# THE LAW SCHOOL AS AN EDUCATIONAL INSTITUTION

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The question whether professional instruction in the law is properly a university function has been, in one aspect or another, a perennial issue for several generations. For the most part, until comparatively recent years at least, the disputed point has been whether the university law school, as compared with other institutions for instruction, could perform adequately the task of preparing aspirants for the practice of law. That phase of the question may now be considered settled for all practical purposes.[1] Almost no one will at the present time deny that the qualified university law school does a competent job, within well-recognized and self-imposed limitations,[2] of supplying the profession and the public with men who are reasonably well prepared to be entrusted with the protection of their clients' interests.

But the question is a two-edged one. Now that the universities are secure in the claim that they excel in the preparation of students for the bar, perhaps the time has come when emphasis should be placed upon the question's other aspect. Is the adequate training of students for the proficient practice of law a task with which the university should appropriately concern itself? When the university law school undertook this task it assumed a dual trusteeship: to the profession and the public it assumed the responsibility of affording a type of instruction which would insure, so far as possible, against the dangers of

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1. See Hanna, The Law School as a Function of the University (1932) 10 N. C. L. Rev. 117, 149.

2. Cf. Hanna, supra, note 1, at 149-150: "No one expects the law school completely to train the lawyer. It gives him a technique, and a certain familiarity with his future materials. The rest of the training he must give himself over many years. Part of the function of the law school is to give the apprentice a chance to mature a little in a contemplative and non-sordid atmosphere. The law school recognizes an enormous variety in types of law practice and a tendency to specialize. Its attitude is that no one can tell what its students will actually do in practice. * * * The law school consequently aims to cover subject matter in which will be found as many common elements as possible of all kinds of law practice."

the incompetent and irresponsible lawyer; to the university it impliedly gave assurance that the purposes, the traditions, the *mission* of the university would be safe in its hands. It was to be a professional training school; but it was to remain part, nevertheless, of an institution whose functions had been defined in rather idealistic terms of personal integrity and social responsibility, an institution of higher education in the best understood sense of the expression. Though ably and efficiently discharging the former of its two obligations, the law school may yet lapse into complacency with respect to its fulfillment of the latter, despite constant vigilance and self-criticism and continual striving for improvement.

Certainly it is not the purpose of this paper to contend that there is no rightful place in the scheme of the university for professional instruction in law. Rather the purpose is to inquire, with that capacity for self-criticism which characterizes the educated mind which is the object of the university training, what it is that justifies the existence of the university law school, and to what extent the law school in purpose and in practice fails to conform to the objectives which are its justification. Let it be noted that this project is not stated in its more obvious affirmative form: the present discussion does not undertake to marshal the evidence as to the many respects in which the law schools have taken thought and made provision for their broader responsibilities. The map could be impressively dotted with schools which leave little to be desired in the application of ingenuity and energy to conform to the highest standards which have been suggested. But these achievements speak for themselves, or have had their capable spokesmen. Nor is the present writer so callow as to suppose that he is by any means alone in feeling concern that the law schools should address themselves earnestly to the performance of their more comprehensive function. There are many teachers of law who have given the problem sincere and constant consideration, and who have vigorously written, planned, and acted to the end that the law school should prove deserving of its position as part of an educational institution; so many, in fact, that the mention of a few[3] is necessarily unfair to the others whose work cannot be

3. In addition to those whose contributions are noticed more particularly herein, the following have in various published works considered the

acknowledged. Self-congratulation, however, is all too familiarly the tone of discussions of legal institutions by the gentlemen of the legal profession;[4] and here in the pages of the law review (the very existence of which, by the way, is evidence that the law schools are sensible of their higher calling) we can afford to indulge in a rigorous self-criticism, even though we do not in all cases expressly admit our virtues, without caring for the aid and comfort which such an examination may give the opposition.[5]

There are some, no doubt, to whom the suggestion that the university law school's justification is anything but obvious will savor of profanation. Yet our claim to a place in the educational sun cannot be taken for granted. Others question it. It is an open secret that our colleagues in other sectors of the campus sometimes regard us with the jealousy and suspicion reserved for interlopers. Bertrand Russell[6] appears to think that the prevalence of professional instruction in the universities is merely a phenomenon of our plutocratic society, the result of insistence by dominating holders of the purse-strings, "practical" men who care nothing for "culture." Certainly it cannot be said that the law school is inherently entitled to its present accepted position within the university's gates. The first American professorship in law was established at the college of William and Mary in 1779, having as its only precedent the Vinerian chair at Oxford, established in 1758; but it was not until the founding of the Harvard Law School, in 1817, that the university law school, devoted to the professional training of lawyers, appeared in anything like its present form; and

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question: Wesley N. Hohfeld, Roscoe Pound, John H. Wigmore, Karl N. Llewellyn, H. Claude Horack, Herschel W. Arant, William O. Douglas, Lloyd K. Garrison, Leon Green, Malcolm Sharp, James M. Landis, John Dickinson, and others.

