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LEGAL PEDAGOGY, OR WHAT HAVE I?

Our schools have been teaching law like mad for three generations. We have been so busy at it that we have been unwilling to stop to take an observation and see where we are and whither we are bound. Every important change in legal education has been accomplished by some man newly come into the profession from active life outside; and these reforms have not outnumbered recorded angels' visits, few and far between. We select our teachers because they have been good scholars, or good practicing lawyers, or good judges—good too, sometimes, because as scholars or practitioners or judges they are dead ones, and we beatify them. We have a surprising percentage of successful appointments at that. But when we have them we set them a task which is usually a life task; apparently in the belief that a man may equally well teach Property or Constitutional Law or the law of commercial paper, so long as he teaches it a long time.

Yet law is not all alike from the point of view of teaching it. From its beginning the law has pendulated between the two poles of certainty and flexibility. Now it has been rigid and formal; again, equity has prevailed, or the administrative needs of the race. But once worked into the pattern of legal thinking, each quality persists through the forward and the back swing of the pendulum.

One may see both qualities operative in our own day. We are told on high authority that the precepts of our law are either standards, principles, or rules, the standard being a somewhat vague precept, the principle a general precept, yet more definite than the standard, and the rule being a specific precept of great definiteness. The rule is perfect in certainty but deficient in flexibility. The standard is thoroughly flexible but deficient in certainty. The principle is intermediate, having a reasonable degree of certainty but

still great flexibility in application. It is not always realized that different topics in the law partake more of one or the other of these forms.

Thus, topics differ in the degree of certainty or of flexibility that is desirable, and this is the reason why certain topics conform more exactly to standards, certain others to principles, or to rules. Take, for instance, on the one hand, rules of practice, forms of pleading and rules for passing the title to land. In these subjects certainty is distinctly called for, while flexibility is either unimportant or undesirable. We should expect to find, therefore, that the law on these subjects is largely made up of definitive rules, clear in their application and narrow but sufficient in their scope. On the other end of the scale, public law, as a result of the rapidly changing requirements of public life, calls for a maximum of flexibility, and on the other hand, while certainty is to an extent desirable, it is quite subordinate to the desire for flexibility. We therefore find that public law is generally speaking a law of standards. Even where a constitutional provision or other portion of statute law, like, for instance, the Sherman Act or the Interstate Commerce Act, appears definite and certain on its face, the courts have interpreted into it a standard of reasonableness, or some other standard, so that the application of it has become, as it ought to be, very flexible. This is also true of some portions of torts, and particularly of the law of negligence, where the fixing of a standard leaves the application of it very flexible and adaptable to changing conditions of life.

It must be evident that men's minds vary as the law varies. Some have fixed beliefs, and they find themselves in sympathy with the rules of law. They are clearly best fitted to teach such subjects as Property or Procedure. Others have minds of such flexibility that they can teach most sympathetically public law and similar subjects. Others vary between the extremes and might best be fitted to teach one or another intermediate subject. What a stride for-

ward our schools might make if someone had the ability and were charged with the duty of finding the round holes for the round pegs!

If this could be done, much greater liberty and power of initiative might safely be left to each teacher. Conferences of groups of teachers in similar subjects might then discover sound new ways that would remake legal teaching.

But it is not enough to get the right teacher if we tie him up in artificial bonds. A re-examination of the curriculum is next required.

The teacher of law has always been faced with a twofold task; to make a man into a lawyer by building up in him a legal mind and by teaching him facts which will be useful for him in his career as a lawyer. Men will never agree on the proper balance between these two endeavors; but it is clear that whatever the proportion, a teacher must give to the pupil some of each of these classes of instruction.

The history of the units of the curriculum is an interesting one. Down to 1845 the unit was the treatise. Each student was given a list of treatises which he was expected to master and on which he was drilled by the instructor.

By about 1845 the unit had gradually become the subject, and the method of instruction the lecture. A certain number of subjects were taught by a professor. He gave such number of lectures as was necessary to develop his subject and then went on to the next subject in the list, and so on to the end of his year's work. By 1870, at latest, this unit, the subject, had developed into a very different unit, the course. The course was a standardized subject calling for a certain number of lectures either once or twice or three or four times a week for a specified time. These courses being standardized became interchangeable, and a mark in a course could be considered along with marks in other courses in reaching a definitive estimate of the pupil.

The course was an enormous advance in pedagogy over what went before, but has one characteristic that may be

dangerous, namely, that its length is fixed. A course is 32 lectures, or 48, or 64, or whatever the number of lectures allotted to it may be, and the number is some standardized number, which is necessary to enable one course to be set off in office records against another.

