

CHANGING RESPONSIBILITIES OF THE LAW SCHOOL: 1868-1968

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If we compare the announcements of courses offered in the University of Wisconsin Law School in 1868 and in 1968, we see, first, some reflections of the history of curriculum—of changes in the formal pattern for learning law. We note a several-fold increase in the number of courses, the development of a longer-staged and more graduated arrangement of courses, the emergence of much more specialized subject matter. The Law School of 1968 is a much more elaborately organized formal enterprise than its ancestor of 100 years ago.

To put the 1968 catalog of courses alongside that of 1868 can, however, help us to more subtle insights into the development of law school roles. Implicit in the changes in course offerings and requirements are changes in philosophy. The 1968 curriculum symbolizes the emergence of much more demanding ideas of the range, styles, and especially the purposes of knowledge for which the Law School should take responsibility. One should not read into this comparison grounds for complacent pride, that the 1968 Law School has progressed far beyond the narrower horizons of 1868. Among the faculty of 1968 there is disturbed awareness that time has developed the demands upon legal education faster and with sharper definition than it has developed the response to the new demands. Nonetheless, the school cannot get on with a bigger job without growth in ideas about what its job is. Comparison of the 100-years-apart course announcements can help us grasp key elements in the development of ideas about the Law School's missions.

The root change between 1868 and 1968 was a shift from a static to a dynamic conception of what the law is. In its exclusive focus upon a limited number of doctrinal headings, the 1868 curriculum reflected the idea that the law was a fixed body of knowledge, the content of which consisted mainly in definitions of values or procedures to enforce values, to be brought to increasing perfection of line by logical exposition. It was the point of view given classic American expression by the preface to Langdell's first case-book in contracts (1871), which characterized the law as a science, the knowledge of which was all to be found in the law reports. This was in the bad sense, a schoolman's concept. It does not take a very keen imagination to see from the 19th century law reports and statute books, and from what other documents reveal, that in practice men in the United States always have adopted an instru-

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mental view of the law. If the 19th century law school insisted on squeezing formal legal education into a few doctrinal categories determined by logic, so much the worse for the school. The working society was at the same time insisting on putting law to work: to build a family-farm economy in the Mississippi Valley; to foster the building of canals, turnpikes, and railroads; to legitimize the corporate device as a means for mustering, disciplining, and protecting capital; or to provide acceptable forms for transactions in increasingly impersonal markets. Nonetheless, the 1868 catalog of law courses faithfully expresses the main tendency of legal education of the time. This was to turn its back on the facts: that law was not fixed, that it was embodying shifting and emerging ends and means of the general life; that it operated to serve or disserve men's wants in the economic, social, or political dimensions of their living; and that—beyond what men consciously willed or desired—the law as an operating institution, along with other great institutions was shaping the social environment as much by drift and default as by directed effort.

The 1968 Law School curriculum, in contrast, represents the dominant ideas of law as process (providing legitimated means for the emergence of public policy decisions and their adaptation to experience) and as function (providing, or legitimating other provision, for the operational needs of society and of individual life). To emphasize these aspects of legal order is not to deny the reality of stable elements in law. Both as process and as function, this legal order seeks to guaranty prized values (as in the Bill of Rights) and to help create reasonable predictability in affairs (as in setting limits of potential liability in tort, or furnishing assured forms of security for lending or investing money). The continuance of doctrinal headings in the 1968 curriculum (contract, property, constitutional law) expresses the fact that in its processes and as part of its social functions, law seeks stability in terms relevant to particular ends and to time and situation. Where the 1968 approach differs much from that of 1868 is in seeing that in a society so marked as ours by the constantly shifting impress of science and technology and by the attendant high division of labor and the complexities of urban living, stability of values can only be achieved by constant adaptation and contrivance. Hence in 1968 courses focused on the ways in which public policy is made through law are prominent (for example, the Legal Process course; offerings in jurisprudence, in advocacy, and in the framing of legislation), and there are many seminars which come to bear upon emerging new areas of value definition or social tensions. The 1968 Law School is no less concerned with stability in law, but it finds the quest for stability unreal save in terms of a moving equilibrium. So, too, the 1968 Law School catalog displays a concern with the functions of law relative to needs and demands arising outside the legal order. It is a concern manifest most overtly in the addition of

courses focused upon particular relations or particular relational problem areas in the society, as with collective bargaining, estate planning, corporation finance, or public welfare administration. Here, again, the emphasis is on the dynamic rather than the static aspects of law, for such orientation upon social jobs inherently emphasizes adaptation of means to ends as well as the creative definition of ends themselves.