4. For example, in an address before the North Carolina State Bar at Raleigh, October 28, 1939, Mr. Frank J. Hogan, President of the American Bar Association, said: "I am not surprised when cynical philosophers and misled politicians take a fling at us, but I am both surprised and angered when lawyers themselves do it! In spite of all the wisecracks, the alleged wit, and the splenetic denunciations aimed at him, the lawyer has survived and continues to be the minister of public justice, the defender of private rights, the adviser in the most sacred things of life, the 'unbonded fiduciary of a thousand trusts.' * * * Since General Grant stepped out of the White House only two of our thirteen Presidents have come from all other professions, vocations, and occupations combined."

5. Cf. Hanna, supra, note 1, at 123, 124.

6. *Education and the Good Life* (1926) 304.

the innovation was not generally adopted until after 1840.[7] We must make out our title on some more positive muniments than prescription or inheritance.

Perhaps the most facile apology for university law training would be that hoary formula of smugness, that the law is a "learned" profession. No law school would now accept the support of such a broken reed for its pretensions. In the first place it may be doubted whether the profession deserves the compliment implied in this rather meaningless expression;[8] and in the second place it will be stoutly denied in responsible quarters that the modern university exists for any such narrowly utilitarian purpose as the mere imparting and perpetuation of lore, professional or otherwise. Dean Pound recently said[9] to an audience composed largely of law students, "In a very real sense your education will consist of what you have left after you have forgotten all that you may learn." If this be true of legal education, then the fact that we perform the service of lodging a certain amount of esoteric information in the mind of the prospective lawyer is insufficient justification for our existence, and we must ask ourselves what we do in addition to warrant our pose as educators.

The temptation may be strong to comfort ourselves with the reflection that the university law school performs a great social service. We need, and will have always with us, the lawyers; incompetent lawyers are a social menace and an economic drain; the preëminence of the university in the training of capable lawyers having been demonstrated, it is not only a worthy function but almost a duty of the university to continue this service to the community. The premises of such an argument are very sound; the conclusion seems to follow; and yet it falls short of stating a purpose, the pursuit of which would call forth the best that the university law school has to offer. It is the refuge of those who would adopt the easy complacency of the view that in the diligent performance of the former of our two obligations, that to the public, we *ipso facto* will be discharging the latter. It is, moreover, a pessimistic and defeatist point of view,

7. Brown, *Lawyers and the Promotion of Justice* (1938) 24-28.

8. See the pertinent remarks of H. S. Richards in *Handbook of Association of American Law Schools* (1926) 31, quoted in Hanna, supra, note 1, at 127.

9. In an address at Duke University, February 17, 1939.

in that it seems to assume that lawyers are a necessary evil, and that the mere alleviation of the evil is a high purpose. It is a striking confirmation of the observation[10] that the law school has an unduly modest, if not a shrinking, conception of its relation to the university and its objectives. It is not enough. It proceeds upon another premise, not often stated, which is unsound. If the Massachusetts Institute of Technology could produce better neckties than the manufacturers, that fact would not necessarily argue for necktie production by that institution as a public service, *and therefore as an appropriate function of an educational institution.* That lawyers and neckties are two different commodities is not only a distinction to be noted, but is in fact the very point of the discussion: universities are justified in producing lawyers, and not neckties, for society, if at all, precisely for the reason that lawyers are human beings and the producer can instill into them something more than the inanimate excellence of a skillfully finished product. What, then, is this additional ingredient, the supplying of which is the university's justification as a lawyer-factory, and to what extent is it supplied by the university?

John Stuart Mill, justifying the absence of professional instruction from the ideal university, somewhat paradoxically achieved a fair statement of the purposes of the university law school as they are now frequently defined:

> What professional men should carry away with them from a University, is not professional knowledge, but that which should direct the use of their professional knowledge, and bring the light of general culture to illuminate the technicalities of a special pursuit. Men may be competent lawyers without general education, but it depends on general education to make them philosophic lawyers—who demand, and are capable of apprehending, principles, instead of merely cramming their memory with details. * * * Education makes a man a more intelligent shoemaker, if that be his occupation, but not by teaching him to make shoes; it does so by the mental exercise it gives, and the habits it impresses.
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> This, then, is what a mathematician would call the higher limit of University education: its province ends where education, ceasing to be general, branches off into departments adapted to the individual's destination in life.[11]

10. Hanna, supra, note 1, at 149.

11. *Rectorial Address University of St. Andrews* (1867) 21, quoted in Thwing, *Education According to Some Modern Masters* (1916) 149, 150.

