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# LEGAL EDUCATION YIELDS TO THE TIMES

FRANK W. HANFT †

THE FUNDAMENTALS of good law teaching cannot be supplied by any method or any viewpoint, theory, or emphasis. The ability to understand complicated cases and to present them as simply as their nature permits, but no more simply, and the power to speak vividly as well as accurately — these elements of adequate law teaching are probably worth more than any method, however good, or any point of view, however sound. There is no substitute for contact between the minds of professor and student, and for the ability of the professor to sense the breaking of that contact when he ceases to carry his class along in the presentation of his materials. But although it is impossible to have good law teaching without these fundamentals, it is possible to have these fundamentals and still have bad law teaching. Effective legal education may go in the wrong direction. Objectives must be formulated. Philosophy of law is of importance in that formulation.

The extent to which the teaching of law is colored by a prevailing legal philosophy was vividly impressed upon the writer when a law student about fifteen years ago. The historical school of jurisprudence then prevailed in some of the country's best law schools, although its days were numbered. Casebooks reflected the historical approach. Thus, in the evidence course Hinton's *Cases on Evidence* was widely used. The first eight cases of that book are English, not one of which is dated later than the sixteen hundreds. The next four cases are likewise old English, all decided in the seventeen hundreds, while the following four are also English, these having been decided in the eighteen hundreds. The seventeenth case is modern American. A similar scheme continues in other sections of this book.

The result of this type of instruction was that the law student of fifteen years ago had to learn vast quantities of obsolete law from cases arranged in serial form, the first perhaps showing a rule beginning to glimmer inarticulately in quaint, barely comprehensible English, while succeeding cases traced its development or change. This technique was designed to enable the student to understand modern law by showing how the law evolved. Background was the thing. The background of early law was expected to make clear the foreground of modern American law. But the theory did not work. The trouble was that the background became so mixed up in the minds of the students with the foreground that they were not sure which was which. Furthermore, the premise that to understand modern law one must know its origin and

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development is, in a great majority of instances, false. For example, the modern rule that any affirmation purporting to be one of fact made by a seller relating to goods sold, which affirmation is intended to and does influence the buyer to buy, is an express warranty, is a rule so clear and logical that it is much more comprehensible than the historical background with which it was accompanied. That background usually emphasized the hazy old bezoar-stone case,<sup>1</sup> holding that an affirmation of fact gives no cause of action in warranty unless the fact is warranted. What constitutes a warranty as distinguished from an affirmation is not there stated. Further, the law of deceit is pretty well tangled in the report of the case with the law of warranty. However important this case may be for historical study, the thesis that it helps to clarify modern law is unconvincing.

Furthermore, historical jurisprudence in legal education made a most unhappy union with the recently arisen case system. However excellent the case system, with modifications, may be as a means of impressing on the student mind a picture of law in operation, as a method of presenting historical background it left much to be desired. The essentials of the historical development could better have been presented in summary, without obliging students to wade through ancient cases reported at a time when the use of language as a means of expressing facts and law fully and with precision was still undeveloped. True, acquaintance with the fashion in which cases were decided and reported in earlier days, and with the growth of law, is important cultural material for legal education, but this purpose could have been accomplished, and better accomplished, by a separate course in legal history.

A peculiarity of historical jurisprudence which had a strong influence on legal education was the contempt of the historical jurists for legislation. This was the center of their battle with the analytical jurists, who contended that laws were the commands of the sovereign. The historical jurists, accurately perceiving that this was not the whole truth, contended that on the contrary law grew out of the life of the people, and was founded on what they did, not what some legislative body decreed that they should do. Neither school was right; neither school was wrong; each was guilty of magnifying a part of the truth and holding it forth as the whole truth—an error men continually fall into when in impetuous pursuit of some theory. At any rate, since the historical jurists had a contempt for legislation, in law schools where historical jurisprudence was in flower legislation was likely to be ignored or merely mentioned, not studied. This stock argument was made: "If you study legislation, the legislature tomorrow may repeal all you know." The argument was more felicitous in its expression than in its substance.

