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Harold Shepherd

University of Washington School of Law

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SOME PROBLEMS IN MODERN LEGAL EDUCATION*

Those of you who enjoy Gilbert and Sullivan recall, no doubt, the Lord Chancellor's appraisal of the law in "Iolanthe," "The law is the true embodiment of everything that is excellent, it has no kind of fault or flaw, and I, my lords, embody the law." Those of you who enjoy Dickens may also recall that one of his characters, Mr. Bumble, summed it all up by the expression, "The law is an ass." I have always suspected that the truth lies somewhere between the two, and that perhaps, in a nut shell, the true task of modern legal education is to make the law less like Mr. Bumble's conception and more like that of the Lord Chancellor.

I had the pleasure of meeting the president of your association and Justice Parker of your Supreme Court at the meetings of the American Law Institute held in Washington, D. C., last May. As we listened to the addresses of Chief Justice Hughes and Mr. Wickersham, outlining the purpose of the institute, and the significance of the work it was doing in restating the common law, and as we later listened to the discussions of the particular restatements by distinguished law professors, eminent judges, and practitioners, I think we were all impressed with two facts (1) that we were participating in a distinctly modern educational movement, both of scholarly and practical significance, (2) that it was a movement in which the three branches of the legal profession, the judges, practitioners, and law teachers, found a common meeting ground and a mutual helpfulness.

The work of the Institute is demonstrating, I believe, that the contributions of the teaching profession to the practice need not be limited to the writing of texts and articles or even to the training of students in the law schools. It has demonstrated also the extreme value and importance of the cooperative efforts of judges and practitioners and the teaching profession.

*Address Delivered at the Annual State Bar Association Convention.

I am very much impressed with the idea that not alone the task of restating the law but the whole problem of legal education is largely the joint concern of the practicing profession and the law schools. For that reason, I especially appreciate the opportunity of attending these meetings and becoming acquainted with the members of the Washington Bar. I come with no idea of revolutionizing legal education or this association. I appreciate the excellent work that has already been done, but I do know that the task is never completed. I start with a keen appreciation of the fact that we are interested in a common cause. Improving the standards of legal training and affording opportunity for a study of those problems which the legal profession must solve in order to prove unfounded the layman's distrust of the Bar and to discharge the obligation that we owe to society. I appreciate also the fact that the secret of our law school's success depends in great part on a close contact and constant association with the active practitioners of the law, the problems they have to meet, and the ways they have to meet them.

It is the practitioner who realizes most keenly that in the past twenty-five years the practice of law has undergone great changes. The increasing complexity of business methods and the financial structure and the enactment of new tax laws have forced him to assume the role of business advisor and economic counselor and accountant. He has discovered the wide variety of distinctly modern business devices with which the classical curriculum of the law school was entirely unfamiliar. He has witnessed the transfer of many functions which lawyers used to perform to banks, trust companies and other business organizations, and, in turn, has been asked to perform functions and to supply a technical information largely of a business or economic character. He has discovered, in short, that problems that come into the office present not isolated questions of law, but, rather, combined problems of business financing, corporate organization, reorganization, accounting *and* law

Not only have closer relations between private business and law raised new problems for the practitioner, but there have been other equally pronounced changes, in the public law field. The past twenty-five years have witnessed the sudden growth and development of administrative bodies and a resultant body of administrative law. It was not so many years ago that Professor Dicey in the preface to one of his books thanked God that there

was no such thing in the Common Law as the "Droit Administratif" of the French. The decision of the House of Lords a few years later in *Local Government v. Arlidge*, (1915) A. C. 120, 84 L. J. K. B. 72, 111 L. T. 905, 79 J. P. 97, however, forced him to recant. No practitioner can longer ignore this important modern method of administering justice. Dean Pound of the Harvard Law School has referred to it as the most significant legal phenomenon in the last century. In our Federal Government we have at least five important administrative agencies and in the states the number is, of course, much larger. In my own state of California I have counted thirty-three separate administrative bodies, some of them discharging functions created for the first time by modern legislation, most of them taking over functions hitherto handled by judicial bodies. It is not my purpose here to discuss in any detail the reasons for the development of administrative agencies or the nature of their functions. Suffice it for my present purpose to say that they came into existence to deal with problems largely social and economic in character, problems peculiarly those of the past thirty-five years and with which the existing judicial machinery was unsuited to deal.

