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WHY NOT A CLINICAL LAWYER-SCHOOL?—SOME REFLECTIONS

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(1) *The Problem*

In June, 1933, Mr. Jerome Frank presented to the readers of the UNIVERSITY OF PENNSYLVANIA LAW REVIEW a plan and an argument for establishing a "Clinical Lawyer-School".[1] The plan appears to propose in substance:

First: That students be brought into closer contact with the everyday activities of practice, (1) by study of complete records in appealed cases, (2) by frequent visits to the courts accompanied by their instructors, (3) by participation in an active legal clinic operated in connection with the law school, and (4) by working as apprentices in law offices at intervals during their student work;[2]

Second: That formal instruction in economics, history, political science, anthropology, and psychology be given concurrently with and correlated to the formal instruction in the law;[3]

Third: That time for the activities just described be provided by omitting a large part of the instruction now ordinarily given by the use of casebooks, retaining a few courses "to teach dialectic skill in brief-making";[4] and

Fourth: That in order to provide men able to conduct a school along the lines suggested, the Faculty be recruited largely from experienced law practitioners and students of social sciences.[5]

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[1] Frank, *Why Not a Clinical Lawyer-School?* (1933) 81 U. OF PA. L. REV. 907.

[2] *Id.* at 916-919.

[3] *Id.* at 921-922.

[4] *Id.* at 916.

[5] *Id.* at 914-915, 922.

The argument for this proposal is in substance:

First: That law practice is a practical art consisting in the conduct of controversies and negotiations on behalf of others;

Second: That an ideal training in this art would consist in an apprenticeship to someone engaged in practicing it in the grand manner;

Third: That the case system as developed by Langdell and Ames teaches little except dialectic skill in brief making—which is but one, and that not the most important, of the modern lawyer's tools; and

Fourth: That the plan of instruction above outlined can be put into effective operation so as to provide a broader and surer foundation for beginning the practice of the law.

That law practice is a practical art of the same order as other arts by means of which the life of society is conducted is a proposition which there is no occasion to dispute. That an ideal training in this art would consist in an apprenticeship to someone conducting an ideal practice was affirmed by Dean Ames of the Harvard Law School in the pages of this REVIEW thirty-four years ago: [6]

> "One of my colleagues has said that if a lawyer's office were conducted purely in the interest of the student, and if, by some magician's power, the lawyer could command an unfailing supply of clients with all sorts of cases, and could so order the coming of these clients as one would arrange the topics of a scientific law-book, we should have the law-student's paradise. This fanciful suggestion was made with a view of showing how close an approximation to this dream of perfection we may actually make. If we cannot summon at will the living clients, we can put at the service of the students, and in a place created and carried on especially for their benefit, the adjudicated cases of the multitude of clients who have had their day in court. We have only to turn to the reported instances of past litigation, and we may so arrange these cases by subjects and in the order of time as to enable us to trace the genesis and the development of legal doctrines. If it be the professor's object that his students shall be able to discriminate between the relevant and the irrelevant facts of a case, to draw just distinctions between things apparently similar, and to discover true analogies between things apparently dissimilar, in a word that they shall be sound legal thinkers, competent to grapple with new problems because of their experience in mastering old ones, I know of no better course for him to pursue than to travel with his class through a wisely chosen collection of cases. These 'constant debatings' in the class have a further advantage. They make easy and natural the growth of the custom of private talks and discussions between professor and students outside of the lecture rooms. Any one who has watched the working of this custom knows how much it increases the usefulness of the professor and the effectiveness of the school."

[6] Ames, *The Vocation of the Law Professor* (1900) 48 U. OF PA. L. REV. 129, 140; AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS (1913) 354, 363-4.

That the case system as developed by Langdell and Ames teaches little except dialectic skill in brief making is a proposition which seems fairly questionable. The curriculum of the Harvard Law School presents the average student with final judgments in about six thousand actual controversies—the same number that an active lawyer disposing of three litigated cases weekly would encounter in an uninterrupted practice of forty years. Surely that number of decisions, if wisely selected and arranged and well presented, need not leave the student wholly ignorant of the world in which he is about to move. That another plan of instruction would be more effective can, of course, be proved only by experiment. Mr. Frank concedes that the success of his plan would be dependent largely on the teachers,[7] a proposition which can be predicated safely of every teaching system past, present, and to come.[8]

But it is no part of the purpose of this essay to enter into controversy upon these points. The striking feature of Mr. Frank's proposals lies in the fact that—starting with Dean Ames' premise that an ideal legal training would be that of an apprentice to an ideal practice—he draws a wholly different picture of the ideal practice, and, of course, of the kind of law school which would most closely approximate thereto. This change in the picture of an ideal practice corresponds to changes in the actualities of practice and in the structure and problems of American society which have developed in the thirty-four years since Dean Ames spoke. The significance of these changes both to law practice and to legal education seems to me to lie in their relation to an historic background far deeper and broader than the brief historic sketch with which Mr. Frank's argument begins.[9] It is with the hope of painting in this background and setting Mr. Frank's proposals in a just relation to it that these reflections are set down.[10]

(2) *The Crucible*

On October 14, 1066, at Hastings, began the last of the long series of invasions, proselytings, and conquests which determined the character of the English people and laid the foundations of English law. Seven hundred and sixty years earlier, in A. D. 407, the Roman administration in Britain had ceased to function, and for two centuries the land had been flooded by

[7] "In the last analysis, of course, the kind of law school here pictured must depend on its teaching staff." Frank, *supra* note 1, at 923.