We would, of course, modify this statement to some extent today. We believe that professional knowledge itself is one of the things a university should give to a prospective lawyer, and we would certainly deny the likelihood of a man's becoming a very capable lawyer without general education. Making these allowances for the time and environment of this *dictum*, it becomes remarkably similar to some of our own statements of policy. If this is all, however, there can be little question but that our law schools justify themselves. We are entitled to insist that above all else we devote our energies to the training of men who "are capable of apprehending principles instead of merely cramming their memory with details." Our use of the case system[12] almost alone establishes that fact. We can, indeed, justly claim that we do much more than this. If education is spoken of in terms of freedom from the stultification of authoritarian scholasticism, of the critical attitude, of the development of the inquiring mind, we may feel relieved to reflect that the renaissance has come to the law schools, even to the smaller and more provincial ones, in a big way. We have emerged from the darkness, to bask in the cool light of our pragmatism, realism, and functionalism. Our students are brought to approach the law with a healthy skepticism, if not so much for its institutions, at least as to its "principles." But is this quite sufficient? We emphasize the social and economic significance and content of the law in a new high degree, particularly in those schools which have adopted revised curricula including material which was formerly considered "non-legal." This innovation may be regarded as the highest development thus far of a technique for presenting law to the student in perspective as part of the complex scheme of human affairs. It is perhaps the flower of all our efforts until now to discover the formula which will bring about the simultaneous fulfillment of both phases of the university law school's obligation. As such it deserves more than passing notice, for it is just at this point that we need to be most vigilant, most critical of solutions, most wary of false assumptions. When there is greatest apparent cause for satisfaction with an hypothesis, there is the utmost need for careful checking to assure ourselves that it can be relied on. It may be well to consider what the introduction of this method is intended to accomplish.

12. This feature of our curricula is discussed further below.

Latest of the schools to announce the adoption of a curriculum revised along the lines indicated is the Washington University School of Law. The listing in the projected program of such courses as Legal History, the Profession of the Bar, Legal Processes, Legal Accounting, Law and Economic Problems, Law and Adjustment of the Individual, Family Law, Regulation of Economic Competition, and Jurisprudence, significantly indicates the trend of thought and the extent of the departure from traditional methods. It is interesting to note the following explanation accompanying the announcement:

> In requiring six years of university training for all graduates and introducing new material into the law curriculum *the Faculty is adhering to the objective which American law schools have thus far emphasized, namely, the professional training of lawyers.*[13] The material newly introduced relates largely to the social and economic problems with which law must deal. The purposes of the revised course of study are: (1) to improve the ability of graduates of the School to solve the problems arising in the course of their individual professional activity, whether as practitioners, administrators, or judges; (2) to aid in producing a bar which is better equipped than at present to deal collectively with the issues that confront it in legal administration; and (3) to train individuals who, when called upon to participate in business administration or public service, can do so with understanding.[14]

Thus those who have formulated this plan do not expressly claim for it what others undoubtedly, and with considerable justification, will: that it offers, in addition to improved technique in the production of good lawyers, the best curricular vehicle thus far devised for the fulfillment of the obligation of the law school as an integral part of the university.[15] It is reassuring that they do not. For what we have to fear most, if we are concerned for the excellence of our performance in the role of educators, is the making of any assumption to the effect that merely by producing more efficient lawyers we are *thereby*

13. Italics supplied.

14. Announcement of Revised Curriculum, Washington University School of Law. (March 1, 1939.)

15. Perhaps the reticence on this point is partly to be accounted for by the fact that the explanation was presumably intended in large part for the benefit of some who have not yet become convinced of what now seems the obvious truth, that the ends of a purely practical professional education may be well served by the adoption of such a curriculum.

fulfilling our equally important function. What we have to fear is becoming involved in the deadly satisfaction which characterizes the bar generally,[16] that a good lawyer is the noblest product of evolution, that his work is necessarily a social blessing, and that his is unmistakably the good life.

The training of men proficient in the arts of advocacy is not obviously an end of itself worthy of the efforts of a university. Probably no other profession is so pregnant with potential ambiguity in this regard. Although the doctors also have their important questions of social[17] and personal[18] integrity, their problem does not seem quite so fundamental as ours from this point of view. A man proficient in the useful skills of saving life and health cannot be very bad at his worst, so long as he stays within the law and maintains respectability by adhering to the meanest standard of ethics; but even an "ethical" lawyer may be a social menace and an intellectual charlatan. It may possibly be true that the lawyer can best serve the community and fulfill his own destiny by applying himself diligently and honestly to the furtherance of the interests of those who choose to become his clients, but the probabilities are against it, and in any event it ill becomes a university to assume that this is true. Unless the discussion is to become metaphysical in an extreme degree we may admit that the university would be reasonably safe in taking it for granted that preservation of the interests of patients in their lives and health is an end worthy in itself. The variform interests of the lawyer's clients are another matter.

Of course, there is a stereotyped professional answer to attempts of this kind to impose upon the lawyers responsibility for the results they bring about through the use of their professional skill. This has been put in favorable form, without rancor, by an impartial writer:

16. The use of such a generalization is of course unfortunate and would be inexcusable, without qualification, under other circumstances. It is employed here without debilitating moderation to emphasize, *inter nos*, an attitude which is certainly all too prevalent.

