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Curriculum Structure and Faculty Structure

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My essential thesis here is that the structure of the law school curriculum is a product of the structure of the law school faculty. This thesis, if correct, could explain why the law school curriculum has not changed very much over the years, despite repeated calls for reform. It also predicts that there will not be much change in the future, or at least that change will continue to be very slow.

In an earlier article I identified the interest groups that have a stake in the law school curriculum.[1] These interest groups include the bench, the bar, the general public, such funding sources as the legislature and private donors, the students, and the faculty.[2] Of these interest groups, all seem to be more or less ineffectual except the faculty. The other groups are at significant disadvantage in influencing policy partly because they have limited knowledge of what legal education ought to achieve or could achieve, and partly because they are not in a position to implement a policy if they could formulate a sensible one. In contrast, law faculties actually have some idea of what legal education could and ought to be, and are in a position to claim special expertise. More important, law faculties are in a position effectively to block any but an aggressive and sustained movement of reform, and probably could dilute or suppress even a movement of great strength. This is particularly true of faculties that have tenure and an authoritative voice in law school governance. The law faculties at all accredited law schools have that status at least nominally, and almost all of them have it in fact as well. Hence, I suggested, in curriculum reform the faculty of the law schools were not so much the solution as the problem.

I propose to elaborate this theme by simultaneously bringing into view both an ideal law school curriculum and the political structure and professional interests of the law faculty. In projecting this picture, I do not mean simply to suggest that law faculties should be reorganized to facilitate an ideal curriculum. Law schools have other tasks and other institutional responsibilities beyond giving instruction to the passing cohorts of law

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1. Geoffrey C. Hazard, Jr., Competing Aims of Legal Education, 59 N.D.L. Rev. 533 (1983).
2. I should add, with acknowledgement to Willard Boyd, the interest of the university of which the law school is a part. That interest has intellectual, institutional, and financial components.

students. These responsibilities may be better served by the present structure of law faculties, and probably are important to society over time. Thus, as in all things in life, we probably confront trade-offs.

The Ideal Curriculum

The idea of an ideal law school curriculum is both eminently sound and a mere chimera. The idea is eminently sound in that we can imagine the curriculum that ought exist in an ideally constituted law school. The idea is a chimera in that an ideally constituted law schools can hardly become a reality.

By an ideally constituted law school, I mean one that has the following characteristics: It has a national standing so that all outstanding students have a practical chance of becoming enrolled in it, regardless of where they might live or what might be their prior educational and life experience or their present financial resources. Despite its national standing, the ideal school has close connections with the local bench, bar, and thus is acquainted with the irregularities and anomalies of legal process as they occur in everyday life. At the same time, the school's national status gives it close connections with national bench, bar, and legal process, so that it is also acquainted with the irregularities and anomalies of legal process as they occur in the upper reaches of the political system, in such institutions as the Supreme Court, Congress, the executive agencies, and the elite law firms. The school is publicly funded, reflecting that the fiscal resources available to the average state law school are more munificent than those available to all but a handful of private institutions. The school, however, enjoys the financial autonomy of a private institution, and hence does not have to cope with political interventions by the state legislature, the state supreme court, or the state bar. Despite this fiscal well-being and political autonomy, the school's faculty and student body remain modest in self-conception and free of intellectual pretension. The school is large because it must accommodate many worthy students and must be able to provide a wide variety of options in its educational program. But the school is also small so that it sustains the energy and responsibility generated in intimate institutions. The cost per student is high because a good legal curriculum is expensive, but low because neither students nor benefactors can afford a high-cost curriculum. Its student body is a cross section of the community, but is uniformly high in achievement and aptitude. The same is true of the faculty.

Given this ideal setting in which to work, the architect of an ideal law school curriculum would be able to design one without too much difficulty. Indeed, an ideal curriculum could be *designed* without having any setting in which to put it into operation. The difficult problem is not design, but implementation.

