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LEGAL EDUCATION—SOME COMPLIMENTS DUE IT WESLEY A. STURGES†

The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1949, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This ninth annual lecture was delivered on February 15, 1957.

When judges, lawyers, law teachers, and law students come together, as on this occasion, legal education seems to be an ever faithful subject for discussion. It seems to be of common interest to these groups albeit that their several views frequently indicate some want of harmony. If there are others at the affair, laymen, let me call them, they may seem to be of little consequence—not unlike the parties to causes in litigation at times.

In the circumstances of this occasion I am prompted to turn once more to this topic so tried and true among us. And in doing so I genuinely hope that the endeavor, imperfect though it will be, may at least signal my purpose to do honor to the late Professor Williams who served his profession as a law teacher so ably and so endeared himself to those with whom he worked and lived. I count it an honor indeed to be invited to contribute to this series of lectures in his memory.

Quite clearly it is more popular to *criticize* organized legal education in this country, to emphasize its alleged shortcomings or failures, to urge corrections and reforms,—than to praise it or any accomplishments in its name. It is apparent, moreover, that from the law-teaching profession comes the principal part of this criticism. It seems to be a professional trait to search vigorously every nook and facet of our programming and execution of legal education and to declare our professional weaknesses and short comings. In some law schools a voice of like tenor is sometimes heard among the students; in others, of course, there are indications that the students understand that there is less tolerance for student criticism. Our contemporaries at

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the bench and bar also advance critiques. Generally complaints from this source are considerably pedestrian, tedious at times, and of dubious contribution to any improvement in the processing of legal education. I put it this way, but not in any disrespect of the bench and bar. Those at the bench and bar are busy men, busy in the realities of judicial life and the daily practice of law which are much apart from the educational practices at the law school.

My guess is that if, to outsiders, our organization, programming and execution of legal education are as bad as some of us sometimes say they are, those outsiders may well conclude that there can be no good in us.

The truth is, however, that the vigor of our professional self-criticism has served as a forceful factor in the development of current professional legal education; it has been one of the most significant factors in furthering the pursuit by the law-teaching profession for truth and realism. This trait or devotion to criticism has served as a continuing vitality for the examination and re-examination of the validity of our contribution to the general cause of education.

And so I am prompted briefly to review and summarize some of our accomplishments—some words of *praise*, if you please—for the law-teaching profession and current legal education. Even if these accomplishments fail to add up to a big total in number, they are, notwithstanding, worthy of broad citation for work well done in furthering the best in the educational process. That this citation may be made to appear duly tempered and tested for its validity, certain considerations indicating limitations still current upon our accomplishments in legal education will be sketched in. Inquiry into some of these limitations may plausibly suggest some part of the further course of our endeavors—what ought we to do next, and how?

Notable changes in the processing of the professional education of would-be lawyers have come to pass since the beginning of this century—in the fifty to sixty years just passed. These changes joined with many others in our economic, social, and political life, including especially those in science and enterprise, during the same period. What might be reckoned as significant interrelationships of these changes, I pass by.

During the period embraced in this review the older practice whereby the would-be lawyer read law in the office of a practicing attorney in order to learn the law and qualify for the bar has become, as we all know, almost completely displaced by the professional law school. Most of the present-day law schools were organized by, or have become absorbed into, a going university. Most of these law

schools are comparatively young in years, and so do they represent the youngest, or near youngest, venture of the university in education.

As the professional law school displaced the older practice of reading law in a practitioner's office, so did a profession constituted of full-time law teachers come into being as a separate and new segment of the legal profession. These teachers became set apart in their specialized professional calling not unlike, in general outline, professional teachers in other fields at the university.

The competence and excellence of the members of the law-teaching profession have not been—and are not now—gauged by their experience in the practice of law or upon the bench. Admission to the bar has assumed no significant role in determining the qualification of the professional law teacher; and, generally, competence as a practitioner or judge is not regarded as any substantial assurance of qualification for the teaching of law. And, of course, Professor A's competence and excellence as a law teacher do not assure his worth at the bar or on the bench.

