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Walter Gellhorn

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CURRENT TRENDS IN LEGAL EDUCATION AND THE LEGAL PROFESSION — AN ACADEMICIAN'S VIEW

WALTER GELLHORN*

The papers comprising this *Symposium* on Whither We Are Drifting (or, anyway, *Should Be Drifting*) offer a wide selection of information, insight, and, occasionally, invective. I read all of them with interest and some of them with admiration. That is to say, I agreed with some more than with others. A well-designed symposium, as this one is, necessarily reflects differences in outlook and conclusions. Despite their differing views, however, all the distinguished participants in this discussion shared a concerned enthusiasm for legal education and an optimistic belief that it might conceivably produce social benefit. None of the contributors forthrightly denounced law schools for what they are doing, though some thought they should do more or do it somewhat differently.

As a law teacher, I take pleasure in the writings of those who believe organized instructional programs make for improved professional performance and, in the end, for a better society. At the same time, I occasionally find myself fearful that teachers may be expected to do too much in too short a period. One is aware, for example, of widespread demands that the elementary and high schools expand their effectiveness by assuming all manner of tasks worth doing, but left undone by others: Pupils should be taught reading, writing, mathematical and other skills, good citizenship, how to drive a motorcar, where babies come from, race relations, the perils of narcotics addiction, a world outlook, stenography, the menace of communism, proper dietary practices, pottery making, avoidance of venereal disease, consumerism, foreign languages, baton twirling, and how to beat the rules of football without being caught by the referee. If, in the end, schools' diffused effort produces lesser accomplishment, most of us criticize the schools instead of wondering whether the demands made upon them were realistic to begin with. Something of the same kind may happen to law schools if hopes of accomplishment mount too high.

Some 50-odd years ago, Harlan Fiske Stone, then the dean of the Columbia law faculty, exclaimed that he had at long last designed the perfect law school curriculum. Its sole defect, he rue-

* University Professor Emeritus, Columbia University School of Law. A.B., Amherst College, 1927; LL.B., Columbia University, 1931.

fully added, was that its completion would necessitate 10 years of study. Today, as was true in Dean Stone's time, only 84 weeks — not "3 years," as is usually said, but a mere year and eight-thirteenths — are devoted to the formal study of lawyering. One hears complaints about how much remains to be done after law school graduation before a completely polished lawyer makes the light of his countenance to shine upon the world. Instead, one should be hearing exclamations of wonderment that so much progress has been achieved in so brief a period of study.

Progress could not have been achieved if, as some of the symposiasts seemingly believe, law teachers still endorsed the conception that law is a science whose principles are discernible entirely in judicial opinions. Rather, most teachers are of the Holmesian persuasion that the life of the law has been experience. Books are indeed the main diet of law students; they are used, however, not so much as revelations of doctrine as recordations of experience. The casebook in Contracts tells a story about what a client did and about what his lawyer did and about the consequences of approaching a problem in this way instead of that way. The Estates casebook tells a story about what a lawyer did or failed to do in an effort to effectuate a testator's desires. The Administrative Law casebook tells a story about the consequences of an administrator's procedural choice, thus stimulating a consideration of how the consequences might have been altered, for better or for worse, had some other choice been made. So it is throughout the curriculum. Law schools are, in short, engaged in intensive study of experience.

Must all experience, if it is to be effective, be had at first hand? I think not. I find much wisdom in folk sayings like "Learn from the mistakes of others; life is too short for you to make all of them yourself." Henry Ford had that same thought in mind when he asserted: "The school of experience is absolutely the best. The only trouble with it is that its graduates are too old to go to work." Law schools compress into a very short period a vast amount of professional experience which can be organized and appraised and compared with other experience; this enables young women and men to begin careers before they themselves have accumulated professional experience episodically over a longer span of years. Of course some lessons are learned lastingly and dramatically by direct experience, as is suggested by the adage: "A burnt child avoids the fire." How many sensible parents believe, however, that their children should be exposed to burns in order to discover the desirability of avoiding them in the future?

Still, law schools probably should bestir themselves to expand their students' encounters with pertinent experience. Most law schools' curricula remain too focused upon what can be found in appellate courts' opinions, though the bulk of modern lawyering is not reflected there. Hence, added pedagogic attention to relevant professional activity in other areas of life would no doubt enhance law students' skills and sensitivities. This may be done by various means, including clinical programs (preferably those which are well structured rather than purely happenstantial), simulation, drafting exercises, and problem solving.

