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CURRICULUM CHANGES: PHILOSOPHY AND THE BEHAVIORAL SCIENCES VERSUS A DEVIL'S ADVOCATE.

PAUL J. GODA *

I. INTRODUCTION

The pressures for curriculum changes in our law schools today are manifest and widespread. The variation of suggested rationales for changes in the curriculum towards the first degree in law ranges from the heights of the policy directed law school or legal directed law school to the depths of the skill directed law school, drifting back to the plateau of the combined purposes law school, making for the best or the worst of all possible law school worlds.¹

Obviously behind this multiplicity of curriculum policies is a battle of ultimate objectives. Professor Shuman has put it well:²

What is puzzling is that despite the shared feeling of dissatisfaction, there is so little agreement on curricular reform. This is largely due to a lack of consensus on a philosophy of legal education out of which some curricular reform could be expected. And this, in turn, is due to a lack of agreement on the values which are regarded as durable and desirable in the society where we live and where our law graduates will practice.

Eighteen years ago, Professor Lon Fuller, in a brilliant article,³ asked for a determination of goals, not only in teaching law but in living out the law as a profession. He even suggested the need for a metaphysics. That debate is still going on. A "Symposium on Philosophy and Legal Vocationalism" in the *Journal of Legal Education* made much the same plea for a philosophy of our objectives.⁴

In this paper, I would like to shift the grounds of the debate because I think it is futile to found legal education on any ultimate legal philosophy, let alone any ultimate philosophy.⁵ The questioning that is part of the seeking of objectives and goals is certainly a part of legal education. But I fear that in the thrust for change, legal education may be undergoing an identity crisis. Legal education may react like an adolescent by refusing to acknowledge that it has a limited scope within the pluralism of American culture.

* Father, Church of the Nativity, New York City.

¹ Cf. "Report of the Curriculum Committee," *Proceedings: Part I, Reports of Committees and Projects, 1966 Annual Meeting*. American Association of Law Schools, Washington, D. C., 1966. pp. 37-55.

² "Introductory Remarks by the Chairman," *Symposium on Philosophy and Legal Vocationalism: Theoretical Considerations and Practical Proposals*. 19 *Journal of Legal Education* 169 (1966). p. 169.

³ Lon L. Fuller, *On Teaching Law*. 3 *Stanford Law Review* 35 (1950-51).

⁴ *Symposium, op. cit.*, p. 169.

⁵ To avoid any misconceptions, the reader is informed that the author is committed to a philosophy which has a metaphysics and to a natural law system in ethics.

Paradoxically, it seems to me that the answers for which we are seeking within the particular institution of legal education may be discovered in the trends towards specialization and towards inter-disciplinary courses which are expanding the curriculum today. Both of these trends cause tensions and contradictions within the structure of curriculum change. Both of these trends have given some answers to the new objectives of legal education.

I intend to speak somewhat as a Devil's Advocate with reference to changes in legal education today, not to condemn the changes, much less the ferment and rethinking of legal values, but to pose some problems which seem to me to have escaped the debate.⁶

When I said that legal education might be reacting like an adolescent, this meant simply that law might be arrogating to itself a dominant position in American society. It is, perhaps, one thing to say that law now permeates every activity.⁷ This is only a statement of observation. It is entirely another thing to say:⁸

Today we lack—and desperately need—a profession concerned with the overall structuring of society. Where most areas, even philosophy and the social sciences, have become increasingly specialized, students of law have, of necessity remained generalists. This is so because law touches all areas of life, and because it touches life in a prescriptive sense—by the setting of standards—and thus it unavoidably treats of society as it ought to be. Hence the study of law as a subject matter must be in a study of society in the moral sense of ought and should . . . Herein lies law's responsibility to be, not merely in apostrophe but in reality, the queen of the humanities.

Or one may gently say, and it is true:⁹

It is not only because the law school is eminently equipped for the task of meeting today's challenge, but because there is a special relationship of law to societal needs, of ideologies to law, and of the lawyer to society. Having undertaken a virtual monopoly of legal education, the law school cannot shirk its task.

But does this mean an extreme?¹⁰

. . . law is steadily becoming more pervasive and influential in directing and managing the affairs of society. Law, as the guise worn by government, is assuming many functions that were previously undertaken by other agencies: family, church, school, and various associations. Law is now clearly the dominant social force, and we are being transformed into a legalistic society.

Besides being rampant legalism, about which more later, such an attitude is not only similar to the omnivorous craving of some of the developing so-

⁶ Cf. *Roundtable on Curricular Reform*, 20 *Journal of Legal Education* 379 (1968) which does not raise these issues.

