

COMMENTARY

OBSERVATIONS ON THE STUDY OF LEGAL EDUCATION—CIRCA 1980

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I have chosen the word “observations” to describe this paper, but in spite of good intentions it is more likely a polemic. This may be just as well, for both our legal system and our doctoral system have been well served by adversarial methodology in arriving at the truth. The more pleasant and cooperative consensual approach has its merits, but once beneath the surface one finds it replete with productive, yet unpleasant, encounters. As consensus is based upon an already conducted contest, any resultant analysis is affected by hindsight.

For me to proclaim any partisanship is probably unnecessary, because my identification as a “politician” makes me suspect from the outset. In any event, the rhetoric I use will reveal, rather than conceal, the bias. But I feel the better for the confession, and it may nudge other contestants to doff the camouflage of “reporter” or “professor” and show their true colors.

I have reached a number of controversial assumptions about the practice, the teaching, and the study of law in the mid-twentieth century America. While each assumption should be fully supported by facts and fair arguments, a commentary of short length on a subject this broad will not so permit. Consequently, what follows will be more of an outline than a discussion in depth on any one of the topics. However, I stand ready to back up each assumption set forth. The assumptions have not been reached through whimsy, but through long labor in the vineyard (the legal laboratories) and constant cogitation.

1. *Law is learned more by experiencing than by teaching.*

This assumption is not to the discredit of pedagogy. On a time

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basis alone, three years in law school in contrast to forty years in practice, the laboratory has a great edge over the lectern.

2. *Law (government) is measured by voluntary observance.*

A great deal, if not by far the most, of human activity going on in any society is individual, requiring not compulsion but, rather, group cooperation through mutual understanding. In doing the research for *Reflections on Voluntary Compliance under the Federal Election Campaign Act*¹ I was amazed to find that the rubric "voluntary" or its equivalent was for all practical research purposes missing in the many varied publications on legal words and phrases and in the indexes to legal reference works, periodicals, text books, case books, and annotated statutes. By contrast, the words "voluntary compliance" or their equivalent are found frequently in the statutes of the federal government and its fifty states.

This indicates to me a grave lack of understanding on the part of the legal scholars and teachers of the limited role government (legislative, executive, judicial, and administrative) should play in a society. It also reveals a basic prejudice on their part to make "government" synonymous with "society." And yet government can encourage voluntary compliance on the part of the citizenry through the neutral role of umpire while the participants in many instances make up the rules to be applied. In a sense the Law of Merchants and other sets of mores and customs codified into law are products of such a process. Enforcement of the federal income tax laws depends more upon voluntary compliance than compulsion. The sense of equality and fairness felt by honest citizens nurtures this enforcement strength, but only so long as the law (government) can operate effectively to check any erosion of this voluntary foundation.

3. *The teaching of law in our law schools is very narrow.*

The legal profession, practitioners, teachers, and scholars are not adequately serving our society as a result of this narrowness. The nation's "other" 200 law schools have emulated the teaching of law in our twenty elite schools in part because these elite have produced the majority of the law professors. This teaching has been limited to the judicial practice of law, to the exclusion of the legislative and executive

1. 29 CASE W. RES. L. REV. 830 (1979).

practice of law and to the near exclusion of that remarkable hybrid, administrative law. Yet most of the legal controversies in our society today, and arguably the more important and far reaching ones, are decided not in the courts but, rather, in the legislative, executive, and administrative forums. Scholarship tends to follow what is formally taught, and what is formally taught tends to be that which has been researched. Therefore, when the teaching of law is narrow, the scholarship is correspondingly narrow. Where there is practice without broad scholarship, the goals tend to be short range. Pragmatism, not principle, prevails, and we have what all lawyers should dread: government by men, not government by laws.

As the practice of legislative and executive law has increased in importance in our society, the total practice of law has indeed moved away from principle and toward pragmatism. Yet the practice of legislative and executive law—that is, the administrative law practiced in the federal “independent” regulatory bodies (arms of the Congress) and the executive agencies (arms of the Administration)—drew heavily upon the judiciary for their initial rules of procedure and codes of ethics. The Congress in turn drew heavily upon the judiciary for its initial writing and subsequent updating of the Administrative Procedure Act. Furthermore, by providing for judicial review of administrative decisions, there has been constant input from the courts toward perfecting procedures along the lines of the predilections in judiciary practice. The legal scholars and teachers have neglected these fields of study, however, to the extent that insufficient work is being done to apply principle to their practice. At the same time a “school” of pragmatics has taken over “teaching” this neglected field to give an unearned respectability and encouragement to those practicing a crude form of pragmatism devoid of ethics and rationalism.² Gradually the dominance of this anti-intellectualism is destroying what integrity has been

