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WHAT CAN THE LAW SCHOOLS DO?*

EDWARD H. LEVI†

I

IT HAS OFTEN been said that law schools do not provide adequate training in trial practice. The statement is true. But the inadequacy of law schools in this respect is only part of a larger problem. To some extent law schools are out of touch with reality. The question to be asked is whether the law schools can do anything about this.

The question is not to be avoided for law schools by stating that law is a set of principles dealing with justice, and a set of normative rules regulating human behavior. The principles and rules not only regulate human conduct and values; they grow out of them. The principles gain meaning and the rules are to be judged by their effect on behavior. To the extent that law is a behavioral science, it grows, like any other science, by asking the right questions. We cannot ask the right questions if we remain remote from what is going on.

To a certain extent law schools are out of touch with what is going on. The area where this is most noticeable is the area of the trial court. Law students, at any rate, unlike medical students, do not participate in the preparation of a case. They do not take part in the questioning of witnesses. They do not themselves observe many cases, if indeed they observe any at all. The result is said to be that the young graduate lawyer is not ready to step into the courtroom. He gains his trial experience as he goes along in the practice of law. To this extent he learns on his clients. Many such lawyers of course actually serve a kind of internship in a large office, and the internship may be directed to training in trial practice. But many young lawyers, for one reason or another, may go on for years without receiving such training. This is a perennial subject of concern for law students and for the bar.

If there is a solution to this problem, it is not easy to find. The whole solution does not lie in having a teacher who has had wide trial experience describe such experiences to law students. It does not lie in lectures by practicing lawyers. These are of value. But they are not enough. At the

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University of Chicago Law School Judge Hinton was a teacher of trial practice who had considerable trial experience. The same thing can be said of Professor Ming, who now teaches procedure and practice at the School. Bruce Bromley, one of the leaders of the New York trial bar, for years delivered lectures on trial technique at the Yale Law School. From such lectures students gain valuable insights. They catch a point of view and an approach which later experience will make more meaningful. But such lectures are not adequate substitutes for learning by doing. Any teacher who has taken part in a case—perhaps the very case being taught in the casebook—is apt to find it a most puzzling experience to try to get across to the students the problems of strategy and technique which were paramount when the case was being tried. The difficulty is that the student has never participated in what is being described. It is like telling a student how to use a library. He will really find out when he uses one. Similarly I think we must conclude that trial lawyers are not made by classroom listening.

In the face of the difficulty of devising any solution for this lack of law school training for trial practice, it is often said that this is a matter properly beyond the reach of the law schools. The law school ought to concentrate on those things they can do well; that is on the preliminary theoretical training. The law office, the bar association, or the young lawyer on his own, can concentrate on the practical side. There is, of course, a great deal of merit in this point of view. For one thing, it has worked. Despite the shortcomings of the law schools, the bar is well trained. The law student of a few years ago will greet his law professor with stories of the practical things which the law school overlooked, but which the student-turned-lawyer has somehow managed to pick up. This can be something of a tribute to the law school. The job of legal education is to turn out law students who will continue to learn. In a certain sense, real training for being a lawyer must come after one has become a lawyer, and law schools would be foolish if they did not recognize this.

I think we must recognize also that the subject of training for trial practice has achieved a kind of symbolic importance which is at least different from the problem itself. Law schools are expected to be theoretical—in a derogatory sense—and the point that they are theoretical is made by saying that the students are not trained for trial practice or that, indeed, some of the professors would make sorry spectacles if they should ever get lost in a courtroom. It is part of the language of our time to emphasize the traditional trial stage, even though vast and important areas of the law have developed outside of the common-law proceedings. Thus, in a

strictly vocational sense alone, although public policy considerations may argue differently, it would not be wise to train lawyers as though they were going to spend the major portion or any considerable portion of their time on negligence cases or in criminal proceedings. The lawyer today is likely to be an office lawyer or an administrative hearing lawyer, and he is likely not to be a specialist in litigation in the ordinary sense. And yet these arguments do not appear to justify the absence of some contact between the law schools and the trials of cases.