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1. *Chandelor v. Lopus*, Cro. Jac. 4 (Ex. Chamber, 1625).

The idea that legislation is ephemeral whereas the principles of the common law are abiding has proved false. Quite apart from the Uniform Acts, there is a great body of modern legislation such as that providing for regulation of the rates and service of public utilities, married women's statutes, and the considerable body of legislation in the field of insurance, which has turned out to possess a sturdy longevity.

This experience of legal education under the influence of historical jurisprudence has left us at least three object lessons. First, there may be a great difference between what is good for law professors and what is good for law students. Doubtless to a law teacher, already familiar with the elementary principles of modern law in his field, the exploration of the history of law in his field was a delightful mental experience, rich in cultural value, and more exciting than the tedious task of making plain to students elementary principles already familiar to him. Yet a new approach, inviting to the teacher, and easily comprehensible to him, may serve to befuddle students in their search for elementary principles. The mastery of fundamentals is, after all, the primary purpose of law students and the aiding of that mastery the main justification for law professors. Second, legal education suffers when it is completely dominated by any group adhering to a single point of view or theory of law. Historical jurisprudence made a bad master for legal education, but it had much to contribute. Third, undergraduate law students are in no position to profit from doses of some juristic theory administered to them along with their contracts, sales, and trusts. They do not know enough about other angles of juristic thought to appraise the type they are receiving. Most of the students who were dosed with historical jurisprudence did not know what was happening to them. They did not even know there was such a thing as historical jurisprudence. Years later the writer had the good fortune to discover, through the medium of a course in jurisprudence, what ailed his undergraduate training. Most of his fellows, now practising lawyers, never did find out. They merely had the feeling that the books contained too many old cases. In so far as the later acceptance of a view goes to prove its worth, time has justified the students, not the professors. Let those legal educators who ride hard in the classroom the latest brand of juristic theory take warning.

Legal education is shaped in part by the school of juristic thought which happens to be in vogue. The juristic thought of any era in turn is likely to reflect the dominant ideas of that era outside the legal field. Although this truth is plainly deducible from the magnificent panoramic picture of the legal thought of the ages contained in the writing of Dean Pound,<sup>2</sup> the idea is so important to an understanding of what is going on in legal education today that it warrants a brief elaboration.

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2. Pound, *The End of Law as Developed in Juristic Thought* (1914) 27 HARV. L. REV. 605, 627.

Where the thought of men is largely religious, thought about law followed the same pattern. The most familiar example is to be found in the life of the ancient Hebrews as recorded in the Old Testament. Their religion was the substance of their thinking. Their thought about law was no exception. Laws were regarded as commands of God; infractions were offenses against God. During the early Middle Ages when the Christian religion colored the thought of the time, legal thinking followed along similar lines. When authoritarian religion in the later Middle Ages gave way before the rising creed of reason, law came to be thought of as a body of principles deducible by reason from the nature of man. When Kant and Hegel brought philosophy to a new zenith, continental legal thought fell under the dominance of the philosophical school of jurists. Each striking development in the thought of mankind since that day has had its plainly visible following in juristic thought. English utilitarianism produced a utilitarian school of jurists. When human thought felt the impact of the theory of evolution, law was regarded as the product of a process of evolution. And when science revealed that natural phenomena proceeded along the lines of newly discovered scientific laws, and great numbers of men hastened to the conclusion that the universe itself and even the intelligent life therein were mechanical in nature, there arose a group of jurists who reasoned that law was the inevitable product of natural forces governing the conduct of human beings. The Marxian movement developed the juristic idea that law is merely the expression of the will of the dominant class of society. With the development of modern industrial conditions group activities took on increasing importance; individualism yielded ground to a social point of view; and the sociological school of jurists reflected in legal thought the same change of emphasis. Psychology, a science not yet over its growing pains, has produced its creedists who have had a following in juristic thought. All this might be summarized by saying that jurists clothe their minds in the mental styles of their times.

