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TWO MODELS OF LEGAL EDUCATION

GERHARD CASPER*

A recent inquiry into the first term classroom experience at Yale Law School evoked the following response from a member of the class of 1972:

I find that my general impression of the faculty is that they haven't got a very clear idea of why they are teaching or what they are teaching or what value their teaching will have, and I think that their confidence and their emanation of self-confidence in this respect is not only deceiving but it's kind of, well, there's this kind of subtle pretension that I don't like.¹

Since this statement was made neither at the University of Tennessee nor at the University of Chicago, I feel free to repeat it here without adding qualifications of my own. It destroys the law professor's last straw of hope. Packer and Ehrlich, in their recent Carnegie report on *New Directions in Legal Education* took a very similar position as concerns the second and third year of law school,² but were unwilling to abandon a belief in the soundness and effectiveness of the first year emphasis on teaching "analytic skills."

In 1848, Julius von Kirchmann, in a famous lecture delivered before a gathering of lawyers in Berlin, spoke about "the futility and worthlessness of jurisprudence as a science." In the course of his lecture, he made a remark which has been used ever since to shock German first-year law students: "Three correcting words from the legislator, and entire libraries are turned into wastepaper."³

American lawyers rarely ask the rather tough question implied in this observation. Though legislatures and courts often undo what we believe established, we rightly assume that the core of the law, or put less kindly, the status quo, is not really imper-

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These observations are the text of a speech delivered November 15, 1973. This address was part of a symposium on legal education held on November 15-17, 1973, at the University of Tennessee College of Law, Knoxville, Tennessee.

1. Quoted in Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 639 (1973).
2. PACKER & EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 32 (1972).
3. KIRCHMANN, *DIE WERTLOSIGKEIT DER JURISPRUDENZ ALS WISSENSCHAFT* 25 (1960 ed.).

iled. The very essence of the common law tradition—sometimes referred to as “legal reasoning” pure and simple—consists of incremental change. Precisely because we make this assumption, it seems worth asking whether legal education offers anything which can withstand more than three correcting words from the legislator.

Some reflections about the subject matter of legal education against a comparative backdrop will be my topic tonight. As I turn to the model of Continental, in particular German, legal education, first, I shall not apologize for the simplifications I shall engage in. The quest for a “model” is a quest for the forest, not for the trees.

Any attempt to understand the Continental model of academic legal education must necessarily include a short excursion into the early, extremely consequential history of Roman law teaching on the Continent with its emphasis on something other than the multitude of local laws and customs then in force. The most important of the early European law faculties was that at Bologna. It was a direct result of the rediscovery of Emperor Justinian's *Corpus Iuris Civilis*, that great anthology of the practical legal wisdom of classical Rome. Bologna quickly gained European renown and by the middle of the 12th century had 10,000 students from all over Europe. The history of Continental legal education thus begins with education in a subject matter which is not easily defined. Roman law had, at least initially, only a very tenuous claim to being “positive” law. The claim was shaky because it had legitimacy only insofar as it could be tied to the authority of the Holy Roman Emperors who did, of course, see themselves in a line of succession mythically and mystically going back to their Roman predecessors. But the authority of the emperors was hardly recognized in all of Western Europe and was also the subject of jurisdictional disputes even within the realm.

An adequate comprehension of the spread of Roman law can be achieved only if we link it to the medieval “renaissance”: the interest in and study of antiquity generally. From this scholarly immersion, Roman law emerged as “natural law by virtue of its historical dignity and metaphysical authority.”⁴ Roman law was written-down reason, *ratio scripta*, the subject of scholastic, and

4. WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT* 51 (1967 ed.). See also DAWSON, *THE ORACLES OF THE LAW* 182 (1968).

later, humanistic analysis. The language of its sources was also the language of the educated and of scholars: Latin. The place of its study was naturally the academy.⁵ While the subsequent recognition of Roman law as the common law of much of Western Europe was greatly influenced by this status, its superiority was also enhanced by the analytic efforts devoted to it because of the status. Since the genius of the Roman lawyers had displayed itself in case analysis and not in the formulation of abstract principles, and since the casuistic method was congenial both to scholasticism⁶ as well as to the practice of law, the academic law faculties quickly became a training ground for lawyers absorbed by church and governments in ever-increasing numbers. Indeed, the professors themselves were engaged in significant consulting work and therefore practice-oriented.⁷