⁷ Charles A. Reich, *Toward the Humanistic Study of Law*, 74 *Yale Law Journal* 1402 (1965), p. 1407.

⁸ *Ibid.*, p. 1408.

⁹ Dexter L. Hanley, S.J., "Theoretical Study Within Schools," in *Symposium*, *op. cit.*, p. 190.

¹⁰ Iredell Jenkins, "Legal Institutions, the Legal Profession, and the Discipline of Law," in *Symposium*, *op. cit.*, pp. 172-173.

cial sciences, which are themselves still only in the process of development, but also feeds the fear the social sciences not so surprisingly still have of the dominance of law. One political scientist crammed both attitudes into a short paragraph:¹¹

No longer a hostage to history, and freed at last from its bondage to the lawyers as well as from the arid schematism of the political taxonomists, political science is in the process of becoming one of the central unifying forces for understanding why we behave like human beings.

Although the author who makes this quotation comments that this is a short view and far too optimistic, he does not bother to disavow the antagonism to law.

It is somewhat amusing to read an ex-Harvard Law School student state that his best classroom instructors were in law school and not at Harvard Graduate School or at Harvard College.¹² But it is frightening to read of the problems of legal education in French universities, which apparently are undergoing the same crises of integration versus specialization, of philosophy versus vocationalism, which we are undergoing, but from an extreme position rather than from a middle area. Their law schools have dropped from 41% of total enrollment in 1910 to 15% in 1963, as well they might have.

The *Facultes de Droit* now have three sections, Public Law, Private Law and the Economic Sciences. This split is recent. Until 1953, there was no specialization possible at the license level. But this does not mean specialization in our sense. Public law, private law and the broad scope of economics were all part of one and the same degree. The very attempt to keep so much together was apparently the reason why the system of legal education grew out of touch with the needs of the community.¹³

II. TENSIONS AND CONTRADICTIONS WITHIN OUR BASIC PROBLEMS.

It is trite to say that modern pressures are causing changes within the structures of society and that legal institutions must change with these pressures. It is equally trite to say that we live in an age of accelerated change, when the speed and multiplicity of changes demand swifter reaction. But it must be emphasized that the law as we know it, that body of structures and documents and men which is formally and informally organized into an institution, will always suffer from cultural lag. The formal will always lag be-

¹¹ Peter H. Odegard, "A New Look at Leviathan," in Lynn White, Jr., ed., *Frontiers of Knowledge in the Study of Man*. New York, Harper and Brothers, 1956, p. 94, quoted in Heinz Bulau, "Segments of Political Science Most Susceptible to Behavioristic Treatment," in James C. Charlesworth, ed., *The Limits of Behaviorism in Political Science*. The American Academy of Political and Social Science, Philadelphia, Oct. 1962. p. 28.

¹² William M. Johnston, *Teaching in the Law School: A Model for Other University Divisions*. 37 *Journal of Higher Education* 159 (1966). p. 159.

¹³ "Law in French Universities: Confusion About Recent Changes," *The Times Educational Supplement*. London: Sept. 20, 1963, No. 2522, p. 336. I am not sure how the law schools were affected by the spring riots of 1968; certainly a process of decentralization in higher education is continuing.

hind the informal. At its peril, it cannot lag too far behind; but similarly at its peril, the formal structure cannot outstrip too far its surroundings.¹⁴

I must emphasize that I do not wish to overlook the need for change and that I realize that the legal educational system must not become trapped in technical processes, in what is, perhaps to facilely, called vocationalism. It has been well said:¹⁵

An organization that is organized around a particular body of technology or professional skill is likely to be very bad at judging its effectiveness, by comparison with other special skills, in accomplishing a political purpose. Moreover, the most common fault of any organization is to fail to adapt to change, and this failure most often takes the form of worrying more and more about the technical processes that it uses, and caring less and less about its essential purposes.

The changes to which the law must adapt today are so many and so varied that I fear we may be overzealous in changing by losing sight of the law's essential purposes. We may paradoxically be smothered, not so much by going off in all directions at one time, as by trying to solve all the ills of men at one time in one specialized field (which is not really so different).

What are some of the changes? First, there are the obvious ones. ". . . the theoretical, social and moral heritage that has hitherto constituted the traditional framework of law is rapidly being eroded, if not exhausted . . . So law is operating more and more in an actual, ideal, and intellectual vacuum."¹⁶ True to a point and yet I think that the decisions of the United States Supreme Court have really been an attempt to make the ideals behind our political structure become actual in our tumultuous present. "The . . . pressure arises from the accelerating development of a national and international situation which has forced us to confront the chasm which separates some harsh actualities of our life from some of our most deeply regarded ideals."¹⁷

But attempts to implement equal justice before the law, voting rights and due process, may touch many lawyers only indirectly (to their shame) although these are the more publicized developments. There has also been a vast change in property which has transformed it from the simple bundle of rights which was private and to be defended by law and lawyer against other private rights or against a simpler form of government.