A search for the prevailing characteristic of the legal thought of today thus finds its clue in the prevailing characteristic of thought outside our legal field. That characteristic is iconoclasm. Rejection of old authorities, institutions, rules and forms is the one uniform quality of our era. We are united in rejections; we have as yet no common acceptances. It is amazing how completely the iconoclastic spirit of our time has penetrated the diverse aspects of human life. Many of our writers, swelled to bursting with the new spirit of freedom from all forms and restraints, have considered themselves emancipated even from the rules of good grammar. In art there is a corresponding revolt; the surrealists have carried the rebellion against form to the point of idealizing formlessness. In home life the fundamental form, marriage, has been considered a proper subject for experimentation. Religion has been rejected

bodily by a whole nation, Russia, while within religion, in the United States and elsewhere, modernistic ministers are busy rejecting ancient doctrines, such as the virgin birth, the sanctity of marriage, etc. The fundamental institution of our economic life has been private property; but the development of large corporations is furthering the idea, still not completely emerged and by most men felt rather than articulately formulated, that in place of ownership we have in each corporation three interested groups, capital, labor, and management. The sit down strike is emblematic of organized labor's rejection of the old concept of property. In politics the New Deal has capitalized the iconoclastic mood of the people. The consistency of the New Deal lies in what it rejects, not what it proposes; it rejects old forms, methods, and restraints on a multitude of fronts.

The spirit of iconoclasm permeates the life of our time, and equally far reaching is the conflict of view as to what should be substituted for that which we have broken. Out of the welter of multitudinous conflicting views has as yet emerged nothing commanding general acceptance. Surrealism in art is happily by no means prevalent; it is merely the latest unsteady impulse among artists. The institution of marriage is under attack, but nothing better, nor nothing near as good, has appeared. Russia's experiment with an unstable marital union proved unsatisfactory, and the trend is back to the old form. The anaemic religion of many up-to-date preachers is failing to fill churches. The New Deal still experiments. The spirit of our age is no substitute for the spirit of the ages.

Precisely the same condition exists in the field of juristic thought. Just as the dominant ideas of past ages ruled the legal thought of those ages, so the iconoclastic spirit of our time rules our jurists. The Realists hold the floor, but who are the Realists? They can be classified in diverse categories, depending on what the classifier deems significant. It can only be said that there is a group of jurists united in the rejection of long familiar molds, and in the will to strike out for themselves. They appear to have in common a motive for rejection, namely that law had come to be too much of an abstraction, too divorced from realities. Here unity among them ceases. The rest is a seething tumult of varying views, emphases, performances. This restless activity has flooded into law teaching; indeed, much of it originated there. Unfettered experimentation and the pushing forward of diverse views all under the banner of Realism is as characteristic of legal education in many law schools today as the historical approach was fifteen years ago. However, the new impact on legal education carries with it both greater dangers of abuse and greater promise of gain than did historical jurisprudence. The remainder of this article will be devoted to a brief appraisal of what

is going on, a summary of some of the abuses threatened, and of some of the gains made or hoped for.

At the outset it is important that we do not, by reason of our nearness, lose our perspective and see Realism as something bigger than it really is. Realism, like most of the schools of juristic thought in the past, is likely to turn out to be a collection of new emphases rather than of new ideas. Academic squatters are numerous on the common intellectual domain of mankind. Academicians are fond of taking some common place idea which has never been pushed forward by anyone in particular, of expounding the idea vigorously and claiming it as their own. Specifically, an idea much in vogue among some Realists is the idea that what a judge does is determined by his background, the position of the family in which he was reared, his type of mind, and even his mood of the moment. This is an idea borrowed out of the common sense of mankind. Probably a hundred years ago lawyers might have been heard talking to clients in fashion such as this, "We'd better try to get our case before Judge Jones and not Judge Smith. Smith is a terror in these drunkenness cases."

