A LAWYER LOOKS AT A LAWYER'S TRAINING

Certain Intellectual Attitudes Commonly Expressed in the Law Schools Which Are Destructive of the Free Manifestation of That Intelligence Which Is Our Heritage —Need and Difficulty of Objective Thinking—Tendency to Invest the Law with an Appearance of Vast Profundity—Proper Attitude toward the World of Legal Learning—"The Great Thing Is to Be Simple"

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ONE purpose of a university is to afford a reflection of a universal viewpoint, through minds of diverse viewpoints. My viewpoint is that of a lawyer, not a teacher. I speak to you as one who, having been a student at such a law school as this, has practiced law for twenty years. Let it be plain that I do not indict the law schools, nor the law teachers. But every one of you will agree that all of us have a common enemy. It is that which impairs the high quality of our thinking. I intend to discuss certain intellectual attitudes commonly expressed in the law schools which I think destructive of the free manifestation of that intelligence which is our heritage. A wise man has said, "So live that the man you wish to be at forty, may be." Each of you is now the potter and your hand should not shake. Goethe said, "Let the young man take care what he asks in his youth, for in his age he shall have it."

The best thing about the lawyer's life is that, if you are big enough, it is a life of endless intellectual growth. That growth of your mind *is* your life, for your life is not made by externals. Emerson said, "Nothing is, at last, sacred but the integrity of your own mind." He might well have said, "Nothing is, at last, important but the infinite unfoldment of your own mind." The two are really the same—for the integrity of your mind is attained by a slow growth and its genesis is that infinite capacity for, and the taking of, infinite pains, to the end that its natural enrichment may appear.. This has been seen as the source of genius.

The natural mind of man is a spontaneous bubbling up of native intelligence. Children have this until they become self-conscious. You can perhaps remember that you had it in your youth and, if I am not mistaken, you will observe that as you proceeded through your schooling it faded as you became more self conscious, more impressed by the thinking of others and more burdened with hard work in thinking. The psychologists, who have been studying the training of children, have learned that one thing which greatly inhibits the free play of their natural intelligence is consciousness of self. The whole development of the training of children in modern progressive schools has proceeded upon the basis of a careful recognition of this fact. As I observe the thought processes current in law schools, in the light of my experience as a law student and lawyer, I am impressed with the extent to which the student's thought is robbed of its natural versatility and spontaneity. My thesis here tonight is that this is because there is a failure to avail ourselves of the high privilege and power of objective and impersonal thinking.

What is impersonal thinking? You and I watch an elephant walk up the street. Well, he just comes up the street! We critically observe him. He comes without our effort or responsibility. We need not think about ourselves. We like to look at him but we do not want to own him. Our thought about him is purely objective and impersonal.

Yet, our thought may not be purely impersonal. When fear or desire comes in, we may say, "Will he walk on me?" or "May I own him?" Or "Oh! There is the professor of elephantology. I must find out what he thinks of the elephant, and there is Professor So-and-so over there. He is a practical elephantician. He traveled with a circus and carried water to the elephants for fifteen years. What does he think of the elephant and, oh dear, what will he think of what I think of the elephant!" Such thinking is not impersonal.

My first illustration—impersonal thinking—is the thinking of the seasoned lawyer, the thinking you students will come to have, the thinking you should have now. The second illustration is the thinking I had as a law student. The first is real thinking about the elephant. The second is not, because if I think about what you think regarding what I think about the elephant, I am thereby really thinking about myself, not about the elephant at all. And this is the birthplace of intellectual egotism and untold limitation. Fear and self-consciousness, if you have them, prevent your calm consideration of the law, because they incline you to think of yourselves. Deference to the personality of others is similarly obstructive. Your thought is thus diverted from its right object. This is why you find learning the law difficult. You are not thinking of the law.

After years of effort in trying to think objectively, I can see how my law school training almost defeated it. I can see that the same obstructions beset you. I was brought into a thought field which was entirely new. I stood before it with the awe of the uninitiated for a vast something of which I was ignorant. It involved strange impressions, new concepts, was couched in a strange language. My problem was to make that thinking my own and

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this I valiantly attempted at the rate of reading, say, fifty pages of hard cases a day.

My way as a student, as yours, was made harder by certain bad habits and traditions of the lawyer and law teacher. Modern scholarship generally is now denying that many branches of thinking are sciences, which for generations have been paraded about as such. The law is in no respect a real science. The law is merely a body of thought which reflects certain phases of man's thinking about human relationships. It does not lie in planes of precision, and is not, nor can it be, entirely logical. Nor need it be highly complicated. I have had long experience in a highly technical field involving a congeries of legal, economic, accounting and engineering principles. Some of the cases appeared to be very complicated. But every one of them ultimately resolved around a few essentially simple principles. Common sense, not occult theory, was their key. This is, I think, true of the greater part of the body of our law. Pascal said, "The great thing is to be simple. But it is so hard to be simple." Certainly it is not the way of wisdom to try deliberately to make things complicated.

