

The Education of a Lawyer

“LAW,” said Publius Iuventius Celsus, more than eighteen centuries ago, “is the art of equity.”¹ Lawyers are, therefore, the artists of equity and the education of lawyers ought to be a training in arriving at equity in an artistic—or what comes to the same thing—an artificial manner. The term “art” in this most famous of definitions is to be taken literally. An art, a *techné* in Greek, is something that does not come—or rarely comes—naturally. It must be acquired. It is a technique. There is no such thing as non-technical law or a law freed from technicalities. What is really meant when we inveigh against legal technicalities is that we justly object to bad technicalities, technicalities that do not serve the end of law but impede it. It is as though a painter were to load his canvas with colors that do not produce the effect he wishes but spoil it. That makes a bad painting and, applied to law, it results in bad law. But when technicalities do reach the intended result, they are not good technicalities so much as inevitable ones. If a method is legal, it is technical.

As a matter of fact, I think Celsus was wrong even for his time, and much more so for ours. Law can be better described as the art—not really of equity—but of inducing a certain group of officials—principally judges—to make morally satisfactory or economically useful judgments in regard to the particular situations that are submitted to them. In making these judgments they should be guided by equity or justice, except so far as their hands are forced by an accumulation of rules, some derived from legislative mandates and contained in statutes, and—at the common law—a great many derived from generalizations made of previous judgments or from statements uttered in connection with previous judgments.

That is to say, there is an art or technique of judges as well as an art or technique of lawyers, and the latter art really comes to be a means of attempting to direct the former, with the certainty that in a considerable number of instances the attempt will fail. When we seek to train lawyers, accordingly, in their art, we seek to train them in doing something which cannot be successful in all instances, because it involves the effort at directing minds. And however much we have circumscribed and limited the action of human minds, we find it very difficult to be sure of our results whenever even these circumscribed and limited minds are to be moved toward a specific goal. To make men think as we wish them to think is not a simple problem, even after we have devised what seems an infallible implement for that purpose.

¹ *Ius est ars boni et aequi.* Dig. 1, 1, 1, pr.

All this must be said in advance of any discussion of legal education because nothing is commoner in such discussions than a confusion of means and ends. We often find ourselves talking not about training lawyers, but about teaching, *i.e.*, of expounding, legal doctrines, legal rules, legal principles, either as a scientific body of facts or as a loosely assembled string of disconnected statements.

A certain part in law is played by a body of facts, comparable to the body of facts studied in economics, in history, in politics, or even in the more or less exact sciences. In law, we have enormous collections of past judgments, very minutely arranged and classified, and we have solid books—a great many of them—in which these judgments are discussed, compared, criticised, attacked or commended. We now have a large periodical literature in which chiefly the same thing is done. We have also a rapidly increasing body of statutes, which are designed to make the art of judging easier, but in reality make it harder, because the statutes are often too vague, too general, or too particular.

This body of legal facts is for our purposes to be found in books,—hundreds of thousands of printed books. We cannot possibly teach all of them, because no one can learn all of them. We can learn some of the classes to which the facts belong, and we can make these classes as small, and, therefore, as numerous, as our memories will permit. We can scarcely help learning a great many individual and unclassified facts in this connection as well. But for the most part, we must content ourselves with learning where these facts are to be found when we need them.

All this can be taught in the approved and common methods of lecture and drill, of syllabus and repetition. It can be put into manuals and summaries and these manuals and summaries can be conned as grammars and geography books used to be conned. At the end of that process we can state with glibness and confidence that a promise is not binding without consideration, that a condition in a deed which is repugnant to the grant avoids the condition, that there is no recovery for an injury caused by negligence if the injured party was guilty of contributory negligence. Or that no one of these propositions is true, by which we mean that they are not to be found expressly or by implication in the stupendous mountain of printed stuff that we have in some way to master or at least to find our way in.