The impact of these developments was so profound that Roman law, if in an increasingly esoteric form, dominated legal education, at least in Germany, until well into the nineteenth century. The links between the study of law and theology, philosophy, history and politics were ruptured by the trend toward scientific specialization, ever spreading since at least the end of the eighteenth century.⁸ The "scientific" demand that your subject matter be clearly identifiable resulted in an isolation of legal studies, while the further demand for exact demonstration led to an exaggeration of syllogistic reasoning and philological interpretation.⁹ Perhaps it is no gross overstatement to maintain that legal studies acquired an air of unreality, also furthered by the fact that law professors stuck to Roman law and for some time remained unwilling to give equal status to what was quickly becoming the law that really mattered: legislative codifications, statutes, and administrative regulations. The absolutistic and enlightened modern state of the eighteenth century could hardly be satisfied with this state of affairs and therefore began to require clerkships and generally regulate educational requirements so as to satisfy the needs of its judiciary and bureaucracy.¹⁰

5. KOSCHAKER, *EUROPA UND DAS RÖMISCHE RECHT* 133 (1947).

6. *Cf.* VIEHWEG, *TOPIK UND JURISPRUDENZ* 39-50 (1963 ed.).

7. KOSCHAKER, note 5 *supra*, at 124, 223. *Cf.* DAWSON, note 4 *supra*, at 196.

8. *Cf.* KÜBLER, *JURISTENAUSBILDUNG IM ZIELKONFLIKT* 8 (1971).

9. *See* WOLF, *GROSSE RECHTSDENKER DER DEUTSCHEN GEISTESGESCHICHTE* 625 (1964 ed.).

10. KÜBLER, note 8 *supra*, at 9. On the rise of new sources of law, *cf.* ROSENBERG,

The model of legal education which emerged in the course of the nineteenth century and which survived until the last decade or so without much serious questioning, is one of a two-stage legal education, the structure of which is by and large determined by government. Though, of course, vast differences exist between the German model and, e.g., the French or Italian, the similarities may be greater than the differences, at least as we talk in terms of a model.¹¹

Students enter state university law faculties after they have completed their secondary education. Access to legal education is virtually automatic upon fulfillment of secondary school requirements. There is, as yet, no screening of applicants. German law faculties may have as many as 3,000 students with a professorial staff not substantially larger than that of an average American law school. For four or five years students take a curriculum which is more or less prescribed by governmental regulation. It covers the most important areas of law from the civil code to criminal law, administrative law and constitutional law. The predominant mode of instruction is the lecture method. The subject matter is the positive law—conceptualized, systematized, occasionally even problematized, to be sure—but the emphasis is on somewhat abstract information about rules and principles of law, supplemented by practice exercises in their application.

David says about French legal education that the technical aspects of legal problems receive little emphasis in law faculties where “we tend to live in the realm of ideas and pride ourselves in not worrying about the more mundane, and sometimes sordid, problems of legal practice.”¹² About Italian legal education, it is stated that it is not concerned with the techniques of problem-solving but with the inculcation of fundamental concepts and principles.¹³ Much the same could be said about Germany when I was a student more than ten years ago. Since then, and, I think it is fair to say, under American influence transmitted by professors who have been exposed to American law schools, legal education has come to pay more attention to problems rather than

BUREAUCRACY, ARISTOCRACY AND AUTOCRACY—THE PRUSSIAN EXPERIENCE 1660-1815 45 (1966 ed.).

11. On French legal education, see DAVID, *FRENCH LAW* 49 (1972), on Italian legal education, CAPPELLETTI, MERRYMAN AND PERILLO, *THE ITALIAN LEGAL SYSTEM* 86 (1967).

