DESIGNING CURRICULA: MAKING LEGAL EDUCATION CONTINUOUSLY EFFECTIVE AND RELEVANT FOR THE 21ST CENTURY

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What is the state of legal education today? Is it preparing the students of today for the challenges of tomorrow? How can this limited period of formal legal education best be structured? The author, always keeping in focus his beliefs concerning the role and purposes of law itself, takes a philosophical, as well as practical, look at the functions and skills required of a lawyer in light of an ever-changing society and explores how law schools can better equip students to perform their professional tasks.

Speeches about legal education are usually delivered in a contingent apocalyptic style. Our democratic institutions, our very Republic, if not the entire world, are presented as if they were teetering on the verge of destruction, their hope of salvation resting entirely and precariously on the introduction of changes in the American law school curriculum. The professional megalomania evident in this genre is set in relief if one substitutes for the word “legal,” words such as “medical,” “dental,” “pharmacological,” “agricultural,” and so on. Even assuming that legal education is qualitatively different and more important to community life than the others, the jeremiads are still unjustified. Consider:

— The availability, economy, and quality of legal service in the United States is probably better now than it has been at any time in our history. It is also probably better than in any other country in the world.

— Those who are admitted to American law schools are better educated than their predecessors. It was not that long ago that a general university ed-

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ucation leading to a B.A. or B.S. was not a prerequisite for law school admission.

— Those who now study in law schools get a better grounding in the fundamentals of the profession than their predecessors. In the past, acolyte lawyers “read” law in chambers; the curriculum, one would suspect, was essentially composed of what the lawyer for whom one was clerking was profitably involved in.

— Those who were called to the bar were rarely examined and, if at all, even more rarely in any thorough fashion. Though one may joke about the pharisaical character of Bar exams and Bar review courses, there is no question but that they provide some quality control on those who are subsequently licensed to perform legal professional services for the public.

— Our civilization ruthlessly changes and obsolesces skills including those that were acquired in law school. Arrangements for timely renovation of professional knowledge and skill by periodically updating professional methods are far from perfect but far better than whatever may have existed in the past.

— Most important, the entire issue of law school structure and curriculum is under constant reconsideration by those charged with responsibility for American legal education.

This inventory should not be taken to mean that we are perfect, nearly perfect or, at least, at the first step of beautification. There are serious pathologies in our legal and political system, each of which can be catalogued under the above headings. Some of them may be remedied or at least tempered; some, for complex reasons arising from our general political values and the organization of our universities, will prove more resistant to change. And even if one were to conclude that the present state of affairs is quite satisfactory, major changes likely in the next three decades in both national social processes and in interdependences with communities in other parts of the planet, will present formidable challenges to our political and legal institutions.

The point is that any discussion of the problem is impor-
tant and timely, but hardly hysterically urgent, in large part, because it is already well underway. I make no pretense to discovering this subject, but only seek to contribute to the methods and procedures for its solution. This Article addresses, first, a general method for designing and appraising curricula, and second, an examination of a number of features which any curriculum, should, in my view, include. As part of this inquiry, I investigate the reasons why certain features of our profession are taught as an "oral tradition" and sometimes not even acknowledged as that, while others are raised to the level of explicit instruction. After briefly considering some time-structural options for the period of legal education, I conclude with some comments on the dynamics that tend to militate against explicit decisions about curriculum as well as the fortunate corrective that arises from the diversities of jurisprudences about professional education in American law schools.

I. Metacurricular Theory

The impetus for discussions of the future of American legal education does not arise from a sense of imminent doom but from the sense that law, in industrial and science-based civilizations, is a tool for achieving social objectives; that these objectives, the contexts in which they must be achieved or approximated and the appropriateness of the tool must be regularly re-examined and re-appraised; that curricula, like law schools themselves, are also tools and that, as such, they must be appraised for the extent to which they have achieved and are likely to continue to achieve social objectives in present and projected contexts, and, if necessary, whether and how they should be restructured. There is more than an accidental link between the law school graduate's role in national and international society at different points in the future and what we are now training students for. Hence, examination of the basic methods by which this can be accomplished and identification of the goals which we seek to achieve have become normal parts of our self-appraisal.

As is obvious, I take it for granted that curricula and law schools are subject to appraisal and redesign and concentrate on how we ought to go about this important project:
for those who like more grandiose titles, you may think of this part of my remarks as a "metacurricular theory."

The formula I propose is quite simple—though its implementation can pose awesome problems. Curriculum and law school structure, as I have said, are tools for training decision specialists to perform indispensable decision functions in an industrial and science-based civilization in the next generation. What those functions are will depend upon present and projected social preferences or goals about the most desirable ways of arranging social and political processes. Those preferences must be correlated with the functions for which current law school graduates are being prepared.

This, then, is both an empirical and a projective exercise, for what lawyers did in the past is no assurance that they will continue to do those things in the future. We can say with certainty that lawyers will continue to be specialists in decision, in making and appraising choices for and on behalf of others. But the determination of what those particular choices will be is no easy matter. Even if a provisional consensus on what they will be in the Twenty-First Century can be arrived at, there will continue to be disputes as to emphases and priorities in what should be done in law school.

The metacurricular procedure may be summarized briefly:

— Identify Social Preferences (Goals)
— Project Probable Future Contexts (Future Projections)
— Demark Professional Tasks to Be Performed in Those Contexts (Task Inventory)
— Design Curricula to Train for Performance of Those Tasks (Curriculum Design)
— Develop Optimum Learning Procedures (Learning Optimization)

Application of this metacurricular theory requires one to determine what one expects lawyers to be doing in the Twenty-First Century, then to catalogue the necessary skills those performing those functions will require, then to determine which of those may be most efficiently cultivated in the six, fourteen-week periods that comprise primary legal education, which may be left to "hard knocks" or "experience" (our professional euphemism for externalizing onto clients
the costs of learning the law), and which may be assigned to supplemental education in a variety of forms. Once we understand what the professional tasks are likely to be and which are the best modalities for transferring the necessary information and skills, it is possible to consider the content of the six temporal units that currently comprise primary law school education and the ways they may be arranged so as to achieve a greater return on the objectives we have specified.

