

SURVEY OF THE LEGAL PROFESSION: THE LEGAL EDUCATION PHASE

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THE EDITORS of this JOURNAL invited me some weeks ago to write an article on the plans and objectives of that phase of the Survey of the Legal Profession which has to do with legal education. This, with some misgivings, I consented to do. Word has gone out that a survey of the profession is in progress, and it would seem that the public, and particularly the professional public, should be told more about it. I am a bit fearful, however, that I am taking liberties in calling what I am about to describe "plans." There still is too much of this project that is uncharted for us to be talking about blueprints.

The idea of a survey of the profession did not spring full-grown from the head of Zeus. It was conceived during the war years in the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association, and had a period of gestation.¹

The Council saw much in the war years that made it apprehensive that a severe let-down in the standards of legal education and admission to the bar was in the offing. Its score sheet showed that enrollments in the law schools had dropped to 15 per cent of the pre-war number; that some of the schools had closed their doors; that all law schools were severely affected; and that bar admission standards were in serious danger of becoming demoralized. As the Council viewed the situation, influenced as it then was by the nearness of a debacle, an appraisal of the effects of the war on legal education and admissions to the bar was clearly indicated. In consequence the chairman of the Section presented to the House of Delegates of the American Bar Association a resolution that an over-all study of legal education and admissions to the bar be made after the war. The resolution received unanimous approval.

That resolution was approved in February, 1944. The war then was still in full swing, and the Council had time to appraise this project before going into action. After further reflection it reported to the Board of Governors of the American Bar Association, and subsequently to the House of Delegates, that, while it remained steadfast in its

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¹ Elsewhere I have recorded the order of events in its development. *Legal Profession Survey Project*, HANDBOOK, ASS'N OF AM. L. SCHOOLS 97 (1946).

opinion that a survey of legal education was of the utmost importance, a study which was confined to that subject alone was necessarily too restricted; that legal education is but a means to an end, involving the preparation of recruits for the profession; and that the study actually needed was not one dealing with legal education and admissions to the bar alone, but rather one which encompassed a critical appraisal of the whole legal profession. A study on that level, the Council reasoned, would be highly beneficial with respect to legal education and bar admissions policies, in that it would tend to supply objectives for them. The emphasis, however, as the Council pointed out, would not be on education and qualifications for the bar, but on the profession. In a survey of the profession, the Council concluded, legal education and admissions to the bar would be an important phase, but nevertheless only a phase, of the greater study.

This proposal found favorable reception almost immediately. The American Bar Association approved the project, and later that Association and the Carnegie Corporation of New York agreed to finance it.

It is not my assignment here to describe the whole Survey project. For perspective it would seem desirable, however, first to paint with a broad brush, so that legal education may be seen as a part of the over-all plan of the Survey. A succinct paragraph published in the American Bar Association Journal² is descriptive of the organization of the Survey and of the status of its Council as an autonomous body. This paragraph reads:

The Survey will be conducted as an independent project in the interests of the profession and the public by the Director and the staff which he selects, and will go forward with the advice of the Council. The relationship of our Association is that it perceived the need for finding out the facts as to our profession, arranged for the financing of the Survey jointly by the Carnegie Corporation and the Association, sponsored the selection of the Council from among lawyers and non-lawyers with outstanding qualifications, and committed the project to the independent judgment of this distinguished body and the Director chosen by it. With these steps of organization completed in April, the Survey and its results are completely in the hands of the Director and Council.

One of the early acts of the Council of the Survey was to draft and adopt a constitution. In defining the respective powers and functions of the Council and the Director of the Survey, this instrument provides:

The Council is created for the purpose of conducting a Survey of the Legal Profession in the United States of America to be recorded in

² 33 A.B.A.J. 423; reprinted, 33 A.B.A.J. 1075 (1947).

permanent form and to be made available to the members of the legal profession and to the public. . . .

The Council has the power and the responsibility to appoint a Director for the Survey who, when appointed and so long as he shall hold office, shall have academic freedom to direct and to report to the Council from time to time facts essential on which to found conclusions with regard to the legal profession and its various relationships to the public, social, and economic life of the United States of America.³

Six main divisions of the Survey have been set up, namely: Professional Services by Lawyers; Public Service by Lawyers; Judicial Service; Professional Competence and Integrity; Economics of the Legal Profession; and the Organized Bar. These divisions have in turn been broken into subdivisions, and for each of the subdivisions the Director has appointed a consultant who is responsible to the Director for the work of his subdivision. The legal education phase of the Survey falls under the Professional Competence and Integrity division, and is under my supervision.