From the middle 19th into the early 20th century, legal scholarship enlarged its ambitions, but still within what was in practice a static view of legal order. The years from Story's treatises into the 1920's were the period of the writing of great classifying treatises. Legal research sought to bring wider areas of doctrine within tighter patterns of conceptual order. But, except for the imaginative use of history and the shrewd psychological insights in Wigmore's work on evidence, the treatise writers dealt with law as if it were a self-contained system of truth. Legal education at Wisconsin participated in and drew on the greater riches of the work of the treatise writers, as in the product of Jones and Page. However, this was development within about the same frame of reference as that marked out in the 1868 course announcement.

Radical redefinition of the law school mission began with the first explorations stirred between about 1905-1915 by Roscoe Pound's call for a sociological jurisprudence. The first major impact of the new ideas was made in the span from the mid-1920's to the eve of World War II, in the name of a realist philosophy of law. Wisconsin's law faculty had early links to this movement through Walter Wheeler Cook and Malcolm Sharp.

In their broadest reach of ideas, the realists asked that law be researched and studied always in living relation to the society of which it was a part. This law-in-society emphasis had more concrete expression in twin concerns with the social functions of law and with the processes of public policy making through law. Whether the focus was on function or on process, the result was to ask that the law school cease to treat legal doctrine as a self-contained body of truth developed simply by logic. Attention to function and process directed inquiry to the interplay between legal and other-than-legal institutions of social order, and between ends and means defined in law and those struggling to definition in other centers of behavior, in the market, the family, the church, or in the striving of unofficial interest groups. In turn, this direction of thought demanded that students become more fact-oriented, more concerned to implement Holmes' injunction that law be understood more in terms of experience than of logic. If law-in-society was the central substantive idea in this new approach, empirical, fact based analysis was the central change in method of inquiry.

At Wisconsin, as elsewhere in the law school world, the realist

movement of the 1920's and 1930's made its principal contribution through emphasis on decision making processes. To study where and how public policy decisions were made was easier than to study the social functions of law. Study of function called for drastic re-orientation of the subject matter concerns of legal scholarship, toward economics, sociology, and general history as well as the history related to social structure and values, and toward social psychology and the examination of political behavior. Such directions of inquiry asked that legal scholars make themselves at least competent amateurs in other men's specialties. They were asked, also, to embark on the time-costly business of searching out and classifying their legal data by criteria wholly different from those that had guided the former generation of legal treatise writers. Thus, despite brave talk and some limited ventures, the bulk of intellectual investment under the realist banner went into fresh examination of legal processes of decision making.

At Wisconsin the later 1930's saw a rapid infusion of a process emphasis onto the curriculum and into faculty members' research, spurred and sustained by the enthusiasm of Dean Lloyd K. Garrison. One symbol of this was the creation of a required first year course (now known as the Legal Process, original designated Law in Society) centered on examination of comparative contributions to law making by the bar, judges, legislators, lobbies, and executive and administrative officers. Another example of the new emphasis on study of process was an innovative symposium on the Wisconsin blue sky laws and their administration, published by the *Wisconsin Law Review* on the basis of lengthy team research directed primarily at the administrators' office files and resting considerably, also, on careful interviewing. Less traceable on the record, but a broadening day-to-day influence in these years was the increased attention given in established courses to critical identification and examination of areas of policy in which new law was being made, often in veiled fashion. Likewise, part of the fresh concern with study of legal process was a trend to pay more attention in the curriculum to legislative and executive or administrative activities, breaking away from legal education's inherited excessive preoccupation with the courts. Seminars addressed to public policy fields in which the growing points were clearly statutory or administrative marked this development—as in collective bargaining, cooperatives, patents, and antitrust.

After World War II, an enlarged law faculty carried on and enlarged this process orientation. The fact that both older members and new recruits to the faculty brought to the campus a wide range of experience in wartime administrative agencies reinforced this direction of interest. The Legal Process course was continued, and substantially revised and enlarged in its jurisprudential aspects. The creation of seminars continued to offer flexible means for broader attention to the administrative process and the value issues

