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LEGAL EDUCATION IN MODERN SOCIETY

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It is interesting to note how the economic situation conditions all things, even the public address. Time was when the Commencement oration was a paean of joy for the great heritage that was ours and the opportunity that lay before the young man in being permitted to participate in the struggle to obtain a share of it. But now it is customary to look upon the future with fear and foreboding and to expect the most drastic of changes in our political and social institutions. Lawyers, it is true, still generally talk of the Constitution in terms of religious awe, but more are beginning to show a fear that the state which it is assumed to have guaranteed is perhaps not absolutely ideal. In short, a period of extreme self-analysis has developed. I must say that I like it. Better a groping to ascertain what is happening and an aspiration, however faint, to improve oneself and one's professional and social institutions than that smug satisfaction which wraps its rapacious self-seeking in the American flag and dares any one to dislodge it from its constitutional pinnacle. I think this attitude represents a real gain, a gain of which the future potentialities are so great as perhaps to make the present depression—when it retreats into the proper perspective of history—seem like a boon after all. And though I shall express some critical judgments upon our past professional activities, I do so in no spirit of despair, but with not a little satisfaction in the belief that you will willingly accompany me in the self-analysis I am proposing. Hence the indications I have given that I shall "view with alarm" are justified in

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part at least, though they represent by no means the whole picture I would place before you.

I can put the problem as I see it quite succinctly. The lawyer of recent years has been brilliantly successful as a practitioner or, as expressed by one of them, as a "client caretaker". He has failed, however, in social and political leadership of the type which traditionally we have expected the profession to represent. So, also, the law school has been marvelously efficient in training for such client-serving. It, too, has failed to stimulate and to train for that leadership of which I have just spoken. Can we afford to remain satisfied with this situation?

We may pause for a moment to consider the truly remarkable growth and practical success of the American law schools. It has been one of the outstanding events in education in modern times. Even the older schools are little more than one hundred years in age, and the great growth of the schools has come within the memory of many persons now living. Only a short time ago the lawyers of the country were trained for the most part by the apprentice system in law offices, with occasional additional lectures, originally with practitioners, later from law professors. The rise of the law schools actually received its impetus when, in the seventies and under the leadership of Langdell and Eliot of Harvard, there were developed the policies which have conditioned and made possible legal education as we know it. These were the case method of study, the full-time law teachers, and the high preliminary requirements for admission to law study, consisting, under the Harvard plan, of graduation from an approved college. With the latter requirement reduced to that of two years of college only, these have become the standard and ideal requisites of legal education in the country today. The case method of instruction made law study at once concrete and practical instead of abstruse and theoretical, and it developed that marvelous facility in analysis of existing complex situations and of dissecting judicial precedents which has made the young law school graduate of today so valuable to the great law firms specializing in matters of finance. The full-time faculty provided a group of men able, ambitious, and devoting their lives to the scholarly study of legal problems, who, by their writings and by their public and semipublic activities in behalf of law reform, as well as by their teaching, made legal education a profession in itself, not a

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mere by-product of a busy professional career. And the preliminary education requirement resulted in a student body of sufficient maturity and background to assimilate and make effective the training thus made available to them. The Association of American Law Schools, organized in 1900, made these requirements the ideal and soon the actual conditions for school membership in it. In 1922 the American Bar Association adopted as its program of standard requirements for admission to the bar in all States at least two years of college education followed by graduation from an approved law school and passing of a state examination, and it then entered upon an active campaign, under the direction of its Council on Legal Education and a full-time executive, to secure state enactment of these requirements. In the little over a decade which has since elapsed, its campaign has achieved real success, so that now more than half the States, comprising over sixty per cent of the population of the United States, have bar admission standards substantially equivalent to those of the American Bar Association. This means that hereafter the greater number of the young men and women coming to the bar of America will be trained in accordance with those standards.

