THE GREAT IDEAS ONLINE

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Archivist's Note

This TGIO appearing in two parts is an unusual piece for several reasons. First it is an early Adler piece written while he was still at the University of Columbia. Second, it shows Adler's highly analytical style. Third it shows Adler's interest in pedagogy which would become a lifelong interest leading to his development of Paideia Education in the 1980's. Finally the subject of Law was the reason that Adler first came to the attention of Bob Hutchins when he was acting head of the Yale Law School. This ultimately lead to Hutchins inviting Adler to join him at the University of Chicago after Hutchins was named President there.

Part 1 of 2

SOME ASPECTS OF FIRST YEAR WORK IN THE COLUMBIA LAW SCHOOL. 1929-1930

Report by
Mortimer Adler to
Dean Y. B. Smith.

This report is intended as a discussion of the general problem of the introductory courses in the curriculum of the university law school. The problem may be stated in terms of two related sets of questions: those concerning subject-matter, its definition and organization, and those concerning the pedagogical principles and practices involved in the actual work of instruction. While some of the issues formulated and considered in this report may have general significance, the report itself is based upon attendance at and observation of three courses, torts, contracts and possessory estates. These three courses were chosen as a fair sampling of first year work. Insofar as the problems herein discussed are peculiarly due to the subject-matters of these courses or to the unique characteristics of the instructors, the significance of the analysis and comment is strictly limited. Certain points may, however, be generally applicable to all first year work.

I attended the classes on torts, contracts and property in the manner of a regularly matriculated first year student at least with respect to presence in the classroom and doing the assigned reading. I did not participate in class discussions; I did not make digests of the cases read, nor did I try to write down everything the instructor said during the hour, as so many of the students do. I mention these items only because it is important to recognize that my reaction to these courses cannot be taken as representative of the response of an average first year student. Much that I have to say is certainly to be qualified by my peculiar interests, which are obviously fundamentally different from those of the regular student. He is primarily interested in learning to practise law, and to this end he is interested in passing examinations with good grades. He will judge a course as good or bad very largely in terms of these criteria. I was in the fortunate position of being a student without any of the responsibilities which tend to detract from the student's immediate enjoyment of his work. My statement, therefore, that I enjoyed almost all of the hours spent on this work, both in and out of class, reflects in part the happy detachment with which I could pursue these studies; but only in part, for it also indicates quite plainly the extraordinarily high degree of excellence of these courses, the brilliance and competence with which they were planned and conducted. [Hear! Hear!] Not even freedom from any practical obligations could make a dull or stupid course enjoyable or exciting.

There is one other consideration which the reader of this report must take into account. Much that I have to say about the subject-matters of these courses and their pedagogical practices is motivated by a fundamental standard of value, which can either be dis-

missed as a temperamental peculiarity on my part, or be considered in its own right as a significant axis of criticism. The latter position would seem wiser to me. Be that as it may, the point is that many of the evaluations I have made have been determined by the standards of formal logic, the requirements of which seem to me to be fundamental to the organization of any subject-matter and relevant to methods of instruction in that subject-matter. I have assumed that the purpose of the instruction has been not only knowledge of the law, but understanding of it as well. If the student is to understand a subject-matter, in addition to becoming acquainted with its component parts, he must be shown its structure and compelled to make original analyses. Hence I have been particularly attentive to this aspect of the work, one that is not so important, of course, if the object in view is merely passing the bar examinations.

This report is presented in three sections. The contents of each may be briefly indicated here. First, a summary of my observations of the classroom work in each of the courses, including a description of the instructor's technique, and a comparison of the three courses in terms of these different approaches, and in terms of what I have felt to be the students' response to them. Secondly, a general criticism of the first year work and specific criticisms of the separate courses. And thirdly, a discussion of general problems which bear upon the whole law school programme, and the proposal of a number of schemes and plans for meeting some of these problems.

I.

Each of these three courses exemplified a different type of approach to the law and a different method of instruction. They were all successful in the sense that they interested a large majority of the students, as indicated by the faithfulness of their preparation for class discussion and the intelligence and vitality with which they participated in discussions directed by the instructor's inquiries or initiated by their own questions.