12. DAVID, note 11 *supra*, at 51.

13. CAPPELLETTI, MERRYMAN and PERILLO, note 11 *supra*, at 89.

concepts. However, this is a difference of degree, rather than kind, since the problems continue to be approached mostly in terms of legal principles and little consideration is given to political, economic or social variables.

All in all, German legal scholars remain firmly convinced that they teach a "science" (*Rechtswissenschaft*) the subject matter of which is "out there," i.e., positive law. Even those law professors who pride themselves on being "progressive," i.e., not oriented toward the maintenance of the political status quo, find their progressive solutions to social problems usually by vigorous, if not rigorous deductive reasoning. For instance, in postwar Germany, law professors and courts have been busily engaged in turning the constitution into a coherent and comprehensive ideology which provides answers for the most difficult social and political questions.

I emphasize information and systematization because, I think it is generally agreed that the question of "how much information?" has become an important one, at least in the upper-class curriculum of American law schools. To the extent to which upper-class courses simply continue to analyze the shortcomings of appellate reasoning in illustrative or interesting cases (something which may or may not be legitimate in the first year), the question of what the student has learned at the end of a course is hardly a frivolous one. Though it may also be true that the extent of the phenomenon is often exaggerated, since most law professors attempt to convey at least the central themes and ideas of their subjects.¹⁴

"Over-interpretation" aside, the European tendency to systematize coherent subject matters, like for instance, constitutional law, and account for all phenomena, perhaps results in a benefit which we should not belittle. Attention is paid, for instance, even to those constitutional provisions which are of no great consequence in the day to day administration of law and which rarely appear in the law reports. American constitutional law teaching and research, on the other hand, continue to see constitutional law as primarily referring to Supreme Court decisions. This has led to a state of affairs where we have badly neglected the institutional arrangements even of the federal gov-

14. Cf. Goldstein, *Review of Packer and Ehrlich, New Directions in Legal Education*, 82 *YALE L.J.* 1092 (1973).

ernment. When these arrangements are thrown into question, as has been the case in the last decade, whatever we, as students of the Constitution, have to say about them often has a partisan ring to it, merely because of the ad hoc nature of our contributions.

There are two additional unhappy consequences of the American preoccupation with the courts. Given the powerful sway precedent exercises in the essentially very conservative American polity, single decisions, like for instance those of Marshall in the *Burr* case, suddenly acquire an importance which is altogether out of proportion. On the other hand, a vacuum of court decisions tends to lend legitimacy to the mere fact that political actors, like for instance Presidents, previously got away with actions which may have been no more than exercises in brute force. As anybody who has testified before a congressional committee about constitutional matters knows, legal arguments in areas where there is little court jurisprudence tend to be incessantly challenged by the exceedingly narrow-minded question: "But is there a court decision on the point?" The notion that the Constitution is identical with court decisions continues to prevail in spite of, or more likely because of, so-called legal realism. The legal realists' theoretical fascination with prediction made them concentrate on the courts, which were also those government agencies they knew best. Unfortunately, here too Holmes provided an easy formula: "The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law."¹⁵ This notion was very unpretentious, indeed.

I am turning to the second stage in German legal education. The German law student completes his university education with a state examination usually consisting of a legal research paper, a written examination over several days, roughly comparable to our bar examinations (and often prepared for in the same way, i.e., by cram courses) and finally an oral examination before a commission consisting in most cases of professors, judges and other practitioners. Once this hurdle has been overcome, the lawyer-to-be enters a government-prescribed rotating internship of two years' duration. During the internship, he has the status of a civil servant and must serve in the capacity of a clerk to a

15. HOLMES, COLLECTED LEGAL PAPERS 173 (1920). On the prediction theory, see G. CASPER, JURISTISCHER REALISMUS UND POLITISCHE THEORIE IM AMERIKANISCHEN RECHTSDENKEN 56-64 (1967).

civil court, a criminal court or a prosecutor's office, an administrative agency, an attorney, plus in one additional legal capacity of his own choosing. At the end of this stage, a second comprehensive state examination is awaiting the intern.

