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THE AUTOBIOGRAPHY OF AN EX-LAW STUDENT*

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WHEN I began to study law in 1920 we were chiefly concerned with two things: one, our definition of law, and two, our desire to be scientific. We knew what we wanted in both cases. The law was what the courts and other governmental officers would do. If we were scientific we could predict what they would do. The task of lawyers, law teachers, and law students was therefore clear. It was to learn how to predict what the courts and other governmental agencies would do.

To acquire facility in this mode of prophecy we turned, as Langdell had turned, to what the courts had done. Since what they had done last was what they were most likely to do next, we kept up with the recent cases, and even studied accounts of them in newspapers and mimeographed sheets. Since what the courts had said shed some light on what they would do, we devoted a good deal of attention to analyzing and reconciling the language of learned judges. What they had said and done, carefully noted item by item, made up the vast collection of items which at the end constituted our legal information.

You will observe that we were thoroughly Baconian as to science and thoroughly behavioristic as to psychology. It was scientific to collect and examine a multitude of particular items, which gradually arranged themselves into rules the courts had followed. We knew that the courts would follow these rules in the future as they had in the past because courts were people, and people behaved as they were in the habit of behaving. Our scheme was very simple and quite complete.

Yet even in those remote days we had some qualms about it. Since we were a university law school, we could not limit ourselves to what the courts had done. Our function was to improve the law, not merely to learn it. We had to decide, therefore, whether the courts had done right. We could not content ourselves with the weight of authority; that was too

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much like counting noses. We could not test the cases by their conformity to principle. There were no such things as principles in our definition or our science. How were we to tell whether the cases were "sound"? Fortunately at this juncture pragmatism came to our aid. It told us that we could test the rules of law by discovering whether or not they worked.

This helped us a great deal. For a long time we sat and speculated about how the rules worked. In public utility law, for example, we decided that Mr. Justice Brandeis was right about the rate base and Mr. Justice Butler was wrong, because Mr. Justice Brandeis' rule would work better than Mr. Justice Butler's. Whether this was really because we were in favor of lower rates and thought the Brandeis rule would lower them, though today it would raise them, whether it was because we liked liberals and therefore preferred Mr. Justice Brandeis to Mr. Justice Butler, I do not care to say. In attempting to decide which rule worked better we had to assume a social order and the aims thereof, and then try to determine which rule did more to achieve the aims we favored. What made this difficult was that we didn't know much about the social order; we didn't have any special competence in the matter of social aims; and we didn't have the slightest idea how to go about finding out whether a given rule helped to accomplish them or not.

Suddenly we discovered that there were people who knew all these things, people who could tell us how the law worked and why. They were the social scientists. We had every reason to resort to them. The courts were social agencies; their conclusions must be conditioned by society. The social scientists could help us to predict what the courts would do. The psychologists would help us understand the behavior of judges. The psychiatrists could help us there, too, and could also assist us in comprehending criminals. Hand in hand with these other scientists we could become scientific.

Therefore we added to law-school faculties men who had no legal training, but who were experts in these other sciences. Where such additions were impossible because of penury or prejudice, we took co-operation for our watchword and began to work with scholars in other departments of our universities. The social contacts we developed were very pleasant. Imagine our confusion, however, when we discovered that from their disciplines as such the social scientists added little or nothing. They taught us to reverence our own subject; it was more interesting to them than their own. With the enthusiasm of converts they showed us the masses of social, political, economic, and psychological data which lay hidden in the cases. They then proceeded to teach the cases better than we could teach

them, not because they had been nurtured in the social sciences, but because they were good teachers.

The fact was that though the social scientists seemed to have a great deal of information, we could not see and they could not tell us how to use it. It did not seem to show us what the courts would do or whether what they had done was right. For example, the law of evidence is obviously full of assumptions about how people behave. We understood that the psychologists knew how people behave. We hoped to discover whether an evidence case was "sound" by finding out whether the decision was in harmony with psychological doctrine. What we actually discovered was that psychology had dealt with very few of the points raised by the law of evidence; and that the basic psychological problem of the law of evidence, what will affect juries, and in what way, was one psychology had never touched at all. Thus psychologists could teach you that the rule on spontaneous exclamations was based on false notions about the truth-compelling qualities of a blow on the head. They could not say that the evidence should be excluded for that reason. They did not know enough about juries to tell you that; nor could they suggest any method of finding out enough about juries to give you an answer to the question.

[We decided, then, that it was nice to have met the social scientists and that we should continue to associate with them in the hope of some day striking some mutual sparks. If, for the moment, they could not help us to tell whether the rules worked, we could at least see for ourselves what the courts were doing. Since the law was what the courts would do and since all the courts do is not in books, we decided to observe the law in action. We collected tremendous numbers of facts about the operation of procedural rules and set about getting them in other fields. We thus added greatly to our accumulated data about what the courts had done. It was data of another kind than cases. But like the cases it was data absolutely raw. We did not know what facts to look for, or why we wanted them, or what to do with them after we got them. We were simply after facts. These facts did not help us to understand the law, the social order, or the relation between the two.