But we lawyers, and especially we law teachers, have been guilty, largely unconsciously, of a sort of affectation. Ours has been a learned profession and our egotism has inclined us to strut. We cannot resist the temptation to invest the law with an appearance of vast profundity. This is a natural inclination—in part, the result of a sort of self-hypnosis, because frail humanity finds one measure of its worth in its work, and is prone to magnify its difficulty and importance. Each thinks he sees high qualities in his chosen field which none other sees. The automobile salesman honestly thinks his automobile the best. Further, most people are guilty of the assumption that a man is learned or should be thought to be so if he expresses simplicities in profound language. The practice has been common to the medicine men of the tribes of all the ages. Thus, we may in part account for the pompous language of court decisions, the unnecessary repetition in the language of pleadings and contracts, the hypercritical and supertheoretical structure of many of the law review articles, and their attempts to find intricate and involved legal explanations of which the courts themselves would be neither capable nor guilty.

There is even an unnecessary ostentation in our display of industry. We are told solemnly that we should not submit an article to a law review with notes less than three inches deep. These articles and decisions are the admiration of all aspirants to law review editorial boards, which cite forty decisions in support of propositions not even in dispute, when a single leading case would do. Law work is done in a laborious way consistent with its claimed importance and profundity. The lawyer, like Atlas, is never pictured as upholding his universe with spontaneity. He has the frown of deep responsibility which to the close observer looks like seriousness.

To this law school world, partly real and partly affectation, I came as a student. I came with such spontaneity, individuality, and freedom as were left to my mind after experiencing the regimentation of my under-graduate experience. You will observe that the elements which I have named all tend to make the student think the work difficult and his capacities inadequate. The effect upon me of all this combination of circumstances was to give me an inferiority complex and a personal sense of great responsibility.

The manner of our instruction perpetuates these errors. The law student sets forth valiantly to acquire what appear to be things external to him, and to make them part of himself. He is going to own the elephant. He is certain to get the impression that this acquiring (i.e. learning) and keeping (i.e. remembering) is the essential nature of the educative process. Now, if the essential function of the lawyer were to go about retailing his information like an itinerant Oriental story teller, this method would perhaps be well adapted to the end. But the lawyer is a creator, not a mere retailer. His education should be by a process of unfoldment of his natural powers rather than by an accretion of external facts. The free play of the spontaneous intelligence, the resourceful, colorful, activity of the reasoning powers of the first class lawyer, are quite unlike the activity of a mere mental storekeeper, with his facts all nicely arranged in well ordered boxes, whose contents he dispenses to his clients. These legal mental storekeepers make fairly good law clerks, not lawyers. The factual information, the rules of law, can always be readily found; it is their resourceful use under wise generalship which is difficult. If you think of your mind as a limited sort of storehouse, into which you pile all the things you can grasp, you have an entirely false idea of what education is. It is absolutely unnecessary to make this learning a part of yourself. You make a mistake to try to learn it by that process. The great body of the law is all there. Any part of it is easily available to you. The greatest step in learning it is made when you really know that. It is absolutely useless to try to make anything permanently part of yourself that you do not love, and it is hard to love anything which you can acquire only with a struggle. Fear and the very struggle push it away. How do you account for the remarkable statement which you sometimes hear students make—that as soon as they have passed the examination, they intend to burn their case books and their note books? That attitude of revulsion is the proof that the process is wrong. By what possibility can the student reason objectively when, as at some of our leading law schools, he has been invited, at the beginning of the course, to look at the two students beside him and remember that one will certainly flunk?

Is it not simple enough to see why the academic process makes us self conscious? It is not on an impersonal basis. If you think of your mind as a sort of storehouse into which you are piling your acquisitions in a selfish process to avoid academic extinction, you become selfish. You engage egotistically in a contemplation of your storehouse and a comparison of it with that of others, and, mark my words, your storehouse will always seem paltry to you; you will always be hampered with a fear about it, and your natural and real powers will be hindered in their ripening. There is nothing finer than to work hard, if for the love of it. But if, in the love of self, you stuff your paltry cupboard so that, like a cheap minded housewife, you may display your Mid-Victorian furniture to the envy of your neighbors, your mental life will be that of the drudge. This is the explanation of that common

phenomenon among our American lawyers—the drudge mind and the intellectual egotist. When the housewife displays her egotism and pride in her furniture, we see her at once as a Mrs. Babbitt. But in the academic world we are not so certain to see scholarly ostentation of mere mental bric-a-brac for what it really is. University people who regard themselves as liberals point to the selfishness and egotism of a capitalistic society resulting from the emphasis on material acquisitiveness—and it is detestable. But they are frequently blind to the fact that a brother in the blood stands boldly by his side—the selfishness and egotism resulting from the false processes of intellectual acquisitiveness—and that a society suffering from material egotism will not be saved by a class trained in intellectual egotism.