Fifteen years ago observing law students used to write different types of examination papers for the different professors. The judges of the examinations papers were different types of men. Realism had not then been heard of; historical jurisprudence was the thing; but common sense was the same then as now.

Although this particular aspect of Realism is merely an emphasis, not a contribution, it is nevertheless a necessary emphasis, provided it is not carried too far. Students need to be reminded that law operates through human beings, and that it is well to know the human beings along with the law. But over-emphasized, this idea leads to such extremes as the view that judges make their decisions by hunch, and then resort to rules of law not to arrive at the decisions, but to explain the decisions arrived at. Yet this description fits the judicial process in relatively few cases. If a man duly becomes surety for another, and the creditor be unpaid, and he sues the surety, then, in the absence of special circumstances, almost all courts will hold for the plaintiff. Though the judge's whole childhood was blighted by poverty because his father had been ruined by being held as surety, still the judge will decide against the surety; a simple elementary rule of law produces the judge's conduct. This is "reality" in the great majority of cases. And even in those rarer instances where the judge is not bound by rule, and his background becomes relevant in predicting how his mind will work, it must be remembered that a most important part of that background is his saturation in rules of law.

Further, the new emphasis on various tenets of the Realists should not be permitted to crowd from the classroom the heritage left by other

schools of thought in the past. It is all too common to think of one school of juristic thought as overcoming another by demonstrating the first to be false, just as later scientific discovery proves earlier scientific theories false. But it is nearer to the truth to say that restless human minds are not content to go on thinking the same things forever, and that succeeding generations of jurists insist on exploring the law from different points of view. Pound speaks of Kant's giving a death blow to eighteenth century natural law philosophy. This is right in the sense that natural law theory ceased to satisfy as a complete philosophy of law, and that juristic thought moved on to other concepts, other points of view. But if the statement is understood to mean that the concept of natural law was demonstrated to be false, or that it ceased to have any place in the working legal philosophy of mankind, the statement is untrue. As will appear more fully hereinafter, a sort of inarticulate natural law is part of the working philosophy of most lawyers and law teachers. Kant's own fundamental principle of affording the maximum amount of free will to every individual so far as is compatible with a like amount of free will on the part of other individuals, itself failed to hold the stage forever. Yet there is enough of truth in it so that if no one had thought of its like before this day, and it were now to be announced for the first time, it would be widely acclaimed. So with many another juristic idea. Who can say that any view of the Realists will a century hence be regarded as more significant than the work of Rudolph Stammler, particularly his magnificent attempt to work out universal tests for the justice of law in actual operation?

It is scarcely to be expected that Realism will not in its turn give way to other emphases, other viewpoints. If Realism by and large seeks law in terms of the facts of life, then it may be said that already a diametrically opposite philosophy is gaining headway, namely Kelsen's pure theory of law. Since Realism is largely an emphasis, or group of emphases, sure to give way in time to others, why should it crowd forward in the classroom to the exclusion of others? It may not be feasible to require all students to take a course in the world's legal philosophies, but at least all law teachers should provide themselves with such knowledge. The students would not then be subjected to a one dish meal of juristic point of view. Of course there will continue to be a number of law teachers anxious to demonstrate their emancipation from the thought of the past, and their own capacity for independent thinking, by swallowing whole the creed of the Realists and parading it before their classes. Nothing can be done about such men.

There is a good deal of routine classroom performance wherein the philosophy of the teacher makes little difference. If Schmidt in a festive mood throws a brick through Olson's store window, there is no doubt that Olson should be permitted to recover the amount of the damage.