These law teachers have their own separate national organization—the Association of American Law Schools. That organization indicates little interest in the American Bar Association which, in turn, assumes the role of spokesman and law-giver in matters involving the legal profession. Some law teachers maintain a membership in the national bar association—apparently for reasons not closely related with their professional work as law teachers. Judges and lawyers indicate little interest in the doings of the national law school association. The American Bar Association has reiterated its interest in legal education. The Section on Legal Education of the association should be credited with posing substantial, even if indirect, pressures for the improvement of legal education. Increased quantitative requirements to accredit law schools and to qualify persons for admission to the bar have, of course, had their effect upon legal education. Their impact upon the *quality* of legal education, however, is not very clear.

As law teachers have come to their own professional role largely apart from the legal profession generally, so has the law student moved away from a life among the courts and “that strange compound,” to quote Justice Cardozo, “which is brewed daily in the caldron of the courts,” and away from his student life among the practicing lawyers. He left them to settle himself on the campus at the university and there to become busy, busy indeed, with his case-books and term papers or examinations, with the professors of the school, and in the culture pattern of his contemporaries in the given law school.

I am persuaded to the view that training at the professional law

school seems to have become superior to the earlier office training for the would-be lawyer. I also share the view that while the professional law school is the junior, or near-junior comer to the campus, yet, as compared with its associates on the campus, it is the best that the university has to offer in the name of education.

Of course, the very making of any such claims to superiority for the professional law school reasonably provokes a challenge as to what may be the basis of grading the excellence of an educational service. I also realize that one making the claim may in turn be discounted as for claiming a divine guidance which, of course, he may not have. I am not unaware of the doctrine that only fools rush in where angels fear to tread. Even so, there is no law against one having convictions as to the basis of judging excellence for the educational programs and practices at the university. It seems to me that the university is hard put to justify its existence unless it succeeds in training youngsters for competence in citizenship. Many side-shows on the campus can not substitute for this, the main basis of its claim to charity, fame, and respect. By training youngsters for competence in citizenship I mean the exposing of the students to a curriculum composed of living, human affairs—human transactions and relationships, if you please. By such exposure let them be challenged to identify and to seek to understand the components of our democratic social order. Let them also be exposed to educational techniques designed to induce the formulation *by the student* of informed, deliberate, pragmatic judgments as to how such affairs may best be resolved and administered to further the social order which we cherish. And as such affairs and relationships are ever in process of change and accumulation, so should the curriculum be both responsive and functional.

I doubt that any curriculum at the university so substantially meets these specifications of merit as that of the modern law school. As the law school agenda comprehends the problems of law administration to serve the ends of justice and public order within our scheme of social organization, so do those problems generally constitute the substance, the raw material and living realities, of the social sciences or humanities.

The most distinctive technique of the educational process also may be found at the law school. I refer to the so-called case method. Insofar as it has displaced the traditional academic lecture, the sermonizing from the Mount to the multitude together with the usual repetitive drills and exercises, it should be credited as a major and unique contribution to the educational process.

The course of progress, of changes, and of developments, in professional legal education also are worthy of special note over and beyond

the scope and educational validity of its curriculum and techniques of instruction. This development or evolution is a story of some of the consequences of a vigorous scrutiny of orthodoxy by the new profession and a high devotion, it may now be said, to their duty as educators. This scrutiny has been, of course, akin to—indeed a part of—the trait of the new profession critically and quite continually to examine and re-examine the objectives of legal education.

The story of the thrusts for realism by the new profession begins with a recognition of the rather prevalent nature of contemporary orthodoxy. It may also be emphasized that probably that orthodoxy, as encountered by the new law-teaching profession, was more extensively ingrained, officially authenticated, and hallowed, if you please, than any which ever confronted any contemporaries at the university.

At the beginning of the century law-teaching materials were rigged to center attention chiefly—almost exclusively—upon opinions and decisions of appellate courts. This rigging was common to both case-books and reputable texts.