Dean Smith's method might described in the following terms: While almost every class hour was a composite of lecture and discussion, there was a slight preponderance of the lecture over the discussion. Some class hours were entirely devoted to presentation from the platform; few class hours were entirely taken up with discussion in which students participated; in the great majority of instances, the hour started with questioning and developed into lecture presentation of analyses, arguments or summaries. There was no day by day assignment of cases; the student was simply requested to prepare a certain section of the case-book in advance of

a stated date. In periods of class discussion Dean Smith was always more interested in the development of the point under consideration than in the diligence or delinquency, the intelligence or stupidity, of the particular student. Only rarely was a student addressed for failure on his part to satisfy the requirements of intelligent discussion, and such cases were always one of flagrant ignorance or lack of understanding. There was never any attempt to threaten or cajole students into doing a sufficient amount of work; the class was conducted upon the assumption that that was expected of a student in the way of diligence and resourcefulness was too obvious to need explicit mention.

The subject-matter of torts was organized in terms of a number of fundamental topics. Within each of these topics the material was presented systematically; the fundamental concepts in terms of which the courts have developed certain specific doctrines, such as proximate cause, or last clear chance, or the effects of mental anguish, were sufficiently emphasized and defined. But the relation between the various topics, or doctrines, was much less apparent than the relation between the elements of any single doctrine. At various stages of the course, Dean Smith in summary or review would present certain general notions upon which the law of torts is founded, and in terms of which a systematic organization of a wide variety of topics might be effected. In view of the fact that the student was never explicitly required to undertake a comprehensive analysis of the subject-matter of torts, nor to see its various parts in relations, it is questionable whether Dean Smith succeeded in conveying any picture of the whole subject-matter, or oven in arousing the curiosity of any except the very best students as to the fundamental concepts underlying non-contractual liability.

At all stages in the development of the course, Dean Smith quite effectively introduced the non-legal background of social practices and economic conditions, against which the legal rules become significant. He showed the development of the law of torts out of actions for trespass, and the gradual differentiation of the civil from the criminal aspects of the torts case in terms of the two purposes it may serve, deterrence and punishment as opposed to remedy and compensation. By thus indicating the general trend of the law in terms of changing social conditions he was further enabled to discuss the possibilities and merits of current and future legislation. He never allowed these general questions of social policy, once raised, to pass without refreshingly original discussion.

Whenever a particular case or series of cases was examined in any detail, the steps of judicial reasoning were closely analyzed and the

elements of policy and prejudice which might have determined the holding, and the formulation of the rationalizing *ratio decedendi* as well, were extricated, or at least sought. This analysis of the judicial process was carried on most effectively when a temporal sequence of interdependent cases exhibited lines of affirmation of or dissent from the basic precedents. Here again, however, it is questionable whether any but the best students perceived the picture, or profited by the exhibition of casuistical skill, since they were not explicitly required to perform in like manner themselves, and since in most instances these excellent analyses were presented by lecture rather than developed out of class discussion.

In general it might be said that the course moved slowly, too slowly, perhaps, for the better students. The amount of repetition involved in frequent summaries of earlier discussions and previous hours is of doubtful value; the value may, of course, be different for different grades of students. This question of speed, in its relation to summaries and reviews, will be taken up later. Other aspects of the course on torts will be pointed out when it is compared later with the two other courses being considered.

Professor Llewellyn's method might be described in the following terms: The class hours are devoted very largely although not exclusively to discussions. At the beginning of the term the discussion was usually initiated and sustained by the questioning of the instructor, but later in the course many class hours were spent in controversy over questions raised by members of the class. The most striking feature of Professor Llewellyn's pedagogical method was the almost complete absence of summaries. Discussions both started and ended with questions. Instead of concluding an hour, in which many questions had been raised and considered, by a resumé of the main points which had been thereby exhibited, Professor Llewellyn would merely formulate what he thought to be the significant questions which remained unanswered.

In order to understand this method of instruction and also to under stand the various reactions to it on the part of the students it is necessary to take into account Professor Llewellyn's purpose, which, according to his own statement, was to teach the students not the law of contracts but rather how to study the law. The subject matter of the law of contracts simply afforded materials to be used in the process. For this reason there was a striking absence of inculcation of doctrine. It made little difference whether certain items of information were conveyed; whether rules of law were explicitly and legalistically stated; whether differences between the jurisdictions were enumerated. The only important consideration was that

whatever point happened to be under discussion should he discussed soundly and intelligently from a wide variety of angles, only one of which was legalistic.

