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LEGAL EDUCATION*

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THE history of legal education in this country is the history of salutary movements that missed the point. Langdell's reforms were salutary and necessary. He found a dead dull routine of giving and memorizing lectures. He infused life into legal education. The case method had a reality about it that texts and lectures lacked. At the time it performed a great service; and, in a sense, it is doing so still.

Langdell's reforms had some defects. In the hands of others, at least, they reflected a misconception of science. As everybody knows, the notion that science is created by the accumulation of data is naïve. As Poincaré has remarked: "A collection of facts is no more a science than a heap of stones is a house." The case method threw tremendous emphasis on particular cases and particular facts, and created the erroneous impression that a science of law would eventually emerge from this mass of material.

The case method went too far partly because of the prestige that was attached to it after the Harvard Law School began to prosper under it. Every law school that aspired to tell its constituency that it was as good as Harvard felt it necessary to announce that all courses were taught on the case system. It was perhaps desirable to teach most of most courses by that system. But we need not suppose that because the case method is effective most of the time it must be effective all of the time. When the teacher's object is merely to transmit a simple but important piece of information, when the class is large and of very uneven abilities, or when the subject under discussion is chiefly of historical interest, the case system leads to an inordinate waste of time.

Law students must learn to read cases, but three years seems a little

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protracted for the process. A student who cannot read them after six months will probably never learn to do so. The widespread insistence on teaching everything by the case method cannot therefore be justified by the necessity of giving the student an equipment for finding and reading case law.

From another point of view Langdell's reforms occurred at just the wrong time. Langdell's system placed primary emphasis on reading and understanding the opinions of courts of last resort. He introduced it just at the time when the slow but sure process of driving the arts of reading and writing out of the high-school and college curriculum was beginning. I do not say that grammar and rhetoric did not deserve to be driven out, to so low an estate had they fallen. Perhaps it is better to have no instruction in them than to have the kind that we had in the '70's. I am almost certain that it would be better to have none than to have the kind we have now. Logic and casuistry, the application of general principles to concrete cases, were much more difficult to handle under the case system than they were before. But at this time, too, logic was disappearing from the collegiate course of study. The same questions could be raised about the effectiveness of instruction in formal logic that I have asked about the teaching of grammar and rhetoric. Perhaps it was so bad that it ought to have been got rid of at any cost. But soon we had the spectacle of students and professors wrestling in the law schools with logical problems of the greatest difficulty and doing it without any equipment except that with which they had been gifted by nature.

At this juncture the arts of grammar, rhetoric, and logic, all theoretically indispensable tools for reading, writing, and thinking about legal decisions, were taken away from those who had to cope with them. At the same moment they were deprived of what was left of another important aid to understanding judicial opinions; for the great books of the western world began their departure from the course of study of secondary schools and colleges. This process has continued to the present day, until only scraps of them appear anywhere in the curriculum. Law students were required to read and understand the opinions of judges bred in an intellectual tradition that was increasingly alien to them. Contrast the education that Lord Mansfield or Judge Story or even Lord Birkenhead had with that of the student who has been graduated from college and is about to enter law school today. Then ask yourself how it is possible for him to understand the opinions of these judges when he is as ignorant as he is of the intellectual background of their writings. He has lost the arts with which they read the books that were the basis of their education. He has

lost the books, too. All the fragmentary history, social science, and literature he has read and all the experiments in natural science and psychology he has done cannot make good the losses he has sustained.

I believe that it is in large part these losses that are responsible for the shift in emphasis under the case system from instruction in legal principles illustrated by cases to instruction in cases as indicating what the courts could be expected to do. There is no reason why the case system should necessarily have forced the consideration of principles out of the course of study. You can't teach principles without teaching cases. But you can teach cases without teaching principles. Principles cannot be studied in an environment in which the intellectual tradition has ceased to have vitality for those who are living in it, when philosophy is in decay, and the consideration of ethics, apart from that awful bore, the required course in legal ethics, is regarded as irrelevant to education for a learned profession. By twenty years ago jurisprudence, comparative law, and legal history had become subjects taken by queer students who were fortunately few in number. Jurisprudence itself was often taught in the light of the doctrine that the law is what the courts are likely to do. In all courses the student's notion was that he should write down the rule which was held by the weight of authority, noting exceptions if he intended to practice in an exceptional jurisdiction, and that he should memorize those rules for the purpose of repeating them on the final examination. The best student was the one with the best memory who could manipulate the rules best in the face of hypothetical cases. The best teacher, of course, was the one who stated the rules most clearly, concisely, and slowly so that they could be most easily and correctly written down.