17. Professor Henry Sigerist is conducting at Johns Hopkins University a course in "Medicine and Its Relations to Society." See Time, January 30, 1939, p. 51.

18. Cf. A. J. Cronin, *The Citadel* (1937). It is unfortunate, and perhaps significant of the failure of our law schools to build a tradition of high professional rectitude, that no such novel has been written of the law. Until such a one can be plausibly written, it might be well if we said less about "the noble profession."

> In our competitive society an attorney is brought into a case by only one party. It is his duty—limited by a sense of professional restraint, to be sure, but without immediate concern for the attainment of the most just result—to advance the claims and interests of his client. Thus our system of administering justice demands partisan advocates on the one hand. On the other, it demands impartial judges, and juries, who, after having been enlightened by partisans for each side of the controversy, will supposedly be better able to reach a just decision. Under such a system lawyers can be held individually responsible for shortcomings in the promotion of justice only to the extent that they are lacking in integrity, ability, adequate training, or a willingness to cooperate with their colleagues in remedying conditions.[19]

That lawyers can take refuge in such a classic gem of casuistry, and at the same time claim credit as responsible leaders of society, is indication of a truly remarkable faculty for ambidextrous self-justification. The student who is permitted to accept this reasoning unquestioningly is being permitted to vindicate for himself a long life of clever insincerity and dispensation from the cares of the ordinary conscientious citizen, for which he will fall into the habit of claiming high honors. He is further being permitted to close his mind to critical examination of the essential machinery of the administration of law, for the successes of which he, though free of responsibility, will still be sedulous to accept credit. It seems strange to us now that our forebears allowed the event of a litigation to depend upon the physical prowess of the parties; it may some day seem equally strange that we permit it to turn upon the forensic skill of their agents.

This product of wishful thinking is a view which the university law school can neither recommend to its students as sound nor accept for its own justification. Its sophistry is implicitly recognized in Thurman Arnold's excoriation of the "adversary method" of arriving at the truth of facts and the right application of law in judicial questions.[20] For present purposes we may

19. Brown, *Lawyers and the Promotion of Justice* (1938) 197.

20. Trial by Combat and the New Deal (1934) 47 Harv. L. Rev. 913, 922: "Mutual exaggeration is supposed to create lack of exaggeration. Bitter partisanship in opposite directions is supposed to bring out the truth. Of course no rational human being would apply such a theory to his own affairs nor to other departments of the government. It has never been supposed that bitter and partisan lobbying assisted legislative bodies in their lawmaking. No investigation is conducted by hiring persons to argue opposite sides. The common law is neither clear, sound, nor even capable of being restated in areas where the results of cases are being most bit-

relegate to the footnote Mr. Arnold's pertinent doubts as to the viability of truth in such an atmosphere of partisan exaggeration and spurious sincerity, and the institutional aspects of this folkway. From the ethical point of view the theory is that the individual lawyer's obligation as an intelligent member of society and his intellectual integrity as a human being are fulfilled and preserved by his impartial desire to see truth emerge, necessarily, of course, as a compromise, between his own extravagances and those of his opponent, tempered, it may be, by the level-headedness of a judge who, the lawyer hopes, will not be swept off his feet even by the lawyer's own extended arts of persuasion. The theory is not even within shouting distance of the facts. No lawyer entertains any such desire except in a desperate case. The lawyer is a pleader of causes. He is the first to assert his lack of impartiality when taxed with his duty to make account of his stewardship of our legal institutions and processes. Witness his distaste for jurisprudence; it is not for him, he will say, but for the jurist and the philosopher, to chart the course of the law. Yet we now realize more clearly than ever before that even as he pleads he is himself a modeller of the law in proportion to his abilities.

If our defense must come to this; if all the power of our great universities is brought to bear for the purpose of training adept craftsmen with a code of values which might do credit to a commercial radio announcer crying his sponsor's wares, then we have indeed been "piling Pelion upon Ossa to reach a pot of jam on a pantry shelf."[21] We have been producing not educated leaders of society but mere "client caretakers."[22] We have laid ourselves open to the just and searching charge that we produce "artisans of the law, but not architects of our institutions."[23]

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terly contested * * * Mutual exaggeration of opposing claims negative[s] the whole theory of rational, scientific investigation. Yet in spite of this most obvious fact, the ordinary teacher of law will insist (1) that combat makes for clarity, (2) that heated arguments bring out the truth, and (3) that anyone who doesn't believe this is a loose thinker. The explanation of this attitude lies in the realm of social anthropology."

21. John Kieran in The New York Times, February 16, 1939, p. 26: 3.

22. Kales, A Comparative Study of the English and the Cook County Judicial Establishments (1909) 4 Ill. L. Rev. 303, 318. In adopting Professor Kales' clever phraseology I mean to indicate no sympathy with his view that what we need is a class of barristers after the English pattern.

