

SYSTEMS IN LEGAL EDUCATION*

Until recent years there was but one system of teaching law in the schools. It was the good old system employed in all the professions of introducing the student to text-books of recognized authority and compelling him to commit their contents to memory, under the guidance of an instructor. As shown by Professor Theodore W. Dwight, "it was the method advocated in the Roman law of introducing students to their first knowledge of that remarkable system of jurisprudence." In the earlier days, the work of the instructor was limited to ascertaining that the student had properly memorized the text and to oral explanations. The student's memorizing feat being accomplished, he was admitted to the bar. But because law, like medicine, is not an exact science and a working knowledge of law involves knowledge not only of its rules, but of how those rules are applied, only the preliminary stage of a man's legal education was finished when he passed out of the law school into the ranks of the profession. While the swearing in of a law school graduate placed upon him the *imprimatur* of the court in form notifying the public that he was competent to practice, it, in fact, was little more than a permission to enter upon the second stage of his education in which he would be given the opportunity to learn the application of the rules of law. Before his admission to the bar, he had been studying law only in the abstract, but afterwards he began a voluntary course of delving into the undigested mass of its original sources,—always more or less at the expense of clients, who were compelled to take the consequences of his lack of knowledge.

Of late years, public opinion and legislative action have forced a very substantial raising of the standards of admission to the bar. The principal law schools of the country have more than met these requirements by adding to their courses of instruction, as a means of teaching the application of law as well as of aiding the student to digest and crystallize his knowledge of the rules, an extended and systematic study of precedents.

But the mere addition of the systematic study of cases to the work of the law school was by no means a readjustment of the methods of legal education. It was nothing more than the extension of

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the field of school work to include and systematize work which had formerly been left to the student to perform without system after his admission to the bar and generally according to the exigencies of practice.

The fact that a study of the precedents, either before or after admission to the bar, can not be dispensed with in the acquisition of a legal education, some years ago led a number of the most brilliant law instructors of this country to the conclusion that what was indispensable as an aid to the student, to infuse into him the meaning and spirit of the law and to teach him its application—in short, to give shape as a whole to what would otherwise remain to him a collection of arbitrary and more or less unrelated rules, and to develop his powers of analysis, furnished the only proper means of systematic study. The “case system” was born and was adopted by one after another of many of the law schools of the country. By many of its enthusiastic admirers its alleged superiority over the way in which Coke and Mansfield and Marshall and Lincoln acquired their knowledge of the law has been proclaimed as though it were not only an innovation in the method of teaching, but a new and royal road to learning. The very name itself soon developed commercial value as a trade-mark, and as such it has not gone unexploited.

The case system consists in teaching law from start to finish by means of cases as a basis. The student, without any preliminary teaching in the terminology and fundamental rules of the science that he proposes to master, is furnished with a compilation of precedents, arranged with masterly skill to show how rules that originated in primitive conditions have been developed to meet the complexity of modern life. From the study of these cases it is demanded of him that he first extract the rules of law and then trace them through the process of development down to their present-day application. Nothing could be more simple—in its statement.

The superiority of one system over another can be proved conclusively only by results. The case system has not been long enough in use to furnish this proof. The most distinguished professional men of the present day are men whose student life ended before the day of the case system, and in expressing a preference for the old-fashioned way of studying law I am not so unwise as to assert more than a belief, which I hope is not grounded in prejudice so as to be irremovable by evidence, that the man who undertakes to study under the case system does so under a handicap. But in the absence of the proof, which I doubt will be ever forthcoming, the question must be open to debate, with the burden of the argument on those

who champion the innovation. And this is the way that burden is sustained by Professor James Brown Scott, one of the most distinguished law instructors of this country, in an address delivered at the opening of the George Washington University in September, 1906:

"In order to forecast the law, and make a judgment in a particular instance a development or prolongation of precedent, rather than a guess, law must be studied historically and the threads of development knit into a single strand. . . . The only reasonable and the only satisfactory way of dealing with the English law is to bring to bear upon it the historical method. Mere legal terminology may seem a dead thing. Mix history with it, and it clothes itself with life.

"Admitting that law is a science, it necessarily follows that it should be studied as a science; and if, as Descartes said, the first principle of the philosopher is to doubt, the first step in science is experiment, and perhaps the happy combination of doubt and experiment may produce, not merely a science, but a philosophy of law.