Orthodoxy in the training of would-be lawyers called for the quantitative imparting to the student of selected general principles of the law as revealed in opinions of the appellate courts. Many of these general principles were more or less plausible derivations from one or more abstractions, such as, for example, “the very nature of things” or “the principle” of the thing. Frequently these derivations bore ethical overtones; some purported to be the embodiment of public policy. Thus, it was judicially declared that, by the common law, arbitration agreements are, *by their very nature*, revocable; that arbitration agreements are not enforceable at the common law because they are *contrary to public policy*—they would oust the courts of their jurisdiction. Similarly, law in the abstract was personified, activated, and made the explanation for things. Thus, while some parties have been known to the law as sureties, there *also* were those, we are told, that “*the law treats as sureties*,”—who are sureties “*by operation of law*.” Similarly: Equity acted *in personam*; it abhorred forfeitures; etc.

Some of the new profession, with some of their kind on the bench, soon dared to deny their faith in such derivations; they denied faith in them as competent end-products of the judicial process; they denied faith in the process of making them. In a word, these earlier iconoclasts of modern legal education set out to challenge the judicial process for over-indulgence in abstractions, personations, and lyrical clichés. The more aggressive and perceptive among them, like Walter Wheeler Cook, were fortified by comparable contemporary inquiry such as Einstein’s studies, that of proponents of behavioristic psychology, and that of students of semantics. Here were fellow iconoclasts,

considerably uninhibited; and on their way to realistic identification of their parts of the world of the day.

Equally critical were the iconoclasts in the new profession of *stare decisis* when its application was avowed to perpetuate the symmetry and containment of general principle regardless of what the decision in the given case did to the particular plaintiff and defendant. The tenet that "*hard cases*" must not destroy *principle*, must not make "*bad law*," was never pleasing and nearly always was offending to the iconoclasts of the new profession. Claims to the necessity of certainty in the law or to judicial impartiality in such cases were too high-cost.

Inspired to scrutinize the judicial process as it was manifested in appellate cases, our pioneers of modern legal education were urging new points of emphasis and new points of departure by appellate judges. For example, in substantive decisions upon the merits of a civil cause, why not begin with the facts in the given case, the claims made by the respective parties, and then more apparent reflection by the judges on the bench as to which of the claims *ought* to be validated and enforced and which should be denied—and *why*—and the *why* being set out in language meaningful to the man of lay intelligence.

The iconoclasts with their proposed new points of emphasis and new points of inquiry by the judiciary in the resolution of the merits of controverted causes placed themselves in open disregard of an existing, authoritative validation of principles of appellate jurisprudence however abstract might they be.

The very questioning of the appellate judiciary for over-indulgence in abstractions was near heresy. General principles as declared by the judges of the highest courts were enshrined in an exceptionally authentic tradition. Thus, Blackstone, it will be recalled, had devoted followers among American judges and lawyers. He was an authority to them. His commentaries upon the functions of judges were easily read and remembered and, therefore, widely accepted and respected. You will recall that while he had elevated the judges to the high honor of oracle, he had pleasantly subordinated them to their master, the law; their function was to interpret the master to the British subjects. Apparently it was considered that somewhere there was a body of principles of law, principles of hoary, if not eternal verity, and that judges, bound as they were by their oath, must give due expression to the application of that body of principles to the new case. If this were not so, law would lose its certainty and sanctity and our jurisprudence would become one of men and not of law.

Of course Blackstone had had his critics like Austin, who called Blackstone's views a "childish fiction"—a "childish fiction" it was considered to be to try to maintain that "judiciary or common law is not made by them [the judges] but is a miraculous something made by

nobody I suppose, from eternity, and merely declared from time to time by the judges." This view was, of course, the one more acceptable to the realists in the new teaching profession. And in 1917 Justice Holmes, as we may recall, took sides with Blackstone's critics by declaring from the Supreme Court bench his opinion that "the common law is not a brooding omnipresence in the sky." In 1921, while Justice Cardozo characterized as a "vivid phrase" Blackstone's identity of the appellate judge as a "living oracle of the law," Cardozo was saying at the same time that: "The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars."¹ The controversy was again dramatically presented in the Supreme Court of the United States in 1935 in the *Butler*² case. Justice Roberts felt called upon to reiterate the role of judges (even those of the Supreme Court) as being limited to *ascertain* and *declare*, while Justice Stone championed the power and responsibility of the judiciary *to make* a decent law in contested causes.

