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THE CORRELATION OF WORK FOR HIGHER DEGREES IN GRADUATE SCHOOLS AND LAW SCHOOLS¹

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The relation of the study of law to other university studies has in the past been considered mainly from one aspect which has presented little difficulty. It is generally recognized that a lawyer is better prepared for his life work and is likely to obtain a broader view of legal principles if he brings to his profession some education in political economy, sociology, and political science. College courses in these fields are therefore recommended for pre-legal training, and are freely taken by students expecting to enter the law school. Work of this kind is chiefly undergraduate, and does not affect the relation of the law school to the graduate school.

In entering upon a discussion of the correlation of work for higher degrees in the law and graduate schools, it is first of all important to understand the conditions with reference to advanced work and the corresponding degrees found in American law schools at the present moment.

Recent advances in law school standards, either requiring a college degree as a prerequisite for a law degree or recognizing a previous college degree by the bestowal of a higher than the ordinary law degree have not changed the strictly vocational character of law school studies.

In 1902 when the law school of the University of Chicago was established, the thought that law work done by college graduates was deserving of the same recognition as other graduate work led to the introduction of the J. D. degree, which has since been

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adopted on the same basis by California, Leland Stanford, Jr., Michigan, and New York University. To some extent the appropriateness of the doctor's degree was also supported by the argument that the study of law on the basis of cases is a form of research; but in opposition to this contention it is insisted that it is not the mere use of original sources, but the independent discovery, collation, and sifting of source material which in the graduate school constitutes the title to the doctorate, and that the only corresponding work in law schools—brief writing for moot courts or practice courses, or note writing for law reviews—is of too limited a scope to be reckoned as the equivalent of a thesis. The bestowal of the doctor's degree in law upon the basis of purely vocational training (although to some extent supported by European precedents) has therefore met with a certain amount of criticism, and some of the foremost university law schools have refused to adopt it. In any event it must be recognized that the J. D. degree of this type and the Ph. D. degree represent work of such different character that it would serve little purpose to discuss the question of correlation. We may justly claim for the best law schools with purely vocational instruction a high and useful function well performed, but that function is not the stimulation or direction of independent research with the view to the advancement of knowledge.

It would be otherwise if the law school curriculum made provision and gave opportunity for serious investigative work on the part of students.

The preparation of a thesis figures as a matter of fact in the announcements of a few law schools as a part requirement for the regular degree, notably in California and Wisconsin, at one time also in Michigan. Nowhere, however, is this thesis required to be printed, nor does its position in relation to the entire course seem to rise very much above the level of a superior grade of term paper. It certainly does not correspond to the place of the doctor's thesis in graduate work. There is a prevailing conviction that the entire period of the three years' residence is needed to do even bare justice to the field of taught law that the law school offers. In other words, there is no present inclination to abate strictly professional in favor of research work, even if this policy should entail the relinquishment of the claim to the doctor's degree in law.

It is possible to save the integrity of the professional curriculum by offering opportunity for research work after the completion of the regular course. In a very informal way this has been done

in Pennsylvania since 1907. The law school announces, without any further specification, a graduate course for the writing of a thesis under the direction of the faculty, a single fee of \$100 being charged for a course of one or more scholastic years. Northwestern began to offer a fourth year in 1908, requiring a thesis upon some phase of local law worthy of publication in the *ILLINOIS LAW REVIEW*; Harvard introduced the fourth year in 1910, Michigan in 1915. Fourth-year work is also provided for in Columbia, Yale, and Boston, and New York University announces that it is prepared to offer it.

Pennsylvania, Northwestern, and Columbia recognize this work by a master's degree in law; Harvard by a doctor's degree; Michigan holds out the two degrees in the alternative. Neither Harvard nor Michigan requires a dissertation, and while the other schools demand a thesis or essay, only Pennsylvania and Northwestern seem to make provision for its being printed. It has been admitted in Columbia that the arrangement for the master's degree does not work satisfactorily, and the introduction of the doctor's degree has been strongly recommended by a committee of the faculty, though so far without success.