How shall we think about the "future"? One economical method for sketching probable futures may be stated as follows. Imagine an organic continuation of relevant contemporary social trends, a radical change in the trends likely to yield major positive achievements of those national goals, and a national calamity likely to cause serious setbacks to the achievement or approximation of those national goals. For each of these three imagined projections, try to construct what America, in the network of international communities in which it operates, will be in terms of the population in various politically relevant groupings; the subjectivities of the different groups in terms of how they identify with the collectivity and inter-identify with each other, how congruent their images of past and future are, and what they demand; the demographic distribution of the groups and the way they will interact; the aggregate resources available to the national community (national wealth) and to different component groups; the way those resources are used both to produce and to influence patterns of concentration or sharing of values; and the net production and distribution of all the values emerging from this national process: power, wealth, skill, enlightenment, well-being, affection, respect, rectitude. For each of the phases and values, make projections or extrapolations, as the case may be, that present, in toto, a rounded picture of what the United States and its world might be at some point in the future.

These "pictures" or artificial constructs of the future serve as targets for achievement or avoidance and help us to shape contemporary behavior so as to make its goal orientation more refined. Each of us can make more efficient choices among current options if we have sketched the desirable and undesirable futures we wish and can relate the current options' consequences to those alternative futures.
To be useful, this method of constructing alternative futures cannot be done "once," and then forgotten. It must be done at intervals, if not continuously, for the object of the exercise is not to "predict" the "future." Even to put it in those terms implies that there is such a "thing" as a future and that one can "find it" in the sense in which one finds the Holy Grail or the Lost Ark. Because there is no certain future, it is not there to discover. If the concept of future is to have any value for decision, it must refer to a consciously projected flow of artificial images of utopias and dystopias, against which current strategic options or choices may be checked to see whether they will increase achievement or avoidance of those utopias or dystopias.

Once we have sketched in the contours of the social process in which the students of today will be performing professional functions in the future, we may try to identify with more precision exactly what those functions are likely to be and to assign certain quanta with regard to their relative importance in terms both of the career of the students and of the needs of the community.

This difficult task is further complicated by the fact that the American Bar is heterogenous. Its members range from those who routinely perform essentially clerical functions, such as closings on small property holdings, the drafting and probating of wills and so on, through those who advise and perform legal functions for small and medium-sized businesses, through those who argue in court and other tribunals, on through to those who manage multinational corporations and the capital investments of great conglomerates through to those who manage the affairs of entire states. It ranges from the criminal to civil side, from the local to the global.

There is yet another dimension of heterogenity. In contrast to European systems, in which a specialized bench is recruited at a very early career stage, our bar recruits judges at relatively late stages, often after active and varied legal and political practices. Moreover, in state-sponsored arbitration, younger lawyers are frequently coopted to episodic functional judicial roles. Hence, legal education, insofar as it acknowledges the need for special training for judges, must try to incorporate it into the ordinary educational process.
Nor do we have special schools for legislators. In our system, lawyers frequently act as participants in the legislative process at many different levels of social organization, and the results have enormous social consequences. Hence primary legal education must also develop ways of synthesizing and transmitting the skills indispensable for the content and crafting of legislation.

Legal education must accommodate this diversity; at the same time, it must counter tendencies toward the fragmentation of the profession. It must create and maintain a comprehensive, cohesive esprit de corps. Because lawyers, for complex reasons, have rarely if ever been popular among the population at large and it is unlikely that they ever will be, systems of internal support, reciprocal evaluation and internal policing mechanisms are extremely important for the psychological health as well as the effective functioning of members of the bar.

The content of a curriculum will be greatly influenced by the application of the “metacurricular theory” I have sketched. It will also be profoundly affected by the jurisprudential conceptions of the designer. These, too, should be made express to reveal their influence and facilitate appraisal of their cogency.

II. CATALOGUE COURSES AND THE CURRICULUM OF THE CORRIDORS

I suggest that a number of basic jurisprudential principles govern curricula design. Many of these are already incorporated in legal education, but for complex reasons, which remain to be considered, they are not acknowledged. They are, as it were, an “oral tradition” rather than a “written” one, a type of folk or craft component of professional education which is not transmitted in formal fashion and is often not acknowledged in our books, a curriculum of the corridors rather than of the classroom.

There is nothing wrong with an oral tradition. Indeed, there are often cogent reasons why key norms are transmitted orally rather than by inscription. But the curricular appraisal we are engaged in requires that those components of the operational curriculum which have been placed or slipped below the threshold of visibility be made explicit, if only to determine whether they should continue in one or
either of the curricula and how. In some cases, it may become clear that a much more explicit treatment of a topic as a full-fledged part of formal education would best serve professional education. In other cases, we may discover that there are compelling reasons for leaving some parts of our education at the oral or folk level. Some parts currently taught might well be made part of the curriculum of the corridors. The two curricula are not, one should add, mutually exclusive. They may interstimulate. An innovative seminar with a small subscription may become part of corridor curriculum and vice versa. Innovations in one school may become part of another, and so on. The links and loops between the two forms of curricula themselves present strategic opportunities for curriculum designers.

