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LEGAL EDUCATION—FOR WHAT? CHANGING PERSPECTIVES 1935-1962*

FRANCIS M. SHEA**

An old associate of mine from the South was fond of telling a story of a negro who had been convicted of murder. He came up for sentencing; the Judge pronounced those awful words, "On Tuesday, January 7, you will be taken by the Sheriff of this County and delivered into the custody of the Warden at the Penitentiary at Raleigh and there a current of electricity will be passed through your body until you are dead, dead, dead, and may God have mercy on your soul!" The Judge then extended the doomed man the customary invitation to say a few last words. The colored man responded, "Judge, boss, Your Honor, you don't mean this here next coming Tuesday?" This is the way I have felt for the last couple of weeks.

I shouldn't have been quite so apprehensive in talking on this subject which has been of continuing interest to me, but not a matter of professional responsibility since 1939, if my assignment were merely to speak to an audience that couldn't talk back. But I was invited not merely to speak in the presence of three of the most literate, knowledgeable and thoughtful men in this field but to subject my views to their immediate critical appraisal. I mentioned my anxiety to one of my partners, and his tart reply was that my obligation was not to come out unscathed but to give the others something to talk about.

If one generalizes an answer to the question, "Legal Education—For What?," the perspectives are I think constant, whether the problem is sighted in 1935, or twenty-seven years later, in 1962. The aim is to educate a corps of men who can carry well a large responsibility for giving civilization security and making it work. Their task is manifold: to subdue the extravagances of force whether of the state, of the great private foci of power, or of neighbors' fists; to insure every man the essential conditions of dignified life, conditions which the Founding Fathers tried to summarize in the Bill of Rights; to organize the cooperating and accommodating arrangements which permit a pluralistic society to function; to plan the dispositions of private and public accumulations of wealth; to formalize the conflicts that would otherwise threaten peace, tranquility, and fruitful enterprise and resolve these conflicts either consensually or by the decision of some accepted tribunal.

The lawyer's basic instruments are decisions in particular cases, somewhat like and somewhat unlike the situation he has to resolve, constitutional and legislative rules of law, the decisions of administrative agencies and the rules

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and regulations which such agencies promulgate. But the materials which may be relevant to any problem he faces are unlimited.

The talents he needs are a mind with some range, a capacity for precise analysis and a constant awareness that the law is a compendium of antinomies. Any principle pushed too far loses its force and collides with other principles which will overwhelm it, and so the wise use of any principle is a modest use. He must have capacity for precise statement so that cooperating or accommodating arrangements once reached will not be open to constant question as interests change and so that planned dispositions will not go awry. He needs capacity for persuasive statement both written and oral to secure agreement or win decision, and an appreciation that bombast merely heightens his own conviction, while candor and understatement are more likely to convince others. Finally, he must have the will daily to lay his reputation on the line, often with the sure knowledge that a court or jury may tumble him head over heels before another moon.

It is a formidable undertaking to produce such a corps of men, enough to frighten any faculty about its responsibilities. But a few rather obvious observations should give the universities heart.

The law school's responsibility is only to give a competent three year introductory course to an education that extends over at least a decade and should, indeed, end only with the end of a career. Nor should law faculties be required to assume that nothing has gone before, so that they must introduce graduate students into the uses of simple declarative sentences, and acquaint them with elementary economics and accounting. Unhappily these assumptions are all too often justified. But I wonder if the time has not come when the law schools are entitled to insist that the undergraduate schools do their job if they want to qualify students for admission to the law schools. I'd favor experimenting with toughness. The medical schools do not hesitate to prescribe content for the pre-medical education. Why should we?

None of us have any doubt that capacity for adequate written and oral statement is essential equipment for a lawyer. There is no secret about how either is to be obtained. There must be extensive practice in writing or speaking constantly tested against good models and corrected and corrected until the product is acceptable. It has been my practice when I thought a brief inadequate in its presentation to insist that the writer prepare an outline and eliminate every sentence, indeed every phrase that was an aside from or had no clear and immediate relevance to the outline. I would underscore words that I thought imprecisely used and insist that he find in the dictionary, definition of the word that corresponded to his intended meaning. A respect for words and an understanding of decent organization of material generally results from these exercises.