In order to judge of the possibilities of correlation, it is necessary to scrutinize somewhat closely the tendencies of the new graduate work in law. If its hope lay in the intensification of the work done in the professional school, i. e. in carrying to a more advanced stage the case work of the traditional type, we should expect a prominent place in the graduate course to be given to research in common law problems, with strong emphasis upon the production of a dissertation. But this is the case only in Pennsylvania and Northwestern, while, on the other hand, Harvard and Michigan have no thesis requirement at all, and nowhere do we find the mention of specific common law topics or subjects for graduate courses, although the common law offers abundant material for dogmatic research.

The subjects which dominate the fourth-year course are outside of the ordinary field of professional studies and relate to public and international law, legal history and foreign law, jurisprudence, and legislative problems. Among the courses announced we find the following: theory of law and legislation, province of written and unwritten law, problems of law reform; Roman law, civil law and modern codes; introduction to comparative law; procedural reform; penal legislation and administration; theory and practice

of legislation; problems of contemporary legislation; analytical jurisprudence; philosophy of law; and Anglo-American legal history. We need only place in juxtaposition a list of the usual law school courses: contracts; torts; trusts; wills; pleading; evidence; corporations; partnerships; suretyship; mortgages, insurance, etc., to realize that the usual order is reversed in law; it is the non-graduate work which is specialized and intensive, while many graduate courses are of the most general description, being apparently intended to introduce the student to phases of juristic thought and source material with which his professional studies have left him entirely unacquainted.

This character of graduate courses becomes especially striking when we compare it with the pronounced policy of law school instruction in favor of rigorous and intensive mental discipline, which has barred from most schools even an elementary introductory course, because it is believed that such a course would not be capable of severe and exacting treatment. While a relaxation of this policy in the case of advanced students only need not inspire serious apprehension, yet the majority of the new graduate courses seem to have been and to be still looked upon with some doubt and misgiving, and it was perhaps a consequence of this skeptical attitude that when the fourth-year course was introduced in Harvard, the dean's report failed to make any mention of the fact.

Analyzing the new graduate law work somewhat further, we may distinguish in it three main objects: first, the extension of the traditional type of work by including phases of public law not previously treated by a number of schools, particularly administrative and international law; second, a sort of higher criticism of the common law on the basis of historical and comparative jurisprudence, which may be supposed to be the ultimate aim of the courses in legal history and Roman law, and the direct aim of the courses in jurisprudence; and third, an entirely new attempt to take up constructive problems of legislation and law reform.

It is a noteworthy fact directly bearing upon the problem now under discussion that nearly the entire fourth-year law program had been anticipated in several universities by schools or departments of political science, and their experience with this work should not be neglected.

The fact that courses in jurisprudence and Roman law were given in the name of political science undoubtedly tended to discredit them with law students; to other than advanced law students

they were given at a considerable disadvantage, and intensive research work could be thought of in only very exceptional cases. The opinion has been expressed that a more intimate connection with the law school, and the bestowal of a law degree, will be necessary to produce satisfactory results with this kind of work. A greater measure of success in the fourth year of the law school may well be looked forward to; but for original work in legal history, the training, equipment, and special gifts of the historian are needed more than those of the lawyer or jurist; and the decline of the study of the Roman law in German universities since the introduction of the civil code does not seem to promise well for the future of that study, which seems destined to fall into the hands of classical scholars. As far as continental law is concerned, it would be strange if, with modern facilities for travel under normal conditions, a student desiring to take up the thorough study of some branch of French or German law should not prefer to pursue his studies abroad.

In view of these conditions it is doubtful whether the character of the instruction in this phase of fourth-year law work will be fundamentally different from what it has been in the past in departments of political science, although it may be expected to become more profitable if taken with a background of three years of common law.

In undertaking to teach public law, departments of political science were favored by the fact that there was a certain demand for such instruction in the law schools. As early as 1891 Columbia recognized public law courses for credit toward the law degree. Constitutional law was commonly treated as a regular law school course, but other public law subjects were first taught by men primarily connected with political science. International law still stands to a considerable extent outside of the law school, and Harvard Law School even now admits it only with the addition to the title "as administered by the courts," thus saving the law course from profanation. The subject of administrative law was developed in a school of political science, and that of municipal corporations was at least first taught there.