The glory of legal education is its concentration on the particular and its insistence on the general. Law schools have recognized that the quality of a professional man is that he is equipped to give advice in terms of a specific situation. So law teaching starts with an analysis of a specific situation and the rule which is to be applied to it. The ability to compare cases by contrasting fact situations is at the very heart of the lawyer's craft. But the process is also the search for a rule. It could not be otherwise, for the principle of equality—which is the basis for the doctrine of precedent—makes it necessary for us to know, as best we can, what the rule is, and to what fact situations it will be applied. This insistence upon both the particular and the general has given law teaching a unique status among the social sciences. We have not engaged in elaborate fact studies just for the sake of collecting data. Such studies as there have been, and unfortunately they are few, have always been directed to the question of what rule is to be applied. On the other hand, unlike what sometimes occurs in economics, we have been unable to ignore those facts which make the application of the rules difficult. Indeed, we are rather pleased when a difficult fact situation confronts us with conflicting rules, and the theoretical framework of the law has to be reworded if not reshaped to solve the problem.

This dual quality of emphasis on fact and theory, together with the ethical insistence that the result ought to be appropriate, are the unique contributions which law schools can make to university life. The law school can act as a center of inquiry for those social problems which are sufficiently troublesome and significant so that society has had to make legal rules for their attempted solution. The inquiry of the law school will be into the nature of the legal rules and their effectiveness in solving the problem. In examining the rules, the law school ought to bring to bear the knowledge of the other social sciences and of psychiatry to the extent that such knowledge is in a form capable of application. In this connection, one contribution which the law school can make is the negative one of showing that such knowledge is not yet in such a form as to be in-

corporated into the law of a democratic society. Law schools have been made part of our universities so that our system of law will be enriched by our general knowledge. The law school operates to bring the difficult problems of the legal world into contact with the general knowledge of the social sciences, and acts to compel that general knowledge to focus itself on the difficult fact situations of the legal world.

This is a somewhat theoretical picture. One thing wrong with the picture is that the law school gets its facts mainly from appellate court case books. The story told by the client, the problem as viewed within a corporate client, even the evidence presented to the trial court are largely unavailable or unused. The result is that vast areas of the problems of the law do not come into contact with the law school at all. It is to the credit of the law schools that they emphasize both fact and theory; it is too bad that frequently they do not know what the facts are. It is for this reason that it can be said that to some extent the law schools are out of touch with reality. The failure to know what goes on at the trial stage is but a part of this greater defect.

This defect is, of course, not unique with the law schools. To some extent it is true of the bar as well. By and large the bar does not know what goes on in criminal cases. We have constructed an image of a criminal case but we do not know whether that image is a correct one or not. We overlook the fact that a guilty plea, after one has been carefully advised by a lawyer, is quite different from a guilty plea made before any advice is given, and that many defendants in criminal cases have had no meaningful advice from a lawyer prior to that plea. We really do not know what goes on in the station house, and we have not quite decided whether statutes which require a prisoner to be taken after arrest before a magistrate are after all really workable in a society where it is hard to catch and to convict criminals. As a matter of fact we do not know much about what goes on inside the penitentiary or the effect of what goes on there, and perhaps we have almost decided that it is useless to try to find out.

What I am saying is of course commonplace, for it has long been recognized that the criminal law and its operations have been insulated away from a large part of the bar. The insulation operates not only for the greater part of the bar, but for the law school as well.

A somewhat similar insulation operates for vast stretches of the law—the area of small claims, confessions of judgments, releases, minor landlord and tenant disputes, the civil analogues to police court matters. The legal aid societies have had great experience with these, of course, and the

regular social agencies meet them as but part of more difficult problems. The law in these areas, however, is probably no more simple than it is where the financial stakes are higher, and the human effects may be at least as great. In one real sense this is the law of the every-day, and it is one testing ground for the law of fraud, of mistake, and the doctrine of consideration—all basic in the theoretical system of law. Often the practical operation of these rules has moved away from the lawyer and to the social agencies, the real estate office, or the insurance adjuster. The law schools which teach the rules do not know much about their effect, and the reading of appellate court cases does not remedy this.

