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THE PLACE OF LAW IN THE LIBERAL ARTS COLLEGE *

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A LAW school man is perhaps not in the ideal position to discuss the place of law in the liberal arts college. Yet discussions of this question have so often been characterized by extremism and lack of frankness that a small degree of moderation and candor, from whatever quarter, may have some utility.

The most extreme views on this subject seldom find expression in formal discussions, thanks to our polite conventions. They exist, nevertheless, to shape the attitudes which are taken when concrete arrangements come to be made.

There is, first of all, the disdainful attitude of some collegians, who regard the law as mean vocational stuff devoid of respectable intellectual aspects. This cloistered attitude is happily dying out, but there are those who cling to it. These are the men who smile when they quote epigrams such as that the study of law sharpens the mind by narrowing it; but often their jesting is in earnest. Such men would do well to look around them, for a little observation would teach that in this age of sociological jurisprudence the study of law as a mechanism for dealing with a wide range of human problems, with its insistence on rigorous and objective thinking and its appeal for enlightenment from every relevant source, can be—and sometimes is—a liberalizing experience. We are here speaking, however, of the total effect of a professional education in law, and it does not necessarily follow that bits and pieces of a law curriculum should be imported into the liberal arts college.

There is, secondly, the haughty, proprietary attitude of some law school men, who regard any attention by the college to conventionally legal subjects as a presumptuous infringement by self-appointed incompetents. Such men would do well to recall that the concerns of lawyers are to a large extent precisely the concerns of historians, economists, political scientists, sociologists, and philosophers, and that under one name or another these matters were the subject of university study long before the professional school of law was conceived. They might also recall with profit that the study of Anglo-American law as such won its way

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into university purlieus in the first place at least partly on the basis of its claim to be recognized as an appropriate component of the course of liberal studies. Blackstone's inaugural lecture as Vinerian Professor of Law at Oxford is familiar, but some of us tend to forget that the greater part of it was devoted to an elaboration of the "undeniable position" that a competent knowledge of English law was "the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education." The same theme was repeated by some of the early American professors of law: James Wilson at Pennsylvania announced that the plan of his course was to furnish a "rational and useful entertainment to gentlemen of all professions," and Chancellor Kent at Columbia deemed his lectures "useful and ornamental to gentlemen in every pursuit."¹

The third conspicuously extreme position is much more prevalent, and much more important because it finds its way quite generally into the actual arrangements of the liberal arts curriculum. This is the attitude of the academician who is well aware of the extent to which his sphere of interest and responsibility coincides with that of the law school; who needs no convincing of the cultural values of law study; who is deeply impressed with the efficacy of methods of study which have been developed in the law school; and who leaves no stone unturned in his determination to shape his courses so that in method, materials, content, purpose, and result they will be indistinguishable from those given in the professional school. I shall have more to say of this attitude, because it causes me the greatest concern; just now I shall say only that those who adhere to it would do well to reflect that in Blackstone's panegyric on law as a liberal and humane study there was undeniable hyperbole and more than a little disingenuousness. It is reasonably clear that what Blackstone and Wilson and Kent were mainly interested in was the establishment in the universities of professional law study, and all were conscious of the need to appease what Blackstone called the "monastic prejudice" of hostile academicians. The lack of frankness which has plagued formal discussions of this question is congenital, and it will not do to take such dissertations on the value of law study for the average man too literally.

That there is a place for law in the liberal arts college I have no doubt. That college courses, especially in the social sciences, must inevitably cover much of the same ground that is occupied by the law schools seems merely obvious. That law in some of its aspects, and certainly legal institutions, can and should be an important part of the program of studies of the college which aims simply to produce educated men, must at the

¹Currie, *The Materials of Law Study*, 3 J.LEGAL EDUC. 331, 347, 356 n. 67 (1951).
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present time be primarily a declaration of faith; but it is a faith to which I adhere. It seems to me that, not from lack of interest but from over-zealousness, the colleges have in general failed to realize their opportunities—and, indeed, to meet their responsibilities—in this matter. We are confronted with a paradox: whereas once the college faculties regarded with aversion anything that smacked of the lawyer's practical art, the difficulty now is that some members of those faculties, in their enthusiasm for the educative potential of legal studies (or perhaps simply in their enthusiasm) have injected a professionalism into their courses which poorly serves the objectives of general education, which tends to the neglect of their own distinctive contribution, and which fails, finally, to warrant its last desperate justification—that it provides desirable preparation for law school. The rightful place of law in the college curriculum will not be established by efforts in that direction.