The task of teaching, so far as it concerns this material, is simple enough in theory and extremely difficult in practice. Two things must be done. The material must be sifted and summarized and classified. Much of that has been done for us by established, if arbitrary and fairly recent, categories. We recognize in the symbolic words "contracts," "torts," "equity," "trusts," "future interests," "real property," "wills

and administration," group-names around which we gather a certain number of propositions of all degrees of generality. These propositions we must in some way get into the minds of students so that they will remember them. It is strictly and literally a process of "information," or, if we like and are not afraid of words, of inculcation or of indoctrination. Here, if nowhere else, formal training² is futile. If the propositions about consideration and negligence are important and true in the sense indicated, the law student simply must remember them as a school-boy must remember the multiplication table, although even the school-boy when he comes to study higher mathematics, may find that the multiplication table is only qualifiedly applicable.

Now, whether the law student will remember his propositions by repeating them until he can recite them by rote, as an older generation of law students learned the incorporeal hereditaments listed in Blackstone, or whether he will remember them better by learning imaginary situations which illustrate them, or remember them best by knowing the actual facts of a real case which a judge has declared to be determinable by means of these propositions, may be a matter of controversy. If the "case system" devised by Langdell two generations ago did no more than substitute the last method for the first, it is hard to see either why it was successful or why it should be particularly praised. To remember that a third party beneficiary has in some cases a right of action on a contract made for his benefit may be facilitated for some persons by speaking of the rule in *Lawrence v. Fox*.³ But other persons may not find this mnemonic device helpful, and intrinsically there is little merit in it.

And there can be no doubt that in the hands of less competent men than the brilliant Harvard group that included among others such extraordinary persons as Langdell, Thayer, Gray and Ames, the case system came to mean little more than attaching the label of a case name to a great many legal propositions. The "case book" devised for use in this system at Harvard classified these legal propositions according to a definite scheme and within each sub-heading arranged them more or less chronologically by cases, an excellent and important innovation. As far as the Harvard case books were concerned, they were also marked by a preference for English cases. Indeed, it often had the look as though the English development was considered the norm and all other developments slightly aberrant lines which can be best followed by reference to that norm.⁴

² By "formal training" I mean the theory to which I shall refer later, *viz.*, that the value of any kind of teaching consists in the effect on the mind of the act of instruction and that what is taught need not be remembered.

³ (1859) 20 N. Y. 268; 2 WILLISTON, CONTRACTS (Rev. Ed. 1936) 1102, § 380.

⁴ Cf. Professor Karl Llewellyn's article on the Case Method in (1930) 3 ENC. Soc. Sc. 251 with the bibliography on p. 254, especially the references to the REDLICK,

There were sound reasons in history and common sense for dealing this way with English cases but as a matter of fact any other jurisdiction with a great deal of varied experience could have been used equally well. And a completely eclectic system could also have been used as most modern case books do, books in which the classification of propositions is just as marked as in the older books and in which the cases are even more obviously symbolic representations of the propositions they "stand for."

But it should certainly be clear that the "case system," as it was devised and applied by the masters of that method, was not meant merely as an orderly arrangement of propositions, ticketed with case-names, each proposition being recorded in the student's mind as the "rule" that the case "stands for." This unfortunate phrase is, of course, the essence of conceptualism—which is a fighting word. It fits in well with the system of dogmatic legal theology that is, curiously enough, more prevalent among the hard-headed and practical gentlemen who make their living by practising law than among the unpractical academic persons who teach it. What is often forgotten is that the use of a case merely as a symbol of a rule really vitiates the case system entirely, since the rule "the case stands for" can be committed to memory without burdening ourselves with the case, unless it happens to be a case in the jurisdiction we wish to practise in. One would have supposed that instead of what the case "stands for" the facts themselves in a summarized form would be what the student would be asked to remember and the general applicability of any inference to be drawn from the decision would be indicated within varying limits. That at least would justify the use of cases rather than of abstract propositions as a means of legal teaching.

But what the case system is really based on is a famous and ancient method, called variously the "dialectic" or the "Socratic" method, after its first and perhaps greatest professor. It is different from the one actually employed by Socrates himself in that instead of demanding snap-judgment from his innocent and often ingenuous victim, and then demonstrating the absurdity of the answer, the case method begins with a judgment already given by a court. The Langdellian Socrates may then proceed to determine the value of the judgment by slight or great variations in the facts, until he has got what is an apparently satisfactory general proposition which will cover this case and a great many others.

