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Legal Education and Lawyer-Made Law

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THE other day I heard a Harvard heart specialist tell about a medical mission to Pakistan in which he took part. He described the need of the Pakistanis to create a system of medical education for eighty million people, starting from a single medical school. He then remarked that, to encourage his Pakistani friends, he had contrasted the state of American medical education when he was a student forty years ago with its present-day achievements.

As I heard this physician describe the progress in medical education over his own professional lifetime, I could not help but compare the progress of legal education over the same period. Progress there has been and it is substantial, but I suspect it is discernible chiefly to law teachers. The law school graduate of 1912 or thereabouts looks back on the law school of his student days with a great deal of satisfaction. Indeed, he is inclined to believe that there were giants in those days and to consider the period of, or shortly before, his own attendance at law school as the institution's Golden Age.

As a matter of fact, in 1912 legal education in many schools was very good, but the satisfaction we can take in where we have been should not dampen our interest in where we still may be able to go. We must avoid the example of the Boston spinster in the classic story. You will recall that straitened finances had confined her quite closely to Beacon Hill and that, rather late in life, she came into an inheritance. Her friends were delighted. “Now you can travel,” they said. “But why should I travel?” she asked in reply. “I'm already here.”

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* Address delivered at Alumni Day Exercises, West Virginia University College of Law, May 31, 1952.
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Without questioning the proposition that legal education is already here, I think we may profitably inquire into where it may go from here, just in case it should come into more affluent circumstances. Incidentally, I refer to finances not merely to preserve the parallel with my Boston story but because progress in legal education, as in most human activities, is going to cost money, not much, to be sure, in terms of the vast sums required for medical education but something more than law schools have been accustomed to receive from tuition income or biennial appropriations.

As I see it, there are at least two main directions which progress in legal education might take. Fortunately, if inspiration and income suffice, there is no reason why the law schools may not move in both these directions at the same time, and that without sacrificing the essentials of good legal education as we know it today.

One of these directions is toward vantage points that will enable law students to see some of the concrete problems of modern American law in broad perspective. Our students soon learn to get down to brass tacks but unfortunately too many stay there. Somewhere in their law study they need to achieve a wider view. Ironically, the very legal studies that could contribute most to this basic purpose, we and our students have tended to treat as frills. I shall name only three of those which can be shaped to meet the need for perspective.

First, of course, is Jurisprudence which links the particulars of a legal system with its philosophical assumptions and values. Another is Legal History, whether English or American, which sets modern legal concerns in the perspective of time. A third is Comparative Law which enables the student to see how the objectives of law which we recognize are pursued in the legal systems of other countries or even in the emerging law of world organization.

The second direction in which I hope for progress in legal education is the one that I want to emphasize this morning because the law schools will be able to pursue it only if they enlist the cooperation of their alumni and the practicing bar generally. But before I point out the reason for this, let me call your attention to one of those commonplaces which we tend to ignore, perhaps because they are so obvious.

It is a fact that a great deal of the law under which all of us live and work in these United States is written, not by Congress and the state legislatures or by the courts and the administrative
agencies, but by American lawyers, sitting in their offices, striving to carry out the lawful wishes of their clients.

Now the laws that the lawyer writes are not called statutes, regulations, and ordinances, or judgments, decrees, and orders. We have labels for them such as contracts, deeds, mortgages, indentures, leases, wills, trusts, settlements, charters, by-laws, and scores of other terms, but, if these instruments have been drawn and executed in accordance with law, they are just as effective a means of creating or transferring rights and duties, powers and privileges, as the most solemn enactments of a legislature.

If your client disregards a duty imposed by statute, he may have to pay a sum of money called a fine; if he disregards a duty imposed by a deed or a contract, he may have to pay a sum of money called damages. The people who start the machinery of justice turning to extract the sum in either case may be different, but the effect on his pocketbook may be very much the same.

I could multiply such similarities but to do so for this audience would be to labor the obvious. The significant thing for the purposes of legal education is that the lawyer's vast output of law is largely escaping systematic study. Relatively little attention is paid to it in the classroom except in those situations where a lawyer's failure to do his job successfully has led his client into litigation. Ordinarily we encounter the problem as it appears in the opinion of the appellate court that has been called on to set the tangled situation to rights, and we sometimes speculate on what the lawyer should have done to have kept his client out of trouble. But as a means of revealing the function of the lawyer as law-maker, our method is inadequate in at least three respects.

First, we see the problem after the event rather than as it reaches the lawyer, with all the uncertainties unresolved and choice among the alternatives still to be made.

Second, we are likely to focus on only that segment of the problem on which the litigation has been centered: we do not see the lawyer's problem as a whole.