23. Albert J. Harno, Letter to the Law Alumni of the University of Illinois, April, 1937.

It should clearly be the purpose of a university law school to produce competent lawyers who are educated men and women as well—not merely "philosophic" lawyers in the restricted sense intended by Mill, but lawyers whose education is thoroughly assimilated with the professional life and function upon which they are embarked.[24] Interpretations of the meaning of education are legion, but an apt one is at hand:

> To my mind, an educated person is not merely one who can do something, whether it is giving a lecture on the poetry of Horace, running a train, trying a lawsuit, or repairing the plumbing. He is also one who knows the significance of what he does, and he is one who cannot and will not do certain things. He has acquired a set of values. He has a "yes" and a "no," and they are his own. He knows why he behaves as he does. He has learned what to prefer, for he has lived in the presence of things that are preferable. * * * [He] has learned enough about human life on this planet to see his behavior in the light of a body of experience and the relation of his actions to situations as a whole. Such a person is acquiring a liberal education and it makes little difference whether he has been trained in philosophy or mechanics. He is being transformed from an automaton into a thinking being.[25]

It may be said that we must have artisans as well as architects. I think the answer must be that, even so, the mechanism of the university law school need not and must not be geared down to their production. An educated person must think; thinking, he must have convictions; having convictions, and also having highly developed mental ability and a position of influence, he cannot live a life of intellectual prostitution by laying aside his convictions for the purposes of his professional function, even though he may take them up again on Sunday or in the bar association meeting. If a man believes that the services of his profession should be made more easily available to those in the lower economic brackets, he does little to advance the cause by declining the retainers of the indigent except where a contin-

24. It is also an important function of the university law school, of course, to foster legal scholarship, to "push forward the frontiers of knowledge" in its field. Simpson, The Function of the University Law School, (1936) 49 Harv. L. Rev. 1068, 1074. The present writer, however, feels neither impelled nor qualified to question the zeal of our law faculties in this regard.

25. Everett Dean Martin, *The Meaning of a Liberal Education* (1926) 28.

gent fee is practicable. If he believes deeply in civil liberties it hardly becomes him to exert all his talents and his skill in an effort to uphold an abridgment of them, even in court. If he believes in the validity and desirability of a piece of legislation, no amount of sophistry will justify his strenuous efforts to secure its overthrow in litigation, no matter how ineffectual those efforts may prove to be. If he is insincere in his efforts he is disloyal to his client and to the court; if he is sincere he is false to himself. An educated man cannot go through life with his tongue in his cheek.

Dean Charles E. Clark recently had occasion to defend the Yale Law School against charges of "radicalism" in its faculty —charges apparently based upon nothing more than the fact that members of the faculty were intelligent enough to have formed opinions on matters of social interest, and sufficiently alive to their duties as educators to discuss them on occasion with their students. Explaining that otherwise the school might have been "narrowly vocational and provincial," Dean Clark said:

> As *individuals,* teachers and students must have views or remain colorless nonentities * * *. The great teachers of law in the modern generation have been those who, by their example and the stimulus of their minds, have led their students to develop individual views which each could support as his own. One must have an hypothesis on which to build his law. If the student had only teachers so neutral as to attempt to reject all hypotheses he had better stay away from law school and buy a legal digest or encyclopedia instead. The student can expect men of different minds and thoughts; he can expect, too, tolerance of dissident views on the part of each individual instructor. * * * But he is indeed lost if he gets men without ideas or opinions.[26]

It is strange indeed that the law schools should be taken to task by their critics for exercising the function which is their *raison d'être;* that they should be expected to apologize for that which is their real justification; that their very standard should have thus become a shield. The critics should learn their subject better. This is not to say, and Dean Clark did not mean,[27]

26. *Reports of the Dean and of the Librarian of the School of Law for the Academic Year 1937-1938, Bulletin of Yale University* (Supp. to Issue of Oct. 15, 1938) 18, 19.

27. Id. at 16: " * * * the teaching courses are not made vehicles of propaganda, and the legal issues covered by the various courses in the

that the purpose of the law schools is to indoctrinate. Our function is not to inculcate creeds, but to remind our prospective lawyers of their obligations to themselves and to society as intelligent beings of respectable mental behavior; not to tell them what to think, but continually to disabuse them of the notion that they may now cease thinking except within the limits of the interests of a client who has fortuitously employed them; not to tell them that the influential position of lawyers as leaders of society has been lost to them forever, but to warn them of the dangers to that position of influence if it is abdicated by them in their professional conduct, to be reserved for their occasional and avocational capacity as government officials.

