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The Product of the Present-Day Law School

A CANNY old lawyer friend of mine made a practice of trying to explain his most complex legal problems to some intelligent—and, of course, patient—layman. He said he wanted to test his expert judgments by getting the reactions of an untrained mind.

I suspect that something of that purpose lurks in the invitation to me to discuss the work of the modern law school. I not only disclaim expert qualification in the educational field but I even venture to doubt whether the future of the legal profession will hinge on its educational perfections or delinquencies, at least insofar as such perfections or delinquencies concern the manipulation of legal concepts. The bar reminds me in some respects of the farmer who was solicited to buy a new book on scientific agriculture. He pondered the offer and refused with that solemn common sense so characteristic of men of the soil. He said: "I ain't goin' to waste no time on new books. I already know how to farm a lot better than I'm ever goin' to farm."

My acquaintance with it leads me to believe that the equipment of the present law school graduate is sharp enough and sufficiently manifold. The law and its disciples will flourish or decline much more on other grounds. Those grounds, I believe, will be mainly concerned with whether we can make our services sufficiently available to the broad base of the nation—the hundred million of farm laborers and small farmers, industrial workers, small business men, merchants, shopkeepers, and clerks. Can we make our services sufficiently available so that all these may feel that the security and well-being of their lives depends on our services? Can we make the functioning of the law intelligible to these persons, and the ends of the law beneficient in the lives of those hundred million? Can we make the hundred million believe that before our desire for power,

[This article was presented in the form of an address by Mr. Jackson at the meeting of the Legal Education Section of the American Bar Association at its recent convention in San Francisco, on July 11, 1939. *Editorial note.*]

for security, for income, we lawyers put our faith and devotion to a government that serves all and serves justly? On the answer to these questions, I think, will our future depend.

It is characteristic of Democracy, it seems to me, that while in times of opulence its leaders may become venial, in times of crisis it calls forth valor and devotion that can be counted on to carry it through to new security and development. I have good hope that the products of our law schools in these and future years will furnish that kind of leadership. And I think I have reason for such hope.

I find the product of our law schools today has a great advantage in attitude over one who has been in practice for some years. Cocksureness on all subjects is no longer the attitude of the law school graduate. Compared with the lawyer who has made a mild success of practice, he is a model of humility. He is far more receptive to a new idea and much more ready to carry on research.

Then, too, the recent product of the law school has a better perspective. Most lawyers soon distort and unbalance their perspectives. Any lawyer who has won a case in a particular field is in danger of having sealed his mind on that topic. A too dramatic and impressive experience may limit one's mind as definitely as to have had no experience at all. The man who begins all discussions with "Once I had a case" is not only less companionable but a less-balanced advisor than one who has never had a case at all. The man recently from the schools sees his problem in a better relationship than he will fifteen years later.

Then, too, he is disinterested. Few men escape becoming mental prisoners to the views and interests of clients, or classes, or of the status quo after a few years at the bar. They learn that bold thinking often leads one out on a limb and they become prudent. They acquire family responsibilities and want to take no risks of a break with the source of their income. They will not dissect a problem fearlessly when it leads to conflicts with convention or authority. The newer graduate has usually a relatively dispassionate but uncompromising enthusiasm for truth—lead where it will.

The young school man comes to you with an unspoiled standard of success. A few years at the bar tend to create a subconscious, if not conscious, money test of success. A good fee is more respected than a good brief. Few characters are tough enough to resist this in the environment and competition of the law. It is fatal in a public servant. We have seen how disastrous is the desire to get rich in the judge.

It is one of the advantages of the young law graduate that his standards are still those taught in school. He seeks intellectual adventure and opportunity to explore new fields, he despises a shabby job, even if it gets by, he has a pride of craftsmanship wholly apart from his place on the payroll.

These characteristics of the young lawyer fresh from school—the humility and perspective, the courage and disinterestedness, the devotion to honest craftsmanship, and, above all, the deep feeling that the Government should serve all and serve justly—such characteristics must be made persistent and prolonged into the days when these young men will constitute the most powerful leadership of the nation.

But I need not tell you the regard which this present Administration has for you and your products. An administration which draws personnel for its highest appointments from the law schools needs no spokesman to put its opinion in words. The sneer of the opposition at the "brain trust" is a better tribute than any we could pay to ourselves.