There are many reasons for the development of oral traditions. Where law claims divine inspiration, it would amount to sacrilege to install man-made law alongside divine creations. But as each generation encounters new social problems, it must legislate, venerable myth notwithstanding. Oral tradition is a way of incorporating new law but not acknowledging that it is in fact such. In other cases, material that should be learned but which is incompatible with the formally accepted conception of law or of a particular profession—its myth system—is best left to the curriculum of the corridors. Until the recent revolution in professional ethics in the profession and belatedly in law schools, most of the practical ethical problems which attorneys encountered were not dealt with as formal curriculum but, for better or worse, were passed on as part of a folk tradition.

Let us address the basic jurisprudential principles I have now twice threatened you with and determine which of them can best be taught explicitly or implicitly.

A. Transnational Comprehensiveness

Most projections of the future emphasize the increasing transnational character of daily life. I believe this will penetrate every level of practice, down to the point where it will be fairly routine in probating wills to discover that property is found at a number of jurisdictions within and outside the United States. More generally, for reasons which I will explain below, I think a profound understanding of how the international political system affects the United States and
vice versa will be indispensable for effective practice of law in the next century.

This focus is one thing which certainly cannot be left to the oral tradition. The degree of international interdependence is not always apparent, and sensitivity to it cannot be taken for granted. Indeed parochializing influences and, in particular, narcissistic celebrations of national character which historicists would contend are endemic to law may be strong enough to conceal or minimize the actual degree of interdependence. To cite only a few examples, it will be necessary to treat in explicit fashion the degree of interdependence that has emerged and will continue to develop in:

— Wealth and market processes about the globe;
— The development and distribution of knowledge and the protection of forms of it which can be characterized or claimed as property;
— The development and distribution of skill and "know-how" and its protection;
— The development and protection of health and well-being, disease control, and medical research.

In every area of human production and distribution of values, transnational arrangements have become indispensable struts. They must be studied explicitly if decision specialists in the next generation are to understand them enough to manipulate them effectively and responsibly. Transnationality should be incorporated in both special courses and seminars and as a component in existing courses. The incorporation should be sought at every level, including the library. The lamentable practice of international and foreign law "annexes," separated from the central working collection, should be reversed.

B. Multi-Methodology

There should be an emphasis on equipping the acolyte lawyer with a wide range of diverse techniques, in addition to the traditional verbal skills, in order to enable him or her to perform many of the tasks which will be considered presently. By this I do not mean something on the order of the contemporary nostrum that lawyers should be "computer-literate." That is about as profound as saying that lawyers should be able to type. Our province is influencing the behavior of individuals and groups so that, thanks to the com-
bination of our efforts and skill, it discriminates in favor of our clients and the community. This involves performance much more than the portentous invocation of rules. Psychology, social psychology, sociology, economics, and statistics have produced a wealth of verified insights about influencing or manipulating behavior and about the social consequences of particular types of behavior. These insights should be made part of the explicit education of lawyers. The objective is not to make lawyers into research sociologists, psychologists, economists, and so on, but rather to draw on the insights of those other disciplines insofar as they are relevant to the performance of legal tasks.

C. Extended Conception of Decision

A third basic principle is a conception of law and legal tasks which covers the range of decision functions and does not focus exclusively on courts and court-related institutions. That restriction of focus is, unfortunately, endemic to contemporary legal education and, I believe, one of its most serious pathologies. In classroom discussions each year, I am astonished by the number of students who use the familiar method of logical derivation of rules from cases and statutory material to reach a conclusion which they believe is morally unsatisfactory. (And they are often right!) But students are so conditioned to accepting the law they work with as a “given” that it does not occur to them that it can be changed. When one says something as obvious as “if you don’t like the law, change it,” jaws drop open. When students realize that they may (and as lawyers routinely should) get elected to legislatures in order to change the law, establish pressure groups, arrange strikes and other forms of agitation to promote or lobby new legislation, a psychological barrier, a set of “mind-forged manacles,” to use Blake’s wonderful phrase, is shattered. Students realize that the word “decision” includes more than one function. It is not simply a question of application of existing law, but also of the prescription or legislation of new law. Prescription or legislation, in turn, imports promotion or lobbying and the termination of existing law. In fact, if one unpacks the word “decision,” it becomes obvious that there are at least seven functions which lawyers perform and for which they must develop special skills. The functions are:
Intelligence — the gathering, processing, and dissemination of information relevant to policy and decision.

Promotion — sensitizing politically relevant actors to goals and practices discrepant from them and increasing their demand for the establishment and implementation of explicit policy.

Prescription or Legislation — the formal adoption by a community of one of a number of policy alternatives as its law.

Invocation — the provisional characterization of deviations from law and a demand for an appropriate community response.

Application — the confirmation that a violation of law has taken place and the specification of appropriate sanctions.

Termination — the nullification of existing law and the development of methods for ameliorating the adverse social consequences of withdrawal of a normative strut on which citizens have made good faith value investments.

Appraisal — the evaluation of the aggregate performance of a comprehensive decision process and the assignment of responsibility for unsatisfactory performance.

Unfortunately, most of our discussions in law school tend to revolve around the function of application. What skills students acquire with regard to the other, equally important functions are derived from the oral tradition or the corridor curriculum. Courses on the lawmaking process are only the faintest reflections of the struggles and political processes in which policy for the community is hammered out. Nor is there adequate consideration of the sanction component in legislation, without which efforts at lawmaking remain little more than pious aspirations. There are no courses on lobbying, one of the most important functions in our political system in which lawyers play a major role. Nor do we treat in explicit fashion techniques for appraising the aggregate performance of our legal system in terms of our major political goals. This is, of course, the raison d'être of the law. If
the lawyers of the next generation are not able to consider this in a systematic and effective fashion, who will?

