyze, compress, arrange, and reduce ideas to accurate expression; and also to develop a skill of special technical legal interest: the ability to distinguish a court's "authoritative holding" from legally less important language in the opinion and even from the court's effort to decide some point which is not strictly "in the case."

Another standard class technique is the testing of any student's formulation of a rule or principle (or, indeed, of policy) by a series of hypothetical cases which push the proposed formulation further and further

out to the borderlines of application, so as ultimately to reduce any over-formulation to a partial absurdity which shows on its face its own need of correction. Such hypotheticals can either be invented, and so make their appeal to common-sense judgment, or they can be derived from other decisions, so that their appeal becomes one also to accepted authority.

But the range of approach in individual use of these and other accepted techniques is immense. Perhaps the two most striking lines of variation are what may be called approaching the case from the front, on the one hand, and approaching it, on the other hand, from the rear. The latter approach takes the decision primarily as a something done and complete, a something which provides an authoritative datum about the state of the law, a something to be tested, therefore, for how far it reaches, how solidly it may be expected to stand up under later events, and—on a sharply different level—for how wise it is or how it fits together with other decisions or principles of law.

This line is obviously related to the "answer" and the "subject-matter" approach to the material. It is at the present time altogether too widespread. It is an approach which had great utility in the early case-system days, when great bodies of our fundamental law were still in relatively unorganized form; an approach which still displays value in those fields of law which are still growing and relatively amorphous today; in addition, at least one sound, clean, semester-long job along these lines is worth a student's time in order to put him through the process which leads to developing any picture of the organization of rules of law on a larger scale of synthesis. For that, too, is among the craft skills which a lawyer must master as he moves in life into any field of interest in which the law is in rapid movement. Yet I insist that even when that *skill* is intended to be a central value of a course, the skill as such will be absorbed by the bulk of the students only if the skill is made explicitly, sustainedly, insistently the focus of organization and of class treatment. It is too complex a job to become an incidental by-product for any but the gifted.

The contrasting, less frequent, and more vital approach "from the front" is an approach to the case as a problem *for* solution, not as a problem already solved. Its essence lies in such questions as: What materials were there to work with, before the decision and in the decision? How could the case, or the materials at hand, have been analyzed, presented, and argued to give cogent reason for deciding for the losing party? How did the winning party arrange his case to win? Or did the court decide for the winner in spite of his blobs in presentation and argument, and, if so, how and why?

In a word, the problem is presented as one *for* solution, as a problem not with its answer at hand but as one to which possible answers are to be worked out in class. The court's actual answer could, except so far as it indicates the prior materials available for use, be omitted from the decision entirely so far as this training aspect is concerned, save that that decision provides one important datum on questions which concern every lawyer: to wit, what kinds of men and minds sit on the bench, what appeals to them, how do they think, and how do they decide in fact?

In this aspect, every case worked over becomes a direct exercise in living law and in dealing with an essential problem which the prospective lawyer will face in his life work—the persuasion of a court to reach the desired answer in a new case as yet undecided.

Either of these lines of approach throws off by-products of analysis, of training in orderly thought, and to some extent in argument. But it is obvious that where the principles around which the discussion revolves are principles of *law*, then the principles of *effective craftwork* must come in for less conscious attention and for much less adequate development. Indeed, as case teaching has moved into these later days, and the fact situations considered and their implications of policy have become increasingly complex, some of the old-time virtue is lost when the "case" is made up solely of a judicial decision, and especially when that decision is "edited down" into greater "simplicity." For discussion in class which has to rest upon horse-sense judgments of policy loses its bite when the facts are not themselves sufficiently understood in their background and weight to render the students' untutored horse sense sufficient to ground an answer. And with the increasing pressure to "cover ground" in regard to rules and principles of law, discussion tends to shoal off. The basic virtues of the method cease to be achieved with any reliability *throughout* the class.

But *reliability* of the effective results of teaching, spread down to every single graduate, is the essence of *reliable* professional training. To me it seems clear that what is called for in this aspect, in order to recapture the ancient virtues of case teaching, is a great intensification of the problem discussions: the provision of much more background of fact and policy in regard to any problem or set of problems, a vastly more sustained discussion of details more fully presented and more clearly seen—in a word, the stepping up of this basic and vital method until it does take hold of every student; a stepping up, though at the price of reduction of the number of problem situations dealt with in any "course" down to a third or a tenth.

This leads into the next problem one faces in all professional training, but one from which the law curriculum, with the modern expansion of government, perhaps suffers more than most: the hugely growing quantity of information about subject matter which is needed for competence in the discipline. The pressure to expand the amount of "just plain law" "covered in class" has of course greatly increased the tendency in case teaching to concentrate upon subject matter at the expense of training in craft-skills. Nor could anything be a less happy development. For it is obvious that man could hardly devise a more wasteful method of imparting *information about subject matter* than the case-class. Certainly man never has. We face a crisis when we find the curriculum being drowned in an unthinking effort to use such a method as the sole means, or the main means, for accomplishing an end so vital.