[8] As Mr. Frank points out, many excellent teachers may be found among the users of the current methods. *Id.* at 914.

[9] This sketch consists of a very short summary of the history of American legal education since 1800, and of the life and character of Christopher Columbus Langdell. *Id.* at 907-910.

[10] Not being a professed historian, but, like Mr. Frank, a lawyer interested in his profession, I have ventured to take my history from those good secondary sources which lawyers generally must rely upon for their knowledge of the past. The views expressed in this essay are, of course, personal to the author and are in no sense representative of the opinions of his associates on the Faculty of the Harvard Law School.

successive invasions of heathen Germanic tribes. So complete was the destruction of Roman civilization that the history of these two centuries is almost unknown. Records begin again with the landing of Saint Augustine at Thanet, A. D. 597; and the following two centuries witness the gradual conversion of the Saxons, their consolidation into from seven to ten local kingdoms, the rise of an English Church with a priesthood, monasteries, and bishops, and the development of a Christian culture equal to anything which Western Europe could offer at that time. About A. D. 800 development was again interrupted by a series of Danish invasions which gave the name of Danelaw to the whole northeast half of England, drove the Saxons to consolidate their remaining territory under King Alfred, and thus created for the first time the conception of an English crown. The Danish conquest reached its zenith about A. D. 875. Between that date and A. D. 950 Alfred and his successors reconquered the Danelaw. There followed a century in which there were no great movements of peoples, but in which the English crown alternated between incompetent Saxons and highly competent Danes. Thirteen years of vigorous government under Harold. Then the Norman Conquest and the crowning of William at London on Christmas Day, A. D. 1066.[11]

Throughout the following eight hundred and sixty-eight years, from A. D. 1066 to the present, England has preserved an unbroken identity as a territory, a political organism, and a race. Her history, like the life of an individual, has not been uneventful; but, like the life of an individual, it has been uninterrupted—it has never lost contact with its past. For eight hundred and sixty-eight years England has lived within the same narrow boundaries; for eight hundred and sixty-eight years the throne has stood at Westminster; for eight hundred and sixty-eight years her leaders have never been displaced by conquest or her people ousted from the soil. Nor has this unbroken identity ever resulted in stagnation. England has always been ready to accept whatever Europe had to offer, and has been able to pay abundantly for all that she received.

Many causes, doubtless, have contributed to this result. One is the small area and very definite boundaries of the country. Another is the peculiar character of the maritime frontier. This has acted not so much like a wall as like a grating, opposing an almost insuperable obstacle to the passage of large bodies while affording free access to the winds of all the world. A third cause is the topography of the island which makes London the one natural capital both for business and for government and at the same time places that capital on the sea. It is this factor, perhaps, which sums up

[11] For a fuller account of the political and legal history summarized in this paragraph see 8 ENCYCLOPEDIA BRITANNICA (14th ed. 1929) tit. English History; 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1898) bk. 1, cc. i, ii; PLUCKNETT, A CONCISE HISTORY OF ENGLISH LAW (1929) pt. 1, c. i.

all the others—London possesses in an extraordinary measure the ideal characteristics of a national brain. For eight hundred and sixty-eight years it has been the seat of wealth, finance and government; the focus of roads; the goal of ambition; the meeting place not only of the nobility and country gentry but also of domestic and foreign commerce, of English and foreign sailors, of merchants, bankers, and statesmen from both home and abroad.

A fourth factor has been the character of the government, of which we shall now speak.

(3) *Our Lady the Common Law* [12]

Mr. H. G. Wells, in one of his brilliant flashes of insight,[13] has given us a picture of two types of governing persons, the conflict of whose temperaments and traditions has produced a large part of the political history of the world. The first of these is the priest, erudite, studious, thoughtful, who spends his life in one place watching the wheel of the stars and the steady advance of the seasons, and conducting the ancient religious ceremonies at stated times. The second is the king, active, wilful, aggressive, leading a dangerous and uncertain life, whose whole reason for existence lies in his ability to conduct warfare and to bring political changes to pass. A priest-ruled society will normally be stable and orderly, and may be very prosperous, but it is not capable of developing much vigor either for attack or defence. A king-ruled society will normally be energetic, and may enjoy the fruits of aggression, but its vigor is apt to disappear suddenly on the death of its king. The functions of these two types of government in a community may perhaps be compared to the functions of the intellect and the will in an individual; and just as a good individual character depends on the strength of both the will and the intellect and the maintenance of a just balance between them, so a good constitution of government depends on the skill with which strong royal and strong priestly elements are co-ordinated and combined. Each of these elements may be detected in every modern community; and in proportion to their strength and to their balance and harmony is the community's political stability and capacity to act with effect.

The Germanic tribes which occupied England during the fifth and sixth centuries had not yet reached that stage of civilization where either priesthood or kingship had been fully evolved. Their permanent political organization probably did not extend beyond small tribal units, and they were still governed by the primitive—and possibly more wholesome—sentiments of honorable rivalry and companionship among comrades in arms.[14] The

[12] Acknowledgment for this happy phrase is due to SIR FREDERICK POLLOCK, THE GENIUS OF THE COMMON LAW (1911) 2.

[13] OUTLINE OF HISTORY (3d ed. 1921) c. xix, § 5.

[14] *Id.* at c. xv; POLLOCK, *op. cit. supra* note 12, at 7-13.

