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THE LAW SCHOOLS, THE LAW REVIEWS AND THE COURTS†

LYMAN P. WILSON

It is trite to say that we are in the midst of a great social upheaval and that we are now in a period of intense readjustment of our social philosophies. And it is a naive mistake to think of this process as a new phenomenon, just as it is a mistake to speak of the depression of the nineteen-thirties as a new experience and to call it the greatest depression the world has ever seen. It was the greatest that *we* had ever experienced, and we followed a very natural human tendency when we substituted our experience for the records of history. In precisely the same way, many highly vocal persons are today referring to our present upheaval as though it were something new or anomalous, when it is but a normal process, that from time to time has recurred ever since man first attempted to construct an organized society. More than thirty years ago, Dean Roscoe Pound pointed out that we were then entering upon one of these periods of social change, which mark the beginning or an end of a social epoch, and that this one promised to rival the age of Coke and to surpass that of Mansfield. One must be a poor scholar indeed if he does not today recognize the accuracy of that prediction. If the present period of readjustment is to be understood one must have in mind the mechanics of social change—the “hitching forward” of social institutions.

We did not arrive at the present state of our society by any steady process of evolution. Social developments seem never to have come that way. It would be more accurate to say that the history of organized society is marked by alternating periods of rest and feverish readjustments. Man is a peculiar animal. He is, to a greater degree than most of us would be willing to admit, a creature of habit. He finds it much easier to continue to do things as he has become accustomed to doing them than to change to more efficient ways. He boasts that an all-wise Creator has endowed him above all the other animals; that *he* has been given the power to reason. Yet he still finds it easier to believe than to think, easier to accept ready-made ideas from books, from the press, from the radio and from persuasive speakers than to seek out the facts and from those facts to reach reasoned conclusions of his own. It is perhaps inaccurate to call this attitude of mind an intellectual inertia, or to label it with the harsher name laziness. But whatever

†An address given before the Judicial Section of the New York State Bar Association in New York City, on January 20, 1945.

you may call it or however you may describe it, here is a factor which to me seems to explain why we have these periods of intense social readjustment in which the reactionary sees the end of all good things and the reformer sees the vision of a permanently better world.

Let me put this idea into terms which should have meaning to the legal profession. (It has meaning for all the social sciences, I think, but in this form it has specific meaning for us.) If we choose any time and place in any stable, organized society, we will find that society controlled and held together by certain rules and principles. For our purpose it is not important to inquire what the source of these may be, whether they derive from habit, usage, custom, legislation or from the accumulated decisions of some tribunal. It is enough that they exist. Now if the conditions of that society were to remain entirely static, that system of law could and would go on indefinitely. But society does not remain static. It changes. To quote the words of Jerome K. Jerome: "Oh, give me back the good old days of fifty years ago!" has been the cry ever since Adam's fifty-first birthday." The best simile that comes to my mind is that of the growing boy whose frugal mother requires him to continue wearing a pair of pants until the internal pressure becomes so great that the seams burst and the boy emerges—to his mother's great embarrassment and his own discomfiture.

Thus, since man is a creature of habit this trait induces him to tolerate the restraint of his own laws long after they have become uncomfortable, economically undesirable, or socially inexpedient. A system of laws once established and accepted is continued in force until the pressure of social change becomes so great that these bonds are burst. Sometimes the break is too long delayed. Then the release of social pressures comes so suddenly and the break is so tremendous that the result is cataclysmic and we have a true social revolution or even the end of an order. Then, in response to some cosmic urge, or, it may be, to the "hope that springs eternal in the human breast," man has always gathered up the useable fragments of his old social structure and has proceeded to build anew upon more spacious lines. Not infrequently, despite the records of social history, he convinces himself that he has at last achieved an Utopia. At any rate the old pressures are gone and he now has plenty of elbow room. So he sits down complacently to form new social habits; his customs again crystallize; he again follows fixed patterns of conduct until the pressure again reaches the bursting point and then another period of readjustment follows. As yet mankind seems to have been unable to devise a social order sufficiently elastic to accommo-

date itself to inevitably changing conditions and thus to avoid this old governmental cycle.