The case method thus could and often did come to the same sterility as the textbook and lecture method and for the same reasons. It could degenerate into the discussion of the language of the judges, ending with the statement of the majority and minority rules which the class faithfully committed to their notebooks. The case system was no more "practical" than the one it replaced except for the training it gave in finding and reading case law, which, as I have suggested, could have been acquired in six months. From the strictly practical point of view the case method might be said to prepare men to argue before appellate courts, an experience most students were not destined to have until long after their legal education had been forgotten. The principal virtue of legal education under the system of twenty years ago was that students learned to work. This was not a result of the system, however; it was the result of the intense competition in law schools, which in turn was the result of the direct

relation that came to be established between law school grades and law office jobs. If that relationship had been established when the textbook-lecture method was in vogue, competition would have been as keen and the students would have learned to work just as well.

The rise of the university law schools from the '70's paralleled the rise of the great corporations and the tremendous expansion of American industry. The bar entered on a new phase, and the law schools went with it. This was probably the first time in our history when it came to be taken for granted that the bar was the servant of commerce, industry, and finance. It became possible for lawyers to amass substantial fortunes. As the bar came to see the law as a means of making money, law students inevitably came to see it in the same light. A member of this Bar told me of a question asked him by an old Wisconsin lawyer forty years ago. The question was, "Is it true that there are men in New York who are practicing law for money?" There were some such men then, and I have heard that there are a few still.

There used to be a difference between a profession and a trade. The distinguishing marks of a profession were three. It had an intellectual subject-matter. It had it in its own right. The object of the group was not to make money, but to advance the common good. I do not say that any profession in history has perfectly realized in all its members this last qualification. I do say that there have been times even in this country when the bar as a whole would have been ashamed to say that the law was a means of making money. I doubt if any such sense of guilt prevails today. The good result, and it is the only one, of this shift in interest from the common good to financial success is that law students work hard because they want to make high grades in order to get good jobs. The bad results in legal education are the monopolization of the curriculum by subjects which look financially profitable, and the further suppression of the intellectual content and the intellectual tradition of the law. In this atmosphere there are two reasons for giving or taking a law school course: one, that it is on the bar examinations; and two, that it has an apparent connection with making money.

All such connections are, of course, more apparent than real. A law school cannot give the qualities or the experience that leads to financial success. It can create an arena in which, in order to succeed, a student must have qualities that may help him to succeed at the bar. That is, it can so organize itself that in order to be successful in law school the student must be quick, have a good memory, and a capacity and willingness to work. Some of these talents may be useful in making money. But

they by no means guarantee success in making it. Beyond giving a chance for these qualities to operate, a law school can make no contribution to financial success. Vocational courses, practical courses, courses designed to make men whiz-bangs in a particular field the minute they graduate, are all a hoax.

I asked a member of the New York bar, who has achieved some distinction at it, a classmate of mine in the law school, what he had got out of his legal education. He was at a loss for an answer. I then asked him what he thought the student should get out of a legal education. He finally said, "The most important qualification for success at the bar is guile. A university cannot and should not teach guile. Therefore a university should not teach law." You may deny the major premise and the conclusion of this syllogism, and I too should deny the conclusion. I hope to show how a university can teach law. All I am attempting to point out now is that if the aim of the bar is financial success, and if the best way of achieving it is guile, students are not likely to be much interested in a course of study resting on the notion that the law is a learned profession and that a university is a place for the pursuit of truth and the cultivation of the intellectual virtues.

The methods and content of legal education that I have been describing characterized a period that came to a more or less definite close in leading law schools fifteen to twenty years ago. At that time new and salutary reforms began to be talked about. As we have seen, the remoteness from reality that had once afflicted the textbook-lecture system had come in some places and in some hands to afflict the case system, too. An impractical educational program was masquerading as a practical one. We were still, we thought, too theoretical. We did not know the economic, social or political basis of legal decisions. We did not know their economic, social, or political effects. Judges made the law, but we could not understand the psychology of judges, and this went for juries, too. We were too theoretical, we felt, in the organization of our courses. Their names were historical; their contents were antiquated; they did not either by name or contents present the facts of legal life to the student as they would appear to him in practice.