Along with this increasing formal recognition of the law school's place in American professional life, there has come a like increasing awareness and acute and polemical discussion of the pedagogical and public problems involved in training for the bar. It has been a matter of remark by many that in the period after the War, a period of apparent stagnation and frustration in philosophy and the arts, there was an unusual ferment in law teaching and a definite challenging of the ancient order of things. This attack took several forms. First came Dean Roscoe Pound's emphasis upon sociological jurisprudence, with Justice Brandeis perhaps the chief judicial exponent of the union of law and the economic reality. Later came several movements: one emphasizing legal analysis and calling for more clear-cut thinking and expression of terms in describing legal situations; another "the functional approach to the law," examining the various legal devices of the law—the corporation, the partnership, the trust—with particular stress upon the function they were designed to fulfill; and finally the jurist realists who led many a charge against conceptualism in law. The realists perhaps have aroused the greatest din of battle, because of the vigor of

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their assault as well as by their complete insistence—in season and out—upon law as it actually develops, even down to the causative force of the digestive processes of the judges. The brickbats they hurl at the conceptualists are devastating in weight unless it be true, as the latter claim, that they do not deserve the title at all and that they are the only true realists in giving the only actual view of the law by allotting proper weight to the force of judicial precedent and tradition in shaping our modern system and in promoting a desirable uniformity and impartiality among all litigants. Dean Pound in fact has dubbed the self-styled realists as only neo-realists. Even more recently a group has developed which argues for a return to first philosophical principles and to the testing of legal rules by the standards of Ethics and the Good Life, with Aristotle and Thomas Aquinas as guides. The disputations have waxed warm and furious. Amusing caricatures could be made of the participants, since the vigor of debate often leads them to adopt exposed positions. All this, however, whatever may be one's judgment upon the various individual battles now going on, indicates a most healthy vigor in the schools now extending into the profession itself. I am inclined to consider it, in what it portends more than what it now represents, as the most hopeful sign of impending change in the profession that now exists. It shows a willingness to challenge existing dogmatism and tradition, characteristics which have so limited our profession in the past, and a desire to face the facts of modern life in a way that makes education and research a real adventure and an augury for improving social adjustment as greater knowledge is acquired.

It has been true, however, that the finest products of the law schools in recent years have been drawn off into the service of a business and profit economy which already now in retrospect looks unlovely. The law schools have been criticized as training for this type of professional activity and thus continuously providing the skilled artisan who makes the business structure yet more amenable to the tyrant rule of the captains of industry. It is this phase of legal education—of the fruits of modern legal education, oversuccessful along materialistic, under-successful along spiritual lines—that troubles me as I know it troubles my colleagues among law teachers. And it is concerning this that I should like to speculate with you for a few moments.

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Now it is certainly true that we in the schools do not consciously plan to emphasize this side of professional training. Every school develops courses in fields not immediately popular to the student body and faithfully repeats them year after year. It is unfortunate but true that the modern law student takes no great interest, for example, in the criminal law and in criminal procedure. The schools have been rather sharply criticized by members and officers of the American Bar Association for not doing more in the way of formal teaching of Legal Ethics, though most schools do attempt some sort of course in the subject. Any one, however, who has tried to teach the subject can realize how hopeless it is to make students of maturity and of sophistication in American ways of living and ideals take any intellectual interest in the announcement of obvious moral precepts from a professorial desk. In the keen competition with other courses and law review, moot court and legal aid work—all of absorbing intellectual interest—such a course tends at best to be dull and often ludicrous. The first fact we must honestly face is that we are conditioned by the profession itself and we must turn there to see what it does to us and our teaching.

Now I do not wish to make any blanket indictment of the American lawyer, although it is apparently becoming increasingly popular to do so—a fact which in itself should cause some pause to the bar. As a matter of fact, the lawyer in turn is conditioned by the economic organization in which he functions. In an organization emphasizing individualistic activities and with the motive of private profit largely unrestrained, it is but natural that lawyers should aid the activities of the strong and predatory buccaneers who have been the arch prototype of American success. It is the lawyer's function to aid people to live together more easily but nevertheless *according to their present habits and desires.* It is only natural that in any sharp political overturn the lawyers suffer materially; that "first we will hang all lawyers", as Jack Cade says; that the immediate desire is to dispense at once with the adjusters and ameliorators of the old régime. Nor is it surprising that a new breed of lawyers is soon found necessary and is developed to serve the new organization. So in Russia today, we find a new bar, including, of course, those older members who were able to adjust themselves rapidly to the social changes. And we find, too, as we ought to expect, in view of the political theories now dominating there, that

the lawyers are members of groups or collegia, with their activities and their fees regulated by the groups.