The pretty little conceit which the lawyers invented to support their disclaimer of responsibility for their professional progeny missed the boat largely because it fails to take into account *the lawyer's freedom of choice in the acceptance of employment.* This, now, might be called an electric subject of discussion if it had circulated in professional circles sufficiently to have acquired any sort of reputation at all. Unpalatable though the thought may be, however, the law school must sooner or later face the problem squarely. An examination of some of the texts and casebooks in the field of legal ethics, to which such matters are commonly relinquished, will reveal a certain delicacy and restraint in the treatment of the factors (other than the more obvious ones relating to conflict of interest and the like) which make for acceptance or rejection of proffered employment. There seems to be a tendency to emphasize the duty and the privilege to accept employment, and the privilege to decline, rather than any duty to decline. Certain fairly familiar rationalizations are referred to as *authoritative* solutions of the more perplexing hypothetical problems which the students may concoct. One of the brilliant exceptions is Professor Elliott E. Cheatham's recently published work.[28] His preface gives blunt warning of what is to come:

> The first purpose of this book * * * is to give an understanding of the legal profession as an institution, and to encourage an appraisal of its work and organization in the

curriculum are fairly presented, with emphasis being put upon the student's own analysis and with a compulsion to every student to reach his own conclusions."

28. *Cases and Materials on the Legal Profession* (1938).

> light of its social functions and of the conditions under which it operates. In the last decade the law schools have set about examining afresh almost every element of law except the profession which administers it, yet many of these other elements of law can better spare university study than can the legal profession itself. The zeal of the lawyer in advancing his clients' interests is constantly modifying the substantive law through court decisions or legislative action, and much study is given by the bar and by laymen as a means to this modification. There are no similar inducements, however, to a study by the profession of its own activities. Such a study can well be made in law schools, by those whose training and sympathies enable them to understand the profession and whose work does not necessarily incline them to uphold its inherited position and practices.[29]

The American Bar Association's Canons of Professional Ethics do, it is true, treat this matter straightforwardly, although briefly and without exactly laying the Association open to the charge that it is preaching.[30] Canon 31 is especially worthy of note in this connection:

> No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

What the Canon does not point out is the gravity of the university law school's obligation when it comes to shaping this vital sense of responsibility in the lawyer-to-be. In the very nature of things there can be no sanctions imposed by the bar for neglect of responsibility in the higher planes of professional behavior, where the choice of a course rests within the individ-

29. Cheatham, op. cit. supra, note 28, at v, vi.

30. Canons 4, 5, 6, 30, 31. Appended to the Canons is also a recommended form of Oath of Admission which includes the following clause: "I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land."

ual's discretion. The discretion itself must be developed. We need to ask ourselves constantly whether we are producing lawyers who will fit too aptly into the picture connoted by that vivid appellation of cinematic gangster-slang, "mouthpiece." The average student comes to law school originally with his head full of questioning about problems of professional ethics and about the justice of the law. We need to be extremely careful not to damage this healthy attitude by evasion or by answering authoritatively that most of the conduct he questions is "permissible" under enforceable codes of ethics. We need to be equally careful not to stifle his curiosity about the manner in which the law deals with human controversy. Perhaps our sophistication has been carried too far when we can blandly quiet doubts and questioning by repeating the obvious but inadequate observation that "law is not the same as justice." Why is it that justice as a topic of discussion is in such disrepute in the law schools? Granted that the concept is vague and variable, our ignoring it does little to aid the student in fulfilling the oath,[31] which he will later take, not to "counsel or maintain any suit or proceeding which shall appear to me to be unjust." If the form of words is to have meaning the lawyer must have formed some concept of justice, and no agency seems more appropriate than the university law school for the development of such a concept.

There are of course limits to the implications of this thesis. In many of the routine problems of the law no principle of social or ethical significance is involved except that disputes should be settled honestly and expeditiously within the framework of the existing order. A wise practical consideration confines the sweep of our skepticism: "Our effective thought in a problem-solving situation is oriented by the problem itself and by the purpose of solving it."[32] If the suit is to recover a profit on a wholesaler's contract, we cannot go into remote discussions of the economic soundness and social justice of the profit system—that is one of the conditions which gave rise to the problem; we cannot fulminate about the economic waste of middlemen; we cannot question the propriety of governmental sanction for private promises; we cannot go sighing off after anarch-

31. Quoted supra, note 30.
32. Morris, *How Lawyers Think* (1938) 6, 7.

ist utopias and universal brotherhood. But these routine matters are not alone the meat on which we feed. There is not a day during which lively and significant issues are not injected into the business of the classroom. If it were not so the law could not command the interest of men of the stature of our teachers.

The most likely response, among these teachers, to the arguments here put forward is not indignation, but boredom. This may be considered an attempted conquest of mind over what does not matter, a tilt with a man of straw. The university law schools are well aware of their responsibilities, and are constantly devising new methods of carrying them into execution. There is no occasion to elaborate the obvious. One may hope that this is true, and at the same time regret that there is so ready an impulse to claim it. That this paper is not intended as a jeremiad will bear repetition here. The achievements which have been made are acknowledged with admiration; the sincere thought devoted to the problem by teachers of law is beyond praise. But the responsibility involved is too important for us to run the risk of lapsing into what may prove to be a false sense of security concerning its fulfillment. Indeed, what we have most to bear is that our efforts in this direction will exhaust themselves in methodology, in the devising of some technique which can be relied on to insure us against failure, in the discovery of some curricular philosopher's stone which will have the property of transmuting our day to day efforts into successful achievement.