"Almost within our own day we have discarded the text-book for the experiment, and high schools as well as colleges and universities turn the student into the laboratory. Chemistry, for example, is no longer a pleasing exhibition performed by an instructor in a darkened room to the delectation of freshmen. The student is put to the test, he takes the problem, he experiments, he solves it, and in so doing acquires a training and knowledge which cannot or which should not be divorced. The text-book is not neglected, for otherwise each student would have to reconstruct in his laboratory the experiments of the ages; but the training and knowledge gained in the laboratory fit the student to read with pleasure and profit approved texts, and in rare cases the training and knowledge so acquired may advance by experiment the science of chemistry.

. . . "Anyone who has had experience in the class-room knows that the student is awakened by an illustration taken from the professional experience of the instructor, and that the concrete illustration remains when the abstract principle is forgotten which it was sought to illustrate.

"If, then, the excellence of the text-book method is found in discarding the text and resorting to the concrete case, it necessarily follows that a discussion of a subject based solely upon selected concrete cases should commend itself to teacher and student alike. The concrete case is grasped by any student of average intelligence, and, once grasped, he is prepared to follow in detail the discussion of the case. If to the concrete case hypothetical instances and modifications be suggested, the student is led perforce into a theoretical discussion in which he discovers the theory underlying the case and its modifications. By the constant application of this method, not as a test of memory, but as an investigation of principles of law, the student is led insensibly to a grasp of legal principle. The concrete case suggests the theory, and theory and practice thus go hand in hand. From their happy combination, knowledge of the law is produced. By means of this method the student is the chief factor; he trains himself; he discovers and reconciles difficulties, and receives in proper cases the guidance and assistance of the instructor."*

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This, then, is the argument in favor of the case system in teaching law—a system differing in no wise from the old-fashioned course of instruction which trained the master minds of the profession except that the latter, by teaching the student the rudiments of the law—its origin, its terminology, and its fundamental rules—prepares him to enter, without loss of precious time and needed energy and to pursue along the lines of least resistance, the scientific, broadening and training part of his legal education—the study of cases. These three together—origin, terminology, and fundamental rules—furnish the language and conceptions of the law, which must be acquired in some way before the real work of training and development can begin; for no man can understand the application of law made in the concrete case until he can think and speak in terms of the law.

The only question at issue, then, between the advocates of the two systems is as to the wisdom of abandoning entirely the dogmatic and exegetical preparatory course designed to facilitate the advanced work, throwing the student, who is as yet ignorant even of what law is, into the strenuous task of constructing at once the plans, foundations and superstructure of an edifice for which he is furnished with nothing but the prepared materials of the superstructure—not even a knowledge of the simplest principles of the builder's art.

The high priests of the case system cult are extremely enthusiastic in their propaganda. It strikes them with the force of divine truth that a line of study which flooded their already prepared minds with the light of revelation must be not only the logical but logically the sole line of study—dispensing with the necessity for the elementary instruction which enabled them from the very start to enjoy the more scientifically mapped-out line of study as at once an intellectual treat and a mental profit.

It is quite evident that when Professor Scott says that the excellence of the text-book method is found in discarding the text and resorting to the concrete case and therefore the discussion of a subject should be based solely upon selected cases, the persuasive force of his argument is due to the fact that he has so cleverly stated his premise in the form of a paradox that it has all the charm of an epigram. It is needless to say that the excellence of the text-book method is not found in discarding the text, but in supplementing it. Is the excellence of medicine in illness found in discarding medicine and resorting to scientific nursing? And if, in illness, medicine can be made excellent and effective only by supplementing it with scientific nursing, does it necessarily follow that the sole

treatment indicated is a course of scientific nursing? If the efficacy of a drug administered in composition has once been demonstrated, does it necessarily follow that this drug's supreme efficacy will be found in administering it pure?

The great trouble with all teachers—the great trouble with all men in discussing methods of instruction—is their tendency to forget the difficulties that they themselves experienced in the early stage of their own student career, and their consequent inability to understand and appreciate the difficulties to be overcome by those who are now in their turn beginners. They are unable to go back over the years and put themselves in the mental attitude of the student. Especially is this true of teachers of such a lawless science as the science of law. But in justice to law instructors it must be said that the weakness in their teaching is largely due to excessive modesty. They take too much for granted. The elementary propositions which once brought them to the verge of nervous prostration have now become to them self-evident truths, and they cannot believe that the members of a succeeding generation could possibly be as dull as they themselves once were. We are all unfortunately given to teaching over the heads of our students. And when, to difficulties arising out of the personal equation, we add difficulties due to system, there ought to be some overpoweringly good reason for it.