Probably it is safe to generalize that this disputation as to the "true role" of the appellate judges is, for the present at least, more generally settled in favor of the iconoclasts.

Thus, the proponents of realism in the law-teaching profession, aided by some of their kind on the bench, brought on the identification of the judge as a living reality in the judicial system and worked his liberation from a prearranged and brooding omnipresence of existing principles. Thus was he restored in person and as a human being of *finite* competence and worthy of scrutiny for his own professional behavior—as a decision-maker—as a law-maker.

But what of it that judges make the law in the new case, rather than merely interpret it? What of it that judges are human beings like other folk? To the iconoclasts it was one successful piercing of the veil of verbalism and mysticism in which the living realities of the judicial process had been shrouded. This is illustrated in a general way in the reporting by Justice Cardozo in 1921 upon the points of inquiry which he undertook in furtherance of his introspective survey of his own process as an appellate court judge in making decisions. He posed for himself the following inquiries as to how he behaved in functioning as a judge, as a decision-maker, as a judicial law-maker: "What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to

1. CARDOZO, *The Nature of the Judicial Process* in *SELECTED WRITINGS* 114 (Hall ed. 1947).

2. *United States v. Butler*, 297 U.S. 1 (1936).

contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency . . . how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?"³ Presumably few, if any, of these inquiries would be deemed pertinent by a judge duly serving as the "living oracle of the law" as intended by Blackstone.

It remains to emphasize that the pioneers in realism within the new law-teaching profession, and some of their kind on the bench, engaged in various other thrusts for realities relating to judicial law-making and law administration. For example, they pressed for substantial changes in traditional processes and attitudes pertaining to the advocacy of causes by lawyers and to the course of the judiciary in resolving them. They led a broad attack upon the untoward empire of legal language.

Judicial opinions and legal texts provided the law with its own concepts and with specialized terminology to name them. Many concepts recognized in legal lore were and still are very abstract; by the same token legal words to invoke them have had no precise content. The abstractness of these concepts and of their nominations in legal language was quite as offending to our iconoclasts as the abstractness in the make-up of the bases for the derivation of the general principles of the law which we already have noted.

Judges in their judicial opinions coined legal words and phrases to embrace or account for a given factual situation and some legal issue involving it. Then followed traditional advocacy and judicial labors in subsequent cases as to the *real nature* of the coinage. To illustrate: In 1915, in the House of Lords, a given course of commercial matters transpiring between two parties was diagnosed as a "repudiation" of a contract, and, it (the "repudiation") being allocated to one of the parties, it was ruled that said party should be denied his claims upon the contract.⁴ But it came to pass for determination in subsequent judicial deliberations whether or not the given doings really were a true "repudiation"; whether they were "a repudiation going to the root of the contract"; whether they were not more nearly a "mere" something else—perhaps only "frustration"? In 1942 the House of Lords came to rule that the given doings were no "repudia-

3. CARDOZO, *op. cit. supra* note 1, at 108-09.

4. Lord Haldane in *Jureidini v. National British and Irish Millers Ins. Co.*, [1915] A.C. 499 (1914).

tion" at all, or, at least, they were not such "repudiation" as brought the legal consequences ruled in 1915.⁵ Something was overruled.

Another illustration occurs to me: The deceased left a widow. Some of his real estate acquired during marriage was subject to a purchase-money mortgage which remained unpaid at his death. Wife had not joined in the mortgage nor in any manner waived her dower. Upon his death the widow appealed to the courts for dower even as against the mortgagee. If there had been *instantaneous seisin* in the husband-mortgagor when he bought the land, the mortgagee would, of course, prevail. So the real question—the "single point," to quote the court—was whether or not the transaction really constituted a true instantaneous seisin in the husband. This was handled judicially by searching out and articulating the real and true nature of instantaneous seisin and, by analogy and syllogism, casting the given transaction inside or outside the true nature so articulated. The New York Court of Appeals, after reviewing the authorities, convinced itself that there is true instantaneous seisin when, as the court observed, livery to a man is *eodem instanti* withdrawn from him, or in other words, as I quote the court, "it is in him and out of him, *quasi uno flatu*, and by one and the same act."⁶ And so the mortgagee won—and this in a "lien theory state"!