It is into this process that the social reformer injects himself, always believing, or seeming to believe, that *he* can somehow halt the process, but never quite recognizing that, human nature being what it is, there is a point of futility at which his best efforts will be nullified. King Canute could not stay the tides on England's shore, and there seems to be no more hope that we shall be able to halt the process by which society hitches forward on its way to a hoped-for, but always deferred millenium. The recognition of this fact does not necessarily mean that there is nothing that our profession, and particularly the teaching branch of the profession, can do about the matter. It does not mean that we can only ride the elevator up and down, meanwhile merely accommodating ourselves to its motion. There is reason to hope that we may to some degree retard or modify the building up of social pressures, so that when the break does come the stress upon our social order will be less severe. Likewise interested in this problem are all the workers in all the fields of social science. I do not exclude nor ignore them when I discuss with you some of the aspects of the problem which more directly affect our profession.

My own thinking upon the possible function of our law schools in this connection goes back to the meeting of the Association of American Law Schools, held at Milwaukee, in the summer of 1912, in conjunction with the Annual Meeting of the American Bar Association. Perhaps because it was my first such experience this meeting made a great impression upon me and its scenes have remained fresh in my memory. In my later thinking there has been the realization that we were then approaching a pressure point and that sweeping changes in our social outlook and in the basic philosophy of law were at hand. There was at that meeting one who spoke with the voice of prophecy, and, who, like prophets generally, heard dissident and doubting voices. To that prophecy and some of its implications I invite your attention.

At the opening session Dean Roscoe Pound delivered as his presidential address a paper entitled: "Taught Law." In this paper he pointed out that even then we were in the midst of a transition from the individualist idea of justice of the eighteenth and nineteenth centuries to that of social justice in which the broader interests of the social group were to be considered. He pointed out also that in such a period of transition there necessarily is "much straining of legal systems and much crude groping for the principles by which the ideal of social justice may be realized." He pointed also to the fact that

the public was dissatisfied with the jurist and that the jurist was dissatisfied with himself, but indicated that much of the perennial dissatisfaction with the jurist must be referred to causes which inhere in any attempt to administer justice according to law, and is, therefore, ill-founded. He found no such palliative for the shortcomings of the law-teacher and he continued:

Concerning this, the public law had a good cause against the American teacher of law. While the rest of the world is imbued with faith in the efficacy of effort, and while, under the stimulus of that faith, advance and achievement are the order of the day in every other field of learning, it is too true that the legal scholar is busied chiefly with threshing over old straw. It is too true in this country that, under the influence of ideas derived from purely historical study, he is sceptical as to the outcome of conscious law-making; he doubts the possibility of deliberate direction of legal development and hence he leaves it to laymen, whose crude, if well-meant efforts are unhappily subject to criticism, if not even to ridicule, to wrestle as best they may with the legal problems involved in social progress. It is probably not true on the whole that our jurists—and by this I mean our teachers of law, who at least ought to be our jurists—are dissatisfied with themselves. But I submit that they should be so dissatisfied and that it will be a healthy symptom when such dissatisfaction becomes acute.

Dean Pound pointed to three major defects which he believed to exist in 1912:

1. The lack of a coherent *system* of law. Our law, having grown so largely by accretion remained [and perhaps still remains] in the form of loosely interrelated subjects, each independently worked out in minute detail.

2. The sharp line drawn between the traditional law and the imperative law promulgated by legislatures—a line perpetuated and emphasized by the text-writer, the practitioner and the courts.

3. An attitude of indifference, if not aversion, to lawmaking with a view to social progress. This attitude was generally accepted in 1912 by the lawyers and the courts. It was almost as generally transmitted by the teachers of law to their students.