With the development of administrative agencies, the lawyer has again been faced with new problems and a new type of practice. In substance, they may be largely social or economic the proper distribution of a risk of industry in workmen's compensation, the economics of rate making in public utility regulation, for example. Procedurally, we are witnessing the interesting experiment of practicing before a body, not a mere referee or umpire like a court, but an agency of the state which is an interested party, an actor. It is only within the last few years that the law schools of the country have begun to recognize in their curricula the significance and importance of administrative law.

What I have just said about new problems in business and public law is true also, I believe, in the fields of social legislation, domestic relations and the criminal law. With the ever increasing complexity of our social and industrial life and with the increased knowledge of these problems that we are gaining from sociology, medicine, and criminology, the lawyer will be called upon to lead the way to solutions that find justification not merely in terms of legal phrases, but in terms of social consequences. I might multiply the number of new developments presenting new legal problems. Radio communication and air transportation from

the standpoint both of governmental regulation and private litigation are but illustrative.

Not only has the modern practitioner discovered deficiencies in the content of our curricula, but he has come to feel that the methods and techniques of teaching, the legal theories he acquired, and the traditional approach to the law that he acquired in law school are strangely at variance with the actualities of practice. This presents a problem far more important and difficult than mere deficiencies in content of curriculum. If the test of a sound legal training be the ability to predict in advance the actions of courts in litigation, the modern law school must constantly re-examine, in the light of this test, not alone its curriculum and the materials it uses, but its teaching methods and primarily its conception of what the function of law really is, and what, therefore, the true factors are that influence judicial action.

Lawyers would, of course, be trained and would practice their profession even if there were no universities and for much the same reason, I suspect, that farmers would farm, without schools of agriculture, and miners would mine even though there were no schools of mining. The necessity of administering justice and of some trained body of men to aid in the settlement of social conflicts is inherent in our scheme of social organization. Sheer necessity would insure some sort of legal training. In England this was done and done well in the Inns of Court. Originally in our country it was done largely by the apprenticeship system in the offices and under the immediate supervision of trained practitioners. Although there were many admirable features to this kind of training, yet, for reasons familiar to you, it became impractical on any large scale and has been generally abandoned.

With the introduction of the case method of study into the Harvard Law School by Langdell, a new era in legal education began. With the emphasis placed on the study of actual adjudicated cases and the employment of the socratic method of instruction, it became possible to approximate the realities of office training and, at the same time, to supply a systematic and organized group of principles, which, it must be admitted, the apprenticeship system failed to give. In its origin, it was largely an attempt to provide for legal training a technique roughly analagous to the laboratory methods of the biological sciences. The value of such a system was readily perceived and it became adopted as the basis of study in all of the leading law schools of the country

Whether the originators of the case method believed that they had discovered the perfect technique, "The true embodiment of everything that's excellent," I do not know. I doubt it. Like everything else in life that is capable of great utility, it is subject to great abuse, and within the past ten years there has crystallized a school of thought that asks us to pretty thoroughly re-examine our premises. Encouraged by the opinions and writings of judges like Holmes, Brandeis, Cardozo and Hutchinson, the new-school men like Bingham, Cook, Oliphant, Llewelyn and Frank have, in various forms, advanced the thesis that the traditional approach to law is based on a false, or at least an incomplete philosophy of what law really is, and its function in life. As a basis for predicting judicial action in future cases, our traditional approach to the law has caused us to ignore highly important factors influencing judicial action.

Perhaps the fundamental error in the orthodox approach to the law is the assumption that all of the reasons and the true reasons for decisions are always to be found in the language of court opinions. If we look at merely opinions they may have the appearance of completeness, but, certainly, we can no more tell whether we have all the reasons for a given decision by reading the opinion alone than we can tell whether all the books in a given library are listed in the card index by consulting merely the card catalog. Discovering there a list of titles from A to Z, inclusive, might be highly misleading for the simple reason that all of the books on economics, for example, may have been left out.

