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Part 2 of 2

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

Report by
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III.

The following suggestions, for the most part, bear upon some of the points of criticism made in the preceding section. In some instances, however, they are relevant to problems which have not yet been formulated.

(1) The most important proposal that I have to make is a plan for the modificiation of the case method of instruction. The case method has the following defects: it tends to emphasize the particularity of the rules as opposed to their generality; it requires the

student to give more attention to the task of digesting each particular case than to the equally important task of assimilating and organizing a series or group of cases which are relevant to one another; and it seems to put the burden of dogmatism on the student rather than upon the instructor. While it is undoubtedly valuable for the student to learn how to digest a case, to learn how to extract a holding from the rest of the opinion, to learn to distinguish between statements of fact and conclusions of law, these digests are an evil influence if the student does not supplement them by some other kind of treatment of the case materials. From my observation of students in class, it seems to me that the student tends to treat cases in isolation from one another. He has each case abstracted on a slip of paper and when the case is mentioned for discussion he pastes this case into his notebook at the proper place. The notes he is taking of the instructor's comments or of the current discussion are supposed, perhaps, to connect the individual case with the other cases in the field, but so far as their discussion of cases goes, most students do not manifest a comprehension of the relationship of cases. Their task of synthesis seems to be completed when they have pasted their digests into their notebooks.

The introduction of the case method was accomplished about the same time that laboratory methods were introduced in the study of experimental science, and for closely similar reasons. It seems obvious enough that the experimental sciences have grown as a result of experiments, and that their future as well as their past depends upon the experimental procedure; and as obviously, common law has grown in terms of its cases, and its future is in part a matter of future case decisions. It seems justifiable, therefore, to propose that students be taught experimental science by means of the study of its fundamental experiments, and that students be taught the common law by a study of its leading and important cases. It would be unfortunate, however, to ignore the fact that science consists of more than experiments, and the law, of more than cases. A student whose study of a science consisted merely of an examination or repetition of important experiments, not only would learn nothing of the subject matter of the science, but would not even understand the experiments he performed. They would be nothing but a ritual for him. Similarly in the law, a student might become peculiarly expert in digesting separate cases and yet not understand what their significance was nor why they were important or crucial in the development of the law. As I have already pointed out, the use of the case method is closely related to a prospective view of the law in which the major interest is the prediction of some future decision. This prediction can only be made in the light of some analysis not of isolated past cases but of series of past cases, and especially

their oppositions and interdependencies.

It is my assumption here that a group of related cases represents a theory, i.e. a doctrine or argument and that any part of the substantive law contains opposing theories and arguments exemplified by diverging series of cases. As the case method is now used the student is primarily required to state the holding of a particular case. It may be said that he is implicitly expected to relate this case to other cases, but it seems to me that unless he is explicitly, required to do so and that unless he is given some help and guidance in this difficult task of case synthesis comparable to the help and guidance he is now given in learning how to analyze cases, he cannot be expected to become proficient in formulating legal arguments. In fact, the average and the poorer student never go beyond digesting cases and waiting for the instructor or someone else to do the rest. The scheme I wish to propose aims to correct these defects in the use of the case method. The student should be required, in addition to abstracting individual cases, to develop from selected groups of cases the theory or theories which they presuppose. He would be expected to expand and to modify these theories as he studied new groups of cases. Under the present system a case is discussed with a view to finding out what it holds. As an alternative procedure the lecturer might present merely the holding and expound the theory which supports the holding. In connection with such procedure the student might be expected to find the particular cases which exemplify the holding and which develop the said theory, and also to find the cases which fall outside of the holding and the theory. In short, the lecturer in the course of the term would develop dogmatically a number of systems of rules, each of them a doctrine or argument relevant to some topic in a given field. The student's job would be that of criticism of these arguments in the light of the cases. This would reverse the present method which seems to encourage the student to dogmatize from the cases and which puts the job of criticism on the instructor. The suggested method seems preferable because (1) the instructor is more competent to dogmatize than the student, i.e. where dogmatizing means nothing more than analytical exposition; and (2) the student needs the training in criticism more than the instructor does. (3) Furthermore, the instructor's expositions would throw more light on the theoretical structure of the law than the student can obtain from the present discussions, and the student being given the role of critic would be forced to acquire the empirical, qualifying, probability, prediction frame of mind. Under the present method he is less likely to acquire this because his task of analyzing individual cases is continually inspiring him to make easy conclusions from insufficient premises.

In addition to the foregoing suggested modification of the use of the case method, by analytical expositions of legal doctrines and arguments by the instructor, the student should be required to supplement the study of cases by some formal synthesis. This might be effected in the following manner: The subject matter of any course can be divided into a number of topics or problems. The student can be required to make a written report on each of these divisions of the course, preferably at the end of the period devoted to the given topic. This report should attempt to synthesize all of the cases assigned, indicating their temporal and logical relationships; it should summarize the generalities and rules in this field of subject matter, indicating briefly the formulation of the relevant legal doctrines; it should contain the student's critical commentary on these formulations; and. finally, it should exhibit rigorous terminological competence both in the phrasing of rules and propositions and in the making of distinctions. A report of this kind would, of course, have to be read and visibly corrected. It would serve not only as a device for grading students, but also as a device for teaching them. It would be effective in the latter respect only if the reports were returned with critical comments, very much as a piece of prose composition is returned by an instructor in English.