It has been only a few years since an excellent study on pension funds brought home the point of an older study that corporate ownership of much of our productive property has meant that owners no longer control their

¹⁴ Cf. however N. S. Timasheff, *An Introduction to the Sociology of Law*, Harvard University Committee on Research in the Social Sciences, Cambridge, 1939, p. 342, with his own definition of cultural lag which denies that law can lag behind because the evading behavior is still partly determined by law.

¹⁵ Don K. Price, *The Scientific Estate*. The Belknap Press of Harvard University Press, Cambridge, 1965. pp. 184-85.

¹⁶ Iredell Jenkins, "Legal Institutions, the Legal Profession, and the Discipline of Law," in *Symposium*, *op. cit.*, pp. 172-73.

¹⁷ J. D. Hyman, *Concerning the Responsibility and Craftsmanship of the Judge: A Review of Julius Stone's "Legal System and Lawyers' Reasoning" in the Light of Recent Criticism of the Supreme Court*. 14 *Buffalo Law Review* 347 (1964-65). pp. 360-61.

property and that we are becoming a paraproprietal society. The connection between man and things is becoming attenuated:¹⁸

. . . power does not follow property, as has often been said, but the power really attaches to him who controls the use of property . . . Therefore, if the right to use property be separated from ownership, as happened in the modern corporate system and the domainal system, power separates from ownership and goes to him who holds control.

A second conclusion follows immediately. The power which follows control of property gravitates to those who can use property

. . .

. . . a man's relationship to things—material wealth—no longer determines his place in society (as it did in a strong proprietary system) but his place in society now determines his relationship to things.

Lawyers could accept this kind of change in property rights, although it meant that greater control was in the hands of managers. After all, the lawyers made the corporation a creature of law. But hard on the heels of this mammoth change in property was another, the result of the acceleration in technological change. Brainpower has become an even more evanescent form of property than stocks. Moreover, this brainpower is both public and private.¹⁹

This combination puts the lawyer into a new relationship with public law. Not only the more spectacular developments in rights of indigent criminals and poverty law, but the problems of political authority with respect to property are in issue. With vast support by the government of basic and applied sciences, we have been put into the position of taking the bundle of rights which was private property and the bundle of powers and functions which is government and thoroughly mixed them up.²⁰

But this does not necessarily put the lawyer into a position of greater power. Now, not only is the manager in a stronger position in American society because of corporate growth, but the scientist as well. A 1962 study indicated that of 7640 Federal civil servants in the top ranks, only 3% had been lawyers. Of the very top positions within the career civil service, only 8 out of 63 were lawyers. There was a far higher proportion of scientists in both categories.²¹

¹⁸ Paul P. Harbrecht, S.J., *Pension Funds and Economic Power*, The Twentieth Century Fund, New York, 1959. pp. 278, 286-87.

¹⁹ Price, *op. cit.*, p. 44: ". . . the new basic sciences, by their inherent nature, have carried forward by a large jump the change in the nature of property that had been made by the old industrial technology. The old technology fostered the growth of private corporations, and made their stocks a new kind of liquid property. The new science has made some property almost ethereal. Or, in less metaphorical terms, it has based some very fast-growing forms of property on brainpower, and on the terms and conditions under which the humans who have that asset are related to public authority."

²⁰ *Ibid.*, p. 49.

²¹ *Ibid.*, p. 61.

The attitude of some scientists is instructive. Robert L. Hershey, Vice-President of E. I. Du Pont de Nemours and Co. has said:²²

In my opinion, the reason why the American steel industry, by and large, has not been more progressive is that until recent years its management has largely been made up of lawyers; scientifically trained and technically oriented men have not had leading positions among its top executives.

Whatever the facts about percentages and power of lawyers in important offices, the undoubted ferment about law in American society has led many to wonder about the ferment in legal education. Besides the legitimate needs for change and adaptation, one wonders if there is not a certain element of panic and haste, especially when the stated goal is to set the lawyer into the posture of the social engineer.

There seems to be an identity crisis of the lawyer as a professional which hits the law schools the hardest because they are much more sensitive and aware of the storm of change. It is my contention that we must properly limit what we think of ourselves as lawyers. We must give up both a conservative professional loyalty and a liberal legalism which seeks to be dominant over all of society.