Realists, historical, analytical or sociological jurists, or law teachers without any philosophy at all would handle the case pretty much in the same fashion. Even in the handling of a case where criticism is in order, the criticism of the Realist, the sociological jurist, and the man of no formulated philosophy will sound alike. The working philosophical tool kit of the average lawyer or law teacher is remarkably simple. There is usually an unarticulated instinct for a certain amount of analytical thought, born of the human desire for order and logical consistency. Then there is a dash of the natural law concept that right is right and that man carries a compass known as his conscience which can be relied upon to point to right. Finally, there is the feeling that law ought to work, hence must take into account what men are like and what they are doing. In the daily discussion of cases in class these are the customary implements of teacher and students alike. The excellence of the performance depends on the skill with which they are used.

The danger arising from an overdose of unassimilated Realism was well illustrated by an article submitted for law review purposes by a young law teacher. It was plain as day that the author had received a big dose of Realism at one of the leading law schools. It was there undigested in his article. The article set forth the Realistic viewpoint, and then it set forth the cases, but the viewpoint was not related to the cases. The cases were handled pretty much as they would have been even apart from the theory. Realism to this young writer was not a working philosophy, it was merely a separate piece of learning. There is reason to suspect that the teachers in his graduate courses may have been a little too evangelical. Juristic evangelism carries with it the usual abuse of evangelism, namely that the other fellow is regarded as saved or lost according to whether or not he accepts bodily the doctrine preached. Acceptance is the objective, not understanding.

Enough has been said to suggest the principal danger inherent in Realism, namely the danger of overemphasis. To an unexcited intelligence the antics of men absorbed in some intellectual obsession is a spectacle more curious than dangerous, but it must be remembered that unexcited intelligence is rare. There is always danger that some idea or set of ideas will damage legal education by overstimulating their adherents.

What about the benefits to be expected in legal education from the present movement? As already stated, there is much diversity of view among jurists who could be classed as Realists. No attempt will be made here to gather together all their views and to appraise them. Now that the law reviews make it possible for each to be heard by all the others, professors are engulfing one another with too great a flood of ideas about the law itself and the methods of teaching it. Rather an effort will be made to trace into the classroom what seems to the writer to be

one of the principal contributions, if not the principal contribution, of Realism to legal education: the shifting of emphasis from the point of view of the judge to that of the lawyer.

The general acceptance of the case system caused the growth of an abuse of which the law teaching profession long seemed unaware. That was the development in law students of the judicial point of view. The minds of law students were shaped like those of appellate courts. The students had before them for the bulk of their diet cases out of the reports of appellate courts. This meant that the facts not relevant to the presentation of questions of law had been eliminated in the process of preparation of the case by opposing counsel, in the trial of the case in the lower court, in the preparation of the appeal, and finally by the casebook editor. Like an appellate court, the student had his eyes directed to a selected set of facts and to the question of what law governed those facts. The major discussion in class centered on the question whether the case was right or whether it was wrong. Professor and students either re-decided the case or confirmed the decision.

This abuse was sensed by practicing lawyers. The writer has heard of complaints from the bar that young law school graduates are whizzes before the Supreme Court but not much good at anything less than that.

The Realists are furnishing the needed corrective for this situation by shifting the emphasis over to the lawyer's problems. After all it is obvious that the great bulk of law students will become lawyers, whereas few will become judges. This shift of emphasis is in order. Concretely, how is it done?

One successful device directed toward this end has been the reclassification of legal materials in the casebooks. For example Sturges, *Cases on Credit Transactions*, in both the first and second editions, brings together in a single book cases relating to the various types of security. Here are materials on suretyship and mortgages, each of which was formerly studied in a separate course, on conditional sales, formerly part of the sales course, on deeds of trust, trust receipts, pledges, and a great variety of unorthodox hybrid security devices heretofore either scattered through such courses as personal property and sales, or not included in the curriculum at all. This arrangement has obvious usefulness in inducing students to think about the problems of the lawyer. For lawyers do not only try cases involving security transactions; they draw security instruments. When a client wants to obtain credit by giving security there is a multitude of fashions in which it can be done; the law student's attention is directed by Professor Sturges' casebook to the problem of finding the best device to fit the needs of the particular client. An orthodox course in mortgages begins at the point where it is decided to use a mortgage, or worse still, where it is already in litigation, and examines the legal problems following thereafter. The course in credit

