

Designing Law Curricula for a Transnational Industrial and Science-Based Civilization

W. Michael Reisman

The challenges to planning and designing programs of legal education that are, at once, professionally relevant and intellectually enriching come from a number of coinciding world revolutions. These revolutions render ineffective or obsolete many of the institutions and practices of our inherited systems of governance and the political-philosophical conceptions on which they rest. Their result, the reality with which our graduates will contend, will be so different from the reality we know that our usual historical and comparative techniques of scouring past and current practices in our own and other advanced systems for alternatives may provide little guidance.

Since the end of the Second World War, the great imperial trading systems have largely yielded to an inclusive world system marked by progressive reductions in tariffs, subsidies, and other nontariff barriers—techniques long used to manage domestic political economies. At the same time, there has been a progressive narrowing of areas that governments had immunized from this global system. The ascendance of capitalism virtually everywhere and the eclipse of anticapitalist economic and moral theories have reinforced the internationalizing economic trends. These trends have increased the need for competitive capacity of virtually every entity and have set off, within states, rapid and disjunctive social changes, which are driven, as well, by other intersecting trends. The resulting spread of a single, inclusive industrial and science-based civilization has, of course, generated and diffused new technologies and opportunities, but it has also put great stress on traditional moral and religious doctrines and on those for whom these ideas are central struts of their existence.

As more and more of the planet has become part of a single market, skills have diffused at a differential pace, often creating population explosions, thanks to the introduction of relatively rudimentary medical technology without the transplantation of comparable economic developments that would have permitted larger populations to self-sustain and that also would have led

W. Michael Reisman is Hohfeld Professor of Jurisprudence, Yale Law School. Some of the ideas in this paper are developed in more detail in *Designing Curricula: Making Legal Education Continuously Effective and Relevant for the 21st Century*, 17 *Cumb. L. Rev.* 831 (1987).

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to voluntary limitations on reproduction. Capitalism with its "frenzy of increase," in Canetti's vivid phrase, must consume ever more natural resources, putting unprecedented stress on the environment.¹ The revolution in communications, which has been a key girder of the internationalizing economic process, has also broadcast images of wealth, intensifying and adding urgency to demands and expectations.

Local problems caused by population pressure, no less than economic exchange, have benefited from the explosion of rapid and cheap transportation. Throughout the history of our species, migration has been one survival strategy, but its scale has usually been limited by natural barriers and primitive transportation. Now, transportation allows sudden, virtually unpredictable mass movements, putting at risk the economic and other opportunities that make certain states immigration magnets. Yet threats of political explosions at the source of the outflow are increased if the magnet states try to close themselves off. Enhanced and accessible transportation also facilitates the rapid spread of currently incurable diseases that, in the past, would likely have burnt themselves out in isolated corners of the planet.

New transnational patterns of loyalty are developing. As states and smaller, traditional social units prove unable to provide security and the other values for which their members look to them, desperate searches for new identifications are ignited. And as English reinforces its status as the global lingua franca, traditional language and thought systems are disappearing as rapidly as other endangered species. The more gifted members of the declining and disappearing cultures may make the leap to a new and more inclusive and robust culture with its promise of comparatively greater opportunities, while the less adaptable often slip into an anomic reality as the social and economic conditions that sustained traditional kinship units disintegrate and are replaced by significantly different ones.

These trends relate, as well, to the transformation of crime or, more generally, action that threatens public order. Crime has also transnationalized, making historically feared transnational gangs like Triad societies or the Mafia look, in retrospect, like neighborhood toughs.

A rapidly changing world is inevitably marked by conflict between contrary political forces, as individuals and groups who see change as an indulgence press for still more, while those who feel threatened—politically, economically, or in terms of moral ideas—resist. Hence, at least in the short term, one notes in certain critical sectors a growing tolerance and demand for violence as a political technique.

Obviously, a world of this sort generates new principles and governmental structures, for which the same pattern of support and resistance can be expected. The once hallowed principle of economic self-determination, an article of faith in the 1970s, is dead. The Bretton Woods institutions, reinforced by a network of international and regional trade organizations and specialized agencies, now dictate a single macro-economic policy format to

1. Elias Canetti, *Crowds and Power*, trans. Carol Stewart, 465 (New York, 1962).

even the largest and strongest states. While some scholars and politicians who haven't heard the news still ventilate about sovereignty and the sanctity of domestic jurisdiction under the United Nations Charter, extraordinary and unprecedented national competences have been transferred to international institutions, most recently to the decision structures of the World Trade Organization. If Europe is any harbinger, a centralized transnational bureaucracy will be making decisions that penetrate deeply into the fabric of national and local life. Not surprisingly, this trend generates counterforces: the broad spectrum of anti-Maastricht reaction in Europe and the recrudescence and, more surprisingly, legitimization of isolationism in the United States. In Europe, even the assurance of deference to local decision, the so-called "subsidiarity" principle, has hardly blunted the reaction.