I do not believe that these strictures are empty. I have quoted some indications earlier which almost proudly proclaim that we are becoming a legalistic society. A recent round table in the *Journal of Legal Education* sharpens my point. Dr. Judith Shklar has written a most impressive work on legalism. She was invited to discuss the subject with law professors and bravely accepted. She emphasized that judicial institutions are not neutral, that they are of necessity a stabilizing force in society for all their responsiveness to social changes.²³ The law is an institution and an ethos which can lock lawyers and legal theorists in upon themselves in legalism.²⁴

But Dr. Shklar at the end of her paper pointedly said that she did not condemn the whole range of legalism:²⁵

The foregoing suggestions for a reconsideration of legalism as a concept and a practice have no other objective than to give legal theory a greater relevance. They do not imply a criticism of legalism as an ethos or of law as an institution. It must be repeated that the hope is that a greater degree of social self-awareness will make legalism a more effective social force, a more intelligible and defensible political ideology and a more useful concept in social theory.

²² Dean Morse and Alron W. Warner, editors, *Technological Innovation and Society*. Columbia University Press, New York and London, 1966. p. 64.

²³ Judith N. Shklar, "In Defense of Legalism," in *Legalism: The Jurisprudence Roundtable*. 19 *Journal of Legal Education* 49 (1966). pp. 57-58. Cf. Timasheff, *op. cit.*, pp. 334-40. The most general function of law is to create order, peace, security, organization.

²⁴ Shklar, "In Defense of Legalism," in *Legalism*, *op. cit.*, pp. 51-52: "Like many other belief systems, however, legalism can and does limit the analytical perspective of its adherents. It is only when this happens that it becomes an intrusive ideology. When it prevents one from recognizing that the ethos of legalism is but one among many and that it may not always be an adequate response to every social need, it is a real hindrance to the development of a legal theory that has real sociological significance."

²⁵ *Ibid.*, p. 58.

Professor Shuman in his reply seemed to respond self-defensively when he thought that Dr. Shklar's point was that legalism was utterly wrong. Indeed, he seemed to flee from a real confrontation of values.²⁶ Prof. Jones in his response tried to limit legalism into a minor question of legal process, a synonym for a legal malfunction.²⁷ He suggests that there is no confrontation in legal education with legalism of any kind²⁸ and thus fails to meet Dr. Shklar's arguments directly as to what the legal institution really is. For law teaching is an entrance into legalism, into the law as an institution set up by men.

III. TENSIONS AND CONTRADICTIONS WITHIN SOME OF THE SOLUTIONS POSED TO THE PROBLEMS OF LEGAL EDUCATION.

To say that legal education introduces us into a legalism, I must emphasize again, is not to speak a condemnation, but a warning. The term legalism in the sense in which Dr. Shklar used it is intended to demonstrate the strength and weakness of legal education and of law. *The law as we know it is an institution set up to guide men in their communal ventures. It has purpose, function, structure. It is highly practical and lives in the ongoing problems of the community. It is not frozen because nothing practical can be frozen. There must be initiative and change for real justice. The legal profession, for example, has never been doctrinaire about extreme theories of political sovereignty:*²⁹

It was of course not the scientists, but the lawyers, who saved us from this dogmatic belief. Some people still think that the function of judges is simply to interpret and apply the laws that legislatures enact, and the function of administrators merely to administer such laws. This was the conception of the extreme doctrinaires of both the American and French revolutions But the lawyers in the tradition of the common law never held with such nonsense. They knew that justice required a great deal of initiative and inventiveness from a profession with a corporate tradition. They knew that the political authority of a legislature would be destroyed, rather than enhanced, if the legal profession and the judiciary looked to it for all ideas and initiative, and failed to exercise their own.

The same well-educated man who suggested that his best classroom instructors had been in law school founded this phenomenon on the law teachers' "unabashed assumption that the task of education is to prepare students for life." How to use a bureaucracy, how to use professors and objectivity through humility before such a vast subject were the foundation principles. He posed the challenge, and the dilemma, of the law rather neatly in a short epigram. "A scholar shapes his field; a lawyer serves his."³⁰ If one is caught up in a profession, more accurately in an institution, there are institu-

²⁶ Samuel I. Shuman, "Legalism: Asset, Nuisance, Necessary Evil or Illusion?" in *Legalism, op. cit.*, pp. 60-61.

²⁷ Ernest M. Jones, "Legal Education Confronts Legalism," in *Legalism, op. cit.*, pp. 73-74.

²⁸ *Ibid.*, pp. 75-76.

²⁹ Price, *op. cit.*, pp. 64-65.

