

A THEORY OF LEGAL EDUCATION

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I

The difference between success and failure in education depends mostly upon the character of the person being educated—whether he seeks his education or has his education thrust upon him. And no amount of change of curriculum or alteration of courses or requirement for degrees will alter materially this fundamental truth. But, like everything else, the detail of college education is a matter of fashion. It is sometimes the fashion to be foolish; it is sometimes fashionable to be athletic; rarely it is fashionable to be serious. And the young men and women who are not independent enough to ignore the styles, but blindly follow them, are not bad material at all; in fact they are the stuff out of which the great majority of mankind is made. Therefore, to govern the fashion in education, to set the style running in a new direction, or rather to give opportunity for the fashion to set itself anew, may be the making of a multitude.

We are just emerging from a period when education in its highest form has been regarded as made up of the classics. That is to say, it has been the style for the young men and women of opportunity, both in this country and abroad, to devote four years of their lives to the study of subjects which admittedly and with malice aforethought have nothing to do with any life work which any of them can reasonably undertake,—unless it is to teach the same ideal mentality to others. And in this way education has ideally been very much like religion: the mind of the student has been turned back to that period of the world when men thought in terms of religion and philosophy, and dreamed dreams and saw visions and created works of art which have never been surpassed. To dwell with these men; to see their work and to understand their thoughts; to live in the atmosphere of purity in art; to lie in the gardens of the ancients and to appreciate their poetry and religion was regarded as the ideal beginning of any young life. The very difference between this sort of preparation and the struggle for existence was its own main advantage. If one could not in the modern world live as the ancients did, much more was it important to take a few short years at the start, before the mind grew fast to the practical facts of the market, and to stimulate the imagination, so that it could always balance against the heavy burdens of responsible citizenship the calm withdrawal at the end of the day into the cool intellectual life of the classics. In this way classical education gave the most to those for

whom it accomplished the least. And its greatest practical results were to train the brain and to stimulate the imagination.

It might have been all well and good if classical education had continued to do these very things. It may well be that the complicated features of modern life are so very complex that preparation to solve them is as well obtained through the study of the classics as by intensive application to the problems themselves. It may be that one can as well lay a foundation for engineering by a study of Greek as by a study of mathematics. In other words, if the mind is trained in the beginning, and the imagination is stimulated to run in almost any direction at all, then one may perhaps go forward into life with as much hope of understanding the problems that arise and of making one's way into the intricacies of society with success as though one gave up the same period of preparation to the study of the particular trade or profession which one was to follow in after life.

But the trouble is that, for the majority, classical education failed sometime ago to accomplish its purpose. It failed and still fails to train the mind or to stimulate the imagination. It failed to give to the student a liking for the classics themselves. It failed in its own very features of allurements, because in the conditions of modern times it fails to allure. A time came when students demanded a greater liberality of curriculum. They said that the study of so much Greek and Latin did not attract them; and besides it could be of no possible use to them in life. They wanted something more useful, something more modern. They did not want to turn into a kind of recluse and live with the ancients. They wanted to live in college in just the same way in which they lived out of college; to think the same thoughts; to meet the same people; to talk about the things which were discussed by others. The pressure of the outer problems became so great that these problems forced themselves into the classical atmosphere of the colleges. The colleges could no longer remain oases in the practical world around them. They were forced to become practical themselves in order to exist at all. They had to become more of the earth because the earth had become a very much more exciting place than before the great developments of the nineteenth century. And the earth thus forced its practical way into every nook and corner of the lives of all people at all times.

And then when classical education had thus been destroyed, the thing which was substituted was also destroyed. For, after electives were recognized, it became the fashion to regard college as a mere pretense for work, and actually a vacation, or at most a place for competitive amusements where the goal is personal popularity, so that there may be open to the student in after life those inner opportunities for advancement which cannot be had without a "pull" either in business or in society. The college authorities lost the chance of controlling the

students; they failed as a criterion of power or success because the students ceased to follow their lead and took college life mostly into their own hands. They seized the throne in a revolution which was no less important because it was noiseless, gradual, and unpremeditated.

