

## COMMENTS

*The purpose of this department is to afford an opportunity for informal exchange of ideas on matters related to legal education. Typical comments will range from about 1200 to about 3000 words in length, and may either advocate innovations in curriculum or teaching method or respond critically to previously published material.*

### A NEW ZEALANDER LOOKS AT AMERICAN LEGAL EDUCATION

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I suppose no human being is capable of complete objectivity. By that, in connection with the subject of these remarks, I mean that one's impressions of everything, from American conversation and cooking to American politics and education, are colored by, and only to be understood completely by reference to, one's own personal tastes, predilections, education, and background. That profoundly platitudinous remark is intended to explain the presence of the few introductory remarks which follow, designed to supply at least the salient features concerning the writer's own education and background.

It used to be the fashion for travel posters to refer to New Zealand as the Britain of the South. It is true that in most departments of our daily life the British influence is the predominant one.<sup>1</sup> Our system of legal education, then, reproduces the essential concept which will be familiar to readers of Alfred Z. Reed's two books<sup>2</sup> as underlying the British methods of legal education; the insistence on the dual function of the university and the law office in providing, respectively, theoretical and practical instruction. With us the link between the legal profession and the university is somewhat closer than in Great Britain or some of the other Dominions. Thus, the examinations conducted by the University of New Zealand for the degree of LL.B. are also the examinations which must be passed by all desiring admission to the legal profession; that is to say, the holder of the degree is qualified for admission to the profession<sup>3</sup> without the necessity of passing other examinations, and the young man who is unable to attend the University but nevertheless wishes to study for admission to the profession, by himself or with the help of a correspondence college, must pass the same examinations as the aspirant for the degree. Questions of cur-

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<sup>1</sup> I might make an exception in respect of our railway engines, which are obviously American in design.

<sup>2</sup> TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (Bull. No. 15, Carnegie Foundation, 1921) and PRESENT DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA (Bull. No. 21, Carnegie Foundation, 1928).

<sup>3</sup> As a barrister and solicitor; it is possible to qualify for admission as a solicitor only on completing a slightly less extensive course.

riculum and examination within the University are subject in the first instance to the scrutiny of a Council of Legal Education comprising representatives of the judiciary, the legal profession, and the University teachers of law. The function of the University teacher is thought by most members of the legal profession to be to teach the rules of law, what they are, and where to find them; but, apart from the courses required in Conveyancing and Procedure, the practical application of the knowledge thus acquired is thought to be a matter for training in the office. Indeed, so important is this last factor thought to be that for the last few years one of the requirements to be fulfilled before admission to the ranks of the profession is that the aspirant shall have completed three years' work in either a lawyer's office or the legal branch of a government department. A by-product of the system is that the majority of students combine the acquisition of their theoretical knowledge with the acquisition of practical training, and spend at least the last three years of the minimum five necessary for the completion of a LL.B. degree by working in some law office during the day and studying at night and on week-ends.<sup>4</sup>

Perhaps one more observation is necessary for complete fairness in the presentation of the ensuing remarks. I am currently engaging in post-graduate study at the Columbia Law School. If, then, some of my impressions are of things which have never been apparent to readers as features of American legal education in general, they may perhaps be laid at the door of the "Columbia method."<sup>5</sup> I hasten to add, however, that my impressions have been gathered from many sources extraneous to the classrooms of Kent Hall, including a good deal of reading and many fruitful discussions with fellow graduate students from a variety of middle-western and southern law schools.

Against the background sketched out above, the most immediately striking feature about legal education in this country is that the law school is apparently relied upon to turn out, without the extraneous aid of office training, pretty complete young lawyers; but, from the point of view of the bar admission authorities, what must be tested is not their possession of a reasonable degree of practical know-how but the effectiveness of their law school course in furnishing them with the minutiae of legal rules. I am well aware that the system we endure (I was going to say enjoy, but, as a law teacher, I incline to think endure is the better word) is open to a good deal of criticism, and especially that which points out that it is impossible to divorce the learning of legal rules from the learning of how to apply them in practice; but I do not think that its almost compete antithesis in this country is any less open to criticism. In spite of all I have heard and read about the superiority of the law school to the law office as a training ground for the day-to-day practice of law, I remain unconvinced. I know (rather, I am told, though I cannot quite understand it) that there is little place in the typical American law office for that institution known to us as the law clerk—the second- or third- or fourth-year student who attends to the stamping and registration, files the court papers, drafts the sim-

<sup>4</sup> The classes at the University are, therefore, held in the early mornings and late afternoons, principally at the latter time.