Perhaps I should make a further citation in this connection in order not to slight other elders of this clan having very high seniority. I must mention "Possession"—forever incorrigible in so much of legal lore. What man of law is there who has not at least attempted professionally to represent a "true nature" of "Possession"? Quite likely, of course, each research also has embraced the identity of more or less intimate associates like "*actual* possession," "*constructive* possession" and "care," "control" and "custody," all being more or less short of "title," and of "ownership."

In short, much time and energy have been spent—and still are being spent by lawyers and judges—in translating human relations and transactions into or outside of the alleged *true* matrix of various traditional legal abstractions. Our iconoclasts considered such labors and processes unrewarding and misleading, even though these doings took on some appearances of a judicial struggle for impartiality in the run of cases and even though some regard thereby seemed to be paid to *stare decisis* for the sake of certainty in the law.

There were similar thrusts for realism centering upon abstruse and technical words and phrases which have seemed to inspire less intellectual labor over their "true meaning" or "true nature." Thus in *Benelict v. Ratner*⁷ decided in the Supreme Court of the United States

5. *Heyman v. Darwins Ltd.*, [1942] A.C. 356.

6. *Stow v. Tift*, 12 N.Y.C.L. Rep. (15 Johns. R.) 458 (1818).

7. 268 U.S. 353 (1925).

in 1925, a certain assignment by a business unit of some of its accounts receivable was summarily brought to legal grief and invalidity because of a conclusive imputation of fraud to one or more of the commercial people who were parties to the transaction. The transaction was declared a fraud because it constituted a something which the Justice coined as being a "reservation of dominion inconsistent with the effective disposition of title and creation of lien." These words, "reservation of dominion inconsistent with the effective disposition of title," were repeated three times in the course of the opinion—perhaps, I suppose, to emphasize the legal wickedness of the assignment. It still is a mystery what this series of words might have meant to its author. It was, to say the least, a laborious way of reporting judicial disapprobation of the commercial deal under review. The actual ruling seems to have as its greatest claim to fame the provocation of much litigation. Many more common and stock terms in legal lore moved about at or near par with little critical inquiry as to their meaning, if any. "Title" is a fit illustration. "Title" in traditional legal lore has been thingified and activated, and accordingly as it "passed," or did not "pass," has it underwritten legal distinctions between such commercial transactions, for example, as "sales," "conditional sales," "sales on condition," "sales on trial," "contracts to sell," "pledges," "chattel mortgages," etc. Of course there have been "titles" and "titles," including the somewhat dubious group of "bare, naked legal titles" and those resting from time to time "in nubibus."

Our iconoclasts of the new law-teaching profession were persuaded early that traditional abstract concepts and their names as they circulated in legal lore bore no constancy of legal consequence regardless of any alleged "true natures," or "true meanings." Critical synthesis of decisions taught the variability of the abstract concepts of legal lore and squeezed from them and their names their persuasiveness when used to implement any syllogism formulated to explain the reason why the judges decided the given case as they did.

In short, the pressure of the realists upon this area of law-making centered generally upon what was cited as the mere troweling together of terms to which the judges arbitrarily assigned a meaning most suitable to their purpose in the given instance. And, as it came to pass, in 1935, Circuit Judge Learned Hand read a burial service over the long-time aide-de-camp in the law—"Title." With deliberation, apparently, he observed in a judicial opinion that "'title' is a formal word for a purely conceptual notion; I do not know what it means and I question whether anybody does, except perhaps legal historians."⁸

8. *In re Lake's Laundry, Inc.*, 79 F.2d 326, 328-29 (2d Cir. 1935).

