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TEACHING THEORY AND PRACTICE IN THE NEW DAY

MERTON LEROY FERSON*

Law schools are expected to do two things: One is to implant in the mind of each student a background of legal theory and the other is to teach him what is called the practice of law.

Time was when candidates prepared themselves for admission to the bar by reading in lawyers' offices. The student was expected thus to master the theory of the law and at the same time to learn how to act in the role of a lawyer. Some excellent lawyers were thus developed. Law practice at that time was largely forensic. The student's association with a practicing lawyer was well adapted to develop his technique in that kind of practice; but legal theory was not adequately taught in a good many offices.

Law schools took over the work of preparing students for admission to the bar. Few persons would question the superiority of a standard law school over a typical law office as a means of teaching legal theory. Forensic practice, however, is difficult to teach in a law school and most graduates fresh from law schools need further training before they are qualified to conduct litigation.

The shortcomings of law schools have been the subject of much lamenting. Teachers have been devastating in their criticisms of current legal education.¹ Nevertheless, there have been few significant changes in the courses taught or in teaching methods during the last generation.

However good or bad legal education has been in the past, it behooves law schools at this time to heed the changed conditions of practice. Social and political ideas have changed. Litigation has given way to negotiation. The lawyer has come to have less business in the courts and more in the administrative tribunals. His cases are not so likely to involve a dispute between one individual and another individual as they are to involve a dispute between an individual and the government. Specialization in practice is more common than was formerly the case. Utility corporations are being supplanted in wide areas by "Authorities." The very literature used by the practicing lawyers has changed; law reports are giving way to "Services." The practice of law in the sense

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¹ Harold Dwight Lasswell and Myres Smith McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943).

of the activities of a lawyer in the service of clients has changed in scope and character. Court work now-a-days takes only a fraction of a lawyer's time; in most instances it is only a small fraction. This broader scope of practice should be kept in mind by a law school in laying out its new program.

In view of the fault that has been found with legal education, and in view of the changed conditions of practice, law schools are on the spot. But the critics mentioned above do not mean to say that the law schools are altogether failing to do what can justly be expected of them. On the contrary, the critics—mostly teachers—are zealous critics because they are zealous believers in the law schools. On the whole, our law schools deserve considerable credit for the calibre of the men they have graduated and for the improvement they have wrought in the law itself. It is in order, however, that law school men should consider ways and means to turn out graduates who are better fitted for modern practice.

The law is indeed a "seamless web," and by that token the theoretical subjects are entwined with the practice subjects. There is an advantage, however, in setting apart for teaching purposes the theoretical courses and the practice courses, and for accentuating the difference between them. One type of course has to do with the lawyer's mental background; the other has to do with his legal workmanship. A teaching technique that is most effective in teaching theory may not be well adapted to the teaching of practice. And the literature on which the respective types of course are based may well be different. Our usual pabulum of adjudicated cases is admirable—even by itself—for teaching theory. But when we come to teach the practice in a given field we need something additional to bring out the special problems in that field.

Can we make a case for the teaching of legal theory, at all, in this new day when rules of thumb constitute such a large part of our law? Has theory any practical value? We have a flood of new rules, regulations, directives, and interpretations. They come from boards, commissions, and directors. They purport to be explicit and to regulate in detail the facts and processes of life in human society. All these new rules and interpretations from administrative agencies are additions to the vast and ever growing bulk of statutes and cases. It is all grist for the lawyer. How shall he master it? Must every student learn it? Should law schools teach it? Impossible! Anyway, it would be a waste of time. Most of it the student will never have occasion to use. Much of it will be changed. But a lawyer should be able to master and apply the part he needs. He should have the power to implement the numerous statutes and administrative rules; and that power is more than

the ability to read English. The ability to use a piece of law includes knowledge of its background, its place in legal outline, and its relation to established doctrines of common law. In short, it calls for legal theory.

Every graduate should have power to analyze legal material, a background against which to interpret it, and a framework to help him put it in order. An observation recently made by Dean Pound is in point. He said, "Knowledge as such is worth little without knowing how to use it. It is likely to be so up-to-date that it is out of date tomorrow. Discrimination, reasoned judgment, and creative thinking must work upon knowledge to make it fruitful. No one can approach a mastery of all the details of knowledge in even the narrowest field. But he can attain the wisdom that will enable him to lay hold upon those details when and where he requires them and to make something of them. Without this, the study of up-to-date subjects as merely so many tracts of knowledge is futile."²

The powers of discrimination and creative thinking, the necessity of which Dean Pound emphasizes, are particularly essential to the lawyer. And the teaching of legal theory is admirably adapted to cultivate those powers. The dialectic exercises commonly carried on in law class rooms are well suited to sharpen the student's power of discrimination and to encourage him in constructive thought. The case material lends itself admirably to that purpose. Teachers in other fields envy the law teacher this excellent mind-building material.