However, the more favorable the attitude of the law school was to these subjects, the more they tended to become pure law school subjects. This was due both to the fact that the law school furnished the larger and more responsive constituency, and to the necessity of founding all further work in public law upon a

thorough knowledge of its common law status; but incidentally the evolution of these courses testifies to the absorbing and overmastering interest of the judicial aspect of any branch of law that is administered by the courts. Either the political science side of the subject suffered by the emphasizing of the legal side, as in the case of administrative law, or the two sides became practically divorced as in the case of municipal government and municipal corporations. It was undoubtedly the subordinate place of the judicial side of international law which made it possible to maintain a fair balance between the law and political science of that subject.

While thus public law by being admitted into the regular law curriculum tends to be assimilated in character and method of treatment to other common law subjects, and problems of organization and constitutional relations fall to departments of government and political science, this division leaves no room for the constructive aspect of public law on its legal side. In this respect public law shares the fate of private law, the constructive problems of which likewise lack systematic treatment, while principles of criminal legislation become more and more the subject of scientific investigation.

When we speak of law reform, we have in mind all the inquiry and agitation that is directed to the more perfect realization of justice in its relation to legal rights and remedies. Problems of law reform can be effectually approached only upon a basis of thorough familiarity with the common law, and constitute a field of endeavor in which lawyers hold undisputed sway; it seems therefore to be believed that the ordinary professional training of the lawyer is an adequate preparation for their solution, and if legislation on legal subjects has in the past been often defective and disappointing this is apt to be ascribed to lack of competent professional advice.

The fact, however, is that principles of common law or equity furnish by no means adequate guidance to needed readjustments of legal relations, and that legislation has often had to do pioneer work without the aid of any preliminary scientific work.

Legislative thought has thus become a constructive factor in American jurisprudence which, however inferior to judicial thought in juristic scholarship and technique, cannot be safely ignored by legal science. Yet American law schools practically treat legislation (except as a subject of judicial interpretation) as a negligible quantity. And still less do they consider it their business to treat

systematically of the principles by which future legislation should be guided. This is a direct consequence of the exclusive devotion of law school instruction to the training of practitioners in court; legislative problems are not possible subjects of discussion in the court-room, and therefore not appropriate subjects of class-room discussion in the law school. The exclusively vocational character of the law school has thus been responsible for the serious neglect of an important aspect of legal science.

Under these circumstances the appearance in the graduate law curriculum of courses in legislation and law reform promises to be of special significance. This may not be fully realized even by those who offer them, for there has been so far little intimation of the precise scope and purpose of these courses. In some cases there is a special reference to procedural reform and criminal legislation, these being the subjects in which the greatest amount of systematic thought has been given to law reform and principles of legislation. It is reasonably certain that in course of time such problems as liability, the protection of purchasers and creditors, settled and community interests in property, form and informality in legal acts, or—in public law—discretion, compensation, penalties, methods of control, and methods of enforcement, will be scientifically studied with a view to discovering definite and demonstrable working principles of legislation, to be substituted for the prevailing fashion of reaching legislative decisions on controverted questions of legal policy on the basis of conjectural impressions and forecasts. Such a result may not be in all cases attainable, but in the mere adoption of new methods of inquiry and new standards of judgment there will be a gain.

Judicial decisions, instead of absolutely dominating legal thought, will be subjected to a more detached criticism, and may have to take their place as mere expressions of prevailing legal ideas and as factors in the production of social reactions which must furnish the ultimate standards of law. Legislative thought will count as no less legitimate a subject of study than judicial thought, and both the history of legislation and the history of its judicial interpretation, administration, and enforcement will serve to shift the emphasis in the consideration of legal rules from correctness and authoritative sanction of theory to the justice and effectiveness of their operation. It will be realized that courts must necessarily look upon canons of justice as static and imposed by authority, and that the monopoly of the judicial point of view in law schools and

law treatises unduly narrows the province of legal science. And by adding to the study and criticism of abstract concepts embodied in rules and principles, the observation and estimate of the living forces and tendencies which subject these concepts to the test of human experience and social reaction, legal science will assume a much closer relation to the other social sciences than it bears at the present time.