The course ordinarily grew up originally by a professor choosing the subject, fixing boundaries, and then making his subject thus delimited fit the time allowed him. If the time was ample for the subject he could go rather leisurely through his work. If, on the other hand, the subject-matter became too large and too important to fit the course, it had to be compressed, like the occupants of the bed of Procrustes. As a result, certain courses are somewhat thin in parts. The teacher tries to cover all parts of his subject whether in so doing he repeats what some other teacher is doing or not. If, for instance, he is teaching Agency he so uses his time that he may spend one day on definitions of Agency and another day on the capacity of a person to be an agent. He takes up the making of a contract by an agent including a number of principles which have been thoroughly considered in the course on Contracts. He feels it necessary to deal with the commission of torts by an agent in such a way as to afford a complete picture not only of the agency but of the tort, and he therefore repeats much of the work in Torts.

The result is that some parts of his course are so simple that a student is impatient at being drilled in them; some parts he is already familiar with and rather resents taking them over again; other parts which are characteristic and difficult he enjoys, for they give him something to think about and afford to him that mental training which comes from solving a difficult problem.

Another result of the course-unit is that a very considerable part of the work offered in a school can never be taken by a student, and he leaves without knowledge of the difficulties of half the law. It has been suggested that he might in a few lectures be given the gist of the courses that he does

not make part of his course of study. The difficulty with this suggestion is that he will get just what he does not need, that is, the facts of about several branches of the law which he will forget soon after he gets them, keeping them in his mind only for the passing of the bar examination.

What he needs is mental training that will come from dealing with the difficulties and the peculiarities of the branches of the law which he takes.

An investigation of the number of electives taken at the Harvard Law School in the last few years shows that the number of men taking a given course varies from 99 per cent. of a class to about 5 per cent., and that the average man during his three years fails to take three hours of the Property courses, half an hour of Procedure and Equity, eight hours of Commercial Law, and nine and one-half hours of Public Law.

If the curriculum were so arranged as to consist of courses of equal effectiveness in mental training and in conveying information about the law, there could be no particular objection to this state of things; for after all, a man can absorb in three years only so much mental training and only so many facts. This is not the case, however. The curriculum has been patched together in a haphazard way because some particular man desired to give a particular course. There has been no investigation of the importance for teaching purposes of legal materials not used in any course, nor have we considered in any scientific way how much of the courses offered might be omitted without loss to legal education. Our minds are tied by vested rights; those of ourselves and of our colleagues. Vested rights in case-books have also played their parts in blocking reform.

It has been suggested that men should get a larger proportion of facts in their legal education. It has also been suggested that the teaching should be based more on the factual situation and less on legal theory. In each of these suggestions there is truth. In some subjects, particularly

the commercial subjects, there is great need of more information as to commercial processes. Besides, in commercial subjects there is perhaps a waste of time dealing in each course with matters common to all commercial courses as well as with matters already covered in the law of Contracts. But clearly no one who is not engaged in teaching those subjects can suggest the proper remedy. If the teachers of these subjects in a school or, better still, in several schools could get together and lay out a year's work in Commercial Law, determining the method and the subjects of instruction, they could give to their students far better knowledge and power in commercial problems than could be obtained from such separate courses in Commercial Law as any student can now find time to take.

Public Law, too, should have a far greater degree of freedom and experiment in matters of teaching, and the instructors in the Public Law courses could, if they got together, frame a year's work in which, omitting the easy topics and the repetitions, a course of severe discipline in Public Law could be given, far more informing and far better in its training than anything which can be done for a student today with the separate courses.

It is obvious that a student cannot, under the present system, cover much more than half the courses offered for his election in the larger schools. He cannot in three years cover the larger proportion of the law, and even in four years he must leave undiscussed a considerable amount of worth-while legal principles.

The question is, what should be omitted from his curriculum? Is it wiser to omit whole courses or, taking twice the number of courses, to omit considerable portions from each course? This is the problem of the schools today. It would take long and thorough discussion among many men in sympathy with a change to bring about a sound result through the omission of parts of courses and gathering together in a greater unit what remains.

This work, to a teacher of law, should be as interesting as the work of discussion of the Restatement in the Committees of the American Law Institute, and one can imagine no higher intellectual joy than taking part in such discussions. Nor can there be a higher satisfaction to a teacher than having a hand in the discussions that must precede any change of the sort. It takes, however, a rather restless type of mind to contemplate sympathetically such a study and such a change.

The trouble with our teaching is that we remember the words in which a great truth has become a commonplace, but forget to apply the truth in our life. Law is a seamless web. This is as true now as when it was first uttered by Professor Maitland a generation ago. But the web, though seamless, has a distinct pattern of colors, bright and dull. It is wrought with gold. It is, to be sure, loom-soiled and badly worn in places; still, it remains seamless, and is a good, warm fabric for all its faults.

In time, the schools got at this web and toughened it by teaching it, but before long they hit upon the expedient of cutting it into so many square yards for purposes of teaching. Into hunks of square yards it was therefore cut, irrespective of where the yard's edge came. It cut through pattern and through thread of gold and let the snippets fall unattended to. In other words, we developed our procrustean system of courses, each consisting of a stated number of lectures, each expected to complete the study of its square yard. The yard might contain a fascinating, intricate pattern or it might be only dull filling. Through it might run a thread which could only be followed if traced into another square yard, but one who dealt with one of the square yards had no part in the examination of the next bit.