Some say that nobody should be allowed to become a practicing lawyer unless he has first completed a set of prescribed courses which will have enlightened him about lawyers' work. This is not a newly asserted proposition. Twenty-odd years ago a clamorous demand was made, for example, that demonstrated ability to complete a title search should be a prerequisite to admission to the bar, and in at least one state nobody could sit for the bar examination unless he had completed a 3-hour, 1-semester course in mortgages on real property. I hazard the guess that many of the distinguished, effective, and materially successful contributors to this *Symposium* never in their lives had occasion to search title, and I suspect that their careers could have advanced fruitfully without close study of mortgages. Yet, had the counsels of well-meaning and experienced practitioners been heeded in the past, these able people might have been encumbered by superfluous programs of instruction or, lacking those programs, have been deemed unqualified. One of the papers in the present collection expresses belief that every private practitioner's daily work is affected to some degree by pension reform laws, the movement toward a uniform probate code, no-fault automobile insurance, the 1975 tax law revision, "truth in lending" regulations, and controls over securities issuance. For many practitioners these are no doubt matters of moment. Without a great deal of effort, however, I have been able to think of some whose daily work they do not touch. In short, attempting to define in an authoritative way *What Every Good Lawyer Should Know* is a risky undertaking.

Even were the proposition of universal need more clearly supportable than I deem it to be, law schools would be ill advised to attempt to meet it. "Information keeps no better than fish," the philosopher Whitehead tells us. Today's "truth in lending" regulation may be amended tomorrow; the pension reform of 1975 may have to be forgotten before the end of 1976; and a lawyer would ill

serve his clients if he rested on his recollection of what he had heard in a course about the revenue law in effect while he was still a student. Legal education is not designed to give information. It does sharpen awareness of the need to know, and it certainly should enhance ability to learn what is needed, when it is needed. But it cannot provide students a cupboard inexhaustibly full of goodies to be withdrawn as may be required during professional careers lasting some 40 years. Continuing legal education may justifiably be deemed a means of replenishing the cupboard, though assuredly it is not the sole means, or even necessarily the most effective means, of a conscientious, energetic lawyer's keeping abreast of developments.

Advocates of compulsory courses in law school or afterward are, in my belief, unrealistically optimistic about the consequences of having had a *course*. Every law teacher knows that his words dent the brains of only a minor fraction of those who purport to study in a course under his direction. Every lawyer, if he can look back upon his own student days unsentimentally, knows that he himself was among the unreached majority in various courses in which he enrolled, perhaps especially those in which he was forced to enroll. Requiring all students to complete specified courses in order to represent parties in litigation will not, in my belief, assure the competence which judges and high-minded attorneys hope will become characteristic of trial lawyers. An empirical study might very possibly show that most of the assertedly incompetent trial lawyers in New York did in fact take all or nearly all the courses which are now proposed to be made obligatory. And I will wager that most of the incompetent trial judges (of whom a few do exist, I have been told) took similar courses, later fortified by active practice in courtrooms.

Is the moral, then, that what occurs in legal education is of no moment? That is certainly not my conclusion. My suggestions point in other directions. First, the qualities of the law students who ultimately become this country's lawyers are so diverse and the students' responses to educational stimuli so varied that a prescribed program will not produce a standardized result, no matter how earnestly it be desired. Second, the tasks of the modern legal profession are so variegated that any attempt to define what is "practical training" must err on the side of artificial narrowness or boundless prolongation of schooling. A course which bears on economic relations with developing nations may, for some hard-headed practitioners, be intensely practical, as may be a course in

Chinese Communist Law; not long ago a lively market arose for those who had studied Near and Middle Eastern Legal Institutions, a course not likely to appear in most listings of what is "practical." Conversely, a "practical" course in trial advocacy may prove to be highly "theoretical" if the professional demands upon the person who took it do not lead to the courtroom. Predicting what a neophyte lawyer will need is rarely possible because few can foretell with reasonable assurance the nature of a law student's future responsibilities.

Finally, law school is meant to prepare a student for professional life, not for the first moment of a professional life. Mental equipment must be built to withstand decades of hard wear and tear; a good foundation must be laid for beginning the building of methodological skills, a building process which will continue throughout a career and, at the end, will rarely have been brought to perfect completion. To suppose that lawyers can be produced by an educational assembly line is chimerical. What the best kind of legal education does produce is a young person who has seen what lawyers do, that is, has noted and thought about their experience in numerous settings, and is ready to begin the constant self-polishing which leads to being an experienced, able, and worthy leader of the bar.