D. Law as Choice: Implications and Application

The fourth basic principle, one which I am sure will be the most controversial, involves an acknowledgement of the fact that at the center of the legal enterprise is an ongoing process of making choices. If you accept the proposition that law making is an appropriate part of the legal curriculum, you will, by implication, acknowledge that the legal enterprise cannot be viewed exclusively as a closed system in which logical rules alone operate. It is an open system in which choices among competing alternatives must be made. The same applies a fortiori to the promotion function and to application. Though our system regularly struggles with the extent to which our judges should be creative, anyone who has been in an applicative role knows that choice is inescapable. Choice should not be confused with an exercise of caprice. Choices in all decision functions are expected to be informed by careful examination of the past and, in democratic politics, by a canvassing of the expectations and demands of the community. But law is not and never will be a mechanical operation. The point has never been put more eloquently than by Martin Buber:

There are all sorts of similarities in different situations; if one can construct types of situations, one can always find to what section the particular situation belongs, and draw what is appropriate from the hoard of established maxims and habits, apply the appropriate maxim, bring into operation the appropriate habit. But what is untypical in the particular situation remains unnoticed and unanswered . . . . In spite of all similarities every living situation has, like a newborn child, a new face, that has never been before, and will never come again. It demands nothing of what is past. It demands presence, responsibility; it demands you.

Buber’s reflection draws attention to a central feature of our profession which is still inadequately treated in legal education. Since choice is so central to our enterprise, the ultimate instrument of legal operations is the individual or, more precisely, the self-system, that bundle of selves that makes up each of us.

All of us are subject to internalized pressures and forces
which can influence the accuracy of our perception and the rationality and means-end correspondence of our choices. There are three types of distortions that we are prey to. Neurotic distortions, arising from undigested memories and unassimilated experiences of the past; subgroup parochialisms; and some of the special distortions that arise from institutional biases acquired in professional training. All of these operate on us at all times. When we are making choices only for ourselves, it is a matter of personal liberty as to whether we wish to try to identify these forces and thereby increase the rationality of our behavior or to ignore them with the often momentary and sometimes terminal sense of exhilaration that one gets from the fact that one has no idea what the consequences of his actions will be. When we make choices on behalf of others, and that, of course, is central to the legal enterprise, it seems to me morally mandatory that we identify these internal pressures and forces, and where necessary, attempt to neutralize them. This can be accomplished by a variety of methods now available in psychology and social psychology, but it should not be part of folklore or oral tradition.

I would like to see law schools in the future develop self-scrutiny workshops in which these distortions could be examined and students could develop methodologies which they would continuously use for the rest of their lives to calibrate themselves. I do not minimize the difficulties and even dangers involved in this enterprise. To the pervasive concern for the privacy of students must be added a concern for the risks of intervention in the sub-systems of all human beings. The notion of a self-scrutiny workshop would best be tried as a pilot project with entirely voluntary subscription. Not all students may wish to subject themselves to such forms of self-exploration, however they may be accomplished, but even if only a few do, the idea of self-scrutiny will enter into the general intellectual life of law schools and stimulate even those who are not prepared to undertake it explicitly to begin to think in those terms. Explicit curriculum will thus enrich the curriculum of the corridors.

E. Context and Power

As a fifth general recommendation, I would like to see law school curricula reflect an increasingly contextual rather
than exclusively textual conception of law in social process. In particular, curriculum should acknowledge quite candidly the inevitable role of power in law. Let me illustrate the importance of a contextual method by considering one sort of "non-court" problem you might encounter when you begin practicing law. I will draw on an example Professor Schreiber and I have used in a recent book. Imagine, for the moment, that you are a junior member of a firm which has, as a client, Suzuki Industries, a large Japanese corporation which operates multinationally. Suzuki has decided as a matter of policy, to invest in the United States and is now contemplating establishing a subsidiary manufacturing component in Penntown, a small town in western Pennsylvania. Material on relevant United States law, Pennsylvania law, and local law has been forwarded to Suzuki headquarters in Tokyo. Now Suzuki has asked your firm to visit Penntown and report more fully.

The request should hardly be surprising. The prudent investor from abroad, like his American counterpart contemplating an investment overseas, wants to know more than the constitution, statutes, and by-laws of the community he may enter. And the reason is obvious. A description of the written law alone, no matter how rigorous and thorough, cannot give your Japanese client a full, rounded, or dynamic picture of how decisions are actually made in Penntown.

You arrive in Penntown to flesh out the picture. Whom do you ask? What do you ask? What information is really necessary for you and for your client in order for each of you to understand the environment into which the foreign corporation may enter and how to plan its entry and operation efficiently. Some of the things which you must inventory, but which are not expressed in the formal law material already gathered, are the individuals, groups and entities — formal and informal — actually involved in making those critical choices in Penntown that will affect Suzuki's prospective operations. You and your client are interested in their behavior, in a very specific and not in an abstract sense. You are trying to guess how these actors will behave under a variety of conditions that may prevail in the future.

As a matter of common sense we are constantly orienting ourselves in that elusive notion called "the present" by looking at what happened in the past and the conditions that
prevailed then in order to determine how we, or others whose actions are likely to influence us, will behave in the future under similar or different conditions. (You can anticipate some conditions; others, you may be able to create yourself.) So, more concretely, you will wish to know what these groups and individuals in Penntown did in the past, what conditions prevailed then that may have influenced what they did, what conditions are likely to prevail in the future, the different ways the groups may react to them, and the effects that each of these potential reactions can have on your client.