When the advocate for the case system says that “almost within our own day we have discarded the text-book for the experiment, and high schools as well as colleges and universities turn the student into the laboratory,” it seems to me that he confounds addition with substitution.

Laboratory work (within which term must be included the case reading now prescribed to students in all schools of law) is either demonstrative or experimental. Formerly, none but demonstrative work, and but little of that, formed any part of a scholastic training. But every professional and every technical school has been forced to make laboratory work a very substantial part of its means of imparting knowledge. Except in the case system law schools, this laboratory work has been taken up, or extended, not in substitution for, but partly explanatory of, and partly in addition to, the text-book or lecture work, which was formerly the sole, or nearly the sole, basis of instruction. Except in the case system law schools, the text-book or lecture has not been discarded as a basis of instruction. But as surely as the adolescent must have a food differing from that of the infant, the vanishing point (in value) of mere

exegetical teaching is reached, and the good work can only be carried on by means of the laboratory.

Would you teach a man surveying by giving him a transit and chain and sending him out into the field to measure lines and angles, that from the multitude of his observations he may deduce the rules by which areas are computed? Or, would you first teach the boy arithmetic and trigonometry with a text-book. (and birch-rod, if necessary) and then send him into the field? Can you imagine a boy beginning the study of anatomy in the dissecting room?

The fact is that in every line of technical instruction, barring only the law, a preliminary course of dogmatical exegetical teaching is absolutely required; and although laboratory work is often taken up in connection with it, such work is purely for demonstrative purposes.

It is literally true that schools of technology have discarded the printed text-book, but it would be a mistake to suppose that they have discarded the text-book system or that they have substituted laboratory work for the printed text-book. Inquiry at the Carnegie Schools of Technology, in Pittsburgh, where they may well be supposed to be up-to-date, both in their methods of teaching and in the completeness of their laboratory equipment, elicits the information that no text-books are used, and there is an intimation that in these days inventions and discoveries follow one another so fast that up-to-date text-books in physical science are not procurable. To the question, Are the students from the start turned into the laboratory there to acquire their knowledge by constructive work? the answer received was a decided negative. Elementary instruction is there given entirely by means of lectures. Laboratory work is required in connection with the lectures, but only for the purposes of illustration and review—to clarify and fix in the mind of the student the information imparted to him in the lecture-room.

Whether the text-book or the lecture should be used in teaching is a matter quite outside of this discussion. In individual cases, whether the one mode or the other should be used is probably a question of expediency and not of pedagogy. Both the text-book and the lecture belong to the same exegetical or text-book system as opposed to the case system, and except from a pedagogical point of view it is immaterial whether the student prepare from a printed text-book before the class-room exercise or do his studying afterwards from the text which he has written himself.

It must be remembered that an introduction to law is an introduction to new and strange conceptions—some of them so new and strange that they baffle for a long time both the comprehension of

the student and the ingenuity of the instructor. For instance, the famous Professor Theodore W. Dwight described seisin as "the union of a physical fact with a metaphysical conception." When a man is asked for the first time to understand the peculiar blend produced by the union of a physical fact with a metaphysical conception, is it to be wondered at if he feels his reason totter?

The reports of cases were not written for students. They were not written to teach law. They are communications from the courts to the profession in justification of the courts' decisions. Not being addressed to laymen, but to members of the same profession with the judges, all of them supposedly learned in the law equally with the judges, naturally these communications take for granted a knowledge of the fundamental rules and conceptions of law.

Imagine the educational value to a beginner of one of these judicial opinions!

But while a single case can hardly be said to have educational value standing by itself, it is still true that the great mass of decisions, whether we consider them to have been correctly or incorrectly reached, are based upon fundamental rules of law as to the existence of which there is no controversy. And just as patience, perseverance and intellect discovered the key to the cuneiform inscriptions and translated them for us, so it is possible for the same qualities, in the multitude of decided cases, first to find, and then to trace, the rules of the common law.

But what a task a student sets himself when he starts by this method into his law studies! He is not starting in as the explorer of an uncharted region. On the contrary, he is proposing to familiarize himself with a country, the maps of whose landmarks lie upon every shelf; and yet, it is insisted that he should put all these aids out of sight and do independently the work of an original explorer.

