

## CRISIS IN LEGAL EDUCATION

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THESE are signs of an unusual ferment in American legal education. Law faculties all over the country are busily engaged in re-examining, overhauling, and revamping their pre-war curricula; special committees have been created by the Association of American Law Schools for the express purpose of revaluating the objectives of legal education; and even the American Bar Association has just launched a comprehensive study of the legal profession to determine, among other things, just "what we are educating [law] students for, and whether the type of education we offer prepares our students for the tasks they must perform in the profession."<sup>1</sup> Countless articles have appeared in law journals under such captions as "On What Is Wrong with So-called Legal Education."<sup>2</sup> Teaching materials with "the new look" have made their appearance in classrooms; and experimentation with four-year law schools (instead of the conventional three) has been under way. All of this is suggestive of unrest and dissatisfaction with the old order of things in legal education. It is a period of great soul-searching and stock-taking—a period of transition, of doubt, of conflict and debate. "Whatever else it is a sign of," observed one of our law-teaching luminaries, "it indicates that there is something wrong with us. If we were completely healthy, we should not be anxiously seeking the aid of a physician."<sup>3</sup> It is an especially difficult period for the younger generation of law teachers; they know there is something wrong with the old, but the directional lines of the new have not yet been clearly drawn.

What seems to have taken place is a general revolt against the arid conceptualism of an earlier jurisprudence, which stressed the logical consistency of self-contained rules of law without considering either their social origins or social consequences. It took the skepticism of at least the last two generations of law teachers to demonstrate that judges were human—the products of social and psychological conditioning, that their

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<sup>1</sup> Legal Profession Survey Project: Report by Dean Albert J. Harno, Association of American Law Schools Handbook 103 (1946).

<sup>2</sup> This is the title of one of the earlier of the many provocative articles on legal education by Professor Karl N. Llewellyn, 35 Col. L. Rev. 651 (1935).

<sup>3</sup> Radin, *The Dilemmas of Legal Teaching*, 30 Iowa L. Rev. 355 (1945).

decisions, especially in the field of public law, were top-level policy matters, and not mechanical deductions from logico-legal syllogisms. These teachers (typical is T. R. Powell of Harvard) were "debunkers" and "exposers." They dealt almost exclusively with judicial case materials, were skilled in the dialectic process, and took great delight in exposing the logical fallacies and inconsistencies of judge-made law. As healthy as this skepticism was, it was, at best, negative in approach. It specialized in tearing down, not building up; it created a distrust of the rational, a suspicion of generalization and principle. But it did provide the seeds for the rise of the newer generation of "realists." Once the mask of conceptualism was off, fruitful (and fanciful) inquiries were made into the psychological and social motivations behind judicial behavior. Even the excesses of the "gastronomic" theory of jurisprudence or the questionable adaptations of psychiatric lore (Jerome Frank: *Law and the Modern Mind*) failed to dampen the ardor of the younger generation of law teachers in their search for the "realities" behind the law. But once the "realities" were laid bare, they were utilized for two major classroom purposes: 1) they furnished grist for the exposé (which was also the forte of the "skeptic"); and 2) they encouraged the development of skills with which to manipulate (not in the evil sense) the dispensers of legal authority—particularly the court. In this latter development, perhaps more is owed to Karl Llewellyn of Columbia than to anyone else in the modern legal teaching profession. He convinced many law teachers that their job is to transmit to their students less substantive knowledge of legal "principles" than the necessary skills to get things done—of sharpening the skills of advocacy, of brief-writing, of argumentation before the jury, etc. And many present-day law-school courses have accordingly been patterned along these directional lines.

But despite these advances, there is still evidence of a marked restiveness in the law-teaching world. There is a growing feeling that the lawyer's skills have not and should not be confined to the courtroom, that what the lawyer does in his work-a-day life and what the lawyer is trained for are at great variance. The lawyer's professional life consists of a series of activities in many diverse arenas. Not only does he do battle in the judicial arena—he appears before legislative bodies to testify on behalf of or against pending legislative proposals, he advises clients who are haled before legislative investigating committees, he must know his way around the complicated maze of administrative tribunals, he is called upon to mediate or conciliate labor disputes, he is apt to be consulted on matters involving the United Nations, he is called on to lobby on behalf of certain

measures, or asked to draft proposals in the interest of "public-spirited" groups. In brief, he is "trouble-shooting" in all directions—in *and* out of the courtroom. And the law-school world, which is just beginning to realize what the lawyer actually does, has found itself unprepared to equip the student with the necessary skills. It is difficult to recruit teachers themselves equipped with the skills to be imparted; it is even more difficult to build the necessary teaching materials for classroom use. Witness, for example, the enormity of the task, recently undertaken by a group of law teachers, of preparing materials to equip the would-be lawyer for the task of minimizing labor-management conflicts.<sup>4</sup> Although teachers have caught up with reality, there is a prevailing sense of frustration in not being able properly to cope with it.