In the Claims Division of the Department of Justice every man without exception made his argument before me and two of the section heads before he

took it into court. A perceptive judge told me that the arguments in the Court of Claims improved 100% almost immediately after this practice was initiated. To this day I never go into court on an argument without spending two or three evenings rehearsing it with one of my younger partners.

Why shouldn't these practices be required in the undergraduate preparation for law school? If they are not too humble for men who are matured in professional life, why should they be scorned for grander things in undergraduate preparation? Let the colleges push the beginnings of this training back to the high schools if they choose, but the law schools have a right to insist that the colleges have not done their job if a man with an A.B. degree can't write a simple declarative sentence and make an intelligible oral statement. But neither should the law schools forget that literacy is a life-long battle.

Let me return now to my suggestion that a law school's task is essentially to provide a three year introductory course to at least a decade of legal education. Dean Griswold, I think rightly, points out that we have in this country probably one of the best apprentice systems ever devised for the education of lawyers. Let me speak from my own experience, and I shall speak only in the area of litigation, though with variations the same would go for the rest of practice.

My firm has been recruiting largely from law clerks of the Justices of the Supreme Court. It is hard to believe that there is much wrong with the legal education that produces them. Yet their education in the practice of the law is very far from complete. They start at salaries of \$7,000 or \$8,000. We can't afford to have them run errands or write wasteful memoranda on isolated points without knowledge of the full scope of the problems they are tackling.

When we start one of them out on a new case, the whole problem is talked out with him at length before he starts research and a tentative analysis is made. He drafts a brief. It is revised, or more likely reviewed and discussed, and he revises it. The revising becomes less and less, but even after five, six or seven years this process is still going on. He starts at once preparing cases for trial. He is likely to take on the initial interviews with witnesses, or it may be a joint undertaking. He starts assembling and analyzing the documents, and you tell him to take a look at how the indexing and summarizing was done in a previous case. You are reviewing the matter with him constantly. When you get to court, he will be keeping summaries of the testimony and records of the documents admitted or excluded. Overnight he will be getting up quick memoranda on evidentiary points and working on the motions to come at the end of plaintiff's case or when the defendant closes.

In a year or two he will be taking on some of the direct testimony and motions. He will begin to handle some smaller cases on his own. In five to seven years he has become a partner, but that does not mark the end of the supervised educational process. However, one day, to cite an experience of my

own, you hear him argue one of his own cases that has reached the Supreme Court, and it is made gratifyingly clear that this man has reached full maturity as a lawyer. A decade of the most intensive educational process has emerged in this result, a process in which from the start a man has a dignified, remunerative and responsible place, a process in which he assumes independence progressively in the areas where he has demonstrated capacity for independence. I suggest that this gradual transition from supervised work to responsibility affords the toughest, most exacting and fruitful tutorial system devised for legal education. And to those who see greener pastures in Britain or elsewhere, I suggest they take another look. I have criticism of our practice when it is affected by the fear of some older men that they may lose clients by entrusting, when they are ready for it, full responsibility to their juniors. But this is a criticism not of the thoroughness of the training but that it may be too prolonged and stifle initiative.

Let me recite a little more raw data concerning a law office's view of and participation in legal education, and then I shall try to draw some tentative conclusions. My partner, Gardner, and I are constantly evaluating between ourselves the work of our younger partners and associates. The first thing we are interested in is how reliable is the man's research. Has he found all the relevant material; does he read it accurately, can he be counted on not to let his wishes or laziness give greater weight to an authority than it will justly bear? Does he honestly disclose the pitfalls of his analyses and the limits of his research? The reliability of a man's research and his capability of getting it done in time is the basic starting point, but it only qualifies a man as a research assistant. The next question: does he know how to organize material and write simple clear English? The worst trial a law office has is a man who thinks he has written a brief if he covers in extenso and with an even hand all possibly relevant points, unless it be the man enamoured of his purple passages. Lastly is the test which determines whether a man is only a good assistant on critical problems or whether his work can be accepted as a final product. The question as we phrase it is how thoughtful is he. I suppose what we mean is does he have speculative capacity. How discerning is he of the variety of synthesizing patterns that will fit the material at hand and of which pattern is most likely to win acceptance.