In delimiting the legal education phase of the Survey—and lest the reader conclude that I have left out more than I have actually been guilty of overlooking—it should be pointed out that a number of studies which are closely related to legal education, but which vary considerably in material and emphasis, have been placed by the Director under separate consultants. For example, the consultant for Pre-Legal Education is Chief Justice Arthur T. Vanderbilt, and the consultant for Admissions to the Bar is James E. Brenner. Post-law-school Education, or, as it is more commonly called, Continuing Legal Education, has two consultants, Herbert W. Clark and Robert G. Storey.

The consultant on Legal Education works with a group of advisers chosen from the profession⁴ and with a smaller group of lay advisers.⁵ The advice sought is by no means restricted to these

³The members of the Council are: Howard L. Barkdull, Cleveland, Ohio; James E. Brenner, Stanford University, Calif.; Herbert W. Clark, San Francisco, Calif.; Charles P. Curtis, Boston, Mass.; John W. Davis, New York City; John S. Dickey, Hanover, N. H.; Albert J. Harno, Urbana, Ill.; Frank E. Holman, Seattle, Wash.; Devereux C. Josephs, New York City; Wm. Clarke Mason, Philadelphia, Pa.; Harold G. Moulton, Washington, D. C.; Orie L. Phillips, Denver, Colo.; Carrol M. Shanks, Newark, N. J.; Reginald Heber Smith, Boston, Mass.; Robert G. Storey, Dallas, Texas; Arthur T. Vanderbilt, Newark, N. J.

Judge Orie L. Phillips is the Chairman of the Council. The Director of the Survey is Reginald Heber Smith.

⁴The members of this group are: James E. Brenner, Paul W. Brosman, Elliott B. Cheatham, Herbert W. Clark, Lon L. Fuller, Bernard C. Gavit, Frederick D. G. Ribble, Will Shafroth, and Russell N. Sullivan.

⁵The lay advisers are: B. J. Cahn, President, B. Kuppenheimer & Co., Inc.; Frank G. Dickinson, Director, Bureau of Medical Economic Research, American Medical Association; Robert L. Johnson, President, Temple University; M. G. Kispert, Mas-

individuals. They are the faithful stand-bys. Advice is sought and gratefully received from anyone who is willing to give it.

It was soon perceived, since legal education has many facets, that the subject had to be broken up into a number of sub-topics. This was done and work is now in progress on these sub-topics. The first of these studies which I shall describe has to do with the question, Who should be permitted to study law? Perhaps more appropriately the question is, Who should have the privilege of admission to the bar? We have never quite frankly faced this question. We have, of course, rubbed elbows with it in setting up standards of admission to law schools and admission to the bar, but we have never met the issue straightforwardly. The American people adhere to the premise that everyone is entitled to an education. But are all entitled to a professional education? Mr. Homer D. Crotty of Los Angeles is devoting himself to this question.

In making this study Mr. Crotty will delve into the purpose back of the establishment of standards of admission to law study and of admission to the bar. Is the public afraid of a lawyer's monopoly? Why have efforts to improve standards met with so much inertia and resistance? He will cover the history of the efforts to improve the educational requirements for law study and admission to the bar; make comparisons in these requirements from state to state; and compare the requirements as they exist in the various states with what they were twenty years ago. He will also review the requirements for admission to the Supreme Court of the United States, the United States courts of appeals, and the district courts, and prepare a schedule showing the requirements of the various districts.