The components of an ideal law school curriculum would be substantially as follows:

(1) Indoctrination in law, including exposition and analysis of rules and description of the institutional setting of their application. The specific subject matter of this legal corpus would include torts, contracts, property,

procedure, constitutional law, taxation, and the rest of the conventional subjects we all have been taught. Indoctrination would begin at the outset of the first year and continue throughout, on a diminishing degree of depth and an increasing degree of breadth.

(2) Training in basic practice skills and techniques. These include the ability to listen carefully, to speak precisely, to read critically, and to write clearly and concisely. These skills also include competence in various controlled behaviors, such as aggression, conciliation, and judiciousness. Inculcation in these skills would begin at the outset of the first year and continue throughout with an increasing degree of intensity and variety of format. In the beginning students would simply be asked to audit and try to make sense of an ordinary law lecture, for example; later, they would have to listen to a witness or to a client and try to deduce what was being said; toward the end, they would have to listen to meetings, conversations, negotiations, and trials, and be tested on hidden as well as overt agenda.

(3) Education in relevant nonlegal disciplines, such as philosophy, economics, sociology, ethics, politics, psychology, and history. Education would also be required in the special languages of statistics and accounting. Here, the curriculum would have to be adjusted to take account of the different academic backgrounds of the student body. These disciplines would also have to be reformulated so that they were presented as methods of problem analysis rather than as bodies of theory. The components of this part of the curriculum would have to be sequential, building one on another instead of unfolding in the more or less random sequence found in the advanced courses in today's law schools.

(4) Education in depth in some specific legal problem. This is the learning experience traditionally described as "independent research" or "legal scholarship." The aim is that a law student really understand one facet of the law, a competence that can be acquired in only this way.

Another necessary component of legal education is more difficult to describe and is sometimes overlooked. It could be described as positive or critically oriented socialization into the law. This process consists of two connected segments. The first is at entry into law school, and the second is in the transition from law school to the professional labor market. The socialization process would include, but not be limited to, study of the legal profession and study and reflection concerning such notions as "professional responsibility" and "public service."

There are great differences of opinion within the legal academic community and within the legal profession over whether this is indeed an ideal curriculum. Within the legal academic community at any rate, there are some who believe that anything beyond the study of the rules and economics is a waste of time. There are others who think that the study of either rules or conventional economics is pathological. But disregarding these extremes, my guess is that there would be pretty broad consensus on this definition. If so, then the question arises why actual law school curricula do not correspond to this ideal.

There are some obvious answers to that question. One, of course, is cost. Implementing such a curriculum would seem to be ruinously expensive.

Some commentators have suggested that it would be ruinously expensive except at the high budget, prestige schools. If I am right about the finances of law schools, however, implementing the ideal curriculum would be no more difficult, purely in financial terms, at the average state university law school than it would at the so-called prestige schools. In any event, the problem probably is not fundamentally financial, for reasons to be developed presently.[3]

A second answer to the question of implementation is that the law schools of today in fact have implemented this kind of curriculum to a perceptible degree. The typical law school curriculum of today has a lot more skills training and interdisciplinary work than may be commonly acknowledged. We teach a lot of doctrine, and at least some students do serious legal scholarship. For at least the last twenty years there has been much effort addressed to what I have called positive socialization. We must always remember that perfection is the enemy of second best, and that second best is what we ordinarily must settle for. On that basis, the law school world may be closer to having the ideal curriculum than is generally supposed, especially considering that we have no ideal law schools.

Yet serious impediments remain. It remains true that too much of the curriculum is simply indoctrination in doctrine, or—even worse—pedagogy that passes for critique of doctrine but is in fact scornful counterindoctrination, in which the students are told not only that the rules do not mean everything they say but that they do not mean anything at all. Skills training remains pretty much a stepchild. So does education in relevant nonlegal disciplines.