The Supreme Court, the Circuit Courts of Appeals, District Courts, administrative tribunals, and executive departments have all been enriched to an unprecedented extent from the faculties of law schools. Some have returned from government to teaching, and none can doubt that the flow of experience from the intensely practical field of government into the schools has benefited them as certainly as the schoolmen have helped government.

But I wish also that we could do more in the way of fixing permanently the set of craftsmanship and devotion with which young men emerge from the law schools, and I wish we could do more in aiding you to make the pattern of legal education one of public service.

I wish we might carry a merit system of appointment to the point of taking into government each year the top five per cent of the graduating classes of the good schools of the nation. That would give us a "rookie" class from which experience would sift out the leading intellects of the year's crop. A merit rule of promotion and tenure would encourage many to make public service a career. By the certainty of access of top men to government positions, an emphasis on public interest would shape the whole course of professional training. It is too much to hope for such standards immediately, but it has gained impetus from the fact that wherever you have seen a

successful job done in this Administration you will find a head of it who grasped for young talent as it came from the schools.

From what I have already said you will have no doubt as to my respect for the quality of present-day legal education. There is, however, perhaps one criticism which I might voice. I am aware that it is a concern of many of you. Yet I feel that the weakness still persists. This weakness is the tendency of legal learning to regard law as an end in itself, as a thing apart from life, to be logical and symmetrical and harmonious in itself, aloof from the experience of illogical people. When we forget that law is the science for simple and untaught people to live by, we begin to overprofessionalize our learning. This excessive refinement of legal theory is not only a weakness of the teaching but a devotion to it is the weakness most often to be found in the product of the school who fails to make good in life.

We must recognize the nature of the tools with which we lawyers work. Our legal craftsmen are largely engaged in refitting or inventing or limiting legal fictions by which we test the liability of conduct past or seek to govern conduct prospective. The law which the schools transplant into the young lawyer's mind, and which becomes one of the products of the law school, is a fabric with fictions making up a large part of its design.

If you doubt this statement, sit with me in imagination at the feet of the Supreme Court at the session of May 29th, last. Speaking of intangible rights, Mr. Justice Stone, in *Curry v. McCanless*,[1] declared: "These are not in any sense fictions. They are indisputable realities," and added, "While fictions are sometimes invented in order to realize the judicial conception of justice, we cannot define the constitutional guaranty in terms of a fiction so unrelated to reality. . . ."[2]

On the same day in *Graves v. Elliott*,[3] Mr. Justice Hughes said: "I think that the decision in this case pushes the fiction . . . to an unwarranted extreme. . . ."

In presenting his views in a third case, *Newark Fire Insurance Company v. State Board of Tax Appeals*,[4] Mr. Justice Reed said: "It is not the substitution of a new fiction as to the mass of choses in action for the established fiction of a tax situs at the place of incorporation."

This was an exceptional day for the consideration of fictions,

[1] (May 29, 1939) 59 Sup. Ct. 900, 905, 83 L. ed. Adv. Ops. 865, 871.

[2] *Ibid.* at 909, 83 L. ed. Adv. Ops. at 875.

[3] (May 29, 1939) 59 Sup. Ct. 913, 915, 83 L. ed. Adv. Ops. 880, 882.

[4] (May 29, 1939) 59 Sup. Ct. 918, 921, 83 L. ed. Adv. Ops. 889, 892-893.

but this collection of references to fictions of the law gives dramatic point to my thesis. The cases which turned on these controversies over fictions govern questions of taxation affecting many thousands of persons.

There are other fields of the law in which fiction is almost the only reality.

The law's greatest achievement in the realm of fiction is the law of corporations. The limited liability corporation is to modern business almost as fundamental a device as the wheel is to modern mechanics. And we cannot even agree on what it is: "... an artificial being, invisible, intangible, and existing only in contemplation of law,"[5] says John Marshall. But the New York Court of Appeals said: "A corporation, however, is a mere conception of the legislative mind. It exists only on paper through the command of the legislature that its mental conception shall be clothed with power."[6]

Whatever it is, we resort to a fiction to separate certain collective interests and obligations from those of the stockholders individually, and to govern their conduct. To "find" a foreign corporation so as to sue it is a metaphysical inquiry of complete unreality. The presence of an executive officer on its business is not always a manifestation of corporate presence. We become so entangled in our own fiction, that we invent one to get us out of the consequences of another.

