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The Law-School Curriculum in the 1980s: What's Left?

Karl E. Klare

I. Introduction

A premise of this article is that there is, to borrow a phrase, a difference between the “curriculum-in-action” and the “curriculum-on-the-books.” By “the books” I mean law-school catalogs, curriculum-committee memoranda, and the like. Behind the formal curriculum there is a “hidden curriculum” consisting of a set of very powerful although usually unarticulated messages about substantive law, the definition of professional role and expertise, and the possibilities of and constraints upon human freedom. These messages are contained in the instructional methods, the emotional setting of the classroom, and the social hierarchy of the law school, and in the array of course offerings and requirements, the sequencing and pacing of courses, and indeed in the overall structure of the formal curriculum.

Based on this premise, and speaking now of the total curriculum—formal and hidden—the following are my primary claims:

1. Law-school education does not, by and large, train students either to practice law or to engage in serious legal scholarship. Rather, the law-school curriculum disenfranchises students intellectually and disables and incapacitates them professionally. The primary function of law schooling is to prepare and to socialize students for entry into a very narrow range of career lines.

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1. After initially drafting this paper I learned that Prof. Cramton employs this concept. See Roger C. Cramton, The Ordinary Religion of the Law School Classroom, 29 J. Legal Educ. 247, 252-53 (1978):

   "The sources of the world view represented by "the ordinary religion of the law school classroom" [include] ... the informal or hidden curriculum that encompasses what students learn apart from the formal curriculum ... . As in other educational settings, the "hidden curriculum" may be as important as the formal curriculum—the total learning environment influences what students learn.

   A colleague has called my attention to a book of that name. See Benson R. Snyder, The Hidden Curriculum (New York: Knopf, 1971).

2. Curriculum design operates on the assumption that training in the practice of law should occur in the practice of law. The economics of practice are such that for the most part only the large firms and some of the government agencies are set up to provide systematic on-the-job training. It is therefore a latent assumption of curriculum design that if the law schools have any responsibility at all to the consumers of legal services, it is only to those who are wealthy enough to afford big-firm counsel.2

3. The primary ways that the law-school curriculum disables and socializes students are: (a) by the systematic manufacturing of false consciousness; (b) by instilling a distinct set of social and moral attitudes in students; and (c) by ignoring or denigrating training in the intellectual and interpersonal capacities needed to practice and study law successfully.

4. Curriculum is designed to serve the needs, cater to the interests and abilities, and legitimate the power of law teachers, not to train law students.

After elaborating on these points, I will conclude by offering some brief prescriptions for curricular reform. My central thesis is that the law-school curriculum will not change very much until we—i.e., law teachers—change ourselves and our professional identities.

II. How the Law-School Curriculum Disables Students3

A. The Structure of the Curriculum4

What are the ideological and emotional messages in the contemporary curriculum? How does the curriculum disable students intellectually? To begin with, I would focus on the enormous significance of the overall structure of the curriculum. The key to that structure is the division and contrast between a tightly constructed first-year experience overwhelmingly focused on common-law doctrine, on the one hand, and, on the other, an upper-level experience loosely structured to the point of disintegration, consisting of a mélange or hodge-podge of public and private law

2. This is not to claim that poor people, unions, small enterprises; and other less-well-off clients never receive first-rate legal services but only to assert that law schools are entitled to little credit if they do receive such service.

3. The stereotyped portrait of curriculum drawn here admittedly does not do justice to the diversity of American law schools, particularly those outside the most elite group. I believe the generalizations are useful and telling, however, because the instructional methods and curricular organization adopted by the elite law schools are widely copied and diffused throughout American legal education. Indeed, the vast majority of law teachers were trained at a remarkably small and homogeneous group of schools. See Roger C. Cramton, The Current State of the Law Curriculum, 32 J. Legal Educ. 321, 324 (1982); see also The Chronicle of Higher Education, Nov. 10, 1982, at 2, col. 3 (American Bar Foundation study shows that 20 top law schools produced 59 percent of all law professors in the United States in 1975-76).

4. The following argument draws heavily on Duncan Kennedy, The Political Significance of the Structure of the Law School Curriculum (unpublished paper delivered to the Faculty Seminar, University of Victoria Law School, Victoria, British Columbia, February 1980).
courses the only "unity" of which is their focus on doctrine, legal reasoning, and conventional modes of social policy analysis.