There are, too, a good many general principles or doctrines of the common law that a lawyer needs to absorb and make a part of himself. The doctrines of mutual assent and consideration in Contracts; the doctrine of contributory negligence in Torts; and the doctrine of *respondeat superior* in Agency are examples. They are indispensable as a background against which operative legal facts and explicit rules must be considered. The lawyer is like other scholars in that his appreciation of data depends on what is already in the back of his mind. Decisions and statutes are significant to the lawyer according to his background. Anyone can see the affairs of life; anyone who can read English can read our cases, statutes, and regulations; but anyone who reads these cases, statutes, and regulations without having a background of common law doctrines will get an idea that is incomplete, warped, and dangerous. The importance of a sound background of theory and legal doctrine has increased rather than diminished in recent years. Such a background affords a basis for putting in order a mass of material that is otherwise chaotic. A lawyer's knowledge of basic subjects is taken for granted.

² 30 American Association University Professors Bulletin 211.

Our voluminous "tracts of knowledge" do not dispense with the need to study legal theory.

The recognition of background courses as such, and the difference between these and courses in legal workmanship, have implications for law teachers. A background course may well be comprehensive at the sacrifice of detail. It should put less store on teaching all the details of a subject and more on the orderly arrangement of the material. It should view the general field without unduly dissecting it. It should stress broad implications of cases rather than meticulous distinctions on fine points; i.e., it should view the forest without getting lost among the trees.

A first concern of American law schools at this time should be to put our basic theoretical courses in order. One question in particular should be considered. Have we not gone too far in the direction of identifying the theoretical and the practical? One has to do with mind building and the other has to do with workmanship. They are related, to be sure; and the difference between them may be largely a matter of emphasis. But they are not identical. Grammar is a thing apart from the art of writing. Mathematics is a thing apart from the art of designing bridges. Chemistry and physics are things apart from the art of healing disease. Theology is a thing apart from the art of preaching and the cure of souls. And legal theory is a thing apart from the art of adjusting human relations. Theory and practice—both important—are not identical.

The attempt to identify the theoretical and the practical may be partly the reason for our multiplicity of courses. Mr. Laswell and Professor McDougal in their scholarly article dealing with legal education have noted³ that we have a "plethora of repetitive secondary courses—such as Sales, Insurance, Credit Transactions, Bills and Notes." These courses are indeed repetitive in the sense that they all teach the general principles of legal transactions. They are secondary in the sense that each one stems from the central idea of contracts or—more properly—legal transactions. These courses are kept on a dead level with the general course in Contracts. There is no recognition of Contracts—or Legal Transactions—as a basic theoretical course with the others set apart as specialized practical courses. The same kind of material—i.e., adjudicated cases—is studied in one type of course as in the other; and it is treated the same way in both places. The result is that our teaching of theory is scattered and inadequate. A movement to reintegrate our teaching of theory would make for brevity, clarity, and order.

The general subject of Legal Transactions, for example, would be more easily and better understood by students if law schools were to

³ Laswell and McDougal, *supra* note 1, at 233.

give a course on the general subject instead of continuing to present Contracts, Sales, Insurance, Agency, and other varieties of legal transactions as coordinate courses.⁴ Such a general course might be called "Legal Transactions"; it might be called "Contracts." The name is not important.

There would be several advantages in giving a basic and comprehensive course on Legal Transactions. First, it would save time. Second, it would emphasize the unity of the law. The present array of subjects makes students think that the law exists in compartments. Third, and this is more important, it would enable teachers to present legal materials in more effective order—to proceed from the simple to the complex. The elements of a cash sale, for example, are simpler than the elements of a contract; but, under the present arrangement, Contracts are presented before Sales. Fourth, it would enable teachers to dwell on basic ideas—to teach more of the jurisprudence of the general subject.

The "secondary" courses also suffer from not being recognized as such. The presentation of a specialized practical course should include much more than legal doctrine; it calls for information that is not contained in the adjudicated cases. A course in Insurance, for example, should teach the student how the insurance business is carried on. He needs to know about rates, forms of policies, special interpretations, adjustments, and trade practices. He needs to be up to date and not some years behind, as adjudicated cases inevitably are. We do not have a special kind of law for each one of the "secondary" subjects. But each one does have peculiar problems. That is presumably the reason for segregating it. These problems cannot be adequately presented without supplementing the case material. Economic and social considerations, together with trade practices and administrative regulations, all bear on the problems that come up in "secondary" courses.

Much has been said in favor of the "functional approach." And certainly the bearing of law on business and social living is a matter of first importance. But the vastness of our law is overwhelming unless it can be kept in order by some pervading theory. The functional approach and the theoretical approach are both important. Let us not exalt either one to the disregard of the other. In fact we need to intensify our presentation of both. That is not done by keeping courses on a dead level, each one being final instruction in both legal theory and the functional application of law to a particular kind of business—such as Sales, Banking, or Insurance.