For information, as such, can be packed into books. Its acquisition can be guided by syllabus and lecture. That is what books, syllabus, and lecture are for, whereas the case class is a class in doing—though the doing be mental and verbal; it is a cooperative, supervised, systematic exercise in diagnosis of a problem; in organization of data; in the arts of reaching for, building, and testing solutions or arguments, of making reasoned judgments of policy and putting them to the test; an exercise in the craft-skill—and the human skill—of accurate, orderly, persuasive formulation in language of thoughts that need such organization and expression in order to accomplish a given purpose.

Now, case teaching has shown that such exercise can profitably be carried on in large groups working on common material; whereas the basic acquisition of information is best accomplished man by man, as each man reads by himself. Indeed, one can go further: the case system can be directly vicious on the point of acquiring needed information about the state of the rules of law, because the effect over three years of limiting a student's required reading substantially to fifteen or so pages a day, conveniently collected in a single book (or spotted by the instructor without need for student research), is to discourage that very habit and skill of independent outside reading and searching which is one major part of every professional man's equipment.

Again be it noted that I address myself to the abuse of the method, not to what is inherent in it. Consider, for example, the possibility of building up our so-called cases out beyond the judicial opinion into something resembling the completeness of the cases gathered for the Harvard Business School. Consider the elimination from the center of a case-course of the present emphasis on "covering subject matter" in class, with that problem relegated to the outside reading of the student.

Consider the supplementation of the case-class by other types of course such as those I shall shortly mention. Given these things, the evil referred to would simply disappear.

There is an increasing body of opinion in the law schools to the effect that if the various legal craft-skills now inculcated by indirection in the first-year case-classes were made the explicit *focus* of the first year, we should be able to bring every student who remains in the school into the opening of the second year already trained to read judicial decisions and to use them with some professional competence. We all find that this is accomplished among our best students, and the body of opinion referred to leans to the view that the failure to do so for the bulk of students rests on the shift of emphasis in the first-year courses, over the past half-century, to "subject matter."

In any event, three things are obvious. The first is that the skills properly to be derived from case teaching are essential to every lawyer. The second is that the handling of all or the bulk of the inculcation of the rules of law by way of the case-class (which comes, before the third year, to deaden students' interest as much as in the first semester it stimulated that interest) is so costly in time as to make the amount of information acquired about the more important or typical fields of law definitely inadequate for any graduate. The third thing is that along with the so-called "case skills" there are many other craft-skills of the lawyer which the schools can and should impart both in theory and in practice.

Indeed, one of the most satisfactory educational tools in existence is the machinery of the student-run law reviews, under which the better men are drained off case-class work into jobs of research, synthesis, criticism, and expression, and are given training which surpasses in adequacy that accomplished by their faculty in the classroom. The student-run law review is a unique American achievement which I wish I had time to describe; here is the only known group of first-rate professional periodicals responsibility edited and partly written by *undergraduates* in the discipline. The importance of those reviews here lies in the fact that they are themselves also educational machinery with cleanly developed techniques for rapid and amazingly effective training, machinery recognized by faculties as having peculiar value in supplementation of the standard curriculum. The second importance here of the reviews lies in the fact that they are, under present organization, available only to a small portion of the student body; and that the implications of that fact lie largely unnoticed: to wit, that the law degree does not yet certify professional competence, and that the law curriculum fails to utilize

known and effective teaching techniques which exist, developed and in use, in the law schools themselves.

Here and there throughout the country one finds other experiments, and at times experiments highly successful, in proceeding further along comparable lines. In some places the moot-court work, in which students get practice in the art of argument—at times even in the art of presenting cases at trial—has reached not only an effective level but a range of application that spreads its benefits pretty well throughout the student body. Here and there one can find effective courses in the interpretation of statutory language, and in its drafting, and in the legislative process, and so on. In the main, however, we find neither advocacy nor the techniques of handling statutes as yet a true part of the curriculum for all, and the same holds of the arts of simple counseling and of drafting legal documents such as contracts, pleadings, and wills.

Yet each of these fundamental arts of the legal craft is an art with principles, well practiced by, and to a lesser extent consciously articulate among, the better lawyers of the country. In those skills, in making their theory conscious and in giving elementary practice in their use, lies the first great immediate need and opportunity of legal education today.

And be it observed that the teaching methods required are essentially those offered by case-teaching itself, when rightly understood in contrast to prevailing misunderstanding. For, as indicated above, 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. Certainly it has been demonstrated that appellate records can become good "cases" —that appellate advocacy, for instance, can be effectively taught in fairly large groups with, for example, a set of teams, of four each, at work preparing the arguments on each side of the issue. There I speak from personal experience. Under such a regime one major by-product is the learning of teamwork; and the fact that there are four, or six, or even eight teams at work on a given side does not at all detract from the effectiveness of discussion and criticism before and by the whole class of one or two briefs taken as samples, using them as a basis for developing the relevant craft-principles and for testing and applying them. The critique which derives from those teams whose briefs are not the subject of the detailed discussion is informed, embattled, and in turn informative to others. As in any proper case-class, there is before the group a common body of basic problem-material. What is under study

is the possibility which it offers for learning and practicing how to operate and how to organize insight and judgment. As in any proper case-class, concrete variations of possible solutions of a concrete problem offer the wherewithal not only to develop explicit principle, but to give to principle a living meaning—and to check up on inadequate formulation.