The standards which the students have thus created give little weight to learning or to intellectual attainments but reward athletic and family or personal distinction with a reward which is real and tangible. To get ahead in life it has become necessary to "make" some fraternity, which may depend upon family connection, or distinction in athletics or on some college newspaper, or more or less often on careful and not too obvious political maneuverings. The faculty has little or no say in the matter, and scholarship counts as somewhat of a handicap in general, because, though there are a few greatly admired who combine high scholarship and social prominence, the majority must give so much attention to collateral lines that they have created a fashion of scoffing at the curriculum, a thing which in their hearts they do not do, but which they must pretend for their own protection.

On account of these things college men are shying away from post-graduate professional study. It is too protracted. The pressure of business and social opportunity is too great. Their fences have been built; their "pull" is fixed; their friends are on the move. Wall Street or Lasalle Street calls too plainly. And sisters and sweethearts file past in an alluring procession of opportunity and pleasure. The cloister is pitted against "the moiling street," and the street prevails.

Meanwhile there is going on quite another movement in education. The new Americans are beginning to be felt. The great American theory of universal public education has been their first aid. For their use a great public school system has been created beginning with the common schools and ending in the state universities. In addition there are the state and private professional schools; the last of which are much the most numerous of all. At these professional schools there is merely professional work. There is no time for anything else. There is no leisure for the students. They work all day at the store or office and attend professional school at night. They may get a poor education. They may find it exceedingly difficult to stride forward after they are admitted to their chosen professions; but they can gain admittance, and then their friends in the business world look out for their success. Their friends look out for their success with a vigor which is not fully appreciated by the privileged classes. And the incentive to success is so very much greater in those who enter by this route than it is in the others that they forge ahead with appalling rapidity in spite of their lack in education. They cannot in general compete with those who secure a college course and then three real years in a graduate professional school; but for all those who fail to make use of these educational opportunities or who take only the minimum in the belief that their

"pull" will make up for their deficiencies, these new Americans are creating a terrific struggle. A royal road to the bar no longer lies through a mere college course and the least possible study of the law.

Quite the contrary. For the demands made today on the professional man are far greater than ever, and in the law they lead him outside of his profession. No one who aspires to leadership at the bar can now expect success unless he is prepared to meet the economic and social problems which arise in his practice with more intelligence than his clients. He must be prepared to try cases involving methods of finance and corporate management and industrial relations in a way which is not to be found in the legal text books; and he must be able to advise his clients and to think with them and for them in the development and management of business. In order to do this he must have a preliminary knowledge of the fundamentals of these subjects, so that the views he takes are not governed by the business fashion of the moment or on what everybody else is said to be doing, but on his detailed study of the problem before him in the light of his knowledge of the general principles of finance and economics and government and law gained in his education.

It is much the same in medicine and engineering and architecture and in all the learned professions and callings. The discoveries in science, the development of transportation, the expansion of trade, the growth of the modern city, the invention of new devices of usefulness in all lines, and the greatly increased necessity for research and original ideas in every field of endeavor, put the same sort of pressure on the expert adviser and operator whether he undertakes to design a bridge or erect a building or remove a vermiform appendix.

There have thus developed two opposing pressures from these two different directions upon the students of our colleges, which have tended to develop some of them into real leaders, to make others a failure, and to discourage the majority. From the one side comes the competition in the mere earning of a living, created by our ambitious and pushing new Americans. From the other side come the difficulties inherent in the nature of modern life.

The students have perceived these things sooner than the leaders of education. When they find themselves at the end of a glorious senior year at college they shrink from professional life, from the necessity of so much more preparation before they can begin to struggle for their place in society or before they can begin to realize on the place of preference which they have been making for themselves in their undergraduate days.