Before we proceed, there are one or two formal matters that require attention. It would be possible to consider college courses having legal content both from the standpoint of their general cultural value and as preliminary training for the student who intends a legal career. I take it, however, that the spirit of my assignment calls clearly for a consideration of the appropriateness of legal studies to a plan of liberal education for all college students, irrespective of ultimate vocational aims. I therefore propose to dismiss the pre-law aspects of the matter with two rather summary remarks: First, if a course does not serve the ends of liberal education the college is not justified in retaining it simply because it is good preparation for law school; and second, the best preparation for law school is furnished by courses which concentrate on the goal of imparting a liberal education, and do not attempt to anticipate the professional curriculum.

It may be well, also, to narrow the field of discussion. Among the courses of more or less legal character commonly offered by undergraduate schools it is possible to distinguish at least five different categories. First there is International Law, which we can at once exclude from the present discussion on the ground that it has never become firmly established as a professional law course in the sense that Constitutional Law, for example, has. This particular transition is incomplete. The current literature of legal education echoes frequently the pleas of devoted law teachers for the inclusion of International Law in the law school curriculum. Without taking sides on that issue, we can simply observe that International Law is not sufficiently established as a component of the professional curriculum to constitute part of the problem under discussion.

Next there are the business law courses, beginning with the conventional concoction of commercial law topics, ramifying with increasing complexity into business organizations, corporate finance, labor law, and government regulation of business, and passing at some not very determinate stage into the graduate level. An undergraduate school of business administration raises questions altogether different from those raised by the liberal arts college in this connection, and on that ground this group of courses can also be put aside. A rather remarkable circumstance enforces a brief comment, however. Columbia College recommends its elementary course in business law (designed primarily for students intending to enter the graduate school of business) for both pre-law and liberal arts students. Few teachers of Contracts in the first year of law school would recommend a course in business law for pre-law students; and whatever may be the merits of such courses as training for business, their value to a liberal arts program is somewhat less than obvious.

The third category consists of a few rather random courses designed to afford opportunity to the intensive specialist in a field to gain some acquaintance with related legal problems or conditions. Thus a course in *The Law of the Press* may be offered to English students interested in journalism. The most interesting offering in this class is Harvard College's *Comparative Literature 181—Copyright and Other Legal Protection for Literature and Art*—given by Professor Chafee. The variety and uniqueness of these courses defy generalization. I suspect that their value to the liberal arts program depends primarily on the instructor, and that *Comparative Literature 181*, at least, is a rewarding educational experience.

This brings us to the two remaining categories, which are to remain in the area of discussion. The first comprises those courses in the departments of political science, history, and economics which treat of law and what we call legal problems not because a little knowledge of the law is regarded as an ornament or a useful adjunct of training in the discipline, but because these matters lie at the very heart of the discipline itself. These courses deal with law because they must. To say that constitutional development should not be studied in college is to say that history should not be studied. To say that administrative law should not be taught is to say that the science of government should be dismembered. To suggest that problems of competition can be studied without reference to the Sherman Act, or labor problems apart from the Wagner and Taft-Hartley Acts, is to propose an absurdity.

Courses in this category are abundant, not to say proliferous. Few colleges neglect English and American constitutional history. Labor

law and government regulation of business are usually to be found among the offerings of the economics department. Political science leads all the rest, with courses in The Legislative Process, Constitutional Law, Administrative Law, State and Local Government, and variations too numerous to record. Harvard College offers no less than four separate courses in state and local government, surely affording a more generous opportunity for intensive study of even the strictly legal aspects of the subject than any law school.