REPORT (1914) *Carneg. Found. for Adv. of Teaching*, No. 8; and also REED, REPORT (1921) *ibid.*, No. 15. A general historical account of legal education in modern times may be found in my article on *Modern Legal Education* (1933) 9 *ENC. SOC. SC.* 334-340.

This is excellent logical or dialectic exercise, unless the questions and the satisfactory answers are all known in advance—as unfortunately is sometimes the case. And if logic and dialectics are part of a lawyer's technique, it is good training in that technique in the only way in which any technique can be trained, *i.e.*, by actually practising it.⁵

But this technique can be used in regard to any kind of propositions, propositions that are found in our repository of legal data and propositions that are not found there at all, that in fact contradict those that are found there. If this technique is to be used as a means of fixing the true or correct propositions in the student's mind, it will be only because they will have been mentioned so often and in so many forms that they will stick.

But the method as a mnemonic device for legal propositions is one thing and the method as a training in the technique of a lawyer is another. It may indeed serve both purposes, but the whole point of legal education is the question whether we want both purposes served, or both purposes served equally effectively. It is quite possible that we might value the technical result, the practice in the technique of dialectics, very highly; and not value at all the legal propositions that by means of this technique are firmly—alas, often ineradicably!—fixed in the student's mind.

It is here where the issue is often joined and, therefore, here where the confusion between methods and results is most troublesome. In many discussions of legal education objections are directed against the "case method" when what is objected to is really the group of propositions in which that method is exercised. If dialectics forms part of the technique of a lawyer, we must have propositions of some sort and the fact that the use of propositions involves the dreadful sin of conceptualism cannot be avoided.

We are thus brought back to our starting point, the art of the lawyer, and if that is, as has been stated, the art of influencing judges to arrive at technically satisfactory judgments, dialectics clearly forms part of it. A logical arrangement, a cogent inference, are things that judges declare they desire, and a technically trained lawyer must know how to furnish them. We must, therefore, train lawyers in furnishing them, and this cannot be done merely by teaching them how it is done, unless some

⁵ It may be noted that "dialectic" really has nothing to do with "dialogue" in the modern English sense of a conversation between two persons in which a mistaken belief that *dia* was something like *dyo* or *duo* has been at work. Nor indeed with "dialogue" in the proper sense. "Dialectic" refers to the method of discussion in which the logical limits and implications of a proposition are brought out by attempted applications of it to various hypothetical instances. The Hegelian perversion of the term may be disregarded.

opportunities are added of considerable and continuous practice. No art is acquired solely by knowing how. It is only acquired after extensive and successful exercise in it.

There is no doubt that dialectic is only one of the methods that can be used to influence judges. The other methods form part of the general art of persuasion which is an art that has recently inspired the production of a host of best-sellers. Any one who desires to "influence persons," to "make his personality count," has only to read such books and find out how to persuade people to act as he would have them act. If he adds to this extensive and highly accessible literature, the vast number of books written on salesmanship, which is also based on persuasion, he will do all that can be done.

Still, he will obviously have to do that for himself. No doubt salesmanship and the art of "controlling personalities" can be taught, because colleges do offer courses in them. But I am afraid the law school cannot teach these things. Sales resistance, I am assured, can be overcome by the methods of the high-powered salesman and it may be that some high-powered attorneys have methods that are not appreciably different. But in general, judges are likely enough to resent the fixed smile and the breezy if somewhat mechanical fluency that make the man systematically trained in salesmanship a little painful to contemplate. As far as legal persuasion depends on arts like these, we are not yet in a position to add conscious training in them to our law curriculum.⁶

In the same way, the other forms of pressure by which in theory judicial action might conceivably be determined cannot be taught at all. They are definitely illegal in that for the most part, they constitute a contempt of court. We shall have to leave the situation as it has long existed. The only technique that can be taught in law schools is that of dialectic.

How is it to be done? The case method was, of course, a method of dialectic. But its principal purpose was not that of training students in method but of inculcating in their minds certain legal propositions which were regarded as valuable. They constituted the "right doctrine," the "true doctrine" or the "right theory," the "true theory"—no one said the "orthodox theory"—and if the student remembered the propositions and assumed them to be irrefutable, he had been well taught.