This structure sets up and constantly accentuates a set of contrasts between public and private law. The core of the curriculum (here I refer not to the number of hours allocated but to the way the curriculum is experienced by students), the portion that is presented as hard, precise, lawyer-like, reasoned, judicious, as the product of "legal thinking" is the set of rules associated with the nineteenth-century vision of the market and private ordering as the central institutional basis for organizing social life. Real contemporary social problems, for example, the problems of occupational safety or of the poor consumers are not dealt with and cannot be dealt with in the first-year courses like torts or contracts. Such matters are "deferred" to advanced courses, and naturally so, because most significant social problems today are governed by statute or other complex legal institutions (like collective bargaining) and are therefore not suitable for the instructional mode common in the first year. The underlying message is that doctrine, particularly private law doctrine, is rigorous. Private law is governed by a technique of higher-order reasoning the mastery of which is the key to becoming a lawyer or at least the key to being rewarded in law school. Whatever particular instructors might say to the contrary, the curriculum presents the common law as containing a deep, inner rationality and coherence, or at least an adaptative potential. The legitimating aspects of the common law are ignored.

Since the 1930s at least, we have also accepted the public law courses into the curricular fold on a deferred and dispersed basis. Their deferred placement and smorgasbord treatment conveys the message that they are neither central to the definition of lawyers' skills (as opposed, perhaps, to their billing logs) nor are they coherent. Rather, they are interstitial, mushy, political, ad hoc; they are the courses in which major doctrinal developments turn on fortuities like the mustering of five votes in the Supreme Court.

These courses deal with a set of incremental government interventions in a market-centered regime, and the predominant discourse revolves around the appropriateness of such interventions, as though the market were not itself a regulatory system. The discourse does not revolve around the fundamental assumptions underlying public regulatory modes. For example, in labor law we discuss the appropriateness of this or that incursion on managerial prerogative. We do not ordinarily talk about who should own the means of production, or how work might be organized so as to make it a rewarding, developmental experience.5

5. This phenomenon cannot be explained on the grounds that such questions do not pose "legal issues." See, e.g., United Steel Workers of America, Local 1330 v. United States Steel Corp. 492 F. Supp. 1 (N.D. Ohio, 1980), aff'd in part and vacated and remanded in part, 631 F. 2d 1264 (6th Cir. 1980) (ordinarily workers do not, by virtue of their labors, obtain a property right in the means of
The very structure of the law-school curriculum, then, is emblematic of the notion that the core of private property and private ordering arrangements constitutive of nineteenth-century capitalism is rational, structured, and central to the lawyering identity, and that to the extent that those arrangements need to be reconsidered, updated, or refashioned, the appropriate mode of doing so is through public law reform via interstitial, ad hoc adjustments, that is, chiefly through regulation of the type championed during the New Deal. From this powerful set of symbolic messages law students learn that the only lawyer-like way to view the world is moderately, through the window of moderate conservatism or liberal reformism. They learn that the only lawyer-like way to think about social change is in terms of atomized, marginal, incremental reform through governmental regulation of private conduct, i.e., that the New Deal represents the outer boundary of human wisdom in the art of politics. Finally, they learn that lawyers do not possess intellectual skills and preoccupations appropriate to discussion and analysis of fundamental issues of social and political organization and thoroughgoing social change. Inculcation of this one-sided array of political lessons inhibits students' intellectual progress.

B. The Emphasis On Doctrine

A second disabling feature of the law-school curriculum arises from the fact that almost the entire content of what we teach is doctrinal analysis. A typical criticism of this aspect of the law-school curriculum is that the overcommitment to doctrine prevents us from doing other valuable things, like "skills training." This is not my criticism. Indeed, properly understood, training in doctrinal analysis is a form of skills training which has an appropriate place in the law-school curriculum. My objection is on other grounds and has two interrelated components. First, we do not teach doctrinal analysis well because the curriculum takes the idea of legal reasoning seriously. Second, the purpose of stressing legal reasoning in the law-school curriculum is not to train students but to instill in them a certain ideological message that will be described below.

An inescapable signal is conveyed by the hidden curriculum, by the years of sitting through hierarchical classes in which the instructor guides students through doctrinal mazes toward correct answers. The message is that legal reasoning is a distinct mode of analysis that is in the possession of the legal profession and that it is the job of law students to master. The premise so carefully inculcated by our teaching is that this special mode of reasoning is capable of taking us from legal premises (e.g., precedents, production); and NLRB v. Yeshiva University, 100 S. Ct. 856 (1980) (employees, like some university professors, whose work is at least in part a self-governed, developmental experience are not "employees" within the meaning of the National Labor Relations Act).
notions of rights or of social policy) to determinate answers, determinate solutions in particular cases, without resort to political or ethical choice.