When we are able to examine it more closely, the ingenious revised curriculum may appear to be one of the devices from which such results will be expected. Our realism has achieved relevance for "extra-legal," "non-technical," "policy" factors in the scheme of legal education.[33] But to what end? Is not the emphasis here, as always before, upon the development of the expert technician who will be able to predict with a greater degree of accuracy and to control, to some extent, the decision of the court? The student wants to learn all of the tricks so that he can undertake either side of a given question, depending upon whether it happens to be the prospective plaintiff or the defendant who favors him by making an appointment. Today

33. Fuller, American Legal Realism (1934) 82 U. of Pa. L. Rev. 429.

the slickest trick is to know that the court may respond to what were once considered non-legal considerations. The court's response to considerations of justice was so unpredictable that it was long ago discarded as useless for technical purposes. We used to emphasize rules, giving carefully the "minority" as well as the "majority" view, with particular attention to all "exceptions" to both. We used to investigate the historical soundness of the rule, partly perhaps in the interest of an aesthetic appreciation of symmetry of growth, but primarily to give the student as a lawyer a fulcrum upon which he might rest to overturn his adversary's case. Similarly we tested the "logic" of the rule, and more recently we developed the elaborate technique of evaluating and distinguishing cases. Now we impress upon the student the unreality of law except as a prophecy of the action of a court, and teach him to take into account in making his prediction the social and economic factors which, we now realize, may affect that action in the same way that precedent and logic may. But to impart this acute and discriminating skill is only one of our functions. There should be general agreement with Hanft[34] that the change of emphasis from the point of view of the judge to that of the practitioner is a decided improvement in modern legal education; but we shall lose something of vital importance if we allow this deference to the functional to deprive us of examination of the ends of the law and the manner in which they are being served by the profession. A great deal has been said as to what the character of the law student's education should be in view of the fact that he is more likely than his fellow students in the university to become a judge, a legislator, or a public administrator —and that is good. More should be, and is being, said as to what it should be in view of the fact that very probably he will become a lawyer—and that is even better. Yet much more needs to be said as to what it should be in view of the fact that quite certainly he will become a human being. "The dominant vocation of all human beings at all times is living—intellectual and moral growth," said John Dewey.[35]

It will not do to say that this is the task of the university proper, as distinguished from the law school. Another of our

34. Legal Education Yields to the Times (1937) 47 Yale L. J. 214.
35. *Democracy and Education* (1916) 362.

philosopher's stones is the requirement of a specified number of years of pre-legal general education. But the law school itself has a very definite responsibility here which cannot be successfully shifted to others. Our task is the assimilation of law into the general culture which has been acquired; the correlation and application to the law of the attitudes of mind and the concepts of right thinking which the university inculcates in its general way; the readjustment, in short, of the educated man who is to become a lawyer. For this specific task the teachers of sociology, philosophy, government, economics, history and psychology are not equipped. They have not the time to advert particularly to the significance for law and lawyers of what they teach. They have not, as a rule, the specialized knowledge of the problems of the law which is essential to the accomplishment of such a result. And even if they had the time and the technical understanding, there would still be the disadvantage that they are laymen, and therefore deprived of any great influence for this purpose, for the pre-legal student is often, in his attitude toward the unanointed, already a confirmed legalist. There is the further objection that ordinarily, when the student comes to us, the university has finished with him. If it has done a good job he will come with an eagerness to orient himself in his new character. But unless we are alive to our own responsibility we run considerable risk of relieving him of this troublesome complaint, if not directly by indulging professional assumptions, then indirectly by keeping him so occupied in the study of the veins of the leaves that he has no chance of seeing the forest. After a few years of this, the student will be equipped to meet any educationalizing influence he may encounter later in life with contempt for the layman's lack of comprehension. It will not do. The law school cannot delegate to others the task which it alone can adequately perform, that of reconciling law and culture, and of helping the student to make the reorientation called for by his election of a professional career.

In this connection, one of the features of the new curriculum at the Washington University School of Law is the requirement, during the final two years of the four-year course, of nine hours of work in other divisions of the University. This collateral study "has the three-fold purpose of permitting the student to satisfy educational needs of which he may have become con-

scious, of throwing him into intellectual contact with students having different backgrounds and objectives, and of reminding him that he is a person as well as a prospective lawyer."[36] This is perhaps the most direct effort to devise a means of solving the problem. It is one which promises much, but is as yet untried and there is still the difficulty that it is not so much a solution as it is a transfer of responsibility.

