

## Some Notes on Law Schools in the Present Day<sup>\*</sup>

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An area specialist who took for his province all knowledge about the United States would have much to say about the American law schools. A look at the *curricula vitae* of first-rank politicians, of relatively non-political officials (among them, of course, the judges), and even of high corporate and foundation people, would convince anyone that, while there is more than one way to influence and power, the law school way is of great importance in our culture. Many of the people who took this way would tell you that studying in law school was the most decisive of their intellectual experiences. What goes on in these schools deeply affects our society as it will be; their current state foretells, though delphically, the future. I am going to write—very briefly indeed, considering the magnitude of the topic—about the uneasiness that now infects the law school enterprise.

It is not surprising that some of the student unrest which has plagued campuses at the undergraduate level should spill over into graduate and professional schools. Unless one buys two propositions which to me are refuted by all experience—that young people are better and wiser than older people, and that a shifting student population is likely to glow with pertinacity in its warmths of today—one might simply conclude that this storm could and ought to be ridden out.

But the anxieties go deeper than what may be an ephemeral student discontent. There exists among law faculties a profound and troubled conviction that change ought to take place, and that great change of some sort impends and must be managed.

At this level of abstraction—at least if we strike the word “troubled”—I say no more than could have been said about any good American law school at any time within the last twenty-five years, at the very least. The feeling that sweeping change is imminent and desirable is (however paradoxically) a permanent characteristic of our law schools—as perhaps it is of American life. Unless one probes more deeply, one easily finds *la même chose* in 1938. And the call for change in law schools has always taken the same double form: We tell ourselves, as we

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always have told ourselves, first, that law (through liaison with social science, or by developing its own means, or in both ways) badly needs to inform itself more fully about the facts of life on which it operates, and, secondly, that all legal ways of work, procedural and substantive, institutional and intellectual, must be remolded so as to do more good, more real good, in this more accurately explored world. These two propositions have so many times, over the decades, been put forward, and so much work has been done to implement them, that one may be a little bewildered by seeing them inscribed on the most lately unfurled banners.

Yet I think most of us feel that, while the words are the same, the accompanying anxiety goes deeper than it ever did before. When our law schools are measured against the world in which they are training people to work and often to lead, many teachers now seem to feel not so much discontent as panic. This has many symptoms, and I will not go into all of them here, but the most disturbing one, to me, is something that might with only a little uncharity be called anti-intellectualism—the feeling that hope is to be seen not in adaptation, however imaginative, of our traditions of clean thought and fine sifting of fact, but only in a mystique of “involvement,” in action to which thought is poorly ancillary—or in something else which can be discovered only by feverishly random trial and error. I cannot participate in these feelings, but I think I can grasp a little of their genesis.

In the face of war and poverty, there has come on the law schools an uncertainty not only about the proper shape of law and about the proper way to do the work of law, but about law itself as a set of institutions apt for doing any useful work at all in those very areas where supremely good work must be done if our culture is to survive outside the madhouse.

I will illustrate this from two fields. First (and this is one surely familiar to all readers) let me instance the field of civil rights, or, to turn the coin around, the field of racism. The progression here is classic. The institutions of law travailed. From the school segregation cases forward, law by its only known means—judicial decisions, statutes, administrative rulings—washed out of its fabric every trace of racism—or as nearly as that is possible in human political action. Yet black discontent has only increased. And the reasons, if not fully known, include two in chief. First, there is poverty, a poverty connected with racism, and even with slavery, by the most easily visible causal links. Secondly, there is an inchoate and not always clearly expressed desire for something—“identity,” “community”—which law is incapable of

giving. For my part, I think that in this field of racism it is unfair and even purblind to reject as quite worthless the part law has played. Things have gotten tangibly and intangibly better for many blacks in ways which can be traced to law as clearly as effect can be traced to cause in most social matters. But the fact of poverty massively remains, and surely there is a great deal in the assertion that law, having made so fair a start, has simply failed to solve the problem of a racism fatally linked by history with a poverty with which law knows not how to deal.

A less familiar example is in the field of contracts. This last semester I took a vacation from constitutional law, my special subject, to "teach" contracts to a group of exceedingly able first-year law students. I had a good time; I hope they did, and that they were not permanently harmed. My impressions of the subject, thus systematically revisited for the first time since my own far-off student days, were horrifying.