Continuing, he pointed out that while the first of these shortcomings—the lack of a coherent system—is of prime importance to one who is concerned with law as a science, it really has a much wider practical import. Not only does a lack of system place obstacles in the way of teacher and student, it also operates against an efficient administration of justice and works injury to the public respect for law, but (he continued):

. . . the second and third of the defects above enumerated produce even graver consequences. It is not too much to say that they are bringing about an acute conflict between the law, as it is taught and received and administered, and those who are working for social progress. So long as those who are best qualified to study these defects of our received legal tradition neglect to do so, and leave the adjustment of the law to social justice to extra-legal agencies, this conflict will not only injure the effectiveness of the law, but will threaten, if not overturn, many of the great juristic achievements of the past. . . . Let us note the true nature of this conflict, the fundamental difference which it involves. It is not in the least due to the dominance of sinister interest over courts or Bar or jurists. It is not due, the legal muckraker notwithstanding, to bad men in judicial office or to intentional enemies of society in high places at the Bar. It is not a conflict between good men and bad. Instead it is an intellectual conflict. It is a war of ideas, not of men; a clash between old ideas and new ideas; a contest between the conceptions of our traditional law and modern juristic conceptions born of a new movement in all the social sciences. Such a conflict the teacher of law ought not to ignore and cannot ignore, for it has its roots in the legal tradition which he teaches and thereby perpetuates, and our chief hope for deliverance is a clear recognition of the fundamental issues by those who teach and thereby mold the tradition and a conscious and intelligent effort on their part to divert that tradition to the path of progress.

In 1912, one need not have been a profound student of social evolution nor even an acute observer of human nature to predict that this undebatable thesis with its undeniable conclusions would have little immediate effect. Indeed, it was only after many years of preaching of sociological jurisprudence that his repeated admonitions began to bear fruit and to find echoes from other sources. That these ideas did have their effect may be seen in the changed attitude of law teachers, and, I believe, in the rapid multiplication of the law journals published by the schools. To these last I invite your attention.

The generation which has elapsed since Dean Pound's pronouncements at Milwaukee has seen the rise of the law reviews. Not only have they increased in number but they have assumed a function which at that time they were only beginning to perform. Prior to 1912, thirty law-school journals had been started. Of these, fifteen were alive in that year and of this fifteen about a dozen were still being published in 1941. From 1912 to 1941, about sixty-five law reviews came into existence. Of these some forty-five had survived until 1941. Thus the fifteen law-school journals of 1912 had grown into an array of sixty in 1941. The reasons for this expansion are many: The

number of law schools in the country increased during that same period, and, because in education as elsewhere there is such a thing as "keeping up with the Joneses," each new school and each of the older ones that did not already have a law review felt the urge to start one. Many improvidently yielded to the urge and embarked upon ventures which could not survive. Then, too, material with which to fill such journals was more abundantly available. The new thought that was stirring in the law schools provided more to write about, and there were more law teachers to write about it. And there is also the fact that professional promotion, to an altogether too large a degree, depends upon the *amount* that a man has written, and the further fact that there is among us a certain appreciable fraction of persons who suffer from "writers' itch"—a malady from which, unfortunately, no one ever dies. Nor can we ignore the ever-present blandishments of editors soliciting materials with which to fill their pages.

The rise of the law school reviews to the place which they now occupy is not a phenomenon to be considered by itself. From what has been said, it is too much to claim that this development has been a conscious response to the challenge of social change, but there seems to be little reason to question that it was to a great degree a by-product of the attempt to meet that challenge. It is also too much to claim that the generous treatment accorded by the courts to the law reviews came in recognition of their success in meeting that challenge. There had been a marked change in the business of our courts. Whereas, in an earlier day the judge had the time to philosophize about the law, a day when we looked to the judge to examine reasons, backgrounds and theories and to write his wisdom into his decisions, there came a time when the courts found themselves under such an ever-increasing pressure of work in their daily routine of deciding cases that there was no longer the time for the extended scholarly investigations of former years. At this same time law teaching was developing as a specialized branch of the profession. Here was created a group of students of the law, who not merely had the time to perform this service, but whose very function was the investigation of and report upon the history and the science of law. The manner in which this function passed from the one group to the other is so effectively described by the late Justice Cardozo, in an introduction to the *Selected Readings on the Law of Contract* (1931), that I cannot do better than to quote at some length from that statement:

Most of the essays in the law reviews are written by law teachers, though there have been notable exceptions. For a long time the practicing lawyers and the judges, recruited for the most part from the ranks

of the practitioners, were suspicious that there would be a loss of practical efficiency if the teachers in the universities were not made to know their place. At the worst they might be philosophers, and they were theorists at best. In part the distrust was a piece with the belief that man thinking is less efficient than man doing. The truths of theory were contrasted with those of practice as if opposition between truths were possible. . . .