³⁰ Johnston, *op. cit.*, p. 161.

tional practices which demand a certain amount of formalism in order to achieve practical results.

All this can be, of course, a weakness. To overemphasize formalism and limitation is to have petrified. The scholar should criticize and shape his field and there should be legal scholars. The man who can combine both the old and the new, the formal and the informal is valuable—and rare.³¹

But it is not with this sufficiently developed antinomy that I wish to deal. Rather, it is with some of the hidden tensions and contradictions within some of the attempted solutions which try to avoid the Scylla and Charybdis of legal education, the over-generalization of philosophy on the one hand and the over-technical aspects of vocationalism on the other.

It has been denied, and rightly denied I think, that legal education is basically a specialized mental discipline.³² And Prof. Fuller is correct in ironically disposing of the assumption that legal education is a process of habituating the student "to restrictions that the traditions of the legal profession have evolved for the governance of its mental operations."³³

But I suspect that it is too simple to come back with the opposite extreme, and to say, again with Prof. Fuller, that "the only discipline we should seek in law school is that which sets the student's mind free, not that which makes it comfortable within a framework imposed on it from outside."³⁴ This, it seems to me, is subtly unifying legal education with mental discipline by another, sweeter name.

Or it has been said that law schools have kept the subject matter secondary to methodology. Thus it is suggested that our solutions should be a study in depth of various subject matters:³⁵

Such a course need not and should not become the watered down study of philosophy or history or social science. The focus and object of study would remain questions that are uniquely legal. But it would be law in greater depth, intensity and excitement.

My problem is the natural retort, what is uniquely legal? And how does what is uniquely legal relate to curriculum choice? We have already denied the standard of an interiorized mental discipline, which would be a standard for "locating areas of greatest relevance, usually technical, and concentrating

³¹ Prof. Fuller long ago sufficiently developed the theme of this problem for legal education, *op. cit.*, pp. 42-43: "Herein lies a dilemma for student and teacher. The good student really wants contradictory things from his legal education. He wants the thrill of exploring a wilderness and he wants to know where he stands every foot of the way. He wants a subject matter sufficiently malleable so that he can feel that he himself may help to shape it, so that he can have a sense of creative participation in defining and formulating it. At the same time he wants that subject so staked off and nailed down that he will feel no uneasiness in its presence and experience no fear that it may suddenly assume unfamiliar forms before his eyes.

No teacher is skilled enough to satisfy these incompatible demands. I don't think he should try. Rather he should help the student to understand himself, should help him to see that he wants (and very naturally and properly wants) inconsistent things of his legal education."

³² Reich, *op. cit.*, p. 1402; Fuller, *op. cit.*, pp. 36-37. cf. Neal H. Tracy, *The Process of Curricular Change*. 47 *The High School Journal* 170 (1963-64). p. 175.

³³ Fuller, *op. cit.*, pp. 36-37.

³⁴ *Ibid.*, p. 38.

³⁵ Reich, *op. cit.*, p. 1404.

our efforts there, or justifying whatever we wish to include on some theory of mental discipline."³⁶

Rather, so said the same man, we must have "goals stated in terms of the behavior expected of a professional . . ." ³⁷ These goals are not structured internally from within the profession since the goals depend on the needs of society. A part of these goals must be technical competence, not on any theory of mental discipline, but on the theory of societal needs.

We must here turn away from the world of the scholar, the world that is shaped only by criticism, and face up to the basic necessities of legal education for the first degree in law. Without succumbing to the inherent overreaching in the following words, we can accept the underlying theory: ³⁸

. . . I suggest that the essence of law is disclosed in the fact that it is an agent of mediation between the realms of the actual and the ideal. Law is a specific vehicle that man creates and employs to help in the realization of a social order that will be conformable to his human values and aspirations.

More specifically, law is not just a science: ³⁹

Engineering [sic], medicine, and law, in different ways, have the function of taking the abstractions of science (or other systematic knowledge) and applying them to the concrete and practical affairs of men. That is not only their function; it is their purpose. Science can insist on ignoring questions of purpose in order to be objective and precise; the professions cannot. . . . Each [profession] is organized around a combination of social purpose and a body of knowledge . . . Each is organized as an almost corporate entity, with some control over its standards of admission.

This is the point at which I think we can learn something about legal education from the interdisciplinary approaches which many have been advocating.⁴⁰ The social sciences have pointed out that law, the law I should say, cannot use a holistic approach. Law is a formal institution, with certainty and definiteness in order to promote the practical realities of everyday living. The law will thus have the limitations of its institutional existence.

Timasheff points out that law is one of the forms of social coordination. It is specialized because it is ethico-imperative, characterized by support from "centralized power and its coordinating activity, and not merely by the mutual

³⁶ Tracy, *op. cit.*, p. 175.