The system of courses, though it has developed the teaching of law wonderfully in its time, is now outworn; it is detrimental to sound teaching principles to follow it longer.

Some way ought to be found of avoiding its evils: namely, first, of teaching so that the student will from the beginning realize the unity of law; second, of tracing a principle through all its applications once for all instead of taking it up in a number of times in its different applications; third, of avoiding the waste that comes from the necessity of making subjects of different importance and difficulty, which really require different lengths of time for their investigation, conform to a uniform time schedule; fourth, of developing naturally knowledge of law by studying it as a whole, teaching with care all the characteristic and difficult problems as they come in their sound logical order of development.

A thoroughgoing reform of this sort in the method of teaching law will require a fundamental change in the analysis of law. It has been the habit to develop different topics; but these topics are not arrived at on any well-settled principle. We have, for instance, a course on contracts, the development of which is around the idea of a method of creating rights; a course on equity, the idea of which is to examine the instances in which one can go to a special court for a remedy; a course on torts, the idea of which is to deal not with the formation of a right, but the violation of it by a wrong; a course on property, the idea of which is to develop not principally the formation of a right of property but a study of the kind of right and its incidents; a course on evidence, the central idea of which is a method of proceeding in court; and other courses are formed with other principles of delimitation. The law so taught relates itself only to a law that seems artificial and unrelated to reality.

Lately these defects have led some progressive teachers to relate their courses to particular fields of action. These new efforts, particularly in commercial law, have attempted to bring together the principles of law called for in a certain class of business transactions. This so-called functional approach to the law is important merely in its emphasis, as the

supposedly new information has always, of course, been given by good teachers; but the difference in emphasis is a valuable one in that it calls the attention of teachers to the weakness of the old system.

While the law student at the beginning of his course is not a child, to be led with faltering steps from simple ideas to complex ones, and therefore it is no objection to teaching law that the subjects developed in the first year of study are as difficult of comprehension as those developed in the third year, nevertheless, to give courses as it happens, now a course in property, next one in equity, next one in constitutional law, etc., involves a waste in new adjustment to each course as it comes on.

To cover the law properly as it is now, must require four years of law-school work. There seems no reason why that should not be required. Two or three years of college should be enough preparation for law if it is wisely taken, and each school can stipulate the education that it desires in its pupils. Thereupon, the whole law could be taught in a scientifically conceived order, so that everything of value would be presented to the student in its proper relation and as fully as would be needed. This would result in two improvements on the present system. It would do away with duplication and with the emphasizing of unimportant points which are too often the fruit of the present system, and it would also save the loss of motion caused by attuning one's mind to a new isolated topic each time a new course is taken up.

Begin, then, with the simplest legal situations and go through constantly more complex ones until the whole experience of human life has been covered.

For the first year, the study will begin with *individual* rights. Treating the individual as if he were an isolated creature with no relations with others, there should first be studied the nature of legal personality and the rights which

flow from personality, such as freedom from violence, from personal indignity, from injury to reputation, etc. Next will come the study of *familial* relations, domestic status and its incidents; the family, its formation and its position in the law; marriage and divorce; the domestic relationship and its incidents, such as rights to defend, to correct, etc. The third field of study will be *social*. In this will come the rights that spring from relations of a private nature with other people; rights of property; rights the infringement of which constitutes torts; social agencies, like clubs and other non-commercial associations; social agreements; charitable organizations of a semi-private nature; and all laws that arise from the association of men outside business and politics. All this might be covered in the first year and would give a strong start in the development of legal ideas.

The second year will be occupied with *commercial* relations: contracts and business agreements; association in business of all sorts, business agency, partnership, incorporations, syndicates, etc.; commercial ways and needs, like the law of banking, of insurance, of trade, etc. Maritime law and relations might also come in here. A whole year's work on this general branch of human experience can be arranged by the teachers in the subjects so as to form a complete whole, and give to the second-year student a thorough training in all of commercial law.

The third year will be occupied with *societal* law. This will take in all public law, constitutional, administrative, etc., including the law of taxation and the law of public corporations; international law, some topics of the conflict of laws and of criminal law. Here, again, discussion based upon experience by a group of teachers in the subject to form a single year's study cannot help proving much more enlightening, and cannot help giving to the student a much more thorough grasp of the problems than any work done in the schools today.

In these two years the student must be given a background of facts on which to base his legal study. Whether this should be done in the method now adopted by those favoring a functional approach or whether some better way can be invented, remains to be seen; but one has great faith in the united wisdom of a group of teachers in a class of subjects such as those here considered.

The fourth year would be devoted entirely to a study of *remedial* law; courts and their ways and jurisdiction; procedure; evidence. The time allotted to this general subject would enable it to be developed in a way that should stimulate the power of research and the feeling for reform. The second and third years would be broadening and enlightening years. The fourth year, building upon the experience of the second and third, could develop a power and a judgment in the students that one feels can seldom be developed by the present curriculum.

I am convinced that a school so organized, with teachers set to congenial assignments, is calculated to carry us as far ahead in our profession as we can go in this generation.

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