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# SOME ANXIETIES OF LEGAL EDUCATION

by

*Joseph T. Sneed\**

## Introduction

by

*Charles O. Galvin\*\**

In the Spring of 1966, Southern Methodist University sponsored an assembly-type weekend meeting at the Kilgore Community Inn in Kilgore, Texas, to which the University invited members of the faculty and administration, community leaders, representatives from other institutions, students, and friends of the University. The purpose of the assembly was to enable the leaders of the University to have a clearer understanding of the University's role in the community, and to provide the representatives of its various publics with an understanding of the pressures and options facing private education in America today. This meeting was an outstanding success, and at the instance of the President of the University, the various schools and colleges were requested to consider similar programs.

The dean and faculty of the School of Law volunteered to be the first of the schools of the University to try a similar experiment in the same location in April 1967, for a period of three days. Members of the faculty, students, representatives of the bar and the judiciary, and representatives from other legal educational institutions engaged in a "think" session about the role of legal education generally and the role of SMU's School of Law particularly. More specifically, the purpose of the assembly was to assist the administrative officers of the University and the faculty and dean of the Law School in assessing realistically what will be required to place the School of Law in the forefront of legal education, and to identify the various pressures and options facing legal education and the major policy decisions that must be made.

The former President of the Association of American Law Schools, Professor Myres McDougal of Yale, and the President-elect of the Association, Professor Joseph T. Sneed of Stanford, presented major keynote addresses describing the role of legal education in our society in these times. Following these two keynote addresses, the entire group entered into a discussion with the principal speakers.

On the second day Dean W. Page Keeton, of the University of Texas School of Law, and Dean Richard C. Maxwell, of the School of Law at

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the University of California at Los Angeles, discussed some of the particular problems of law school administration, the maintenance of effective liaison between a law school and its various publics, between a law school and the central university administration, between a law school dean and law faculty and faculty committees, and between the dean and faculty and students. After the presentations by the two deans, the group then broke into discussion groups, each group consisting of a mixture of visiting legal educators, faculty, students, alumni, members of the judiciary, and practicing lawyers to discuss some of the topics which had been raised in the principal addresses and also other related topics.

Professor Michael H. Cardozo, Executive Director of the Association of American Law Schools, discussed the relation of the organized profession and the legal educational community to the Association, the work of the Association for individual law schools, and the participation by the law schools in the work of the Association. The discussion groups reconvened and continued to range over a wide variety of subjects including teaching methods, quality of teaching, various concerns of the faculty, the work product of the faculty, student life and student participation, the future for financing of private education, the future of the law school with the profession, relations with alumni, continuing legal education, and the like.

On the third day the rapporteur for each discussion group presented a summary of the discussion of his group the previous day, following which there was a spirited discussion of the reports by the whole assembly. A summation was then made by each of the principal speakers and the meeting adjourned.

This experiment was an unusual one in legal education. There are many instances in which faculties consult with one another for extended periods on the revision of curriculum or reorganization of policies of the law school. This experiment, however, involved faculty, representatives from the alumni, students, judges, and visiting legal educators in an intensive and concentrated review of the operation of a particular law school over a three-day period. The effect of this program has been to initiate a continuing dialogue between students, faculty, and others about our Law School, providing new insights and new dimensions respecting our operation.

Professor Sneed has kindly permitted us to print his remarks.

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OUR AGE is in many respects a period of anxiety. All of us sense that in countless ways the manner in which we live is being altered. Some of these changes are predictable; but many, if not most, catch us unaware. Moreover, we are told that the rate of transition is increasing exponentially. Caught then in a process which vouchsafes only fleeting glimpses of the road ahead, the daring plunge on, confident that their course can be altered should the next glimpse reveal disaster dead ahead, while the cautious hang back hoping to keep familiar landmarks in view as long as possible. And in each of us dwells both the bold and the prudent. The tension exerted by these opposing impulses is the spring from which our anxieties flow.