As a salutary reaction against the remoteness of the case system and idle speculation about actual situations discussions began which resulted in three related movements. One, the functional approach, was an attempt to reorganize law school courses so that they bore more obviously and directly on types of legal practice. The second, factual studies, was an effort to follow the law in action, to find out the consequences of legal

decisions, and what was actually going on in the legal world. The third, co-operation with other disciplines, represented the feeling that economics, history, sociology, psychology, and political science all had something to do with the law and the conviction that scholars in those fields could shed some light on the origin and the effects of what the courts were doing.

These developments were natural and desirable. The system of legal education invented by Langdell had gone almost as dead as the one it supplanted. Some refreshment was necessary if only to hold the interest of students. Moreover legal scholars were engaged in criticizing the effect of decisions with little actual knowledge of what the effects were. When they were not doing this they were discussing the language of judges. Some effort to go beyond the words of courts was imperatively necessary.

It is necessary today. I believe that the effort to make legal education vital, to collect facts, and to get at the historical, social, economic, political, and psychological bases and consequences of the law should continue unabated. I have no sympathy with law professors who wish to lapse into arm-chair speculation or into logic-chopping, particularly if they have had no speculative or logical training. I have no sympathy with those who think they have done their whole duty when they have read the cases and told their students what they hold. I trust that nothing I may say will be interpreted as encouragement to the lazy, irresolute, or incompetent. No law professor can claim to be one if he separates himself altogether from the "realistic" movement.

Yet it may be permissible to suggest that this movement is not the final, complete, and conclusive answer to the problems of legal education. The functional approach strengthens the notion, and it is a pernicious one, that the duty of the law school is to train the practitioner in using the tools of his trade. It produces a descriptive type of education, in which no effort is made to communicate principles. The object is to describe to the student the situation in which he will have to work. I need not tell you that changed economic or political conditions can and often do change the practitioner's situation overnight. The functional approach puts the emphasis on the wrong place. It puts it on what the lawyer does. I am tempted to say that a university law school should put the emphasis on what the lawyer is.

Co-operation with other disciplines is an excellent thing. The law schools have been too often and too far separated from the rest of their universities. But co-operation with other disciplines requires that the co-operating disciplines each have a theoretical structure which makes the facts and ideas of the one intelligible to the other. Facts about busi-

ness are not useful to economics in the absence of economic theory. Facts about law are not useful to the legal scholar in the absence of legal theory. The facts of each are not interchangeable to the other unless the theory of each can be grasped by the other.

At the time when the movement for the co-operation of the disciplines began legal theory had ceased to play any important role in the law schools. The collection of cases and the formulation from them of rules suggesting what the courts would do had become the preoccupation of the teachers. They had, therefore, no theory into which they could absorb what other scholars had to give. At the same date social scientists were divided, with some notable exceptions, into those who believed in arm-chair speculation and denounced all contact with the world and those who believed that a house was a collection of stones and denounced all speculation whatever. Psychology had become principally the pursuit of rats through mazes, though it was occasionally enlivened by the study of animals of more complicated anatomical structure and more dignified social position. Co-operation under these circumstances could not be fruitful, and it has not been. Again I say that this does not mean that co-operation should not be continued; it does mean that the indispensable conditions of successful co-operation remain to be worked out.

For the same reason the collection of facts about the operation of the law has not fulfilled the hopes we had of it. It is a gratifying thing to do because it is hard, and we are still in some respects Puritans; it is different, and we like to think we are making progress; it brings us up against the real world, and we are sensitive to the charge that we are academic recluses. But factual material is useful only to illustrate, confirm, or deny principles and ideas. Or to put it another way, we do not want facts; we want relevant facts. In order to decide what facts are relevant we have to have some theory or other. But as we have already observed, legal theory was almost non-existent. Fact-collecting under these circumstances tended to be the indiscriminate and therefore useless assembly of miscellaneous and trivial items. Facts are absolutely indispensable. No theory is any good until it has been checked by the facts. But no fact is any good unless there is a theory which it bears upon. Fact-collecting, an important new development in legal education and scholarship, could not be as useful as it must become because at the time it began legal theory was at the lowest ebb it had reached in centuries.

Langdell's reforms were off-center. They were important, but not as important as a vital central core of jurisprudence. The functional approach, co-operation with other disciplines, and data-collecting were off-

center. They were important, but they could be effective only if a vital core of jurisprudence were the center of the law school. The protest of Langdell and of the newer protestants against theory was misdirected and their remedy did not meet the real issue. Because theory was being badly and unrealistically taught they objected to theory itself. They proposed substitutes for it that led to the still further degradation of jurisprudence and of legal education; and the realism they achieved was, as we have seen, a realism in name only. What they should have done was to recognize that jurisprudence is central and to revive the intelligent study of it. They would then have found that the case method, the functional approach, co-operation with other disciplines, and the collection of facts fell into their proper places and accomplished the results for which they hoped.

