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1989 SIEBENTHALER LECTURE

PHILISTINISM IN LAW

*Richard A. Posner**

I am delighted to be here and to have the opportunity to discuss with you a subject of great importance and mutual concern. This subject is the intellectual content of law—or lack thereof. I speak against the background of general concern in the nation today with the quality of education and the intellectual tone of society. Law is not immune from this concern. Indeed, I believe that law as it is taught, studied, adjudicated, and practiced in this country today is insufficiently intellectual. I will be saying the same thing if I say that American law is too provincial, too Philistine; that it is self-satisfied; that it is intellectually isolated; that it is for the most part derivative and unoriginal; that it is becoming less intelligent, less useful, and less relevant every day; that it is a prey to fads and charlatanry; that it has low standards; that it is methodologically reactionary and compromised, politically timid, and prone to pandering; and, for good measure, that it is anticompetitive.

I can hardly sustain so sweeping an indictment in the time allotted me to this lecture—especially since I have overstated my case for the sake of dramatic emphasis. I will have to paint with a broad brush and leave to future work the filling in of convincing detail, including necessary qualification. I need hardly add that I am not criticizing this or any other law school. It is an entire professional culture that I am criticizing.

For almost a century the formal training of most American lawyers has consisted of three years in law school devoted primarily to reading and discussing English and American appellate opinions. Granted, the case method is somewhat less

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dominant than it was thirty years ago, when I started law school. Today there is more emphasis both on statutes and on practical lawyering ("clinical education"). There are also some economic and other interdisciplinary perspectives. But, with a few, not necessarily happy, exceptions (most notably the Yale Law School), the core of the curriculum—at law schools large and small, national and regional, public and private—remains, in course after course—for three straight years—the study of appellate cases. What is more, a good deal of so-called "enrichment" of legal curricula comes from giving students released time for internships and externships, which in many cases amount simply to tuition without teaching.

After law school, it is true, the lawyer obtains practical experience. But increasingly it is experience of a highly specialized kind, as a litigator or counselor or negotiator in a particular corner of the law. Eventually the lawyer may become a legislator or a judge or a law professor. The lawyer who becomes an appellate judge will find himself leading a peculiarly hermetic existence in which the law, again just as in law school, is served up and dished out in the form of appellate cases, briefs, and argument. He will also find himself leaning heavily on young lawyers just out of law school—the ubiquitous law clerks who are doing more and more of the judge's job as judicial workloads expand.

The conventional training and experience of lawyers is indispensable for the practice, teaching, and administration of law. But these things are not guarantors that law will be administered with distinction, especially in a society as rich in change, conflict, and specialized knowledge (not only technical) as ours. Appellate opinions, especially those of just one legal system (in this context, the entire Anglo-American legal universe may be considered a single legal system) afford only a narrow glimpse of life; and the experience acquired by a specialized legal practitioner affords only a slightly broader one. Among the many questions that a lawyer's knowledge will *not* answer are: whether making it easier to declare bankruptcy has caused more bankruptcies and higher interest rates; whether the rules of evidence are necessary to prevent juries from making incorrect judgments, or effective in doing so; why, after many years of slight or even no growth, the judicial caseload exploded beginning in about 1960; whether conditions in prison affect the recidivism rate; whether changes in

the rules of accident law (*e.g.*, substituting comparative negligence for contributory negligence, or strict liability for negligence) affects accident rates, either directly or by altering the price or availability of liability insurance; whether suits on alleged oral promises are mostly phony, implying that the scope of the Statute of Frauds should be broadened; whether reapportionment has altered public policy, and, if so, in what direction; whether activism or restraint is the better policy for modern American courts; whether a general rule requiring the losing party to a lawsuit to reimburse the winner's reasonable legal expenses would increase or decrease the settlement rate; whether the civil jury—which has virtually disappeared outside of the United States—is an anachronism; why law firms are growing in size; whether the rules on judicial conflicts of interest are too strict (too lax); whether *Miranda* has increased the crime rate; whether arbitration produces more or fewer errors than judicial determination; whether the Continental (“inquisitorial”) system of procedure is more efficient, accurate, just, or fair than our adversarial system; whether law actually influences public opinion.

