

Some Thoughts on Legislation in Legal Education

by Quintin Johnstone*

I am in strong agreement with Professor Williams about the need for more emphasis on legislation and the legislative process in the education of law school students.¹ He is, of course, quite right in stressing that legislation is the primary source of law in this country and that those preparing to become lawyers should not only master the techniques and doctrines of statutory interpretation, but should have a thorough understanding of legislative institutions and legislative lawmaking as well.² Practicing lawyers must work extensively with statutes in ascertaining and applying existing law. Even more than case law, statutes are essential legal sources in the work of lawyers. In their practices, lawyers may also find highly useful the ability to draft proposed legislation, to predict with some reliability future legislative action, and to convince legislators of the merits of certain pending bills. It would seem obvious that the schools that train lawyers would focus heavily on legislatures and legislation in order to provide students with the requisite skill and understanding to deal most effectively with this crucial aspect of law. Instead, however, the law schools overemphasize the judicial process and appellate court case law at the expense of legislative procedures and statutes.

Why this downplaying, even neglect, of legislation by the law schools? Although he touches on other reasons, Professor Williams seems to attribute it principally to a teaching and research preference by law professors for the more fluid and superficially, at least, more creative and exciting

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1. Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 *MERCER L. REV.* 803 (1984).

2. *Id.*

process of judicial decisionmaking in the common law tradition.³ As he says, "In some ways there is *no fun* left when a statute enters the picture."⁴ I have difficulty accepting this explanation, for statutory lawmaking with its pressure groups, political controversy, and frequent compromise often has an excitement and intellectual fascination exceeding that of lawmaking by courts. Statutory implementation, especially in the high visibility public sector, also often raises dramatic and intellectually challenging issues.

The principal problem I see with legislation as a subject of law school instruction is how it can be taught in a manner that is satisfactory to law teachers and law schools. Professor Williams recognizes this problem when, toward the close of his article, he quotes a friend as saying that if Williams could develop a way to teach effectively legislation he could become another Langdell.⁵ One difficulty is that, except for statutory interpretation, the case method, built around appellate opinions, is unsuitable for teaching legislation. Without casebooks that rely heavily on appellate opinions, most law teachers are lost when it comes to teaching large classes. Reliance exclusively or even primarily on lecturing is unacceptable, and since you cannot lecture and the case method does not fit, what do you do for a semester with a sizable class?

Statutory drafting can be taught effectively on a tutorial or perhaps even small group basis but, I submit, generally not in large classes. Reed Dickerson's *Materials on Legal Drafting*,⁶ that West recently published and that Williams' article refers to,⁷ may be a satisfactory teaching tool when Reed Dickerson teaches a large drafting class, but I doubt if many law teachers have the dedication, patience, or competence to use the Dickerson approach effectively with such a class. Nor are many law schools likely to sectionalize a statutory drafting class into numerous small groups so that teaching can be carried on in units of appropriate size. Cost is a deterrent. Except perhaps for small groups in one or more basic first-year courses, most schools feel they cannot afford to extensively sectionalize large classes. Even on a one-to-one or small group basis, there is a further difficulty with law school instruction in writing and drafting. Most law teachers dislike this kind of teaching assignment, try to keep it to a minimum, and avoid it when possible. It is a dull, tedious, and very time consuming job, approaching in misery, when done properly, the grading of examination blue books. With the many law students whose writing ability is barely at a college freshman level, the task is even

3. *Id.* at 833.

4. *Id.* (emphasis in original).

5. *Id.* at 843.

6. R. DICKERSON, *MATERIALS ON LEGAL DRAFTING* (1981).

7. Williams, *supra* note 1, at 825.

more onerous, and law teachers may correctly feel that they are not qualified to teach basic college English.

How, then, should legislation be taught? Professor Williams does not tell us but says it is a challenge and with "creativity, resources, a willingness to experiment, and hard work," suitable teaching methods can be found.⁸ He convincingly points out the need but modestly refuses to recommend solutions. It seems to me that the solutions are fairly apparent and that the Williams' article mentions most of them. These solutions will not, however, ensure what Professor Williams seems to want, which is that legislation, in one guise or another and in all its facets, be a major part of the curriculum in most law schools. Better teaching methods, better teaching materials, and better teachers should make legislation a more respected and more popular subject of instruction. But with so many new subjects pressing for curricular recognition and the schools responding with an indiscriminate smorgasbord of offerings, it seems improbable that legislation can take over a central place in the curriculum unless law school teaching programs are drastically restructured. Fads exist in legal education as elsewhere in social life, and legislation may take its turn in the future as have clinical education and law and economics in the recent past, without law schools changing much in other respects.