³⁷ *Ibid.*

³⁸ Iredell Jenkins, "Legal Institutions, the Legal Profession, and the Discipline of Law" in *Symposium, op. cit.*, pp. 173-74.

³⁹ Price, *op. cit.*, pp. 122-23, 133.

⁴⁰ It should be said parenthetically that the lesson should have been learned in trying to teach law in the liberal arts. Cf. Francis Elwood Barkman, "Law-in-the-Liberal Arts: an Appraisal and a Proposal for Experimentation." 19 *Journal of Legal Education* 1 (1966), p. 34: "Much of law-stuff is strictly a matter of acquired taste, a taste not essential for the average liberal arts graduate. Life in this world would be miserable indeed if all men were lawyers. Accordingly the suggestion is advanced that we stop talking to liberal arts students and teaching them in their law courses as though we were trying to make them into lawyers."

social interaction which produces and reinforces the ethical group-conviction." ⁴¹

American sociologists tend to be more precise and pragmatically oriented in describing the legal institution. Law is formal social control, related to certain informal controls. And the connection with certainty through documents is inescapable: ⁴²

It has been maintained that handwriting is essential to formal control because of the need for keeping records. Accounts of legal rules, rule interpretations, and rule enforcement must somehow be kept. The fact that [some groups] have memorized a great number of precise regulations suggests that writing and printing are not essential to express rules, but they do greatly facilitate explicitness. It is difficult to conceive of modern legal systems apart from the masses of printed materials.

The law as an institution is committed to a legal-institutional approach, to the formalities of community living. A legal-institutional approach is and must be formal and does not encompass what we call the "informal" aspects of living in community. ⁴³ If there is any place where the formal meets the informal, it must be in what has been called the frontiers of the law, in those situations (and for legal education in those courses) where we cannot be definite because the institutions have not been formed to meet societal needs.

It seems to me to be of importance to compare our problems with those of some of the social sciences. At least some social sciences have seen that the political scientist, for example, cannot compete with the practicing lawyer because of the huge amount of information in law books. The legal-institutional approach to political science is most inviting because it seems so definite and certain. But the further problem of the political scientist is that very few events are explainable in terms of legal categories. ⁴⁴

There is another way to understand the legal-institutional approach. Although Langdell's case-method approach is not followed today in its pure form, and although the philosophy of his approach, that "printed books were the *ultimate sources of all legal knowledge*" ⁴⁵, cannot be tolerated if we wish to avoid a vocationalism in law, documentary collection and interpretation are still at the heart of the lawyer's trade precisely because the law is a formalized institution and because communal society demands some sort of certainty and predictive capacity for the exigencies of practical living. This is a public expectation of the profession of law which no amount of societal innovation can eliminate.

I am not writing a brief for the Langdell method. But I am saying that the legal-institutional approach is at the heart of formal legal education. An

⁴¹ Timasheff, *op. cit.*, pp. 12-16, esp. 15. Cf. James F. Davis, Henry H. Foster, Jr., Ray C. Jeffery, Eugene E. Davis, *Society and the Law*. The Free Press of Glencoe, 1962. pp. 58-59. The authors accuse Timasheff of combining law and ethics.

⁴² Davis, *op. cit.*, pp. 41-44.

⁴³ Samuel Kriskov, "The Legal-Institutional Approach," in Donald H. Riddle, Robert S. Cleary, ed., *Political Science in the Social Studies*. 36th Yearbook, National Council for the Social Studies, Washington, D. C., 1966. p. 39.

⁴⁴ *Ibid.*, pp. 39-41.

⁴⁵ Albert J. Harno, *Legal Education in the United States*. Bancroft-Whitney Co., San Francisco, 1953. p. 129.

important part of that approach is the formality of documentation, its collection and interpretation.

The price we have to pay for being professionals who must fulfill certain expectations of the community is that we must prepare first of all for those expectations, not as technicians or vocationalists, but to know what we are about when we do try to reach out to the frontiers of the law. The strength of law, the law, the legal institution, is its possibility for precision and practical implementation. If we throw this away, we may as well become political scientists or what you will within the fields of the behavioral scientists. The behavioral and social scientists are starting to recognize their limitations; we should recognize ours.

