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A Course on the Introduction to Law

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I.

A recent survey by the Committee on Curriculum of the Association of American Law Schools in connection with an Introductory Course in Law gives evidence of considerable interest on the subject. Responses were received from seventy-five per cent. of the Association schools, so that the expression of opinion on the subject can certainly be accepted as representative.

With few exceptions the schools answered that a conscious effort should be made to introduce students to the study of law. A majority thought that the desired results could be best accomplished through the use of separate courses in the various fields covered or in connection with the usual beginning courses. Practically all of the rest thought that one course would be advisable. About a dozen of the schools answering had such a course. The hours given to it varied from one to five semester hours.

A number of schools had abandoned previous efforts along this line. The reason given was, in substance, that the work was too general. Apparently what had been tried was a broad orientation program based primarily upon a lecture method and text materials. In some instances it had been presented by the attempted co-operative efforts of several members of the faculty. It had been concluded that the efforts were sufficiently unproductive to warrant the discontinuance of the effort.

Most of those who expressed an opinion of doubt or conviction as to the advisability of a definite project on the subject asserted that such a program must be too general to be of value and that the only way to begin to learn law was to be completely immersed in it. Several expressed the matter substantially in this manner: "The only way to learn to swim is to get into the water." A number asserted that there was no time available for such a course. Others recognized that the course must finally become one in elementary legal philosophy and insisted that legal philosophy can best, or only, be taught in the third or fourth year of a law student's career. It was said also that the historical aspect of an introductory course is adequately dealt with in the usual first-year courses.

II.

The objection based on the time element is most easily disposed of. In final analysis there is always involved in curriculum matters a judgment as to comparative values. The final allotment of the three years of time to the courses included in the curriculum is based upon a conscious or an unconscious decision as to comparative worth as between the courses included and as against the subject-matter excluded. The objection that there is no time for an introductory course is of itself invalid. It may well be that on the merits we ought to make room for it. The objection is at best a decision against its worth on a comparative basis. It is at worst an excuse for refusing to consider the problem of its inclusion.
It is worth noting in this connection that there has been a considerable increase in the number of hours required in the first year of law school work and the total number of hours required for graduation. Only three Association schools now require but twenty-four semester hours of work in the first year, and only five require but seventy-two semester hours of credit for graduation. A very considerable number of schools require thirty semester hours in the first year. A good many require twenty-eight. The average for all the schools of the Association is 28.3. The average required for graduation is 79.83.

There is therefore substantial opinion to the effect that the first-year curriculum can be increased to thirty semester hours. The actual distribution often favors a larger load in the first semester, for example, 16-14, 17-13, or 15-13. Most of the increase has in fact been occasioned by the inclusion in the first semester of the first year of courses on Court Organization, Legal History, Legal Ethics, and Introduction to Law.

The practice is a recognition of the rather obvious truth that the beginning law school student can very profitably spend more hours in the classroom than he can later on. During the first year and particularly the first half of it the burden is on the instructor. The ground covered is necessarily less than in the second and third year courses. There is little in the way of independent work and outside reading which the beginning student can do to any real advantage. He usually enters law school with energy and enthusiasm to spare, and it is extremely wise to take advantage of them.

A substantial number of schools have made room and found time for a definite project on the subject. The student load for the first semester has been increased to fifteen or sixteen hours, so that the usual first-year work is not necessarily cut to take care of it.

Whether or not there is time for an introductory course depends, therefore, on whether or not it merits the necessary time.

The answer to the argument that such a course must be too general to be of value is likewise rather self-evident. The past experience on that point is not very conclusive. If the previous courses were too general, the obvious remedy is to make them more specific. If lecture methods and text materials were ineffective, why not try the case method? There is no apparent compulsion to a too general course or even a general course. If the subject admits of generalities under all of the accepted rules of logic and experience, it necessarily admits of detailed and specific subject-matters, because it is out of the latter that generalities should be drawn.

III.

The assertion that legal philosophy can only be taught to third and fourth year students is not axiomatic in character. How do we know that? My own limited experience convinces me that the exact opposite is true. I have attempted to teach something of the judicial function and process to third-year classes. Those students were more or less completely immune to it. I have used exactly the same materials on first-year classes with much better and even encouraging results. The reasons after all are rather obvious, and they involve the real merits and necessity for a thorough and broad introductory course.