Look at the lists of graduates of any of our colleges, at the record of the life work which these graduates have undertaken, and see the difference between the graduates of today and those of twenty years ago. The proportion going into professional life of every kind has

very greatly decreased. Before me is the Alumni Directory of Yale University published in 1920. It contains the latest information then available on the numbers and names and addresses and business or profession of all the living graduates of Yale College; and the information it contains may well be regarded as typical of the best American institutions of learning.

A study of this list shows that the total number of men who were living in 1920 and who graduated from Yale College in the years 1885-1894 inclusive was 1296; that of this number 380 were practising law and 115 were practising medicine. Thus for this ten year period 1885-1894, 29 per cent. of these living graduates were practising law in 1920 and 8.8 per cent. were practising medicine.

The same list shows that the total number of men living in 1920 who graduated from Yale in the years 1905-1914 inclusive was 2931; that of this number 541 were practising law and 129 were practising medicine. The percentage here is 18 per cent. in law and 4.4 per cent. in medicine.

Thus taking the ten-year period 1885-1894 inclusive, and comparing it with the ten-year period 1905-1914 inclusive, we find that the dropping off in the professions of law and medicine was from 37.8 per cent. for the prior period to 22.4 per cent. for the latter period, or from 29 per cent. to 18 per cent. among lawyers and from 8.8 per cent. to 4.4 per cent. for doctors of medicine.

It is true that these statistics are taken from a single college. But they correspond so closely with what appears to be the case from general observation in other colleges that it would seem safe to assume that the graduates of Yale are not deserting the professions in any greater proportion than the graduates of other colleges.

At first sight the reduction in these numbers may not seem important; but in fact it is alarming that there should not be a great increase. As the years go on the demand for highly trained men in these professions has grown greater and greater. Such men may rise from the lowest strata of the population, but they can hardly attain distinction without a good education. Yet, as this need for broadly educated men has thus increased, college graduates have not availed themselves of their exceptional opportunity to fill the need.

Then look at the other side of the picture from the point of view of Illinois, where statistics are available as to the profession of the law. The latest census figures show that in the State of Illinois in the year 1920 there was a total white population of 6,299,333.¹ Of this total white population 3,812,665 were twenty-one years of age and over, of whom 16.8 per cent were naturalized immigrants.² These may in gen-

¹ *14th Census of the United States. Population: Illinois; Composition and Characteristics of the Population (1920) Table 1.*

² Statistics compiled from *ibid.*, Table 5.

eral be regarded as the lowest class in the state who can enter the profession of the law.

The Illinois State Board of Law Examiners made up statistics in January, 1922, based on their records of the last 3,200 applicants for the bar.³ This covered a period of about three years prior to 1922. Out of this total number 376 persons were born in some foreign country. In other words, 11.7 per cent. of all the applicants for the Illinois bar over a period of about three years were "naturalized immigrants," within the meaning of the census report. Thus the percentage of naturalized immigrants studying law is almost as high as their percentage in the total population. Here at least the lowest dregs of the "melting pot" are boiling over the top. Statistics for the other learned professions in Illinois are not available. But if anything like the same proportion should exist in any other, or in all others combined, the disproportion of new Americans in the professions would be startling.

The same statistics of the Illinois Bar Examiners also show that out of a total of 1099 persons last admitted to the bar 11.4 per cent. were born abroad, and 45 per cent. were of foreign-born parentage. And of the 3,200 applicants to the bar, above mentioned, only 15 per cent. were college graduates.

It thus appears clear that the process of Americanization is working with enormous speed. A far greater proportion of newly made citizens are entering the learned professions than is the case with those of longer American traditions. And these new citizens are coming with a minimum of educational requirements. They cannot stop for more. They earn their own living during their period of study. Their period of study is purely practical in character. They take no time for the humanities outside of what is required in the high schools. They are not acquainted with economics. They have scarcely heard of history or science or sociology or philosophy. But they come, forced by economic necessity, ill-prepared, failing in their bar examinations again and again, struggling on, to take in general the lower positions in the game, to live cheaply and to maintain the standards of legal ethics so long as they can. All honor to their ambition! All honor to their pluck and driving energy and their courage and attainments!