There are perhaps two major points to be made about the German model. (1) Like in America, the underlying concept is that there is a unitary program of legal education for the multitude of tasks performed by lawyers in a modern society otherwise dominated by the concept of division of labor. (2) Unlike in the United States, practical training is *formally* considered a part of legal education. I am emphasizing the adverb "formally," since in fact and principle, American legal education is, of course, not radically different. Even before the recent vogue of clinical education set in, many students received exposure to legal practice during summers between academic years, through clerkships following graduation and through their status as apprentice lawyers called "associates."

As concerns the unitary education point, the German model suffers badly from the difficulties necessarily associated with the attempt of educating a non-specialized lawyer. It has become quite impossible to cover all fields of law, even if your goal is no more ambitious than to convey some rudimentary information. An American lawyer will be shocked when he discovers that the average German law student is hardly at all exposed to tax law. The failure, probably indicative of a private law bias of German legal education, continues in spite of the tremendous practical importance of the field, and regardless of its theoretical potential as a key subject for understanding the distribution of wealth and analyzing concepts of social justice.

Since German legal education, for reasons of volume alone, is incapable of producing the well-rounded lawyer, it has to face the same nagging question Americans have yet to find an adequate answer to: what exactly should we be teaching? A German author who defends a unitary system of legal education, recently placed the emphasis on law as a system of communication, a language the unitary nature of which, he says, is one of the basic conditions of our social existence.¹⁶ I wonder whether this is not too easy and too elusive an answer when we try to find a common denominator for, let us say, the problems of torts, land planning,

16. KÜBLER, note 8 *supra*, at 21.

and securities regulation. To compound the difficulties, there is a widely heard demand in Germany today that the study of law analyze not only the intra-system connections but the historical, economic, sociological and philosophical aspects of law and that it incorporate critical reflexion on legal and political evaluations as well as on the political relevance of legal practices.¹⁷

The major and most successful challenge to the traditional structure of German legal education has come in the form of calls for an integrated legal education which would do away with the bifurcation between theory and practice. Proposals and experiments vary considerably in principle and detail. I shall here touch upon only one of them, the so-called "Hamburg Model." The model, which is now in its initial stage of implementation, provides for a five year program of legal education. The first year will have only a modest component of exposure to what courts and government look like when seen by the participant-observer (ten percent of the available time is allocated to this purpose), while most of the time will be devoted to a theoretical examination of state and society from both a legal and a social science vantage point. This will be done in separate law and social science courses, e.g., criminal law on the one hand, and criminology on the other. This dualism reflects a practical necessity more than a theoretical position. Presently, hardly any law professor is qualified to integrate both the legal and the social science perspective. During the second and third year, 70 percent of the time will be taken up by instruction in private law, constitutional law, administrative law and commercial law. Thirty percent will be devoted to attaching students to judges, to moot court exercises and other activities of a like nature. The goal is more ambitious than a parallelism of theory and practice, it comprises also continuous evaluation of a student's practical experiences in collaboration with his instructors. The fourth and fifth year will permit students greater specialization and independence. For instance, 30 percent of the fourth year is to be spent in a law office where the student supposedly will be given responsibility for independently performing legal tasks.¹⁸

Only experience will show whether the model provides a step

17. HAMBURGER MODELL EINER EINSTUFIGEN JURISTENAUSBILDUNG 10 (1970, mimeographed).

18. For details, see *id.*, *passim*.

in the right direction. Two problems are obvious. (1) The "integration" of theory and practice may easily degenerate into using practice for demonstrative purposes only, with the student having even less independent responsibilities than the German law intern has now, and thus little opportunity to learn by trial and error.¹⁹ (2) Anybody who has ever engaged in the empirical study of legal institutions shudders at the potential for superficial analysis, given both the lack of systematically collected data about the behavior of legal institutions, as well as the ignorance of lawyers as far as social science, and the ignorance of social scientists as far as law is concerned.

Let me now turn to the way I view the American model. The separation of theory and practice in American legal education has never been as complete as under the European model. In part, this is due to the case approach and the so-called Socratic method which goes with it. Inductive reasoning from cases starts with data which are practice-oriented. To be sure, our casebooks tend to distill the facts of the cases rather than ask the student to sort them out. In doing that, the casebooks often rape those facts. However, in the interest of the economy of teaching and publishing, hardly anything else is possible, as anybody must admit who has attempted to understand the facts of *Martin v. Hunter's Lessee*.²⁰ Also, we commit the often mentioned sin of concentrating on appellate decisions.