First of all, much of classic contract law is trivial and insipid. Results are justified on grounds having no relation to any intelligible policy. This is true not only of such peripheral questions as whether an "acceptance" of an "offer" takes hold on the mailing or on the receipt of the accepting letter. It is true, *par excellence*, of the all but sanctified "doctrine" of "consideration," which says, very roughly, that valuable exchange for a promise must be given or pledged before that promise is valid and enforceable. In the fine grain of this doctrine, judicial reasonings are inconclusively metaphysical; no relation to sound or even comprehensible policy is made to appear. The "doctrine of consideration" was said by its exponents in another generation to constitute our chief answer to the question, "Which contracts ought to be enforced and which ought not to be?" My own summary finding is that the "doctrine" serves only the function of deluding us into thinking this question has already been satisfactorily answered, with the consequence that we have never undertaken the hard work necessary to beginning the construction of a good answer.

So much for the pathology of "contracts." On the other side, the contract law system may be seen as helping to maintain the smooth working of the economic system. I don't think it contributes as much to this as some others think it does; at its best it may help some. But how much interest can you expect a law student or a citizen today to have in that function? If an economic system may be said to have failed when millions of people are in poverty, though goods are abundant, then the smooth maintenance of our system is the smooth maintenance of a failed system. Take this at its least: Insofar as it contributes to lubri-

cating our economic system, considered as a set of bargains, the contract law system is contributing nothing whatever to the solution of our most pressing problem of economic justice.

But the plot thickens. For the contract law system actually serves yet another function, a baleful one indeed, yet one clearly visible on the face of hundreds of reported cases. It serves massively and systematically as an *intensifier* of economic advantage and disadvantage. It does this because people and businesses who are in strong bargaining positions, or who can afford expensive legal advice, can and epidemically do exact of necessitous and ignorant people contractual engagements which the general law never would impose. Let me give an example. If a poor woman wants a washing machine, and thinks she can pay for it in instalments, and it is delivered, and it turns out to be seriously defective and inoperable, then the general law says she does not have to pay for it. This is obviously just, and obviously inconvenient to the seller. The history of contract law in the field of consumer transactions is a horrible history of devices—some of them successful—to make the woman pay for the worthless washing machine. She may, for example, be required to sign a “negotiable” promissory note, which is speedily endorsed to a finance company. Unless she is a very unusual poverty-bracket housewife, she does not know that “negotiable” means, “You have to pay even though the machine is no good.” *Ignorantia juris*, however, *haud excusat*.

Now judges are often compassionate men, and are almost never sympathetic to delinquent vendors or to finance companies. So, in a hard-fought lawsuit, the housewife may sometimes be relieved from so harsh a bargain. But how small an achievement that is, in the face of poverty! If the system succeeds, if it works at its imaginative best, it simply thwarts one overreaching unconscionability, and sets the finance company's lawyers to working on the next one.

Nor does the contract law system offer any serious compensating advantage to the poor, or even to the middle class. The mere expense of litigation will usually make it uneconomic for them to appeal to it, and when they do they will often find that its intricacies of doctrine, or its rules of damages, make the appeal unavailing. I could go on and on. The contract law system is for the “haves.” It is for those who can afford lawyers, to draft and to sue. At its best, it harmlessly mediates deals between fairly large business men. At its worst, it is a weapon in the hands of business men, for them to use on the rest of us, and most destructively on the poor. The best one could say of it is that no amount of restudy of doctrine, no overhaul in the light of social fact,

could ever make this system *affirmatively* responsive to the needs which now cry out so loudly for relief that other social demands ought hardly to be heard.

I have mentioned two fields—civil rights and contracts—where law has failed to solve the chief problems that society has tendered to it for solution. Other fields could be mentioned. But for now let us assume—and I think on examination the assumption would turn out to be warranted—that this failure is general.

Now the older mode of thought, within whose field of force the older calls for “change” were heard, would have been likely to say, “Civil rights law has not done nearly enough? Contract law is futile when not worse? Very well then! Let us take another look at the cases, at the statutes, at the methods the judges use, at the way we select juries, at our modes of collecting evidence. And let us see if we cannot set this right!”

The trouble is that now everybody knows what we have run up against. We have run up against poverty. “Civil rights” law cannot help the poor, unless and until a decent living is seen as a “civil right.” Contract law can have no meaning to the poor unless and until their poverty is relieved to the point where, with its associated ignorance, it no longer puts them at a fatal disadvantage with respect to the forming and the enforcing of any consensual arrangement.