Let me pause for a moment on the last of these questions. There can be little doubt that law affects behavior by altering incentives. The criminal law, for example, makes certain kinds of antisocial behavior more costly than it would be in the absence of that law, and as a result there is less such behavior—though how much less is a profound mystery. But lawyers tend to believe that law affects behavior not only by altering incentives but also and perhaps more importantly by changing attitudes, which in turn affects behavior. Many lawyers would say, for example, that although anti-discrimination laws tend to carry weak sanctions and often are fairly easy to evade, the existence of these laws constitutes a “statement” that has changed people’s attitude toward discrimination. Perhaps so, but where is the evidence? Is it more than a self-regarding professional faith that law changes the way people think? Public opinion polls suggest that courts and the legal system generally have very low saliency for the vast majority of Americans. Lawyers may have a grossly exaggerated view of the effect of law. Surely this is an urgent subject of inquiry, but the profession lacks the tools to conduct it.

Rather than continue the litany of vital unanswered and, at present, unanswerable questions about law—I could go on for days—I should like to ask, what questions *can* lawyers answer

out of their (our) stock of legal knowledge, supplemented by legal (and life) experience? The answer is that they can recite or look up the legal rules, predict their application in factual situations either clearly encompassed by the rule as written or formulated or not too remote from litigated cases, make arguments that are persuasive in our legal culture, and answer simple questions about the legal institutions with which they are familiar. These are valuable professional skills, but they do not produce answers to the kind of questions I have put. They do not, in other words, enable our legal rules and institutions, and proposed changes in them, to be analyzed. For that type of evaluation other skills are needed—skills not imparted at any stage in the training of a lawyer.

Let us cast our minds back over the changes in the legal system in the last quarter century. We have witnessed the advent of a new bankruptcy code and a new copyright act, the growth of the class action, an enormous expansion in civil rights litigation (especially litigation brought by prisoners), a host of judicial and statutory initiatives in the field of discrimination, a vast expansion in tort liability, a shift in the balance of legal rights from landlords to tenants, a tremendous increase in the numbers of judges and practising lawyers, a dramatic rise in the amount of litigation, an increase in the salaries of lawyers so great as to create fears that there is a national "brain drain" from the humanities and sciences to the law, a glorification of the jury, rising judicial caseloads combined with an increased delegation of the judicial function to law clerks and other judicial adjuncts, an expansion in the federal rights of criminal defendants, a vast increase in the public subsidization of legal services for indigents, an increasing politicization of law and, concomitantly, a declining consensus among legal professionals. In this period of unprecedented growth, controversy, and turmoil for the American legal system, has the legal profession been in control of events, anticipating and resolving problems as they arise, or has it been a cork bobbing on the waves of a sea whose dynamics the profession does not understand? It is the latter in my opinion.

Let me put a simple question. Which of us can state with confidence that the developments in the American legal system since 1960 have been on balance beneficial to society? Americans today have more legal rights than they had twenty-nine years ago, and many injustices that flourished in the 1950s and earlier

are, today, unlawful. But the actual impact of the rights revolution on the welfare of Americans is unclear, and the cost of that revolution may have been very great. Less than a month ago the president of Columbia University, himself a former law professor and law school dean, in an article in *The New York Times Magazine* decried the diversion of intellectual talent into law from other academic fields. He failed to consider whether this diversion is one of the consequences of a rights revolution that he enthusiastically supports. The greater the demand for legal services, the higher the wages of lawyers and the greater, therefore, the diversion of intellectual talent from other fields.

The law schools have been for the most part bystanders to the revolutionary events in law of the past quarter century (individual lawyers, of course, have been major participants). The law schools did not anticipate the revolution and have contributed little to it—especially little in the way of measurement and evaluation. Most law professors have cheered on the expansion rights; some have denounced it. The amount of actual study of its course, costs, and consequences has been small. The reason is that law professors are trained and skilled in basically one thing, and that is the analysis of legal doctrine. They do not have the tools for assessing a revolutionary social phenomenon—the explosive and unprecedented expansion in legal rights in recent decades.