It not only has been suspected by lawyers and detected by law teachers, but admitted by many frank judges that decisions in many cases have been arrived at first and a rationalization sought afterwards. Nor is a rationalization hard to find with the vast number of theories, fictions and slippery words with which the law abounds, combined with the ability of a clever judge to distinguish cases. The truth is that many highly important facts never get into the record at all, let alone the opinions. Many unformulated but highly significant considerations of policy, political, economic or sociologic, may never appear in the written opinion, or may be well concealed in a mass of legal verbiage. And it is not only teachers of constitutional law who have discovered this. It is, of course, well that such considerations do influence decisions. The genius of our common law has always been its ability to deal with individual cases and, even though tardily at times, adjust to changing conditions and circumstances. But if our common law is the result of human

experience, it has not always been the genius of our opinions to accurately reflect it. Laboring under the doctrine of *stare decisis* with resultant pressure to reconcile and distinguish cases, courts have often been compelled to find nominal justification for decisions simply in terms of legal phrases and abstractions. And it has not always been the genius of our law teachers to recognize opinions as merely the linguistic medium through which judicial action is accomplished. Rather have we tended to regard judicial language and phrases as themselves the law and find justification for actions of courts in terms of a symmetrical legal phraseology instead of in terms of the social ends accomplished.

Although legal devices may create a ritual strange and mysterious to the uninitiated, law itself cannot remain something apart from our ordinary life. It began and will remain simply that method which society has adopted as a means of social control. The wisdom of its rules must always be tested in terms of its social consequences and not merely in terms of the means it uses to accomplish them. The danger in law schools lies in an over emphasis upon legal devices and ignoring the social and economic forces that shape and should justify judicial action.

I need hardly remind a body of lawyers that the problems with which law deals are as many and varied as the activities of life itself. A problem of corporate reorganization, a libel action, an action for divorce and a proceeding by an employe for compensation may all be found in a single volume of the reports. But merely finding them in a law book does not make them isolated legal phenomena. They may really involve the economics of finance and accounting or the political question of freedom of the press, if children are involved in the divorce case, a problem of sociological importance is presented, and in the employe case we are really dealing with a socio-economic attempt to solve a problem of the machine age and large scale production.

That the law should be responsive to social and economic changes seems obvious enough, and yet I fear that in our quest for certainty in the law and in the great emphasis we have placed upon legal devices, and especially upon legal language, as ultimate solutions, we have been led into the false security of thinking that such problems can be solved by mere legal phrases and syllogisms. Unfortunately, there has developed a dogmatism in teaching which, with each succeeding law school generation, tends to get farther and farther away from the actual facts and forces that shape the actions of courts. We have placed too much reliance on formulae and words

as though they had some compelling force in themselves and an inherent meaning apart from the factual situations with which they are associated. I must confess a great sympathy for Ali Baba's brother, caught in the robbers' cave. It has seemed far more important to me to spend time considering on the whole whether he ought to get out of the cave than to make his release dependent upon his repeating the formula "Open Sesame."

The law is not, and perhaps never will be an exact science. Instead of atoms, chemicals and measuring rods, for which a more or less uniform action may be assumed, we are dealing with something at the same time infinitely more valuable and variable—human beings. Our laboratory ought not to be circumscribed by the four walls of the class room or even of the library. It includes whole states, a philosophy of living and more than a theoretical knowledge of social and economic forces.

If I have thus far been largely critical, what may be said constructively? Many remedies have been suggested. It has been assumed that extensive pre-legal training would supply the broad and cultural background that would be ample antidote for legal formalism. The program of the American Bar Association has centered largely around this and the results so far have been good. At Yale and Columbia they are trying the experiment of having certain law courses given jointly by law teachers and specialists in related fields. It has been suggested that we should use more non-legal materials and employ the techniques being developed in other social sciences. A number of the more modern case books contain, in addition to cases, materials designed to present the social and economic background producing the legal problem or shedding light upon its correct solution. A number of recent studies have indicated that many of our conventional legal classifications in the curriculum should be abandoned and that we should bring together in one course on the basis of the economic problem, for example, involved, the legal problems that have hitherto been unrelated.

I shall give but one example. In the course in credit transactions which we are to offer in the Law School next year, we have brought together certain problems in mortgage, suretyship, pledges, conditional sales, bills of lading, etc., in so far as they involve the common business problem of obtaining credit with a security device. The theory is that, by treating them, not as separate unrelated courses, but simply as different legal devices for the accomplishment of a common business end, a much more realistic picture of the actual practice of law can be given.

A careful study of our curriculum, in light of the particular present day problems which lawyers are called upon to solve, will reveal many opportunities for changes of this sort. Instead of attempting, as we have in the past, to crowd, by distortion if necessary, new situations into existing categories, we should be willing to adopt new categories to deal with new problems, for the end of law is not the perpetuation of any set of legal devices but the effective adjustment of social conflicts. The day when the legal solution of a pressing problem depended solely on the existence of a writ in the register formally fitting the case is past.