Yet all this said, the examination and re-examination of actual court decisions clearly forces the student to "think like a lawyer," whatever that may be. Trial and appellate moot courts, i.e., simulation games, have been part of American legal education for a long time. All this is valuable and in many ways clearly practice-oriented. In addition, there is the increasing attention paid to clinical education which more likely than not will gain in importance, though we have yet to develop a satisfactory mode of integrating clinical education into our curriculum. At present, the clinic tends to be an activity apart from the mainstream of teaching and there is little review of a student's clinical experiences by the regular teaching faculty. One of the main problems here is the obviously formidable cost of clinical education conscientiously done. These matters, however, I have to leave to the

19. KÜBLER, note 8 *supra*, at 12.

20. 14 U.S. (1 Wheat.) 304 (1816).

experts, of whom I am definitely not one.

These comparative observations about the relative practice-orientation of the case method aside, it is perhaps worthwhile to recall that it originated with a concern for making the study of law "scientific." In 1886 Langdell told the Harvard Law School Association that it "was indispensable to establish at least two things; first, that law is a science; secondly, that all the available materials of that science are contained in printed books."²¹ To treat law as a subject for scientific investigation meant to look into, as one author put it, "the outward manifestations—that is into the statutes, and more particularly into the decisions—and formulating to the mind *the invisible law* whence they proceed."²²

Modern American and German legal education thus started from essentially the same premise: the scientific study of law calls for research into the principles underlying the facts, i.e., the laws. Both also made the same erroneous assumption that these principles were to be found in the heaven of concepts. What saved American legal education from becoming quite as abstract as its Continental counterpart was the circumstance that its "facts," i.e., the cases, were much "smaller" and more open-ended than the rules of law to be found in a European code. A more mundane factor has also played a role. In the, comparatively speaking, small American classroom, the Socratic method with its concern for detail is at least a possibility, if not a reality. Though legal education in the United States is "cheap" by comparison with, for instance, medical schools, it is very expensive if compared with the mass approach in Europe.²³

The legal realists discovered rather quickly that Langdell's notion of science was incredibly naive.²⁴ The problem with *their* attempt to revitalize both legal methodology and value theory was that they burned the barn to roast the pig. By suggesting that law was really politics, even more economics, and therefore should utilize the full panoply of historical, economic, sociological and behaviorist methods, they brought about two most unfortunate results. (1) They discouraged social scientists from worrying about something which, taken by itself, seemed to be irrelevant.

21. Cited in SUTHERLAND, *THE LAW AT HARVARD* 175 (1967).

22. BISHOP, as cited in FRANK, *LAW AND THE MODERN MIND* 97 (1930).

23. See RHEINSTEIN, *THE CASE-METHOD OF LEGAL EDUCATION—THE FIRST ONE-HUNDRED YEARS* 32 (manuscript to be published).

24. See, e.g., Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303 (1927).

(2) They discouraged lawyers from carrying out the empirical research into the behavior of legal institutions that social scientists would not do. The lawyers, with their shrewd sense of the rules of evidence, quickly discovered that the social sciences were much less scientific than the widespread enthusiasm of the thirties suggested.

Though important modifications have been made through emphasis on "problems" rather than cases, law schools continue to concentrate on normative matters by means of inductive and deductive reasoning, while the social sciences either continue to ignore legal institutions or devote their efforts "to study scientifically how and why judges make the decisions they do,"²⁵ which normally leaves most of the intricate policy questions which lawyers face outside the scope of inquiry. To be sure, there have been efforts to bridge the gap, of which the one by Lasswell and McDougal has perhaps been the most ambitious. But then Lasswell's and McDougal's language deprives them of the chance to be understood by lawyers. Their empirical exploration of "values," instead of utilizing specific categories which alone can explain the complex interplay between norms, theory and behavior, uses extremely broad value concepts.²⁶ On the normative side, "law, science and policy" basically calls for a commitment to a specific school of psychoanalytic theory which draws heavily on certain interpretations of parochial American values, thus severely limiting its appeal and usefulness.