Many other developments and difficulties deserve attention and reflection. On this occasion, neither the narrow issue of specific curriculum content nor the global issue of late twentieth-century political economy will be addressed. My focus is upon some partial and contributing answers to the question why the law school curriculum has remained remarkably much the same over the last twenty-five years, despite incessant calls for its reform.

Implementing the Ideal Curriculum

One aspect of the answer, and my present thesis, is simply stated: The law school curriculum has remained the same these last twenty-five years because it is a function of the structure of law school faculties, and the structure of law school faculties has remained the same over this period. Having made this point by simple assertion, I should like to develop it by indirection.

Suppose that a philosopher-dean were to be granted autocratic authority to institute the ideal law school curriculum. He or she might proceed, as all new law schools proceed, by recruiting experienced faculty who had been teaching at other law schools, and then by adding a few young lights who had been trained at such law schools. That approach would of course result in replication of the conventional law school curriculum, as indeed it has in one new law school after another established in the last two decades.

3. See also Swords.

Another approach would be to recruit experienced faculty and young lights who have gone on record as dissatisfied with the conventional curriculum, and rely on that dissatisfaction to energize the adoption of a reformed curriculum. Several schools have tried this, notably Antioch, and one is trying it now, Charles Halpern's challenging adventure at City University in Queens. The verdict on such endeavors is never final so long as hope and pedagogical energy persist. I remain skeptical, however, precisely because I believe that the faculty will come to dominate the program in these new schools, and that over time the faculty's conservative needs will prevail.

Another approach might be taken by our hypothetical philosopher-dean. This would be to inquire directly how each component of the ideal curriculum might best be taught and then to organize the instructional apparatus accordingly. There is some empirical basis for considering this approach because the various components of the ideal law school curriculum have actually been instituted at one place or another.

Here are a few examples from my own experience and observation. One is trial advocacy, which is certainly a relevant practice skill. For trial advocacy, the state of the art pedagogical apparatus has been evolved by the National Institute of Trial Advocacy in its years of experimentation and development. The elements of this apparatus include a short time module, usually two or three weeks in which the student does nothing else; teams of instructors, mostly practitioners teaching by demonstration; and intensive self- and peer-evaluation, including use of video-tape technology for clear self-perception. All this requires a tightly scheduled and closely monitored training sequence under skillful administrative direction.

Another example is education in the methods of social science. Here there are lessons of experience both in social sciences themselves and in interdisciplinary studies involving legal subject matter. The main lesson seems to be that one learns social science by doing it, that is, by actually participating in a research project, even if of modest scale. Only in this way does one discover how necessary in social science are careful reading of what has already been done and precise formulation of the question to be answered. One also learns to comprehend the significance of statistics, to appreciate the economy of using preexisting data rather than collecting data anew, and to understand what Walter Kaufman said about scholarship in general:

> Nowhere is the proportion between effort and result more aggravating than in the pursuit of truth: You may plough through documents or make untold experiments or think and think and think . . . lie awake nights and eat out your heart—and in the end you know what can be memorized by any idiot.[4]

Providing this experience in social science would require that the law school itself have a continuously on-going program of social science research, or that it be intimately connected with other departments that were so engaged and into which law students could be introduced as collaborators. This is essentially what is done in many "law and" research

4. Walter Kaufman, Critique of Religion and Philosophy 69 (1961).

projects, but of course on nothing like the scale that would be required if all or even many law students were to participate.

One other entails a more modest operation. This is training in writing and speaking, both of which are foundational practice skills. The best way to learn to write has long since been proven: It is to write, over and over again, under the tutelage of a critical and patient editor. That is how it is done in eighth grade composition courses worthy of the name, in English 1A in college, in law review and other law school writing experiences, and in apprenticeship in law firms that care about writing and care to do something about it. Essentially the same method is required in learning the skill of public speaking.