One solution to the legislation teaching problem is for legislation teachers to focus on statutory interpretation. This approach, which Professor Williams apparently does not favor,⁹ has the advantage of dealing directly with subject matter persistently relevant to all lawyers and law students. Systematic coverage of interpretative rules, concepts, and techniques can be extremely useful and is far preferable to attempts at covering this subject matter by the always dubious pervasive approach. The nature of ambiguity in statutory language and how lawyers and courts can narrow or broaden that ambiguity are matters of great significance in all advanced legal systems. Even the canons of construction, which in application can be weak rationalizations for reaching decisions on statutory meaning, have at least adversarial value and lawyers should be familiar with their utility and their weaknesses. When teachers focus on statutory interpretation, they will find that this aspect of legislation has the added advantage of being well-suited to use of the case method and large class instruction.

The solution for teaching statutory drafting, it seems to me, lies in small group or very individualized instruction in which the emphasis is on student writing that is thoroughly and critically reviewed by the teacher. Writing, including statutory drafting, is a personal endeavor that needs

8. *Id.* at 843.

9. *Id.* at 820-22.

very personalized critiques if through the teaching of others this mode of expression is to be improved. This personalized form of teaching is essential, costly, and burdensome when applied to student writing, and should be recognized and rewarded as such. If regular members of law faculties will not conscientiously and competently take on this kind of teaching assignment, part-time adjuncts can be found in most communities who will. Lawyers with considerable legislative drafting experience are the most likely prospects for such jobs, but there are many teachers in college and university English departments, if given some background in law, who would be excellent potential law school drafting instructors. Professors of English, with special interests in legal writing, are being hired by some large law firms to improve the writing abilities of their associates. Clearly, these persons would also be effective in working with law school students.

To give more meaning to student drafting work, it is best if the assignments are for real clients who will, if the work is properly prepared, submit the end products for legislative adoption. In some instances, it can be useful to both clients and students if the students submit supporting memoranda with their statutory drafts on the constitutionality or probable impact of what they are proposing. As Professor Williams points out, a few schools have legislative drafting centers or services in which student work is used.¹⁰ Other schools can rather easily and cheaply establish such services when the principal purpose is to generate student drafting projects. When no charge is made for work performed, it is surprising how many responsible interest groups there are, including legislators and legislative committees, who desire help in preparing legislative proposals.¹¹

A wider range of choices is available for successfully teaching other as-

10. *Id.* at 824.

11. For example, Yale Legislative Services (YLS), a Yale Law School student-managed program for which ungraded course credit is given for legislative assignments, had ninety-five projects available in the Fall of 1983 on which students could elect to work. YLS projects generally entail drafting of bills, legal and policy analysis, or discussion and criticism of existing or proposed legislation or regulations, and, more typically, some combination of all of these. Illustrative topics on the Fall 1983 list are fiscal autonomy for local boards of education in Connecticut, revision of the proposed federal Synthetic Fuels Corporation Act of 1983, tax exemption for religious cult organizations, removal of zoning law barriers to the provision of home-based day care centers, regulation of New Haven street vendors, needed improvements in Connecticut's farmland preservation programs, evaluation of water supply management laws in Massachusetts, voting rights for District of Columbia residents, handgun control in Connecticut, strengthening workers' compensation laws in Maine, state regulation of industrial plant relocations, second opinions for surgery covered by Medicaid, alternative financing for Rhode Island schools, New Jersey regulation of highway access, and Connecticut air pollution control. Proposals for projects come mostly from legislators, public interest groups, and government organizations. No charge is made for project work.

pects of legislation, including the legislative process and predictability of legislative behavior. One is the well-led seminar that probes some aspect of the legislative process in-depth.¹² Another is the course or seminar that considers proposals and prospects for legislative change in a major field of substantive law, such as federal or state income taxation, antitrust, public welfare, or environmental regulation. For law schools in or near a state capital, an added possibility is a seminar dealing with the work of a current or just completed legislative session, using guests active in the legislative process. The same type of format might be used by law schools in large cities for contemporary sessions of the local city council, as legislation also encompasses the work and work products of local government legislative bodies. These, then, are examples of the many kinds of valuable and interesting offerings on the legislative process that innovative law teachers can develop and use to provide students with a realistic understanding of how legislatures work and statutes evolve.

Offerings of this type have an added advantage in that they can be shaped to further research interests of teachers working on legislative process problems. They are also conducive to productive collaboration with political scientists. In this interdisciplinary era in law school teaching and scholarship, political science and political scientists are not receiving the attention they deserve. In their mutual concern with power and the institutions of power, lawyers and political scientists have a close affinity. Despite these close intellectual ties, the law schools seem to be drawing more new and useful ideas from economics, sociology, and history than from political science. Joint teaching and research efforts by academic lawyers and political scientists on legislative process problems might well be worth the effort.