Legal education which fails to make student and teacher alike aware of the complex interplay of norms, theory and behavior which results in judicial or legislative decisions, is, in my opinion, highly deficient. It will never even approach an understanding of causation, nor will it offer a satisfactory answer to the question of legitimacy which should trouble lawyers. Lawyers, for instance, had little to contribute to the great political debate in the sixties about "law and order" and "civil disobedience" because, as they tended to line up on the side of "law and order," they failed to explain the legitimacy of a system which permitted questionable politics to become equally questionable law by highly questionable procedures.

25. SCHUBERT, *JUDICIAL BEHAVIOR* 3 (1964).

26. See Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943). For a detailed critique of Lasswell and McDougal, see G. CASPER, note 15 *supra*, at 133-89.

What was wrong with Langdell was not his striving for science, but his too narrow concept of science. What has been wrong with the realists has been that their concept of social science was entirely too ambitious and their normative agnosticism too pronounced not to result in fatal misunderstandings. We have to be much more modest. Modest attempts to integrate legal education with the perspective of causation may well make use of the case approach with its almost ideal focus on relatively narrow questions which permit controlled investigation of explanatory variables other than precedent and rules. Since cases inescapably present us also with the question of choice, they permit the necessary double perspective. We have to develop the ability to perceive and understand the social phenomenon "law" at more than one level of analysis at a time: only if we see action from both the perspective of causation and the perspective of choice will we truly comprehend the nature of action.²⁷ I submit that this is also the only mode by which we can ever effectively teach "legal ethics." It goes without saying, that we can realize even this modest aim only if we are prepared to sacrifice "coverage" even more than we do already to the goal of "in-depth" analysis.

An example of what I have in mind is provided by Professor Fairman's recent volume on the history of the Supreme Court during Reconstruction.²⁸ Fairman's method for understanding such decisions as *Georgia v. Stanton*²⁹ is one of context analysis, including political, economic and social aspects of the context. The Constitution he expounds is a "living constitution"—worlds removed from the sterility of our constitutional law casebooks with their emphasis on concepts, embellished by a few "background" notes. Since Fairman does his job with scrupulous attention to the technical aspects of the law, his approach may serve as a model of what should be done, not only in scholarship, but also in teaching. As Fairman puts it:

Unless one has patiently examined the involved chronology—to distinguish between what was cause and what was consequence—and has looked squarely at the hard alternatives inher-

27. PITKIN, WITTGENSTEIN AND JUSTICE 285-286 (1972).

28. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88 Part One (1971). For my views, see my review of FAIRMAN in 73 COLUM. L. REV. 913 (1973).

29. 73 U.S. (5 Wall.) 50 (1867).

ent in the facts, he cannot know the context within which the Court acted. Without full knowledge a reasonable judgment may not be made.³⁰

But Fairman does not restrict himself to using cases as a justification for exploring which legal, political, economic and social variables might explain court decisions. By emphasizing the Court's attempt at clarifying constitutional and political commitments of the *postbellum* American polity, he contributes to the use of court decisions for understanding political value conflicts and their authoritative resolution. In his words: "One who observed, perceptively, in the Supreme Court chamber would learn enough to chronicle the annals of America—political, economic and social."³¹ At this stage in the development of legal and social science studies, such an approach seems to me more promising than the more systematic ambitions which characterize recent German reform movements, though I agree with their epistemological underpinnings.

On a recent Sunday I worked in my office at the University of Chicago Law School preparing for this occasion. During a coffee break, I chatted with a law student and—no small wonder—asked him what he saw as the major problem of legal education. He responded: "Law schools do not know whether they should teach chords or songs." I retorted: "But we must teach chords *and symphonies*." On reflection, I should be satisfied if we restricted ourselves to the teaching of chords and sonatas.

30. FAIRMAN, note 28 *supra*, pt. 1, at 90.

31. *Id.* at 251.