Christian priesthood—armed with a far better intellectual training—established itself almost as soon as a serious mission was sent. But it took four centuries and a half of irregular warfare ending in a near-conquest by Denmark before the full institution of kingship in the person of Alfred appeared. The history of the century and a half which follows Alfred—A. D. 900 to A. D. 1050—reflects the mutual actions and reactions of three strong but still unharmonized elements, the old Saxon and Danish popular customs, the Christian church, and the new kingships which were still largely a matter of personal influence and prestige. Some fresh force was needed to bring these three into union. That force appeared suddenly in the shape of the old Aryan conception of comradeship in arms.

The Norman Conquest was neither a popular nor a political movement; it was a business venture conceived on a magnificent scale. The army which landed at Hastings was composed of five thousand warriors collected from a large part of Europe and led by successful and ambitious gentlemen who had staked their lives and fortunes on the prospect of sharing in the profits to be made from developing the backward and politically unstable land to the north. The defeat and death of King Harold resulted in the prompt collapse of the loosely knit Saxon Kingdom, and in a few years Duke William and his companions were in full possession of the strongholds and revenues of the realm. To maintain and exploit their position a good organization was necessary, and this King William and his successors, Henry I, and Henry II, set themselves to provide. In A. D. 1086 was completed the Doomsday book, an inventory of all the landed property and taxable resources of the kingdom. The collection and disbursement of revenues was handled by an efficient committee called the Exchequer, to which the sheriffs were required to render yearly reports. The king's periodic tours of the kingdom—in which he inquired into local conditions, heard complaints, and dispensed justice—were supplemented by the circuits of the Justices in Eyre. In A. D. 1178 was established a permanent judicial committee, later called the Court of Common Pleas, for the purpose of hearing complaints to the king. About A. D. 1187 appeared two legal treatises, the *Dialogue of the Exchequer* and Glanvill, in which the workings of the Exchequer and the common law of the King's Courts are described.[15]

This organization and consolidation of the fruits of the Conquest progressed in the face of two strong oppositions, the old Anglo-Saxon tradition of local self-government,[16] and the self-assertiveness of the church.[17] The Norman nobility, always in a minority, was compelled to rely

[15] For a fuller account of the political and legal history summarized in this paragraph, see PLUCKNETT, *op. cit. supra* note 11; 8 ENCYCLOPEDIA BRITANNICA (14th ed. 1929) tit. English History.

[16] This found written expression in the publication of the so-called LAWS OF EDWARD THE CONFESSOR in the reign of Henry I. See PLUCKNETT, *op. cit. supra* note 11, at 178.

[17] As conspicuously exemplified by Becket. See *id.* at 15-17.

on firmness, reason, and order for the preservation of its control. Thus the original sense of comradeship among the invaders, the need of solidarity to preserve their position and of moderation to exploit it with profit, the strong spirit of pride in their old laws which so superficial a conquest was bound to induce in the Saxons, and the orderly efficiency of the Norman administrators, all combined to raise the spirit of legality to a point where the barons could join together in asserting the laws of the realm against royal mismanagement and extract the Great Charter from King John at Runnymede, June 15, A. D. 1215.[18]

For the next two and a half centuries, from A. D. 1215 to A. D. 1485, England was governed by means of the concept of law.[19] The system of land tenures and of personal status constituted at once the kingdom's political, fiscal, and administrative organization; and the controversies to which this system gave rise centered in the Court of Common Pleas. Between A. D. 1215 and A. D. 1297 we find a series of charters and statutes in which the relation of the crown to the subject, the land law, and large parts of the law of procedure are thoroughly overhauled and restated. In A. D. 1256 appeared the great treatise of Bracton, with its memorable statement that "The King is subject not to man, but to God and Law". By the reign of Edward I—A. D. 1272-1307—the professions of attorney and serjeant in the Court of Common Pleas had become well established and the long record in the Year Books of their doings had been begun. In A. D. 1292 a royal writ recognized the existence of "learners", or apprentices to these officers who thereafter habitually attended the Court. Quite soon after A. D. 1300 the Crown adopted the policy of recruiting the bench from the outstanding men at the bar.

It must not be forgotten that during the period which thus opened the law was not printed, and that nothing remotely resembling the Parliament of Gladstone and Disraeli was to be found. Such Parliaments as there were, were called at the King's pleasure, and rather for advice than for action. Communication and the formation of public opinion was difficult. Hence the law courts monopolized to a far greater extent than at present the intellectual aspects of politics, and furnished the principal alternative to fraud and violence for the settlement of great issues of all kinds. The serjeants became very wealthy, even apprentices could make an excellent living; the Inns of Court became the center of intellect and fashion in London, the teaching and discussion of legal principle and philosophy went on simultaneously with the work of the courts. Thus it came about that there was developed a tradition not merely of administering justice according to law,

[18] *Id.* at 23.

[19] For a fuller account of the political and legal history summarized in this and the five succeeding paragraphs, see *id., passim.*

but of governing according to law, which gave character and direction to the politics of the succeeding two hundred years.

The century from A. D. 1485 to A. D. 1603 witnessed the rise under the Tudors of the sovereignty of the state. King Henry VIII in collaboration with Parliament confiscated the property of the monasteries, made himself head of the Church, restated Christian doctrine, and created a number of new courts outside the old legal system to which were committed an extended authority over the subjects and affairs of the realm. These courts were largely manned by men trained in the Roman civil law, which at that time was being popularized all over Europe.