Incidentally, of course, he learned something of the method by which these doctrines had been presented to him by his teachers. And if he was mentally alert, he may well have noted how effective that method

⁶ The technique of salesmanship is often avowedly determined by the assumption that those who are to be persuaded are persons of markedly inferior education or intelligence.

could apparently be, no matter what the doctrines were that it was intended to inculcate.

But as a matter of fact, the identity of the technique is only apparent. There is no such thing as a method in the abstract or a technique that can be applied equally to any type of material. It is quite true that logically satisfactory syllogisms can be constructed without reference to the content of the propositions but no intelligent student trained in the case system could fail to be aware that the construction of the proposition was the real task and the ingenuity displayed consisted largely in developing useful propositions out of unpromising masses of repetitious discussion which were found in most cases.

This developing of useful propositions was directed to the final goal of making a large and coherent system of many of the classes and subclasses of the law and it meant that the trained student must pick out of the opinions and statutes propositions that lend themselves to this larger purpose. This is really the form that his dialectical training must take, and the question of how it is to be effected at once arises.

Obviously, the case method is in part an excellent device for this training if it is really used as it professes to be. The task of the lawyer at the common law will be, first, to organize the facts that are presented to him in such a way that those which seem to present a justiciable issue are segregated from those which do not seem to; and, second, to do three things, to find cases, to derive legal propositions from them, to arrange these propositions into logical systems. The case system trains him in the second and third parts of this second half of his task. Ordinarily it does not deal with the first part of it, because almost by definition the cases are given in advance or cited in the notes. But in theory at least it is the student's task to examine the case so given and to derive from it a clearly stated proposition that can be arranged with others into a dialectically cogent system.

We know that this theory is not in fact often realized, that the analysis of the case and its position in a system to be constructed is in most instances as definitely transmitted in verbal form as if the doctrines had been learned out of textbooks. Very little real practice in case analysis is obtained when the "summaries" of the cases are available in printed or written form, nor can any admonition from instructors prevent this access to already prepared and demonstrably "correct" summaries. Students, therefore, are really not getting dialectical training in the form of case analysis unless they are either strong minded and conscientious enough to resist the lure of the predigested summary, or unless the cases are frequently and completely changed.

As a matter of fact even the conscientious and strong minded student

is likely enough to be confused and to assume that what is wanted of him is a tenacious grasp of the legal propositions involved in the case. If that is so, there is really no point in refusing to accept that proposition just because it is presented to him already elicited and formulated. The danger is always present that when a method of teaching has a double purpose, it will be judged, by some, exclusively by its success in one of these purposes, and it is a noteworthy fact that the most practical members of the legal profession are apt to regard the repetition of abstract legal propositions as better evidence of good legal teaching than skill in dialectic analysis.

But from what has been said, the case method as ordinarily used permits little or no practice in the selection of cases—which is the particular phase of dialectics that will most occupy them in their future careers.

The net result is that if a special type of dialectics is part of the technique of a lawyer, the case method will prove effective for it only if it is modified to a considerable extent. Whether it can be so modified in view of the physical conditions under which law must often be taught, involving large classes and limited library facilities, need not be examined here. If the case method is used merely as a means of inculcating doctrine, or better doctrines, it is not clear that it is better than the older devices by which doctrines were read, discussed and committed to memory.

But the case method has been attacked on the basis of theories that are directed not to the ineffectiveness of the method in training law students in dialectics but to the right of dialectics to be taught at all as part of the education of a lawyer.⁷ Dialectics must deal with propositions and the discussion of legal propositions is, in the opinion of a certain number of vigorous critics, the most futile of occupations. It is not merely that the propositions are the wrong propositions, although that is a count in the indictment. It is that law is not a matter of propositions

⁷ It is obviously impossible to discriminate sharply between the discussions of legal education and those of legal analysis. If law is conceived of in a particular way, it is this law which is to be taught and its character must help determine the method of teaching it.