And, third, as I have already remarked, we see the failures, not the successes: those ingeniously simple or ingeniously intricate arrangements that skilful lawyers have designed so well that they may govern business or family affairs for years without ever creating a ripple of controversy.
In carrying out his work as law-maker, the lawyer is at once the architect and the builder of human relationships. He draws on his legal learning for knowledge of the legal tools and materials he can use and their capacity to bear loads and withstand stresses. At the same time, he draws on his knowledge of human nature and of business practice to gauge the workability of the arrangements he is considering. In addition, he employs his skill in analyzing problems and in using language effectively to make sure that the documents embodying the arrangements he has designed cover all significant contingencies and, at the same time, do not create other risks by ambiguities of plan or language.

What, you may ask, can we hope to learn from a more systematic study of the lawyer's law-making? Isn't each instrument he draws either unique or so much a matter of routine that a form book is its proper source? There is so much truth in an affirmative answer to that question that it is easy to overlook the truth that it would ignore. Most transactions are routine and many are unique. But the profession is continuously meeting new types of demands and finding new ways to satisfy old demands. There was a time many centuries ago when conveyances in trust were the novel creation of some bold solicitors. But pension trusts for employees exemplify a modern innovation in the use of the now venerable trust device. The lease-back, the percentage lease, stock options for executives, these are but a few other instances of recent developments in lawyer law-making that would have sustained and repaid systematic study.

Moreover, not only may the product of lawyer's law-making reward study; the process as well deserves examination. Books and articles have been and are continuing to be written about the judicial process, the legislative process, the administrative process. But I suspect the first book has yet to be written about the process whereby a couple of lawyers bring two militantly hostile parties together in an office, adjudicate their disputes, draw a decree or statute called a contract to govern their conduct for the next ten years, and thereafter administer the law they have written in a way that will sensibly and faithfully carry out the legislative intent.

Perhaps books aren't written about these accomplishments because they are such every-day matters. But most every-day matters yield returns when they are studied with detachment by persons of imagination, insight, and some flair for generalization.
If we can study this process of lawyer law-making, I am sure we shall find aspects of it that can be communicated to law students to their and the profession's advantage.

An essential ingredient of the success of modern American legal education has been the ready availability of a vast store of cases. I suspect that, in the education of the American law student, the aggregate of all that his teachers have told him has counted for much less than his encounter with several thousand sets of concrete facts, each accompanied by a judge's efforts to identify and dispose of the problems the facts raised in a way that would fit his decision into a coherent system of law. If we are to give to the student who studies lawyer law-making the same feel for what is significant in the specific instance, we shall need to build up an inventory of cases of lawyer-made law, especially cases which record the lawyer's successes.

These cases exist, but they are in the files of law offices, private and public. Moreover, a good part of each case is not in the office files but in the recollection of the lawyers who have handled it. The case may perhaps be classified in terms of the main type of instrument in which the lawyer or lawyers have embodied the parties' wishes. However, each of these instruments has arisen out of the particular needs of one or more clients. To obtain an adequate statement of the problem, therefore, it is necessary to have not merely the end-product, the contract, the option, or the lease, but also the background facts or assumptions of fact. Moreover, we should need the reasons that led the lawyer to his solution. These may reflect a client's whims as well as the latest decisions of the state supreme court.

Is it feasible for us in the law schools to get and report cases of this sort? One difficulty is both obvious and serious: the lawyer's obligation to preserve the confidences of his client. Often, however, a little ingenuity in disguising the actual situation will completely cover up the identities of the parties involved. An easier and more satisfying way which would be open in a good many situations would be to secure the client's consent to disclosure. Not infrequently the arrangement the lawyer has perfected represents something which both he and his client can brag about. I think it fair to say that this problem can be more serious in a state of small cities such as West Virginia than in a state which includes a metropolitan area, but I see no reason for West Virginians to be defeatists
on this score. An exchange of cases among cooperating law schools would go far toward solving the problem.

I have encountered the objection that to ask a lawyer to report a case in which he has worked out an ingenious arrangement is to ask him to give up a trade secret. This seems to me valid only where the sharing of the plan would be to the detriment of his client. A lawyer is entitled to no trade secrets of his own. He is a professional man, not a tradesman. The physician who tries to keep a remedy secret is properly regarded as unethical. The lawyer should be subject to the same standard.

The fact is, however, that many accomplishments of the lawyer in developing plans for his clients remain a secret, not because he has tried to keep them as such but because there are no satisfactory channels for their dissemination. Lawyers seldom write articles about the trail-breaking contracts and charters and settlements they have drafted, and the law schools have developed no systematic way to tap these advances in professional knowledge. It is as if nobody in Johns Hopkins thought of reporting to surgeons there or elsewhere Dr. Blalock's remarkable surgical technique for turning "blue babies" into normal infants.

A third difficulty is a very practical one. If connections are once established with practicing lawyers to enable the law schools to secure from them cases of this character, can these connections be maintained over the years? How are the lawyers to be kept interested and active in this rather burdensome form of aid to legal education?

I think the answer to this depends on how effectively a law school uses the cases the cooperating lawyer supplies. If it learns how to make good use of them, the satisfaction the lawyer will take in seeing his work contributing to the advancement of his profession will assure his continued cooperation. If, on the other hand, he is contributing chiefly to a law professor's filing cases, then the participating lawyer's interest is certain to flag. This may make the solution seem easy. I can assure you it is not.