The next study projected has to do with the situation of legal education in the law schools. This study is being made by Mr. John G. Hervey of Oklahoma City. Mr. Hervey is also the Adviser to the Section of Legal Education and Admissions to the Bar of the American Bar Association. From the point of view of the labor involved and the coverage, this is the most extensive of the studies projected under this title. It involves an inspection of all the law schools in the United States. The effort will be to get the facts about legal education as it is measured out by the schools. Broadly speaking, legal education should be looked upon as a lifetime undertaking. So conceived it has three phases, each of which complements the other: Pre-law-school education, which as a study in this Survey is under the supervision of Judge Vanderbilt; post-law-school education, which is under the super-

sachusetts Institute of Technology; Richard L. Kozelka, Dean, University of Minnesota School of Business Administration; and G. Herbert Smith, President, Willamette University.

vision of Dean Storey and Mr. Clark; and law-school education. Mr. Hervey will investigate and report on the law schools of the country.

The effort in this study will be to define the atmosphere—the conditions, physical and intellectual—in which education in the law schools is administered. What is this we call legal education? It will be Mr. Hervey's job to get the spread of law school education as found at its best and at its worst. The appraisals he makes will necessarily depart from the usual pattern of law school inspections. They will call for infinitely more insight than that disclosed through the counting of the books in the library stacks, the chairs in the reading rooms, and the members of the staff. He will deal with factors more intangible and subtle. His study will involve objectives and conceptions such as Professor Lon L. Fuller touched upon in the paper he presented last spring at Buck Hill Falls, Pennsylvania.⁶ Mr. Hervey's undertaking is essentially an exploratory expedition.

In gathering the materials for his study, he is sending a questionnaire to all the schools, and it will be followed by inspection visits. The inspections will be made by a corps of inspectors, who will be brought into a conference on inspection objectives and methods of approach before they set out on their assignments.

Professor Karl N. Llewellyn has accepted the assignment of making an analysis of current law school programs. There is at work in the law schools today a substantial ferment for change, touching the materials of the curriculum and the methods of teaching. Somewhere in our study of legal education, the case method will have to come in for analysis and evaluation. We hope that Mr. Llewellyn will undertake this analysis as a part of his assignment. No one, I believe, doubts the value of case instruction as a superb teaching device. Many, however, believe that it cannot be looked upon as the sole method of instruction. They hold that it is excellent so far as it goes but that it is an incomplete device for a well-rounded legal education. What is, perhaps, the most favorable appraisal of it was made in 1914 by Professor Redlich.⁷ Others, while praising it, have pointed to its shortcomings.⁸ Clearly, case instruction leaves out much that is to be desired in the development of some of the skills—for example, in legal drafting, the

⁶ Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL ED. 189 (1948).

⁷ REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* (CARNEGIE FOUNDATION BULL. NO. 8, 1914).

⁸ ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* (CARNEGIE FOUNDATION BULL. NO. 15, 1921), and *PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA* (CARNEGIE FOUNDATION BULL. NO. 21, 1928). For a more recent appraisal, see HAROLD J. LASKI, *THE AMERICAN DEMOCRACY* 583-591 (1948).

handling of legislation, office practice, and the arts of advocacy--that are essential to a lawyer. It would seem that case law also falls short of the goal in the training of lawyers for the public service.⁹

But whatever the result of the objective evaluation of case law instruction may be, it is to be observed that forces are at work which are inexorably fashioning changes in the materials and methods of law teaching. A shift in emphasis in the practice of law touching such fields as Administrative Law, Taxation, Labor Law, and Accounting is necessitating readjustments in old courses and in methods of teaching to make room for these aggressive newcomers. What is more, the teaching materials for some of these courses cannot be constructed from cases, and all would seem to require introducing the student to substance and procedures quite foreign to the content of the orthodox casebook.

The basic problem for Mr. Llewellyn would appear to be to work out a balanced synthesis of various lines of thinking on the needs of law school education, recognizing the value of each line of thought as an ideal but recognizing also the problem of pressures.

His critique should, as he sees it, attempt to move on two quite distinct levels. The inquiry in one of them would be, What can and should be done at once, with presently available materials and personnel? and, in the other, What reasonably can be projected for accomplishment in, say, five years of further development of materials, methods, and personnel? In making his study he will, in all probability, wish to note and evaluate teaching experiments that are now under way in various law schools, and stress the possibilities offered through cooperative work among small groups of men gathered from different faculties.