Of course, there were those of the new profession who, during the time of this review, placed extraordinary hope in the service of legal words. They sought to restore certainty in the law and undertook to facilitate it by putting refinements and restrictions upon the idea-content of terms traditionally circulating in legal lore. Let a "right" be a right; and let it not be confused with a "privilege"! Given a certain specification of idea-contents for various words and the syllogism would be at least more reliable. These endeavors pretended some hope for a new certainty in the law. But the ancient illusions were soon manifest. Worse still, these endeavors aided the isolation of legal lore from the realities of the ideas and means of communications of the general lay-citizenry. (It may be added, parenthetically, that a crusade born among lawyers to Restate the Law seems to have rested upon like impulses.) These endeavors obviously were side-shows of smaller consequence in the regard paid them by the more critical in the new and growing law-teaching profession.

I shall mention one more challenge of traditional techniques in judicial law-making by our pioneers in modern legal education. The process now referred to is manifested in *Benedict v. Ratner*, cited above, namely, of the judiciary making sinners out of laymen in their daily commercial dealings and then offering their sin to support argument of the court in making a decision invalidating the transaction. Divine guidance that judges might seem to enjoy under Blackstone's tenets as to the judiciary was largely lost in the new realism. Judicial imputation of fraud by conclusive presumption, or otherwise, is deemed frail indeed when wanting of documentation with the facts of life. So does judicial pronouncement of what is "public policy" earn respect only as it is adequately documented. Judicial declarations as to what *is* for or against "public policy," or the "public interest," have become so hackneyed as to be suspect in most cases.

In order to indicate a decent regard for the limitations upon my time for this paper on this occasion, I will bring to a close now this story of the quest of some members of the new profession for realism in judicial law-making.

By way of summary: It seems that the proponents of realism in our new profession of law teaching, aided by some of their kind on the bench, have been quite widely successful in gaining the identification of the appellate judge as the living, finite reality of the judicial system, and his liberation from a prearranged and brooding omnipresence of existing principles. Any divine function for him has been made obscure indeed. The judge has been personalized, recognized as a human being of ordinary competence, and, of more importance, subject to scrutiny for his own professional behavior as a decision-maker—as a law-maker. No judge can claim his work well done who finds it to his convenience to trowel together legal abstractions in

exposition of the treatment of a plaintiff or defendant in a given case. The truth of his reasons should out! Respect necessarily has become limited for judicial impositions upon civilians of the roles of saints, or wards on the one side, and of sinners on the other, in the course of their mundane affairs, and for judicial declarations of what is a "public policy" in order to preside at the winning of an argument. Such impositions and declarations deserve, indeed they require, adequate documentation by the facts of life—a process frequently difficult to perform, and unhappily, infrequently undertaken.

Of course, some of the realists of the new law-teaching profession progressed little further than to demonstrate analytical destruction of general principles in the law, decry the troweling together of legal abstractions to explain the reasons behind the decisions of cases, and to undertake a psychoanalysis of the judiciary to estimate how the brethren might behave in different litigated causes. While the latter process is not to be belittled, these teachers failed or neglected to attempt even to bring forward any worthy substitutes for traditional judicial law-making. Students left the class-hour impressed with the proposition that there is nothing-to-nothing, no-how, and all in the law is crazy contradiction and confusion, and with the conviction that citizens in their causes in our courts are subject to the prerogative of the judges to indulge in their own fitful responses in the new cases as they are unfolded before them.

Others in the new profession came to emphasize what they have called the social implications of judicial law-making. They named their tenets sociological jurisprudence or the functional approach. By the gospel, broadly stated, of this group, the validity of judicial law-making, like the doings of other agencies of government, is brought to judgment for its service to the society of which the judicial system is a part. This calls for the identification and recognition of the values and ideals of the given social order and appreciation of the service of the law-maker in stabilizing, perpetuating, and furthering those values and ideals. Law-making and law administration should be regarded as means to these ends; not as any significant ends in themselves.

In line with these views of some of the members of the new profession toward the programming and execution of legal education, many casebooks and other teaching materials have experienced an evolution consisting of revisions and extensions implementing in considerable degree the purposes of the developing realism. Broadly speaking, the changing teaching materials and changing programs of instruction have become devoted less and less to the portrayal of the general principles of the law as undertaken in earlier orthodoxy. Laborious or pontifical statements by the judiciary of traditional legalistic principles frequently are included as text material in order

to manifest "horrible examples" of the judicial process, rather than otherwise. The new materials have, of course, been extended to cover a large variety of so-called "legal subjects" which were unknown to earlier curricula. Both in content and arrangement the changing curricula have reflected in varying degrees the developing realism of legal education. In the extended teaching materials some "non-legal" materials have been added; and, indeed, here and there, a law school faculty roster discloses a brother who is destitute of any degree in law.