Whatever one's views on the utility of legislation as a law school subject and its proper place, if any, in the law school curriculum, I suggest that implicit in the Williams' article are some basic issues in legal education that should be considered by any symposium that purports to deal seriously with American law schools and what they should be teaching. Debate over legislation and how it should be taught can be looked on as the catalyst for opening up a more searching inquiry into broader issues of contemporary legal education and the goals, needs, and shortcomings of present day law schools. I will very briefly set out some of the fundamental issues suggested to me by the Williams' discussion, issues relevant not only to legislation but to many other aspects of legal education as well. The issues are all obvious ones but are often ignored or casually glossed over when decisions about legal education are made. Although the issues

12. The seminar in Political Economy of the Legislative Process offered by Professors Klevorick and Mashaw at Yale Law School is an example.

are obvious, there is little or no consensus on what should be done about them. I will conclude with a few observations on how certain of these issues might best be resolved.

One issue faced by every law school is what should be included in the curriculum. Should there be a basic core curriculum, and if so, what should it be; to what extent, if at all, should particular courses be required of all students, and if so, which courses; and can and should there be a sequential structuring of law school offerings, with more advanced courses and seminars being based on more elementary or introductory offerings that preceded them? Very closely related to these questions is the issue of who should decide curricular matters. Should this be the prerogative exclusively of the teaching faculty; and if it should, is it preferable that the faculty act collectively, individually, or through committees? Should the principal consumers, the students, have a voice? Should the practicing profession, through organizations that accredit law schools, or the courts, in setting bar admission standards, mandate what the law schools teach in whole or in part? Is there a constructive role that university administrations or non-law school faculty members could be playing in determinations concerning law school curriculums?

Another patent legal education issue concerns what law schools should try to teach their students and what kind of mix there should be in seeking to impart information, communication skills, reasoning ability, advocacy techniques, professional socialization, morality, interpersonal sensitivity, and whatever else may seem relevant and feasible. Obviously, a major objective of law schools is training prospective lawyers, but of what should this consist? There is vast variety among lawyers in what they do, what they need to know, and what aptitudes they must possess. Lawyers are now such a heterogeneous group that, arguably, there is no longer even a single legal profession. How should the law schools approach this variety problem and should all law schools have the same mix of goals, or should each school try more consciously to shape its educational programs to meet the needs of students it attracts and the available market for these students upon graduation? Furthermore, how much of lawyers' education should be left to their post-law school experience, including learning on the job and continuing legal education?

The last issue I wish to raise concerns law school resources: what resources should be available to law schools for performing their educational functions? Most particularly, what should be acceptable faculty-student ratios? Should law faculties continue to be staffed principally by career teachers of the present average high caliber, and how should law teachers hired full-time allocate their energies among teaching, research, and such other activities as administration, law practice, and professional and community service?

In my view, law schools and others with an interest in legal education

should begin to think seriously about undertaking a major restructuring of law school educational programs. The profession has changed substantially in recent years and will change even more in the next generation or so. The practice of law has become far more specialized, with a growing number of specialties; law offices are becoming larger and more bureaucratic; an increasing percentage of legal work is becoming highly routinized and repetitive, much of it amenable to performance by paralegals; clients are becoming more cost-conscious; and competition among lawyers for legal work is becoming much keener, with the result that law offices are giving greater attention to efficient office management, systems development for routine work disposition, and market penetration and marketing methods.

As the profession changes, the law schools must adapt if they are to continue fulfilling satisfactorily their major role of training lawyers. In carrying out their training role, however, the law schools may have to do so with less in the way of financial resources. The universities are moving into an increasingly tight period financially, and both public and private law schools are feeling the pinch. Tuition at private law schools is increasing faster than the inflation rate, threatening the long-run viability of some of these schools and the quality of most of them. In addition, a cutback in numbers of law students, even a sharp cutback, is very possible as an increasingly overcrowded bar weakens demand for new lawyers and influences many of those persons who had contemplated law school to choose some other vocation.

If the law schools restructure their educational programs in the light of existing and coming realities, what changes should they make? In my view they should concentrate on two matters: developing a rational core curriculum and setting up a series of in-depth specialty programs. The core curriculum should be largely required of all students and each student should also be required to take one specialty program and become highly proficient in that specialty before graduating. The present, widely followed scheme of relatively few required courses that are traditionally considered basic and a large number of electives scattered over the amorphous spectrum of law-related studies is inefficient both for the schools and their students. In light of today's needs, the required courses are arbitrary selections from among many useful subjects, including some of greater utility than those required.