The attack on conceptualism in law and, therefore, in legal teaching is best found in the writings of Mr. Jerome Frank, *LAW AND THE MODERN MIND* (1930); *Are Judges Human?* (1931) 80 U. OF PA. L. REV. 17, 32-38, 233-242; *What Courts Do in Fact* (1932) 26 ILL. L. REV. 645, 761. Nearly all the relevant literature of this lively controversy is to be found in the articles of Dr. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809; and the reply of Professor Walter B. Kennedy, *Functional Nonsense and the Transcendental Approach* (1936) 5 FORD. L. REV. 272. Cf. also Correspondence (1936) 5 FORD. L. REV. 548, and Kennedy, *More Functional Nonsense—A Reply to Felix S. Cohen* (1937) 6 FORD. L. REV. 75

at all but a part of the living order of society and must be taught as such. This attitude is in the main called the realistic or functional approach, and much can be said—indeed much has been said—in its behalf.

It is based in part on the quality of the propositions themselves which in the case method are derived either by the instructor or the student from the cases collected in the usual "case book." Is the "mailing theory" for the formation of contracts really in force? Is it a fact that any actual business situations are regulated by it? Do the rules of equitable waste determine any present problems that men must consider in buying and selling land? And, if they are not, why do they play so disproportionate a part in our case books? Indeed, why are they there at all?

Realism or functionalism in law teaching demands, we are told, that only those propositions be taught which are required in order to determine which actual transactions daily and hourly taking place are lawful and which are not. But since these transactions are continually changing in form and content and character, since, that is to say, many common transactions of a generation ago do not occur at all or very rarely now, what is actually taught must vary with each generation, and the legal propositions that are examined, critically discussed and logically arranged will not be the same for any length of time.

If this theory were carried out to its complete conclusion, it would doubtless mean that no two successive groups of students would use the same legal propositions. Actually, of course, no one proposes such a thing. But realists do emphasize actuality and that means in all probability the recent past and the impending future. If the legal propositions that form the meat of our instruction are those that in fact have been used to control recently occurring transactions—let us say within the last generation—so far as they have been litigated, or are the propositions that are likely to control those of the next generation, we have enough material to occupy the energies of schools and teachers and students for a full curriculum of studies.

Evidently, if we recall what the technique of law necessarily is, a special emphasis must be placed on the second half of the statement made above. It is the group of propositions likely to control the transactions of the immediate future that form the real body of realistic law, and what those propositions are must be determined. The ideally best way of determining it, however, would involve a study of all the social, economic and political backgrounds of these transactions, and the ideally best way of understanding what transactions are likely to occur and, therefore, what legal propositions are likely to be applied, would be to understand so fully, so completely and so accurately all the forces of society that our forecasts would be raised from the rank of mere guesses to that of reasonably accurate conjectures.

A good deal of what is said on this subject apparently assumes that we can make some effort at such an understanding in the law school itself, even though no one thinks, or has ever thought, the law school wishes alone to take on itself the burden of providing it. If, however, we ought to do something about it, that something must be done by means of systematic training, and the training can scarcely be other than that kind provided by the social studies found in what is called the "academic" part of the university, economics, sociology, history, political science. It has looked, therefore, as though realism in teaching law consisted merely in transferring some courses in economics, commerce, politics—usually summarized and brief courses in these subjects—from class rooms marked Economics 1A or Poli. Sci. 226, to class rooms marked Law or Jurisprudence with or without a serial number. Is it for this that mountains have been in labor?

I think this is a little unfair to realists, although it is probably not unfair to some indiscreet advocates of realism. Realists can make quite a case for their opposition to what may be called the ostrich attitude of many exponents of law, the attitude of refusing to look at certain objects and thus finding them non-existent. A lawyer who knows nothing of economics, of commerce, of politics, of history, simply does not know law. As a matter of fact, so far as lawyers participate in legal discussions at all, they are bound to deal with these matters and, if they lack training in them, it usually means that they have poor or inadequate ideas about them, not that they have no ideas at all. The question will be just where and how a lawyer's acquaintance with these things will be obtained. Can the law-school provide facilities for acquiring the technique of persuading courts by dialectically successful presentation of legal propositions, and at the same time provide facilities for studying the economic, social and political data which will be implicit in these propositions? If the law school cannot provide both, shall the law student acquire his non-technical training simultaneously with his technical law, but outside of the law school, or shall it be before or after his technical training?