But as critical as is this problem of discovering and developing the technical skills for the modern lawyer, even more critical is the growing concern over what may be done to direct the ends for which these skills are to be used. Out of the welter of discussions concerning the lawyer's skills has emerged the realization that in operating in these varied arenas of activity, whether before or within a court, legislative body, administrative tribunal, or private group or organization, he has assumed a major role in the molding of policy judgments, the impact of which may affect large segments of the nation's life. And there is a corresponding support for the proposition that a part of the education of the law student should be devoted to a conscious attempt to shed light on and give direction to this policy role. Law schools have heretofore shied away from this problem—being content with developing only skills and techniques, and leaving the question of policy and values to the liberal arts schools or to the cold, bitter world of experience. "Policy" considerations, of course, have always entered into class discussions through the back door. The individual professor's ethical and political bent soon comes to the surface in the very selection and analysis of classroom materials, in the direction of his questions. But they are not organized consciously into an affirmative teaching program. Now, however, there are currents which seem to be moving in the other direction. In a recent report of the Committee on Aims and Objectives of Legal Education, organized by the Association of American Law Schools, it was asserted that ". . . an essential aspect of [legal education] is the encouragement and development in law students of certain social attitudes and a sense of ethical values, particularly those

<sup>4</sup> See Transcript of Proceedings of the Conference on Training of Law Students in Labor Relations, Conducted by the Round Table Council on Labor Law, Association of American Law Schools, June 1947.

values which constitute the basis of our democratic institutions.”<sup>5</sup> The ambitious project of study launched by the American Bar Association is concerned with “what contributions do law and lawyers make to the basic principles of a democratic society?”<sup>6</sup> One of the leaders in American legal education predicts (and hopes) that law schools “will insist that students shall have grappled with some of the fundamental problems of the relations of the individual and the state before entering upon the technical aspects of the study of law.”<sup>7</sup> Another views the introduction of policy discussion in the classroom as “thrusting most of us toward a realization that underneath policy judgments on little questions lie deeper policy judgments on large ones, which . . . call for being made explicit and for testing. . . .”<sup>8</sup> And still another: that one of the functions of the law school is “to seek to increase the common store of general understanding of the total process by which a community achieves its values.”<sup>9</sup> These examples could be multiplied many-fold; the direction is unmistakable. But why now—at this time? And what stands in the way of meeting the challenge?

The first question takes on shape and meaning when viewed against the background of a society in transition. This country, in a comparatively short time, has been undergoing a transformation from a predominantly laissez-faire type of government to a highly centralized state of gigantic proportions, in which most of our economic life is either subject to or affected by governmental rule and regulation. This has been in response to unrelenting pressures of new interests claiming legal recognition—particularly the “common man’s” interest in security, in a greater share of things material and spiritual. As these foreseeable demands increase and the resistance to them tightens, our basic institutions will be subjected to great challenge and strain. Those who must give way to satisfy the pressure of these interests will try desperately to withstand the attacks upon the traditional “way of life”; and those who exert the pressure will severely strain and even challenge that “way” if their interests are not satisfied. There is, in fact, crisis in the air now—crisis in the theory of the state. There are new forces gathering to challenge the present order of things.

<sup>5</sup> Association of American Law Schools Handbook 124 (1943).

<sup>6</sup> Harno, *op. cit.* supra note 1, at 99.

<sup>7</sup> Vanderbilt, Foreword: A Symposium in Legal Education After the War, 30 *Iowa L. Rev.* 325, 330 (1945).

<sup>8</sup> Llewellyn, Report of Committee on Curriculum, Association of American Law Schools 192-93 (1944).

<sup>9</sup> McDougal, Report of Committee on Aims and Objectives of Legal Education, Association of American Law Schools 25 (1945).