But the problem remains. Where is the material for the leaders? How can the greater difficulties of business and of government be met by men without education or perspective? How can the newly made Americans express for America the true purpose of her traditions and her institutions? How can the demands of the learned professions be met if the colleges are giving so little to the professional life of the day?

Fashion governs reason and common sense. It must continue to

³ Mimeograph issued May 26, 1922 by the Illinois State Board of Law Examiners; reprinted (1922) 5 ILL. L. QUART. 1, 12.

govern. No amount of persuasion or compulsion will be adequate to set the current carrying the students in the opposite direction. No superimposed plan of university authorities can change the fashion and fill the post-graduate professional schools. The only method which can safely be followed is to catch some idea of other tendencies which naturally set against the fashion and yet are a part of it, and then to give opportunity for their actual development. The fashion must be given a chance to change itself.

It is in general the fashion at college to remain through senior year and to graduate. But against this runs the pressure for a practical education, which is not merely a revolt against the classical education. It is not merely a desire to think of and to study things which are familiar. It is the manifestation of a very serious purpose which is struggling to be free. It clearly exists and is recognized by the colleges in many ways: in the abandonment of the classics; in the introduction of semi-professional studies (such as journalism) for undergraduates; in the arrangement of courses in groups which have a more or less practical meaning; in the promotion of the early selection of a career; in the more extended use of faculty advisers who interest themselves in the individual students from the point of view of their life careers; and in the privilege given to seniors to take their last year in the professional school and to count this time toward two degrees. Thus this pressure for practical things manifests a real and serious purpose which may be recognized and availed of in all phases of the curriculum.

This is the tendency which makes an opportunity to fill the post-graduate professional schools. Since there is a pressure toward a more practical education, then let the professional school begin at an earlier year. If this is made possible, is it not reasonable to suppose that many more students than is the case at present would enter the professions even if they could not begin their professional careers at any earlier age? For, of course, it is not desirable to reduce the number of total college and post-graduate years to less than seven—certainly not to less than six. But the junior year could be made the beginning of a legal education, to be obtained in a really great professional school, the courses in which would not be confined to professional technicalities, but would include just as much of the broadening and collateral courses as is now possible in undergraduate and post-graduate work combined.

If this program were carried out the student would probably be the first to recognize that it is highly desirable to transform junior and senior years at college into a period of training for the intellect in a far greater sense than is usually the case to-day. For law students at least, and probably for students of other professions, it is desirable and truly possible to bring the atmosphere of the professional school into these college years. It is possible thus to develop earlier purpose to the students' thoughts, earlier seriousness to their purpose, and greater understanding in all of their studies without in any sense depriving

them of the enlargement of their acquaintance, the establishment of their independence, or the general development of their characters.

The present waste involved in the last two years of college is proverbial. The desire to bring into college life the atmosphere of the professional school has long been regarded as an ideal greatly to be sought but difficult, if not impossible, of attainment. For those who are content without a professional training it may remain difficult; but for professional students the solution would seem to exist in making it possible for them, though not compulsory, to enter the professional school at this earlier period and then to combine the broadening courses of the college with the technical instruction of their chosen profession.

As part of the plan the curriculum of the law school would be greatly enlarged. Instead of training its students merely in the law, the school would recognize that history and economics and sociology, and perhaps even philosophy and literature, are part and parcel of a legal education; and either within its own doors, or in the university of which it might be a part, the school would offer some or all of such courses to its students.

Moreover, as time went on, and the faculties of liberal arts and of the law came closer and closer into touch, the courses would be found susceptible of better arrangement and adaptation to each other, so as to make it possible for the students to find in the law the foundation stones of society and to recognize in constitutional and political history and in the changing scenes of economic development the reasons and explanations of the changes and developments of the law.

