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What's Wrong with Modern Legal Education

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What's Wrong With Modern Legal Education?

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SOME ONE ONCE OBSERVED that the size of a man is measured by the size of the things that he will let bother him. Which is to say, that what concerns the legal profession, and those who aspire to enter it, is the adequacy of the job that is being done. The great majority of the lawyers have had training in the law schools of the country—very few come to the practice today via law office study. The practicing profession is, therefore, but the mirror that reflects the schools in which the lawyers were trained. If the bench and the bar give back distorted images of justice, it is only because the schools have failed to inspire devotion to high ideals and have not shown them the paths of true nobility, intellectual greatness, and real culture.

One thing which should ever command your interest as alumni is your Law School. It is a part of you—you are an integral part of it. It belongs to you and the graduates who have gone before. Its concern should be your concern and its problems should be your problems. And the institution will be judged by your performance. Your success, your leadership, and your professional stature cannot but reflect credit or discredit upon the school. I should hope, therefore, that one of the things which will bother you in the years ahead, regardless of whether it be convenient or not, would be the welfare of the school in which you have been trained.

Another thing which should ever intrigue your interest is the problems of the profession. The stature of the profession can never rise higher than that of its component members. You will be a part of it—it will be a part of you. And both the profession

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[*Editor's Note:* This is the substance of the Graduation Address delivered by Dr. Hervey at the June 1957 Commencement of Cleveland-Marshall Law School, at which a Degree of Doctor of Laws, Honoris Causa was awarded to him by this law school. Introductory portions of the Address have been omitted here.]

and the practitioner will succeed only as they respond to the solution of the problems of the day.

There is an ancient rabbinical story of Sandalphon, the angel of prayer, who stands on the ladder of light that Jacob saw in a dream. From the world below there rises the supplications of the weary and the troubled masses. The angel listens and gathers the prayers together and they turn into flowers. Their fragrance is wafted through the gates and down the streets of the celestial city. In like manner, as it were, the individual practitioners and the profession as a whole, sense the yearnings of the people for justice and mercy. They turn to us for compassion and understanding. We are the ministers of justice. We stand nearest to the sources of right. It behooves us, therefore, ever to be compassionate and understanding. For in that way we can leave the profession, when we depart, upon a higher plane of usefulness than when we entered it.

Permit me now to move from the particular to the general because, as a member of the profession, your interest will encompass all schools. There is a fancy in many quarters that legal education today is generally excellent. Even national bar presidents have said that our law schools are much advanced over the past—both in content and methodology and that our graduates are better fitted, both in theory and skill, to cope with the legal problems of the day. The defenders of the law schools are legion. The evidences of progress are voluminous.

On the other hand, a sizeable segment of the profession is equally sure that our schools do less than is possible in preparing their graduates for successful practice. The advocacy of the late Jerome Frank for "lawyer schools" rather than "law-teacher schools" and the very frank criticisms of (the late) Mr. Chief Justice Arthur Vanderbilt and Judge Herbert Goodrich with respect to the orientation and content of legal education should not be dismissed lightly. Judge Goodrich recently summed up his unease in these words:

> . . . the (curricular) revision has tended to go too far in cutting down time allotted for what we used to call the fundamental common-law subjects in favor of the newer and fancier ones. It may be granted that federal taxation occupies such an important place in the economy of all of us that some knowledge of the structure and working of income taxation, at least, has to be made known to the student. That does not mean that three or four courses are necessary for this purpose nor does it mean that there is

> the slightest hope of turning out a man with his tax law up to date.
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> . . . undergraduate legal instruction should be fundamentally common law instruction and without it the student is inadequately prepared. Three years is not long enough for everything and making a choice may be painful but it is inevitable. I submit that we have too much of which is of lesser importance.