Fictions make the law a mysterious force in society, and introduce something occult in its application. Clients who attend court cannot understand what the lawyers are arguing about. Corporations are operated by men who little understand them. Taxes must be paid by men who cannot comprehend the niceties on which they depend. Laws of property are full of mystical distinctions that trap the unwary.

A society of laymen will, of course, revolt now and again against such things. A work-a-day world played havoc with the philosophy of assumed risk, the fellow-servant doctrine, contributory negligence, and even fault, as a basis of liability when it discarded such fiction for the simple realism of workmen's compensation. The capricious capers of that "reasonable man" are now creating a demand for automobile compensation. The doctrine of *caveat emptor* became so unreal that it was set aside by the Securities Act. The artificial concept of unfair competition to which legalists clung led to the creation of the Federal Trade Commission.

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[5] Dartmouth College v. Woodward (1819) 17 U. S. (4 Wheat.) 518, 636.

[6] People v. Knapp (1912) 206 N. Y. 373, 381, 99 N. E. 841, 844.

There is a two-fold danger in this fictional character of the law. The first danger is that it may be deeply destructive of public confidence.

If the law proceeds in terms of complicated fictions which are gibberish to the layman, he can not feel confidence in it. He can not feel that it is the protector of his interests and security. It must remain a mysterious and frightening process with which to become entangled. Where the whole process is unintelligible, if the decision is favorable to him, the layman can only feel that it is due to his counsel's shrewdness or to his own destiny which makes accidental things fall to his favor rather than to his detriment. On the other hand, if the results are unfavorable to him it becomes a brutal blow, a sacrifice which he can not understand being called upon to make. Trickery, mischance or injustice are the associations with the law which he carries away from such an experience. But I need not stress with you how important it is that we make the process of the law intelligible, and apparently as well as actually just, to the common man.

There is a second danger in the fictional character of the law. It is the danger that a system of fictions will persuade those who construct, operate, and maintain them that the fictions have an independent validity. As a consequence, the concern of the lawyer, the teacher or the judge may become too much a matter of how skilfully he can manipulate the fiction or how complete and coherent he can make the system of fictions. I am not one to sneer at either of these preoccupations. I realize fully that the flexibility and predictable character of the process depends upon considerable devotion to these matters, and the capacity of the process to do justice stems in no small measure from such qualities. But it can not be our exclusive or in these times, even our primary concern. It is the ends which the law serves that must be today the subject of our major devotion. The law must be available to the one hundred million. Their needs must be served by it and served in ways that they can understand. It does not matter how refined the concept or how perfect the logic, if it does not solve the problems of "just plain folks," it is without merits.

The law school man, removed as he is from the arena of battle, must guard against the tendency to see the law and believe in it as a complete system within itself to be judged by its harmony and symmetry and logic. A very logical and symmetrical legal doctrine may be bad law for those who live under it.

But for the very reason that the law school man stands apart from the active contests of the law, he is in a uniquely favorable position to take a detached and critical view of the law in operation. This is the great opportunity of the law schools, as it is their great responsibility. It is to the everlasting credit of the law schools that, by and large, the most critical and constructive writing about the law has come from the teachers rather than the practitioners. The great American legal treatises—Wigmore on *Evidence,* Williston on *Sales* and on *Contracts,* not to mention others—have been the product of law school minds. The ordinary treatise by a practitioner, in contrast, is apt to be little more than a handbook of rules, useful for its purpose but lacking in the qualities of historical perspective, critical appraisal, and constructive suggestion.

If there is any deficiency in the training of the law school student, it is that not enough emphasis is placed on these qualities. The law student tends to be so absorbed in learning the rules that he overlooks their origin, development, and usefulness. How can these things be brought home to the student during his relatively short period of legal study?