For, in reality, these subjects, now so diversely taught and separately regarded, are but one and the same in the every day life of every nation. As political theories change, the law follows and expands. As business enterprises take on new phases, and commerce and exchange develop varying forms and instrumentalities, the law wraps itself about them and interprets them according to the great code of ethics which forms its base and gives it life. So that any student with a true perspective and a large horizon must see his subject, not merely in volumes of decided cases and in existing statutes, but as a vast and changing scene of political, sociological, and economic life reaching back into the past and hurrying toward the future.

A great school of law, taking its students at this earlier age, could give them this perspective. Its new and greater foundation would in itself be educational. Its traditional atmosphere of reality and of scholarship would revolutionize the spirit of college life. Its dignity and new breadth of view would capture the imagination of its scholars so that they would hardly be recognized as the classmates of those who remain in the college. And if these should afterward come into the law school it is safe to assume that in every field they would be outstripped by the men who came in before and sooner acquired the spirit of the professional school. For the spirit is the thing; the coming

to grips with realities when the others are dreaming; the taking hold of life with its absorbing problems when the others look on wondering; the commencement of the voyage when the others are merely drifting with the tide.

II

Thomas Jefferson wrote to his cousin in the year 1790⁴ regarding the study of the law and said that "as other branches of science, and especially history, are necessary to form a lawyer, these [the reading of certain books] must be carried on together." And the letter goes on to give a list of books that must be read, including, besides many technical law books, the following:⁵ "Locke on government. Montesquieu's Spirit of law. Smith's wealth of nations. Beccaria. Kaim's moral essays. Vattel's law of nations. Mallet's North antiquit'. History of England in 3 vols. folio compiled by Kennet. Ludlow's memoirs. Burnet's history. Ld. Orrery's history. Burke's George III. Robertson's hist. of Scot'd. Robertson's hist. of America. Other American histories. Voltaire's historical works." So that these books on subjects outside the law are about the same in number on the list as the law books recommended by Jefferson. And besides these he also stated that grammar and rhetoric and literature and the poets should be read for the sake of the training and the style.

Of course, there is no one who will dispute the proposition that a broad education is essential to the well prepared lawyer; and the course of reading recommended by Jefferson is not materially different in general scope from the combined courses obtained by the average student in his collegiate and law school days. But it is interesting to observe that Jefferson naturally treated all these subjects as "necessary to form a lawyer" and not merely as cultural subjects or subjects on which the brain may receive a training sufficient to warrant the law school authorities in deciding that a student who had had them would be equipped as a mental machine for the study of the law. The program of Jefferson is a program of study necessary for the knowledge of the lawyer as well as for his mental training. They become part of the man and of his professional equipment. They are demanded in his life work as are the ordinary tools found in the laws of practice and of pleading.

It would seem that there should be no difference today; or, if there is a difference, it would more naturally seem to lie in the direction of a greater extension of non-legal courses than in the direction of a contraction of study to the purely legal. And yet this drawing in of the curri-

⁴Thomas Jefferson to John Garland Jefferson, June 11, 1790, 6 *Works of Thomas Jefferson* (Federal ed. 1904-05) 70.

⁵Jefferson arranged the list of books in three columns. The names quoted comprise half of the second, and all of the third, column.

cula of the law schools to the strictly legal is exactly the thing that has happened; and the fact that it has happened by indirection and not with intention is beside the point.