Nevertheless this new interest in facts had some effect on the curriculum. It culminated in what was known as the Functional Approach. The Functional Approach was based on the Fact-Situation. The Fact-Situation became the center of our educational attention. We knew that we were supposed to train young people to practice law. We knew that cases do not present themselves to the lawyer labeled Torts, Contracts, Equity I, or Constitutional Law. The lawyer is faced with a Fact-Situation. The

Fact-Situation may involve five or six of the traditional law school disciplines. We could see that this was wrong. We could see that if we could organize a curriculum of Fact-Situations we could by passing the young man through it prepare him to meet these facts or these situations in after-life. He would recognize a familiar Fact-Situation that he had known in law school and could deal with it as an old friend. So we shifted our courses around and renamed them in the hope that we might sooner or later find out how to introduce the student to those Fact-Situations he was most likely to encounter in the practice.

The trouble with the Functional Approach was that it threatened us with a *reductio ad absurdum*. If the best way to prepare students for the practice was to put them through the experiences they would have in practice, clearly we should abolish law schools at once. I challenge you to find the least excuse for one in the latest manifesto of Mr. Jerome Frank. We could not successfully imitate experience in the classroom. Even moot courts were probably a waste of time. The place to get experience is in life. The place to get legal experience is in a law office. Since there were already too many law offices, we saw no reason for turning the law schools into law offices, too. The Functional Approach seemed likely to remove the last vestige of excuse for the maintenance of law schools in universities.

By another route this general program led us toward another absurdity. The law is what the courts will do. Courts are people. What people do largely depends on their visceral reactions. The law may thus depend on what the judge has had for breakfast. The conclusion is that legal scholars, adopting the slogan of Shredded Wheat, "Tell me what you eat and I'll tell you what you are," should devote themselves to studying the domestic larders of judicial wives. The prospect of a life of such investigation might well put an end to legal scholarship altogether. Digestive Jurisprudence and the Functional Approach were on the verge of destroying the two characteristic activities of the university law school.

At the time when I stopped studying law these horrid possibilities were just appearing on the horizon. They struck terror to the heart of at least one law teacher. And there were other fears that daunted me. Had we not engaged in a hopeless task? There were thirty thousand cases and eight thousand statutes a year. In addition we had taken up the burden of discovering and studying a lot of facts outside the cases. In addition we had decided to master the data of the social sciences. We had to do all these things if the law was what the courts would do and our job was to predict what they would do next. How could we hope to make the slightest impression on all this material in one short life-time? Of course we

could break the field down into smaller and smaller compartments, narrowing our individual vision to our individual capacity. But this would mean adding to the faculty every year until the number approached infinity. {

Another thing bothered me. Suppose the legislatures should repeal everything we ever knew. Mastery of all the facts about the Sherman Act painstakingly acquired in the course in Trade Regulation might be a positive disservice under the N.R.A. Could it be that in presenting our students with Fact-Situations of the present or immediate past we were actually handicapping them in their battle with the Fact-Situations of the future? We had given them no weapons but our advice about these good old Fact-Situations. But suppose the foe was a brand new one, the product of a New Deal.

Finally I was haunted by the notion that our duty to our students' was to educate them. We knew of course that they came to us without education. We had learned not to expect any from the colleges of liberal arts. When we got through with them we might flatter ourselves that we had trained them to be good technicians, competent craftsmen, or as Mr. Beale has put it, to make a noise like a lawyer. I could not see that we had done anything about their education. Education, I had supposed, was chiefly an affair of the intellect. Our curriculum was anti-intellectual from beginning to end. It involved not a single idea, not a single great book, not a single contact with the tremendous intellectual heritage of the law. We did not even expect intellectual exercise. We discussed the logic of the cases, it is true; but none of us knew any logic. We could not engage in intellectual exercise because we were not competent in the intellectual techniques which it requires.

I found myself therefore at the end of my legal career facing a series of dilemmas. We must educate students, but we couldn't do it because the law is what the courts will do and our students must become able prophets. This requires them to know all about what the courts have done and are doing. There is no time to do more than train them, even if we knew how to educate them.

We must, then, train students. This is a vain hope because the law offices can do it better, and because just when we get them trained new legislation which we cannot foresee may make the habits we have given them the worst they can possibly have.

We must, then, devote ourselves to legal research. But if the law is what the courts will do and we are going to be scientific we must get the cases, and the facts outside the cases, and the data of the social sciences. But

when we get this material it is useless because we don't know what to do with it. It is a hopeless job, anyway, because there is so much material that we can't possibly accumulate it all, and we have no basis for selection and discrimination.