I venture to suggest that the reconciliation of these points of view lies not so much in emphasis on *what* is taught as in *how* it is taught. In training members of the bar for practice in the latter half of the twentieth century, it is not the substantive content of legal education nor skills training, as such, which should primarily provide the rallying point for the efforts of any law school. With the dynamic quality of our Anglo-American system and its Phoenix-like quality of re-making itself from its own ruins, it is more important that the law schools and lawyers reflect the notion of a current jurisprudence as a point in the continuum of a constantly evolving institution. The law graduate of today should acquire the sense of relationship between the past and the future, with the two producing at any given point in time a synthesis which enables the legal system to solve social problems without shocking the common sense of the community. In acquiring this perspective, the lawyer should gain also a knowledge of the rules of the past and of their growth and development into those of the present and the future. But the study of the common law should be a part of the methodology of the growth of the law as a social institution rather than dogma which count as articles of faith.

This belief is consistent with current attitudes among law teachers, but its implementation is not as effectively accomplished as they would proclaim. We are accustomed to think in terms of courses, or sequences of courses, or programs composed of subjects. We are thus still largely fettered to notions of content. The most prevalent method of solving the problem, one of giving recognition to the existence of new jural problems, is that of filling an already overfilled vessel—to impose an overlay of new courses, such as, perhaps, renegotiation of government contracts, world law, or international taxation, to mention three of the more recent additions, without in most instances doing anything much about the underlying basic curricular structure. To relieve the pressure on the base, there are the alternatives of calling the overlay "electives." This puts them in competition with each

other for the student's time, or else making some room for them by stealing an hour here and there from some already existing course either directly or combining two or more existing courses. But whatever the method of curriculum reorganization, and whatever its announced motivation, there remains an unconscious attachment to substantive content.

We recognize that there are practical difficulties in escaping from preoccupation with content. While the purpose and function of modern legal education may be perfectly articulated, the materials for its blueprinting are still largely primitive. Casebooks generally are concerned with the substance and structure of a particular segment of the content of law, and without detracting from the excellence of law school training in analytical and analogical reasoning, or the sense of relevance and the other intellectual habits that the American lawyers exhibit, the day to day work of the classrooms is largely concerned with the narrow substance of a particular course.

The law schools also are sensitive to criticism from the bench and bar, particularly in the areas of skills and practical training. Also, the law school faculties are ofttimes swayed by those who hold the purse strings. No matter how firmly crystallized a particular local rule may have become and no matter how easily it may be learned through the simple expedient of picking up a hornbook, few law teachers, aware of the predilection of the local board of bar examiners for certain questions, will neglect to spend a few minutes on it, despite its purely informational character, and despite his awareness that it steals precious time from the more immediate and central task.

Personally, I do not accept the thesis that the lawyers of today are better trained, both with respect to theoretical and practical skills, than their predecessors. There is no compelling evidence that the product of today's law schools is any better equipped, relatively, to grapple with the solution of the problems which he is being required to face than the graduates of a generation ago were with theirs. While there have been marked, and sometimes, notable changes in courses and materials, the techniques of legal education have altered little during the past generation. The advances made have been no more than sufficient to maintain legal proficiency in the same relative position with respect to social, economic and political institutions and disciplines. Indeed, the latter give evidence of a speed of growth and development which may make legal training and institutions lag behind. Therefore, while I see no immediate cause for alarm

with respect to the efficacy of legal education, neither do I see any cause for rejoicing.

One century's sacrilege may well be another's archeology. Which is to say that there are areas in which the law schools are doing rather less well currently than formerly. One such is the area of advocacy. In the concentration of the schools in producing lawyers who are fitted to handle intricate technical problems there has been *over-emphasis on the law* and *under-emphasis on the lawyer.* The best of the graduates from many schools go either into the higher echelons of government service, legal or political, or into the large city offices where the bulk of practice revolves around our economic life. There is the tacit, if unexpressed, premise that court appearances are to be avoided, as if advocacy were something shameful. As a result, the criminal bar is entirely neglected. It is left by default to the less swift in the race for fame and fortune. The leaders of the bar are largely business advisors—to quote Morris Ernst, "The defense of liberty has lost its prestige. . . . The defense of property pays better not only in dollars but in public esteem."