In short, I suppose our test of excellence is as classical as Hesiod's famous lines, "He is best of all who of himself conceiveth. . . . Good again is he too who can adopt a good suggestion, but whoso neither of himself conceiveth nor hearing from another layeth it to heart;—he is a useless man."

There is one thing we have very little interest in, and that is how much prior knowledge a man has of a particular field. All things being equal we would, as a matter of economy, choose the man who has previously worked over a particular field. But all things are rarely equal and he can quickly fall in another. I am speaking now about the field of litigation and should note that

in tax and estate planning there is need for someone who commands all current material, but he doesn't have to acquire them in law school.

Now let me seek to draw a few tentative conclusions. The two most profound things which I think have even been said on the subject of education were Cicero's dictum that repetition is the mother of learning and Aristotle's analysis that "the virtues we get by first performing single acts of working, . . . for what we have to make when we have learned how, these we learn how to make by making."

So if you want to cultivate thoughtful men, you must give them time for thought. If you want speculative minds, you must afford them opportunity for speculation, and repeated speculation. Neither they nor their teachers can be on the dead run or ceaselessly gorging materials. Ruminations goes on in some rudimentary way during the process of ingestion but it is only after one has gathered the core of his materials and ordered them and is no longer bustling around that the most fruitful speculation occurs. This may, to be sure, be followed by more gathering to fill out and verify the results of speculation. But speculation itself needs time and quiet and the absence of other intrusions. I should keep a sharp eye out against any tendency of our law schools to gorge students with too much material. I should be concerned too that faculty members not spend too large a portion of their time developing new materials for new courses or devising law office problems and law office solutions. One of the primary things to safeguard is time for student and faculty to speculate.

In keeping with this view, the so-called perspective courses, such as legal history, comparative law and jurisprudence have an important role. I feel likewise about the courses which have broad generalizing aspects and enmesh law in the problems of politics and economics. I have in mind courses such as Administrative Law, Conflict of Laws, and Constitutional Law.

My partner, Gardner, who is a man of scholarship but one who has become an intensely practical lawyer tells me the last thing he would surrender from the law school curriculum was Goebel's course in *The Development of Legal Institutions*. For my part, Frankfurter's course in *Public Utilities* would be one of the last I would give up. Frankfurter as I remember spent about three months on one case but out of it I got a lasting view of the uses of Legislative History, the economic and political problems that spawned doctrine and the way a lawyer should really tear a case apart to reach its full significance. I conclude again that the quantitative bulk of material covered is not of great importance and that some of the most important things taught at law school are not to be found carefully catalogued in the curriculum.

Of course the two greatest devices conceived for legal education have been the case method and the law review. Whatever experiments are tried, the first should not be slighted at least until some other method has proved itself by long testing. I favor anything which will extend law review training more broadly, but I suspend judgment as to whether the cost in terms of drain on a

faculty's limited energies will prove that present experiments in this direction justify themselves. I have wondered whether as in the case of law review notes student appraisal and criticism might not substitute in some sizeable measure for faculty appraisal and criticism.

The one area of law school training I would slight, if anything must be slighted, is courses undertaking to simulate the practice that the young lawyer will later encounter. Again I say this because I look upon the law school as a three year introductory course to a decade of legal education. The law offices can teach those things that law offices do better than the schools. But only the schools can provide the broad theoretical background that ought to underly the practice.

I suppose in the end my most basic feeling about legal education is that if one assembles a sufficiently talented faculty and a sufficiently talented student body curricula and teaching methods will in large measure take care of themselves. As a Dean, that was the target from which I never took my eye. To assemble talent and provide conditions hospitable to the free development of such talent and to a feeling of continuing personal accomplishment seem to me the essentials.

I have spoken generally of what legal education is for and offered some tentative observations of what it should do. Let me consider in a little more detail the changing perspectives of legal education from 1935 to 1962. The general aims of legal education are not much different, as I have noted. But the critical problems of our society have changed mightily, and therefore to the extent that legal education equips the country's leadership to meet these problems it must respond to these changes.