<sup>5</sup> See Leach, *Property Law Taught in Two Packages*, 1 J.LEGAL ED. 28, 35 n. 9 (1948).

ple conveyancing documents and the simple court papers, occasionally interviews clients or briefs the evidence of minor witnesses, is hauled over the coals for his blunders or commended for his felicities, and generally acquires a vast amount of practical experience that stands him in good stead in his years of practice on his own account. I concede that if there is no way whereby such day-to-day experience can be gained outside the law school then that institution must do something to provide a substitute. I still do not believe that the law school's training in this particular field will be anything more than ersatz.

Let me have a shot at this question from another angle. Behind every oral or written discussion of American legal education I have come across there is the unspoken realization that it must be crammed into three years of time (the four-year curriculum having hardly taken hold at all). The American law teacher, would-be reformer or arch conservative, may say, with the unknown parodist of Andrew Marvell:

But at my back I always hear  
Time's rusty flivver changing gear.

Heaven knows, the field to be covered in the course of three years in the orthodox, "old-line" school is vast enough; the mere list of electives in the second and third years, as in the announcement of Columbia, Harvard, or Yale, bewilders the visitor from a simpler curriculum. If, within those three years, the law school is to be obliged to furnish with more or less completeness the basic training performed, in the system I am used to, by the law office, something else must go overboard. What is it to be? Are the purely "informational" courses to be jettisoned? Or can the law schools dispense with the "policy training" which is so strenuously advocated by the "progressives" in the profession? Questions like these, I suppose, are the ingredients of the ferment which spills over into the pages of the law reviews on occasions, which will make up the bulk of the pages of this periodical in the years to come, and which agitates the groups in the corridors and discussion rooms at the annual conference of the AALS. My own answer is obviously colored by my personal belief that there are some fields in which law school training (even in the so-called clinical practice) is inferior to the experience gained in real-life practice, and should only be undertaken as a last resort. But one thing delights my sense of irony. We teachers in New Zealand suffer the dark suspicions of a considerable sector of the legal profession; the bar secretly and in some cases openly doubts the value of what we teach. It is purely delightful to encounter a reversal of this situation, in which the law teacher honestly feels that he can train the practitioner's apprentice better than the practitioner can himself.

I see that in the preceding paragraph I made passing mention of policy making in the teaching of law. I must confess that in my initial weeks here I found this notion harder to accept than any other. In spite of the stubborn resistance which has been put up in New Zealand to the introduction of the Langdell-Ames case method in its entirety, I succumbed to the virtues of that particular pedagogical method with little reserve. Although bewildered by the variety, I rapidly perceived the point of elective curricula. Such extra-curricular activities as law reviews and moot courts I regarded with frank envy. But policy teaching—no! For policy to me, stripped to its

essentials, meant politics, and politics in its most naked form. It was no function of a law teacher, as I saw it, to teach 'politics. For, in a discussion of the policies underlying any rule of law, statutory or judicial in origin, value judgments on a political level must sooner or later be made. Sooner or later the teacher must make his own position explicit. And therein, with fresh and impressionable young minds before him, lay the danger of indoctrination. And so in discussions of this issue I took what, to my fellow students and to the teachers with whom I discussed the matter, must have been an inexplicably severe stand as an "anti-authoritarian," as one of the teachers described it.

I hasten to say that, in so far as policy teaching forms part of American legal education, I have been shown the error of my ways on that score. I am making special mention of my initial difficulty, however, because it lays bare a quite extraordinary feature, not specifically of American legal education, but of the American scene in general. Years ago, in one of his most famous comments on the political scene in England, Sir W. S. Gilbert wrote:

That every boy and every gal,  
That's born into the world alive,  
Is either a little Liberal,  
Or else a little Conservative.

It is true that the balance was disturbed for some years by the birth and growth of the Labour Party, and this of course applies to New Zealand as well as to England. But now, if one discounts Communists and fellow-travelers, there are only two parties in New Zealand, National and Labour,<sup>6</sup> and the dividing line between the economic and social policies of the two is a good deal sharper than that which supposedly divides Democrat from Republican. Moreover, it has become apparent to me even during my short stay here that the United States, commonly regarded abroad as the last stronghold of unfettered capitalism, has in fact achieved a degree of community control over private enterprise that is acquiesced in by both political parties alike. In other words, whereas any discussion of policy in New Zealand is likely to center ultimately around the still fundamental question whether private enterprise shall be free or fettered, or even in some cases abolished, and these are matters upon which it is impossible to be neutral, here the vast majority of politically conscious people seem to agree, first, that private enterprise must remain in most aspects of economic life, and second, that it cannot hope now to be entirely free from governmental control in the interests of the community at large. Given an area of agreement concerning those two fundamental questions, the possibility of policy teaching becomes at once more lively and more free from the bogey of indoctrination. Moreover, your law students are two or three years older than ours, and perhaps on that account more resistant to the impact of personal views uttered by the teacher.