The existing theory is that he acquires it before his technical training, in the relatively long preliminary and "undergraduate" curriculum which occupies normally the period in a student's life from his seventeenth to his twenty-second year. We know that the theory is in most cases demonstrably and pitifully out of accord with the facts and it may well be that the failure of theory and fact to meet in this matter is due to the unfortunately current educational doctrine that things are to be learned not in order to be remembered but in order to exert some alchemic effect on the mind by being temporarily denizens of it. If it turns out—as it does—that, for the law at any rate, it would be well if the

economic and social and historical material which at some time is learned, is likewise remembered more or less permanently, the law school apparently will either have to supply the deficiencies of the student's preparation or hope that he will casually and irregularly do so himself.

Many of the problems of the law school would be solved, if the majority of those who enter it, came there with a permanently retained mental equipment in the social sciences, and not merely with an official certification that they had the opportunity of acquiring this equipment.

But in all this a source of confusion is likely to arise that comes from the history of the legal profession itself. In Western Europe generally and in England from the early Middle Ages on, the distinction was sharply made between the real legal expert who expounded and presented the law and the business agent who presented the situation to be regulated by law. The former belonged to the socially privileged classes. He was a gentleman either fully or qualifiedly, and as such received whatever education gentlemen ordinarily received. He was also a half-cleric, since he dealt with books and for a number of centuries, reading and writing were the peculiar mark of clergymen. Both types of education, that of the gentleman and that of the priest, had no necessary connection with the law.

Besides these two types of education of the medieval lawyer, he usually had another one, not acquired by systematic study, but by casual if continuous experience. Litigation concerned itself chiefly—in England almost wholly—with feudal interests in land. The lawyer belonged to the landholding class. His acquaintance with the subject-matter of the law was, therefore, realistic, persistent and profound. The type of education, accordingly, that modern realists most desiderate, was given to one of the older generation of lawyers by life itself. He had always about him men whose claims and obligations in respect of land were the dearest objects of their concern and formed a large portion of their conversation.

The passage from medieval to modern times, and the mere accumulation of legal experience has changed all that. A realistic education produced by the very facts of social life, is no longer available to the lawyer, since the matter of law is much more largely taken from commerce than from the circumstances of an upper social class and the lawyer is rarely *ex professo* a merchant. In the United States two additional changes have affected legal education. One was the fusing of the legal business agent, the attorney or solicitor, with the lawyer proper, the English barrister. The other was the abandonment of the theory that the lawyer belonged to an upper or educated class who was expected to have the concededly ornamental education of such a class. This was

part of the effect of the revolutionary impulse. One of the first acts of the French Revolution had been to abolish the privileged order of advocates and in America in the Jacksonian stir, if not before it, it had become part of the creed of democracy that the profession of law was to be open to any one who chose to exercise it.

The early American lawyer was consequently not assumed to possess the ornamental education which marked an upper social class, and by the encroachment of his business activities as a legal agent or attorney, had much less chance to acquire more than a casual acquaintance with the dialectic technique of law. Training in the social sciences as the background of the law was out of the question since such training was not available anywhere, either for lawyers or anybody else.

During the nineteenth century the training of lawyers entered on a new phase, as it became more and more fully a part of the general university system. The dominance of the Harvard example gave a special direction to the training, but some of its features were probably inevitable parts of the progress of higher education in the United States.

As far as the present situation in legal teaching is concerned, it is the net result of the fusion of three different educational purposes: first, the training of technically proficient dialecticians; second, the grounding of those men in the social, economic and political material in which their technique must be exercised; and, third, the acquiring of that general, more or less ornamental, knowledge which is the common possession of an educated minority and which has almost always a distinct literary and aesthetic coloring. A great many of the difficulties we find with legal education comes from the fact that these three elements are not adequately discriminated. And one thing is certainly clear. The law school in three years cannot provide all three of them.

