

LEGAL REALISTS, LEGAL FUNDAMENTALISTS, LAWYER SCHOOLS, AND POLICY SCIENCE—OR HOW NOT TO TEACH LAW

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It has been eleven years since this querulous maverick said Goodbye to Law Reviews—at least so far as leading articles were concerned—and retired into the comparatively open-collared comfort of the book review sections. If I now break, ever so briefly and just this once, that long-kept vow of chastity from formal forays into Scholarship, my fall is reluctant and can be doubly rationalized. In the first place, I didn't fall; I was pushed—by that persuasive fellow, Prof. Hugh Sowards, who gave me seductive assurance that the new law review he is launching at Vanderbilt will bear but slight resemblance to those repositories of pretentious irrelevance and pompous nonsense of which I once washed my hands. In the second place, this little lapse will be no article in its own right but rather a belated and elongated footnote to what I said in the Virginia Law Review back in November, 1936 (advt.). Only because I happen to be allergic to footnotes as such, will this one—with Prof. Sowards' kind indulgence—appear as text.

Increasingly over the past years, there has cropped up in the law reviews a special kind of leading article. It does not deal with anything courts are doing or legislatures are doing or lawyers are doing; it does not even deal with what courts or legislatures or administrators or lawyers ought to be doing; instead, it deals with a subject of apparently endless and obviously narcissistic fascination to the law teachers who write the articles. It deals with the teaching of law. More precisely, these articles are concerned with how the law teachers who write the articles think *other* law teachers ought to teach law. It isn't legal education they're driving at when they tee off for 20 or 120 pages on Legal Education; it isn't the business of educating embryo lawyers. What they're really out to do is educate the legal educators.

Now Legal Education as it is tossed around in the law reviews is something I confess I know next to nothing about. I've been teaching law for going-on fifteen years, but if I had tried to keep up with the awesome flood of free and conflicting advice as to how I *ought* to be teaching law, I'm afraid I should never have had time to prepare my classes. Hence what few remarks I shall make on the subject may be—and doubtless will be—dismissed as sired by envy, conceived in ignorance, and born of malice. Let me start, then, with the

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mild and cautious statement that, judging from the several samples I've read or skimmed through from time to time, the entire alleged literature of Legal Education (including a strictly descriptive job I myself once wrote to make a chapter for a book) could be dumped with a slurping splash into Bikini Atoll, and law teaching, today or ten years from today, would be none the worse for it.

This is not at all to say that I do not have a stray idea or two about how I think law ought to be taught—nor that I am numb or neutral to other folks' ideas. The fundamentalists, from Fordham to Fuller, appall me with their authoritarian approach, their consecration to word-magic, their witless unawareness that the law is not a theology but a working tool which must be directed, and better consciously than unconsciously, toward ends outside and beyond its own automatic compass. I have been flattered to be rated and berated as a "legal realist"—though it is scarcely a term of descriptive precision which blankets with a phrase both the i-dotting, t-crossing, pedestrian perfectionism of a Karl Llewellyn and the world-wide sweep and search of a Walton Hamilton. But when, in all the war of words, the avalanche of articles, has one heathen realist ever been converted to the oldtime religion, one fundamentalist swung to functionalism? Who teaches law with a different slant because he read an article about teaching law?

In the current number of my own school paper, the *Yale Law Journal*, two of my close friends and teaching colleagues expatiate separately on Legal Education. Jerome Frank, sparkling and eloquent as ever, plumps for "lawyer schools" (note the semantic sleight-of-hand) whose emphasis would train men for trial practice and so elevate and improve the neglected but crucial fact-finding function of lower courts. Myres McDougal, ever the progressive planner, would scientifically systematize on a tremendous scale the quest, through law and law schools, for social betterment. Both articles, for my money, add up for the same reason to a waste of paper and of their able authors' otherwise useful energies.

And it would equally be a waste of paper for me to argue here at length what strike me as the weak spots in these two pieces of special pleading. I could snidely suggest to Judge Frank that he has scarcely applied to his pet proposal the seminal and probing skepticism for which he is famous; that neither the root of the evil he deplors nor the road to its reform is to be found in that easy scapegoat, education; that the true villains are a legal system which sticks to an outworn combative method of finding facts and a legal profession which ranks trial practice—prestige-wise and money-wise—at the bottom of the legal ladder. Or I could poke smug fun at Prof. McDougal's earnest search for certainty in the substitution of one logomachy for another; at his seeming belief that the clumsy vocabulary of the so-called social sciences ("utilization" for "use", "implementation" for "working out",

“integration” for “putting together”) can lend weight or substance or dignity to ideas; at the aroma of authoritarianism, which he would deny, in his or any effort to fit the infinite stuff of humanity into a neatly blue-printed scheme. But to do so would be beside the point as, in fact, this entire paragraph has been beside the point.

The point is that both Judge Frank and Prof. McDougal do beautiful, stimulating, craftsmanlike jobs—each in his own way, each according to his own slants and talents—in *teaching their own courses*. Why in the name of the ghost of Langdell—that first and worst standardizer of law-teaching technique—can’t they let it go at that? Why must they try to cram their highly personalized approaches down the craws of other law teachers? I too have a way of teaching law and it works middling well for me. I even venture to say that, judging by our general aims and purposes, Judge Frank and Prof. McDougal and I are pretty definitely on the same team. Like Judge Frank, I am far more concerned with the meat of facts than with the mercury of rules; like Prof. McDougal, I make and express “value judgments” and care deeply about “policy goals”, though you’ll never catch me talking that kind of language; like both of them, I try to help my students learn to use their own minds in an inquiring way and also to use their legal training toward something more creative, constructive, and humanitarian than purely private bread-and-butter ends. But I should never have the gall to turn the personal “is” of my way of teaching into a universal or nearly universal “ought”. I should never dare nor care to tell any other law teacher how *he* should be teaching law.

The plain fact is that anybody who has to read an article about teaching law to learn how to teach law has no business teaching law—or anything else. The crux, the essence, of every good teacher is his unique and spontaneous individuality, in everything from his mannerisms to the way his mind works. Teachers cannot be molded to pattern like movie stars—and no teacher worth his salt will take his lines or his line of thought on a hand-out or a hand-me-down basis. You can cite me normal schools and teachers’ colleges, but even granting—which I don’t—that a minimum of forced feeding may be suited to the production of grade-school teachers, it has no proper place in the upper reaches of our educational system. And a law teacher, above all others, should have the insight, the feel, the imagination, the capacity for intellectual self-starting and self-propulsion, to go it all the way on his own.

That is why this sour little screed is subtitled: *How Not to Teach Law*—meaning, by reading articles on how to teach law. That is why I hold the whole literature of Legal Education to be not only presumptuous but intrinsically useless—except insofar as pedagogical navel-gazing may afford its indulgers some peculiar and ego-soothing pleasure. And on this score I freely grant that it would serve me right if this peevish piece were to be listed in the periodical indices under Legal Education.