There is obvious truth in the statements made in answer to the committee's questionnaire to the general effect that legal history, court organization, and the other more generally accepted elements of an introductory course are taught in the regular first-year courses. It is literally true that all beginning courses in law are necessarily introductory in their nature. They can be nothing else. A student who succeeds in getting through the first year's work will have picked up considerable of the historical facts about law and its administration. The altogether sad fact is that he also will have
picked up the common-law philosophy of a natural law and its accompanying eighteenth and nineteenth century philosophies in the fields of economics, psychology, sociology, and government as they have been understood by the judges of the past. In ninety-nine cases out of a hundred he is quite likely and more or less inevitably bound to turn out to be just one more dogmatist.

I know of no persuasive reason why a definite attempt should not be made to co-ordinate and integrate the historical materials and to introduce a student of the law to a broader foundation than he is likely to pick up for himself. A homemade legal philosophy is a brew of dangerous possibilities.

It is undoubtedly true that, if an able-bodied man be thrown into a pool of water, he will manage to get out or drown. Either of those alternatives may, however, be a calamity. There is little if any force to the assumption that, as to the one who drowned, there was a particularly fortunate stroke of divine providence. And I think common experience demonstrates that, as to the one who crawls out, the results are not always cause for thanksgiving. Indeed, so far as I know, no one interested in producing good swimmers does business that way. From the beginning, a good deal of attention is paid to the accepted theory and the better practice on the subject. I expect that if a survey were made of teaching in other fields, it would be found that the legal field is the only one where a conscious effort is made not to teach the beginner. Trial by battle is considered somewhat antiquated by almost every one except lawyers.

One can accept if he wishes the smug unreality that the products of the law schools in the past have been adequately prepared. The truth is, however, that a great many of our ills, public and private, have arisen directly from the crudities of legal education. The dogmatic unsocial unscientific lawyer had no real chance to be anything else. He was taught or allowed to believe too much which was not so. Indeed almost every-thing he "knew" or "knows" is substantially false.

It is indeed strange that modern law schools should insist on teaching the legal philosophy of the seventeenth and eighteenth centuries. If one makes no effort to repudiate it, the student necessarily absorbs it. Once absorbed, it is so satisfying and easy that it cannot be displaced except in rare instances.

What is the justification for a law school actually devoted to the ideals of a trade school whatever its pretensions on the subject may be? So far as the schools which depend upon moneys from taxation and charitable endowment for their existence are concerned there is a betrayal of trust if the public aspect of the legal profession is not actively pressed in the curriculum, not by indirectness but directly. A broad foundation, a tolerant outlook, a scientific attitude, social and professional action, these come not by accident but by selection and training. At least to disregard them is disastrous. To struggle with them is hopeful. Legal education should be turned over to the commercial enterprises unless the struggle is to be undertaken.

IV.

Following is an outline of an introductory course which the author has given three times:

Chapter

I. Common Law Procedure
II. The Briefing of Cases and the Use of Law Books
III. The Court System and Organization
   Sec.
   1. The Historical Development and Present Arrangement
   2. The Court as an Entity
   3. The Jury
   4. The Lawyer
IV. What Is Law?
V. Some Accepted Legal Concepts and Classifications
   1. In General
   2. Rights, Powers, Privileges, and Immunities
   3. Legal Classifications
      (a) In General
      (b) Procedure
      (c) Substance
      (d) Jurisdiction
Chapter VI. Sources and Forms of Law

VII. The Historical Development of the Common Law and Equity
1. In General
2. The Common Law Actions
3. The Common Law Supplemented by Equity

VIII. The Judicial Function
1. As to Individuals
2. As to Jurisdiction of Courts
3. As to Other Governmental Agencies
   (a) In General
   (b) Legislative Investigation
   (c) Interpretative, Curative Acts, and Special Legislation
   (d) Direct Legislative Interference
   (e) Legislative Contempt
   (f) Executive Exercise of Judicial Power
   (g) Exercise of Judicial Power by Parties
   (h) Legislative Imposition of Nonjudicial Power
   (i) Legislative Deprivation of Judicial Power
   (j) Court Assumption of Nonjudicial Power