One of the problems in legal education that has evaded solution is how to bridge the gap for the novice between his law school training and the practice. Are the schools at fault for this gap? Is it true that proper material is not to be had in the law for clinical training as it exists for internes in medicine? Law school catalogues commonly contain statements declaring that the schools prepare individuals for the practice of law. Almost immediately after finishing their law school course (if, indeed, they wait until they have finished) the newly graduated take a bar examination. If they pass it, the state issues them a license to practice law. But are they prepared to practice law? Some law teachers state frankly that the schools can do no more than prepare students to take jobs in offices, there to learn something about the practice. But many do not go into law firms; they go directly from

⁹ ESTHER LUCILE BROWN, *LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE* (1948).

law school into their own practice. It is to be observed that legal education today has turned away from its origins in the apprentice method, although legal clinic programs are being conducted in a number of law schools.¹⁰ Some individuals, while advocating the apprentice system, believe that it cannot be conducted as part of a law school training. The appraisal of legal clinics as a phase of legal education is under the supervision of Reginald Heber Smith, the Director of the Survey, and Quintin Johnstone of Willamette University.

A kindred study, but one which has a broader pattern, is being made by Dean Lowell S. Nicholson of Northeastern University. He will deal with the problems of a young law school, or the law school whose graduates in substantial numbers do not go into established law offices, but move directly from law school into practice. The problem here is not only how to give students the rudiments of the arts of practice, but equally, how to apply the substantive principles learned in the classroom, from the study of settled issues to the living problems raised by issues yet unsolved. All law schools, in varying degrees, have this problem. Dean Nicholson's task is to find out what the schools have done to solve it.

One of the enigmas in legal education in America relates to the fact that the law schools have not succeeded in integrating the materials of related disciplines with the study of law. In the affairs of life, law and its administration are interwoven with the materials of the social sciences. Legal principles do not operate *in vacuo*. They have vitality only when applied to facts. Issues over facts are raised by human beings, and center around social, economic, and human behavior problems. Brave words have been spoken about integrating non-legal materials with the law school curriculum, but nothing much has been done about it. Integration involves inherent difficulties, and there does not appear to be a clear understanding of the essential purpose involved. The study of law has not always been divorced from a study of philosophy and the social sciences. It was separated from them by pressures for intense specialization. The question now is how to bring about a reconciliation. Professor Brainerd Currie of Duke University has accepted the assignment of presenting a study of this problem.

Assistant Dean Louis A. Toepfer of the Harvard Law School is making a study on what is being done about the placement of young

¹⁰ Much has been said on this subject. Some recent discussions are: *Report of the Committee on Legal Aid Clinics*, PROGRAM AND REPORTS OF COMMITTEES, ASS'N OF AM. LAW SCHOOLS 87 (1948). Bradway et al., *Improving Legal Aid Clinic Technique*, 18 BAR EXAMINER 46 (1949).

lawyers. This study should have some significant implications for the schools and other agencies interested in helping young graduates to find employment, and it should present some evidence on the question of whether the number of lawyers has reached the saturation point. In gathering data for his study, Mr. Toepfer will try to find out from each school what it is doing to help its graduates find employment, what techniques it employs, and what it accomplishes. A similar analysis will be made as to what is being done on this subject by bar associations.

Working from another approach, Mr. Toepfer will ask a substantial number of individual lawyers what influences determined their placement. Through this approach he expects to get some insight into the relative extent to which background, education, personal characteristics, outside assistance, and luck have bearing on the transition of graduates from law school to practice.

This exhausts the list of topics that, at this moment, have been assigned for study. Some additional subjects have been projected, or are in the incubation stage. These include an appraisal of the contributions of the Association of the American Law Schools and of the Section of Legal Education and Admissions to the Bar of the American Bar Association toward the improvement of the profession through legal education;¹¹ legal education and the public service; and a comparative study of legal education in the United States with that in other countries.

I have one further word, and this one is a supplication. Ever since my reading of *Lighthouse No Good*,¹² the remarks of Dean Prosser's Indian, which I repeat here, have downright disturbed me:

Lighthouse, him no good for fog. Lighthouse, him whistle, him blow, him ring bell, him flash light, him raise hell; but fog come in just the same.

Will the reader please refrain from banding himself with that Indian!

¹¹ After this paper was prepared, this particular assignment was accepted by Professor Russell N. Sullivan of the University of Illinois.

¹² Prosser, *Lighthouse No Good*, 1 J. LEGAL ED. 257 (1948).