We must distinguish at the outset between the day to day work of the practicing lawyer and the occasional opportunity of the occasional lawyer to participate in decisions which may mean that our way of life will flourish or decline. We must educate for both because we never know who that occasional lawyer may be. It is not only that all the Judiciary, most of the Congress and a large proportion of the top executive posts are in the hands of lawyers, but it is rare indeed that any of the critical decisions of government can be made sensibly without their participation.

Let me illustrate from a recent crisis. I know nothing about it that I haven't gotten from the New York Times and Washington Post. But it is evident that in the recent Cuban crisis three alternatives presented themselves. (1) Invasion. (2) Pinpoint bombing of the installations. (3) A blockade. If we invaded, I am sure lawyers pointed out, we would be accused, and many uncommitted nations would accept the charge, that we were waging aggressive war which we ourselves had erected into an international crime. If we bombed, I'm sure lawyers pointed out, we would be charged, and many uncommitted nations would accept the charge, that we were duplicating what we ourselves had dubbed a day of infamy. If we wanted to carry our Allies and the uncom-

mitted nations with us, we had to find a way that could be justified legally. Lawyers spelled out an acceptable legal position from the Charter of the Organization of American States. The position was accepted unanimously by the countries of Latin America and our other allies. It was accepted largely by the uncommitted nations. It accounted in no small measure for the successes of the venture. It was no accident that among the dozen or so men most immediately involved were the Attorney General, Ball, Gilpatric, Sorenson, Chayes, Stevenson, Acheson and McCloy.

Acheson once said to me that he and the British Ambassador, a philosopher by trade, had agreed that only lawyers and philosophers felt genuinely at home in logical thought. Allowing for the prejudices of the parties, the observation is not without substance at least as it concerns lawyers and a particular kind of logic, that most appropriate to the adjustment of human affairs. The lawyer knows the importance of marshalling all the evidence before he begins to speculate. He is by training adept at patterning the raw data in a variety of alternative arrangements. He is used to testing each alternative for its probable consequences. He knows from long suffering that no principle can be pushed too far without disaster. In short, he is devoted to reason, shy of generalizations, forever conscious of the contradictions. He is an *ad hoc* man who never puts his foot down without testing the ground. But his daily life has been one of conflict, one of assuming final responsibility for decisions, and accepting the consequences of his inevitable percentage of misjudgments. In the logical process adapted to testing human probabilities of infinite variety and not shirking a conclusion he is certainly the most practiced. For that reason wherever human affairs cry for adjustment, he will always have a large voice.

In 1935 this country had just come to certain new and firm decisions which have since remained unshaken. It had decided that it could no longer suffer the periodic ravages of the business cycle and that there was something we could do about it. It had decided that every American citizen had among his other inalienable rights, the right to be free of want and fear and that there was something we could do about it. There were launched vast public works projects, support and marketing programs for agriculture, regulation of the securities market, regulations designed to encourage the growth of a countervailing force of labor organization able to stand up against the power of management, social security, etc. All of this involved pioneering lawyers' work on the public and on the private side. To some extent, to be sure, it shifted the decision-making power from private to government hands. But more largely it laid down rules, as law has always laid down rules, within which private exercise of decision-making power must be exercised. It increased greatly the participation of administrative agencies, as distinguished from courts, in the policing of those rules. It encouraged different modes of dispersion of the decision-making power through the community. But I rather doubt that it weakened the function of "private property as a system of legally guaranteed dispersion of decision-

making power through the community" nearly so much as the submersion of individual private property in agglomerations of capital where any individual holding or workable combination of individual holdings no longer has decision-making power. The decision-making power in those situations has been largely surrendered to self-perpetuating private bureaucracies.

But be that as it may, in 1935, except for government servants, the great bulk of lawyers' business had to do with matters of private decision as affected by rules of law whether administered by courts or agencies. So it remains in 1962—And no doubt the overwhelming consensus of American opinion is "committed to retain this private decision-making as far as possible." I see no threat to it from the drift of our own society. I think the opinion here is fixed and resolute that a monolithic social structure is incompatible with what we view as our most cherished rights. The danger is from abroad. If the overwhelming power in the world is antipathetic to our way of life it will probably go.

I suppose in politics as in war we are forever deploying our forces as if the present engagement had the same contours as the last. Habit is not only the conserving force but the revolutionary force because it precipitates explosion by refusal to yield to gradual adjustment.