The area of ignorance for law schools, then, is not only as to the trial of these cases, but relates to the facts and problems behind the trial. It is not so serious that the law student may not know where to file the proper paper, or whether to stand up or sit down when questioning a witness. He can be told. The serious complaint is that the law student may not know how to deal with the vast array of purported facts out of which some kind of an orderly case must be made; and, not having dealt with them, he may not know how to ask the right questions about them. The rules of evidence are well taught today. So much of what passes for practical advice as to how to present a case is only a restatement of these rules, which can be learned through the standard case method or through an examination of records. The serious defect is not with the teaching of the rules. The serious defect is that the student does not come in contact with the situation in the raw, and no amount of lecturing the student on what the raw looks like will remedy this.

Of course, it is exceedingly difficult to know the actual facts of a case. Lawyers make their cases at the factual as well as at the legal level, and they do so by knowing what to look for and what questions to ask. The professional responsibility is perhaps the greatest at this point. The facts thrown away, the lines of inquiry not pursued, are as much a test of the lawyers' skill as any court presentation. An appellate lawyer often finds that but for the questions unasked and the facts thrown away he could be arguing a different and more successful case. There is a make-believe quality in any appellate case, since the court may decide the case as if the facts fell into one mold, forgetting all doubts and prior disputes. The make-believe quality can be serious not only for the persons involved in that case, but for those who in the future are bound by the precedent. It is quite conceivable that in some areas our law has developed not only out of harmony with the actual facts in a particular case, but in general ignorance of what goes on in most of the type cases. So the problem of

fact finding and of asking the right questions transcends the problem of giving law students some experience in the handling and discovery of usable data in the preparation of a case.

The point perhaps can be made by reference to the growing field of trade regulation. A very simple type of case is that where a patentee for some reason or other attempts to tie the license for the use of his patent to the purchase of some other article from himself. This is illegal, and it is said to be illegal because the patentee is attempting to extend his monopoly beyond the area which has been granted to him. Thus, in *Morton Salt Co. v. Suppiger*,¹ the patentee was licensing a salt-vending machine and requiring the purchase of the salt tablets at the same time. Why should this be illegal? The courts have gone on the assumption that in some ways this extends the patent monopoly. In a sense, of course, it does no such thing. The only monopoly power the patentee has before and after the tie-in is based on the monopoly power of the patent. And if the patent is strong enough to compel the purchase of salt from the patentee, it would also be strong enough to compel the licensee, if he did not purchase the salt, to pay more for the license. The great mystery so far as the cases are concerned is why the patentee resorts to a tying clause. Does he think he can make more money by this device, even though he cannot? Is this just an advertising venture? Perhaps if we could find out why it was done, we would have a better clue as to whether or not it should be illegal. Knowledge along this line might change the structure of the cases. The reported cases do not answer the question.

Similarly, in the seventh circuit it was held that General Motors Corporation could not, in effect, tie the sale of its cars to the purchase of financing from one of its subsidiaries.² Again there is the mystery of why General Motors required this. Did it think it would make more money by doing this? If it thought so, then so far as one can tell, it thought wrong. If a monopoly power in General Motors cars compelled purchasers to take the financing they did not want, then the same monopoly could have obtained the same profit by charging more for the cars. It has been suggested that this method of financing removes competition in automobile financing and makes dealers and purchasers depend for low interest rates and loans on "the spontaneous generosity of Ford, General Motors, and Chrysler."³ The implication is that this method of financing is one which may make such cars more expensive to purchasers. The extra

¹ 314 U.S. 488 (1942).

