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Law School Curriculum as Seen by the Bench and Bar, The

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THE LAW SCHOOL CURRICULUM AS SEEN BY THE BENCH AND BAR*

The Association of American Law Schools ask the Bench and Bar to indicate their views of the methods of legal education adopted by the schools. The request is timely. So large a proportion of the training for the profession of law has become the function of the law schools that lawyers and judges have the keenest interest and concern in the lines along which legal education is now developing. Of 643 students trying the New York State Bar examinations in June, 1922, for the first time, only nine had no law school training and of the nine three were college graduates. The betterment of such education not only as the means of preparation for earning a livelihood, but also as the means of raising the general standards of the bar as leaders in the community, is a problem not for the benefit of the individual student only, but for society.

The young lawyer should possess some knowledge of the rules of the law of the place and of their use as weapons of attack and defense; a habit of obtaining information, knowing both sides, and preparing to meet objections; carefulness and precision, courage and character, and a reasonable degree of self-confidence; the general ability to succeed in tasks, and the power to convey his thoughts to courts or juries in clear and convincing speech.

This bread-and-butter minimum of preparation was in the past often acquired by methodical persevering diligence in a good law office, supplementing natural aptitude. (See: "An American Law Student of A Hundred Years Ago," by Chancellor Kent) Martin Van Buren says, in his "Autobiography," that he adopted at a very early age the practice of appearing as counsel before inferior tribunals, that his mind was thereby severely and usefully disciplined for the examination and discussion of facts, winning for him success over many others who had not succeeded so well, although they had acquired a sound education and stored

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their minds with useful knowledge. Without basic aptitude for the law, we may have men of culture who know much law, but who are not lawyers. "Breadth of culture and liberality of mind" may make a happier man, and a more useful citizen, but they do not necessarily make the lawyer a more faithful servant of his client. Character counts for more than culture. Much that goes to make up success at the bar rests on instinctive knowledge of the relation and consequence of facts rather than recollection of legal formulas. Nine-tenths of the problems of the practitioner are problems of fact, and the ability of the lawyer is measured largely by his success in dealing with facts. Lawyers who may fairly be said to be unlearned in the law still win notable success for themselves and their clients. Almost every community has a leader of the bar, who is recognized as a safe counsellor, and an efficient and conscientious champion of the interests of his clients, whose preliminary training has been far from classical in its character.

But, after giving all the weaknesses of a purely academic training due consideration, few, if any, would maintain that the minimum of professional readiness, based on the mere elements of a general education, should also be the maximum of professional aspiration. Many a self-made practioner recognizes the handicap of insufficient preparation. Abraham Lincoln sent his oldest son to Harvard College. Law is a learned profession, and the law schools are not only convenient and efficient, but practically indispensable agents for the proper care and training of its disciples. How well they serve the practical end, which must be the aim of all professional studies, it is my purpose briefly to discuss.

In the law school one breathes a very different atmosphere from that of the law office. "Free from all the details, chicanery, and responsibilities of practice," said R. H. Dana (Autobiography by C. F. Adams) "We were placed in a library (Harvard Law School) under learned, honorable and gentlemanly instructors, and invited to pursue the study of jurisprudence as a system of philosophy."

The law school wisely does not aim to develop business

sagacity, or to train the student in smart and snappy action. I cannot say, either, that we gain therein much acquaintance with "the best that has been known, and said, in the world," (M. Arnold, "Literature and Dogma," pref.) and therefore I am a skeptic as to the cultural value of law studies, except as they enable one to acquire some new points of view.

The law school should primarily aim to be an efficient agency for imparting legal principles to be used in the practice of law. To what extent does it accomplish this end? My first thought is that it sometimes expects too much from the average beginner who is introduced at once to courses of study in various branches of the law in each of which a specialist concentrates his energies in imparting knowledge. New York requires no preliminary educational qualifications for admission to the bar which may not easily be acquired by an eighteen-year-old school boy, and only 222 of the 645 students trying for New York Bar examinations for the first time in June, 1922, were college graduates. But the subjects as taught in the law schools are not elementary, and the daily volume of assigned work is considerable. Haste and superficiality may result. These are bad habits which the law schools should not tolerate. They follow the poorly trained student into his professional career and are the crowning vices of the immature practitioner.