One method, of course, is by making formal provision in the curriculum for courses of study designed to meet this end. A course in legal history, for example, could do a great deal toward making the student legally sophisticated. Once it is realized that a legal rule has had a definite beginning at a definite time in response to a definitely felt need, it is a short step to ask oneself whether the need has ceased to exist, and so whether the rule has ceased to have justification. It is a short step and it is a step which, with this realization that history gives, may often be taken without the paralyzing fear of cutting loose from the old moorings. If the purpose of the rule is understood from its origins, and it is apparent that the purpose is no longer being fulfilled, one may feel that he serves rather than breaks with the fundamental tradition by changing the rule to give effect to its original purpose. I do not underestimate the importance of clinging to our moorings, and consequently stress the significance of such historical understanding. In one field of the law, for instance, I have felt of late that we were cutting back through a maze of cases to original constitutional purposes. Mr. Justice Frankfurter has put this for us in telling terms:

"The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon

the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it. Neither *Dobbins v. Commissioners,* 16 Pet. 435, and its offspring, nor *Collector v. Day, supra,* and its, can stand appeal to the Constitution and its historic purposes. Since both are the starting points of an interdependent doctrine, both should be, as I assume them to be, overruled this day."[7]

As well as in the study of legal history, there are great possibilities also in the study of legislation. A generation ago legislation was regarded as an alien influence warping the symmetry of the common law, and a fitter subject for remonstrance than for study in the law schools. Today that attitude is giving way. Not only is legislation of importance to a lawyer for its own sake, but it throws a light on the development and shortcomings of common or judge-made law. The weakness of a highly developed body of law of master and servant, which included such concepts as assumption of risk, the fellow-servant doctrine, and contributory negligence, might best be understood by a study of the legislative revolt which cast the whole beautiful masterpiece in the social ash can where it belonged.

The study of legislation can do in more immediate context what legal history can do in long perspective. It can show why and how the rules came into being and what considerations were thought by those who made them to justify their becoming laws. Where the legislation is amended, while the original purpose is still ripe and remembered, one is given an oppportunity in the study of the process of amendment to see the appropriate place which is to be given to the machinery itself and to the ends which are to be served by the machinery of the law.

I understand that there is great difficulty in working out adequate technique for the presentation of these legislative materials, but as for this I have entire confidence in the imagination, resourcefulness and persistence of present faculties to do for these important materials what Langdell and his disciples did for case law.

Finally, courses in the social sciences can perhaps be used to give the law student a technique for investigating and judging the effects of rules of law. In the field of criminal law, for example, and in the

[7] Graves v. O'Keefe (March 27, 1939) 59 Sup. Ct. 595, 604, 83 L. ed. Adv. Ops. 577, 587.

field of procedure, a good deal has been learned by studying the results of legal practices. The relation between the privilege against self-incrimination and the use of the third degree to obtain extra-judicial confessions is an instance in point.

Let me draw here on Mr. Justice Holmes for the heart of my meaning:

> "I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions."[8]

But rather than in formal courses in the social sciences, I am inclined to have more reliance on what might be termed the interstitial method, that is, the teaching of these things within the framework of the ordinary subjects of study. Nothing, not even an alluring new curriculum, can take the place of a sagacious and imaginative teacher. He can impart a sense of the movement and function of law which is needed as part of the study of each field of law.

The faculties of our law schools should have constantly in mind the story Mr. Justice Brandeis told of Bogigish.

Bogigish was "a native of the ancient city of Ragusa off the coast of Dalmatia,—a deep student of law, who after gaining some distinction at the University of Vienna and in France, became Professor at the University of Odessa. When Montenegro was admitted to the family of nations, its Prince concluded that, like other civilized countries, it must have a code of law. Bogigish's fame had reached Montenegro,—for Ragusa is but a few miles distant. So the Prince begged the Czar of Russia to have the learned jurist prepare a code for Montenegro. The Czar granted the request, and Bogigish undertook the task. But instead of utilizing his great knowledge of laws to draft a code, he proceeded to Montenegro, and for two years literally made his home with the people,—studying everywhere their customs, their practices, their needs, their beliefs, their points of view. Then he embodied in law the life which the Montenegrins lived. They respected that law, because it expressed the will of the people."[9]

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[8] *The Path of the Law* (1897) 10 HARV. L. REV. 457, 468, reprinted in HOLMES, COLLECTED LEGAL PAPERS (1920) 167, 184.

[9] *The Living Law,* an address delivered before the Chicago Bar Association, Jan. 3, 1916, reprinted in BRANDEIS, BUSINESS—A PROFESSION (1933 ed.) 344, 362-363.