In an increasing number of sectors of social organization, the transnationalization of critical activity is rendering the corresponding parts of the state's governmental apparatus insufficient for the protection of public order. Whether we look at control of health, of criminal activity including terrorism and other forms of purposive political violence, of economic monopolization, of immigration or border control, of protection of intellectual and material property—whatever—a single state cannot accomplish what is expected of it without locking itself into increasingly complex and durable intergovernmental arrangements, each of which necessarily requires some yielding of national competence.

There are no exceptions to this phenomenon. Even the security of the United States, the last superpower, cannot be accomplished alone. In terms of military materiel, the U.S. may have been the only country that could have fought the Gulf War by itself. It simply could not *afford* to do it by itself. Hence the continuing need for alliances of varying durability, with the limits they perforce impose on the freedom of national action of even the strongest alliance members. And if the conception of national security is taken to include preventing the diffusion of nuclear and biological weapons to other states and nonstate entities, stemming the transnational movement of disease, protecting the environment, and assuring external markets, to mention only a few commonly accepted priority items, the national subordination to international arrangements is seen as even more ineluctable.

If these are the problems and attendant internal strains facing the United States, imagine how they look to the elites of medium-sized and small states, some of whom must now depend on networks of international nongovernmental organizations to provide even basic social services. No surprise, then, that we have locked ourselves into free trade agreements that span North America and may now reach down to the Southern Cone, and have assigned an astonishingly broad jurisdiction to as-yet-unestablished decision institutions in Geneva.

All of this may enhance political and economic security, but it also leads to deep ambivalences and insecurities. Robert A. Dahl has written:

A country's economic life, physical environment, national security, and survival are highly, and probably increasingly, dependent on actors and actions that

are outside the country's boundaries and not directly subject to its government. Thus the members of the demos cannot employ their national government, and much less their local governments, to exercise direct control over external actors whose decisions bear critically on their lives.²

Yet rational responses to this increasingly "global" condition involve the creation of more transnational governmental structures. But these, in turn, further minimize opportunities for personal involvement in the decisions that affect one's life. Hence globalism, for all of its promised benefits, has a darker underside that generates at many social levels either a sense of personal insecurity or a sense of personal inessentiality. These experiences impel some to desperate searches for personal security that provide fertile soil for authoritarian systems that promise it. In this context an urgent function of politics and law becomes the containment of demagoguery that incites and exacerbates anxiety—and, more generally, the management of anxiety, both accomplished in ways compatible with systems of freedom of expression.

Where do American law schools and their curricula fit into all of this? Curriculum and law school structure are like a budget in that they are both policy choices and tools for their implementation. They are tools for training decision specialists to perform functions deemed indispensable in the contexts in which they are going to operate. What those decision functions will be depends upon present and projected preferences, or goals, about the most desirable ways of arranging the social and political processes so that—as we demand of all law—they provide minimum order and opportunities for realizing optimum goals. Since we are training people for the next twenty or thirty years and we may take for granted that the tempo and scope of change will continue to be rapid and broad and difficult to predict, curricular design becomes both an empirical and a projective exercise. Lawyers will certainly continue to be specialists in decision, in making and appraising choices for and on behalf of others. But the determination of *what* those particular choices will be, what the context of decisions will be, and which professional skills will be necessary is no easy matter.

Designing a curriculum then involves a number of sequential operations:

- determining provisionally what one expects lawyers to be doing in the first part of the next century;
- cataloging the skills those performing those functions will require;
- determining which of those skills may be sufficiently cultivated in the various component parts of the primary legal education, which ones may be left to "experience" or "on-the-job" learning (a professional euphemism for externalizing onto particular clients the costs of learning the law), and which may be assigned to supplemental "continuing" education in a variety of forms;
- allocating the various information and skill units among the temporal units that make up primary legal education; and

2. *Democracy and Its Critics* 319 (New Haven, 1989).

- determining what skills the instructors in this process will require and ensuring that they acquire proficiency in them.

Because we are planning, by definition, a future-oriented activity, curricular design requires a way of thinking efficiently about a range of possible futures. Let me suggest three in the broadest strokes.

In terms of the trends I sketched, the least probable (though not impossible) of futures appears to be one in which globalism is reversed: the processes of transnational integration are arrested, and the patterns of economic exchange retract to largely national units. Individual entities try to develop autarkic economies behind protectionist barriers rather than integrated economies based on calculations of comparative advantage. Fascination with other cultures recedes, and local cultures increasingly fixate on and celebrate imagined images of their own past.

Another, perhaps more probable, future is one in which trends toward integration produce several large trading blocs—one in Europe, the Mediterranean, and parts of Africa; one principally in North and parts of South America; and one or two in Asia and the Pacific. Each bloc has its own pattern of dominance and subordination. Patterns of interaction within each of the trading blocs will be relatively intense, while patterns of exchange between the trading blocs may be considerably less intense and more centrally organized or “managed.”