Perhaps all this means is that the necessary inquiries should be conducted by other disciplines. But although other disciplines (economics, psychology, statistics, history, philosophy) have the tools, they do not have the language. Just as you cannot be a self-respecting German historian without knowing the German language, you cannot go far in the study of the legal system without knowing law, which means, without understanding a professional culture with its specialized vocabulary, its arcane sources, its folkways. This has proved a formidable barrier to most scholars who are not trained in law. Collaborative research between lawyer and social scientist is one answer; a broader legal education is another. These are not, of course, mutually exclusive alternatives.

I now wish to consider what can be done within the domain of legal education to improve the situation that I have sketched. I have a number of suggestions. The first and most radical is to make the third year of law school optional. This may seem an

inconsequent proposal—to combat Philistinism by reducing mandatory education! But consider: the requirement by state bar associations that lawyers have completed three years of law school insulates law schools from a true market test of legal education. It does not matter how worthless and irrelevant relentless pursuit of the Socratic method is; students have to endure it in order to be licensed to practice law. If the third year were optional, many law students, including many at the nation's most prestigious law schools, would leave after the second year. (Some would want to leave after the first. The logic of my proposal is that there be no educational requirements for licensing as a lawyer—that anyone who passes the bar exam, and satisfies minimal character requirements, be admitted to the bar—or indeed that there be no licensing. But I shall not attempt to develop the radical implications of my proposal.) The education that students receive in law school is subject to diminishing returns, and by the third year the costs—not only steep tuition, but the lost opportunity of being employed and paid full-time—exceed the benefits for many, perhaps most, students.

The loss of tuition income as third-year students dropped out would force law schools to rethink legal education. To keep students for a third year the schools would have to offer them more than more of the same. I would like to suggest what that more might be, in the hope that some measures of reform will be taken even without the acid bath of competition. These reforms need not be limited to the third-year curriculum, and indeed it would make more pedagogical sense to introduce many of them earlier in the student's legal education. Perhaps, as is a common pattern in business, it would be best for law students to enter practice after two years of law school and then return for their third year of law school after several years in practice. But that is another important issue that I shall not pursue here.

Here are some of the skills that I believe are important for lawyers to acquire, and that are most easily acquired in a university setting rather than in on-the-job training. I omit elementary economics because the importance of introducing law students to the rudiments of economic analysis of law is by now widely recognized.

First, lawyers ought to know the principles of statistical inference. Law deals with probabilities rather than certainties: the probability that a criminal defendant is guilty, the probability

that the plaintiff would have developed cancer even if not exposed by the defendant to some carcinogen, and so forth. Lawyers and judges therefore ought to understand how to reason from probabilities. The law of evidence is based to a large extent on intuitions about probability, and many of these intuitions may be incorrect. Every law student should be required to demonstrate a minimum proficiency in statistical analysis. If he does not have it when he comes to law school, he should be required to take a course in the use of statistics in law before he graduates.

Second, and related, law students should study psychology, in particular the psychology of perception and decision-making. Is identification evidence reliable? How are jurors apt to respond to gruesome photographs of the alleged victim of the defendant's crime? Do jurors understand instructions couched in legal jargon? Are judges competent reasoners? The relation to statistics lies in the fact that persons unacquainted with statistical principles tend to make serious mistakes in dealing with unfamiliar or low-probability events. Law students ought to learn where their intuitions are most likely to betray them and where, consequently, the science of statistics will be most useful to them. Psychology is also important to an understanding of deterrence, retribution, accident-proneness, insanity, and other important issues in legal ordering.

Third, law students ought to study the theory of social or collective choice, with particular reference to voting theory and interest groups. In the last forty years there has been a revolution in thinking about collective choice—a revolution of which most lawyers, judges, and even law professors are unaware. It is now recognized by political scientists and economists that “democratic” voting procedures often fail to reflect voters' preferences, because those procedures are manipulable by control of the agenda and by pressures from interest groups, because voting does not reflect intensity of preferences, because voters in political elections (other than at the most local level) have little incentive to become well-informed, and for other reasons. No lawyer can understand the legislative process, itself so vital a component of modern law, who lacks familiarity with modern academic thinking about social choice.

Fourth, and related, law students should be required to study the legislative process more systematically than is possible in courses that deal with a particular statutory field such as labor

or copyright or antitrust. Such a course would attempt to give the students a realistic understanding of both the legislative process and statutory interpretation.