> "But against the courts of common law they stood little chance of success. The close organization of the profession and the numerous vested interests which it contained, the strong tradition of its educational system centering in the Inns of Court, and the practical impossibility of superseding the courts by a newer system, had the result of entrenching the common lawyers within the tangles of their feudal learning; which moreover had become the basis of every family fortune in the land. We venture to suggest that once again the common law stood impregnable upon the foundations laid by Henry II. It was he who gave the common law its firm grip upon the land, and for the future the more elaborate the land law became and the more subtly it contrived to entangle both present and future generations in the maze of real-property law, the more impossible it became for the landed classes to contemplate any interference with the system which assured to them and their children the complicated benefits of inheritance." [20]

The spectacle of the growing power assumed by the sovereign in virtue of the Acts of Parliament passed under Henry VIII finally precipitated an issue between the Crown and the Parliament as to which was the lawful possessor of this power. Throughout the struggle over this issue, which occupied the entire seventeenth century, the bench and bar preserved the legal tradition, invoking Bracton's historic *dictum* [21] against the Stuart pretensions, and thereby giving the revolutions of the period a legal and conservative aspect which otherwise they might not have achieved. The final triumph of the Parliamentary party was signalized by two striking reaffirmations of the principle of legality—the Bill of Rights, A. D. 1689, which asserted the limitations of sovereignty and the rights of Englishmen, and the Act of Settlement, A. D. 1700, which simultaneously fixed the lawful succession to the Crown and declared that the judges should thenceforth hold office as long as they behaved themselves well.

The last two centuries have been occupied with the industrial revolution, the expansion of the empire, and the evolution of legislation and judicial

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[20] *Id.* at 43-44.

[21] See *supra* p. 791.

doctrine by means of which the common law has gradually been adapted to these things. Perhaps the most striking phenomenon in this evolution has been the common law's absorption of the law merchant, and then its domination by the law merchant and by the economic and social concepts of merchants which this drew in its wake.

But to examine the development of legal doctrine would be to digress from our purpose. We are here concerned with the development of legal institutions and of the bar. Throughout six centuries of legal history, from the time of Edward I to the present, the administration of justice has remained a self-perpetuating and self-regulating profession; a career open to talent in which the best powers of the mind could find scope. For more than six hundred years young men of ability and ambition have come to London from all over the Kingdom to take part in the work of the bar. There they have studied the laws, have observed them in action, have been called to the bar and taken part in its battles; and there the best of them have been rewarded by fortune or by seats on the bench. Through repeated restatements of doctrine, through political, social, and economic revolutions, they have preserved the tradition that controversies can be settled by reason, that a hearing means a hearing, and that no generation of men is so wise that it cannot learn from the past. It is in the minds of this living body of lawyers that the common law of England truly resides. Remote as the analogy is, the English bench and bar have perhaps approached less remotely the character of the guardians described in Plato's *Republic* than any body of equal duration and influence of which record exists. Forms of procedure change and the court system is reconstructed; theories rise and fall; treatises become popular and are forgotten. The idea of a court as a place where will, memory, and intellect are all brought to bear upon action persists.

(4) *The Migration*

Between A. D. 1620 and A. D. 1640 there settled on the coasts of New England a number of English divines, small capitalists, mechanics, and farmers, who founded what was, in effect, a new state. These men brought with them neither the common law nor the concept of sovereignty as these were understood at Westminster, but rather the concept of divine or natural law in various forms.[22] During the century which followed other English colonies were founded on the Hudson, the Delaware, the Chesapeake, and in the Carolinas, each settlement bringing with it a fraction of English

[22] The Puritan clergy who governed Massachusetts for nearly a century were dominated by the conception of a divine judge, stern and inexorable, whose laws could be learned by a study of his word. Pastor Robinson's farewell message to the Pilgrims, and the Mayflower Compact, display a kindlier conception of the deity and an idea of natural law as the expression of the normal deeds of associated man. Both views have had a wide following throughout New England history. The relationship of the laws of colonial New England to the English common law is well described in ADAMS, THE FOUNDING OF NEW ENGLAND (1921) particularly pages 416-418.

culture differing more or less from all the others, but no settlement bringing in the whole. Out from these settlements and into the backwoods moved the abundant children of the poorer classes; and through them and into the backwoods also poured a stream of impoverished or adventurous Englishmen, Irishmen fleeing from the wars in Ulster, French Huguenots fleeing from the revocation of the Edict of Nantes, Scotchmen ruined by the rebellions of '15 and '45, and a considerable number of Germans seeking escape from the continental wars. The century from A. D. 1650 to A. D. 1750 was marked by a great deal of social and political philosophizing both in England and Europe,[23] and it was this philosophy rather than the laws of Europe—to escape from which most of them had come to America—which occupied the attention of such Americans as were interested in the study of such things. Those who did not read philosophy experienced a large measure of political liberty in practice, economic opportunity on the frontier was always open, and their ideas of law and ethics were largely those expounded to them from the pulpit as the word of God. Accordingly, when the growing colonies asserted and established their independence in the last quarter of the eighteenth century we find—perhaps for the first time in history—the deliberate attempt, by means of a limited power of attorney from the voters, to create a government which should confine itself to protecting what were conceived to be the independently existing rights of man. It was under government so conceived of that the nation expanded from the Atlantic seaboard to beyond the Mississippi, and the actual government was provided by a class of lawyer-politicians who—unlike the generality of English lawyers—debated not to convince officials or the elders of their own profession but to convince the average citizen standing in a political assembly or sitting in a jury box. The character and influence of the American bar during this period is a matter of common knowledge, but in an age which seems likely to forget it, it may not be amiss to quote two passages from the autobiography of Senator George Frisbie Hoar.[24] Speaking of his mother, he writes: "So with a little alteration, the Greek epitaph of the woman who was the daughter, wife, sister and mother of princes might be applied to her, if, as I like to think, a first-rate American lawyer is entitled to as much respect as a petty Greek prince." [25] And of his own introduction to practice he says: "The Worcester Bar, when I came to it, was much like a class of boys in college." [26]

The three generations of American lawyers to whom Senator Hoar thus refers were—as Mr. Frank points out quite correctly—mostly trained

[23] See, for instance, the writings of Hobbes, Locke, Montesquieu, Rousseau.