To study cases of the sort we have been talking about will take time—they can be much more time-demanding than judicial opinions. Yet every law teacher I know feels oppressed by the inadequacy of the time that is now allotted to his courses. This means that if the cases can be collected and put into usable form,
it will still be necessary to plan very carefully ways of using them. I see three possibilities.

1. The cases can be introduced sparingly into the regular courses as problem material to be examined in the light of the court cases and statutes being considered. This, of course, means that the cases must be closely related to the subject matter of the courses in which they are used.

2. The cases can be used as topics for discussion in seminars in the fields in which they fall. Indeed a seminar might be composed of a series of such cases with several students assigned to different roles in connection with each one. In seminars, moreover, the consideration of the written materials could sometimes be enlivened by presenting the very attorney who submitted the case in the first instance.

3. The cases might be used in a program of problem work supplementing the regular curriculum and especially designed for this purpose. This third method has the special advantage of relieving the necessity of confining the subject matter of the cases to the fields of particular courses or seminars.

Whatever the method used, it is obvious that the number of cases of this character which any given student can consider in the course of his three years of law study would not be large. However, the fact that only a limited number of cases could be covered should not be a bar to their use. The chief purpose of their use is not to convey a knowledge of wide areas of the law but to develop insights into the processes of lawyer's law-making.

Successful study of such material would not prepare the law student upon graduation to duplicate the performances of his seniors. He would still be an apprentice workman, not a journeyman, far less a master. But he would be an apprentice with a much better understanding of what the master is trying to do and how he goes about it, and he would also have a better appreciation of the legal doctrines and source materials which would remain the main business of the law student to study. He would have a better sense of their practical potentialities and limitations as the legal tools and materials with which a lawyer must work. Ideas would have been implanted in his mind which upon cultivation in practice would yield important professional accomplishments. With these purposes in view, it is, I think, clear that the quality of the cases and the imagination exhibited in their selection and analysis are
more significant than their number. If the student were to encounter only one case of lawyer-made law in each course, this still should do much to teach him to "think like a lawyer," to use a phrase that generations of law teachers have turned into a cliché.

Although most of the cases that would culminate in instruments drafted by the lawyer, whether the study of the cases should include the preparation of student drafts might be left to depend on the state of the curriculum.

The teaching of draftsmanship—to the extent draftsmanship can be taught—is a time-consuming business, requiring a lavish expenditure of effort on the instructor's part. If a regular law school faculty cannot assume the burden, there remains the possibility that it could enlist the part-time services of a limited number of practicing lawyers. The medical schools have been able to draw on large numbers of the practicing profession to aid them in the coverage of their immense curricula. Although experience has taught most law schools that only a few busy practitioners can be relied on for the teaching of regular courses, nevertheless, we should not take this as proving that we cannot get greater help from practicing lawyers in other capacities, particularly in work that draws more directly on their experience than does formal instruction in a branch of law. My guess is that a number of able lawyers could be persuaded to spend ten or fifteen afternoons a year sweating out drafts of instruments prepared by students on the basis of situations posed by the lawyers. I submit, moreover, that they would be willing to do this work for stipends which would seem scandalously low, even to a federal court passing on fees in a reorganization. I suspect that some would be glad to do this work simply for the satisfaction it would give them, but this I would not recommend. The best way to exploit a volunteer is to pay him something for his services.

Perhaps, in concluding, I should make clear that I have not canvassed these possibilities here because I feel the West Virginia College of Law is peculiarly in need of them. On the contrary, I believe that, in his courses on legal drafting and in his famous practice court, Professor Leo Carlin has brought law teaching closer to the work of the lawyer than has been done in most American law schools.

Innovation in legal education is not the monopoly of any size or type of law school, although perhaps the state university law
school, because it is closer to its alumni, may be able to develop the
study of lawyer-made law more effectively than schools which draw
their students from a wider territory. I suspect that, for some of
the ideas I have been seeking to sow, the West Virginia hills offer
at least as fertile soil as the rocky pastures of New England.¹

¹In the oral utterances of our profession—in our addresses, arguments, lec-
tures, talks—we cannot indulge our addiction to annotation. Though publica-
tion might have afforded an opportunity, I have not sought to tack footnotes to
my Alumni Day remarks. Had I done so, I might have reported a number of
instances at my own school and elsewhere in which experimentation in the study
of lawyer-made law has come to my notice, and I am sure these instances could
be multiplied. Probably most of them have occurred in seminars, but some
examples within the framework of standard courses have been reported by the
AALS Committee on Teaching and Examination Methods. Ass'n of Am. Law
Schools, 1948 Handbook 194, 206. Recently, moreover, under an arrangement
with Mr. Benjamin F. Goldstein of the Chicago Bar, I have been securing a
series of case reports prepared by Mr. Goldstein to test the feasibility of obtaining
such material and to ascertain the form in which the case might best be cast.
A number of the ideas expressed in this paper had their origin in his views.