My thesis is that the anxieties which at this time beset us as human beings find their particularized manifestation in legal education. My purposes in developing this thesis are: First, to increase our understanding of the complex problems which legal education faces by locating them in their proper context; and second, to indicate, by drawing attention to the universality and complexity of these anxieties, that their amelioration will require wisdom, patience, and the highest talents of our profession. To prove my thesis it is necessary to trace, albeit sketchily, some of the technological and political changes which we have experienced and which presently are occurring. Let us first consider the technological ones.

### I. TECHNOLOGICAL CHANGES

We are all familiar with the staggering technological changes in transportation, communication, electronics and energy production which are taking place. Air transportation, for example, has drastically altered the centuries old relationship between time and distance upon which our political boundaries were built. Moreover, the techniques of communication make it possible to read a daily paper printed near our home in response to electronic impulses originating on the east coast and containing news originally gathered on the west coast. It is now possible to know of and react to any major news development within a very short period of time. And the instantaneous reaction of many millions is an awesome thing. Gone is the brake of time which, by insuring that community knowledge of particular events was acquired quite slowly, reduced the volatility of community responses.

No less dramatic are the possibilities of data management and problem solving in accordance with programed instructions to computers. As these techniques reduce the scope of uncertainty, the sphere within which "hunch" legitimately may be used is reduced correspondingly. And even more important, only one reasonably skilled in the technology has any clear idea about the location of the boundary between sphere of judgment and that of technique. Put more directly, only the expert can know when it is proper to "guess." Finally, the masses of data which can be marshalled to aid in solving a problem require highly skilled analysts and

synthesists for their interpretation and evaluation. The decision maker, except by chance, can never overcome the deficiencies of those who prepare the data upon which he must act. He is, to a substantial degree, their creation.

In the realm of energy there is available to each of us at reasonable cost vastly greater amounts than were available to the generations before us. And we suspect that in the future even greater amounts will be available to heat and cool our homes and offices, drive our conveyances, power our industry and lift the water to our deserts. As the supply curve of energy flattens, the range of endeavors available to us increases, and, as is always the case, dislocations occur. More significantly from a psychological standpoint this abundance of power appears to induce both an insensitivity to its potential destructiveness and a fascination with its utilization. The man who travels ninety miles an hour on a freeway to a degree resembles each of us.

## II. POLITICAL CHANGES

On the political side, the changes are no less startling, although the style of political discourse sometimes obscures this fact. At the risk of being misunderstood, let me point out some of the major changes as I see them. They are, you will observe, related to the technological changes just mentioned.

First, there has been a decline in the importance and significance of the contribution to security and well-being made by those forms of property derived from feudal land law and the common law actions of debt and assumpsit. Accompanying this decline has been the growth of the notion that security and well-being should be bottomed, not on traditional forms of property, but on a direct assurance by society at large acting through government or other institutions whose promises are, in effect, assumed by government. These assurances constitute in a sense a new form of wealth often more favored, despite its lesser alienability, than traditional property. The distinction is between the simple contract right, the negotiable instrument and the fee simple title on the one hand and the privileges and immunities accorded the employment relationship by legislation, the immunity from discrimination on the basis of race or religion and the guarantee of minimum subsistence on the other.

Furthermore, it has been recognized for decades that the manner in which traditional property is managed has been changing. Economies of scale have made necessary large aggregations of resources subject to hierarchically organized control. Three important consequences have flowed from this transition in the structure of control. A diminution in the role played by almost perfect competition in the allocation of resources and the increase in the opportunities to fix prices at points other than marginal costs is the first of these consequences. The second is that the transition has tended to drive a wedge between the beneficial enjoyment and control of property, thus frequently reducing those who look to traditional prop-

erty forms for support to a rentier status. From this flows the third—that the legitimation of inequalities of wealth has become more difficult.

In part because of the emergence of the new wealth forms, but more fundamentally because of political ideas which can be traced to the French Revolution and far beyond, the poor now demand not only a decent living, but also a degree of participation in the social and political order that will insure the permanence of the life to which they aspire. These demands, to a significant degree strengthened by a sense of solidarity derived from the fact that many of the poor are Negroes, constitute a new force which, among other things, causes intense apprehension among those only slightly more fortunate than the poor. In addition, all of us murmur the questions, "Are all the techniques of the poor adaptable by other groups?" and "What would be the consequences of their use by others?"