Student elections, on the other hand, reflect generally vague preferences based on such factors as interest, perceived professional value, scheduling convenience, subject matter difficulty, demands of the instructor, and teacher popularity. The net result is a spotty and unsystematic acquisition of information and insights about law, together with the development, also spotty and unsystematic, of some useful lawyer skills. Ex-

posure to what Professor Williams refers to as "thinking like a lawyer,"¹³ if this means doctrinal reasoning in the mode of appellate courts, has been quite generally overdone to the point of diminishing returns and augmented boredom. A major advantage to the law schools, however, of the present elective scheme is that the onus of course selection is largely on the students, not on the schools, somewhat immunizing the schools from troublesome student criticism. As one sixth semester student told me recently when referring to his largely elective law school program: "I have had a terrible legal education and it is all my fault."

One format for implementing the core curriculum and specialty proposals I have suggested would be to devote the first two years of law school to a background education in law and the third year exclusively to training in a specialty.¹⁴ The two-year background program should have few, if any, electives and encouragement should be given to new groupings of subject matter in particular courses to present more effectively and comprehensively the core body of knowledge and essential skills that every lawyer should possess. Coverage of many traditional courses is in need of considerable pruning and supplementing, with some course consolidation, all in line with a rational set of overarching priorities. Legislation, it seems to me, should be given a prominent place in any background curriculum, but each school should experiment with what it considers the best possible two-year program. As no law school could afford to provide adequate instruction in all specialties, different schools would concentrate on different specialties and many students would transfer for the third year to a school offering their preferred specialty. Law schools now considered below the top in the hierarchy of educational institutions might well gain national preeminence in one or more specialty instructional areas.

One purpose of specialty instruction would be to prepare more effectively students for a specialty field of practice that they would take up upon completing their law school studies. Those students uncertain about their specialty preference might find it helpful in making a decision to clerk for a year or so in a law office or for a judge after their first two years of law school. It is certainly not essential that law school be completed in three uninterrupted academic years. Another purpose of spe-

13. Williams, *supra* note 1, at 806 (quoting J. REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 8, 9-15 (1914)).

14. I first proposed something along these lines in an Association of American Law Schools committee report some years ago. Report of the Curriculum Committee, Association of American Law Schools, Proceedings of the 1966 Annual Meeting, Part One, at 37. I am under no illusions regarding the likelihood of such proposals being adopted, but they should help in generating discussion of crucial problems in legal education that need to be dealt with.

cialty instruction would be to teach students how to go about learning a specialty field of law, so that if they eventually move into a different specialty from the one they concentrated on in law school they would be better prepared to develop competence in the new field. The ability to learn new fields of law is of tremendous importance to lawyers since, in the course of their careers, many lawyers shift specialties.

Clinical instruction could be a significant element in the background program, the specialties, or both, but it seems clear to me that clinical programs are not and will not be of equal value in all types of law schools or in all specialties. The high cost of good clinical education should also be weighed in cost-benefit terms when the role of clinical education is being considered for any kind of curriculum.

With or without such a radical departure from the current organization of legal education as proposed above, I wish to make two added suggestions. One is that the law schools demand somewhat more from their regular faculty members in the way of teaching effort. I sense a tendency of many law teachers to curtail the time they give their teaching in favor of greater attention to research and writing or to law practice as consultants to law firms. More than most academics, law teachers have looked on teaching as a high art, deserving of the best they can give and a large measure of their working time. Legal education could suffer severely if, because of personal scholarly interests or the lure of practice, teaching is relegated to a subordinate concern performed as a necessary but hindering chore. This is not to say that law faculty research and writing are unimportant or that law teacher consultation is never justified, but rather that the law schools should take steps to prevent a serious imbalance in faculty priorities with highly adverse results for students. The law schools should not be permitted to go the way of so many graduate departments in other disciplines.

My other point is that the legal profession should leave matters of pre-admission legal education to the law schools and not attempt to mandate requirements that could shackle the educational process and block innovative change in what and how law is taught to those preparing for the profession. Competition among schools provides major assurance that quality legal education will be retained and will effectively adapt to changing professional needs. The courts and the bar associations are prone to intervene in legal education without adequately thinking through the dysfunctional risks and adverse consequences inherent in the requirements they impose. Furthermore, the bar has assumed principal responsibility for post-admission legal education through continuing legal education programs. Continuing legal education has tremendous potential but has been underfinanced, has been pedagogically deficient, and has had far less impact than is desirable. If the bar is to retain its responsibility for this aspect of the educational process, perhaps it should concen-

trate its educational efforts more fully on continuing legal education, an area in which the need is substantial and there is so much yet to be done.