The proper purpose of law school training is not only to impart knowledge, but also to develop in the student a disciplined and active mind. If it fails in either task, it leaves its work incomplete. "All a law school can accomplish," says Langdell, "is to train the student in the principles and methods, and teach him how to look up a case." To some this sole aim seems an impractical one. They urge that the law school fails in its duty when it fails to teach the whole body of law as it is today; that the law school should "Make sure that those who go forth with degrees have been trained in (all) those things essential to the intelligent practice of the profession;" (Huffcut, Presidential address before Association of American Law Schools, 1904) that this result may be largely accomplished by giving the fundamental subjects by rigid disciplinary methods, and other subjects by methods

having information as their more immediate end. (For a clear statement of what may be said against optional courses, see Woodruff, "History of the Cornell Law School," 4 Cornell Law Quarterly, 91, 105).

The lecture or summation of the day's work, on the one hand, the discussion between teacher and student on the other; the imparting of knowledge on the one hand, the stimulation of powers of thought on the other,—these methods go together in a well-balanced course of legal instruction.

The theories of law teaching adopted by the schools may be grouped under three heads; first, the theory that law teaching should have no avowed object except the development and discipline of the mind of the student. Under this theory, information is incidental. Secondly, that its object is primarily to instill information, and that mental discipline is a by-product. Thirdly, that while mental discipline and the legal attitude must be of primary consequence in teaching fundamentals, yet some courses, or at least parts of some courses, may well be taught by methods candidly instructive, rather than disciplinary. Considering the large and increasing number of subjects having a proper claim for attention, and feeling the limitation of time to three years, it would seem that a careful study of this problem might result in a more general recognition of this third theory of legal instruction.

Moreover, judges and lawyers might be introduced into the law school curriculum with discretion. The tranquility of the student mind should not be unduly excited by extraneous novelties, but an occasional appearance of the doers of the word among the sayers thereof should advantage both the schools and the bench and bar. To leave the student alone with the teacher, may produce lawyers too gently and theoretically trained for their own future usefulness. Practical judges and lawyers are likely to consider it rather important that some highly specialized courses like Patents and Admiralty should, in view of the crowded curriculum, and the advantage of fresh point of view, be taught by the lecture method by non-resident specialists, rather than that the student should be graduated in ignorance of these subjects.

Doubtless the machinery of the mind should not be clogged with facts, but a judge of great learning, experience and acumen, like Hough, covering briefly, with the aid of a printed syllabus, a course like Admirality, unquestionably goes far towards paying his debt to his profession when he states first principles to law students. The printed book is to such a course as a movie to the spoken drama. A soul is breathed into the subject, and the dead matter of the cases is cut away. And when Judge Cardozo, one of the most philosophic of American or English judges, talks to students on the nature of the judicial process, he reveals the judicial mind in action and brings his hearers, by a short cut, to a position of vantage which has taken him a lifetime to discover.

Technical professional efficiency, the production of graduates able to practice law, might indeed be an ideal of the law school, but its accomplishment within the limits of an undergraduate course seems well nigh impossible. The principal difficulties in the way are these: First, the law teachers frequently lack the fund of practical experience which the law office supplies, and the law school can only approximate; Second, the time of the student is better spent in the study of legal principles than in the acquisition of practical details which are worked out more accurately in actual practice than in the class room; Third, the law student is primarily a scholar, the office clerk is primarily an apprentice. As the law office is a poor place for the scholar to study effectively, so the law school is a poor place for the apprentice to master the technic of his craft; Fourth, four years, or even five, would be too short a period to cover the whole field of preparation with the same thoroughness that is given to the fundamental courses.

Law and the practice of law have grown prodigiously intricate and complex. The relation of law to business has become more intimate. Specialization is no longer unusual. Authoritative text books are few and their authority is fleeting. Digests are as voluminous as the reports of a century ago. Judicial opinions, vast in number, sometimes perfunctory and often inconsistent, are the raw material of the craft. The common law has become a shifting thing. Whole pages of the law of master

and servant, sales, negotiable instruments, carriers, and constitutional law are blotted out in a day by legislation, or by constitutional amendments. The concept of the law as a complete system of rules once delivered to the judges as the Ten Commandments were to Moses has become as rudely shattered as were the tables of stone.

