Marquette Law Review

Volume 30
Issue 3 *December 1946*

Article 2

Thoughts on Legal Education

Kenneth K. Luce

THOUGHTS ON LEGAL EDUCATION

KENNETH K. LUCE*

An interesting article appeared recently in the September issue of the American Bar Association Journal, written by the Honorable Arthur T. Vanderbilt, and entitled: "The Law School in a Changing Society: A Law Center." The article is critical in approach, and perhaps Mr. Vanderbilt has deliberately over-stated his case, but the reader is left with the general impression that, in the opinion of the author, the average American law school today has made little effort to meet, and is largely unaware of the problems of legal education in this developing society. Numerous recommendations are suggested for change in and addition to modern law school curricula and activities, and they are of such nature that hardly anyone could find reason to oppose the proposals made viewed generally and in the abstract. The fighting issue which emerges from any effort to place such proposals into practical operation is one of emphasis. The problem of emphasis is not insoluble. The article in question does not pretend to deal with it, and it is the purpose of this paper to outline some aspects of the problem in the light of the suggestions Mr. Vanderbilt has made.

It is suggested that the law schools enter more actively than they have into the field of legal education for the graduate lawyer. The latter may find himself lacking in technical knowledge required for tax work, or in certain corners of the administrative law. Legal problems may be considered in the light of general public interest through discussion in institutes, and in conferences among lawyers, judges, educators and business men sponsored by the law schools. Beyond question the law schools should enter into this work in cooperation with the Bar Associations and other groups, and in varying degree many of them already have done so. But here there is only one answer to the problem of emphasis. The law school must expand its activity absolutely. There must be no cutting into, no sacrifice of the training given to the undergraduate law student, and no shift in emphasis by the faculty from the continual improvement of that training to unrelated activity. The law school dean or professor who is forever attending conferences, conventions and institutes soon crosses the line where his school, his classes, and his students begin to suffer.

The article states:[1]

> "Again, most members of the Bar scorn the criminal law as beneath their dignity (excepting, perhaps, anti-trust suits),

* Associate Professor of Law, Marquette University Law School.

[1] Vanderbilt, "The Law School in a Changing Society: A Law Center," 32 Am. Bar Ass'n. Journal 525 (1946).

> an attitude quite incomprehensible to English lawyers, for their leaders often excel in such practice. But how many law schools pay more than lip service to criminal law in an attenuated first year course in the subject?"

The writer is inclined to question whether the very considerable number of American lawyers who practice outside the larger cities "scorn the criminal law as beneath their dignity", except for the lucrative anti-trust suit, or whether a leader of the English Bar would excel in the criminal practice over a leader of the Bar in an average American community of ten thousand people. And assuming such aversion to the criminal practice to exist, query whether the law schools are responsible. The writer graduated from one mid-western law school, and is teaching in another, and can testify that disrespect for the criminal practice and supine willingness to accept its defects as they are do not prevail as the general attitude of faculty and student in either. It is true that the average law school devotes one course to criminal law as such, but the shadow of the criminal penalty is cast in every other subject in the curriculum, and is frequently noted if the course is properly taught. And if the one course in criminal law is increased to two or three, the problem of emphasis raises its ugly head.

It is suggested that increased attention be devoted to a long list of subjects including administrative law, foreign relations, world organization, international law, the civil law and comparative law generally, government and public law, and apparently it is felt that the study of law in the schools of today amounts to little more than a discussion of technical rules. All law schools known to the writer include in the curriculum courses in administrative law, municipal law; and constitutional law covers a broad range and is not slighted. Many of them include courses in legislation and international law. And regardless of the name of a course it appears obvious that whether it is presented as a collection of technical rules in a vacuum, or as a body of living law in a background of human relationship wherever it may extend today, must depend very largely upon the approach of the individual teacher in the class room. Statistics and general conclusions cannot paint a correct picture of the condition of our law schools in this respect. The writer feels certain that the condition is far from deplorable, and is progressing in the right direction.

Perhaps the law schools should increase the length of the course from three to four years.[2] But if any detailed attention is to be given to any considerable number of the subjects suggested and activities indicated by Mr. Vanderbilt; if they are to be placed in the curriculum

[2] Mechem, "The Proposed Four-Year Law Curriculum: A Dissenting Opinion," 38 Mich. L. R. 945 (1940).

as courses with distinct recognition; then the law school course must be increased beyond four years to five or six, or some of the courses now considered basic, such as contracts, torts, agency, corporation law, criminal law and procedure, and evidence must be curtailed or eliminated altogether. Of course such alternatives are nonsense. There are already so many courses that the student cannot take them all in the three years allotted him, so why add more? You cannot make a social minded being, an effective political reformer, or an internationally minded thinker of a student, by adding more courses to those already offered, all on the theory apparently that the courses now offered teach him nothing and make him anti-social. The course system is nothing more than an expedient concession to method in the first place, designed to avoid the haphazardness of just reading law. With this in mind it should be clear that there should be no more courses in the curriculum than the student can take in three years, and these should contain all the law, philosophy, foreign relations and what have you that the school can offer to train the man for a career in which he can make a living and find a useful and constructive place in the legal profession.[3] The content of the courses presents a problem in method and emphasis, but the much needed reform must come within this limited number of courses, and since it is a lawyer who is being trained the writer sees no reason not to call the courses contracts, torts, evidence, criminal law and procedure, and agency. The system of courses now generally in operation has grown like Topsy since the early years of this century, and is too long, but it is no solution to pile on more courses with each social upheaval, each war, and each technological advance.