The final category is small, but I shall speak of it with tenderness. It consists of those courses which treat legal standards, legal processes, and legal institutions, either specially or along with other institutions and social problems, from what for want of a better term may be called the sociological point of view. Representative of the general courses are the Columbia surveys of contemporary civilization and Chicago's general courses in the social sciences. I know of only a few examples of courses of this type devoted specifically to legal institutions: one is given at Princeton by Professor Alpheus T. Mason, and is misleadingly entitled *Jurisprudence*; another is offered at Harvard by Professor Mark deWolfe Howe, and is more appropriately entitled *The Structure and the Growth of Law*; a third, called *Law in Society*, is given at Wisconsin by Professor Willard Hurst. In the Political Science Department at the University of Pittsburgh, courses in *Legal Institutions* and *Judicial Administration* are offered by Judge Gustav L. Shramm, of the local Juvenile Court. The purpose of the Harvard course is "to suggest the processes through which the law has developed, to indicate the limits of its competence, and to give some insight into the nature of the institutions through which it has been made effective." Professor Mason's *Jurisprudence* is "a historical approach to the origins of modern legal institutions, the contrast between the Anglo-American and the Roman legal systems, the major legal concepts, the parts played by legislation and judge-made law, and the question of reform of judicial procedure." The aim of all such courses is, in short, not the mastery of legal precepts or techniques but critical understanding of law as a social phenomenon, through the use of historical, comparative, and philosophical methods. I intend to suggest that it is in courses such as these that the colleges have most closely approached the ideal treatment of law in the undergraduate curriculum.

Certainly I do not mean that courses of this type can or should supplant the more intensive treatment of public law that is indispensable in the fields of history, government, and economics. That must remain, but preferably with some change in method. The proper placement of law in the liberal arts program requires action by the colleges along two

separate lines: recognition that an unwholesome degree of professionalism has crept into the essential public law offerings, and greater appreciation of the cultural value of the study of law as an institution.

I should like to discuss the public law problem first, and with particular reference to Constitutional Law and Administrative Law, because it is in those courses that the tendency to professionalism which I consider alarming has been most pronounced. The practice of adopting a conventional law school casebook as the vehicle for such courses is now well-nigh universal. Classroom procedures and examination techniques follow, as nearly as may be, the law school pattern. I know of one undergraduate course in constitutional law which is based on Evans' casebook, a somewhat more than normally comprehensive collection; the instructor, not content with its coverage, supplements it with cases on full faith and credit and even more technical questions of the conflict of laws.

This, I submit, is zeal misguided. The attempt to transplant the case method is, in the first place, an error of pedagogical judgment. Those who are responsible for this unfortunate experiment are doubtless entranced by the spectacular success achieved by that method in the law schools. Specifically, they are attracted by the mnemonic and illustrative features of a system which associates the principle with the facts to which it is applied; they like the resort to original materials rather than secondhand interpretations; they are perhaps misled by the pseudo-scientific appeal of the so-called "inductive" character of the case method. The important fact which they overlook is that the case method owes its success in the law schools not to these real or supposed advantages, but primarily to the fact that it requires the student to develop proficiency in a fundamental professional skill—the critical analysis of cases and their evaluation as precedents. It is unrealistic in the extreme to expect undergraduate students who have no intention of making a career of either law or political science, and who are exposed to the case method in only a fraction of their courses, to acquire enough facility in such a difficult technique to make the case method worth while. This is somewhat like asking the student who wants to acquire an intelligent layman's concept of astronomy to begin by mastering the operating intricacies of a large telescope. We in the law schools count ourselves fortunate if our students, spurred on by professional incentives, have acquired a reasonable competence in case analysis at the end of a full year of concentrated effort. When this element is subtracted, the remaining pedagogical values of the case method are probably not sufficient to justify its use.