Some scheme of this sort would tend to counteract the isolation of the cases which results from digest-making and note-taking. Any device which would decrease the amount of note-taking which occurs, would certainly be desirable. The suggested plan might have this effect insofar as the instructor could propose that the student limit his note-taking to those times when the instructor was presenting the exposition of some theory or doctrine. With the present method, there are many students, if not the great majority, who take notes on everything that happens during the class hour.

The above scheme is suggested merely as one of many similar possible variations of the case method of instruction. The same advantages can undoubtedly be achieved in a number of different ways. The chief points in the proposed scheme which, it seems to me, any other plan should include, are: first, the requirement that the student do some original synthetic work in putting together cases, and that he be specifically guided in doing this by the way in which the course is organized; secondly, that the instructor undertake a number of formal expositions of legal theory at various points in the course; and lastly, that the units of the course be not cases but arguments, topics and problems. Cases can be classified in terms of the arguments they apply, and topics and problems can be organized in terms of the fundamental concepts which consti-

tute the subject matter of the course. In addition to these advantages, some modification of this sort would make the case method more realistically adapted to the future professional practice of the law student, which consists not in digesting separate cases but in formulating an argument from an aggregate of cases.

Finally, it may be pointed out that this scheme will give the instructor a number of grades on each student instead of a single final examination mark. It will give two kinds of grades instead of one. It will help to detect laggards and delinquents before it is too late to admonish them. Threats of dire results upon the final examinations are not nearly as effective cautions to the delinquent student as visibly poor grades upon work done during the course of the term.

I have one further point of criticism to make of the case method. Many of the cases chosen for discussion in study are extreme or unusual instances of litigation. Their importance, of course, may be due to their being exceptional, but it seems to me that the student often gets a false perspective of a given part of the law by not being made to realize the difference between the usual run of the cases which are never discussed and the infrequent and exceptional cases which are discussed because they have a startling or striking point to make. This is not an intrinsic defect of the case method; it is rather a matter which should be called to the attention of the individual instructor whose duty it certainly is to make clear the distinction between the typical and the radical cases.

(2) The other major difficulty which I found in first year work had to do with the relation of various courses, and of the various aspects of the total subject matter of legal instruction. It is true that each instructor does a little toward orienting his students with respect to the relation of his course and other courses, but this little is insufficient to be effective. Professor Llewellyn, last year, gave a series of optional lectures to the first year class on methods of studying law. Some such plan might be expanded to include a few more lectures given by one or more members of the faculty on the relation of the various departments and subject matters of the law. What I have in mind is some kind of simple orientation course for first year men, not a regular credit course, but a short series of afternoon lectures in which a general view of the work of the entire law curriculum might be given. This would enable the student to see each of his first year courses in proper perspective; it would enable him to understand in general the relation between procedural and substantive law, between commercial and non-commercial law, between civil and criminal law. Furthermore, it might give

him some philosophical orientation toward the fundamental problems of method and criticism in legal study. As the first year work is now carried on the student gets this philosophical orientation in two or three of his courses, but it is given in a fragmentary manner and because of verbal, if not actual, incompatibilities in the viewpoints of various instructors, the student is more likely to be perplexed than enlightened. This plan of having a series of five or six afternoon orientation lectures would furthermore fit in well with the newly adopted scheme of entrance and freshman readings. The student would be helped in doing this reading if it were "pointed up" by various members of the faculty in these informal lectures; the content of these extracurricular reading assignments could thus be brought intimately into relation with problems in the subject matters of the various first year courses. The extracurricular reading course is an excellent device for taking care of the philosophy of law and for the social and historical backgrounds of law, but the reading is apt to be done in a vacuum by a great many students unless its content is integrated into the curricular work of the law school. A step can be made in the direction of such integration by having this series of orientation lectures, entirely optional of course, for first year students.

(3) The relation between procedural and substantive law seems to me to present a difficult problem in first year instruction. In the first few months of both torts and contracts a number of points of purely procedural significance required discussion before the time they would occur in their proper setting in courses on procedure. I have no suggestion for, the solution of this difficulty except a very general one; i.e. that the first year student be given greater help in keeping clear procedural and substantive questions. It is natural that the instructor should assume that certain general distinctions are understood by first year students. The assumption, however, see ms questionable to me. From my observation of discussion in these first year classes I should say that less than half of the students understood the distinction between fact and law, or knew how to use properly, as terms of art, such phrases as "conclusion of fact" or "conclusion of law". The student is likely to be confused by different usages on the part of different instructors with respect to such a fundamental term, for instance, as "fact". (One instructor gives the term "right" a purely operational meaning, while another treats it as a substantive entity.) I have no scheme to offer for avoiding what seems to me to be an inevitable difficulty in first year work, but some amelioration of this condition might be achieved if first year instructors were more conscious of the difficulty themselves.