[24] George Frisbie Hoar, born Concord, Massachusetts, 1826; admitted to Massachusetts bar 1849; Member of U. S. House of Representatives 1869-77; U. S. Senator for Massachusetts 1877-1904. Died 1904.

[25] 1 HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS (1903) 19.

[26] 2 *id.* at 367.

by an apprenticeship to some older lawyer whom they assisted in practice and with whom they "read law".[27] The conception of the rights of man, and the texts of the constitutions and statutes were, of course, inadequate either for their training or for the conduct of their daily affairs. Some detailed legal system was necessary and it was inevitable that this should be the law which was expressed in the language of common speech. In 1765 Sir William Blackstone had published his *Commentaries on the Laws of England,* a treatise addressed to the interested layman rather than to the expert lawyer, and this served as the instrument by which was transmitted to America the results of five centuries of evolution in English law.[28] Supplemented by Chitty's *Pleading,* Kent's *Commentaries,* the voluminous writings of Story, and numerous lesser works on English land law and procedure, it transmitted to the political leaders of a new people, in an environment profoundly different from that of England, those portions of the English legal system which met their requirements and which it suited them to accept.

(5) *The Crucible*

This easy and confident legal evolution—based on popular ideas and a borrowed intellectual capital—was overshadowed by one cloud. There was growing up in the South an agricultural aristocracy based on negro slave labor, whose commercial relations were largely with industralized England. There was in the North a multiplying body of free laborers whose economic prospects were, on the whole, declining,[29] and a group of manufacturers who coveted the American market for themselves. The fertility of the soil was diminishing in both sections, and the ambitious of both sections cast covetous eyes upon the West. The Lincoln-Douglas debates finally stated the issue unmistakably to the voters in the form of a question whether the West should be inherited by the children of black slaves or of white farmers. The resulting war completely annihilated the slave-holding aristocracy; the Homestead Acts and the railroad land grants threw open the West to free private exploitation; and the country entered upon a tariff policy which secured the home market to the manufacturers of the northeast.

The immediate result of these events, when viewed in retrospect, appears to have been an almost complete abandonment of political philosophy, and of the idea of a community ordered in all its parts by the law. The last great social issue was now settled; America had achieved a free society; attention could now be turned to other things. The intellect of the com-

[27] But Senator Hoar himself was a graduate of the Harvard Law School.

[28] PLUCKNETT, *op. cit. supra* note 11, at 205-207.

[29] The decline in the economic condition of New England labor may be perceived between the lines of MORISON, MARITIME HISTORY OF MASSACHUSETTS (1922), and is reflected in much contemporary literature.

munity turned from law and ethics to science and engineering; a stream of revolutionary inventions, the telegraph, the telephone, new processes in metallurgy, the electric dynamo and motor, the electric light, the internal combustion engine, the radio, the airplane, transformed the whole environment of life. Ambition ceased to interest itself in government and turned to exploitation of these new inventions, of the virgin natural resources which they made available, and of the still unsettled western lands. The native population, about 31,500,000 in 1860, was supplemented during the next four decades by 24,000,000 immigrants who furnished fresh supplies of cheap labor and a fresh market for manufactured goods. The value of manual labor and muscular strength diminished; the demand for specialized skills, particularly mental skills, accelerated; and this produced a demand for popular education of all kinds. Specialized legal technique, along with others, was in demand to organize the growing cities and multiplying business enterprises; the rough apprentice training of the first half-century and the genial generalizations of the early law-books could not supply it; hence arose a great opportunity for schools of law. The country had never had much law adapted to an industrialized society; the law which it did have was, as we have seen, largely imported; hence it was inevitable that the schools should turn to a more intense and exact study of the English law. The common law of England, being a native growth, had never had a law school. The legal traditions were taught and practiced simultaneously in and about the Inns of Court. Schools of English law made their appearance in America for the same reason that schools of Roman law appeared in Europe during the middle ages—a restless and turbulent society, torn from its traditions, had need of legal doctrine which it could not supply.[30]

It was not unnatural that the greatest of these American law schools should make its appearance in New England. Like old England, New England possessed—in 1870—a fairly homogeneous population and a strong intellectual tradition, based on the Puritan theology and the political struggles of the Revolution. Like old England, its geography tended somewhat to isolate it. During the great maritime period from 1790 to 1860 Boston had been a miniature London, the window of an insulated people upon the world.[31] The Civil War had destroyed the principal competing culture. Unlike most of the country west of the Hudson, New England could not look forward to a great period of expansion. Hence it turned its attention to intellectual things. Law, in the hands of Langdell and Ames, became a science, a body of knowledge to be studied rather than an art to be practiced; and at the turn of the century in 1900 Ames could speak with en-

[30] The similarity between the reception of the common law in America and the reception of the Roman Law in Europe, and the contrast of those two processes with the development of the common law in England may be seen in Dean Ames' essay, *supra* note 6.

[31] See MORISON, *loc. cit. supra* note 29.

thusiasm of the "Vocation of the Law Professor" [32] as one of the great callings of the future, a calling of which he was among the noblest examples and which he did much to create.