Some part of the distrust of the teacher and his pamphlets must be ascribed to this vague terror of the nihilistic and explosive power of thinking and of theory. 'Let us admit the case of the conservative,' says Dr. Dewey, 'that if we once start thinking, no one can guarantee where we shall come out, except that many objects, ends and institutions are surely doomed. Every thinker puts some portion of an apparently stable world in peril, and no one can predict what will emerge in its place.' Teachers being notoriously given to thinking, one can never know what they may do in unsettling the foundations of the established legal order. To this fear of their power there may have been added other emotions more selfish and ignoble. Some of the distrust has had its origin very likely in a state of mind to which the psychologists and psycho-analysts have given a label and a niche. In old times the label would have been nothing more high-sounding than an aversion or a prejudice. Today it would be dignified as a complex, a protective shield against the aggressions of superior competitors. In gaining a name it has become involved in a certain measure of reproach which is making it unpopular. Ticketed and labeled, it tends to desiccate and shrivel.

Certain, in any event, it is that the old prejudice is vanishing. Within the last fifteen years the conspiracy of silence is dissolving, with defections every year more numerous and notable. To trace the reasons for the change with adequacy and fullness would be a slow and heavy task. Minor factors have had their share. The leading cause, however, has been a dislocation of existing balances, a disturbance of the weights of authority and influence. Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the courts to the chairs of the universities. . . .

This change of leadership has stimulated a willingness to cite the law review essays in briefs and opinions to buttress a conclusion. More and more the law reviews are becoming the organs of university life in the field of law and jurisprudence. The advance in prestige of the universities has been accompanied with a corresponding advance in the prestige of their organs. . . .

At this point let me make it clear that my only interest, for the purposes of this discussion, lies not in the fact that this change has taken place, but in the problems which the change presents to those who are directing the law reviews. Please remember that this new function has been closely

followed by a period of legislation, unprecedented in our history, in which social welfare has been the dominant note.

This new function of the law reviews and this changed relation with the courts and the lawyers, although welcomed by the schools, has placed them in something of a dilemma. To attempt consciously to aid in the adaptation of law to changing conditions, or merely the attempt to show the exact setting of given decisions in the law as it is, has presented some rather delicate problems of ethics, and at certain points may even have strained our relations with the members of the bar. If we agree that Justice Cardozo's evaluation is correct, and if we agree that the schools do have an important function in *shaping* the law, as distinguished from merely commenting upon the law as announced, then it follows that the schools must deal with the law while it is in the process of formation. They cannot limit their activities to those of the post-mortem; they must deal with the patient while he is still alive.

That the law reviews have made mistakes, that they have not always been tactful, that there have been instances of bad taste must be admitted. That we have at times irritated the courts is also unfortunately true. A certain eminent judge, who for the sake of anonymity will be called "Smith," said in my presence, "When your Quarterly has something nice to say about a decision of mine, you start out: 'It was said by the court,' but when you say something adversely critical, you always begin: 'Smith, J., in this case said . . .'" No court in the land is immune from the inquisitions of the law reviews, and professors have been charged with setting themselves above the judges. These charges are not now as frequent as they were in the years when the professors and the law reviews were overcoming the prejudice which attached to law faculties because they were teachers and theorists and not practitioners. The courts now either better understand the underlying purpose of the law-school men, or they have learned to tolerate our fulminations. At any rate the critical function of the law reviews has been accepted as a proper part of the juristic process.