(4) There are a number of points to be considered in relation to the preparation of the pre-law student. From my observation of these three first year classes, I should judge that what the prospective law student needed most was training in clarity of speech and thought. Whether or not courses in formal logic and in rhetoric, courses which are no longer given in a great many American colleges, would meet this need, I do not know. It may be that the inclusion of one or two works on formal logic in the list of readings required at the time of entrance might serve this purpose. The modification of the case method which I suggested above might also be effective in this respect insofar as it required formal excellence in the submitted analyses of groups of cases.

(5) I have one other suggestion to make here which is concerned entirely with Columbia College. I understand from Professor Steeves, chairman of the English Department in the College, that a course in argumentative prose writing is being planned. Professor Steeves tells me that it would be feasible to put all pre-law students in the College who wish to take this course in a special section, and to adapt the work of this section more or less to the future professional needs of this body of students. I feel sure that Professor Steeves should be encouraged in his plan and would be greatly aided in the details of its execution if he had the assistance and guidance of the members of the law faculty, who certainly must recognize the thoroughly inadequate preparation of most first year law students in this respect.

(6) My experience of the last year leads me to surmise that almost any branch of substantive and procedural law would profit by formal, logical criticism of its content. This is certainly true of torts and contracts and evidence, and would probably be equally true of almost every other part of the curriculum. Much attention has been paid in recent years to the social and economic backgrounds of the law, to the relation between psychology and evidence, and the relation of sociology, psychology and economics to various parts of business law. The progressive law school has recognized the advantage of having non-legal members on its staff, economists, psychologists or sociologists who not only cooperate in the giving and planning of courses, but who also are collaborators in and critics of the legal researches of their colleagues. It seems to me that the nature of law is such that the formal logician has as serviceable a role to play in the renovated law school as the sociologist or the psychologist. The logician has come to be distrusted by the more progressive law schools for two reasons; first, because formal logic has been viciously and stupidly used by incompetent technicians rather than because of its intrinsic defects; and secondly, because

of the curious notion that the legal mind is already too well trained in logic to need help. In fact, the supposition is that the legal mind needs help in curing itself of its naturally strong tendency to scholastic aridity and formalism. Both of these reasons for either ignoring or opposing the possible services of a logician in a law school seem to me unfounded. The legal mind needs as much help in formal logical analysis as it does in economics or in sociology, and its inveterate tendency to loose speculation about logic needs correction as much as its speculative indulgences in the social sciences. I should like to recommend to the faculty that they consider either the full-time or the part-time services of a logician on their staff, who would perform primarily in relation to the faculty itself rather than in relation to the student body. The student body would, of course, indirectly receive the benefits in the form of a superior analytical presentation of the various subject matters of the curriculum. I should also like to recommend that the faculty, if they are interested in the proposal, consult Professor Richard P. McKeon of the Department of Philosophy in the University. I mention this because the kind of service I have in mind requires a formal and not an empirical or pragmatic logician. Pragmatic logic is already sufficiently represented in the law school in the various social sciences and scientists now coming into its midst. What the law school needs is a rigorous critic, not only of legal subject matter itself but of the social sciences which are often too naively accepted and credulously respected.

(7) Finally, I wish to address myself to the related problem of the future law faculty. While a great step has been gained by having non-legal members on the staff, it would certainly be even more effective if the distinction between the legal and the non-legal members of the faculty could be eliminated and yet at the same time the virtues of non-legal interests and techniques be retained. This, it seems to me, can be achieved in only one way. What is desired is a hybrid individual, an individual who is both competently trained on the legal side and competently trained in some one or more of the relevant non-legal fields, such as sociology, economics, philosophy and logic. The obvious way to obtain a hybrid is by artificial selection and breeding. To this end I propose the plan of picking either promising graduate students in non-legal fields, or promising undergraduates, and giving them a legal education with a view to retaining their services on the faculty if their development warrants it. The average law student is interested in the law course as a means to a professional occupation. He enters the law school after a college education which is largely, if not primarily, directed by pre-law requirements. He usually has no strongly developed interests in such subject matters as sociology, economics,

or logic for their own sake, and if he has, they are soon discouraged by the practical task before him of learning to become an efficient practicing lawyer. Yet the law school is now becoming a graduate school as well as a place for professional training. In line with this tendency it seems to me proper that it should try to recruit individuals whose chief interest will be in law as an academic subject matter rather than as a practice. I have already submitted in another memorandum the details of a plan for the hybridization of the law teacher of the future. Whatever the practical obstacles are, it seems to me highly important that the tendency of the law school to incorporate its work in a wider body of learning should some day be accomplished by a faculty whose training has been directed in the light of that ideal.

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