Why otherwise be concerned at this time about encouraging, developing, and preserving our basic institutions, unless there is fear that they will be endangered? And who will most likely be in the vanguard to meet the crisis, if not the lawyer? It will be the lawyer—whose very operations *qua* lawyer are dependent upon the continuation of the basic institutions of which his “law” is the framework—who will be called upon to use both ingenuity and skill to satisfy or appease the opposing pressures and at the same time keep the seams of our basic institutions from falling apart. As De Tocqueville shrewdly observed, “the authority [the Americans] have entrusted to members of the legal profession, and the influence which these individuals exercise in Government, is the most powerful existing security against the excesses of democracy.”<sup>10</sup> This is so because the lawyer is close to and at home with the instruments of governmental power, and is usually the one called upon to improvise governmental techniques to ease tensions and divert pressures. This is so because the lawyer’s outlook, in the nature of things, is conservative, i.e., his function as lawyer is geared to the basic system of given power relations, which the “law,” as the coercive power of the state, protects. He is, therefore, a “natural” for the task.

Crisis apparently begets crisis. For the crisis in the theory of the state has produced a crisis in the theory of legal education. Both are expressions of a conflict between tradition and experiment. The old in legal education still cling desperately to the traditional roles of “skeptic” and “realist”—the “skeptic” to expose and criticize, the “realist” to manipulate and cauterize. The new in legal education is demanding that law schools now become *policy-wise*. The difficulties which face the law school in the latter task are staggering. It involves a “whole” view of our society and its objectives; it entails considerations of political and social philosophy; it invites a reevaluation of power relations in our society—all of which are fairly distasteful and uncongenial to the traditional law-school mind. What is more, these involve matters upon which there is the widest divergence of view. “We have not,” according to one sage observer, “yet found out . . . what our ideals of government are.”<sup>11</sup> So how can the “proper” policy be taught? It is significant, for example, that at this late period of our political development, the observation that “the community is made up of individuals, and the ultimate end of the [democratic] state is to serve the welfare of individuals,” still invites the question: “What individuals?”<sup>12</sup>

<sup>10</sup> Democracy in America 272 (Bradley ed., 1945).

<sup>11</sup> Llewellyn, *op. cit.* supra note 8, at 193.

<sup>12</sup> Patterson, *op. cit.* supra note 9, at 129.

At the Yale Law School, Professors Lasswell and McDougall have postulated what they deem to be some of the basic values of our democratic society—shared power, shared respect, and shared knowledge;<sup>13</sup> and they are consciously endeavoring to develop and direct the lawyer's skills toward the implementation of these values. As valiant as this effort is, there are many whose concepts of "democracy" would call for a different set of postulates, or who, in accepting "power, respect, and knowledge" as three of our basic values, would have difficulty in agreeing on the extent to which they should be shared in a democracy. But although diversity of views in this field of inquiry is unavoidable, there would still be an area of agreement on "fundamentals." It would not be expected, for example, to find in the law schools any basic challenge to our existing property system, although, of course, there will be differences in "policy" judgment as to the extent to which, and the speed with which, it may be modified in order to accommodate the various pressures seeking realization. There will be basic agreement on the nature of the problem: "How and how far may the property system be stretched without snapping?" The disagreement will be on the means for the basic "how," and the judgment for the "how far." To Professor Lasswell, for example, "capitalistic nations," during the nineteenth and twentieth centuries, "have avoided revolutionary upset by *minor* modifications of the institutional order"; and it was "the devices of democratization and education" which "to some extent . . . diverted attention from the underlying property system."<sup>14</sup> Just what the "devices" will be, and the extent to which they will be employed for the foreseeable crisis to come, is apparently the task envisioned by those who are urging a conscious consideration of the skills of "policy-making." For this task, there will be great reliance on the findings of the sciences—social, psychological, and physical; there will be need for exploring personality and class structures, for measuring needs and costs, for assessing natural, technological, and human resources, for satisfying wants, for easing or diverting social tensions, for determining what problems must be left to extra-legal methods for their solution. These will be the raw materials from which the lawyer will draw in shaping and formalizing the devices necessary for the task—the task of the architect of social change operating within, and for the purpose of preserving, the framework of the given legal system.

As it will be jurisprudence which will be needed to clarify the ends of

<sup>13</sup> Lasswell and McDougall, *Legal Education and Public Policy*, 52 *Yale L. J.* 203, 217 (1943).

<sup>14</sup> Lasswell, *Politics—Who Gets What, When, How* 104 (1936).

the "policy-making," so it will be the sciences that will be called upon to supply the "know-how," the means for their realization. If the interest already manifested in "policy-making" continues, we may anticipate a wedding between jurisprudence and the sciences, with the law schools offering their classrooms as a place of abode. In the event this comes to pass, it is safe to say that life in the prosaic legal household will be made considerably more challenging. And what kind of offspring, if any, the marriage will produce, only time will tell.