I venture to say that under these conditions the stimulating law teacher was never more valuable than now, and that the general standard of usefulness of law school courses and instruction was never higher. The venerable figures of Blackstone and Kent and Parsons and Story, with their comprehensive treatises on elementary law, summing up the development of the time, and furnishing a fresh starting point, have passed away and their places have been taken by a multitude of professors, highly trained, as other college instructors are, for the work of the teacher. They, out of the abundance of reported decisions, compile case books, edit texts, write articles, and produce books of their own, but I believe their most useful function is performed in the class room in personal contact with the student.

Although law is taught to a high degree by the study of cases, it is to the law teacher who looks at the law as a whole, and who works with deliberation, rather than to the judge who looks at a fragment with comparative haste, that we must turn for the training of students in the broader processes of legal reasoning. But we should not be impatient with the law schools if they fail to graduate men who may, without much further experience, faithfully serve their clients with sound knowledge and the power to reflect, coupled with the ability to accomplish results. A law school is not a factory, and a lawyer is not a standardized mechanical product like an automobile. The law schools can give men understanding, but they cannot give them experience, intuition, or the power to acquire and serve clients.

The older members of the bench and bar are at times inclined to condemn the work of the law school and the law teachers. They say that the instruction is impractical, because it does not fit a man to vacate an attachment, or to confute a witness; that it is out of date because it goes back to first principles

instead of turning at once to the most recent decisions; that it is "high-brow stuff", because it is above the comprehension of the immature mind; that it is undemocratic because entrance requirements are unnecessarily high. They refuse to yield to the suggestion that any law school can prepare any law student to advise clients and practice law.

Criticism is wholesome when it is just. It is, therefore, well to ask several questions in order to come directly to the point. Are the best law schools weak or strong? How may they be improved? These questions have to do neither with entrance requirements, length of course, or methods of instruction, whole time or part time, day, or night course, which in themselves present problems of grave consequence. Here we deal only with the relation of the average high grade law course, taken with fair application by a student of adequate preliminary education, to the actual preparation for the practice of law.

First: Is the ordinary law school curriculum adequate? The ordinary law school curriculum contains the staple courses, not preparatory subjects of history, economics, and government, science, mathematics, and language, nor graduate courses in Roman Law, advanced jurisprudence, sociological, systematic, historical and critical, philosophy of law, legal history, and comparative law, or narrow specialties such as mining law, the law of banks and banking and admiralty. The normal period of legal education is a period between general preparation and advanced study. It should not be confused with either. Contract, tort, agency, property, criminal law, equity and trusts, corporations, public and private, negotiable paper, domestic relations—these subjects alone, when taught in proper relation to procedure, form a substantial body of law, and furnish needed discipline abundantly, even to the layman. "For mental training, no matter what a man's work in life might afterwards be, nothing (is) was equal to the study of the law," says Senator Lodge in his "Early Memories".

The time given to such courses is fairly well proportioned. A preliminary course in elementary law would enable a student at the beginning to obtain a mastery of first principles as recog-

nized and applied by the State in the administration of justice which he might otherwise fail to acquire. International law, constitutional law, and the science of legislation should be taught fully and seriously, so that the student may comprehend that law is not wholly a matter of meum et tuum; that the changing will of the State is a more powerful factor in determining the rights and duties of individuals than any of the principles of private right with which the common law abounds and that even the basic principles of common right, as understood by one generation, may become obsolete in the next. "Law is no more nor less than just the will—the actual and present will—of the actual majority of the nation. The majority govern. What the majority pleases, it may obtain. What it ordains is law. So much for the source of law, and so much for the nature of law." Cufus Choate's address before the Harvard Law School in 1845, thus stated for the purpose of confuting the proposition.)

Other topics in addition to the staple courses may well be introduced, not as being of equal importance but as being an essential part of legal education instruction. Any lawyer may be called upon to deal largely with problems of administrative law before Public Service Commissions, Civil Service Commissions, Workmen's Compensation Boards, taxing boards, and other quasi judicial bodies. He may also have to do with the drafting of legislative bills and the promotion of legislation. He should at least have enough light to show him the path, even though the instruction does not further guide his footsteps, and to encourage him to read for himself, even though no required course is given. The field of taxation alone offers abundant opportunity for the specialist in income, inheritance, corporation, and other forms of taxation. Board of arbitration and other forums for the adjustment of controverted questions outside the courts, while assumming a non-professional aspect to the world, actually call for the assistance of the trained lawyer. But much of this learning is ephemeral and new business situations and commercial and industrial legal controversies constantly give rise to new problems. A sense of proportion puts such courses in their proper place. The student must be reminded that although he draws

much of his law from the study of reported cases, the proper function of such cases is to enable the attorney to keep his clients out of court rather than to breed further decisions in further litigated cases. However much he learns, he gathers but a few pebbles from the shore of an unexplored ocean of infinite possibilities.