The problem of the law schools today is therefore the problem of resolution and synthesis. We must conserve the beneficial features of what Langdell and his successors have done and absorb them into a sounder and more adequate policy of legal education. And since I have been so rude to everybody else who has ever said anything about the subject, it is only fair that I should expose myself by outlining now what a sound and adequate policy is. As a preliminary I may point out that what legal education should be depends on what law is. Anybody who has any opinions about legal education must have implicitly or explicitly, a philosophy, a theory, a conception of the law. If a professor told you that he was opposed to any philosophy in legal education, what he would mean would be that his philosophy and his philosophy of law led him to conclude that he was against the particular proposal in question.

I shall therefore try to formulate the policy of legal education in terms of a few basic principles in the philosophy of law. This will not be exhaustive. I shall merely make three simple statements about the nature of law, expand their meaning, and suggest what follows educationally. If I cannot hope for agreement to the principles I elaborate at least the issue may be properly focused; for it will be focused on the necessity of some principles.

The first statement I wish to make is that the law, as made by legislators and judges, and as administered by courts and other officers, is a set of political determinations of the principle of justice with respect to the social and economic relations of men at a given time and place.

The expansion of this statement involves the suggestion that law is only one political instrumentality. Public education, for example, is another. All such political instrumentalities are directed to the common good as

their ultimate end. If this were not so, they would be directed to the good of individuals or of special private groups and would be corrupt political devices, political instruments misused. The common good of a society can be generally defined. Societies naturally exist because individual men are naturally insufficient and insecure in isolation. The common good is the good derived from social living. It is the good of social organization. It consists of peace and order and the distribution of economic goods.

The principle of justice in making and administering the law is two-fold: the ordination of laws to the common good as an end and the direction of social and economic operations according to the moral virtues. One of these is justice in a special sense, in the sense of economic justice or fairness in the exchange and distribution of economic goods. Later I shall refer to a third principle of justice, that the law must proceed from one duly authorized to make, promulgate, and enforce it. According to the principles I have suggested, law can be judged as just or unjust. An unjust law is, of course, law only in name. It is actually an expression of force and not of law.

Determinations of justice are relative to the circumstances of a society at a given time and place. Rules of law are conventional to the extent that they consider particular conditions and attempt to devise just political means in the light of such considerations. Judicial decisions, as applications of rules in particular cases, are also determinations of justice, and as determinations have the element of conventionality in them. But justice itself is not conventional. It does not change from place to place or time to time, although the determinations of it are always relative to particular conditions. All human societies have common features as well as conventional differences. Human nature, which is the same everywhere, is the constant source of these common features. A body of law, then, has two aspects. The first is a natural aspect, from which point of view we see that law has its basis in justice, in the common nature of all human societies, and in the constant nature of man. The second aspect of the law is conventional. Here are revealed the differences in it that are peculiar to different times and places. There are no rules of positive law which are conventional alone. These rules are natural insofar as they are determinations of the principle of justice, which is a principle natural to men.

The second simple point in the philosophy of law that I want to make is that law is a work of practical reason in the regulation of social conduct. The law is not on the one hand a work of the passions, of emotional

prejudices, or of class hatreds; nor on the other hand is it purely speculative or theoretical. A rule of law does not express knowledge. It is not true or false or probable in the sense in which scientific statements or even common opinions are true or false or probable. Law is practical to the extent that it aims at action rather than knowledge, at the regulation of conduct by some form of prescription that can be enforced. It is rational to the extent that its prescriptions must be based upon knowledge and to the extent that this knowledge is used prudently in the determination of means.

Many kinds of knowledge are useful to the practical reason in making and administering law. Knowledge of man's nature is required. This is psychology. So is knowledge of social and economic arrangements and processes. This is economics and sociology. So is knowledge of past arrangements and processes and of the ways in which the law affected them. This is supplied by history and legal history. Ethics, or the knowledge of the order of goods in the happiness of the individual, is necessary. So is politics, which gives knowledge of the order of goods in the common welfare of the political community. And finally we must employ metaphysics, which will help us to understand the good itself and its relation to particular goods.