I sincerely hope that nothing I have said remotely suggests any implication that the men who give these courses are not competent to teach law in the professional manner. I have many respected friends among them. Their talents as teachers would grace the faculties of the finest law schools, and their writings have already enriched the professional literature. The truth is that their very excellence is one of the root causes of the problem. I am afraid that at this point my determination to be frank may lead me to seem unkind, but I must say that I often wonder whether the excessive professionalism in undergraduate public law courses is not traceable directly to the frustrations of men who would be and probably should be law teachers. These are men who must be as conscious as the rest of the world of the fact that their abilities often overshadow those of their favored counterparts in the professional school. The resulting effort to demonstrate their competence by giving courses of the full-fledged professional variety is natural. It is natural, but it is not in the interests of liberal education.

These distinguished men travel in still more distinguished company. They live in the tradition of Blackstone and James Wilson and Kent, and of Woodrow Wilson, who in 1894 addressed the American Bar Association on the subject of Legal Education of Undergraduates. His address was a notable one which has been sadly neglected. I hope that it may some day come to be more widely appreciated. Oddly enough, however, it is significant not for what it says on the subject which was assigned to him, and which we are discussing tonight, but for its insights into the needs of *professional* legal education. Like other orators in the line, Wilson paid ritual tribute to the cultural properties of law study; but he quickly passed to the subject which really interested him: "Every citizen should know what law is, how it came into existence, what relation its form bears to its substance, and how it gives to society its fibre and strength and poise of frame. *But our concern is with the lawyer*, and it is certainly he more than any other who needs to be versed in the philosophy and the history of law."² The ensuing discussion of the education of the prospective law student was years ahead of its time; it was even three years ahead of Holmes's *The Path of the Law*;³ it stated an ideal which the best modern law schools have adopted as their own; it was, in consequence, well ahead of Wilson's present-day successors in political science, who accept the present level of law school achievement as sufficient.

In at least one respect the relation of the law schools to the university community has been highly creditable. Unlike some professional schools,

² 17 A.B.A.REP. 439, 442 (1894) (italics supplied).

³ 10 HARV.L.REV. 457 (1897).

they have refrained from encroaching upon the function of the liberal arts college. In spite of continual solicitation they have steadfastly refused to say how the undergraduate years should be spent. Give us, they have said, men who are liberally educated, men who know as much as possible about the problems and amenities of life, men who have learned to think independently. You are the best judges of how such men are to be produced. The time available to you and to them is short; we will not trespass upon it with demands for the supplementation of our vocationally oriented discipline. This being so, it is especially difficult to understand why the liberal arts college insists upon functioning as a sub-professional school, and in inflicting its professionally inspired designs upon the student who asks only a liberal education.

I have not succeeded in locating it, but I feel almost sure that somewhere in this country there exists a university in which the ultimate inversion has taken place: the vehicle for the undergraduate course in constitutional law is a conventional analytical casebook, such as Dowlings's, and the instructor in the law school course of the same name has adopted Professor John Frank's historical compilation. I am not one to sneer at the efforts of law teachers to borrow inspiration from kindred disciplines; but I suspect that for some time to come the distinctive contribution of the law school will be primarily in the analytical tradition, supplemented as circumstances permit by resort to other techniques; and this not improbable reversal of emphasis highlights the incongruity of the undergraduate approach to public law. As the law school gradually moves toward a more effective and more humane treatment of the subject matter of a calling, the college moves in to occupy the position just partially vacated by the professional school.

In the long run, this flirtation with the case method is likely to have even more serious consequences than those which flow directly from its faulty pedagogy. For a good many years, now, we in the law schools have been acutely conscious of the limitations imposed on professional education by our habitual concentration on authoritative legal materials. We have sought to discover external standards of criticism, and to take account of all factors influencing the development and application of law, wherever we can find them. To this end we have aspired to something called the integration of law and the social sciences. Such an aspiration assumes that social scientists have techniques of their own for advancing knowledge and understanding: techniques that are historical, comparative, philosophical, empirical, statistical. But if, to the neglect of these techniques, the best minds in the social sciences persist in embroiling themselves and their students in the manipulation of precedents according to the analytical practice of law schools, I am afraid there

will be nothing to integrate. Ideally, it should be as hard to distinguish between a political scientist and a law teacher as it is to tell whether Sir Henry Maine was an anthropologist or a lawyer; each would be thoroughly at home with the methods of the other. But if we are told that our colleagues manage to develop in their undergraduates both the analytical skill of the lawyer and the insights of the social scientist, our own experience with the limitations of time and of individual capacity will entitle us to be skeptical.