However these questions are answered, each of us knows that together we must strive to see not only that the more pressing demands of the poor are met, but also that those portions of society which we believe at least equally deserving are not neglected and diminished in importance. But how is this conservation of the valuable aspects of the old and long established to be accomplished? The answer, paradoxically, is both to renew and extend the protection of government, the same institution which also imperils that which we seek to conserve. When this is realized, it is small wonder apprehension appears.

In bringing to a close this sketch of some changes which induce anxieties, recall that I pointed out how the technology of travel and communication has made community sentiment more volatile and sharply enhanced the role of the skilled technician. These consequences are plainly reflected in present day political life. Thus, the day-to-day affairs of government must be conducted by experts and specialists who depend upon a handful of charismatic leaders to insure that the public, by ballot revolts, does not too frequently interrupt their labors. Inevitably the media of communication is sought to be enlisted in the service of preserving continuity. Good press relations, intelligent "news management," and leaders who televise well have become political necessities.

Yet we are dissatisfied. Realizing both that manipulation through communications media frequently serves its purposes well and that it differs fundamentally from the process of achieving mutual understanding, we sense that our faith in the individual as a reasoning creature, endowed with innate dignity, is being severely tested. And, in thinking of the mass audience, we can not ask "What are they?" without following it ultimately with the harrowing question, "Who am I?" No more anxiety laden question exists.

### III. MANIFESTATIONS OF THESE ANXIETIES IN LEGAL EDUCATION

These then are some of the major changes which are occurring and the anxieties with which they are accompanied. Those of us engaged in legal

education share these anxieties. My thesis, to repeat, is that the problems of legal education have their source in the changes just described and that our concerns about legal education are but particularized instances of the anxieties already traced.

### A. Curricular Problems

My first step in the proof of my thesis is to refer to some curricular problems with which we are beset. Thereafter, I wish to turn to issues relating to sources of funds for legal education and research.

*The Allocation of Limited Instructional Time.* In curricular matters an immediate issue is the manner in which we will divide available instructional time between those courses devoted to the nature and regulation of traditional forms of wealth, such as contracts, commercial law, property, business organizations, regulation of business, administrative law, taxation, and those primarily concerned with emerging wealth forms such as social and welfare legislation, constitutional, and I would add, criminal law, urban land and housing planning and community service endeavors. The nub of this issue is not whether instruction in these new areas should be given, but the extent to which we can afford to continue to teach the traditional material.

Moreover, all law, whether related to the traditional or new fields, is more complex and supported by a more voluminous literature than ever before. A single rule of law is made fertile once it becomes involved frequently in the affairs of men. An exception is produced after short gestation, followed quickly by a counter rule and then more exceptions to each. In this manner a clan of rules comes to occupy the territory over which a single authoritative declaration once held sway. In some manner we must apportion our time in a manner which will earn the approval of our students when, in due course, they take the seats of effective judgment.

Any decision as to how instructional time should be divided between the traditional and the new obviously rests upon a guess as to the mixture between emerging and traditional wealth forms several decades hence; but we, like the rest of our fellow-citizens, find prediction in this area hazardous indeed. With external criteria so obscure, it is little wonder that curricular decisions tend to turn on faculty personalities and talents, and, I might add, imperfections and vanities. As William Pincus points out in his recent article in the *ABA Journal*,<sup>1</sup> even when new courses are offered they frequently express the interests of particular faculty members and only accidentally reflect the needs of society.

These observations are not new. Neither is the statement that technology, particularly that of data management, systems design, computer assisted instruction and information retrieval, poses a challenge to curricular planning, teaching methods and library management. We desperately need to know the extent to which tomorrow's lawyers must be able to

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<sup>1</sup> Pincus, *Reforming Legal Education*, 53 A.B.A.J. 436 (1967).

grasp and apply these techniques in order to make certain that their education includes the proper component of technical training. Likewise we need to know to what extent computers can assume instructional responsibilities and make possible the required instruction in the ever growing body of law within the time available to us. But to know these things requires the anticipation of future technological development. We can make intelligent guesses, but guesses, even when intelligent, make us uneasy.