Making all allowance, however, for the lawyer's natural right and duty to serve his society as it actually is, it does seem as though our colleagues at the bar had overdone it. They it is who have provided the skill and the mechanics by which attempts to restrict the increasing inequality of wealth and power have failed. In fact they have assumed leadership in the game, often withdrawing entirely from professional life to do so, and at other times directing the reorganization of vast enterprises to salvage or "bail out" themselves and their associates from past wrecked businesses. Stories from recent receiverships have demonstrated legal skill and technique, but are disquieting in what they show of vast power in the lawyers and how it is used. The hearings now going on as to reorganization practices before the Securities and Exchange Commission furnish case histories which it is our duty to study and to ponder over. If the defense that these were the *mores* of the time is sufficient to excuse the past, certainly it must be made insufficient as an excuse for the future.

But along with this care of business there has come a real and noticeable decline in political and social leadership. This was stated in careful but compelling form by one of the greatest of modern judges, a man of wide metropolitan experience and of restrained scholarship, Mr. Justice Stone. In an address at the dedication of the Law Quadrangle of the University of Michigan a year ago, he concluded a searching examination of the declining public influence of the lawyer by saying:

> . . . In one of the most critical periods of our history, when a major public problem is the choice of remedies for our economic ills and the mutual adjustment and reconciliation of those remedies with legal doctrine, the practicing Bar of the Nation has not attained its accustomed place of recognized leadership . . .
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> At its best the changed system has brought to the command of the business world loyalty and superb proficiency and technical skill. At its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations. In any case we must concede that it has given us a Bar whose leaders,

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> like its rank and file, are on the whole less likely to be well rounded professional men than their predecessors, whose energy and talent for public service and for bringing the law into harmony with changed conditions have been largely absorbed in the advancement of the interests of clients.[1]

A striking expression of the same thought has been made also by one of the militant younger lawyers and New Dealer, Robert H. Jackson, Assistant General Counsel of the Treasury Department, in an address last year to the Conference of Bar Association Delegates:

> During the past year lawyers have written volumes to express their views of the criminal. The criminal has made better economy of language, and has compressed into a single word his contemptuous estimate of us. Every lawyer, even the one he relies upon and trusts, is known to the criminal as a "mouthpiece." The word summarizes his opinion of the lawyers' position in society, one that others in some degree share but that only the picturesque and realistic vocabulary of the underworld is adequate to express.[2]

And in his forceful argument that the lawyer should reassume leadership and render inapplicable the underworld's scornful estimate of him as a "mouthpiece", he says:

> It is a matter of self-preservation, as well as of social duty, that the bar assumes leadership in overhauling our procedure to put the processes of the courts in the reach of the people, and to make justice available to disadvantaged men.[3]

Mr. Justice Stone's conclusions, those of Mr. Jackson, and what I have had to say have concerned primarily those we are accustomed to look upon as leaders of the bar. But this is by no means the whole story. With greater specialization upon the part of the bar comes an increasing maladjustment of legal service to community needs; one comparable to that found in medicine as a result of the decline of the general practitioner. It is becoming more and more the case that the ordinary little man, the forgotten man who is neither over-rich nor very poor, does not know where to turn, while meanwhile the organized bar is crying out against the competition of other groups in the so-called "unauthorized practice of the law." We now have legal practice, particularly

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[1] Stone, the Public Influence of the Bar, 48 Harv. L. Rev. 1, 4, 7 (1934).

[2] Jackson, The Lawyer, Leader or Mouthpiece? 18 Jour. Am. Jud. Soc. 70, 71 (1934).

[3] *Loc. cit. supra* note 2, at p. 74.

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in the metropolitan areas, quite completely stratified. At the top are the great law firms employing multitudes of law clerks—the finest product of our schools—and serving the needs of the financial structures in ways I have indicated. At the other extreme are the shysters, so called—the ambulance chasers, the bankruptcy racketeers, the lawyer criminals—men roundly condemned by the bar leaders and unlovely enough in all truth but responding to a certain kind of demand, a part of which is legitimate. Thus, unless some different method of adjusting the auto accident case is developed —for example, some application of the principle of compensation insurance—the lawyer serving on contingent fee is an economic necessity to the indigent victim of an accident. In between should be the general practitioner—in the old days known and appraised and, where deserving, trusted by the whole community. Now such a man finds a field less open and less attractive than before, and the ordinary citizen increasingly does not know where to turn for a lawyer combining qualities of ability and trustworthiness and availability at a reasonable price.