Law teachers and law students like to work hard if they think that they are thereby indirectly advancing justice. But, as I have said in another place, poverty, in our rich society, is an impudent defiance of the very idea of distributive justice. And law people are filled with anxiety. They are anxious because they do not perceive in what direction their efforts may usefully flow. This is so for two reasons, rather opposite in tenor, though certainly not contradictory.

First, the lawyer can see that the culture in which he lives, and in which his law must grow or not grow at all, is light-years from being ready to put forth the kind of effort and sacrifice it would take to give relief against the injustice of poverty. I have implied that a decent living ought to be a civil right. With this concept, if the society workingly accepted it, lawyers could deal. But the society does not accept it, does not show signs of beginning to accept it, and the lawyer who would mold it into the shape of law feels no clay coming into his hands.

Secondly, it is well perceivable by law people now that, if by miracle the necessary social and political will could be massed, the early years of the process would have little work for lawyers as such. Copiousness, readiness to make mistakes as long as they are in the right direction,

generous inattention to many fine points—these are the virtues needed if we are to transform our society, and these virtues are not lawyers' virtues, nor skill in their proper measurement lawyers' skill.<sup>1</sup>

Law teachers, then, are brought as never before to a sense both of the futility of what they are doing and of the hopelessness of finding within law, however amply conceived, the right thing to do.

Some of them are leaving law for now, to become propagandists, administrators, or other kinds of teachers. I would send them out with a blessing. They may well be the sagest among us.

I fear that some others, most understandably but in my view most unwisely, would slowly change our law schools into agencies of social action, with emphasis not so much on keen thought and research as on the present relief of misery. I have said enough to show why I consider this understandable; I will now say why I consider it unwise. The great law schools of America are the places where, to the highest degree possible in our culture, carefully chosen men think, write and teach about the rational governance of our polity, in all its interconnected aspects. Some of these schools are very good at this job; many are good enough to be of value. If we remake them radically into something else, however valuable that something else may seem, we shall have wiped out a national asset which cannot easily, or perhaps at all, be replaced. In the long run, and even in the rather short run, a nation can only lose, and that very disastrously, by wiping out an asset of this character. Those to whom such an asset does not seem all but supremely precious will hardly be convinced by anything else I can say.

In what ways (short of destroying these institutions as they now exist) can the rational thought, writing and teaching of the law schools be made responsive, in part, to our society's terrible needs?

I would mention first a function which will not be at all glamorous, or perhaps even appealing, but which will undoubtedly be performed whether we like it or not. We will continue, as we have always done, to train a good many people who will see the law in relatively traditional career terms. We will do this because we cannot exclude able applicants who will not sign a pledge to be concerned only with social justice. And our contribution as to them will be to make sure that they are fully aware, before they leave us, of all the social implications of law and of the lawyer's status. I do not think this to be a negligibly

1. On further reflection, I would substantially qualify this paragraph. A good lawyer can be of help in managing anything—even generosity. But a full development of the qualification would make another article—perhaps even another world.

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beneficial function; the country is full of good lawyers, mostly making their own way, whose contributions in time and thought are valuable, perhaps sometimes crucial.

Others of our students will be wanting to be prepared to go more directly for the jugular of social injustice. As to them, we ought to help them sharpen the knife, if they believe, with us, that the most thorough possible understanding, the best possible training in thought, is the right whetstone. If, instead of that, they want present action, there are plenty of other places where they can find it. There is no reason to think either choice is mistaken.

There are many things, on the periphery of poverty, that law in its present state of readiness can do. Civil rights gains can be expanded. The harmful incidence of every kind of law upon the poor can at least be mitigated. "Due process" can gradually be extended to matters now thought to be mere favors, so that a boy, for example, who wants job training will not be at the mercy of an administrator's assistant's secretary's whim.

Above all, we should make a start toward applying the reason of the law, its highest and most inclusive reason, to the claim of the poor, analyzing out of existence all sham defenses against it, and beginning the work of projecting a rational system in which the claim not to be poor, in a rich society, shall seem as natural as the claim not to be beaten up in a society which has the means to keep order. We should go to this work coolly, without bias or preconception, except for the lawyer's bias in favor of that justice which must be done lest the heavens fall upon our children.