This claim about legal reasoning—that it is autonomous from political and ethical choice—is a falsehood. It is a very important falsehood, because it legitimates the power of common-law judges and of the legal profession. But a falsehood it is nonetheless. To the extent that we induce our students by three years of doctrinal emphasis to believe in this vision of legal reasoning, we cripple them as legal thinkers.

Legal reasoning exists primarily as an array of highly stylized modes of justificatory rhetoric. From the standpoint of logic—as opposed, for example, to the perspectives of anthropology or hermeneutics—there simply is no necessity or determinacy to legal reasoning, no inner compulsion to its methods. Legal reasoning is a texture of openness, indeterminacy, and contradiction. Students need to know that in order to work creatively as advocates and analysts. To be empowered as legal thinkers our students must be totally freed from the tyranny of belief in the false coherence or compellingness of legal argument. But in fact our teaching leads ineluctably in the opposite direction, toward reinforcing the mistaken belief that legal reasoning accounts for legal results.

Intensive practice in doctrinal analysis would be a useful form of skills training if it were designed to accomplish the goal of acquainting students with the indeterminate character of legal reasoning. For example, a recurring law-school exercise is to identify the conflict between the respective advantages of “bright-line” rules and discretionary standards. Strict rules are thought to offer the desirable features of predictability, protection of settled expectations, promotion of judicial subordination to the legislature, and so on. Discretionary standards, on the other hand, are thought to be more amenable to appropriate application in the light of factual complexity and to the impulse to do equity in particular cases. It would be useful to train students to be able to take either plaintiff’s or defendant’s side of a case and to generate a persuasive argument on behalf of the client that tilts either toward a strict rule or toward a discretionary standard. But this is not the standard classroom fare. Rather, the typical outcome of the lesson is an overt suggestion or implicit innuendo that the case can be decided on the basis of the need for a rule or standard. Likewise, in any case in which a right or a policy is asserted our students ought to be

6. Law teachers will often acknowledge that while the rule/standard distinction may be incapable of resolving a particular case, this conceptual apparatus does provide a compelling overall orientation to decision making in various areas of the law. (Thus, e.g., “strict rules foster the predictability needed in the law of sales, but open-ended standards are the appropriate guides for resolving child custody disputes.”) The untenability of such a position is demonstrated in Duncan Kennedy, Form and Substance In Private Law Adjudication, 89 Harv. L. Rev. 1685, 1694–1713 (1976). This is not to say that it is impossible to observe judges and legal scholars formulating a consistent attitude toward the formal character of certain kinds of legal rules. It is to assert that such consistency derives not from the force of logic but from the ideological and symbolic cohesiveness of a particular legal world view.
trained to be able to articulate a countervailing right or social policy and to argue persuasively either to plaintiff's or to defendant's side of the case from each of the two rights or policy perspectives. But again, the usual outcome of the law-school class is the suggestion that analysis ("balancing") of conflicting rights and policy concerns is a process capable of resolving cases.

Although highly overrated, doctrinal manipulation of the kind I have described is demanded in the practice of law and is therefore entitled to a place in law training. Moreover, success at this type of doctrinal manipulation tends to emancipate students from belief in the false necessity of legal reasoning, and it is therefore valuable for that reason as well. But that is not what we teach. We teach legal reasoning as though doctrine had a determinate meaning, as though doctrinal analysis were capable of resolving cases without resort to political and moral choice. We teach legal reasoning as though enduring principles of social organization were embedded in the logic of the doctrines themselves (as opposed to the political and ethical meanings of the doctrines).

Imparting such beliefs in the autonomous necessity of legal reasoning denies our students access to the insight that they can only understand and they can only work creatively with legal rules by situating them in their cultural, moral, and political contexts. That is, they can only understand legal rules when they possess the tools of interdisciplinary social analysis.

C. The Emotional Content of and Silences in the Hidden Curriculum

A series of emotional messages is imparted and reinforced by the hidden curriculum. Particularly important is the intensity, confusion, and scariness of the first year, and the malaise and boredom of the upper-level program. Students learn from the emotional content of the law curriculum that they ought to distrust their own deepest moral sensibilities; that they ought to avoid global moral and political inquiry (because it is dangerous, simplistic, and unlawyer-like); that they ought to revere hierarchy; and that manipulating vulnerable people is an acceptable form of professional behavior.