Second: What may the law school accomplish in teaching procedure, including evidence, pleading and practice? The average judge or lawyer condemns the law school for failure to teach procedure, or where the attempt is made, to teach it effectively. The attempt not infrequently resembles the attempt to teach the laws of auction bridge without cards, card tables, players, or stakes. Procedure is a part, and an important part, of the law. I do not disparage the helpful work that has been attempted in some of the law schools, which have undertaken to give ample time to the task. Much is done in the time given, but more time is required than may be given in a three year course. (McCaskill, "Method of Teaching Practice," 2 Cornell Law Quarterly, 299) Evidence and pleading may in a way be taught dogmatically. Pleading is the science of the clear and concise statement of facts with legal sufficiency. Evidence is the art of proving one's case and keeping one's opponent within proper bounds. Evidence is taught by rules of exclusion rather than by methods of proof. The whole subject is easily made abnormally technical and difficult. Practice, however,—the form and manner of conducting and carrying on actions—may be learned to a high degree of efficiency only by practice, by office experience. Multa exercitatione multo facilius quam regulis percipies. The whole subject of practice deals with law in action, and law school instruction is relatively statical, and thus an artificial thing. If practice is to be taught comprehensively, time should be given to the study of printed records of cases on appeal. That is the work of the seminar with a few men rather than of the undergraduate class room. The law school is not, in my view, the best place to learn how to draw legal instruments, collect judgments, or prepare cases for trial. Yet the student must have some preparation for these practical things. While practice should not be ignored in the law

schools, I lack faith in their ability to cover the field thoroughly, not questioning, however, the power of the teacher to put much substance into his courses if he possesses it himself. The lawyer deals with practice piecemeal. He does not attempt to learn the subject comprehensively. He draws on his materials as he needs them. The law schools, on the other hand, necessarily deal with abstractions, and not with actualities, as a doctor might in prescribing for a hypothetical patient on a general statement of supposititious symptoms. The rules of practice in their essentials are moreover local and not general, technical, and not reasonable. To teach broad principles of practice seems a wasteful expenditure of time, if the end is to qualify the student for the practice of the law. Practice may be taught for other ends—to train in readiness, to discipline the mental faculties, to interest and amuse. As a practical subject, it means New York practice, or Federal practice, or some particular kind of practice, not a system which exists nowhere outside the law school itself. Furthermore, practice instruction unduly emphasizes the litigious branch of the law. Instruction in business administration, corporate finance, accounting and kindred subjects is almost as essential in connection with a law school course as are the moot trials and practice courts. Many a successful lawyer has little occasion to know or apply the procedural details of a civil action, and the volume of litigated business yearly grows relatively less in the affairs of the average law office.

Third: Should the law school teach local law or general legal principles? The national law school teaches general legal principles, which are assumed to be uniform, although state rules vary. The university law school must have vision to look beyond the vicinage. The local school is a useful but pent-up and less pretentious younger sister. The written and unwritten law of the particular jurisdiction in which the student expects to practice may, as in the State of New York, be both distinctive and voluminous enough to develop a body of legal principles of its own, which may be taught in local schools and must be acquired by the prospective practitioner. If the school aims properly to prepare students for admission to the bar of the jurisdiction, it should in-

sist on special attention to the local statutes and the recent decisions of the court of last resort. General legal principles are of little consequence when it comes to advising a client, if they conflict with a statute or a recent decision which may be assumed to control. Yet without a sound training in fundamentals, a lawyer is a timid creature, helpless unless he has a case in point. Ultimate conceptions of substantive law are the things that count. "It is very easy to exaggerate the use of acquiring a knowledge of the existing rules of law." (Markby, "Elements of Law," int. p. XI.) The student should be taught to be bold, but not too bold, in attacking anomalous doctrines of the local court. The day should come when the rule will be uniform. The school should candidly state whether it aims to teach general principles or a definite body of local law and should then be judged for what it attempts.