When I say that the law is a work of the practical reason I do not mean to intimate that judges and legislators are perfectly rational. I am merely saying that they are not perfectly irrational. They use human, not angelic or animal, intelligence to make law. Nor do I mean either that because the law is rational in this sense it is good or just. Men can and sometimes do apply their intelligence to the selection of means to the wrong ends. The goodness of the law depends on two factors, the moral virtues, which require that it be a determination of justice and be directed to the common good; and the practical reason which makes that determination in the light of all relevant knowledge prudently.

The third point in the philosophy of law that I should like to make is that the law is a body of rules promulgated and enforced by those who are vested with the political authority to do so. A rule which is a determination of justice in the light of reason is not law unless it is made by duly constituted authorities. The constitutional source of law turns upon the nature of political organization itself, upon the distinction between ruler and ruled, and upon the relation of government to the principle of justice underlying the law. These questions involve in turn such questions as the natural and conventional aspects of political organization, the factors of political authority, the constitutional limitations of just govern-

ment, the relation of civil liberty and political justice, the relation of law and custom, and the problem of tyranny, due process, etc. These questions must be understood if the law is to be understood; they are questions in political philosophy.

We are now in a position to reach some conclusions about what a legal education should be. We see in the first place that it should be both speculative and practical. On the speculative side it must contain both knowledge and understanding of the law. By knowledge of the law I mean the science and history of the law. The science of law is an ordering exposition of the content of the existing law in terms of its rules and concepts, its plan of administration, and its actual manner of operation. The history of law is of course the study of how the law came to be what it is, its intellectual development, and its political and economic background. By that understanding of the law indispensable in legal education I mean the philosophy of law. Just as there are two aspects of law, the conventional and the natural, that is, what is different and what is the same, so there are two aspects of the study of law: for the conventional aspect science and history, for the natural aspect philosophy. The philosophy of law, therefore, attempts through psychology to understand the law in terms of the analysis of man as a rational animal engaged in making and administering laws. Through ethics it attempts to understand the law in terms of an analysis of justice, the moral virtues, and the goods. Through politics it attempts to understand the law in terms of political organization, the sources of authority, constitutionality, and the common good.

The practical aspect of legal education is the training of the students in the operations of legal thinking. They must be trained in the search for and ordering of knowledge relevant to legal problems. They must be trained in the methods of legal analysis; that is, they must know how to refer legal questions to principles in moral and political philosophy. They must be trained to formulate legislation and to interpret legal language. They must be trained in legal argumentation and the proof of matters of fact. They must be trained in casuistry, which is not what you think it is, but the application of general principles to concrete cases.

Since these are the speculative and practical aspects of legal education, we are able to state what the elements are that the course of study must contain. To the extent that law is conventional it requires the study of cases and legal history and the study of the particular circumstances bearing upon making and administering law today as disclosed in sociology and economics. To the extent that the law is natural, the curriculum

must contain moral philosophy, political philosophy, and psychology. Psychology must be studied too because the law is rational, and with it there must be logic, the rules of operation in proof and casuistry, and grammar, the rules of operation in using words, in formulating rules, and in interpreting them.

In short, legal education must consist of the study of law as it is and operates, the study of how law came to be what it is, and the study of the principles which must be employed to solve the problem of what the law ought to be. Not the study of the cases alone, nor the study of how the law operates in fact, nor the study of legal philosophy will give us a legal education. We must have all three, and in an ordered relation to one another. Jurisprudence is the ordered relation of all these studies.

The bar has enthusiastically opposed successive reforms in legal education and has accepted them only when it was beginning to be clear that these reforms had missed the point. I cannot hope that the program I have advanced will meet with the favor of the bar. It contains all the things they have opposed in the past and a good many more that they have never had a chance to oppose before. Lawyers may not like them because lawyers are conservative, but more, perhaps, because lawyers have a mistaken notion of what is practical and a limited notion of their professional field. They sometimes ignore the fact that the law is a learned profession and that there must be more learning in it than learning what the law is. The present character test in New York, though better than nothing, is farcical. To what branch of legal education does the bar look for a contribution to the character of the candidate? Certainly not to the short course in Legal Ethics, which is ordinarily an opportunity for the students to catch up on their sleep. Certainly not to regular law courses, which in most cases are taught from the point of view of the bad man, and not as if the law were intimately and inextricably connected with moral principles.

The members of a learned profession must be learned and they must practice their profession for the welfare of the community. This is the aim of the legal education I have proposed. I shall be glad to accept any curriculum that will accomplish the same aim. But any reform of legal education that has not this aim or that cannot attain it has missed the point. After sixty years of important but tangential effort we should now bend our energies to our central task, the reconstruction of legal education so as to achieve a learned profession and the common good.