The possibilities of reform toward an integrated body of courses are unlimited. The case system is under attack because of its failure in its pure form to provide the student with the historical and informational background necessary to a proper understanding of the problems. Professor Llewellyn cites the illustrative and amusing example of the student who can juggle the principles of Bills and Notes with the mental dexterity of an Einstein, but who has never seen a bill.[4] The requirements, or lack thereof, for pre-legal education are under fire, and it is pointed out that the law schools themselves have done next to nothing about it. Law teachers are puzzled and exasperated because college graduates seem unable to read or write the English language. Can the school give to the student a proficiency

[3] This might be subject to a very few exceptions: namely patent law and perhaps admiralty, where the technical and informational background departs more radically from that normally possessed by the lawyer.

[4] Llewellyn, "On What Is Wrong With So-Called Legal Education," 35 Col L. R. 651 (1935), at page 669.

in modern administrative and governmental problems, and a broad social outlook by adding courses to the curriculum with new names? Our reform of the educational process must begin before that, and differently. Must there be a new course for the background and history and social implications of the labor movement, or can the case system be adapted to present some of this in connection with, say, the injunction, in a course already contained in the curriculum and called Equity, or Contracts? Of course the concepts underlying the after acquired property clause in a corporate mortgage and the doctrine of potential possession are meaningless without their business background and historical development, but is there any objection to doing it all in Sales? The ideal should be the graduate who is a lawyer and a gentleman, who, incidentally, can read, write and speak English. This business of reform in the educational system is a big order, and the writer feels much more optimistic about the prospective graduate if the family and home have produced a gentleman who has learned to write and speak English upon enrollment in law school. For if he is not a gentleman then, will he ever be the kind of public minded lawyer both the writer and Mr. Vanderbilt are talking about, regardless of technical training in the law obtained usually after attaining the age of maturity?

Justice Holmes stated in one of his opinions:[5]

> "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."

There is the crux of the situation. It is so easy to err in adjusting the emphasis in technical and informational training between practice in the courts, practice before a myriad of administrative tribunals, or the drafting of legislation. But if the judgment and intuition referred to by Holmes are developed sufficiently, the errors are much less likely to prove fatal. And development of this judgment and intuition must and can proceed in every course offered, regardless of specific content or name. Furthermore it would seem apparent that such judgment can arise only from some philosophy about law, developed in the process of orderly and disciplined thinking as distinguished from vague and haphazard speculation at close range upon ever shifting external phenomena in social and economic life. There are those who believe it might help to return the high school and college student to some of the mental discipline found in ancient

[5] Lochner v. New York, 198 U. S. 45 at 76 (1905).

languages and pure mathematics.[6] Those of us who adhere to natural law feel there are some enduring beacon lights requiring changes of course when the currents of a time point the positive law in the direction of the rocks. Justice Holmes professed to be a skeptic,[7] but the judgment or intuition which he possessed and to which he referred were things subtle and inarticulate, and obviously not the result alone of technical skill or cleverness.

Courses in Legislation and Statutes are urged. Can any one think of more productive laboratories for the study of legislation in action than the bearded courses in negotiable instruments, sales, corporations, and constitutional law? If we can't get it across to the student there, we never will by adding courses and changing names. If the process requires inroads upon the case system to furnish time for drafting exercise and the like, it certainly can be done. All of the fine work produced by the American Law Institute and the Commissioners on Uniform State Laws is available and waiting. But again the caveat — what is the technically skilled legislative draftsman without a philosophy and a judgment or intuition to do but dash hither and yon upon the current and mayhap in a fog? How is he to know that the so-called administrative organism he is defining may not fit into the right legal scheme because of the possibility of development along authoritarian lines? If the men who control it do know, then it will be made to fit even though the conditions which gave it birth required changes in legal machinery. The rocks are always there, and do not move.

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[6] Pound, "A Generation of Law Teaching," 38 Mich. L. R. 16 (1939), where the author states at pages 24-25: "Yet looking back over forty years of teaching (for I began law teaching in 1899), I seem to see certain effects of college teaching of the social sciences to students with no training in logic or in languages requiring accurate attention to accidence, grammar and context. I seem to feel an increasing difficulty in teaching the technique of legal reasoning to students with a predominately literary training, satisfied with plausible speculation and clever writing, with no sound basis in exact information, no clear philosophical background and no habits of consecutive thought. Certainly the contrast between the feeling of students today and those of yesterday about a course in the law of real property is significant. It did not seem hard to the student of my generation, although it took up more of the curriculum than it does now. The first year course in property in 1889-90 covered more ground than has generally been attempted in recent years, and covered it thoroughly. Today, the subject seems to bewilder students. The things which are simply so and must be learned as such, and the exact logical development of propositions to reach assuredly predictable results are not congenial to the habits of thinking and study of a generation not raised on the Latin grammar, the Greek verb, and compulsory mathematics."

[7] Holmes, "Natural Law," 32 Harv. L. R. 40 (1918).