The world lies about you as a thing of beauty, which you do not have to acquire. The world of legal learning is here in identically the same way. You should look at it, should become thoroughly acquainted with it, and by holding a right attitude of mind, should come to love it. When you come to love it with a free mentality, unencumbered by any selfish desire to own it, as much of it will be yours as you need, and when you need it. This freedom is something the drudge mind never acquires. Nor can it even understand how it can be.

The happy thing about the life of the lawyer is that he may come to think objectively and impersonally, because the fine discipline of his rigorous life in the practice emancipates him from false gods. My thesis tonight is that you should begin to shake loose your shackles while in the law school. The essence of the free mind, and of the able mind, is a certain selflessness. "Humility is the beginning of wisdom," and that humility the lawyer acquires who matures. His dogmatic certitude gradually fades. He comes to see that the law is not an exact science. And while he has a great regard for, and interest in, the law, any egotistical inclination to be proud of what he has acquired of it eventually fades out. The bigger he is, the less pretentious he is. As he matures he claims to know less about the law and becomes a better lawyer by the process. Of the few eminent lawyers I have happened to know, none had any intellectual pride. They appreciate that the law is of purely finite character; that logic is not divine, that it works equally well for devil or saint; that, as Aristotle said, "Only an amateur expects exactitude in life;" that one should never fail to know, as exactly as one may, every bit of the law there is with reference to his problem; but that one should not confuse case learning with wisdom, mere intellectual cleverness with power. As the lawyer matures, it is the common experience that he expresses himself more simply, avoids long sonorous sentences and many syllabled words, and tries to win his case through the simple statement of the truth rather than through a "learned" brief, redundant with the citations of alleged authorities. May we not have the same simplicity and humility in the law schools? Why should we have anything else?

Mr. Emerson said, "Nothing, at last, is sacred but the integrity of your *own* mind." The free play of your innate and natural intelligence—and that is your "*own* mind"—is your real being and the thing by which you are to come, if ever, into the stature of your real selfhood. In order to provide the food essential to enrich your consciousness, it is well to know what the thinking of man has produced in your chosen field. But it is essential, if you are to maintain your own integrity, that you do your own thinking. And it is destructive of that integrity, if you swamp your own individuality with the thinking of other men, which if it ever was real thought, was the expression of *their* minds with reference to their problems. Here is the great vice of dependence upon precedent and of deference to mere human personality and opinion. The academic world is always loudly claiming more independence of thought than is found in the outside world. But every time a Brandeis or a Pound walks across the pages of a law review, every letter on the page performs a pretty typographical obeisance. Every time one of these transatlantic "Leviathans" glides quietly out to sea (and both of these men are very able men), all the little puffing tug boats in the harbor blow their whistles so long that they have to suspend traffic for the rest of the forenoon until they can get up steam again. The matured practitioner shows no such deference to frail humanity. Deference to mere personal opinion is no part of the search for truth, for the truth is inevitably impersonal.

That such processes and mental environments warp the mentality of many law students is shown by the appraisal which lawyers make of many men just graduated from law school. They sometimes say that the course at some of our best law schools is "three years in and six years out"—which means that it takes six years to restore the natural resiliency and bounce of a man's mentality, when preserved in the academic salt barrel. They see that there is high danger in academic training of its teaching the student to distrust his native intuition and common sense, by establishing his trust in something external to him, thereby making him untrue to himself. I have frequently heard lawyers complain that the law graduate is too greatly impressed with the false idea that the law is a science and a difficult one; that he continually seeks for authority in the thinking of other people as expressed in decisions or text books, and is incapable of that free play of versatility and resourcefulness, which is the heritage of the untrammelled mind; that his native intelligence is temporarily obstructed by his bad scholastic habits. A free mind knows no precedents. It looks at the problem in a fresh way, and forges its own conclusions in a pattern none other than its own. The truth is alive, and the man who wins lawsuits is the man who keeps his thinking fresh, who forms his thought patterns in something else than the conventional mold. But the drudge mind is the product of that scholastic attitude, by which the chief end of man is to glorify, not divine intelligence, but the intelligence of the instructor, by handing him back the instructor's own thinking, in the instructor's own language.