Insofar as the law of contracts itself became manifest in these discussions, it did so against a vividly delineated background of social and economic practices. Professor Llewellyn succeeded in making clear the peripheral character of the transactions which the cases reported, in contrast to the customary practices at the center of the field.

The analysis of the case material was made to serve both the function of exhibiting traits of the judicial process, and also the function of making apparent the large number of extrinsic considerations which might determine the trend of the decisions. Professor Llewellyn employed series of cases to show the creative role which the lawyer played in the making of law; how a series of litigations might be planned to lead ultimately to some reformulation of the rule.

In accord with his general purpose Professor Llewellyn was many times severely critical of students for the stupidity or ignorance which they betrayed in discussion. He made it quite clear to the class that he was more interested in their learning to become lawyers than in their learning the law of contracts. He never reproved a student on the grounds that an undesirable performance meant flunking, but rather than it meant that the given individual was shirking his intellectual responsibilities.

The items which have been mentioned are important to remember if one is to understand the ambivalent attitudes of students toward this method of instruction. There is little question that they were emotionally won even when they were somewhat bewildered. The average and poorer students were at times distressed by the absence of summaries, outlines, and lectures, but this was compensated for by the fact that the better students were stimulated to vigorously original work, as indicated by the general excellence and perspicuity of the questions which they contributed in class discussions.

Although the work of the course followed closely the weekly or bimonthly assignment of cases which had been carefully selected and ordered, it is questionable whether even the best students could obtain from this method of presentation any picture of the law of contracts. Professor Llewellyn introduced Hohfeld's "operational point of view" early in the course, and by means of its analytic

force accomplished a great deal in the clarification of some of the fundamental concepts in the field of contracts. The clarification, however, was not followed by any systematic instruction utilizing these clarified concepts.

Professor Powell's method might be described in the following terms: The classroom work was fairly divided between lectures and discussions. Professor Powell used the lecture method wherever a difficult and complex subject-matter required efficient and rapid analysis; he used the inquisitorial technique wherever his aim was either to clarify or to make unusually impressive, points which the student could be expected to discover from his own reading of the textual material. The subject matter of the course on real property seems to be such that discussion is largely of factual rather than of controversial material. The instructor's questions were largely, though not entirely, directed to eliciting specific items of information rather than to a consideration of general issues. In this connection it might be added that Professor Powell never allowed sloppy or unprepared performance to go unnoticed or unreprimanded. The reprimand might take one of many forms, but in any case the student was made clearly conscious that he had sinned. One result of this technique was that students who found themselves unprepared would often be absent from discussion, that is, if they discovered their unpreparedness before Professor Powell did.

The materials of the course were magnificently organized. From the first hour in which Professor Powell outlined the topics which were to be taken up, stating their relation to one another and their relative importance in the time scheme of the course, the progress of the work was almost perfect in its conformity to the explicit schedule. This organization, however, was almost entirely based either upon the historical order of events or upon a purely legal arrangement of topics. In either case the student was confronted with a mass of complex technical details to master. Because of the nature of the material there was probably less opportunity to go into the social and economic backgrounds either of the development of, or the contemporary operation of, real estate law.

Much of the material which the student read and which was discussed in class was textual rather than case material. Again this may be due to the important part which the historical approach plays in this course.

Professor Powell's technique in conducting class discussions by method of inquiry had amazing efficiency both in covering ground and in making clear the important points of the subject matter. The

student was either inspired or dismayed by the instructor's extraordinary command of the details of the subject matter; whether from fear or from envy he was impelled to attempt to achieve some degree of adequacy in his knowledge of the law of real property. The precision and detail of Professor Powell's knowledge were so impressive that the student could not fail either to emulate his traits or to be aware of his deficiency and regret it.