The literature used in presenting a theory course on one hand or a

⁴ See Merton LeRoy Ferson, *The Nature of Legal Transactions and Juristic Acts: Analysis of Common Factors and Variations*, 31 CORN. L. Q. 105-81 (1945).

“functional” course on the other, may well be different. Cases are excellent for presenting theory. But law as the handmaid to business includes statutes, regulations, rules and directives; business practice must also be taken into account.

In these premises it would seem that a basic course in the theory that runs through all legal transactions would be helpful. With that field once covered, the teacher of a functional course could focus his presentation on the many-sided problems of business.

When we turn to the teaching of practice—other than court practice—we find the problem is not the revision of conventional methods. There are none. Imagination, plus a few scattered experiments, must point the way. New methods are needed. The writer has had experience with two devices that may be worthy of being improved and given further use in teaching practice—in the broad sense. One has gone under the name of “Law Institutes” and the other under the name of “Legal Internship.”

The law institutes that have been conducted in various cities have been set up for practicing lawyers and in most instances were set up by bar associations. So far they have been sporadic and not correlated with any general plan of legal education. They are, however, a means of teaching practice; and some of their features could be used to advantage in a settled plan of legal education.

It may be taken as characteristic of law institutes that they are designed for mature students. So far they have been attended mainly by members of the bar. The student's background of legal doctrine is assumed and the typical institute deals with problems of how to do things.

The deferment of practice courses until a student is mature seems to be sound pedagogy. A practice course deals with problems that involve a number of conventional subjects. A course in the planning of estates, for example, calls for familiarity on the part of the student with Trusts, Wills, Property, and Contracts. A student is not ready to study the activities of practice until he has mastered the fundamental law.

There is further reason for postponing practice courses until the student has come to the bar. The practice courses are naturally specialized and the undergraduate law student cannot foresee what specialty he will need. After entering the practice he gets into his groove and comes to know what functional training will serve him best. The more generally needed courses in practice—such as the administration of estates—should be given as a part of the regular law course. The more highly specialized courses might better be offered to members of the

bar. The general policy of postponing practice courses until the student is far along might well be kept in mind in future planning.

Law institutes are characterized also by the type of teachers they employ. It has been noted that the courses are specialized; it follows necessarily that the teachers are specialists. It is not sufficient for one who conducts an institute to know the pertinent law; such knowledge is assumed. He should be familiar, also, with the current practice and be able to appraise the various ways of accomplishing what his client desires. When, for example, the general subject of an institute is "Wills and the Planning of Estates," it is not enough for the lecturer to know the law about Wills, Trusts, Powers and Taxation. He must know the advantage of this or that legal device. He must be able to consider varying situations of clients, have regard for tax angles, and generally to translate the law into the art of using it. The teachers employed in law institutes have been either lawyers in practice who specialize or else professional law school teachers who study a specialty and, on the side, engage to some extent in the practice of that specialty.

Law institutes have been set up sometimes by law schools but oftener by bar associations. They have sometimes been held in law school classrooms; but oftener in halls more centrally located. They have sometimes been compressed into relatively short periods of full time work for the students; and sometimes they have been given in evening meetings held at intervals through a relatively long time. These details naturally vary according to the situations in different communities. The arrangement and times of giving lectures that may be most convenient in one locality may not be suited to the needs of another. Generally speaking evening meetings held at intervals are more convenient for lawyers in a city; while a full time schedule for a relatively short period is more convenient for lawyers in small towns who must come to a center for instruction.

Law schools exist to serve the public and particularly the bar. Should they not give careful attention to law institutes and consider the possibility of correlating them and making them more comprehensive? Perhaps they could be made to complement the regular work of law schools and to be a more or less permanent adjunct to our system of legal education.

In default of the establishment of such postgraduate work by law schools, bar associations have set up law institutes in a good many communities. It would be advantageous for law schools and bar associations to cooperate in this enterprise. Each has something to contribute. On one hand, the bar association knows what are the educational needs of men in practice. On the other hand, law schools are better adapted to set up such institutes than are bar associations. School men are experi-

enced in setting up and administering education programs. There is also a continuity of policy in schools that does not obtain in bar associations where officers come and go at frequent intervals. The law schools are in a favorable position to correlate postgraduate practice courses with regular law school work. They can adapt each one to the other.

There is another reason why law schools should concern themselves with law institutes: It is an opportunity for law schools further to identify themselves with the legal profession. That identity is developing. We see it in the cooperation of school men and practicing lawyers as they function together in the American Law Institute. We see it in the rapidly converging ideas of school men and practicing lawyers with regard to admissions to the bar. This general trend can be accelerated if the law schools will collaborate in an expert way to set up a form of legal education that is useful to practicing lawyers. The medical schools and the medical practitioner have set a significant example. Their experience leaves no doubt that the close cooperation of school man and practitioner is mutually advantageous.