In all that has gone before, there has been no reference to a favorite theory both of laymen and lawyers, and that is that "the law" can be reduced to a body of fundamental principles, that these principles are few in number and can be precisely and succinctly stated, and that once they are learned they can be applied in such a way that all properly trained persons will reach the same conclusions from them.

The belief in the existence of these principles is based on an amiable and intelligible confidence in human reason and human good-will. Whether it is justified or not we need not examine here, but while I should not like to question the fact that there are such principles, those that have been presented as such have rarely had the characteristics that have been ascribed to them.⁸ The famous three principles of Ulpian,

⁸ M. Jean Dabin in his *PHILOSOPHIE DE L'ORDRE JUR. POSITIF* (1929) has attempted to give specific content to some of these principles, pp. 311-361. His success will be differently estimated by different critics.

"live honorably," "injure no one," "give each man his due"⁹ are succinct enough in all conscience, but that they will guide us in the simplest of litigated causes, is hard to believe. And even when they are more definite, we cannot count on their efficacy. So, one of the most humane and lofty-minded of modern French jurists, Monsieur Renard of Nancy, takes the perfectly precise principle of *pacta sunt servanda* "agreements must be kept" and deduces from it at one point that the Bolshevik government cannot justly refuse to pay the Tsarist debts to France and a little later derives from the same principle the result that the French government ought not justly be required to pay its war debt to the United States.¹⁰

I am afraid it will be more or less the same with the principles of moral and political philosophy which President Hutchins mentions in his recent article on Legal Education.¹¹ To refer legal questions to these principles may be possible and even necessary. But that knowledge of these principles will provide an unambiguous answer to such questions is very much to be proved.

But there is no doubt that all that has been said is the utmost and barrenest of futilities if we neglect to follow President Hutchins in what is the main burden of his address, and that is the fact that the lawyer's task is ultimately concerned with justice and that any legal teaching that ignores justice has missed most of its point. Justice, however, is not a mathematical formula but a moral sentiment or a special sort of social emotion. As such, it is as real as a bale of goods or a city lot, indeed, for the purposes of law, more real. "Realists" who ignore this fact should abandon the pretence that they are realists.

We need not ask ourselves whether justice is eternal or unchanging. Eternity is a long word and lawyers have long ago supplied themselves with temporal notions that will serve as substitutes for eternity, such as prescription or immemoriality. Society may or may not once have been the *bellum omnium contra omnes* of Thomas Hobbes. Our memories simply do not go back so far, even when we extend them by historical transmission. As far as we are concerned, we are the inheritors of a social tradition that regards as just the type of human conduct which does not materially infringe the security of life, liberty, property or family relationships, and as unjust, conduct which does infringe this security. Justice does not demand that this security shall be absolute. Indeed it is the special task of most legal systems to indicate with as much precision as possible the situations in which this security may be sacrificed.

⁹ JUST. INST. 1, 1, 3; DIG. 1, 1, 10, 1.

¹⁰ RENARD, LE DROIT, LA JUSTICE ET LA VOLONTÉ (1924) 161, 162.

¹¹ Hutchins, *Legal Education* (1937) 4 U. OF CHI. L. REV. 357-368.

But justice does demand that for some situations, for most situations, there shall be this kind of security, and as long as we retain the intellectual inheritance of our European and Mediterranean civilizations, we shall not recognize as just a social environment in which security in these matters is quite abandoned.

Nor can this social emotion of justice remain an afterthought in legal practice. In spite of some hasty and some justifiably short comments of courts and lawyers about the irrelevance of much that has been offered as an appeal to justice, it is rare indeed that for any reason any court deliberately renders what it feels to be an unjust decision. The few cases in which this is admittedly done are nearly always those in which for reasons that are sometimes avowed and sometimes implicit, a present injustice is rationalized as a step to a larger and more permanent justice.

But in nearly all cases, a technically and dialectically sound presentation of law can be made for more than one conclusion. More than that, contradictory presentations of law that are equally derived from profound and thorough acquaintance with the economic and social backgrounds of any transaction, can be made. In all these cases, part of the lawyer's technique is to select the juster or the more nearly just one, if there are only two, and to persuade the court to share his valuation of these conclusions. That is not only his technique. It is a specific duty imposed on him. Indeed, it is part of the famous Geneva oath which he takes and which has even been embodied statutorily in the California Code of Civil Procedure.