I have just indicated two definite movements in modern legal education—the movement for a broader and more extensive pre-legal training, reflected in the activities of the American Bar Association, and the movement emphasized by the experiments at Columbia and Yale to bring the law more closely in touch with the activities of life by studying it in terms of modern factual problems and justifying it in terms of social ends accomplished.

The first of these (increasing the requirements of pre-legal training), up to a certain point is definitely desirable, and is by no means a complete solution. Studies completed just this year at the University of Chicago strongly indicate that pre-legal training beyond three years does not result in greater achievement in law. Indeed, so far as their experience has gone, a higher standard in law work, as measured by law school records, was maintained by students entering with three years of college training than was achieved by college graduates. The problem of selective admission to the Law School involves more than a mere amassing of college credits, and in my opinion is one of the most important problems with which the law schools have to deal. The number of students in the law schools of the country is entirely too large. In 1928 there were over forty-seven thousand. In 1929 over forty-eight per cent of the graduates from law schools in the United States failed in the state bar examinations. The great majority of these should never have been permitted to graduate and a good many should never have been permitted to waste their time, money and energy by even entering the law schools. While we plan at Washington to require, in general, three years of academic training for admission to the Law School, there should be a further discrimination even among this group. Scholarship in the college, legal aptitude as evidenced through aptitude tests (now available), moral character, ambition and general promise, should together constitute the basis of admission.

If the Bar is willing that the task of legal training should be largely given to the recognized law schools, the responsibility to the Bar should not be taken lightly and certainly a selection and limitation of personnel to those who are really capable of carrying law work and who have the character and moral stamina to make useful and honorable members of the profession is of the utmost importance.

During the past year we have made a complete study and revision of our entire curriculum. In addition to the course in credit transactions, to which I referred, other courses have been added. An introductory course in the first year, designed to give the historical development of the common law, court organization and other legal institutions, administration of debtors' estates, including bankrupts, receiverships, etc., a course in taxation and one in administrative law

The personnel of our faculty has been enlarged, Professors Cheadle and Richards come to us from the Harvard Law School, and Professor Ritchie from Yale.

This summer we have inaugurated what I hope will be a permanent policy of bringing distinguished professors from other law schools to teach with our regular faculty. This summer we were fortunate in securing Acting Dean Hinton of the University of Chicago Law School, Dean Ferson of Cincinnati, one of Professor Williston's advisors in the Restatement of Contracts, and Professor Fuller of Duke University.

Some of you may be surprised, as I was, to know that we have at Washington the largest law school library on the Pacific Coast and that it stands in eighth place among the law school libraries of the United States. In spite, however, of our very excellent librarian, and due solely to an impossible physical housing, this excellent library is only about fifty per cent available to students, faculty and the Bar. An adequate physical plant is a pressing and immediate necessity. With it, the resources of this library and the productive efforts of our faculty can be made available to the Bar, not merely through the training of future practitioners and judges, but more directly by the intensive study of legal problems and the publication of articles. There is no reason why the Law School should not become the clearing house for the exchange of ideas between the practicing bar, the law teachers and the various state and national organizations.

I have attempted to indicate some of our problems and ambitions. Let me conclude with the thought that the most sacred obligation

of the state law school, as I conceive it, is precisely the same as that of any other department of the University. The discovery of truth, wherever it may lead us, and its transmittal to our students. As a faculty, we must preserve our intellectual honesty just as much as the physicist or the chemist. Though we represent a distinctly professional group, we do not represent the partisanship of any of its practitioners. Our duty is to impartially examine facts and where matters of judgment are involved to decide them to the best of our ability, to commend that which we believe to be just and sound and to constructively criticize that which we believe to be unsound.

We are teaching more than merely a craft or a trade. We are primarily trying to teach men to think, to reason and to analyze, to appreciate that law is simply the state's method of social control and, as closely as we can, to keep them in touch with the facts and forces that actually control judicial action. We are not trying to merely perpetuate the technicalities of the past or to develop a craftiness or shrewdness to defeat the ends of substantive justice. I believe that the teaching of law in an educational institution, in an atmosphere of scholarly and scientific work, is society's most effective safeguard against that sort of training.

HAROLD SHEPHERD.*

*Dean of the Law School, University of Washington.