There is no disputing the inadequacy of the legalistic approach for complete solutions to human problems. The incompleteness is not just a philosophical concept. Once any sort of Brandeis brief approach is attempted, mere documentary collection and interpretation are useless.⁴⁶ But the more moderate social scientist who recognizes behavioralism as a tool realizes that he cannot manipulate the whole of life either:⁴⁷

It requires more than behaviorally derived statements to "understand" politics. And to answer questions posed by the problems of consciously and deliberately ordering human affairs, one must necessarily resort to "dialectic," as many classical thinkers would have put it; to over-all judgments about possible historical tendencies (admittedly a shaky venture at best and one which can never be "scientific"); and to the kind of reasoning characteristic of the judge and the lawyer.

Thus in a surprising fashion, we are brought full circle, back to the reasoning of the judge and lawyer, not because of some idea of mental training, but because the judge and the lawyer are faced with doing, with activity in a practical order which demands that responses be institutionalized and made definite. The first major steps in legal education must wrestle with this prime factor of the institutional processes of the law, with documentation and the quasi-certitude of law. The behavioral sciences are at their weakest when studying these institutional arrangements.⁴⁸

It seems to me, then, that interdisciplinary courses in legal education should be placed later in legal education, not just as a chronological matter, but at that stage of education where familiarity with the legal institution, with legalism, of which he is becoming a part, will enable the law student to bring his pre-legal and legal training to bear critically and creatively.⁴⁹ Experiments of this kind have been activated. One school is giving up to one-fourth of the total credits in third year to individual, supervised research, using a field of interest as the environment of study. It is said that the traditional Socratic method will not be displaced and that there is no intention of making the students into specialists.⁵⁰

⁴⁶ Milton Derber, *What the Lawyer can Learn from Social Science*. 16 *Journal of Legal Education* 145 (1963-64). pp. 147-48.

⁴⁷ Mulford Q. Sibley, "The Limitations of Behavioralism" in Charlesworth, *op. cit.*, pp. 69-70, 87-88, 92-93, *cf.* pp. 72-73.

⁴⁸ Charlesworth, *op. cit.*, p. 6.

⁴⁹ Harno, *op. cit.*, p. 146.

⁵⁰ *Professional Education: Course Change in Law School*, 95 *School and Society* 103 (Feb. 18, 1967). pp. 103-4.

It should be evident that the three years of legal education leading to the first degree in law cannot be made into a specialty course either without turning legal education into vocationalism. The specialized courses that so many law schools are putting in will hopefully be on the frontiers of law where basic legal education can meet the problems of modern society in an academic atmosphere. There are other methods of specialization, ranging from professional experiences of a sequence of similar cases to the one big case which makes a name for the individual, as well as the specialization inherent in large law firms. And more and more, academic preparation in post-graduate studies is forming the specialist.⁵¹

Another difficulty in basic legal education is in what one might call philosophy versus legal vocationalism. I personally find this a false dichotomy with which to begin. The real division is always between education and vocationalism, between an integrated view of human activities which leaves one free to judge, analyze, criticize and build, and a limited view of one's own field of competence as purely technical.

To pose the original dichotomy as philosophy versus legal vocationalism is to set up a false, hidden tension in what we are trying to do with curriculum changes and so to leave the way open for extremist suggestions that ultimately go nowhere. In the "Symposium on Philosophy and Legal Vocationalism" presented by the *Journal of Legal Education* in 1966, two of the participants took a sound middle position on the questions of amount and emphasis of jurisprudence in the curriculum.

Fr. Hanley, after attempts to interest his colleagues and after setting up a continuing institute on jurisprudential problems, came to the conclusion that law professors follow their own bent and interests and that the most that law schools can and should do is to support jurisprudential and philosophical studies for those who have the inclination.⁵²

Prof. Joiner put his reasoning more dramatically: ⁵³

How then should philosophy touch this practical world of legal education? It is not enough to say that the world needs more philosophers and all lawyers should become legal philosophers in part by devoting one-third of their study time to philosophy. Such a result seems to be as absurd as saying that philosophy *cannot* aid in the development of the law or the lawyer.

He too suggests limits. Gifted students who are interested should be allowed to follow their interest through a system with curricular flexibility giving the option for jurisprudence courses.⁵⁴

But, again as Devil's Advocate, I would like to submit a deeper question. I believe that philosophy, values, ethics, are not fundamentally a legal ques-

⁵¹ Hubert J. O'Gorman, *Lawyers and Matrimonial Cases*. The Free Press of Glencoe, 1963. pp. 50-51. Cf. Russel D. Niles, *Ethical Prerequisites to Certification of Proficiency*. 49 *American Bar Association Journal* 83 (1963).

⁵² "Theoretical Study Within Schools" in *Symposium, op. cit.*, pp. 190-91.

⁵³ Charles W. Joiner, "A Plea for Flexibility in Content and Timing" in *Symposium, op. cit.*, pp. 179-80.