The Structure of the Faculty

In putting together these components of an ideal law school curriculum, attention must be focused not only on the courses taught but on the people who would teach them. In looking at personnel, we see that our philosopher-dean would have to recruit and retain a very heterogeneous aggregation. The faculty of the institution would have to include:

-teachers of writing and speech, who would continually handle all the tedium entailed in that pedagogy;

-instructors in trial advocacy, negotiation, and other practice arts, who would however have to maintain proficiency in their art and thus would have to be committed primarily to practicing law rather than teaching it;

-working researchers in various relevant social sciences, dedicated to investigations that are simultaneously interesting in a substantive way, exciting to themselves, and suitable for educating law students;

-philosophers in law having time and patience to impart at least a glimmer of their understanding to law students pursuing legal research in depth on their own;

-and teachers of conventional legal doctrine.

It is a serious question whether a faculty could be so constituted, or that if initially so constituted it could remain intact very long. Consider the differences in teaching functions, from the tedium of instruction in writing to the prestige of theoretical investigation. Consider the differences in intellectual orientation, from preoccupation with the nuts and bolts of cross-examination to preoccupation with the wisps of conceptual speculation. Consider the differences in compensation levels in the labor markets from which the various faculty members would have to be drawn. Consider the differences in self-conception, life script, and definition of personal fulfillment among the individuals making up such a group.

We find such differences, of course, in law school faculties as they are presently constituted. But the differences are relatively modest in degree and in any event are muted by various institutional arrangements. The most important arrangement is that most if not all members of the "regular faculty" have law degrees and are called professors of law, whatever they might actually teach. That is, all faculty are equal. A related arrangement is that all the "regular faculty" have teaching assignments nominally equated with each other. All faculty teach "courses" or "seminars," and in most

schools most faculty are expected to teach some of each. Furthermore, all courses and seminars have the same weight, or have a weight expressed in terms of a common module, that is, three semester hours more or less. Thus, all courses are equal.

A third arrangement is that, within the scope of the course defined by the course description, each faculty member has a substantial autonomy in determining the presentation of the course. There are some controls and intrusions on this autonomy, in the form of common syllabi, but these are determined by negotiation among the directly affected faculty and not by external standards or process. Each faculty person therefore does his or her own thing. This autonomy is high among the rights entailed in what is called "academic freedom." All teaching is therefore equal.

The strength of these arrangements can be appreciated by considering the situations in which they do not apply. In general, forms of law school instruction that do not fit this model are regarded as outside the "regular curriculum." Legal writing is relegated to a staff composed of graduate fellows or third-year law students, for example. Work in legal writing also is usually given reduced academic credit or is incorporated into a regular course and given no independent credit at all. Similarly, instruction in practice arts is called "clinical education" and enjoys similar subordinate position in the status of its faculty and the academic credit awarded to it. Correlatively, faculty whose training has been in some discipline other than law hold differentiated status. Generally they are called not "professor of law" but "professor of law and. . . ." In many cases, they are not full-fledged members of the law faculty but hold only adjunct or secondary appointments.

Supporting all these arrangements is the prevailing distribution of authority in the governance of law schools.[5] These days there really are no philosopher-deans who have authority to institute a law school curriculum or to select a law school faculty. Except for initial appointments at newly founded law schools, law school faculty are selected by law school faculties. The curriculum is established by committees of the faculty. The faculty have tenure in office and as a body constitute the law school's legislature, or at least its upper house.

We are thus engaged with the following: that faculty select faculty, that faculty individually have tenure and collectively have constitutional authority over the curriculum, and that in these respects all members of the faculty are equal. It would be expected to follow, according to the principles of economics, that all workloads among the faculty are at least nominally about the same. It would also be expected to follow, according to the principles of politics, that all pedagogy generally should have similar scope. And it would also be expected to follow, according to the principles of sociology, that all regular courses have the same status.

Thus, with law school faculty being equal, law school courses are all equal, and the curriculum does not change. Needless to say, some faculty actually are more equal than others, but that is a question for another day.

5. The ABA Accreditation Standards reinforce this structure, another instance of perhaps unintended effects of regulation.