Now I put it to you that these dilemmas are the inevitable consequence of our notion of law and our conception of science. I do not deny that our definition of law and our conception of science are possible. I do assert that they are not complete and not fruitful for the study of the law.

I suggest that the essential constituent of a science is the analysis of its basic concepts. The proper immediate subject matter of a science is its abstractions, as can be seen as soon as the question is asked, What is the basis of the division, classification, and selection of the concrete material? The answer, contrary to the Baconian dogma, is that the basis must be found in the rational analysis, which is logically prior to the empirical operations involved.

Empirical operations do not make a science. Facts do not organize themselves. Let me emphasize as strongly as I can that we must accumulate cases, facts, and data. I simply insist that we must have a scheme into which to fit them. The law school that ignores the cases, the facts, or the social sciences will be a poor law school. The legal scholar who ignores these things will be a poor legal scholar. What I am suggesting is not to be taken as consolation or encouragement to those lazy, unimaginative, or irresolute souls who have opposed going beyond the language of judges into the facts of the law and of social science. I am not proposing that we discontinue those activities which have characterized the progressive law school in the past ten years; I am proposing an addition to them. To understand this addition we may refer with profit to the words of the great physiologist, Claude Bernard. "By simply noting facts," he said, "we can never succeed in establishing a science. Pile up facts and observations as we may, we shall be none the wiser. Endless accumulation of observations leads nowhere." Experiments and observations are employed to assist in formulating and to exemplify rational analysis, not as a substitute for it. It is rational analysis which finds and orders abstractions which can be organized into systems; and it is by the development or application of these systems in concrete material that we understand facts and data. One aim of science is to understand. This the law schools have neglected for the sake of another and an inferior aim, the prediction and control of behavior. Since a university is primarily concerned with understanding, a university law school might be primarily concerned with understanding the law. This is scientific in the highest sense.

Now I suggest that if we are to understand the law we shall have to get another definition of it. I suggest that the law is a body of principles and rules developed in the light of the rational sciences of Ethics and Politics. The aim of Ethics and Politics is the good life. The aim of the Law is the same. Decisions of courts may be tested by their conformity to the rules of law. The rules may be tested by their conformity to legal principles. The principles may be tested by their consistency with one another and with the principles of Ethics and Politics.

The duty of the legal scholar, therefore, is to develop the principles and rules which constitute the law. It is in short to formulate legal theory. Cases, facts outside the cases, the data of the social sciences will illustrate and confirm this theoretical construction. Where formerly they were worthless because we had no theoretical construction; where formerly we did not know what facts to look for or what to do with them when we got them; where formerly we could make no use of social scientists because neither they nor we had any mutual frame of reference which made material transferable, we may now see how all these things will assist our attempt to understand the law. We can even see how to tell whether cases are "sound."

The concern of the law teacher and of the law student, as well as the legal scholar, is with principles. The leading philosopher in America, Alfred North Whitehead, once addressed himself to the problem of the university school of business. His conclusions are applicable to the university law school, too. He said, "The way in which a university should function in preparation for an intellectual career, such as modern business or one of the older professions, is by promoting the imaginative consideration of the various general principles underlying that career. Its students thus pass into their period of technical apprenticeship with their imaginations already practised in connecting details with general principles." The general principles of the law are derived from Politics and Ethics. The student and teacher should understand the principles of those sciences. Since they are concerned with ideas, they must read books that contain them. To assist in understanding them they should be trained in those intellectual techniques which have been developed to promote the comprehension and statement of principles. They will not ignore the cases, the facts, or the social sciences. At last they will understand them. They will be educated.

I take it that an educated man knows what he is doing and why. I believe that an educated lawyer will be more successful in practising law as well as in improving it than one who is merely habituated to Fact-Situations. His training will rest not on his recollection of a mass of specific

items, but on a grasp of fundamental ideas. The importance of these ideas cannot be diminished by the whims of legislatures or the vagaries of practical politics.

You will say that even if all this is true, it is utterly impractical: the students, the bar, and the public would never tolerate a law school organized to formulate and expound legal principles, even though such formulation and exposition must take account of the cases and the facts of the law and of social science. They believe these schools are founded to train students in the art of practising law and that facility in this art is best acquired through homeopathic doses of experience in law school. I think you are right. Therefore I suggest that in every university where there is a law school a department of jurisprudence be established. The object of such a department would be to formulate and expound legal principles. Gradually its efforts would be reflected in the curriculum and studies of the law school. Gradually it would be discovered that its students were more successful at the bar and even in predicting what the courts would do than the progeny of the law school. Gradually we might come to realize that the best practical education is the most theoretical one. And gradually, very gradually, the law might become once more a learned profession.