⁵⁴ *Ibid.*, p. 180.

tion. This, it seems to me, is what the round table fight with Dr. Shklar was all about. She suggested: ⁵⁵

What rules make legal rules, valid legal rules? That alone is held to be the way to answer all questions about the nature of law. This empty formalism, designed solely to distinguish legal rules from all other rules, precludes consideration of law as a social force. One need only mention Kelsen and Hohfeld and their disciples to see how confining this pursuit of an exclusively "legal", legal theory has become.

Others, including lawyers, have seen what the acceptance of a dominant, narcissistic philosophy could do to law. Prof. Cowan put it very well: ⁵⁶

Characteristically, since it could accept consolation neither from natural law nor from physical science, Anglo-American law turned inward. English legal theory began to develop as a science of itself. It proclaimed (through Austin) that jurisprudence is a self-investigating science with closed boundaries.

There was a reductionist tendency in the times, stemming from the triumph of the physical sciences.⁵⁷ But it should be noted that the behavioral sciences, the last heirs to this reductionist approach, have been realizing that there are limitations to that social science methodology which is sibling to analytical jurisprudence.

Behavioralism and positivism are excellent tools for the determination of facts and the meaning of the use of words. They are less successful in the realms of values and ethics.⁵⁸ An intriguing collection of descriptive essays, *A Current Appraisal of the Behavioral Sciences*, is shot through with the modern struggles between the value-free and policy approaches in the social sciences. The author suggests the need for hypotheses of the middle-range, avoiding pure data-gathering or pure deductive methods.⁵⁹ The spectrum of theories he gives in his section on jurisprudence is truly startling.⁶⁰ He slyly explains, "Although not always recognized, fundamental moral and value preferences seem to underlie much of this controversy."⁶¹

It should take no belaboring to predict that no unified philosophy will be accepted by the law schools to solve our curriculum problems. For we have learned that there is no pure legal philosophy from our own history. What we do have to learn is that we will not raise up a philosophy for our times out of the law schools acting as the spearhead for education and social change.

Jurisprudence, then, is a perennial subject on the frontier of the law. It is not on that frontier in the sense of the specialized or interdisciplinary courses which attempt the sociological fusion of the formal structures of the law with the informal pressures of society. Rather, it is on that double frontier where lawyers must try to integrate their own corporate institution and where

⁵⁵ "In Defense of Legalism" in *Symposium, op. cit.*, p. 52.

⁵⁶ Cowan, *op. cit.*, p. 19.

⁵⁷ Cf. Price, *op. cit.*, pp. 85-86.

⁵⁸ Derber, *op. cit.*, pp. 152-53.

⁵⁹ Rollo Handy and Paul Kurtz, *A Current Appraisal of the Behavioral Sciences*. Behavioral Research Council, Great Barrington, Mass., 1964. p. 13.

⁶⁰ *Ibid.*, pp. 69-76.

⁶¹ *Ibid.*, pp. 74-75.

they also collide with the problems of values and ethics that are not legal but far broader, human problems.

IV. CONCLUSION.

There is nothing that I can say that is startlingly different by way of conclusion. I have surprised myself by opting for a first degree course in law that is still heavily laden with the legal doctrine approach, not as a course in memory, but with the purpose of giving insight into the legal institution as it works. It is only when this is done that the student can go out to the frontiers of the law to work with the social sciences and one's own human values in any meaningful way as a lawyer.

I suspect that I would choose to leave not only the first year but also the second year of law school heavily loaded with what we call the traditional courses. But based on what one has had in college (if in pre-legal education, by luck or foresight, the student has known what he wanted) or on interest, the integration process can be attempted.

But this integration process, and this is the warning of this paper, is not the reductionist approach of an omnivorous law. Nor can it be the opposite reductionism in which theoretical studies usurp the legal-institutional learning of law. Integration can only be within a true interdisciplinary approach, where one is subjected to someone who is not in one's own field after one truly knows one's own field.

Although the legal education of tomorrow may well be interprofessional, the very author who asks for interprofessionalism places the lawyer's stance in the concrete posture of the institution of law:⁶²

The lawyer is not much interested in fact-gathering for its own sake or at the other extreme with large-scale system building. Instead, he is interested in facts as they relate to specific legal problems and bear on crucial social issues that have referents in the empirical world.

It is into that world that lawyers, who after all are human too, must bring their values as human beings. So long as the law is not locked in upon itself and legal education allows an interplay between the institutional forces which are its strength and the societal forces of values and social pressures, which are the sources of our legal institutions, there is no need to fear for our curriculum.

⁶² Davis, *op. cit.*, pp. 395-96.