IX. The Judicial Process
1. The Matter of Language
2. The Matter of Fiction
3. The Matter of Logic
4. The Matter of Ignorance and Prejudice
5. The Matter of Precedent
6. The Matter of Statutes and Statutory and Constitutional Interpretation
   (a) The Mechanics of Legislation
   (b) Statutory Interpretation
      (1) Repeal
      (2) As against Common Law
      (3) As against Criminal Law
      (4) Adoption of Prior Construction
      (5) The “Intention of the Legislature”
      (6) Rules of Interpretation
   (c) Constitutional Interpretation

Five semester hours have been given to the course. In addition a one-hour course in the Legal Profession has been required. For next year it is planned to put the materials on this latter subject into the introductory course and to devote five semester hours to the combined project. By eliminating duplications in those two courses, by minimizing the Use of Law Books and reserving its detailed presentation to the second and third year, and by adding a few additional hours at the beginning of the semester, the subject-matter can be thoroughly covered in five hours. With a beginning student load of fifteen hours, the balance of the accepted beginning curriculum is not adversely affected.

Except as to the chapters on Common Law Procedure and the Briefing of Cases and the Use of Law Books, the materials used are cases, statutes, and law review articles. In the preliminary presentation of those first two subject-matters, the materials used are entirely texts. My own experience has convinced me that it is wasted effort to teach the details of procedure to the beginning student. He needs to know something about procedure in order to read his cases with some understanding. This can be done by lecture and text at the very beginning. The matter can be amplified and illustrated later on through the materials on Common Law Actions. Each case there presents some accepted common-law procedure. By discussing the procedural technic used in those cases as a preliminary step in the classroom work on that subject, the beginning student can be taught all he need to know about procedure. The place of procedure in the judicial process can be stressed there as well as later on, but it is unnecessary to deal with the details of procedural law to develop that point. The law of procedure can best be taught in the third year. It is a subject-matter whose intimate knowledge is immediately necessary to the beginning lawyer, and one which arouses in the third-year student considerable interest. Here at last is something that is practical! (That is a student utterance, not mine.)

Doubtless there is some diversity of opinion as to the proper contents of an introductory course. The differences are
not as great as might be imagined. A survey of the situation reveals that those most actively engaged in the development of the project have come out at about the same place. There is common agreement on the inclusion of materials on procedure, court organization (including the legal profession), and the historical development of the law (using the Common Law Actions as a base). There is some agreement on the inclusion of materials on the source and forms of law and the judicial function, including the doctrine of the separation of powers and the supremacy of the courts. My own opinion still is that the greatest contribution such a course can make is by the inclusion in it of materials on the judicial process and legal philosophy. There can be no sane hope that every law school graduate can be developed into a Holmes. But quite obviously much is to be gained by a conscious and vigorous attempt to contribute to students some understanding of law and its administration.

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An Experiment in Moot Court Work

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The Boston University School of Law has been experimenting with a moot court system which closely approximates real court trials and has apparently additional scientific value. These experiments have reached a stage of practical satisfaction, and are both in teaching results and in arousing the enthusiasm of the students so successful that they seem to be worth recording.

The method employed in the past in this school, and probably in most other law schools, has been the trial based on an agreed statement of facts. This statement, involving one unsettled point of law, is made up by an instructor and given to two student counsel. Witnesses are assigned who read or learn their testimony, and are examined by counsel. In some schools the counsel do not know what the witnesses will say, and some attempt is made to create a trial problem by having witnesses contradict each other on questions of fact. No trial atmosphere is created, however, because the result is a foregone conclusion, and the witnesses have learned their lessons from a slip of paper and the issue of law is framed in advance. The students go through the performance with an obviously artificial make-believe air, and the whole process has an automatic mock-trial effect.

In the new method which I have worked out and put into practice a scene from real life is written out like a movie scenario. Every word, act, and circumstance is written down, and the scenario is given to an assistant, usually the Clerk of the Moot Court. The scenario is an episode upon which legal proceedings are instituted. They contain several matters which constitute defenses or apparent defenses and other matters which avoid or seem to avoid the defenses. Law questions, some settled and at least one not well settled, are also involved. The scene or scenes of the incident or incidents (there may be more than one) are set forth, the parties are named and the documents needed are described, also such properties as are needed. The form of action is also stated.