*Determining the Role of the Lawyer.* With the growth of technology, we find that there is a corresponding enhancement of the role of the technician. While the very fact of his own specialization prevents him from undertaking any attempt to synthesize the results of work done by his fellow technicians, the obvious centrality of his position in society creates certain anxieties. The anxieties find expression when the role of the lawyer in tomorrow's society is considered. Is he to take his place in the growing ranks of the technicians? Or is he to attempt to play a greater role? And, if so, what is it to be? All of us have long believed that the lawyer's calling imposed special responsibilities not ordinarily borne by craftsmen and technicians. Yet it is not easy to delineate this role in a swiftly changing world.

The planning of the curricula of law schools should proceed on some assumptions with respect to this role. Let me suggest that the lawyer best fulfills himself when he is transforming the data of technicians into material upon which those to whom final authority is given can act wisely. Although the lawyer possesses skills (such as his powers of analysis, his abilities as a draftsman, his forensic capacities, and his sense of efficient social structure) which would amply justify his designation as a technician, my vision of his place is different. At his best he occupies a strip in the functional spectrum located between the band occupied by final decision makers and that of specialists.

This view, however, does not solve all our curricular problems. Only dimly do we behold the outlines of tomorrow's issues and the technical data from which they spring. Without clear perception the best that can be done is to remain alert to the emergence of new data and issues upon which curricular changes can be based, to continue to deal with the problems of the present, and to increase our understanding of the process by which lawyers take the data offered by technicians and transmit it into material upon which ultimate decisions can be based.

Perhaps this conversion process, occurring as it does in numerous settings including litigations, counselling, and government service, has common characteristics which can be taught better than in the past. However, as one thinks of the ways in which the process that distinguishes the lawyer from the technician can be taught, there is encountered a disconcerting fact. The lawyer, within or without the law school, is an instrumentalist. He is at his best in devising a solution to a specific



practical problem. The study and theoretic description of the interaction between groups within society is not his forte. This is the domain of sociologists and, despite many worthwhile efforts to increase the extent of collaboration between lawyers and sociologists, there remains a tension between them attributable in large measure to the pragmatic, short-run orientation of the lawyer.

Unable to discern the way stations on the road of technological and political change and not generally predisposed to study and teach social processes, we teachers feel frustrated. Some of us in moments of depression tentatively suggest that law should not exist as an independent field of study. Most of us feel otherwise, but none of us enjoys the comfort of certainty. And, as I have indicated, this deprivation is one we share with all who have thought about our times.

*Meeting the Growing Demand for Lawyers.* Before passing to some financial aspects of legal education and research, let me touch on several other matters which have curricular implications. The emergence of the poor as a substantial political force, nourished with a supply of federal funds, requires not only finding a place in each law school's curriculum for courses dealing with poverty problems, but also critical evaluation of the output of graduates to determine whether the legal services for the poor are attracting a sufficient number of reasonably qualified graduates. It has been estimated that the number of needed anti-poverty lawyers to be employed by the government within a few years will exceed the number presently serving in the Justice Department. At the same time the demand for lawyers in other sectors of society grows as our laws and regulations grow more complex and numerous.

Awareness of the growth of law-related knowledge and the upsurge of demand for lawyers prompts many suggestions for curricular changes. These range from extending the period of training to permit both greater coverage and at least the introduction to a specialty, to contracting the period of formal study and substituting therefor "clinical" experience in neighborhood legal offices or other appropriate settings. These suggestions make clear that while our objective remains fixed and certain (to meet the demand with a supply of competently trained lawyers), disagreement about the manner in which it is to be accomplished is sharper now than it has been for many years.

This makes us uneasy. We sense that many would leave some demand, particularly among the poor, unmet to insure the maintenance of competence, while others willingly would risk quality impairment to make certain that legal services to the poor were available. It requires little insight to conclude that this anxiety is rooted in the political changes that I traced a moment ago.