To justify this apparent waste of time and energy there ought to be some overpoweringly good reason. And the advocates of the system have found this reason in the peculiarly intellectual training which it gives to the students who pursue it. Certainly, no system could possibly be devised that would better accomplish the desired result of imparting to the legal mind an intensely intellectual bent. When a man is put to work in an unknown field to discover for himself and almost by himself the causes of a multitude of effects, and having discovered and formulated them, to bring them scientifically into correlation, he must necessarily tax his mental powers to the very utmost. The original character of the work, the argumentative method of work, and the intensity of the effort put forth

are the formula for working out this intellectual training, which develops to an unusual degree the analytical faculty.

If power of analysis is the one supreme thing for the law student of proper ambition to strive for, if it is the most important part of the equipment of the great advocate, the safe counsellor, the even-minded judge, then, indeed, to continue to teach law by the old-fashioned text-book system is but the folly of men who are behind the times and whose clear duty it is to admit their error and to put into the hands of the entering student a compilation of so many hundred cases and oblige him from them to discover for himself the existence and doctrine of contingent, springing, and shifting uses with all their absurd and disturbing results.

There are two objections urged against the case system of study for all but those who propose to follow the theory as distinguished from the practice of the law.

The first objection is what would seem to be a natural tendency to over-train and over-develop the analytical faculty. Both observation and report incline me to the belief that it gives to an undue proportion of students a tendency, which they never lose altogether, to play the game, so to speak, strictly according to rule, for pure love of the game, and without regard to the stakes. They follow out their legal inquiries with absolute logical precision, and the desirability of making a proper application of the law is entirely overshadowed in their minds by the importance of following a proposition out to its absolutely logical conclusion. They love to split hairs and to argue technicalities which have nothing to do with the merits of the case except that, being raised, they delay or prevent consideration of the merits. They become intellectual spendthrifts; they forget that the science of law is a "lawless science," to apply which well learning must be tempered with wisdom. They fail to realize that "law is not a science in itself . . . [but] a resultant of social forces,"¹ and that the great judicial decisions—those that have had an important bearing on the national life—have resulted quite as much from a clear view of public needs and public opinion as from the application of precedent.²

The lawyer's opinion of the law upon a complicated state of facts may well be compared and contrasted with the mathematician's

1. Brooks Adams, Esq., in the *Green Bag*, January, 1907.

2. Professor Hershey, in *The International Law and Diplomacy of the Russo-Japanese War*, p. 85, expresses an opinion with regard to the study of international law mainly or exclusively by the case system which tends to support this view.

computation of the resolution of forces. The mathematician's factors are all physical and capable of being measured with extreme accuracy. The result of his calculations is absolutely correct, or so nearly so that any possible error may be disregarded as a negligible quantity. No two competent mathematicians will vary in the results of their several calculations.

On the other hand, few states of fact can be settled by the application of a single rule of law. Few rules of law run in parallel lines. The most that any lawyer can do is to find the point where two or more rules meet in conflict, or where precedent is not quite in accord with the public needs, it may be with the national integrity, and then estimate the result. The making of a constructive lawyer calls for more than great power of analysis, more than a historical knowledge of precedent—it calls for the even development of the mental equipment to the knowledge and appreciation of a complicated array of forces which act and interact—and the rule that precedents must be followed is but one of these forces. It is this very necessity for the constant exercise of practical judgment to avoid being led astray by the intellectual bent that brings the personal equation so prominently into the practice of law.

The graduate from under the case system makes a wonderful brief writer and an equally good digester of the reports; but his training has had a natural tendency to send him up into the intellectual clouds, and as long as he stays there his confrère of more homely, but broader training, has the advantage over him as a professional factor.

The second objection is that the courses under the case system require the expenditure of more time than do the equivalent courses in the text-book schools and that there is an actual loss of valuable time at the beginning of the first year, all without a compensating balance in the superior development of the powers of analysis. That there is this actual loss of time there can be no doubt. The men of my acquaintance from the case schools tell me without a dissenting voice that they spent the first few months of their law course in a miserably discouraging, straining effort to understand in order to learn, and at the end of these months all that they had to show for their time and strain was an ability to learn.

From the very nature of the case system more actual hours of work are required by the student under it to cover a given amount of ground than are needed by the text-book student. To anyone acquainted with the intensive method of mental cultivation applied in the case schools, this must be self-evident. But if any demonstra-

tion were needed, a comparison of the curriculums of the schools under the two methods would give it.

In the text-book schools that have an adequate teaching force the course of instruction is generally divided into three stages according to a method which has lately been adopted in the best schools of technology and to which Cornell University has given the name of "the concentric system."