transactions goes back to the lawyer's problem of deciding in the first place whether to employ a mortgage or some other type of security device in drawing instruments of credit. The portion of the book on personal security, *i.e.*, suretyship, and the portion on property security, for example, each opens with a section entitled, The Technical Contract, which contains cases involving a great variety of security devices. The emphasis is thus shifted from the question, "Did the court decide correctly on this set of facts?" to the problems "How did this type of bargain fare in the courts? What other forms of bargain could be used? What could be accomplished by one form and not the other?"

The change to the lawyer's point of view in the handling of cases requires that the teacher carry forward in the classroom the same approach; it is no longer sufficient for him to add to the cases in the book a few authorities which he has unearthed on related points, or to tell the class what the prevailing view is. Specifically, a case is encountered which holds that in order to recover against a guarantor of collection the creditor must show judgment and execution returned unsatisfied as proof that the claim was not collectible.<sup>3</sup> Is the teacher merely to be sure that the students understand the rule so that if they have cases involving guaranties of collection they will know who will win? Not if the teacher has grasped the point of view brimming over in the case-book. He will emphasize the importance of the circumstances in which a guaranty of collection should be used. Obviously, if a client is willing to be surety for another person because he knows that under pressure the other person can be made to pay, but the client does not wish to be held before every effort is made to hold the debtor, the guaranty of collection is the form of bargain to use. Another problem could be suggested to the class at this point: "A grocer wants to sell his business, including his accounts against customers. Would you advise a buyer to make the purchase on the strength of a guaranty of collection of the accounts?" Obviously the students should reach the conclusion that an unmodified guarantee of collection would be useless in the case of small accounts, for the expense of suing on each and obtaining execution returned unsatisfied might exceed the amount due.

A more complicated illustration of law taught from the lawyer's standpoint can be found in the situation where a creditor obtains a claim against a debtor by the use of fraud. There is a surety on the obligation. A line of authority holds that the debtor's defense of fraud is not available to the surety;<sup>4</sup> hence the creditor may oblige the surety to pay. But the surety who has paid a creditor is usually said to have a right

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3. STURGES, CASES ON CREDIT TRANSACTIONS (1st ed. 1930) 44.

4. STURGES, CASES ON CREDIT TRANSACTIONS (2nd ed. 1936) 95, 96. For a discussion of surety defenses along the lines suggested in the text, see *Commert* (1937) 46 *YALE L. J.* 833.

to reimbursement against the principal debtor. At once there is a problem whether the debtor's defense of fraud good against the creditor may be invoked against the surety who has paid the creditor? Assume that an attorney knows his client is surety on a claim acquired by fraud on the debtor, and that the claim is about to become due. What about the doctrine that if the debtor repudiates the contract by reason of fraud, then the defense does become available to the surety?<sup>5</sup> The question is how to cause the debtor to raise the defense of fraud so as to make it available to the surety. Counsel for the creditor will not advise suit against the debtor, since the debtor may invoke the defense of fraud. Further, the debtor having raised the defense it would be available to the surety. Counsel for the creditor therefore seeks to sue the surety, not the debtor. What is attorney for the surety to do? How about the doctrine of *Pain v. Packard*?<sup>6</sup> Under this doctrine a surety may give the creditor notice to proceed against the debtor, and if the creditor fails to do so, the surety is discharged to the extent of his prejudice. Why not give the creditor such notice the very day the debt becomes due, before he has a chance to sue the surety? If the creditor proceeds against the debtor, the latter is likely to raise the defense of fraud, and it then becomes available to the surety. If the creditor fails to sue the debtor, may the surety not urge upon the court that if the suit had been brought the defense of fraud would have been raised, and thus have become available to the surety. Hence the failure to bring the suit prejudiced the surety to the full amount of the claim, and accordingly he is discharged.<sup>7</sup>