The limitation of the traditional aspect of law can indeed be best understood from the point of view of the social sciences. To them the law means the judicial administration and enforcement of existing arrangements, and represents the conservative forces which retard forward-looking legislative movements. It thus appears too much in the light of an inconvenient obstacle. It does not seem to be sufficiently realized that the preservation of the essentials of law is a social object second to none. Just as economic science has had to learn to look upon the social aspirations of labor not as antagonistic tendencies to be overcome, but as legitimate factors to be fitted into economic purposes, so all the social sciences must learn to look upon legal rights as a competing social interest with whose claims their own demands must be harmonized. The progress of the social sciences should naturally bring about this more sympathetic attitude toward law, but the complex mechanism of legal rights and remedies, the understanding and handling of which requires long and specialized training, practically debar others than lawyers from effective constructive work in this direction, and unless legal science assumes the development of this aspect of the law, it cannot be expected to be accomplished with any degree of success.

In the framing of specific legislative measures considerations of social, economic, and legal policy are practically so interwoven that satisfactory solutions depend upon intimate co-operation from the three points of view. It can hardly be otherwise than that this connection should express itself in the organization and conduct of university work. In the past, however, it has affected the social science departments more than the law school. The great organic legislation which in the last fifty years has revolutionized the entire relation of law to business, is discussed in political economy and not in law school courses. The signs point to a similar transformation of the relation of the state to all forms of organized social endeavor, and the university study of this legislation is likely to fall to sociology which has already in a number of institutions ap-

propriated the new science of criminology. It is true that it was an American law school which organized the American Institute of Criminal Law and Criminology, and law teachers have taken an active part in its work. But this co-operation has always been qualified by the reservation that law school instruction must not be affected by the new methods and points of view, and the law library has never been regarded as the appropriate repository for literature on problems of legislative policy and reform.

It may be expected that the wider scope of jurisprudence recognized in the new graduate law studies will alter this condition. In France and Germany, where jurisprudence has never lost entirely the constructive or non-judicial point of view, university instruction in law has always retained a closer contact with the social sciences than exists between law and other graduate studies in this country; the legal and political science faculty often forms one division of the university. The development in America is not likely to be controlled by European precedents, but if the more constructive study of law can establish itself in American law schools successfully, its correlation to other graduate studies may well be left to take care of itself.

The more difficult problem will be that of correlating the graduate courses in law to the professional law work. Will the former be able to assert themselves in competition with the latter? The energy that goes into advanced work must in a measure be diverted from professional instruction, and the inducements are nearly all the other way. Instruction in the better American law schools is in a satisfactory condition; it compares favorably not only with other university teaching, graduate or undergraduate, but also with the teaching of law in Europe. The now generally prevailing case method is effective and interesting to teacher and student alike, and is believed to be superior to any other method of teaching. The intelligent study of the common law is intellectually fascinating and exacting, and its immediate practical value is indisputable; no one could reasonably think of displacing the bulk of the present curriculum. The time of teachers is fully occupied with well-organized and well-attended courses, so that there is little waste in law school work. The newly introduced work necessarily involves a certain amount of experimentation, and its immediate results may now and then be disappointing. Its method will be not merely different from that of the teaching of the common law, but it will also be less easily handled for class-room purposes. The

material is inferior in quality and interest to case law, and much less readily available. The results that can be looked for will lack the precision and the authoritative sanction that make the study of the common law so satisfactory to the mind that demands certainty.

Under these circumstances it must be expected that professional teaching will continue to absorb the main energies of law teachers, and unless graduate work can be so organized that it will grow naturally out of the professional work, its future must be precarious. Even those who believe in the newly projected work prefer the large professional classes to the small number of graduate students for the greater stimulus and reaction that come from large numbers. Their effort will naturally be to gain for the new type of work a place in the professional curriculum, and this they will not accomplish unless they present courses of the practical value of which students will be convinced, and that can be taught by methods that can be made at least reasonably effective. Until they convince their colleagues of the success of their efforts, the common law will retain exclusive possession of the professional curriculum, and the graduate course will languish more or less as an exotic.

The entire problem then which we are discussing is a problem for the law school to take up and solve. The difficulties in the way of the indicated development should not be underestimated, but there are factors that seem decisive in favor of the new departure. It is unlikely that the great law schools which have committed themselves to the new work will abandon it without giving it a reasonable chance to prove its value and its possibilities. The growing demand for expert assistance in constructive legislative work will compel law schools to recognize the professional importance of that side of the law. The experience of the next ten years will show whether the new jurisprudence can be placed upon a firm and permanent basis and it will then be possible to discuss more profitably its relation to other graduate work.