The purpose of this inquiry is utterly practical. Suzuki Industries wants information that will guide it in choosing how it should act—indeed, whether it should even enter Penntown. Practically speaking, that means how it should act with regard to the people or groups and entities who have an input into the process of making decisions or choices in Penntown. The exclusively book-bound, black-letter lawyer can regale you, in detail, with the formal rules of Penntown. Is that enough for the tasks you will have to perform?

Put most succinctly, you must understand how decisions are actually made in Penntown if you are to advise your client. It is not enough simply to tell Suzuki what the formal rules are, for unless Penntown is a very exceptional case, the rules will not actually be applied or applied in a strict fashion. Even in cases where they are applied, many other factors may enter into how the rules are applied and the fashioning of the decisions that will affect your client. You must, in short, understand the processes in which decisions are taken in order for you and your client to begin to make matter-of-fact assumptions about what future course of behavior will be followed by officials and nonofficials in Penntown. Only with such information can you fashion a course of action for yourself which is appropriate and, acting on behalf of your client, learn to operate in that particular setting in ways that increase the likelihood of influencing and securing favorable decisions.

This point bears emphasis. You may use some of the methods of science, but you are much more than an observer and a recorder. When Oliver Wendell Holmes said that law was nothing more pretentious than the prediction
of how courts will behave, he was putting the matter too narrowly in many ways. The lawyer is not only concerned with courts and their behavior but with predicting and influencing a complex of formal, informal, organized, and unorganized decision-making agencies, groups and individuals which are, in fact, likely to have an impact on his client's interests. One of the challenges of a new context is to find out exactly who those agencies and people are. Conventional legal research is indispensable, but in every problem there will be items, sometimes the most important, which cannot be learned by consulting legal texts.

Let us concern ourselves, for the moment, primarily with the things you would want to know rather than the methods you would use. You go down to the bar for a drink and, in casual fashion, ask people who look like "regulars" who the Mayor is. You may then ask who the Boss is. With a question like that, you are conceding that there is a real possibility of a discrepancy between formal legal institutions, which we will call "authority," and actually effective institutions which, for purposes of contrast, we will call "control." The fact of the matter is that in many municipalities and organizations, in states and even in national polities, there are both formal institutions of the law and effective "machines." The two are not always congruent. From your basic legal studies, you know that in formal law there can be many overlapping and in some cases, inconsistent, systems of law: federal, state, local, religious, not to speak of the internal "law" of corporations and other business entities. Informal law may manifest even greater complexity, for it rarely has principles of "choice of law" or "conflicts rules" for dealing with the clash of incompatible norms.

Your questions about the Mayor and the Boss indicate a conception of legal processes as requiring a certain amount of effective power or control. You are conceding that, in some circumstances, formal institutions may not have that effective power. The implication, of course, is that the lawyers, seeking to predict how decisions will be made in that particular context (not to speak of trying to influence their outcome in favor of a client), must identify the effective power process in that particular community. If power processes are not congruent with the formal processes of the law, must the lawyer become adept at identifying and
manipulating them so as to serve his client? And what of the ethical issues raised by this?

The documentary study your firm completed even before you came to Penntown identified formal and "legal" decision-makers from the "black-letter" statutory and other documentary materials available. But now that you are on the scene, it becomes clear that those documents capture only a part of the picture. Indeed, the part of the picture they reflect may be incorrect. The City Council, the documents say, makes decisions. A day or two in Penntown may reveal that fundamental policy is actually made in a series of informal meetings taking place in country clubs, business lunches, periodic meetings of merchant associations, and so on. The City Council, you may discover, really does no more than validate or promulgate decisions and policies clarified elsewhere.

In their informal meetings, the town's elite may themselves respond to a variety of other pressures. Economic decisions may be influenced by the demands or anticipated demands of different labor groups; representatives of some of those groups may actually be in these meetings. The decisions may also be influenced by the anticipated demands of church groups, of environmentalists, moral majoritarians, and the ever-present media. And, unhappily, the decisions may also be influenced by plainly illegal groups: gangs, crime syndicates, and so on, significant political factors in all too many settings. The point is that information necessary for understanding how decisions are going to be made in Penntown, the sort of information your client needs and the sort that is not elicited from documents, requires a type of inquiry that formal legal education rarely addresses.

I am not certain that it is necessary to design a special course on the identification of power variables in social processes, though the assessment of power is extremely complex. Rather, I would suggest that this factor be incorporated as a regular component of existing courses.

F. Relating Law to the Production and Distribution of Social Goods

Because I believe that law, in important part, is an instrument for influencing the production and distribution of things that people want in a particular community, I think it
important for students who are designing legal systems or appraising their performance to have at hand a way of examining in detail and through time what is being produced and distributed. This is a task which cannot be discharged by reference to a general notion of “things” or “goods” or by such supposedly humorous but actually self-mocking pseudo-empiricisms as “widgets” and “firmstrams.” Performance of this task requires developing a more refined way of referring to the things that people want and the specialized processes for their production and distribution.

Harold Lasswell addressed this problem by suggesting that the things people want can conveniently be referred to in terms of eight “values.” By value, Lasswell meant no more than things or events that people desired: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude. Specific sectors of society concerned with the production and distribution of each value or, as Lasswell put it, its “shaping and sharing,” can be studied for purposes of understanding them or planning interventions to change them.