and interest group conflicts involved in making legislation. Extension of concern with legal administration reached, for example, into pioneering research and teaching about police and public welfare administration, and about urban and rural land use controls, as well as the impact of tax and public grants administration on housing issues. Part of the expanded attention to legal processes was, also, a greater investment in study of operations of international law making agencies and of comparative law. The process orientation deepened, moreover, within the range of staple fields of the law curriculum. Thus research in contract and property law added to traditional interest in the law reports a new attention to the out of court activities of lawyers and their business clients in using, modifying, or even deliberately neglecting formal legal doctrine as they sought to shape their affairs. Indeed, after more than 30 years under the influence of the legal realists, Wisconsin's legal scholars were moving toward the conclusion that the most serious gap separating legal education from the realities of the operating legal order was the want of sufficient research and teaching attention to the behavior of the bar in matters which did not come into formal proceedings before an official agency. Concern with this gap could lead to excessive investment in technically narrow, how-to-do-it-studies. Like other schools, Wisconsin's law school in the late 1960's was feeling its way toward a workable demarcation between the scholarly responsibility of the Law School proper and the functional responsibilities of the university to postgraduate training of lawyers, in such study of working practice at the bar.

I observed earlier that the realist movement had its first and most immediately successful impress on legal scholarship and legal education through attention to process, rather than to function. Study of function refers, again, to perception, definition, choice, and appraisal of social ends of law and of the techniques or sanctions by which law is used to those ends. Ours is by its deepest tradition a constitutional legal order. This means that we do not accept law as an end in itself; we demand that it be used responsibly for the general welfare and the decent fulfillment of individual life. The social context should, thus, have always enforced a functional approach in legal scholarship and legal education. In our national beginnings, legal education did in effect respond to this part of our values, in the attention that our first teachers and writers—notably Wythe, James Wilson, Kent, and Story—gave to constitutional and international law, with their more philosophic dimensions. But the workaday bustle of 19th century growth turned legal education toward a narrow rather than a broad instrumentalism. The first felt demand upon the treatise writers in the later 19th century and in the early part of the 20th was, understandably, to try to reduce some of our turbulent movement in law to more manipulable concepts. Reinforcing this pressure was

the predominance of an abstract, analytical jurisprudence. Legal scholarship thus contented itself for years largely with logical classification of what it found in the law reports, according to abstract concepts drawn from a muddle of civil-law notions and the historical accidents of common law procedure.

Building on Roscoe Pound's jurisprudence of interests, even as they in part rejected it, the legal realists of the 1920's and 1930's called for studying the jobs which law was asked to do to contribute to a decent, workable society. In practice legal realism over the next 30 years proved better at showing up the inadequacy of the older abstractions than at putting better knowledge in their place. In the modest catalog of realist accomplishments, however, the Wisconsin Law School could claim place among the few schools which provided a favoring environment to the new directions of research and study. Before 1941 the school witnessed strong beginnings in field-based study of the rapidly emerging new field of labor law and collective bargaining, as well as in the law of antitrust, of cooperatives, and of patents. A sharper focus upon the social functions of law inherently required that the Law School reach out for new styles of cooperation with or borrowing from the social sciences. The pre-War years thus saw the development of a number of seminars conducted jointly by faculty from the Law School and from the economics department with students drawn from both disciplines. Efforts to make good the interruptions of the War time and to cope with the flood of students which engulfed the school from 1946 through 1949 made it hard quickly to resume experiments in functional study. But the pre-War efforts had planted beginnings too strong to be denied. From about 1950 on the Law School was again marked by a strong research bent, directed toward more self-conscious exploration and testing of social goals and means-to-ends relationships in various areas of public policy.

The continued concern for research and course organization in terms of social functions of law found important new support in the 1950's and thereafter. Before the War money was chronically scarce for research in the social sciences. In the allocation of such little money as there was, inquiry into law was almost never regarded as within the realm of social science. A significant, if delayed, product of the legal realist enthusiasms of the 1920's and the 1930's was the stimulation of legal scholars to make demands which they had not before thought of making upon social science research funds, and the inclination of the fundholders to take an interest they had rarely before shown in the possible contributions which legal research might make to economic, sociological, and political knowledge. Wisconsin's law school was one of a handful which pioneered in opening new communication between legal research and social science research funds sources. Compared with sums made available in other social science fields, only a modest