It has been demonstrated also that particular areas of law and administration can serve very satisfactorily as the vehicles for *exercise* in such matters as negotiation, or presentation of cases before an arbitrator or an administrative official, and that the division of a class (either permanently, or in rotation; either by option or assignment) into agency-staff and citizen interest (or, as the case may be, agency-staff, labor, and employer interest, etc.) is an effective means not only of stimulating interest and work and of developing personal skills, but also of deepening and rounding out insight into the legal and policy problems concerned in the broader background of the concrete situation in hand.

What has not been done as yet on any important scale at any individual law school is to range through the whole field of such possibilities and seek to set up, within the available time, a reasonably rounded, reasonably *reliable* body of training for a *whole* student body. That is, as the question of social responsibility raises its head, *a sustained effort to make the law school's law degree become a reliable mint-mark.* Nor has there as yet been any large-scale attention to provision of the kind of legal text which is needed in order, not to *supplement* a case-course in a given subject matter, but to *substitute* for one.

I have been thus far so occupied with the need for teaching hands-and-feet that I have used up time which should, perhaps, have been devoted to a larger and no less necessary purpose. I reject entirely the suggestion made earlier in this conference that concepts like Good and Just should be spelt with lower-case initials.[1] I reject the general and explicit acceptance of such an idea in our discussion since. To me, my brother who suggested lower-case spelling of the essential goals, and upper-case spelling of Science, has his good idea only partly by the tail. He wants no Authority to tell him what the Goals must be. He knows also that an Authority can be mistaken. He rejects the idea that any Authority is entitled to prescribe any particular Goal.

I cannot quarrel with him about any Authority's dictating any particular goal. But I quarrel hard with any implication he may suggest that there are not, to quest for, Goals worth putting into upper-case. I cannot define them, I know nobody who can. But the Quest after them

[1] The reference is to the address by Dr. Homer W. Smith, of the New York University College of Medicine, on "Objectives and Objectivity in Science."—Ed.

is worth upper-case—a Quest for each of us, and a Quest for our legal system. In my brother Michael's phrase: a quest for The Good Life, for All-of-us.

What I say in what follows is to be read in these terms.

Apart from widening the field of information obtained and developing the practice of independent reading, and apart from the introduction into the curriculum of training in the theory and application of the craft-skills, there remains as a largely neglected feature in the present curriculum the job which has occupied so much attention in this conference: for us, the job of providing the lawyer with some understanding of his public responsibility and with sufficient vision both to get perspective on his life work and to guide his professional judgments—to guide his judgments not only as a craftsman of the profession but also as a citizen whose work is peculiarly centered on the problems of government.

Partly this need is being met by increasing stress in the curriculum on areas of so-called "public law" in which the larger interests of the community and the conflicts of policy within it come in for more emphasis than in the traditional "private-law" branches such as Contracts and Property. Partly the need is being palliated by overt recognition that even "private" law is shot through with problems of general welfare. "Property," for instance, concerns housing and city planning, concerns taxation policy as well as estate planning, estate planning as well as rules about rights of way or the recording of deeds. But in both aspects the continued use of the case-class as a vehicle to purvey information comes at a prohibitive cost in time.

Meanwhile, the tradition of Anglo-American law teaching has run in terms of intense specialization on relatively narrow areas. That is one difficulty. It limits the outlook of teacher and scholar. We have not, for example, had any good survey of the whole picture of our law since Holmes, in the Seventies, partly modernized Kent's imitation of Blackstone. The other difficulty is that policy, when seen in the large, is almost impossible to divorce from politics, and that the tradition of our schools has been a non-political tradition. Faculty and students join in frowning on an instructor's taking, in class, a "preaching" or "political" position. For instance, my own use of the TVA last semester (in Jurisprudence) as an illustration of a vital new approach to problems of governmental organization affronted a number of otherwise interested and sympathetic students. "This goes outside the limits of academic freedom!"

These facts explain—but they neither excuse nor cure—this other major gap in legal training. Let me say only, in the little time I have

left, that I think that the art of making reasonably sound decisions on policy is as communicable as any other skill of the legal craft, and that I believe techniques for giving some reasonable training in it not only can be made available, but are available already. And, secondly, that the development of a whole view of the law and of what law is for is a duty, however partial its performance may prove. It stands as a problem on much the same basis as that which the country faced after the Civil War in regard to the resumption of specie payments. There had been specie payments once; it was urged that they had since become impossible. So here, there was once a time when the seeing of the law whole, in terms of purpose, functioning, evaluation, was the essence of law teaching. "Philosophy," which meant an effort to see and impart whole-meaning, was in the saddle. Let it not be urged that we cannot recapture that ideal-in-action, and inform it also with some reasonable sense of balance appropriate to the common-law tradition, and with concrete training in the hands-and-feet of effective method for accomplishing ideals, merely because such a conjunction looks at the moment "impossible." For we have hardly begun to restudy what can be done with three years of time, or with effort at wider vision. Again, as in that older crisis, the sound slogan is: "The way to resume is to resume!"