The theory of the greatest law schools of today obviously is that they will take into the school only those who have had a college education and will then train them in legal reasoning. The students must begin as "bachelors" of something—it makes no difference of what, so long as they are "bachelors," and so long as they come from institutions which are recognized as excellent enough by the particular law school. By this means the law schools obtain students of some maturity who may be said to have obtained a general education, and who will, therefore probably be able to understand the principles of the law and to develop into legal reasoners. Into this material the law school crams its courses, conducted under the case system, and succeeds in a wonderful fashion in giving to most graduates minds which are highly trained in legal reasoning. The result is so far in advance of anything obtained by the older systems that it may perhaps be regarded by some as above criticism. It is nevertheless open to serious limitations in two important directions: First, it omits entirely to take into account the fact that subjects other than the law are absolutely a part of the necessary substantive material for legal training; and, secondly, it limits the study of the law itself to legalistic reasoning, based on the theories which are found in the opinions of courts, and fails to point out to the student or to develop as an essential part of the law those pragmatic considerations on which the decisions of courts, as well as the action of legislatures, ought to be based.

So long as the law school is not at least partly merged with the college the first of these difficulties must continue to exist. For obviously the law school which requires a college degree for entrance cannot go behind that degree with any hope of success. To set up the requirement that every student pass an entrance examination in history or economics or other subjects would be a step in just the wrong direction. It would be highly unpopular with the students. The law school which attempted it would run the risk of complete failure. The method of entrance by examination is not in style, and it ought not to be. And even if the law school is partly merged with the college, as is here suggested, it must continue to take in those who are merely graduates and to give to such students for years to come the same three years of steady law study which is the régime today. But for all those who can come earlier and can merge their undergraduate study with the law, the school can make it possible for the extralegal subjects, which are really a part of the preparation for the bar, to become a substantive part of their training, without in any way doing away with the character of this material as broadening and cultural.

The mere act of studying to live in a college atmosphere, to pass an examination, and to forget, is not necessarily the only means of acquir-

ing a mental horizon or of becoming a cultured person. The fact that the study of history should be regarded as a real preparation for a profession; that it should be regarded as something which a student might want to remember accurately in after life in order to gain his daily bread; the fact that principles of economics might by the student be regarded as having some bearing on the things with which he himself will deal in his daily life; the fact that a man may face realities instead of fancies or that he may be preparing for work instead of for theoretical cultural avocations; these things do not make for a hardened narrow view of life. Rather the contrary. They are brought into the professional atmosphere to make it broader; to fill it up with hopes and fears which the mere field of the law can never produce; to make of the student of the law something more than a mere legal reasoner; and to give force and direction and horizon to the lives of all those who can find the opportunity to come along this way.

It is true that four years of college must give to the life of every healthy individual some breadth of view and some idea of culture. This remains true when the college is partly merged in the professional school. The cultural feature is not lost in any case. The things that are lost today are the spirit of serious work for two of the college years and the realization that such breadth of view as has been obtained applies to one's chosen profession and is not merely an asset of leisure or of culture. Breadth of view to be effective must be given shape in one's activities. And so long as all the law schools continue to treat these extralegal subjects as having nothing to do with the teaching of the law and having no direct connection with the law, just so long will their graduates fail to appreciate that their prelegal courses have substantive relation to their profession, and will therefore fail in professional life to look upon the problems which are presented and the work in which they are given a part as anything involving historical breadth of view or economic or sociological relations at all; they will continue to save their culture and their general interests for their homes, and confine their professions to the decisions of courts and the dusts of the ages.

For the things go hand in hand. The teaching of the law, and its application as well, has always been based upon theoretical considerations taken from the law itself, though the subject matter with which it deals reaches into all the possible relations and possessions and affections of the human race. Of course the widow still weeps in court and the murderer goes free—more today than ever before. The emotions play their parts to an extent which is more discouraging than helpful. It is not this sort of pragmatism which needs emphasis. The mistake lies in the unchanging practice of deciding all new cases simply upon previous decisions without knowing the practical effect of such decisions upon the business or social life of the times. In every day life the courts are developing the common law in thousands of

decisions. These decisions are based on other decisions, and those in turn on others. And all these decisions are based upon what may best be described as mere legalistics, the reasoning of judges, the refinements of legal theories. The courts seldom think of consulting the historian or the trained student of economics to find out whether their decisions are in any degree in line with the trend of the times, or whether they understand the meaning to the trade of the particular situation that is placed before them. And the law and the lawyers treat all causes in terms of legalistics and not in terms of the general experience of mankind.