And there are a great many situations in which by definition justice is a part of technically correct law. Equity abounds in them and even in common law transactions, what is reasonable—which is usually also what is just—is accepted as a sufficient criterion of what is lawful.

Over and above all these things, legislation is a process in which what is just, that is, what satisfies the common sense of justice, is fundamental. It is not quite true, I am inclined to think, in spite of President Hutchins' assertion, that "an unjust law, is, of course, law only in name."¹² An unjust law is law as much as a just law is, but it is bad law and should be abrogated, and certainly proposed legislation that cannot meet the test of justice, should be vigorously opposed.

Has the lawyer any responsibility for this outside of his service in the legislature when he is a member of such a body? Only to a limited extent, perhaps, but this limited extent should, one imagines, prevent lobbying by lawyers for unjust legislation, even when the lobbying is open and avowed. And on the bench, a frank criticism of legislation as

¹² *Ibid.* at 365.

unjust in application, however righteously conceived in theory, might help to convey to legislative bodies a sense of the fundamental importance of this social directive.

But in the last analysis, justice is a communal valuation and not the special function of a professional class. This valuation is often imposed by the moral leadership of certain individuals or certain groups. It is highly unlikely, unfortunately, that the community will ever accept the lawyers as such a group and in most cases it is the lawyers who must accept the standards of justice that the community—the enlarged community of at least a generation in time—has worked out and is willing to abide by. Lawyers must at their peril learn what these standards are. In a perfectly realistic sense, training in justice is part of their legal education.

Can justice be taught? Probably not by formal and systematic lectures. Probably not by the case method or other set methods. But it may be that justice can be taught by example—at any rate, by intellectual example. There is scarcely any teacher of law who has not been confronted at some time in his career with a student who objected to a decision, because he thought it unjust. The approved method of dealing with a student of this sort is to pour contempt on him and to treat his objection as not merely irrelevant, but slightly stupid. And there is no doubt that the keenest students are more likely to revel in their increasing mastery of the dialectic method than to raise the question of justice.

Under correction, the question of justice is never irrelevant, even in questions of procedure or of the dryest and least human manipulations of corporate finances. The student who raises it in good faith is entitled to have it met with respect. It will often be found that the difficulty is one of emotional identification with the litigant prejudiced by the decision and that those who raise the issue have not clearly determined what the criterion of justice is that they wish applied. In most instances, the objection is based not on the facts as presented in the case, but on an imagined set of facts assumed to be latent.

But even at some sacrifice, no method of teaching law has risen to its responsibilities if at any time or anywhere in the study of law, justice is dealt with as no concern of the lawyer but as a foreign and extraneous matter dragged in for the purpose of pandering to a silly convention maintained by laymen and professional moralists. This does not mean that all legal decisions must be repudiated unless they can be shown to be just. It does mean, however, that none shall be regarded as satisfactory that seem to normal sentiment to be unjust, even though it may not be clear how the injustice is to be remedied. If we may hark back to a metaphor somewhat outworn in respect of modern music, a moral dis-

cord can be tolerated in law only if somewhere it is intended to be resolved.

What is usually forgotten is that many legal situations are morally indifferent and that several contradictory solutions of a controversy may well be just. In such a case, the sentiment of justice takes on a new element, an element akin to what in technical form is called estoppel. But even in cases in which the criterion of justice does not apply because either solution, if feasible, would meet the test of justice, the application of the test is not irrelevant. It must be made, although the result is ambivalent.

Lawyers must know their business first of all, and the most important part of their business is not the preparation of mortgages but the preparation of arguments. They must know the subject matters of the law, which involves a great deal of specific information about the social structure, the organization and the practices of the community in which they live. And they must have the kind of general training that enables them to speak the language and understand the ideas of those who guide and control the community, the kind of education that a few generations ago was called the education of a gentleman.

It is not certain that all three goals can be attained simultaneously. Perhaps in the immediate future we may have to dispense altogether with the last. But we shall not stop acting at cross-purposes unless we know which of these goals we are pursuing and when.

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