I hope I have said enough to indicate that the only possible solution for the ills of the profession is in the profession itself, and that the law schools, if they would understand, much less assist in change and improvement, must turn their attention to the profession and its functioning and forget somewhat, if necessary and for a time, the judicial precedent as well as the judicial lucubrations of individual judges. What boots it to our realists who would understand how and why a case is decided if they do not go behind all this to see what chance a litigant has of getting started aright in the vital matter of securing a lawyer and a good one, too? The profession should be our study. I regard therefore recent attempts at factual study of the profession as most important. Thus one with definite objectives has been brought to a successful conclusion in Wisconsin by Dean Garrison and the University of Wisconsin Law School;[4] an ambitious one is under way in New York City under the auspices of the New York County Lawyers Association;[5] and other more limited surveys have been had in Missouri, California, and Kentucky. And finally plans are under way for a national study under the auspices of the Association of American Law Schools di-

[4]Garrison, A Survey of the Wisconsin Bar, 10 Wis. L. Rev. 131 (1935).
[5]Lazarus, An Economic Survey of the Legal Profession, 7 N. Y. St. Bar Ass'n. Bul. 18 (1935).

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rected by a committee of which I am chairman.[6] We have tried out our plans for interviewing members of the public and of the bar in an experimental way in Connecticut and the results sustain in striking fashion the preliminary assumptions we had in mind. The lawyers—those without arresting reputations—find great difficulty in bringing their abilities to public notice; while the ordinary citizen hesitates to bring his case, especially if a small one, to a lawyer and often it goes by default. Some better means of bringing lawyer and potential client in relation to each other must be devised.

Now it would seem that the schools should do their share in attempting to devise means of improvement. True, their primary function, outside of student instruction, is the ascertainment of facts. But we know how cold and dead that is, unless the facts are given some meaning in terms of human need and desire. We are now told also that as a matter of scientific method facts cannot be pursued *in vacuo,* but only in the light of some hypothesis which points to and explains the selection of data to be considered. Even in research, *purpose* is necessary. Moreover, the law teachers alone are likely to have the time, patience, and prestige to develop and support a program. This is a question of exercising leadership. Then why not the law school men?

Here is where the training of the mind to be flexible, to be prepared to accept new ideas, becomes important. If student and professor are accustomed to accept change, they will not be so shocked when it comes. One test of their training has been the zeal which so many of them have shown in entering government service in Washington. I am all for the brain trust so far as it calls for the university man in public life. Whatever be the shortcomings of the New Deal in economic recovery, it is certainly to be commended for making government seem attractive to the young lawyer and teacher and for making them technicians of governmental change and improvement.

Now it seems that the major line of immediate development in the profession is in the direction of greater collective activity and control. There has been a general trend towards increasing governmental direction of social institutions, which seems inevitable if a crowded and complex civilization is to

[6]See symposium on Bar Surveys at the thirty-second annual meeting of the Association of American Law Schools in Chicago, December 27, 1934, printed in 8 Am. L. Sch. Rev. 116 (1935).

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operate. With the lawyer state control is altogether natural, since he is already an officer of the court and subject to its discipline. The move for group activity is taking the form of support of the plan of the "integrated bar," by which all practitioners must be members of the organized bar and directly subject to its control. This movement, now only about ten years old, has already achieved success in some seventeen jurisdictions. The essence of the integrated bar, according to the American Judicature Society, lies "in the inclusion in the organization of every practitioner, in the equal contributions to expense of operation, and in a form of organization which insures to every member equal rights in management."[7] As incidents to a bar thus inclusive and democratic are powers to control admission and impose discipline. So invigorating is this movement in reawaking interest among lawyers that in California, home State of the integrated bar, it is said that in the first six months of its existence more disciplinary actions were maintained than in the whole history of the State to that time.

It is clear that with such a vital force operative increasingly in the States the lawyers will demand an all-inclusive and national organization. The American Bar Association is not that now. Its membership is only sixteen per cent of the American bar; its functions are social and polemic in character. It has to its credit promotion of worthwhile reforms in legal procedure and legal education. Only to a limited extent does it attempt control and discipline of its members. But even in that organization so generally conservative in leadership and direction, a fresh and vigorous demand for change is developing. The Association's Committee on Coordination with local and state bodies has secured a generous grant from the Carnegie Foundation to study the possibilities of a better national organization and the matter will be a main topic of discussion at the Association's annual meeting to be held next month in Los Angeles.[8] Personally I think that the demands now gathering increasing momentum will eventually be satisfied with nothing short of a completely representative form of organization, perhaps along the lines of the American Medical Association, with groups at least as

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[7]18 Jour. Am. Jud. Soc. 22 (1934).