Now, I am speaking of my own experience. The problem which I had to meet as a young lawyer in escaping from the bad mental habits due to my conventional law school training, was the hardest problem that I have ever met. The training had produced in me, as it does with thousands of young men, a lawyer with a mind as egotistic and brittle as that of an Italian prima donna. Impersonal and objective thought was quite beyond my

capacity. This was the result of the congeries of fear, self interest, deference to transatlantic liners, and a conception of the great difficulty of the law. To those of you who have the responsibility of molding law school traditions, I say that my condition was not my fault. So long as I did work of an unimportant character, I limped along fairly well with my law school mental habits. But when I reached work of actual size, I actually had to discard all of my law school habits and establish new ones, in order to avoid nervous breakdowns after I had had one, and was threatened with a second. Men never break down from overwork. They break down because of brittle minds. The great strength of the tree is in that it knows how to bend.

You may say: You have spoken about the corrosive effect of egotism. Is it not true that some of the most effective men in the legal profession are men of that hardboiled, egotistical type who, by dint of hard work and by processes of acquisition, have taken unto themselves, as the successful business man gathers property or money, the knowledge of the law which has made them a power in their universe?

The reply is: In the infinite variety of examples afforded by human individuals, one may find proof for any thesis. But after observing the mental activity of a great many men, I am sure that human egotism kills more men than bad whiskey. Humility, not human egotism, is the beginning of wisdom. The most efficient mind is an objective and impersonal mind because it is alive and adaptable. The young lawyer's greatest enemy is not his ignorance of the law, but his fear, which is due to our system of scholastic training putting continual emphasis on the personal ego. Yet observe that Jesus said, "Of my *own* self I can do nothing." The Bible says that "Humility is the beginning of wisdom." Lincoln said that he recognized in himself merely a stewardship and an agency. On the other hand, Woodrow Wilson is now commonly recognized as having failed in making effective the very high degree of human idealism, which he expressed in his fourteen points, by his complete inability to get himself out of the way, and to divorce a great ideal from his mere human personality. He held a lamp that had a great light with a clutch so tight that he shattered it. This failure of life to produce a leader big enough to be humble was one of the great tragedies of the war. Lincoln understood life better and would have made no such mistake. Jesus made it plain that the truth is always an impersonal thing, and that its mastery is not properly by any egotistic process. But it seems to me that humility is neither the beginning, nor the end, of much of our scholastic learning.

The dangers in legal dogmatism in a rapidly evolving world, its heavy penalties in the law's past unfoldment, the necessity that the lawyer solve today's problems in a way to reflect the wisdom of the past only if it be today's intelligence, are important considerations clear to every one. But does not our legal training produce the conventional type of thinking which we are well aware we should avoid? The world demands from the lawyer the same quick sensitiveness to the truth which has given the modern scientific mind its remarkable advances. The brittle mind is not the mind of the modern scientist, nor of the modern lawyer. He is continually faced with new problems, and needs the resourceful intelligence which can devise new means of solving them. He has learned from experience that, as Mr. Justice Holmes has said, "certitude is not the test of certainty," that "delusive exactness is a source of fallacy throughout the law," and that the essential nature of most legal controversies is a conflict of contradictory rights, some of which must yield, even when all appear unqualified. Experience has taught him to distrust the dogmatist, who looks to precedent for the precise, when the best fruit of fresh perception is apt to be the unprecedented and approximate.

One of his important functions is in the conduct of negotiations involving conflicting interests. Here it is his privilege and duty to lead a group of antagonists out of the claims of intrenched selfishness, which are usually based upon what are regarded as "rights" but which have no such definite substance, along lines of conciliation to settlements which express a higher right than the attrition and expense of court controversy are apt to produce. We daily observe the courts' battlefield strewn with debris which expresses, not the courts' mistakes, but the stubbornness of the brittle minded lawyer, in insisting upon the egotistic assertion of "rights," which from a more objective viewpoint should have been seen as claims. In controversies where results are needed in accord with good business judgment, or in accord with a true conception of right relationships between the client and the public or the government, the dogmatic lawyer insisting upon technical rights is apt to do great harm. Especially before the administrative tribunals, we have frequently seen the progressive advance of great industries, and their right relationships with the public and with the government, obstructed through the technical controversies of the lawyers, waged through the insistence upon the unyielding and the exact with reference to the indeterminable and inexact—lawyers representing the public quite as much as those representing the industries. These are failures of our profession, failures to which our methods of legal education are a contributing cause. As a profession we need to learn the ways of peace and that humility is the frequent beginning of fine victories where egotistical insistence fails. When a man ceases to proceed egotistically it does not mean spineless negativity. It means that for the first time he finds the full measure of his real efficiency.