An American lawyer who, in 1934, reads this remarkable address—in which the great Dean eulogizes the common law, which never had a law school in England, and at the same time predicts its perpetuation and perfection in America by a group of University law schools, manned by scholars giving all their time to study, reflection, and teaching,[33]—cannot but be impressed by its failure to note certain facts, some of which were already apparent and others of which later events and historical researches have made clear.

The first of these facts is that the English common law, like the Roman, was created neither by schools nor by popular sentiment, but by a strong central government interested in preserving its own existence, which did what it found necessary to that end. Transplanted to America and propagated by law schools, it ceases to be law in the same sense in which it was law in the country of its origin and becomes a system of abstract ideas akin to a religion by means of which a people strives to preserve its identity and culture while migrating or adapting itself to a new way of life.

The second is that "a body of law professors of distinguished ability, of national and international influence" [34] devoting their whole energy to the study and teaching of legal doctrine are bound, in the nature of things, to take on the character of a priesthood and their institutions to assume the characteristics of an organized church. It is not reasonable to suppose that able men installed in such positions will not reason about ultimates in politics, government, and jurisprudence, and that "ambitious professors and bold commentators" will omit altogether to "obtrude their private opinions, and instil doubt into the minds of the youth".[35]

The third is that even in 1900 there was already appearing in America the beginnings of that business and economic organization which has since grown to the point where it competes with, if it does not overshadow, the older legal and political organization as an instrument of national life.[36] It is not the relations of private property, personal trust and individual contract, which now make up the fabric of life for most Americans; and it is not in private litigation that their dearest interests are involved. The fabric

[32] *Supra* note 6.

[33] I include the writing of treatises and essays under the term "teaching".

[34] The quotation is from Ames' essay, *supra* note 6, at 146.

[35] This was offered a long time ago as an objection to the teaching of law in law schools. *Id.* at 134.

[36] For a picture of this organization, see MOODY'S MANUAL OF INVESTMENTS. For a discussion of some of its social and legal consequences see BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933). The Sherman Anti-Trust Act, which certainly has not fulfilled the intentions of its framers, was passed in 1893. The Standard Oil "trust" was in existence before 1900. The United States Steel Corporation was organized in 1901.

of modern America is organized around money, credit, and banking; the control of the great corporations, of markets, and of employment; and the power of governments to tax and spend. The art by which these things are managed is known not as law but as business; and it is on the operations of business that the fortune of individuals depends. While the power of the bar and the importance of the old political forms have been declining there has grown up in business an organization in many ways similar to the old feudal nobility, and its relations to education have become startlingly similar to those which that nobility once had to the church.[37]

The fourth fact is that there was not in 1900 and is not yet, in America, any strongly organized central government; and it remains uncertain whether one can be evolved.[38]

These tendencies and their effect upon the bar have been noted by more than one writer, and it may be useful to refer to them in this place. In January, 1912, Albert M. Kales, a lawyer and law teacher of national reputation, observed the tendency of good lawyers to drift either into business, which he called client-care-taking, or into teaching, where they tended to speculate in "cloud-cuckoo-town common law"; with the resulting impairment in the strength of local legal tradition and in the quality of arguments presented to appellate courts. He urged young law teachers to check their tendency to speculation and to raise the level of advocacy by specializing in arguments before appellate courts.[39] It is not apparent, after twenty years, that this recommendation has had any very extended influence. The drift of the bar towards office practice and of teachers towards legal generalization still goes on.

In 1927 Dean Donham of the Harvard School of Business Administration, himself a graduate of the Harvard Law School, writing on *The Social Significance of Business,*[40] described what he took to be the decline of the American legal profession in these words:

> "To my great personal regret as a member of the bar, it seems also clear that we cannot expect to find the needed leadership in the legal profession. So long as the lawyer was the trusted adviser of his community, the man to whom a large part of the community turned in times of stress, the man who at home and in the broader community outlook represented his town or state; so long as such was the typical condition of the practicing lawyer, he found it simple to correlate his economic status and his social obligations. Without question, from

[37] *Cf.* Pound, *The New Feudalism* (1930) 16 A. B. A. J. 553.

[38] One would have written "now", not "yet" before March 4, 1933. Although since that date the activities of the Federal Government have been multiplied, this activity must still be regarded as in the experimental stage. America has no natural capital comparable to London in its relation to the geography of the country. Whether modern methods of communication render such a capital unnecessary to a centralized political organism remains to be seen.

[39] Kales, *Should the Law Teacher Practice Law?* (1912) 25 HARV. L. REV. 253.

[40] Donham, *The Social Significance of Business* (1927) 5 HARV. BUS. REV. 406, 410.

somewhere around the year 1775, when the legal profession started in this country, the lawyer who was a real leader received his major satisfactions from his social function. To him, the earning of his livelihood was a comparatively incidental matter. When the lawyer ceased to be advisory leader and sound counsellor and, following the creation of large city business law firms, went definitely to work as the servant of the business man, mainly doing his will, he lost something and the community lost a great deal. . . . The earnings of individuals are in general no longer subordinated to the opportunity for service. The profession has become largely an auxiliary business rather than a learned profession. But in view of the close relationship now existing between the law and business, I am far from hopeful of any radical counter development unless a similar development takes place simultaneously in business. As things stand to-day the law is in no position to assume leadership in solving the problems imposed upon us by scientific developments, and even its social consciousness is little more aroused than that of the business group. It is like business and unlike the other professions mentioned in that the harmonizing of selfish and social values is presented in its most difficult forms."