In the first stage, under this system, the law student is put through a course of elementary law which covers practically the whole range of municipal law, both substantive and adjective. In this stage he gets a bird's-eye view, as it were, of the entire body of law and so is quickly made to appreciate the exact nature of the task which is before him. The conceptions of the law are explained with the utmost care and patience and are dinned into him until at least he acquires a familiarity with them which passes for comprehension and which in the second stage becomes comprehension if there is any material in him out of which to make a lawyer. From the text-book he memorizes the definitions and elementary rules and these are elaborately explained to him in the lecture-room and their application is illustrated from every point of view with the homeliest and simplest examples that the ingenuity of the instructor can devise. There is always kept prominently in sight the necessity for getting at the student's point of view—for finding out the peculiar difficulty in the individual's mind and removing it. In this stage the student is not spending months in a heart-breaking effort to find light whereby to advance his footsteps. First, his curiosity is aroused by the mere statements of the hitherto undreamed of relations in which he, personally, stands to the state and to other men. Then his interest is excited by the familiar character of the illustrations used and his ready ability to make personal applications. He is learning law from the very start. And the moment he begins to be interested, which is a question of but days and not months, he takes naturally to a process of self-instruction which does him just as much good as the instruction he gets in the class-room. He begins to ponder law, to talk law, to discuss it and quarrel over it, and even to dream about it. He has begun to absorb law at every pore and to think and talk in terms of the law. This is the first stage, and during its progress the student is not encouraged to read cases for fear of mental indigestion.

The second stage is a repetition of the first, but in a circle of much greater radius. The student takes up the application of the rules of law in all but the most difficult branches. Text-books are the basis of the work done and these are supplemented by discus-

sion in the class-room and by the study of leading cases which have been carefully selected, not with a view to inductive study, but for the purpose of illustrating the propositions of the text with authoritative decisions of what the law now is.

And the work of the third stage is in still larger concentric circle. Except in some non-technical subjects, the work is now mainly carried on by means of cases, and the inductive system is applied in all its rigor.

The supposed merits of this system of instruction, which, in the minds of its advocates, give it superiority over the case system, are that the interest of the student is aroused sooner and he finds himself more promptly in receipt of dividends from his investment. The method of study is far less intensive and in some of its phases the work is more evenly divided between the student and the instructor. This not only allows the addition of technical subjects to the curriculum, permitting a broader field to be covered, but leaves the time and the strength for advanced courses in comparative jurisprudence, Roman law, international law, diplomacy, and economics, with all their mellowing and harmonizing effects. What the student has lost in acuteness of mental vision which the case system would have given him he has gained in the actual amount of law that he knows and in breadth of view. Other things than the mere system of teaching being equal, after his admission to practice he may not with such absolute precision as his case-taught brother reason from precedent to case at bar, but he has been taught to appreciate the lawlessness of the science—that, although law is of divine essence it has a tremendous human compound, and that the application of law is not always a matter of strict logic, but is generally a matter of mixed logic and expediency.

Everybody concedes that all educational methods and systems ought to be arranged with reference to the capacity of the average man rather than the brilliant man, who may be trusted to reach the best results whatever his choice of system may be, and to keep his mental powers in equilibrium during the process. It is the man of merely average ability who runs the risk of losing the perfect balance between the logical process and judgment and of becoming a technical faddist. It is the fault of the American lawyer at his best that he tends to over-technicality, and it may well be questioned whether this tendency is not in large part responsible for the parlous condition into which the administration of justice in many of our states has fallen. We complain in this country about our rules of procedure, which tend to exasperating delay—delays in making up the pleadings, delays in reaching a verdict, and, worst of all, delays

in enforcing the judgment. Are the rules of procedure wholly to blame for this state of affairs? Comparing the administration of justice in this country with that of England, we find our courts hide-bound by their reverence for technicalities. Losing sight of the public good and of the real interests of their clients, opposing lawyers will expend purely intellectual ammunition the whole length of a long skirmish line. I have known counsel for the plaintiff to make a motion to expunge words technically superfluous, but whose presence in the answer had not the slightest tendency to distort or obscure the issue. And then, after serious and lengthy argument with citation of authorities, the judge would take the papers with a grave face and reserve his decision with leave to both sides to file briefs. Both lawyers and judges are so afraid of not being logically and technically correct that every detail of a case is threshed over, often more than once, until the proceedings are drawn out beyond all reason.

If I am right in my assertion of the American lawyer's tendency and in my belief that this tendency is partially responsible for what amounts to a national misfortune, ought we not to work away from this tendency and to do so, if necessary, even at the cost of some intellectual training?

John Wurts.