Take for instance an application for an injunction in a strike case. Is it not possible that the history of similar strikes has as much to do with the desirability and propriety of issuing the injunction as has the decision of the courts in similar cases? Is it not possible that a judge on the bench asked to take action of this sort ought to be informed as to what labor unions are, what their objects may be other than appears on the surface, what the employers are seeking to do and what the history of the subject shows to have been the effect of such injunctions in the past—rather than the mere fact that an injunction was issued in one case and denied in another? The answer seems obvious, and an able lawyer might furnish just this sort of information to the court either with expert witnesses or otherwise; but nothing that is taught in most of the law schools would tend to induce or enable him to do so in the slightest way.

Legislatures in considering new laws have the benefit of a kind of information which ought also to be made available to courts. The information as to proposed laws and their probable operation from experience elsewhere is constantly being presented before committees of legislatures, and legislative reference bureaux have been established for this very purpose. But the courts, where laws are constantly being revised and applied, have little or nothing of such aids. They may be told that some court in another state has decided a certain way; but they are given nothing with respect to the actual effect of such decision. Moreover, information of this sort is not now available to the lawyer if he desired to use it. The best trained of us have forgotten, if we ever knew, how to look up the doctrines or the history of economics in such a way as to use them in practice. The lawyer's library contains very few if any volumes on any subjects outside the law. And no one has taken the pains to compile information on economics or social life in such a way that the facts could readily be found if we searched for them.

But the facts exist. It is clear as the rising of the sun that leading opinions, declaring as they do new and important principles of law, have had a very appreciable effect upon the economic and social life of the times. Such effects have also been studied by sociologists and economists to some extent and no doubt could be discovered in important

cases and made available to lawyers and to judges. So that, with the effect of the thing more known than merely surmised, and with the light of many cases which never came to trial in addition to those few which reached the stage of court opinions, the view of the court could be enlarged and clarified, technicalities could fade into the region of silliness to which they belong, and gradually the point of view of the bench and bar would change from the legalistic to the pragmatic conception of all legal problems.

If this addition of a larger field of knowledge is thus important to the practising lawyer for the benefit of the public at large, it is to the law schools that we must look for its introduction. For even if the profession should become convinced that additional information in the nature of historical experience should be added to their briefs in all cases susceptible of such treatment, the equipment of the bar today is insufficient to make this possible, except in a limited way. Present day lawyers have had no education in the relation of the actual occurrences of history to the decisions of courts. The literature available to the lawyer does not include treatises of any sort which would be of direct aid in finding the historical material which ought to be presented. There are no encyclopaedias of law which give any references to historical sources. The references are all to statutes or decided cases or to legal text books. These references may lead to historical data of the greatest importance, and the opinions of courts sometimes review a series of events connected with important statutory enactments or leading decisions. But nothing of the sort can be counted on. And to the ordinary man the task of digging out the material is of so time-consuming a character as practically to preclude its use except where the historical material is obvious or contemporary. The teaching of history and economics in the law school, ultimately in a new way to bring out their relation to the law, is thus the only method which can be depended upon to bring to the courts these new and important aids to their counsels.

It is true that the writing of a great encyclopaedia of pragmatic law would be also of the greatest importance. It could safely be undertaken only on the broadest scale and on the theory that the first edition at least would be a failure. It is difficult if not impossible to estimate in advance the questions involved in such a work or the way in which it could best be presented. For there is no body of experience on which to move. The combination has never been produced. It has never been tried out in the laboratory of the class room. Students of history have seen many references to the development of the law, and many theories advanced as to the value of this or that sort of legislation; in fact all histories are full of changes in the law, and the accounts of popular movements which produced this or that sort of reform. And while the reform in question has been in the air, the courts themselves have breathed its atmosphere; so that the most extreme decisions in

many cases have been due entirely to the wave of popular feeling which ran high at the time and seemed to demand the heavy penalties imposed. But the development of the particular historical background to any legal proposition would require extended researches in order to make it true and dependable. For while courts have for many years continued to write with accuracy statements of the cases which have come before them, and the principles of the law which appear in these cases are all analyzed and classified and indexed and brought down in reference books through other cases, a general detailed history of the same kind of subject in experience outside of the courts has not been written.