But the law reviews are still left sitting between two fires. If comment upon a case is to be reserved until it has reached a court of last resort the opportunity to exert any formative influence upon the law has to a very large extent been lost. But, on the other hand, if we elect to discuss a case while the controversy is still in a lower court, subject to appeal, and likely to be carried to a higher court—and this must be the case if the problem is to be worth discussing—we intrude our activities into the business of the court, and are likely to tread upon the toes of one counsel or the other or even of

both. The court may not relish our intrusion, and, if our discussion aids one side more than the other, the adversely affected attorney may be enraged. And who is to say that his rage is not justifiable? His view of a case is that of an advocate. For the moment he is much less concerned with legal science than he is in winning a decision for his client. At such a time he may well be irritated by an intrusion, however well-meaning and however effectively pointed at an improvement of the law, if that intrusion upsets the carefully elaborated theory of his case. That the intrusion may be permissible and justifiable by its ultimate results does not soothe his feelings. The result well may be that the school has lost a friend, or, worse, has made an enemy. This last fact has stayed the eager pen of many a note writer, for institutions need friends as much as private persons do, and law professors, too, are human.

If we put aside this very practical question, there still remains the basic question of ethics, for the ethics of the profession should be as binding upon the school-man as they are upon the practitioner. Here, I suppose, as elsewhere, the ethical problem will be solved with some reference to the effect of the activity in question. If there is anywhere in our land a court which has been unduly influenced by a comment or even by a leading article, I have yet to discover that court. On the contrary, many a professor and student, who have labored hard upon a case note, have suffered heartburnings when their scholarly effort has been ignored. If professors and students could be discouraged by such treatment, they long ago would have been disheartened by the number of times the courts have refused to see the light when they have held the torch aloft. Comment upon judicial decisions seems to me to be an inevitable element in any process in which there is a conscious attempt to fit the law to the needs of society. The desirability of such comment seems now to be so thoroughly recognized that one may speak of it as a part of the juristic process in this country. Having become fully accustomed to this tradition, our courts can be relied upon to give such writings no more weight than they deserve.

But where should proper comment begin and end? What about comment upon a case which is pending before some court? Shall we say that all comment about such a case is improper? Shall we ignore the fact that in deciding it the courts are going to shape the law for better or for worse? Shall we treat the law-suit as though it were only a private cock-fight, having importance only to the principals? Shall we continue to criticize a court for what we think are shortcomings when we did not lift our voices while the supposed error was being made? Is not the public a silent but vitally

interested third party in every suit? Should not every member of the legal profession, whether he be judge, lawyer or teacher, realize that over and above the decision in any case is the social interest in better law? Even if we answer each of the above questions to our mutual satisfaction we might still disagree as to the propriety of comment upon pending cases. Members of law faculties do disagree upon the point.

Attention has been called to the degree to which the analytical and critical function of the juristic process has been passed over to the schools and their publications. It seems to me that they would be false to the trust reposed in them, that they would be out of step with the times, if they were to content themselves with a mere cataloging of decisions as they appear, and a mere discussion of the changes, if any, thereby wrought in the law. In 1912 it could truly be charged that the law schools were chiefly interested in the past; that they were still the devotees of a merely historical jurisprudence. In 1945, any school is out of step which does not consider the present and plan for the future. It is also to be hoped that the judges of our courts will recognize not only the need for but the propriety of comment upon pending litigation, and that when made in the proper spirit they will be reasonably sympathetic to it.

In one sense the law school journals may be viewed as representing the interests of the public. If they are the representatives of the public, there seems to be no impropriety in their claiming the privilege of fair comment, which, like other privileges is to be individually forfeited by misuse. An occasional abuse of a privilege should not be enough to deny its use altogether. The fact that upon occasion counsel who have been active in a case choose to write about that litigation before its history has been completely closed; the fact that an occasional attorney will try to add weight to his position in a cause by seeking to get that contention before the court in the form of an article in a law review; the fact that now and then some misguided or incautious editor will grant untimely publication to such an article; these things, if done in good faith, must be put down as errors of human judgment. It may be that the recognition of such a privilege would be the invitation to a greatly increased discussion of pending cases, and that harm would flow therefrom. One who has confidence in the independence and good judgments of our courts will not fear that they will be improperly influenced. One who credits faculty advisers of the law reviews with reasonable discretion will not anticipate frequent or radical abuses of the privilege. One who has heard this question discussed in a meeting of a law faculty knows that it will be availed of only with doubt and hesitation.