This development may be symptomatic of a hidden illness in legal education. In bringing the law graduate to a peak of technical excellence—and I mean this in no narrow sense of mere mechanical proficiency but rather in the wider sense of having him aware of the relevancy of the social, economic, and political factors which make up the context of today's legal matters—we have, nevertheless, as one writer has put it, concentrated on a system of legal education that has placed greater emphasis on *know how* rather than on *know why.* Thus the legal mind of today, though still tough and contentious, seems more narrow-gauged than it was fifty years ago. It may well be that in the very process of broadening the scope of the modern law graduate's training to include extensive familiarity with the behavioral sciences and other peripheral disciplines which are necessary to a lawyer's complete understanding of the social order which he is to serve, that we have destroyed something of the *esprit d'corps* which has characterized the profession from time immemorial and has rendered the lawyer unique among the professions; that in turning him into a very modern legal eagle, to paraphrase Messrs. Gilbert & Sullivan, we have done so at the expense of the spirit of public service which is, or should be, the first article of the lawyer's faith.

It may be presumptuous of me to attempt to interpret Judge Goodrich, but I think that a more accurate articulation of his dismay would consist in the recognition of this subtle, unconscious, shift in emphasis in the role of the lawyer in society rather than to any dilution or debasement of the common law curriculum as such. There is no magic in the alleged dichotomy between "basic" or "common law" subjects and "specialties." All professional education is specialized education. The former are merely the specialties of an older day when practice was mainly concerned with torts and contracts, with bills of exchange and wills minus tax consequences, with issue rather than notice pleading. The study of law, at least as far back as the inception of the case system of study, has always been the study of specialties. Pedagogically, there has been a utilization of the traditional—the torts-contracts-property-procedure complex as the teeth-cutting courses in the American law schools—and since the early approach of the case method was largely an historical and analytical one, these courses have served as the vehicles for the initiation of the neophyte into the history and mysteries of his profession. This is a matter of historical accident rather than intrinsic quality. In England, for example, at least tolerable results are obtained by starting the student out with such courses as Roman Law, International Law, Constitutional Law, etc., and leaving most of the "common law" subjects to await the second and later years. The British employ those subjects in much the same way that the American law schools use their first year program.

How to preserve the continuity of the professional tradition of the lawyer and how to equip him to resolve juridical problems which are too modern to reflect any traditional context is the problem which the law schools must face. It is a problem rather than a dilemma. We must recognize that the lawyer who knows how to reorganize a corporation will probably be more socially useful in the future than the one who knows how to replevy a T. V. set. And it may be that where a choice has to be made, painful though it be, the former should be preferred. An evolving civilization must have its casualties, and the structure of the curriculum will continue to cast off its more dispensable parts and acquire others deemed of greater significance to the society of which the law is both the restraining and the helping hand. No one mourns the disappearance of Bailments and Carriers, for example, from the courses of instruction. We

shall all become reconciled in time to more careful pruning of additional areas of content.

The solution to the problem lies in awakening law faculties to the paramount necessity of transmitting to law students an awareness of the law as an historical and social continuum, creating and recreating itself in a ceaseless evolutionary process; always different and always the same; an awareness that the lawyer is the catalyst and not merely the broker of society; that his traditional role is not merely that of the "Hessian soldier available to whomever would seek his counsel or engage his fighting skills," but a man "willing and able to maintain an independent position, aiding both the processes of government and the desires of individuals, but dependent on neither."

This can be accomplished within the framework of existing curricula and amendments thereof which may be made from time to time the better to adjust it to the then needs of the community. It may require a greater recognition of the areas of legal history and jurisprudence in the curriculum to fill in for the materials which no longer have any living force of their own and which have to be sacrificed for those that do, but which were the vehicle for the sense of continuity which Judge Goodrich had in mind. Possibly it could be achieved by no formal course revisions whatever. It could be accomplished, in part, with nothing more than the rediscovery by law teachers of the role of law in society, the traditional role of the lawyer in the public service, and the essential place of an alert and informed bar in a democratic society.