The legal internship, like the law institute, contemplates law practice as something more comprehensive than the forensic practice of earlier days. Its premises are that when a lawyer comes to the bar he is confronted with such questions as these: How are estates administered? How are taxes levied, calculated, and collected? How are sales under foreclosure and execution carried out? How do the city solicitor and prosecuting attorney prepare their cases? How are cases brought to issue, trial and decision in the courts? What public records are kept and how are they indexed—particularly in the recorder's office?

The Trial Courts, the Probate Court, the Sheriff's office, the Recorder's office, the Tax Commission, the Prosecuting Attorney's office, the city Solicitor's office, and other public agencies are the facilities for conducting government and for the administration of justice. These agencies have in modern times become large, complicated, and highly organized. A lawyer's work consists largely in dealing with such agencies. How can he do this effectively unless he understands the function and operation of each agency? He needs more than a mechanical knowledge of where to file papers and make applications. He should understand the organization, routine, and purpose that obtains in each of these public offices. It is impossible to reproduce in a school the public offices with which a lawyer must deal; it is impossible to imitate the conditions under which a lawyer must work.

The legal internship, as it was set up in Cincinnati, contemplates a working arrangement between the law school and a number of public offices, such as those mentioned above. The gist of the plan is that law students who are advanced in their study are given employment on a

no-pay basis in these public offices. The details of the experiment in Cincinnati had not crystallized when the war came. It had been carried on, however, during the summers of 1938, 1939, and 1940. The number of students who served was not large but everyone who desired to serve was given a place. Each student served for a month or more in the office he entered. The officers under whom the students served were extremely helpful. They rotated the students from one duty to another in order to give a varied experience. Each student who went to the Probate Court, for instance, was assigned to the filing desk for a week, then he was required to figure estate taxes for a time, and for still another period he observed the disposition of cases in the courtroom.

The advantage of the legal internship is that it gives a maximum of experience in the time a student devotes to it. The public office stands at the crossroads of practice. A student situated there sees a volume of law business in a given time that is incomparably greater than he could see if he were attached to a lawyer's office. He learns the organization, function, and routine of the public office; he also gains in maturity and confidence by his association with older men. Another incidental advantage is that it gives the student some inkling as to what type of practice is most to his liking. To that extent it serves as "vocational guidance." It is too early to appraise the value of the legal internship as a feature of legal education. Experiments with it are, however, so encouraging that they should be resumed when the war is over.

The general idea running through the foregoing discussion is this: We should keep in mind the two-fold aim of law teaching: viz., to imbue the students with comprehensive legal theory and to develop their techniques. Both are essential to a lawyer.

Suggestions were made with regard to the presentations of our theory courses. One is that we should teach legal theory in larger segments. A tendency was noted in American law schools—unlike the British university law schools⁵—to divide materials that are naturally coherent into numerous courses. The trunk of the law has been too finely split on functional lines.

The general field of Contracts—or Legal Transactions—was taken for purpose of illustration.⁶ Much of the same theory that is studied in

⁵ Consult announcements of British university law schools, particularly the Scotch university law schools.

⁶ A reduction in the number of subjects could perhaps be made in other fields. Note Dean Fraser's plan in his *Cases on Property* whereby he brings nonpossessory interests and the early methods of conveyancing into "one connected story." He states in his Preface: "Nonpossessory interests are more extensively treated than is usual in an introductory course for several reasons. The early methods in conveyancing are more intimately connected with the types of nonpossessory interests than with present methods of conveyancing. The development of the several types

Contracts is studied again in Sales, Agency, and each of the other kinds of Legal Transactions. The same judges decided the cases in these various subjects. The judges were moved by the same considerations of logic, fairness, and expediency in every case. The result is that the same theoretical factor runs through the entire group of subjects. That theory is obscured by numerous isolated presentations—one for each kind of business.

It was noted that the presentation of a basic course on Legal Transactions involves much more than the assembling of suitable cases into one book. The teacher should know what he is driving at. He would need to view his teaching material from a wide angle; he would need to stress the broad application of legal theory and he would need to throw the theoretical significance of cases into bold relief, paying only minor attention to the current problems of trade.

The extended argument that is here made for a revamping of substantive law courses indicates no lack of regard for practice courses. On the contrary, it is recognized that our ultimate aim is to make our graduates useful in the actual adjustment of human relations. To that end it is urged that we should make our theory courses more theoretical and our practice courses more practical.

and the methods of creating them are one connected story, and each of them is better understood when all are considered together. They have a common historical background, and fullness of treatment in one place avoids the necessity for repetition."