The essential truth of this passage seems scarcely questionable. It summarizes the situation with which the American bar and the American law school are now faced.

(6) *The Problem*

Scientists have a method of analysing substances by the colors of the light which they emit. A prism breaks white light into all the colors of the rainbow. By passing light from a heated substance through a corresponding prism and setting the bands of light emitted by it beside those of the entire spectrum, the elements of the substance may be known. If, in like manner, we set Mr. Frank's proposal beside the historical spectrum which we have outlined, it is submitted that the following conclusions may be drawn:—

First: Legal education by apprenticeship has been characteristic of the great periods of the law. This was true of the period from 1780 to 1860 in America, when American law was in the making. It was true of the two centuries from 1300 to 1500 in England which saw the creation of the English bar. The similarity between Mr. Frank's ideal law school and the "legal university" which existed at the Inns of Court during the Middle Ages [41] is very striking. There is the same emphasis on the arts of forensic disputation, the same emphasis on the training of apprentices through watching and taking part in the work of courts and lawyers; the economics and social sciences which Mr. Frank would have young lawyers study corresponds to the English land law—which was the economics and social science of the middle ages—and which then furnished the substance of the business of the Court.

[41] For a description of the Inns of Court when they could be so characterized, see Ames, *supra* note 6.

Second: But the conditions of effective legal training by apprenticeship do not now exist. The English bar during the Middle Ages was a guild of professional persons practicing before the King's Courts in London, limited in numbers, dwelling in the same group of buildings, eating at a common table, living a life every part of which the apprentices could see and share. The American bar of the first half of the nineteenth century did not lead a common life in the same measure; but its members shared a common political tradition, read the same law books, engaged in similar activities, and appealed both in the court-room and at the hustings to a common body of moral and sociological ideas. No one of these circumstances exists today. American lawyers do not live and eat together, they do not appear before the same tribunals or conduct controversies by the same procedure, their activities are so various that law practice is scarcely capable of definition, and there is no coherent body of legal and political philosophy which can be appealed to in all controversies and in every court. Young Americans who wish to become lawyers must go to law school because the organization of law practice provides no place where an adequate apprentice training can be found.

Third: It may be doubted whether the method of legal training which Mr. Frank proposes approaches the ideal less remotely than does the method now generally in use. The method of teaching by discussing appellate court opinions has its drawbacks, and Mr. Frank has emphasized some of them with a good deal of persuasiveness and force. But that any school which could now be organized along the lines which he proposes would not have equal or greater drawbacks is by no means clear. That part of his proposal which looks in the direction of apprenticeship consists of (1) the study of complete records in appealed cases, (2) frequent visits to court in the company of instructors, (3) participation in an active legal clinic operated in connection with the law school, and (4) work as apprentices in law offices at intervals during student work. The number of records on appeal which can be critically examined must necessarily be very limited. To appreciate the arts of advocacy as exemplified in well-conducted trials one must follow the trial without interruption from the beginning to the end. If active and successful law offices cannot supply students with the training necessary to make them well-rounded lawyers, one may be permitted to doubt whether a legal clinic run in connection with a law school, or a few brief periods of such work as lawyers in practice might be willing to entrust to students, could do more. That part of Mr. Frank's proposal which looks in the direction of giving students a broader training in economics and the social sciences is suggestive; but lawyers who remember the New Economic Era and the statements made by economists on that occasion will hesitate to accept economics and sociology as a substitute for formal training in the law. The case system of instruction, besides the training which it gives in dialectics, has at least one other definite advantage—it offers the possibility of introducing the stu-

dent, in as realistic a manner as the academic environment permits of, to a large proportion of all the legal problems which are presented in the manifold relations of modern life.

I venture to suggest that Mr. Frank, in his desire to create a form of legal education which shall be at once profound and vital, has actually proposed the re-creation of the medieval Inns of Court at a time when circumstances forbid this to be done. The period of American history in which we find ourselves is not at all like the period from 1300 to 1500 in English history. It resembles much more closely the tenth century and the first half of the eleventh—the period from King Alfred to the Norman Conquest, when the English national character was just beginning to be formed. There is the same history of migrations, still relatively recent; the same recent conquest of one-half the country by the other; the same population still cherishing its ancient laws and customs brought with it in its migration from over seas; the same inadequacy of these laws and customs to new conditions; the same uncertainty as to the relative powers of the central and of local governments; the same struggle of magnates for control. There is also a close analogy to the early priesthood in the body of scientists, mathematicians and economists who exercise intellectual domination over a people which does not understand them, and who are maintained in endowed institutions or by magnates who find them useful in their work. There is the same lack of firmly organized authority over the whole body, the same tendency to rely on personal leadership as it appears.[42] Granting—which seems disputable—that human history moves faster than it did formerly; granting that the present national administration suggests the evolution of institutions to some extent analogous to the *Curia Regis* and its committees; the fact remains that we do not at the moment have either a strongly organized central government or a clear conception of what constitutes legality under the conditions of life which we now face.[43] It seems probable that there must still be a great deal of hard work by men of action and a great deal of hard thinking by academicians before we can create an American common law based on the actualities of the industrial revolution, or an institution even remotely comparable to the medieval Inns of Court. I venture to think, therefore, that the bar's immediate task is to strengthen itself and all the institutions by which government is administered; and that the immediate task of law schools is not to teach the technique of practice—after all, an imitation ap-

[42] Of course one could easily parallel this list of similarities with a corresponding list of differences. Modern America is in many ways unprecedented. It can be argued that its present condition resembles that of decadent Rome. But if either of these views be adopted the argument of the text is not thereby weakened. The essential fact that America is in a state of unstable equilibrium, that there is no recognized center around which political authority and political education can be organized, remains unchanged.