Nor can we acquit ourselves of the task by an airy relegation of questions of social obligations to the field of legal ethics, although such an expedient may tempt those of us who delight to label and to classify. In the first place, courses in this subject are not given in all schools; a survey[37] made a few years ago, covering 66 members of the Association of American Law Schools, indicated that of this number only 47 offered a course in Legal Ethics, and that in only 31 of these was the course required for graduation. The "usual" time devoted to the subject was one to two hours. It is common knowledge that, at least in some of the schools offering such a course, it is the football of the curriculum; and perhaps in view of its usually perfunctory content it deserves no better fate. What is more to the point, the problem of the university law school, now under discussion, is too important for the responsibility of working it out to be imposed upon any one member of the faculty, even if his best-directed efforts, taken by themselves, would be calculated to be effective. Professor Cheatham himself points out that exhortation is unlikely to make much impression on the student.[38]

Only a brief while ago our panacea was the case method, and our faith in its efficacy is only just beginning to waver. Here was a gadget that would almost run itself. Dean Clark, in an omitted portion of the passage quoted above,[39] spoke of it in glowing terms:

> It is one of the glories of the case method of law instruction that one is forced to see the flexibility and mobility of law and the possibility of directing and moulding its growth.

36. Announcement of Revised Curriculum, Washington University School of Law. (March 1, 1939.)

37. Report of Committee on Curriculum, *Handbook of Association of American Law Schools* (1933) 148-153.

38. Cheatham, op. cit. supra, note 28, at vi. And see Simpson, The Function of the University Law School (1936) 49 Harv. L. Rev. 1068, 1083.

39. Supra, p. 487.

> Text writers and law lecturers might conceal what they were doing under the guise of merely stating the existing law. This is not possible under the case method, where the individual is forced to make his own deductions, to see that law is a prophecy, and to determine the direction of his own thinking.[40]

These sentiments meet with sharp contradiction, however, in the views of Professor Edson R. Sunderland[41] and Dean Albert J. Harno,[42] both of whom take the position that this device has a positively deterimental effect. Surely the truth is that the case system is merely a technique for the teaching of law, and that for good or ill it is nothing more unless we make it such. Dean Clark imposed upon himself and his faculty, in his generous praise of this brainchild of Langdell and Ames, an unwarranted self-effacement. The Yale Law School is not dependent for its prestige upon any such stratagem, but it might have become "narrowly vocational and provincial," indeed, despite the use of this vehicle of presentation, without men in whose hands the case system can achieve significance.

This must, in the last analysis, be the answer to our problem, notwithstanding all of the contrivances and *tours de force* which have been and will later be conceived. There is no philosopher's stone; we shall find no method of fulfilling our obligation to train capable lawyers, which will produce, as an effortless by-product, fulfillment of our obligation as an educational institution. One may imagine a school which has all of the fashionable accoutrements: it may require a full academic degree for admission; it may have vital courses in Jurisprudence and Ethics; it may use the case system; it may have a stream-

40. *Reports of the Dean*, op. cit. supra, note 26, at 18.

41. Law Schools and the Legal Profession (1931) 7 Am. Law School Rev. 97.

42. In a letter to the Law Alumni of the University of Illinois, April, 1937, Dean Harno wrote: "There is * * * a growing conviction * * * that it tends to produce lawyers who are too narrowly trained for the heavy responsibilities which today are laid upon them. * * * The case method does not tend to inculcate broad conceptions or to engender in the mind of the lawyer a sense of perspective so that he may view the place and function of the law in the social structure. When trained through the case method, the lawyer is likely to work entirely within the law, and to live his two score years of professional life drawing inferences and conclusions here, making refinements there, but never working his way out to view the contours of the law in relief. Here is the difference between the workman and the architect. The case method tends to train artisans of the law, but not architects of our institutions."

lined curriculum, with interpolated sojourns in the College of Liberal Arts; and still such a school would not necessarily be performing adequately the function which principally justifies its connection with the university. On the other hand, a school unable to make use of one or more of these admittedly helpful prescriptions may nevertheless be performing its educational function admirably. The problem must be solved the hard way, by unceasing conscious and subconscious emphasis on the part of the entire faculty, day in and day out; by inexorably facing the facts, including the difficulty of living on high ideals.

> The aim and office of instruction, say many people, is to make a man a good citizen, or a good Christian, or a gentleman; or it is to fit him to get on in the world, or it is to enable him to do his duty in that state of life to which he is called. It is none of these, and the modern spirit more and more discerns it to be none of these. These are at best secondary and indirect aims of instruction; its prime direct aim is to enable a man to know himself and the world.[43]

Add that we, as instructors, must aid a man to know himself in his professional character and to understand the full intellectual and social meaning of law as a profession, and we have stated here a purpose which will not permit relaxation of our vigilance. The liberal, humane, and democratic spirit must be helped to find expression in the pursuit of the law. That such a happy adjustment is possible, the lives of Holmes and Cardozo, among others, bear eloquent witness; but we shall not produce the like of these men unless we recall Holmes' belief that education "lies mainly in the shaping of men's interests and aims," and heed his admonition that it is the business of a law school "to teach law in the grand manner."[44]

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43. Matthew Arnold, *Higher Schools and Universities in Germany* (1874) 154.

44. The Use of Law Schools, in *Collected Legal Papers* (1921) 35, quoted in Cheatham, op. cit. supra, note 28, at vi.