² *United States v. General Motors Corp.*, 121 F. 2d 376 (C.A. 7th, 1941).

³ *Ford Motor Co. v. United States*, 335 U.S. 303, 328 (1949).

charge, if there is one, however, is based on the monopoly power of the make of car. It could be obtained just as easily by raising the price of the car as by raising the price of the financing. On the other hand a possible explanation for such a method of financing might be that it was used to frustrate the monopoly power of loan companies.

This is of course glib talk, but we cannot have much more than glib talk until we know what went on inside of General Motors and what made it adopt this form of selling. The cases do not tell us.

There are hundreds of such unanswered questions. They relate to the criminal field, the small claims field, and other areas of the law as well as trade regulation. The answers to these questions may be basic for the proper development of the law. The questions by and large relate to the facts of the case; they are directed of course by some theory which makes them relevant. The answers to the questions can be important factors in policy decisions. Even without the answers, the policy decisions probably will be made either interstitially, as in the case law, or more directly through statutes, but the policy decisions, if we believe in knowledge, will have less chance of being right in the present state of our ignorance.

II

I have moved from the problem of training students to the general problem of our lack of knowledge. The example of the monopoly tie-in case is a very simple illustration of the application of theoretical economics to a current case law problem. If these cases are now being decided on the theory that the consumer is being made to pay more, then they are being wrongly decided, unless there are some other facts which we do not know about. In other fields of learning, knowledge has been gained by an examination of the facts in terms of some principle of relevance, the creation of a theory, and then a re-examination to discover more or different facts in the light of the new questions posed by the theory. Surely to some extent this must be true in the law as well.

In moving from the problem of training students to the general problem of securing more knowledge, I have been guided by the model of the medical school. The model is suggested when the lawyers ask whether some form of internship for lawyers cannot be developed as now exists for doctors in medicine. Frequently the answer to this suggestion has been that law is not like medicine, perhaps because winning a case is not like defeating invading germs. The adversary nature of law spells the difference. Yet this cannot be a good distinction, because, after all, the adversary process is justified as a truth discovery process and as a method of

rendering justice. If we knew of a better way of discovering the truth and applying the law we would adopt it. Both law and medicine are applied sciences. While the doctor may not have to argue against another doctor before some tribunal as to what the appropriate medicine should be, something like that process must go on in his own mind, for the adversary method is essentially a reasoning process necessary when a rule is to be applied to particular facts. A more telling distinction between the two fields may be that people are quicker to react about problems of health than they are about problems of justice. But if this is the distinction, it surely is not one to be pressed by a lawyer.

Now the model of the internship for the doctor is not merely that he is learning to do what other doctors do. It is rather that he is given an opportunity to work in a uniquely well equipped institution where doctors and researchers are handling cases and are attempting to advance knowledge. Of course these institutions would be justified even if they did not train doctors. They would be justified because of the additions to the knowledge of medical science which their researches make possible. The medical school operates to translate the general knowledge of the other sciences to the field of medicine. It operates to bring the facts of medicine to the present theories, and it asks questions which the present theories suggest ought to be asked.

Cannot a law school be somewhat like that?

Suppose a clinic were attached to a university law school which handled actual cases under the supervision of a trained staff and under the general guidance of the faculty of the school. It would be possible then to take a number of students and to have them assist in the preparation of cases. If the cases were chosen because they had some research interest, these students would be coming into touch with law in the raw in those areas where a university has been able to formulate questions and hopes through answers to be able to advance legal knowledge.

I do not overlook the existence of legal aid clinics in discussing this somewhat different kind of clinic attached directly to a university. This clinic would be run by the university so that its work would be brought into direct contact with the faculty, and so that the projects would be research as well as service projects. The clinic would be headed by outstanding trial lawyers who have joined the staff of the university for this purpose. In running the clinic, the law school would have the assistance of the medical school and of the social sciences. The students who take part in the work should have received their degrees and have passed the bar, and should spend full time on the work of the clinic and the research

projects which grow out of it. Moreover, the cases should be chosen to furnish more court work than is true in the ordinary legal aid clinic.