[43] Witness the confused condition of modern American constitutional law. Witness also the growth and popularity of the idea that justice may be appropriately administered on "hunches". See Frank, *supra* note 1, at 911, and essays there cited.

prenticeship is not much better than an imitation trial [44]—but to mobilize the sadly squandered resources of higher learning to provide an education which shall be a genuine preparation for responsibility in the administration of law and government in the new American civilization which is being born.

Fourth: The immediate task of law schools is to develop and teach a system of legal thought which is suited to the necessities of the times.

It seems possible that a sound criticism of modern legal education in America would be aimed not so much at its methods as at the system of legal doctrine which it is now organized to impart. That system of legal doctrine is based almost wholly upon ideas which were originated between 1750 and 1850 and popularized between 1850 and 1900; and its inadequacy to meet the conditions of 1934 is demonstrated by social and political instability, by lawlessness on the part of both governments and individuals, and by judicial decisions in which long-accepted principles are held inapplicable to the "emergency", that is, to the very circumstances in which clear principles of action and a steady social discipline are most urgently required. Granted that such a situation cannot be met by appealing to old dogmas which have proven themselves inadequate to the occasion, it is even clearer that it cannot be met by "hunches". It can be met only by lawyers who have studied the realities of the present in the light of all the wisdom which the past affords.

The school which sets itself the task of providing America with such lawyers must adopt a far broader conception of legal education than any which is now in vogue. It must think of itself as offering not merely a training for law practice—which today is scarcely susceptible of definition—but a broad preparation for responsibility in the conduct of affairs. Its curriculum must include not only instruction in the current rules of judicial procedure and doctrines of private law, but also in legal and economic history, public law and administration, accounting, and the workings of the banking system and the currency which, it is now evident, is fundamental to the whole structure of private rights and public administration, as it exists today. All this, of course, will require more than three years of study. But there seems to be no good reason why legal training should not begin before the end of the college course. The plan of concentration and distribution in college work is now very generally adopted. It seems unreasonable that university men who are to become lawyers should be forbidden to concentrate in law,—which, rightly viewed, is as fascinating and "liberal" a subject as can be studied; compelled to concentrate in something else; and then, when they come to law school, begin their concentration a second time. Many

[44] Mr. Frank concedes that participation in "fake trials" in a law school is an unsatisfactory means of legal training. *Id.* at 917. It is submitted that casual and intermittent attendance at real trials and the study of records on appeal may be found defective for the same reason. It is only by participation in a law business, and sharing in its responsibilities, that the full benefits of realistic experience are achieved.

courses in government and economics now taught in colleges are intrinsically far more difficult of mastery than many courses now taught in law schools. By telescoping the law school and college work a more orderly and profitable sequence of studies could be pursued. In the last year of the law school course, as practice was approaching, it would be possible to supply practical training in some specialty as I have suggested elsewhere,[45] possibly by such methods as Mr. Frank has outlined, and in collaboration with the bar. Not only would such a course of study ultimately produce an abler bar than that which the country now possesses, but it would give purpose and direction to studies in government and economics which can be achieved only when the student recognizes that he is definitely preparing himself for his life work.

Fifth: The bar's immediate task is to create conditions under which the administration of government and of justice can again be looked upon as a career.

But if the law school's task is to train men capable of thinking effectively about modern problems, the business of getting them to think effectively about the legal problems of any given community and its citizens is the task of the local bench and bar. The first necessity for any political organism that aims to preserve its integrity and vitality is to provide for the prompt and efficient administration of its laws. But it cannot do this if young men of ability and education are not taught the local practice and traditions, if they are subjected to unconscionable delays in the trial of their clients' law-suits, and if they are exposed to effective competition by methods in which their own ethics forbid them to engage. It seems to be settled both by reason and authority that admission to practice as an attorney and advocate in the courts is a matter to be regulated by the judicial power.[46] Any state court or bar might well consider whether, after deciding on its requirements with respect to the fundamental legal training already outlined, it would not impose certain requirements of apprenticeship or of formal instruction in its own laws and practice as a prerequisite to full admission to the bar. And any state court or bar might well consider also how the local practice can be so adjusted and membership in the bar so regulated as to build up a body of advocates with a professional *esprit de corps.*

Sixth: The re-creation of a system of legal apprenticeship must await the completion of these two tasks.

The legal profession is indebted to Mr. Frank for emphasizing what has sometimes been ignored, but never effectively disputed, that real training in the arts of practice cannot be given in a school. But it must also be remembered that the value of the bench and bar to the community depends upon the ends to which the arts of practice are directed, and that these ends are deter-

[45] Gardner, *Specialization in the Law School Curriculum* (1933) 81 U. OF PA. L. REV. 684.

[46] Opinion of the Justices, 279 Mass. 607, 180 N. E. 725 (1932), and cases cited.

mined by the imagination, breadth of outlook, and independence of the bar. It is not possible, in America in this year 1934, to impart imagination, breadth of outlook, and training in the arts of practice simultaneously to any adequate number of young men. The day when this may be possible will be hastened if the universities will accept the responsibility of providing prospective lawyers with as broad and complete a training as the learning of their faculties will permit of, and if the bar will collectively assume the responsibility for that sound apprenticeship in practice which it only can effectively provide.