In educating lawyers today we are providing the leadership of two and three decades hence. In what kind of a world will they have to function then? I am prepared to assume with C. P. Snow that if in four decades Russia could lift itself by its own bootstraps to a position where it matches us in power, so too can China and India, and Africa and South America. We have the incontestable proof that peasants can be converted into great scientists in a generation. The land, the population, the natural resources of several, at least of the areas I have mentioned, are capable of producing and supporting power to match our own, once they command the forces unleashed by the scientific revolution. And the poor and powerless will not remain content to be poor and powerless once they know there is no necessity for it.

Another assumption I am prepared to make is that the common market will be successful and lead to an increasing political unity of Europe. If it is successful, we had better assume it will be adopted elsewhere.

This all reminds me of Voltaire's proof of God. If the predication is wrong and accepted, one lives a short while in error. If it is right and unaccepted, one lives an eternity of torture. The odds in terms of consequences are so large that one would think it the part of wisdom to bet heavily on the probability that others can in like time do what Russia has done. If one chooses to lay his bets accordingly, the present disposition of our assets would seem to call for some adjustment. Beyond the needs of immediate survival our future lies in successfully encouraging the organization of India, Africa, South America as free societies, and therefore our natural allies rather than the natural allies of the communist world. There appears no lack of awareness of all this in the posi-

tions of power in our government. Indeed I am sure that this analysis would seem amateurish to those who have access to the dispatches and the government's forward planning. But I am only concerned with what it suggests for legal education. I think there is an appropriate quickening of interest and tentative, even in some places well developed, experiments in educating for these problems. But in the three years of law school I am not sure how much more we can do than we are launched on doing. But I wish I could give a push to a suggestion of Dean Griswold. I wish we would invest heavily in institutes associated with the law schools where great talent could be assembled to speculate about this problem. Ideas, solid well-conceived ideas, can greatly affect the results. Next to necessity, the quiet, calm reflection of a company of talented men is the best breeder of solid well-conceived ideas. Remember it was the idea of Dean Acheson, a lawyer, that gave us the Marshall plan. It was he who quickly recognized the significance of and strongly promoted the rudiments of the Common Market. The face of the world is different because of this lawyer's well conceived and well adopted ideas.

I asked one of my perceptive friends whether, if he accepted the projections I have outlined of the world as it may be after the next four decades, what contribution he thought could be made to our problems by an institute headed by Herbert Wechsler, Stanley Surrey, Adrian Fisher and Milton Katz. The answer was that such an institute would furnish important contributions to the management of a corner garage, the operations of the Common Market or the organization of a free society in Africa. And I suppose that is the critical answer, where shall we choose to invest our talent.

Ladies and gentlemen, permit me to close with a tribute to this community, this University and this Law School. This community has been one of great civic responsibility. I could mention a number of things, but the fact that it has built this great University from its own resources is sufficient proof. Mr. Capen, a great Chancellor, infused the University with the best traditions of scholarship. And so it has remained! The Law School was founded as an expression of the great feeling of civic responsibility of the Bar of this city as the Medical School was an expression of that same kind of responsibility on the part of the medical profession. The Law School through the devotion of many practicing lawyers and under the leadership of devoted men such as Dean Alden served this community well for many years, living a hand-to-mouth existence. That period should be remembered favorably. In 1935 Mr. Capen decided to commence investing more of the University's resources in the Law School. By 1938, I notice from a review of the Bulletin of that year, seminars were offered in Administrative Law and Trade Regulations by Mr. Jaffe, in American Legal History and Conflict of Laws by Mr. Howe, in Legislation by Mr. Reisman, and in Taxation by Mr. Brown. And one not mentioned was offered in Labor Law by Mr. Lenhoff with others of us participating. That evidenced a good start. It was pushed forward further under the deanships of each of the men who

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has joined me on this platform. Dean Hyman has brought it to full maturity with steady and thoughtful devotion to its needs and the requirements of sound legal education since assuming the deanship in 1953. The School, I think, has taken its place as one of the fine law schools of this country. From now on I suppose it will have larger funds available to it. I can only hope that this great state will give it the support and the encouragement and freedom to reach its fullest usefulness.