Having disposed of my initial resistance to the idea, however, I still boggle at complete acceptance of policy training, and for basically the same reason that underlies my objection to too much emphasis on skill training.

<sup>6</sup> My correspondents inform me that there are rumors of the impending formation of a Secession Party in (as might be expected) the South Island.

That is to say, I do not conceive it as the central function of a law teacher. True, I agree that the law as it is cannot be looked at as a thing apart from the ends it is designed to serve; nor is it immune from criticism in the sense that a bad rule should be blindly accepted without thought of possible change and reform. In so far as effective reform of the law and more effective shaping of the law to serve the purposes of society should be one of the concerns of the lawyer, that awareness of ends and the fitness of rules therefor, that constant and perpetual sense of the necessity for justice, and that comprehension of policy which must underlie the answer to the practical question, "What, in this, that, or the other situation, is justice?"—all intended products of the policy teacher—are indispensable. But, whether or not policy decisions ought to be the sole concern of the lawyer, I find it hard to believe that the opportunity for making fundamental decisions of that sort enters as largely into the practice of the ordinary lawyer, even in this country, as the preachers of the new gospel would have us believe. I have, of course, been pointed to the fact that a large proportion of the members of all the legislatures in this country is made up of lawyers. Whether they are all there because they conceive it to be their duty, or whether they are there because politics is traditionally a stepping-stone to success in the law, I don't know. I do not underrate the value of participation by trained lawyers, whatever their motives, in the councils of state. I do believe, however, that the lawyer trained in what, for want of a better compendious term, I call the "conservative" method, is no less valuable in those councils than his brother who has been exposed to the newest in policy-science courses. And I have commented already within the walls of this University that if the teachers of law are all to abdicate their primary function of teaching law to produce politicians, national or international, they will indeed be selling their birthright for a mess of pottage. In short, a modicum of policy teaching by all means, but let it be kept in proportion and firmly in its place.

I see that I run on; it was suggested that this be a short comment, and I must keep it thus. I should have liked to have space to expand on some of the seeming paradoxes of American legal education, notably the process whereby the most promising of the students are prematurely segregated from exposure to all the multifarious and exciting teaching techniques and courses and relegated to the arduous and specialised task of turning out the law review, and finally, having been denied all but one of the advantages that the full-time system of legal education offers to the would-be lawyer, including the training in many of the basic skills, are snapped up at the top salaries by the top firms. If I were responsible for legal education in any school, that one fact would lead me seriously to wonder what value there is in the attempt to spread the curricular net as wide as possible so as to turn out a well-balanced lawyer, and whether, in spite of the constant clamor that this skill and that skill must be given attention, the really basic attributes of the lawyer are not few in number and relatively simple to attain with concentrated (not diffused) training. But I had better make an end of my impressions, which seem, at most points, to have become criticisms. Two things, however, I would say. The first is this: that if the reader should be tempted to toss this aside with the comment, "It's not really like this at all; our New Zealander doesn't know whereof he speaks," let him ponder the answer I give in anticipation: "I may be wrong, sir; but—it

*looks* like this." May I respectfully suggest that in that one fact there might be some warrant for reconsideration of the impressions of those who have spent a lifetime on the inside?

And the second? Well, I suppose that everyone who has been asked for his comments, on anything under the sun, has felt, as I felt when I was asked for these jottings, that it must appear excessively naïve to be able to offer nothing but praise; hence, no doubt, the vitriol-dipped pens of some critics and book reviewers. The impressions I give above are honest impressions; I have tried to give them honestly and to provide the background against which they can be honestly assessed. But my over-all impression is one of envy—that so much can be done in America in the field of legal education, that there is so much experiment, so much stimulation, so much life; moreover, that the field is so free for the development and expression of the movements and characteristics which I have noted above. It is true that at times I have expressed a certain impatience with the ferment without and the struggle within the curriculum; and that in the course of my discussions with fellow students and teachers here I have voiced the opinion that what is most needed is a well-balanced curriculum within which everyone can settle down to devote his energies to teaching as best he knows how. But I cannot conceal from myself at the same time that balance and absence of ferment may be resting places upon which, as upon the formula in one of Mr. Justice Holmes' most revealing aphorisms, too long a repose may mean death.<sup>7</sup>

The sum of my impressions of American legal education is that, like the law which is our common heritage, it is abundantly living. Long may it remain so!

<sup>7</sup> "To repose upon a formula is a sleep that, prolonged, means death."