What is left out of the law-school curriculum? Omitted is systematic training in how to learn from others; in how to criticize one's own work and the work of others; in how to learn about lawyering from practice, that is, in how to acquire the capacity for continuing self-development over the span of a career; and in how one might act in the central relationships that constitute the lawyering process: adversary, client, coworker relationships, and so on. Omitted also is systematic training in how to work closely and cooperatively with others in situations of high vulnerability and high risk and, finally, in how to think critically about morals and politics based on the best learning available from the social sciences and from ethical discourse.
III. Barriers to Change and Sources of Renewal

Why is the curriculum organized this way? Most fundamentally because curriculum is designed to justify the power of professors, not to serve students’ needs. A doctrine-focused, case-method curriculum, structured around legal categories derived from common-law pleading and conventional definitions of public regulatory programs, is designed to base legal education on what law teachers do best and what they have been rewarded for doing well in the past. It is calculated to center legal education on what law teachers do with maximum authority, the least preparation, and the least exposure to the risk that students might have superior insight to theirs. The skills, capacities, and interests of most law teachers do not equip us to organize legal education in other ways, for example, upon a fieldwork-based, clinical model.

In this respect, not much has changed over the years from the time when Langdellian orthodoxy took hold. The Langdell model of a graduate program in pure law taught by the case method insulated the law professoriat from the rest of the academic community, justified its professional role, and, very important at the time, neatly tied in with nativist and class prejudice. The legal realist revolution promised a great deal but was largely aborted in the area of curriculum reform, primarily because of the underdevelopment of the realists’ social theory.

The only truly seismic change in modern curriculum and law pedagogy came with the clinical education revolution of the past decade. A great promise of clinical legal education is that it poses fundamental challenges to the inadequacies of our curriculum. Precisely for that reason, clinical legal education has been disadvantaged and marginalized within the law-school hierarchy. As a result it also faces internal difficulties, such as the underdevelopment of its theoretical dimensions and, most recently, a tendency toward drift away from its initial political moorings.

What’s left in the discussion of curriculum in the postrealist era? Many attempts to put back together the shattered myth that legal reasoning and legal education are apolitical, and many strategies of denial: denial that there is a problem, denial of the incalculable contribution of clinical legal education, and denial of the need for law teachers to become equipped with new theoretical and pedagogical capacities that they do not, by and large, presently possess.


[In education [the legal realists] realized that a new “method” of interpreting cases opened up large questions about how to study society and the legal system. But they tended to evade these questions through vague ideals of craft addressed primarily to pragmatic technique, and not directly to the difficult issues of what values the profession should support, how manpower should be allocated and paid for, and what kinds of intellectual, material, and political developments were required to realize their social and educational ideals.]

HeinOnline -- 32 J. Legal Education 342 1982
Yet there are potential sources of change and renewal in the coming decade. Most important is the survival and growth of clinical models. The rapidly changing political climate in which we live—particularly the crisis into which liberalism has plunged—must prompt a rethinking of approaches to law and legal pedagogy. In this context, my hope is that the critical legal theory movement will offer positive contributions to legal education and, indeed, that it might show us that something is left.

IV. Proposals for Change

With that last hope in mind, the following proposals are offered for purposes of discussion. The law-school curriculum should be divided into three roughly equal components of (1) doctrinal analysis, (2) closely supervised, field-based clinical experience, and (3) advanced training in cultural and social analysis, that is, in political economy, anthropology, philosophy, and so on. Substantive law ought to be taught in each of the three settings, organized around inquiry into various social problems and relationships but without a separation between public law and private law learning.

Many others have defended the virtues of clinical training. Perhaps I should add a few words regarding the role of social theory in legal education. My proposal does not see theoretical training as a mere adjunct to law study or an opportunity to explore “higher” questions underplayed in the traditional curriculum. Rather, giving access to social theoretical tools is conceived as a way of helping students fundamentally to understand judicial action and other aspects of the legal process by cradling legal rules in their lived historical and cultural contexts. Only thus can we emancipate students from the mistaken belief that legal reasoning is capable of autonomously accounting for legal results. Emphasis on theoretical learning in the law-school curriculum would serve to bring a sense of totality and coherence to students’ understanding of the common-law experience. Finally, it could empower students both by combating the frightening sense of disintegration, particularly in first-year legal education, and also by providing students intellectual tools they need in order to think with sophistication about the legal process.

Curriculum reform of the type advocated would obviously require massive changes in the law professoriate. Incumbent law teachers would be obliged to acquire new capabilities and capacities in practice and/or in social analysis. New teachers would be trained and recruited on a like basis. Change of the kind advocated or, indeed, any sort of serious curriculum reform, is simply impossible unless and until we retrain ourselves as a profession so that we would be in a position to deliver the types of intellectual and interpersonal training our students need. Education of the educators is therefore a necessary precursor of curricular progress.