Equipped with this type of analysis, an observer can describe any process with whatever detail he or she wishes and with a precision which permits one to identify different factors that influence behavior and might be manipulated to bring about change. The phase and value analysis can also be used to describe the comprehensive community process, the effective power process within it, and the constitutive process described below. In a particular community, the outcomes of any of these processes can then be described in terms of the actual distribution of the critical values under study: power, wealth, enlightenment, and so on. Can these conceptions and models of social process which seek to orient student, and later, lawyer in the complex environment of which he or she is a part and which is the target of influence be left to folklore and the curriculum of the corridors? I believe not. Can they be incorporated, without formal curricular change, into existing courses? Indeed, they should, but I believe they merit formal treatment in a first-year course or seminar designed to equip the young lawyer with a set of techniques for describing in detail those sectors of social process of concern, recording trends and making projections about future developments there, and inventing al-
ternative methods for intervention. I propose that we develop a course that Karl Llewellyn might have called “What Are We All Really Concerned About.”

G. Constitutive Process

Power and structure necessarily bring us to the issue of “constitutional” law. The constitutive process, as my colleagues and I prefer to call it, is concerned with decisions about the establishment of those institutions which are specialized to making decisions. These are decisions about decision-making itself: establishing who may make which decisions or perform which functions of decision, the general principles or policies about decision, the places and formalities in which decisions are to be taken, the symbolic and material resources which may be and are used in decision-making, the techniques in which the resources are used, and so on. This is of special interest to the lawyer, for it is frequently the instrument through which wide-ranging changes can be economically achieved.

In many cases, it is difficult to pinpoint a deliberate and conscious effort to decide about decision-making. The pattern of decision-making and the expectation that it is right seem to coalesce from a prior power relationship which continues until all seem to accept it as right and even assume that it is the “natural, peaceful, and spontaneous” expression of group organization and an increasingly pure distillation of the wisdom of the group experience. That moment in the past when the “constitutive” decision was supposed to have been taken acquires mythic proportions. The participants, looming larger than life, are reverenced as the “founding fathers” with an intense filio-pietism that intrigued Judge Jerome Frank. The event of “constitution” itself becomes an object of civic veneration. Though the fictional and myth element in all of this is obvious, even keen and usually skeptical analysts such as Hannah Arendt begin to attribute special metaphysical properties to the moment when “authority” was created. There are, of course, initiating events in a comparative sense, and these events may be carefully staged with ritual and ceremony to underscore their solemn importance. The elite or leadership of subsequent generations may carefully maintain a collective memory of this event, may improve it, or even create the
ceremony and solemnity retrospectively so that the entire event becomes a symbol of the group and a celebration of its distinctiveness and continuity.

But the fundamental decision-making process of a group can in no realistic sense be viewed as a frozen legacy or relic of the past. There is a constant stress for change and for stability by different groups and individuals using the different power bases at their disposal. The constitutive process constantly accommodates to basic dispositions of authority and effective power. To be sure, every change is presented in terms of continuity as a way of maintaining the basic expectation of authority. Courts “follow” past precedents; politicians hew to the “intentions of the founding fathers,” and so on. The fictions in all of this are embarrassingly transparent. What we call a “constitution” is really an opaque symbol for a constitutive process in which a variety of groups and individuals drawing on bases of effective power and authority symbols seek to create, sustain, or change the fundamental institutions of decision-making in a community. I believe that a course in constitutional law worthy of the name cannot study only the selection of issues reviewed judicially by a single institution. That is a course in judicial review. A study of goals, trends, conditions, predictions, and alternatives in constitutive decision must work with a model that includes all effective actors in that process and the aggregate effects of the process in terms of all values.

H. Learning How to Make Decisions

Shortly after I joined the faculty at Yale, I was invited to sit with some senior colleagues who were interviewing a candidate for the faculty. Naturally, the candidate had all the appropriate paper from prestigious institutions. After my colleagues had patiently heard him analyze the legal subject which he had been researching and on which he intended to write, one of them asked him how he would go about making a decision when the issue arose. The candidate reflected and then asked to hear the question again. It was rephrased and the candidate responded, “I’d close my eyes and jump.” He was not invited to join the faculty.

The essence of the professional lawyer’s task is specialization in making and appraising decisions. Most traditional
jurisprudence assumes that legal decision is an exercise in logical derivation: One identifies a rule which is expressed in general terms and specifies it to a particular case by a process of logical inference. A “legal” decision, this sort of theory holds, is a reasoned decision, i.e., a decision which is derived by processes of logic from some general premise. Since this method can only go as far as the rules go, there comes a time when in the absence of an alternative, its practitioners have no alternative but to “jump.”

Obviously, the jurisprudence with which I work and which is the basis for these curricular suggestions must reject such an approach. For our purposes, a decision is a choice aimed at optimalizing the aggregate interests of the person making the choice and of the community or communities of which he is a member. From our perspective, the quality of a decision is based not upon its logical consonance with some general principle, but rather with the conformity of its aggregate social consequences with a variety of goals that we have tried to specify. The question, then, is what are the steps by which a choice can be made.

A characteristic of life in a consumer-based society is the ongoing making of choices by each of us for ourselves and often for others. Many of these choices are made on the spur of the moment and appear to be intuitive. Other choices, for example about career, about investment, and so on, are made with more time and deliberation invested in them. The procedures for making choices in large complex organizations may coordinate the efforts of thousands of people, including experts from many disciplines, and take months or years.

Lawyers who must create new organizations not only make choices but design continuing choice-making procedures which will incorporate others. They must be able to describe these with sufficient clarity so that others can learn them and assume the roles designated. Decision, then, may be a spasmodic “gut” reaction, but it may also be described and analyzed in a more systematic fashion.

Imagine, for the moment, that you are thinking of going to law school. How would you design a strategy that would increase the likelihood of your being accepted to the school you prefer? If you reflect on this problem for a moment, you will see a series of tasks you must perform at some level
of consciousness; the efficiency with which you perform them is likely to increase the chances of realizing your objective.