This kind of clinic could operate in three areas: first, legal aid cases of the ordinary type; second, the representation of defendants in criminal cases of the kind now handled by the public defender; and, third, civil liberties cases. The clinic of course would not supplant the agencies now in the field. It would be a much needed supplement to them and to the work of the various committees of the Bar Association. These areas are not now adequately serviced, and the bar, rightly or wrongly, has come in for some criticism on that account. The problem would not be how to get cases but to limit them to those which would fit in with a workable research program at the same time. If the work of the clinic were of high quality, there seems little doubt that it would fill a public need while at the same time it would provide an opportunity for research and training. The analogy to medical clinics seems very close.

Many of the clients of such a clinic would be in need of medical, psychiatric, or social work assistance. Their legal problems are likely to be related to other difficulties. This is the kind of co-operative work in which a university clinic should excel. The opportunity for training, service, and research would be great in the criminal cases. There would be more trial work. There would be an opportunity to endeavor to learn more about the sources of criminality and about the effects of treatment, both inside and outside of the penitentiary. Out of such research we ought to get a better classification of crimes and of criminals.

The proposed clinic, dealing as it would with indigent clients, would probably not be of much help in bringing to the law school the facts of corporate enterprise, or the answers to such anti-trust questions as are raised in the tying cases. Indeed the clinic would be only one step in the construction of the kind of university law schools that we ought to have. The bar is a socially powerful learned profession. It is exceedingly odd and unfortunate that for this profession hardly any research worthy of the name goes on in the professional schools. One reason for this is that to some extent the bar has been distrustful of the uses of legal research. I think we ought to ask ourselves whether we really believe in knowledge. We have to convince ourselves, for example, that it is important to find out about the effects upon competitive conditions of relative size in an industry. Such questions are important and if we are not careful, in lieu of answers we will get experts. This is surely the trend of the law, and it is a most dangerous trend. Since we know very little about criminals, we will have a board of psychiatrists determine who should stay in jail. Since we

know very little about competition, we will let the Federal Trade Commission tell us what it is. The flight to the expert is in part the consequence of the failure of the legal profession, together with the other social sciences, to evaluate the theories and data of the social sciences in terms of the practical problems which law must meet.

A professional school ought not occupy the position solely of a preparatory school, or if it does, then other institutions of learning for the profession ought to be created. So the problem of law and learning today is to bring the law schools closer to the facts, to create research staffs, and to make possible co-operative work with the bar. Under such a program, a university law school would have a clinic such as I have described. It would have also a graduate program with fellowships of sufficient size to bring back to the school practicing lawyers for a year of joint work with the faculty. It would have research groups which could collaborate with the bar on work in the field of law and economics, on the revision of laws, local and national, and because of this country's world leadership, in the area of comparative and international law. A law school can do these things if the bar is convinced that they ought to be done.

The problem of training law students for trial practice should be seen in its true setting. The problem would not arise if law schools were closer to the practice of law and to the problems of law. It would not arise if the law schools had research staffs comparable to those possessed by other schools in the social, biological, and physical sciences. The bar has permitted its institutions of learning to fall behind.

This program does not mean that we should abandon or diminish the emphasis on the theoretical training in which law schools have excelled. The main contribution which law schools would make, if they should be able to engage in such research programs as I have suggested, would be on the theoretical side. As with the medical schools, however, such research programs in the field of legal aid, the representation of defendants in criminal cases, and civil liberties cases would be justified also because of their immediate social contribution. In the long run such programs would be justified because they would give to the bar professional institutions worthy of a learned profession. They would help the bar fulfill the difficult responsibility which it has of making the law responsive to our growing knowledge of the nature of man. And they would help the bar protect the law from those unreasoned assumptions which, in the absence of study, will distort our legal system.