The duty to aid in the readjustment of the law to the needs of the times falls more heavily upon the teachers of the law than upon the other two branches of the profession, and for a very definite reason. The men behind the teachers' desks in our law schools seems to give coloration and to some degree a permanent shape to the thought-patterns of their students. In this there is reason for gratification, but there is also a high degree of responsibility if the teacher shall prove to be only an instrumentality in perpetuating things as they are. Since the great preponderance of judges and lawyers are graduates of law schools, these groups are entitled to point an accusing finger at their former mentors and in the words of a once popular song declare: "You made me what I am; I hope you're satisfied." The recognition of the persistence of attitudes engendered in the class-room is not new. It led Professor Maitland to say that "taught law is tough law," meaning thereby not that the professor casts new darkness over hitherto easily explainable mysteries and makes them difficult, but that what is inculcated in the class-room persists and is difficult to change or eradicate. The recognition of this fact led Dean Pound to base a ringing indictment of the teachers of law using Maitland's phrase for the purpose. It is a matter of regret that he was heard by only sixty-one registered delegates of the twenty-eight member schools, and that his remarks were buried in the modest pamphlet in which the proceedings of the Twelfth Annual Meeting of the Association of Law Schools were printed. The words of this indictment were as follows:

And yet Maitland was right in saying that taught law is tough law. Every judge and every lawyer, whether trained by reading in an office or by teaching in a school, has his legal mind formed in its impressionable period by the traditional mode of thinking upon legal and juristic questions. Thus the traditional mode of thinking becomes part, and the chiefest part of his mental equipment. All questions are looked at from the standpoint of this received juristic tradition. Subconsciously all the new elements in the law are molded thereto. Consciously or subconsciously, legislation at variance therewith is viewed with suspicion, if not with hostility. It is assumed without question that the only measure of a critique of legal rules is the ideal development of these principles. In this sense taught law *is* tough law, as everyday experience of American law testifies abundantly, and as legislator, sociologist, criminologist, labor-leader and business man have become bitterly conscious. But if this toughness of the mode of juristic thinking which we call the common law is the toughness of taught tradition, the conflict between our law and those who are working for social progress has its roots ultimately in our teaching. In that event, as I have said more than once elsewhere, it is not the recall of judges or the recall of judicial decisions that should be invoked, but rather the recall of law teachers, or at least a great deal of law teaching.

If then this burden rests upon the teaching branch of the profession, it seems proper for me to give my estimate of what has been done in the schools to meet the problem. In touching upon certain points I speak only for myself. Others may not agree with me. I wish that I might say that we have gone far to remedy the shortcomings to which Dean Pound referred. I can only say that some things have been done, but that in the recent outpouring of welfare legislation the schools face a task which is the greatest in their history. Some of the things which have happened are these:

First, law faculties have changed. A generation ago it still was quite the thing to place upon our law faculties men full of years and experience, men drawn when possible from the bench. Some were wonderful teachers, but some were inclined to lay the greatest stress upon the law as it was, and too little upon the law as it ought to be. But at the turn of the century it could be seen that a change was in the making. The teaching function was being differentiated as a separate activity. The learning of law in an office was less in favor. Since it became the thing to do almost everyone went to a law school. In the law school he found young teachers, themselves not long out of law school and with relatively few years of practice behind them. Thus they had not had time to become set in the acquired traditions of practice, and were less inclined to look upon the law as a perfect system. Not a few entered teaching without experience in practice. One of the elements which tended to bring these younger men into the law faculties was the fact that the "case system", though not then new, began really to flourish at this time. If one were to teach by that method he must needs be trained in it, and none but the more recent graduates had been so trained. What the schools lost in experience they more than made up in originality of thought and willingness to experiment. But they still did not get these qualities in sufficient quantity to meet the charge which was leveled against them.

Secondly, a great change came over the curriculum, both as to content and as to method. During the earlier part of the period, the text-book finally succumbed to the case-book as an instrument of instruction. The invention of Langdell came into its own, reached its heyday, and now in its turn has begun to be supplanted by other teaching devices. During this period the content of the curriculum has just about doubled. This in the main has come about through the intrusion of new courses to compete with the old until the three year schedule has become intolerably crowded. What is to be done with the new mass of public law which flows from recent legislation is puzzling more than one law faculty. Two alternatives have suggested themselves: (1) the time for law study can be lengthened; (2) some basic re-

arrangement of materials may possibly be devised which will make more efficient use of the time devoted to law study. Both have been considered and each is now the subject of experimentation. Most schools deem it inexpedient to extend the total number of years devoted to formal schooling, and those which are devoting more time to the professional portion of education are trying to accelerate the prelegal preparation. The new law has come as an attempted adjustment to the needs of changing times. The schools dare not ignore it. It is too soon to predict what will result but changes are in the making.