It is hoped that this may prove to be a reasonably valid story, abridged though it is, of the objectives of the pioneers in realism in the new law-teaching profession and of the points of emphasis in their departure from contemporary orthodoxy.

To give semblance of further validity to the story, it seems right to sketch in some of the more important limitations which, as yet, seem to check the accomplishments of the realists in legal education. Some of them take force within the law-teaching profession. These limitations, I will emphasize, do not indicate that what has been tried by the realists has failed. Instead, a process of transition is indicated.

The limitations I now have in mind relate to the limited prevalence of the acceptance and practice of the tenets of the realists within the law-teaching profession. Apparently a substantial number of the new profession never have endorsed, do not now endorse, and never expect to endorse the new faith. By positive conviction or more negative indifference they find that as an old time legal orthodoxy was good enough for father so is it good enough for me. I am guessing that the attrition of these brothers is faster than their replenishment by younger blood; but only time will tell for sure.

By similar reckoning the stature of the casebook as a tool of legal education should be tested by prevalent practice. It has been applauded as a unique technique in the educational world. It seems to have been designed to challenge the law student to reflect for himself upon raw materials calling for judicial law-making and upon the law so made. Accordingly, did it promise to choke out some of the sins of the traditional academic lecture method. But the accomplishments of the case method depend for the most part upon the instructor who purports to use it. As a law student I often experienced, and I have observed not infrequently since then, an instructor *imposing*, notwithstanding the casebook assigned to the students, his sermons from the mount. Accordingly, the casebook might as well have been any hornbook with black type summaries on the general subject. And sometimes, indeed, I have suspected that about all that the law student required for making a grade of excellence in the course or seminar was his class notes well in hand on examination day. It is suspected that the attrition of this group of our brothers will be slow. We all, it seems, swear by academic prerogative to indulge in the

vice of lecturing to "the boys"—of making everything profound but clear for them.

I am beginning to believe, in this connection, that some of the preparatory schools and a few of the colleges in this country have passed our law schools in putting to use the educational values of the case method of work in small student groups. The traditional lecture is there stifled by a more dynamic and purposeful environment which champions the credo that it is educationally valid to permit the student *to work for and gain his own education* unencumbered by instructors who undertake more than the role of accessory.

While the case method in legal education has proved to be no indispensable tool in furthering the realism of the new profession, it is certain that it has served the cause better than any other or different technique.

It remains to take note of another set of limitations upon the realists in legal education. The realists may well claim valid triumphs over the verbalism and mysticism of orthodoxy in judicial law-making; their contribution to the integrity of the programming and processing of a legal education seems quite apparent. But how shall we reckon their professional contribution *beyond academic halls*? How has it carried to the legal profession, to the judiciary, to the social order generally?

As yet, speaking time-wise, their contribution in these particulars is apparent only to a limited extent. The friction attributable to those within the law-teaching profession who are the doubting Thomases or who are the more positive non-believers in the disbelievers already referred to, may not, of course, be disregarded in this connection.

While some appellate judges in the exercise of their office manifest quite clearly their approach to their law-making devoid of apparent adherence to traditional principle and technique, some do not. Among the latter, orthodoxy of abstractions and syllogisms constructed thereon appear to circulate at par or better.

It also is unknown how the tenets of the realists have served the judges *at the trial court*. Of course, the trial judge may disclose his colors in his opinions—when and as he writes them. But his many decisions and rulings without opinion-writing contribute very substantially to what is yet largely unknown jurisprudence. The extent of the sweep of the realism of the new profession in this area of judicial law-making is scarcely subject to a plausible guess.

Equally speculative is the reach of legal education and of the realism therein into the processes of the jury, of the legislature, of the administrative agencies.