Now I am somewhat disturbed about this speech, for it has not a single inch of annotations and so no shred of scholastic respectability. I must cure this by quoting some profound and resounding authority. I shall end by quoting from a Chinaman. This is from the works of that great medieval metaphysician of the 3rd Century, Tao San. You might have some trouble to find it in the books for he was brought into being for the purpose of this occasion.

> Weary, I asked of Tao Lung, "*Where* is magnanimity?" He was then old. He said:
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> "I knew not until my third wife came, the lovely Looan Tou, in whose untutored and, so, untired, eyes the light of wisdom lay. I said,
>
> 'Even the crazy goose wings north each spring upon his appointed way, as though upon the winds of destiny; while I, the most learned of my time, like a dry and withered lily pad,

am tossed about my garden by every wind that blows.'

And she said, 'He sits in darkness, who holds unto himself, as though he owned, his paltry lamp with guttering flame. Come with me into the garden, where the plum trees bloom, and where the sun, majestic and unowned, surveys the all it owns.'"

And, in conclusion, may I ask, where *is* Magnanimity?

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

COMPULSORY Arbitration of International Disputes. By Helen May Cory. 1932. New York: Columbia University Press. Pp. xiii, 281.—This volume is an extraordinarily precise statement of bilateral and multilateral experience with the idea of the compulsory arbitration of international disputes in the 19th and 20th centuries. With a restraint seldom exhibited in this field, Miss Cory has kept her text confined to her title. Examination of the treaty product since 1820 provided the material for what amounts to a historical narrative of the development of the ideas of compulsory arbitration, for there have been two. The practice of arbitrating was at first voluntary and *ad hoc* to the specific dispute. Treaties obligating states in advance to arbitrate disputes were before the Great War referred to as compulsory, and emphasis was laid upon the scope of the categories of the disputes to be so treated. Since the Great War and the existence of the jurisdictions of the League of Nations and Permanent Court of International Justice, compulsory arbitration has implied reference to a dispute by unilateral state application, with an incidental restriction of the excepted questions.

Bilaterally and multilaterally, there have been some two dozen styles of compulsory arbitration in the broad sense of a system of pacific settlement in which the pronouncement has binding force. For the first time, Miss Cory identifies each of these types, showing how their operative clauses have progressively affected the development of jurisdictional scope. The accuracy of this analysis makes the book a contribution to historical jurisprudence.

The postwar period is overshadowed by the Optional Clause establishing the compulsory jurisdiction of the Permanent Court and the rapid increase of the compromissory clause. Between publication and the writing of this review the parties to the Optional Clause have risen from 37 to 42 states which are subject to unilateral suit within the terms of their subscribing declarations. The increase in number of compromissory clauses is rightly regarded as "the most encouraging development of the postwar period," but the existing number of them, given as 300, is a considerable understatement. The value of compulsory arbitration is defined as removing that uncertainty as to the intentions of states which obstructs an international sense of security.

Reservations to bilateral and multilateral treaties have been greatly reduced and simplified, but in their nature provide loopholes of escape. Miss Cory rightly comments that the new exception of "domestic jurisdiction" plays the same part as the obsolete "vital interests," but does not mention that "domestic jurisdiction" is a legally determinable fact at any given time. The Optional Clause bases jurisdiction upon the existence of a "legal question," which is still undefined internationally. The compromissory clause obliges the parties to a treaty, which defines their engagements, to submit their disputes arising under it to arbitration; by its use in all fields of international relations and frequent reliance upon it, states are becoming habituated to conducting their affairs within the conception of law.

Boston. DENYS P. MYERS.

Aron's Notes on Proof: The Probative Law. By Harold G. Aron. 1932. New York: Georgic Press. Pp. xxiv, 561.

Handbook on the Law of Evidence. By John Jay McKelvey. 1932. St. Paul: West Publishing Co. Pp. xix, 576.

That there is a growing need and demand for a change in our court procedure and in the production of proof is indicated in two recent books of decidedly dissimilar techniques of approach. The Fourth Edition of McKelvey's *Handbook on the Law of Evidence* treats the subject in the traditional Hornbook manner, being concerned primarily with a brief "presentation of the law of evidence with respect to its origin, growth, and present status." It is a distinct improvement over former editions of the work, adding, as stated in the preface, "some material indicative of the current trend of the Law of Evidence towards a maturity less rigid and more in harmony with (to quote the words of Professor Wigmore) 'the idea