[8]The Los Angeles meeting took definite steps looking to a reorganization of the bar. See 21 Am. Bar Ass'n. Jour. 474, 568 (1935). The addresses at the conference on "Better Organization of the Bar" are published in 21 Am. Bar Ass'n. Jour. 522 *et seq.* (1935).

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small as the county ones as basic units, and including under its aegis substantially all the members of the profession.

It is an interesting tribute to the amazing rapidity of movement of the political leadership in your State that it should have seized upon the development so full of promise for the profession and have turned it to serve the cause of Demos triumphant. Last November a bar integration act[9] was passed in Louisiana, in many respects closely following the provisions of other state bar acts but with the vital difference that the members do not control the acts of the incorporated bar. That control is lodged in a board of governors politically chosen on the regular political tickets at the general election. This feature and the direct prohibition against high educational standards for admission to the bar are portents which, I have no doubt, are causing you much worry and are causes of anxiety generally to those of us who love our profession.

Again you may be asking, What has this to do immediately with the law school and with the usual law school curriculum? Well, if I am correct that the next developments in law must be had in the organization of the profession, then it means that the schools must study this subject in order to know the law of our time. But I will go further and say that I think professional organization must advance beyond anything yet contemplated in this country and that I have stated only a few first steps. Consider the maladjustment of the bar to society's economic needs, to which I have made reference. That will be corrected not a bit, but will keep on becoming worse, unless more drastic change can be had. I believe that here, too, rectification of the maladjustment must come primarily from a profession organized to compel and direct it. Thus if the bar associations become a real guild, the citizen can go to any branch office of the association, secure in the knowledge that he will receive earnest attention and be placed in the way of honest, capable legal service at a reasonable price. The lawyer will look forward to a dependable income, and the now untapped field of legal service, left to the church, to the ward leader, or to no one, will be taken care of as it should be by the trained attorney. The systematic organization of legal service to meet the need for it, where and only where there is need, is necessary, and the organized bar is the group best fitted to undertake the job if it has the requisite courage, vision, and initiative for the

[9]La. Act 10 of 2d Ex. Sess. of 1934.

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task. The group can properly advertise its service and thus avoid one of the greatest difficulties of the present system, the unlovely nature of individual law advertising and business-getting and the proper ethical ban on it by the profession. Already the Illinois Bar Association has developed its Experienced Lawyer Service, whereby it brings into touch with other members of the profession those who are specialists along certain lines and work for moderate and definite fees.[10] This idea, expanded to include the general public among its patrons, would mark a worth while development. We do not need by any means to adopt the complete Russian system, but some study of their organization of collegia of lawyers to standardize professional service very considerably but not completely should be had. In fact the professional organization of the bar throughout continental Europe ought to be examined and appraised for its possible teachings for us.

Now these ideas are of course only suggestions of lines of approach, but they show the need of the careful intelligent study which scholars and students must be relied on to give. Justice Atwood of Missouri has said recently: "It must be recognized that much of the stimulus and guidance that has come to the bar in the last decade or so has emanated from members of the teaching profession who are peculiarly fitted and equipped for the work of research in the law and related sciences."[11] Here, it seems to me, is the greatest and most immediate need of the law today; and here the law teachers should be exercising their best talents. I summon the law schools to turn from their success among the precedents to assist in the endeavor to build a better bar. It is a much more difficult task; it calls for what Dean Pound used to like to call "social engineering" of a high and original kind; and it demands unusually delicate co-operation with the lawyers, many of whom will regard any change as interfering with their long-vested prerogatives. But it is an opportunity and an obligation which should be met boldly. No higher undertaking, not merely for the good of the law which we honor and serve, but also for the higher good of all, can be conceived than the restoration of intelligent resourceful leadership to the bar. That, I believe, is the task now before us.

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[10]See Stephens, The Illinois "Experienced Lawyer Service", 20 Am. Bar Ass'n. Jour. 716 (1934), 18 Jour. Am. Jud. Soc. (1934), 13 Tenn. L. Rev. 41 (1934); Stephens, The Forgotten Lawyer, 19 Jour. Am. Jud. Soc. 42 (1935).

[11]Atwood, Objectives and Methods of Bar Integration, 20 Am. Bar Ass'n. Jour. 203, 206 (1934).

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