Thirdly, there has been a shift in the basic philosophy of the law as presented in our schools. It is easier to demonstrate that the shift has occurred than to demonstrate what the shift has been. It has not been the same in all the schools. It has not even been in the same direction, and it is still going on. Not even the wisest man can tell what the end will be. One can be sure that historical jurisprudence, with its concern over origins, developments and conformities to existing patterns, is gone, or nearly so. Likewise the philosophy which concerned itself with the individual has to a great degree yielded to a consideration of the interests of the social group. But to what degree it has yielded and by what the group interests are to be measured are as yet to be defined.

There is talk, all too frequently from persons who may not thoroughly understand our institutions and the evolution of our law, of a jurisprudence of general welfare. Now, "general welfare" is a most enticing term, the content of which is too largely nothing but emotion. The term is attractive because of its beautiful sound and its complete uncertainty. Welfare may be all things to all men. Two of the things which are most needed in our law are *system* which gives understanding, and reasonable *predictability* which provides stability. Neither one can be attained if we shall rush off in all directions in pursuit of some Will-o-the-wisp ideal called "human welfare." Most men are in favor of human welfare, just as most men are against sin, but few can define either term, and fewer are willing to try. Most of our social philosophers seem either to think the term self-evident in its meaning, or to believe that the process of defining it would cramp their style. All of this is bad enough, but the present tendency of some of our courts to base their opinions upon a supposed general welfare, and, in so doing, to disregard established lines of judicial authority, clear legislative intent, and heretofore respected canons of legal interpretation would challenge the wisest man who ever lived. I submit, therefore, that it is not at all surprising that mere law professors become slightly dizzy at times.

There was a time when one could make at least a rough prediction regarding the limits of judicial legislation. That time is passing and in this respect law teaching has become a hazardous occupation.

Lastly (although there are other points which might be discussed) there is the question as to the extent to which the new philosophy shall constitute the instruction offered by the law schools. There are those who argue that it is of prime importance that the student be given the new philosophy and that, after all, it isn't so very important whether he is taught the details of the law. They say that when he has to use the law he can look it up, provided he has the right philosophy. With this view I most emphatically do not agree. I do not feel that a law school has done its job if it has not given its students the equipment with which to solve a good many of the basic problems which they will face upon entering practice. No one claims that any law school can turn out a finished lawyer, but we can teach the student how to use some of the tools of the trade. I am not worried if somebody says that this smacks of the trade school and lacks the professional outlook. A reasonable amount of history, a reasonable amount of the tracing of developments, a reasonable amount of threshing old straw there must be. It is not enough to provide a social philosophy and it is not enough to point to some bright and distant social goal. The surest progress will be made and the soundest decisions will be reached only as we consider how we got to where we are, what, if anything, is wrong with things as they are, and what devices, in the light of history, have some chance of succeeding.

In conclusion, if you say that the law schools have not gone very far toward a solution of the problem, I shall agree with you, for I believe that this problem will never be one which can finally be solved. It changes almost day by day. All that we can hope to do is to keep moving in what seems to be the right direction. We cannot lay out a map for the future; none of us is wise enough for that. We cannot see all the way along any of the possible paths that lie before us; none of us is that far-sighted. At best we can only choose the ways that invite our endeavor and promise to lead us out of present difficulties and into an area in which the conflicts between human interests will be reduced in number. In this endeavor no one of the three branches of our profession can operate alone. There must be as nearly a complete mutual understanding as it is possible for us to attain. This means that each branch must offer its cooperation and each must receive in good faith the suggestions of the other two. There have been few times in history when so grave a responsibility rested upon any profession. We dare not take that responsibility lightly.