The three courses under consideration are clearly different with respect to the instructor's method of presenting and organizing the subject matter, his general attitude toward the relation of legal and non-legal materials, and the role he plays in relation to the student. The foregoing brief survey has indicated some of the major differences. A few more comparisons might be added here. With respect to the subject matters themselves, my impression was that students found the problems of torts easiest, most readily apparent and intelligible, less so the problems presented in contracts, and even less so those of possessory estates. Mr. Llewellyn's technique seemed to elicit the most vigorous type of discussion, both on points indicated by the instructor's questions and on points raised by the students themselves. Mr. Powell's technique required and earned the most adequate day by day preparation of the assigned materials. Such questions as the student raised in his course were largely devoted to matters of information rather than to questions of interpretation. Mr. Smith's technique developed in the student, particularly the better student, a mature attitude of responsibility in the study of law and the handling of the case materials. The discussion in which the best students participated showed originality and independence, as evidenced by their employment of unassigned materials; but there were fewer discussion periods in torts, than in contracts, initiated by the students themselves.

Judging the character of students' responses to instructors is a precarious and difficult, if not an impossible, task. My opinions here are definite enough, but the evidence on which I might base them is elusive and intangible. On the whole, I should say that the student makes a happier adjustment to the work in torts than in either of the other two courses. There is certainly bewilderment and discomfort experienced by the poorer and perhaps the middle range of students in contracts as a result of the speed and the absence of doctrinal statements on the part of Mr. Llewellyn. While Mr. Powell's procedure undoubtedly gains wide respect, it also produces fear and timidity. It certainly can be said that students seem to be more continually aware of examinations and grades in Mr. Powell's course than in Mr. Llewellyn's, and in Mr. Llewellyn's than in Mr. Smith's; this fact is undoubtedly related to their emotional

reactions to these courses. It may even account in part for the kind of work and interest they exhibit.

The most obvious difference with respect to subject matter is the amount of non-legal material which is introduced into each of these three courses. Whether or not this difference is due to the intrinsic characteristics of these various subject matters or whether the difference is attributable to the differing interests and intentions of the instructors, is difficult to say. Parallel to this difference in the amount of non-legal material introduced into each of these courses is the difference among them in the degree of organization of the purely legal elements in the subject matter. It is interesting to speculate on the question as to whether there is any necessary relation between the presence of non-legal materials and the absence of explicit organization of the strictly legal components of the course.

II.

There are two general criticisms which I wish to make of those three first year courses. One has to do with the relation between the case method of instruction and the organization of the subject matter of the course; the other has to do with questions of the philosophy of law which occur in this first year work.

It seemed to me in all three courses, though differently in each, that (1) the outline and structure of the subject matter of the course, and (2) the relations of this subject matter to other subject matters, were not sufficiently emphasized.

Each of these first year courses has a subject matter which has certain natural boundaries which separate it from the materials of other courses. There are also lines of demarcation which are artificial and which have been created merely for the convenience of departmentalizing the law. Thus, for instance, the distinctions between procedural and substantive law, between the law of torts and criminal law, between the law of contracts and such subject matters as real property, trusts, sales, insurance and torts, were seldom explicitly indicated; nor was the student shown a definite picture of what was involved in the subject matter of a given course. As the course proceeds he may or may not be able to form this picture for himself. The point of criticism I have to make is not so much that the instructor fails to draw the picture on the board himself, but that the use of the case method never requires the student to construct any organization of the subject matter In a later section of this report I shall present a suggestion for the modification of the

case method which may remove this particular defect.

The case method of instruction is probably also responsible for the second general criticism which I have to make of these three courses. In the opening weeks of both contracts and torts the instructor found it necessary and advisable to raise a number of general philosophical questions about the nature of law. Mr. Smith and Mr. Llewellyn took the same position although they differed considerably in their manner of phrasing and taking it. The position can be simply stated as a prospective view of the law. The viewpoint is prospective insofar as the emphasis is upon predicting what the holding of a future case will probably be in the light of the precedent holdings of prior relevant cases. Its chief insistence is upon the identification of "the law" with the rule of a given case, the decision or holding which is the "law" of a specific case. My criticism is not that this viewpoint is in itself unjustified or unfair, but that it tends to present one aspect of the law to the exclusion of another. The law can be viewed retrospectively as well as prospectively, and when viewed retrospectively it appears more as a static system of propositions in relation to one another than as a dynamic judicial process. Both aspects seem to me important: the static, because it requires a student of law to appreciate the logical relations of the rules as analytic propositions, and because it draws attention to the conceptual structure of a subject matter; the dynamic, because it makes the distinction between the decision and the *ratio decidendi*, and because it requires the student to appreciate the role which sociological and psychological factors play in the judicial process.