Fifth, and still related, law students need a course in political theory. They need to go beyond bromides about democracy, majoritarianism, and judicial review, and begin to think realistically about constitutionalism and the liberal tradition from Hobbes to Rawls and Nozick and beyond.

Sixth, law students need to study jurisprudence, the field that explores the most fundamental questions about law. They need to become acquainted with the great thinkers about law, from Plato to Holmes, and with the newest fields of jurisprudence, such as feminist jurisprudence and critical legal studies.

Seventh, law students have to study the legal *system*—our own and that of representative foreign countries. They ought to learn about the origins of these systems, how they work in practice as well as in theory, their salient quantitative dimensions, their differences and similarities, their characteristic strengths and weaknesses, how they are perceived by lay persons, how they have weathered political crises and affected their societies, what we can learn from foreign experience. I attach particular significance to such a course. It is vital that lawyers understand how our legal system looks from the outside, and how many of its features are contingent rather than inevitable.

Eighth, law students should have a working knowledge of the theory of finance—the key to understanding a variety of commercial fields including corporations, securities, pensions, trusts and estates, corporate taxation, and bankruptcy.

I have sketched eight nondoctrinal courses that all law students should be required to take except those few who can demonstrate mastery of the subject on the basis of previous training, graduate or undergraduate, or who can pass a qualifying exam. The proposed additions to the curriculum will at some schools require more hours of instruction (some of these hours, however, merely at the “expense” of internships and externships), but at most schools merely substitution for some dispensable electives: perhaps the third course in constitutional law, or the course in admiralty, the seminar in sports law, or appellate advocacy. These are worthwhile subjects (I have written on admiralty and constitutional law, and taught appellate advocacy). But as always it is necessary to make choices; and I do not think we can afford to

be complacent about the existing curricula of law schools.

Some of the courses I have proposed are already offered at most law schools as electives, and a few Catholic schools actually require students to study jurisprudence; but most of the courses I have sketched are either not offered at all or, if offered, attract only a handful of students. No school offers a full year of required non-doctrinal training. It is possible for students at the Yale School to take more than two-thirds of their courses and seminars in non-doctrinal fields, and some students exploit this opportunity. But the school's administration (perhaps more important, the faculty and student culture) makes little or no effort to steer the student to a balanced diet of doctrinal and non-doctrinal courses, and as a result some students emerge from their three years at the Yale Law School with warped legal educations. For I want to stress not only the balance in my proposed third-year program between "soft" and "hard" subjects (political theory is soft; statistics is hard, as is voting theory), but also the balance between doctrinal and non-doctrinal courses. I do not propose to remove training in legal doctrinal analysis from the center of the law school curriculum, but I do propose to make non-doctrinal—but non-clinical—training a strong and systematic, if subordinate, emphasis of the curriculum.

This will require students to work harder. And many will balk—and not out of laziness. Law-school tuition is high, and a high fraction of law students even at the most elite schools do substantial work for private firms—often as much as twenty hours a week. But if law schools could provide truly valuable training for those twenty hours, the students would be better off deferring their entry into the workaday law-firm world.

What on the non-doctrinal side of the divide I am calling hard subjects are subjects that require mathematical or scientific reasoning. Many law students claim to have—they even flaunt—a "math block." This is a disgraceful anachronism for persons who will be practicing law well into the twenty-first century. I am greatly distressed when I see students at the University of Chicago Law School blanch at formulas (such as the Hand formula of negligence) that require no more than high-school algebra to understand. No one who is admitted to a decent law school today is incapable of mastering the rudiments of mathematical and scientific reasoning. Law students—though even more the administrators of the nation's high schools and colleges—should be

ashamed of fearing math and science. This is a scientific age, which is not to say that it must necessarily also be an anti-humanist age. The required non-doctrinal third-year curriculum that I am proposing as a partial solution to the looming crisis of the American legal profession represents a balance of scientific and humane perspectives on law. We need such a balance if we are to meet the challenges ahead. We need a system of legal education that goes beyond Langdell, without sacrificing the real, and today sometimes the unduly disparaged, merits of the Socratic method.