An average student who has had three years of proper training in a law school has probably had enough of that kind of work. Vita brevis. One local law may be left to the period of office clerkship. If he is a college graduate or if he takes four years of law school work, the State of New York excuses him from a period of clerkship in a law office; not from any well-settled notion as to the equivalency of the longer period of school work, but as an encouraging gesture to the student who seeks to lay broader the foundation or rear higher the superstructure than the letter of the rule requires. College graduates have cheerfully conceded that they were not fit to practice law until the completion of a year's clerkship in a law office. The New York State Bar Association has gone on record in favor of a rule that all applicants for admission to the bar should be required to serve one year of clerkship. (Proceedings, 1921, pp. 253-257).

If, after three years of general training, the student can grasp with readiness the significance of facts stated to him as the basis of a legal opinion, can go to the heart of the thing, rejecting emotion, guess work, and law-taken-for-granted, classify the problem in its proper group and subdivision, recall possibly the leading case in point, and then begin the study of the law of case intelligently, the law school has done its share. Natural and

acquired ability and adaptibility to handle another's affairs, the mechanics of the profession, what to do and how to do it, the presentation of facts by witnesses, the alertness with which to defend and attack—for the development of these indispensables the present curriculum of the law school has no place.

When the bench and bar direct their criticism toward the law school the relative failure of preparation for the bar by way of the office clerkship should not be overlooked. The law school does something definite. It may do its work in a good natured and tolerant way, compromising at times, perhaps, too much with indolence and indifference. It seems to be taken for granted also that a certain number of deserving students who will never be sought after as safe counsellors should be graduated from schools and admitted to the bar. The degree of LL. B. at least means that for a certain number of semester hours the student has been exposed to the wholesome influence of the law. In this day, preparation through an office clerkship is an unmeaning thing. The old-time law clerk who followed every detail of his preceptor's work on a case from retainer to collection of judgment, who fashioned his career as a lawyer on such a model, who interviewed the witness and prepared the brief, had an intensive knowledge, narrow though it was, of the law of a given case. The general practitioner once taught his student, companion and familiar friend a great volume of practical law. A present day practitioner commonly would assume little responsibility for the equipment of his student clerks.

If bench and bar begin to criticise, they may consider the class of student, unfortunately not unknown, who graduates from law school without attending a trial, who has read no law when he could sponge the abstract of the day's cases from his more diligent fellows, who has made no attempt to acquire knowledge except for the purpose of passing an examination. Not lax enough to be a total failure, not unethical enough to be in danger of the judgment, he lacks the high regard for the duties and responsibilities of his calling which is one of the traditions of an honorable profession.

There is a short and easy road to the bar, and a long and diffi-

cult one. Those who travel the latter road are not invariably the better lawyers, yet the sum of individual accomplishment as shown by students' notes in the law school journals is probably higher today than ever before. A poorly equipped student may become, in a commercial or popular sense, a successful lawyer, but I observe that Phi Beta Kappa keys not infrequently are worn by members of the Court of Appeals bar.

The law schools fail, if it may fairly be said that they do fail, when they fail to envisage their proper aim. They do not achieve a full measure of success when they assume wholly to fit men for the practice of the profession of law. The ability to obtain clients, to understand their problems and to make things happen for them so that professional efforts shall justly secure an adequate reward, distinguishes the real lawyer from any mere law school graduate. The purely academic law school, however brilliant its accomplishments in other fields, falls short, I think, when it sacrifices everything to intensive training in selective courses in substantive law and refuses even to attempt to narrow the gap between the law school and the law office.

Judge New York Court of Appeals. CUTHBERT W. POUND.

A DISCUSSION OF JUDGE POUND'S PAPER*

The essay submitted asserts in conclusion that the Law Schools "do not achieve a full measure of success when they assume wholly to fit men for the practice of the profession of law."

Yet it is also finally asserted that the "purely academic Law School falls short, when it sacrifices everything to intensive training in selective courses in substantive law and refuses even to attempt to narrow the gap between the Law School and the law office."

I may state my conclusions at the beginning, by asserting that no person, association, or school can by any curriculum wholly fit men of even fair intelligence for the practice of the profession

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