Reckoning the professional contribution of realism in legal education beyond academic halls involves a further factor which is not a little frustrating. I never wrote a dean's report that did not beam

with progress at "my" School; I never have read another's report that did not beam with new accomplishments at his School; and all of this, year after year. But how is said improvement translated beyond our circle of friends and critics in academic halls? Indeed, how do we set out to *measure* the social effect of any aspects of legal education which may have influenced the process of law-making? I suppose it would be urged, in several circles, that some—a substantial number, a majority, or possibly all—of the present Justices of the Supreme Court of the United States are of the realists' school of thought. But how do we measure their official contributions for good or bad to the public welfare? How might we verify that their contributions are, or may be, more worthy, more substantial, more enduring, more pragmatic, more perceptive, than those of their predecessors of, let us say, one hundred years ago? And in this connection it seems pertinent to question how much of the work appearing in the reports of the appellate courts (including those of the Supreme Court of the United States) may be expected to have much bearing, one way or another, upon the social welfare? It seems probable that not a few of their decisions are of little consequence beyond their making. A ruling, one way or the other, probably is the principal contribution of many cases.

It also remains to observe that emphasis upon the social aspects of judicial law-making to test its validity at the same instant challenges our intelligence concerning our social order. But the truth appears to be that our intelligence concerning our very own social order is only fragmentary, largely intuitive, and unorganized for jurisprudential purposes. It seems plausible to urge that the law schools of the country should become the reliable sources of intelligence upon the realities of our current society and be qualified to accord competent opinions derived from such intelligence for pragmatic administrations and determinations of our economic, social, and political affairs by agencies of government, including the judiciary. Any such program would, it seems clear, require the joint participation of our law schools, cooperation of many of our friends in other parts of the university, and much money.

In furtherance of the undertakings and accomplishments of those in the law-teaching profession who were pioneers in extending the tenets of realism which I have briefly cited, legal education should, I submit, next extend itself to inquiry about, and the organizing of, the intelligence to which I have just referred.

I venture to suggest further endeavors for the law schools of the country. These further endeavors likewise are not of small proportions. They likewise involve cooperative action among the law schools and the aid of other units within the university. I shall label them as parts of the gospel of *Simplification*.

Thus, if the law schools of the country were to join in a common undertaking, it seems to me that they should be able, given the patience and perseverance becoming educational units, to rid the myriad of documents of legal nature which are in use in civil life of much of their useless verbiage and to standardize them by writing them down to reasonable essentials. The traditional rule and dominion of the scrivener with his ingrained fears and prejudices should be forced into disrepute by educational pressures.

I have the same in mind with respect to the *chaos and nonsense* impregnated by legislation and judicial law-making in our morass of recording acts.

I venture, with like thought in mind, to urge law school endeavors to simplify—to simplify *far and wide*—current practice and procedure in the many different courts of the land. The arbitral process as currently practiced indicates and emphasizes how much could be done—remains to be done, I will say—to bring to more practical use the courts of our times.

With like thought in mind, law schools should, I submit, undertake an active, indeed aggressive, role relating to the continual propagation of laws by state legislatures and the Congress. Current legal doctrine making for sublime faith in the legislative process can be critically examined while considering other current frailties of judicial law-making. But I have in mind more mundane considerations. I will summarize them in a sentence or two. Once laymen (having reasonable competence to grasp the English language) can read or otherwise absorb our laws with some assurance to themselves of their comprehension thereof, the better secured will be the good things in our social and political order. Reasonably clear presentation of our laws *in simple English* available to the understanding of laymen would, I submit, *grace* the greater part of our present statute laws—state and national. Complexity of subject matters is no justification for abstruse statutory texts—often made eerie with illiteracy.

I dare say that there may be near consensus that all of these endeavors look to ends that are desirable. Of one further thing I am sure, and that is that student interest would be in abundance in each and all of these researches as to the realities of our legal order as a going concern. For organized legal education to undertake them would, I suggest, be fit and promising endeavors in furtherance of the educational process and of the objectives for social welfare to which the more perceptive realists of legal education have been devoted.

The pioneers in realism in legal education followed an *exciting, irreverent, devoted professional life*. I hope that we of the profession of today may prove ourselves worthy of the heritage—and that we go and try to do even better!