2. See, e.g., *The Reagan Steamroller*, NEWSWEEK, May 18, 1981, at 38; *A Win for 'Blue Max'*, *id.* at 40. This article and its inserted sub-article generally describe the successful lobbying effort undertaken by the Reagan administration to secure passage of the President's budget plan. In a 1964 letter to Milton Eisenhower, then Chairman of the Critical Issues Council of the Republican Citizens Committee, I stated:

We have laws today which forbid the executive department lobbying for legislation with federal funds. These laws are ignored and sneered at by the Administration and its backers. Instead of being castigated, those who ignore these laws are praised for their political astuteness in getting legislation moved through what is pictured by many of our most distinguished scholars and thought leaders to be a stupid and recalcitrant Congress.

Letter from Congressman Thomas B. Curtis to Dr. Milton S. Eisenhower (June 3, 1964) (on file

built into the legislative and executive forums and is now moving in to erode the well-developed integrity of the judicial forums established in such a painstaking way over the century.

Yet the beauty of American scholarship in the social sciences, as it branched out from its western European roots, comes from its pragmatism, from the close attention the scholars have paid to the laboratories—to the daily living of the men and women composing the society. This scholarship to a large degree existed outside the teaching institutions.³ The legal teaching institutions have, however, been slow to identify their true laboratories in legal social science. The one instance in which they did, through Dean Langdell's genius in understanding that appellate court decisions were reality and that this material could be brought into the study of law, was remarkably successful. Ironically, it was this very success, starving the other components, that contributed to the narrow growth of legal scholarship and legal education.

Returning to the three admittedly generalized assumptions stated earlier, I will attempt to fashion my "observations" into a modest prescription. The responses to the concerns raised by these assumptions are obvious. We should draw on experience as teacher to a greater degree in the preparation of our future lawyers. In providing the necessary exposure to the administrative and regulatory system so dependent on voluntary compliance, we should insure that the pragmatic employ-

with the *Washington University Law Quarterly*). The legislation mentioned was first enacted in 1919 and is codified at 18 U.S.C. § 1913 (1976).

The scenario behind the passage of the budget bill is an example of the school of crude pragmatism to which I refer. Congressmen and congressional committees over the years have spoken with considerable emphasis about the failure of the executive department either to abide by or to enforce § 1913, the purpose of which is self-evident. Unfortunately, the reporting profession, a basic part of representative government, particularly in correcting the grievances of the people in the legislative forums of government, has espoused this "pragmatic" approach almost to the exclusion of reporting the legislatures as study and deliberative bodies and the political election processes as rational ones.

The judiciary has also spoken on the issue. *See* National Ass'n for Community Dev. v. Hodgson, 356 F. Supp. 1399, 1403 (D.D.C. 1973): "Unfortunately, in section 1913 Plaintiffs have dusted off a statute which because of its obscurity may render impossible a precise judgment concerning the intent of Congress in passing the legislation. There appears to be no record of prosecutions under the statute." There is, however, neither obscurity nor ambiguity about the intent of Congress in passing § 1913. Instead there is neglect. My fear is that this neglect will continue. My sense is that the law curriculum of our nation's fine institutions of legal learning is, at the least, one appropriate place to begin a movement in the opposite direction.

3. *See generally* B. BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY (1960); L. CREMIN, AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607-1783 (1979); L. CREMIN, AMERICAN EDUCATION, THE NATIONAL EXPERIENCE 1783-1876 (1980).

ment of “legal laboratories” enhances, rather than detracts, from the principled, ethical, and rational practice of law.⁴ Finally, we should broaden the scope of law teaching to encompass not only the above mentioned principles, but also to include the vital subject area of legislative law.

The bias I confessed earlier clearly sponsors this final recommendation, but, interestingly, the bias is itself sponsored by the need that the recommendation addresses. We must vigorously teach this law, for its neglect has already prompted a crude pragmatism that only erodes the principles upon which our legal system should stand.⁵ As legislators, we must work hard in making law that speaks to our country’s various needs. As lawyers, we should respect this law and pursue its practice based on the principled and ethical procedures so aptly developed by the judiciary. Only by the presentation of these guidelines in a curriculum committed to the inclusion of a legislative law component can we hope to avoid government by men and promote (return to) government by laws.

4. To this end, practical or clinical offerings in the administrative law area will employ experience as an additional teaching resource. The opportunity to instill at the student stage an integrity-based “code of ethics” into the approach to the practice of this law is also invaluable to the scheme.

5. See note 2 *supra* and accompanying text.