*Special Current Curricular Responsibilities.* These changes also induce uncertainties which strike deeply into the heart of the values upon which much of our law is based. Our assumptions as to what constitutes "civic

virtue," for example, are being questioned sharply. Confronted with the use of new political techniques, such as the protest march, the sit-in, and the walk-out, as well as limited violence, we are confused but aware that new norms of legitimate political activity must be established and embodied in positive law. We realize, almost regretfully, that the law schools have an inescapable responsibility in this area, but we are uncertain about how it should be discharged. Equally uncertain are we about the norms which should apply in the area of "news management" by government officials and politicians. Again, it is my view that legal educators have a special curricular responsibility here. Seminars in the legal design of the institutional structures within which political action takes place would be a step toward meeting this responsibility.

Finally, I am certain that we in the law schools must be alert to the danger that our insensitivity to, and fascination with, physical power is subtly leading us to prefer coercion to persuasion in the area of human relations. Repeatedly we must ask the student, "Is not order more, indeed much more, than automatic response to commands?" This we do not do frequently enough. Our reticence is the indemnity we pay because of confusion's conquest.

#### *B. Sources of Funds for Legal Education*

Now let me turn briefly to the problem of the source of funds for legal education. In response to the increasingly frequent exercise of government's power to structure the economic and social position of various groups, all of us, even those who seek to conserve, are turning to government for validation of our aspirations. Characteristically, law schools have not been in the forefront of this effort but have restrained themselves while certain of their academic colleagues, notably men of medicine and science, have prospered at the hands of government. No longer can we afford this restraint. In common with all groups we must, while preserving as best we can our normal means of support, press our claims for aid by government of both general legal education and research.

We must be certain, for example, that we receive a significant share of fellowships under the Arts and Humanities Foundation Act of 1965, that the Association of American Law Schools and individual schools receive support for activities within the scope of the International Education Act of 1966, that additional funds for physical facilities of law schools be made available under Title II of the Higher Education Facilities Act of 1963, and that the attention of the administration and Congress be fixed on the great disparity between the meager federal support for legal education and the more generous aid given other disciplines and professions. Nor can we divert our attention from increasing the magnitude of the commitment to legal education on the part of foundations. If, as I think is inevitable, the support of legal education by the federal government increases, the opportunity and necessity for foundations to under-

take pioneering steps increases. They must assume the pace setting function because government will have difficulty playing this role.

Mention of this difficulty brings me back to the anxiety we all feel upon realizing that our future to a substantial extent rests in the hands of government. Our concerns relate to the magnitude of government aid, the process by which it is determined which schools get what, the means by which it is extended (whether by direct, categorical, or general purpose grants, tuition subsidies, tax deductions or credits), the extent to which internal control must be surrendered in exchange for governmental support, the possibility that government aid will misallocate faculty time and talent, and the position which the Association of American Law Schools is to occupy in the developing scheme. Almost desperately each school searches for new structures and techniques which, at the least, will prevent deterioration of their position and, at the most, will advance their standing several notches. Moreover, each school apprehensively ponders the question whether its internal organization is adequately designed to withstand the strains which will accompany government support. These strains, although similar to those imposed by large foundation grants, will be greater and more intense.

In all our concern with increasing the aggregate amounts of support for legal education and research we must not lose sight of two individuals—the teacher and the student. Without regard to the level of future affluence, both must be given the opportunity to grow in “wisdom and strength.” Busy-work, committee assignments and student activities must not be permitted to thwart this growth. Should it be thwarted, we are truly Esau’s children.

#### IV. CONCLUSION

Now let me close by observing again that all of us, legal educators, practitioners and the general public are haltingly feeling our way. Conferences such as the one held at Kilgore are part of the process. However, despite our anxieties it pays to remember that we, of all professions and disciplines, should be able to keep our house in order and banish our fears. Our *métier* is designing structures for specific ends which, by careful adjustment of force against force to gain strength, will withstand tensions arising from both internal and external sources. Thus, although our anxieties are shared by all, we, above all, should face them with confidence.

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