It has long been a question, whether or not there should be some first year course introducing the student to law by a general and somewhat philosophical discussion of its nature; or whether this can be left to individual instructors in particular courses. The introduction of philosophical literature into the reading required for entrance and for first year students may solve this problem in part. What remains unsolved, however, is the problem of uncorrected perspective which the student is forced to take as a result of the unmodified case method; i.e., the over-emphasis upon the separate cases, the tendency to disparage the significance of the *ratio decidendi*, the failure to examine the fundamental concepts. There is no question that the old fashioned law course, taught out of textbooks, was equally at fault in its over-emphasis upon system and general concepts. But certainly that is no excuse for the over-emphasis in the other direction which seems to have resulted from the pendulum's swing. The modification of the case method which I shall suggest may remedy this defect, as well as the one previous-

ly discussed.

In addition to these two general criticisms, there are one or two specific points with respect to each of those courses. The only criticism I have to make of the course on torts is with respect to the speed with which it moves. I recognize that frequent repetition of important items and the leisurely and thorough examination of all of the aspects of a given tonic are extremely helpful at the beginning of the course, but it does seem questionable whether the same amount of repetition is required later on. My feeling is that the student would do more work in torts if the course were to move more rapidly. From my observation, he gets into the habit of putting off his preparation of the assigned materials because of his reliance upon the slow tempo with which the work progresses. On the other hand, the discussion is impaired in some instances by the fact that the good student has prepared his cases too far in advance of the time of their discussion. It seems advisable to attempt to correlate the assignment of readings more closely with the topics under discussion. Related to this question of speed is the problem of summaries and reviews. Summaries and reviews are desirable insofar as they give the instructor an opportunity to compensate for the disorganization of the case materials. In a summary the instructor is able to present a somewhat more systematic analysis of the relation of a large number of items than he is ever able to do in a discussion limited to particular cases. The unfortunate aspect of summaries and reviews, however, is that most students write them down word for word and then use them as they would use a textbook; i.e., as a substitute for doing any analysis or construction on their own part.

My chief criticism of Mr. Llewellyn's. course is curiously enough that it is not sufficiently legalistic; that is, the conventional type of legal argument in the field of contracts is not given due recognition. This may be the result of his interest in teaching students how to study law rather than the subject matter of the law of contracts, or it may be due to a greater interest in the social, economic and psychological than in the logical aspects of the subject matter. My own feeling is that this difficulty can be remedied if Mr. Llewellyn would vary his technique a little more frequently. There were a few hours during the course devoted almost entirely to lectures in which Mr. Llewellyn would present analyses of materials either recently under discussion or about to be discussed. The student found these analyses extremely helpful in stringing the isolated beads of case decisions upon some kind of thread. I have great respect for Mr. Llewellyn's attitude expressed in his frequent injunctions to students that they put the cases together for themselves;

but I also feel that it is the instructor's duty to provide them with more of the raw materials and tools for such constructions than he did. The significance of an economic and sociological approach to the law of contracts is enhanced rather than diminished by some suggestion of the legalistic character of its concepts and provisions.

Mr. Powell, on the other hand, is somewhat too legalistic. I have some difficulty in deciding whether this is a trait of Mr. Powell's method or whether it is intrinsic in the subject matter of real property. So much of the course is devoted to the historical background of present practices, so frequent are summaries of the state of the law in the various jurisdictions, and so much time seems required for the definition of technical terms and the elaboration of technical distinctions, that little is left for a broader discussion of the problems of real estate. It seems to me that much of the technical equipment, particularly the meaning of technical terms, could be acquired in a simpler fashion by learning vocabularies. The rote memorization of a dictionary of indispensable terms would have no unfortunate consequences if it were supplemented by an analysis of the complicated arguments in which they occurred. This might help the student more actively to appreciate their technical significance. I am in no position to say whether a course in possessory estates could be begun by discussion of contemporary practices and problems to be discovered in current case materials, and refer to the feudal origins of the law of real property only where such reference was needed to explain the point under discussion, just as early assumpsit actions and early trespass actions are used in the discussion of contemporary contracts and torts cases.

This concludes my criticism of the three courses under consideration. In the following section I shall discuss certain general problems of first year law instruction and offer a few plans or suggestions which have resulted from this year of observation.

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