We come finally to the point that the liberal arts colleges have neglected the cultural values of what Professor Boorstin has called "the humane study of law."⁴ In the presence of the dean of a distinguished liberal arts college I have refrained from attempting to define a liberal education. Dean Ward himself is the author of a widely known statement of purpose: ". . . the business of liberal education in a democracy is to make free men wise."⁵ Wisdom, the power of intelligent judgment, implies more than a superficial acquaintance with the legal institutions that are basic to the social order. An informed citizenry has always been a powerful and necessary force for law improvement. The lay reformer we have always with us, and if it were not so it would be necessary to invent him; but friction and irritation are injected into the democratic and cooperative process of law improvement when the layman exhibits utter lack of comprehension of considerations which are very real to the lawyer. In the words of Woodrow Wilson, while the worst enemy of the law is the lawyer who knows only its technical details and neglects its generative principles, "the worst enemy of the lawyer is the man who does not comprehend why it is that there need be any technical details at all."⁶ It is disconcerting, and it is a reproach to the colleges, that we find among their finest products cultivated men who can discuss with insight everything from Egyptology to nuclear physics, and who yet have no conception of the uses of precedent or procedure; who cannot understand the function of the criminal defender; and who can imagine no reason for a statute of limitations other than a vicious desire to pander to the greed of deadbeats. And the ultimate task of law, which is to contribute to fulfillment of the aims of our democratic system, would be materially lightened if our citizens were to come from the colleges with a clearer grasp of the practical and legal problems involved in the eternal effort to balance the ideal of individual freedom against the need for restraints in a free society.

⁴ *The Humane Study of Law*, 57 YALE L.J. 960 (1948).

⁵ 1 THE PEOPLE SHALL JUDGE vii (SELECTED AND EDITED BY THE STAFF, SOCIAL SCIENCES 1, THE COLLEGE OF THE UNIVERSITY OF CHICAGO, 1949).

⁶ 17 A.B.A.REP. 439, 441 (1894).

I have no syllabus for an undergraduate course designed to carry out the purposes suggested here. Specially designed programs are necessary because the desired understanding of the legal system cannot be expected to materialize as a by-product of the various kinds of attention given to matters of a legal cast in courses designed with other ends in view. These special programs would emphasize the understanding and criticism of legal institutions rather than of legal doctrine; they would require the reading of Bentham and Commons much more than of Mansfield or even Marshall. Chicago's general courses in the social sciences and Columbia's in contemporary civilization are steps in the right direction. The obvious criticism of them from the standpoint of present concerns is that their scope is too wide to permit the specific study of legal institutions as such. The Princeton course in Jurisprudence, the Harvard course in the Structure and the Growth of the Law, and the Wisconsin course on Law in Society set the pattern that should be emulated and developed. I should say that the legal historians are probably best equipped to develop courses of this nature, the basis for this judgment being not only the evidence of the Harvard and Wisconsin courses but the well-formulated ideas of Professor Boorstin on the subject. While I do not join in Professor Boorstin's rejection of the value of the pragmatic attitude to such studies, that is a matter that relates only to the philosophical orientation of the course; it does not alter the fact that he has set forth probably more thoroughly than anyone else what the structure and purpose of such a course should be.

I am reluctant to return to a consideration which has rightly been rejected as inappropriate, but, since history reveals the stubborn fact that liberal arts faculties do suffer from an incurable compulsion to feel that they are contributing to the development of the distinctively professional abilities of the future lawyer, I cannot resist the temptation to voice the assurance that courses of this type would provide valuable pre-law training, and this without distorting the program for the student with no professional intentions, or duplicating professional work to come. There is little enough opportunity in the law school itself for the long perspective, and when it comes it usually comes late. Let this assurance be taken for what it may be worth. It ought to be sufficient justification for such courses that a critical understanding of legal processes and institutions in a democracy helps to make free men wise.