amount of research dollars came to the Law School. But the new resources provided critically important leverage for the fledgling beginnings in more functionally oriented research. First, from the Rockefeller Foundation the school obtained a long-term grant in aid of research into the historic relations of law to the growth of the American—and, specifically, the Wisconsin—economy. Next in time, the Carnegie Corporation gave the school funds which for several years provided fellowships for law-in-action research, emphasizing the measurement of formally declared public policy against the realities of enforcement or follow through (or lack of follow through) in administrative offices, in courts, and in lawyers' offices. From the Ford Foundation the Law School obtained funds which made it possible for faculty members to buy free time to enlarge their knowledge of economics and sociology as a basis for more subtle definition of problems of the social functions of law. From the Ford Foundation also came money to sustain bold new ventures into study of the administration of criminal justice, emphasizing particularly the important but neglected area of administrative process presented by the activities of the police. The Russell Sage Foundation provided money over a generous span of years to help launch new collaborative efforts between sociologists and legal scholars. This program provided a frame of reference broad enough to encompass work reaching from concern with roles of contract law within modern corporate bureaucracy to study of the administrative process in public welfare services. From Rockefeller, Ford, and Russell Sage came, also, funds which made possible several-weeks-long summer "seminars" in which participants were faculty men from law and the social sciences, drawn both from within the University of Wisconsin and from outside, devoted to exploring new fields of research into social functions of law in government contracting, patent policy, criminal justice administration, business use of contract law, land use controls, and other growth areas of public policy. Stimulated by such leads from the foundations, the university broke new ground by adding a research heading to the Law School budget, and steadily enlarging the allocations from the mid-1950's on. This new internal support the Law School devoted almost entirely to provision for graduate fellowships, for research related to the principal research concerns of faculty members pursuing the new functional emphasis. Finally, an additional source of research support entered into law school planning when in the 1960's faculty members embarked on a number of research contracts with the federal government, notably in relation to highways and to natural resource use problems.

A more dynamic conception of legal order, translated both in teaching and in research into greater emphasis upon process and function, brought gains and problems by 1968. The gains were some movement toward bringing legal education and its underpinnings of knowledge closer to the living reality of the society. This move-

ment promises more vitality in legal training: to present law not just as completed doctrine but as the evolving product of distinctive processes for using power, measured against functional needs of individual and social life, promises potent challenges to students' boredom or laziness. To orient legal scholarship toward the dynamics of process and function was to bring a university law school closer to meeting the proper demands for service made on it by the society which supported it. In Wisconsin as elsewhere in the 20th century this public service role of the law school tended to mount in relative importance. Social relations took on increasingly sensitive interdependence which put heavier and heavier penalties on surrender to inertia, narrow interest, and ignorance. The society thus had growing need of the help it could get from institutions like the university and its law school, organized to bear the time costs and to supply the detachment from immediate interest, involved in effective handling of public policy.

The new directions brought costs and unresolved problems, too. For the useful leverage of foundation derived or government contract funds the school could—were it incautious—pay an improper price in subordinating scholars' initiative to concerns defined by others. However, the law faculty was alive to the potential issue here, the foundations were content to make their grants with broad scope of discretion to the grantees, and government needed university service enough to make its bargains in terms which respected insistence on scholarly autonomy within agreed upon general goals. However, the new directions in legal research spelled a new order of costs. Hence, there was an underlying tension here which would continue and would have to be dealt with by the school in an attitude of steady vigilance.

Insistence on process and function oriented teaching and research in law spelled more difficult problems of law school administration. Such insistence could be met only, on the teaching side, by more seminars and ready flexibility in changing course and seminar content. It could be met, on the research side, only by more investment of legal scholars' time in learning workable competence in appropriating the useful products of social science, and in pursuing inherently expensive factual studies (not only in documents, but in field interviews and in field observation of ongoing affairs). University budget makers and legislators who scrutinized their budgets were not accustomed to such expansive requests from this quarter; the older, familiar tradition was that the Law School was one of the blessedly less expensive divisions of university operations. Time costs were as weighty as money costs in the new research context. To advance matters to any substantial extent within a reasonable time meant that the law faculty must be large enough to service the curriculum, while allowing a fair number of men to be on leave at any given span of time. This pattern emerged as a pronounced feature of the school from the

early 1950's on, generously helped by the administration of both the Law School and the general university. Continuance of the pattern, it appeared, would be essential to continued healthy growth of the school.

The Law School of 1968 is, thus, a much more complicated institution—in its internal organization, its budget, its curriculum and faculty, and above all else in its conception of its mission—than its 1868 ancestor. The changes all center about active concern to see legal order as dynamic, not static, and in terms of the distinctive character of legal (as distinguished from other institutional) processes of shaping social order—by defining and measuring law's roles in society by the social functions to which it contributes and in which it participates. Though the frame of reference marks a major change in approach to legal education, it brings legal education within the abiding frame of the constitutional ideal which our deepest traditions provided for law. Because the new directions in the Law School so fit the central values of our legal order, there is reason to believe that these will remain the guidelines of the Law School's course.