In fact along this line the compiler would encounter much contentious material. Historians differ over the success or failure of various important measures. Liberal schools of thought would urge that liberal legislation and liberal interpretation of it has always been a success. Advocates of labor would find little or nothing done for the benefit of labor that had not been beneficial to the state, while conservatives would be just as sure on the other side. In such a condition the courts might well desire to take refuge, as they always have, in burying their political decisions in a mass of legalistics which are supposed to demonstrate that the decision in the hands of any others must have been the same. But this is the evil that we ought to escape. The court ought not to be able to avoid public opinion on any such flimsy theory. The truth should be known. The courts as well as the legislatures should face the music and frankly discuss the economic or social problems involved in terms of economics or sociology, and then take the consequences. If they demonstrate that they are believers in the capitalist theory of government, then that is no more than we knew without their saying so, and their real reasons brought to the light of analysis and discussion would help to clear the air.

But it must not be assumed that the introduction of pragmatic considerations into the study and application of the law would always involve such difficulties. Hundreds of legal subjects of a non-contentious character would benefit by the addition of practical knowledge to the law. Take, for instance, the subjects of agency, of corporations, of trusts, of future interests, of mortgages, of commercial paper. In each of these a compilation of practical information on the actual operation of business men in these particular fields would be illuminating in the extreme. In connection with the law of agency information could be compiled with the highest degree of accuracy as to the practice of the great business enterprises—how they classify their agents, what authority it has been found best in practice to give them, how they execute their authority, report to their principal, and how their relations to third parties has been worked out in practice. If this were done it would form a running body of economic information along beside the encyclopaedia, and arranged in about the same way in which the subject

is treated in the encyclopaedia.⁶ The same could be done with reference to corporate creation and management in a way that would be of the greatest usefulness both in and out of court. Things which the lawyer now pretends to know about the way in which the great corporations are organized could then be known with accuracy and with such explanation of their purpose and of their success in operation as the author could furnish. The history of the origin and development of the modern trust would also be of the greatest usefulness and has already been written to some extent though not in encyclopaedic proportions. In spite of all the technical decisions concerning future interests, I venture to say that no serious study of their usefulness or of their use has ever been made. But much could be done along this line and valuable information furnished to the courts for the decision of future cases. And so, with the other subjects listed above and with many more, the information that could be compiled without venturing into controversial fields would be very great and very useful. Some of it could be obtained within a comparatively short time, and some only with protracted research and difficult analyses.

The Law Schools can begin the program. They can begin it in a way which is not in the least degree difficult or in the nature of any dangerous experiment. They can merely combine the study of the law with the study of history and economics and sociology, and with other cultural courses; and the experience thus gained, by the faculties thus trying to work in harmony, and trying to find the common ground in these closely allied subjects, would open the road. The students would profit by the combination of the courses in any event. They would derive real education out of what is now their junior and senior years at college instead of only a little culture as at present. They would see and remember many of the great connections between the subjects even if the instructors should fail to point them out. They would take hold of the problem as a whole in a way that can never be possible so long as the law schools remain content in their present isolation. They would at once understand that a close connection of these subjects exists, and in their professional careers they would tend to profit by it and to develop extra legal aids for the courts and the legislatures wherever possible. Then if the principle of *stare decisis* should be modified or abandoned in favor of a more pragmatic treatment of the law it would be only after the experience of the law schools had blazed the trail and opened up the new wilderness.

⁶The above paraphrase of the subject of agency follows the general arrangement found in 1 A. & E. Enc. Law.