A third future is one in which the essential model of the new World Trade Organization triumphs and there is a substantial increase in global integration. It is marked by the continuing dominance of English as a world language, rather than clusters of dominant languages in different regions, and the continuing move toward a homogenized global scientific and technological civilization.³

In the second and the third constructive futures, each of comparatively higher global integration based on science and industry, many of the functions assigned to the lawyer may be different from those of predecessors.

Once we have sketched in the contours of what we project will be the social context in which the students of today will be performing professional functions in the future, we may try to identify with more precision what those functions are likely to be and to assign certain quanta with regard to their relative importance in terms both of the careers of the students and of the needs of the community. This inherently difficult task is further complicated for us by the heterogeneity of the American bar. Its members range from those who routinely perform essentially clerical functions—such as closings on small property holdings, the drafting and probating of wills—through those who advise and perform legal functions for small and medium-sized

3. We may equally contemplate possible futures of catastrophe: a viral epidemic of global proportions that substantially reduces the human population; the recurrence of a nuclear balance; proliferation of nuclear and chemical weapons and a proliferation of small wars; the recrudescence of terrorism, with a reaction of increasing the authoritarian governments demanded by citizens concerned with personal security; and so on. Each of these possible futures has implications for the role of those with legal skills.

businesses, through those who argue in court and other tribunals, on through to those who manage multinational corporations and the capital investments of great conglomerates, through to those who manage the affairs of entire states. It ranges from the criminal to the civil side, from the local to the global.

There is yet another dimension of heterogeneity. In contrast to continental systems, in which a specialized bench is recruited at a very early career stage, American judges are recruited after active and varied legal and political practices. Moreover, in state-sponsored arbitration, younger lawyers are frequently coopted to episodic functional quasi-judicial roles. Hence, legal education, insofar as it acknowledges the need for special training for judges, must try to incorporate it into the ordinary educational process.

In our system, lawyers frequently act as participants in the legislative process at many different levels of social organization, and the results obviously have significant social consequences. We do not have special schools for legislators. So primary legal education must also develop ways of synthesizing and transmitting the skills indispensable for conceiving and crafting legislation.

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

In designing specific courses, an approach to law different from the one we have inherited will be necessary, if the education we supply is to be relevant to the second and third images of possible future world social processes which I have described. Again, let me speak in the broadest terms.

First, the legal curriculum should be based upon a notion of a comprehensive transnational legal system rather than an autonomous national system that connects to other states and an international system through certain formal linkages. This is a radical shift of perspective and will influence the focus and content of virtually every subject area. I think that this is the thrust of John Sexton's conception of global education and I agree with him.

Second, the legal curriculum should seek acquisition of a wide range of skills going far beyond facility in linguistic exercises. This is one of Roberta Ramo's proposals.

Third, the legal curriculum should develop an extended professional conception of decision. Practice is not simply a question of application of existing law, but also of the prescription or legislation of new law. Prescription or legislation, in turn, imports promotion or lobbying and the termination of existing law. In fact, if one unpacks the word *decision*, it becomes obvious that there are, at every legal of social organization, at least seven functions which lawyers perform and for which they must develop special skills. Unfortunately, most of our discussions in law school tend to revolve around the function of application by courts. What skills students acquire with regard to the other,

equally important functions are simply picked up along the way. Courses on the lawmaking process are only the faintest reflections of the struggles and political processes in which policy for the community is hammered out. Nor is there adequate consideration of the design of the sanction component in legislation, without which lawmaking exercises remain little more than word games. There are few courses on lobbying, one of the most important functions in our political system in which lawyers play a major role. Nor do we treat in explicit fashion techniques for appraising the aggregate performance of our legal system in terms of our major political goals. This is, of course, the *raison d'être* of the law. If the lawyers of the next generation are not able to consider this in a systematic and effective fashion, who will?

Fourth, as one looks transnationally, the law curriculum should address much more candidly the relation of power and law, and the role of law in the production and distribution of social goods.

Finally, the new curriculum should emphasize that law is a process of making decisions in the various decision phases I have indicated, and that the appropriate role of the lawyer is not simply to observe and report, but to actively try to shape the future through his or her role in authoritative decision.

For the extraordinarily different environment of the near future—one of a transnational science-based civilization—law schools must train men and women to acquire fluency in the dynamics of what will be the relevant decision structures, to become adept in influencing their outcomes and in assisting other people in clarifying goals and developing strategies to achieve those goals in diverse contexts. A critical skill will become the creation of new institutions as well as the more traditional skill in the management and adjustment of inherited ones. For those involved in legal education, a critical skill may become the ongoing refashioning of curricula, as change and obsolescence replace stability and continuity as hallmarks of law. For that task, at least, the basic template will not change, for the design of a professional curriculum will always involve developing a spectrum of images of possible futures, identifying the functions likely to be assigned to the law-trained person in those futures, identifying the skills necessary for the performance of those functions, assembling a curriculum and materials for teaching those skills, and mobilizing the people who can teach them.