Consider first the question of which school. In decision-making, a problem is a discrepancy between what you prefer and what you predict. Before you can determine what your problem is, you must have a clearer idea of what your preference is. A determination of your objective or goal is more than simply getting into a law school. If, for example, you view law school as a step towards state office, plainly you maximize your chances if you go to law school in your state, as it will increase the contacts you will make with others who will be instrumental in achieving your goals. If you are interested in law as an intellectual pursuit, law school itself may not be necessary, but if you set your mind on it, you may determine that some schools are more likely to give you better preparation for intellectual inquiry into law than others. By the same token, if you are interested in law as a way of becoming wealthy, other law schools will present themselves as most attractive.

The determination of what your problem is will require, then, a rather precise statement of what your preference is. Let us refer to this primary intellectual task in making decisions as the task of goal clarification.

The specification of your goals delimits a specific part of past experience which may be relevant to their achievement. It is quite reasonable for you to ask yourself what you or others in similar situations achieved with respect to this or a comparable goal in the past. Such an inquiry will suggest to you what strategies are appropriate to adopt, what obstacles you can anticipate encountering, what resources and allies you can mobilize, and who your major adversaries or competitors will be. Review of matters in the past relevant to the realization of your goal can suggest the possible techniques available for its future realization and permit you to appraise each of them in terms of their past success or failure. Let us call this task of review of past trends, trend analysis.

Of course, things that have happened in the past do not necessarily repeat themselves in the future. For one thing, events in the past are embedded in a context which influenced their outcome. If you were certain that exactly the
same context of conditions would prevail in the future, you could with some confidence assume that the same strategy used in the past would be likely to yield the same result in the future. But conditions often change: in some cases radically, in other cases in limited ways that can still influence outcomes. Your review of past trends will be useful to you in determining future options and strategies only if you ascertain what context of conditions prevailed in the past and whether or not that context is identical or similar in projected futures. This intellectual task of identification and analysis of conditioning factors may be called, for convenience, factor analysis.

Consider our example of the problem of gaining admission to a law school. Salient changes in conditioning factors might include new legislation which requires schools to adopt admissions policies and procedures favoring members of certain minority groups. If you are a woman, you may conclude that your chances in the past would have been substantially less because of bias against women practicing in the legal profession. A changed conditioning factor which has either eroded or penalized that prejudice may indicate greater possibilities for you for general, and in particular, access to schools you might formerly have deemed impenetrable. If you are a member of a minority as defined by the federal government’s Affirmative Action programs, you know that this particular conditioning factor now enhances the possibilities of admission far beyond what they might have been a generation ago. Conversely, if you are not a minority member, you may calculate that your chances have decreased proportionately, for the limited number of places available in any entering class has been reduced, for you, by the policy of reserving a certain number for members of specified groups.

Law speaks reverently of the past and implies that it is concerned only with securing fidelity to certain agreements or prescriptions made in the past. In fact, law is concerned only with the future. Its concern, as the concern of anyone involved in problem-solving or choice-making, is to devise a strategy that will increase the likelihood of the eventuation of desired events (or avoidance of undesired events) in the future. But this requires some way of assessing what alternative futures may hold. In our law school example, you
must, on the basis of the three prior tasks, make certain
matter-of-fact projections about the likelihood of your achieving
your goal by use of some of the techniques you have derived
from past experience. No one is a prophet, but it is possi-
ble, as I suggested earlier, to project a number of fictitious
futures and to see whether any of the techniques you have
considered thus far appears to promise success in those fu-
tures. The efforts to project different images of possible fu-
tures and to incorporate them in your choice-making may be
referred to as prediction.

You will have noticed that the intellectual tasks of deci-
sion we have considered must be used, in one fashion or
another, by specialists in many disciplines other than law.
Trend analysis is one of the functions of historians. Factor
analysis is the sort of thing that sociologists are often en-
gaged in. The predictive function is a task in which virtually
all social scientists must engage. The distinctive contribu-
tion of the lawyer to choice-making is the determination of
alternative strategies for achieving goals. If your canvass of
the prior intellectual tasks indicates that one of the older
methods reviewed in your study of past trends is likely to
achieve your goal, you may simply apply it. But if you think
that it is unlikely to achieve your goal or if you think that
there are alternatives that may increase its likelihood of real-
ization, the intellectual task then becomes one of invention
of alternative methods. People generally seek out lawyers
when they have some idea of what they want and some idea
that their wish is not likely to be realized unless some addi-
tional efforts are undertaken. What the lawyer then does is
invent alternative strategies. We refer to this task as the in-
vention of alternatives.

Should decision-making be left only to the curriculum of
the corridors? Certainly not. On the other hand, it is not at
all certain that it is necessary to create special courses and
seminars for it. This is a matter which should be incorpo-
rated into all courses, though oriented toward decision-mak-
ing in the unique subject-matter of each.

III. The Organization of Time

I have spoken generally about a way of constantly relating
the content of curriculum to the needs of the society which a
lawyer at different points in the future will be concerned
with. I have also considered what I believe are jurisprudentially-mandated elements or foci in any curriculum. I conclude this part with some brief comments on the time-structuring of a curriculum. Though this is a much lower level of discourse, it is a matter of some controversy and does relate to some of the general principles I have tried to sketch earlier.

Time is a technique of social organization, and its manipulation and variation may secure more effective uses of the energies of human beings, different patterns of coordination related to the needs of the projects under consideration, and different configurations of cost and benefit. You will have noted that there is an oppressive uniformity in the time structuring of law schools. Three years are divided into six semesters, each consisting of fourteen weeks, and courses are distributed, for the most part, in those identical time units. That pattern of structure serves a number of purposes, the first being that it secures a uniformity among the institutions concerned with training lawyers throughout a national community of more than 200 million people. The uniformity also permits institutions purporting to perform quality and content controls, such as bar associations, to make comparisons and apply standards in a roughly equal fashion to the institutions distributed throughout the country. It also simplifies the organization of work within law schools and routinizes the lives of those who teach law.

Does this uniformity serve the purposes of legal education? Some material can perhaps be well-taught in fourteen consecutive weeks of two, three, or four hour classes. Other material may be best conveyed to students in programmed learning systems without formal coursework. Other material may be conveyed in two or three weeks followed by examinations. Some courses or seminars may be best suited for time periods of less than fourteen weeks while others should perhaps extend over one or two years. The point is that those who design curricula should explore the possibilities of varying time configurations in order to optimize the object of legal education.

Conclusions

Are changes on the order I have proposed possible? The obstacles, many of which represent cogent and valid objec-
tions, should not be ignored. There is division, sometimes fierce, about the ultimate objectives of legal education. Though there are many voices, there are essentially two basic approaches or traditions. One, which I have adopted, is the notion that the structure of a school, as well as the structuring and reappraisal of a curriculum, are all designed to make both the school and its curriculum instruments for the achievement of certain external, social consequences. This, in turn, is based on my conviction that the lawyer is a specialist in decisions and that, at all levels, the profession is, in large part, a service industry which distinguishes itself when it serves the common interest. Since the Nineteenth Century, the idea of the cultivation and pursuit of knowledge for the common interest in many areas beside law has become a strong demand in national political systems. Modernizing governments create institutions of higher learning, design their curricula, and establish networks of diffusion. The great Land Grant College experiment has been one of America’s major contributions to this development.

But, given the Western university tradition and a variety of social controls that operate within the organization called the university, it is far from self-evident truth that schools of higher education exist for any social purpose beyond themselves. From Plato on, a conception of the pursuit of higher knowledge has been that those specific institutions within which the pursuit takes place as well as the entire environing socio-political system are designed to support the pursuit of enlightenment for a limited number of people. Plato’s Republic, it should be remembered, was ultimately structured to permit Socrates and his colleagues to pursue enlightenment for themselves; they did not pursue enlightenment in order to enhance the life opportunities of all within their putative Republic. The medieval notion of the autonomy of universities and the modern notion in many countries that police and military forces are not permitted to operate within universities as well as our own jealously guarded notions of academic freedom all derive from this tradition.

In the United States, in most institutions of higher learning, these two traditions operate in an uneasy but systemically beneficial coexistence. Professional schools, such as law and medicine, claim to be graduate schools, as part of
universities, as well as professional schools, training individuals in special skills which they will then market to the community at large. Incipient conflicts between these two tendencies are often glossed over by saying, with some truth, that pure research is practical—what is pure today will be applied tomorrow, and so on—but, peace-making efforts notwithstanding, the conflicting views must eventually clash.

Insofar as the schools in which lawyers and other decision specialists are trained are deemed to be professional schools, it is appropriate to consider their re-design in order to produce a product best-tooled to serve the community in the Twenty-First Century. Insofar, however, as the same schools are deemed to be graduate schools engaged in the pursuit of enlightenment for its own sake, no individual or self-selected junta is entitled to instruct individual scholars as to what they will pursue or how they will pursue it.

Because American law schools are a hybrid, drawing on both the professional and academic traditions and because these ultimately cannot be unified, the real possibilities of redesigning, a fortiori implementing a curriculum so that it is one or the other are constantly bounded by the opposition of the other tendency. Comparable tension may be found in contemporary medical schools. There, however, it has become so obvious that the frontier of research is ultimately related to the practice of contemporary medicine that some of the resistance of the "professional" wing has been blunted. Yet it is striking how much of contemporary medical research is being conducted not by physicians but by molecular biologists and physicists.

What is considered "pure" research in contemporary American law schools, in contrast, is not clearly related to the performance of the intellectual tasks we associate with professional legal practice at what might be called the basic or field levels. Indeed, one often detects among those who claim to be engaged in the "purest" of inquiries a certain derisory attitude toward the "lowly practitioner," a cultivated pride in impracticality, and a conception of the lawyer's role reminiscent of Moliere's Bourgeois Gentilhomme (IV, 3), who sought to elevate his own social status by explaining that his father had not been in business, Heaven forbid, but rather gave fine pieces of cloth to his friends . . . who gave him money. The possibilities in some professions for ac-
commodation between conflicting tendencies thanks to a momentary conjunction of theory and practice are not available to us.

These observations do not rule out planning curricula, but they do draw attention to certain structural limitations militating against change. Yet the limitations within a single institution on changing curricula may be unimportant nationally, given the number of law schools and the diversity of functional jurisprudences. A number of observers of American legal education have noted that the 150 or so accredited law schools have developed different relationships to different levels of the practicing Bar, different functional theories of law, and tend to recruit students with interests in particular types of practice or to place their students in certain types of practices. As a result, one finds in the United States a general integrated theory of law held by all members of the profession and, within it, a variety of "sects," "tendencies," and "schisms." Some schools pride themselves on being oriented to practice; others do not. Some schools have earned a reputation for training litigators. Others have strengths in training for government service. Some schools like to view themselves as teacher seminars. The variety of jurisprudences means that experiments that would be stoutly resisted in one school may be enthusiastically undertaken in another. The results, once leached into the grapevine of American legal education, may then be sufficiently attractive to be tried in some of the schools that had initially resisted them. At the same time, programs that the more experimental school might have resisted will be tried in a more conservative school, and their results may then persuade others to exploit them. The loops and inter-stimulative patterns of American legal education are one of the major forces for a net record of aggregate experimentation and change in our legal education system.