If the doctrine of *Pain v. Packard* is not in force in the jurisdiction involved, what about an action in equity to compel the creditor to proceed against the debtor?<sup>8</sup> Would not the fact that the creditor's fraudulent conduct has shed doubt on the validity of the claim constitute a "peculiar equity" in favor of the surety, especially where the surety, if held, could not recover against the debtor? Further, it is established that a surety may by judicial proceedings compel the debtor to pay the creditor.<sup>9</sup> If the surety brings such a proceedings, and the debtor sets up the fraud in defense, may not the defense then become available to the surety as against the creditor? Or, if the surety stands suit by the

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5. See STURGES, *op. cit. supra* note 4, at 96.

6. *Id.*, at 158.

7. Under some statutory modifications of *Pain v. Packard* the failure of the creditor to sue the debtor after notice from the surety discharges the latter altogether, not merely to the extent of his prejudice. See N. C. Code Ann. (Michie, 1935) §§ 3967-3969. Under such a statute the surety's position is a comfortable one. If the creditor sues, the debtor will raise the defense of fraud and it thus enures to the surety. If the creditor does not sue, the surety is discharged absolutely.

8. See STURGES, *op. cit. supra* note 4, at 163-165.

9. See *id.* at 167, 169, 171.

creditor, may not his attorney in some jurisdictions successfully urge that although the debtor's defense of fraud is not available to the surety, still a very material fact, namely the fraud, has not been disclosed to the surety, and that therefore the surety has a defense of his own, *i.e.*, concealment of that fact?<sup>10</sup>

The raising of such inquiries as these develops in the students the habit of thinking about what use a lawyer may make of the law he knows in drafting instruments and planning his procedure before trial as well as in writing briefs when litigation has already begun. Furthermore, there is an advantage in leaving with the students a number of unanswered questions rather than a group of citations to read. When a client comes to a lawyer's office with his difficulties there will be no teacher on hand to tell the lawyer what cases to read. The prospective lawyer should be trained in looking at a problem from the standpoint of what to do, and in using the library to find out. Of course this sort of thing may be overdone; classes should have law as well as problems presented to them. But the library is the most expensive working tool of teacher and students. Most law schools of any size have from twenty thousand volumes upward. Students should acquire familiarity with the library by using it constantly as a whole, as distinguished from resorting to separate bits of it in the form of cited cases. It is not enough to say that use of the library can be taught in a separate course in legal bibliography, and further developed by courses consisting of assigned problems. The library should be as much a part of every course as the casebook and the teacher.

One of the objections to such a course as credit transactions, which cuts across a number of subjects any one of which was formerly considered enough for a course, is that the new combination is necessarily exceedingly concentrated material. One of the most common reactions to the course which the writer has received from his students is that there is an extraordinary amount of law in it. So there is. As a result a good many lines of legal development, such as the law of after acquired property mortgages, must be cut across rather than traced through in detail. Otherwise put, the student is landed in the middle of a subject without enough background to know what it is all about. Here again the teacher and the library have a part to play. The teacher can sketch in the essential background. This will serve the double purpose of making the casebook material clear, and of enabling the alert and curious student to see the outlines of the subject plainly enough to proceed further with his private investigations.

A particularly successful new combination of materials is the course in debtors' estates.<sup>11</sup> This course combines the study of common law

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10. See *id.*, case p. 100, at 105.

11. See STURGES, CASES ON DEBTOR'S ESTATES (2nd ed. 1937).

compositions, assignments for benefit of creditors, receiverships, and bankruptcy, including the composition, extension and reorganization proceedings under recent amendments to the bankruptcy act. Viewed from the lawyer's standpoint it is really hard to see how these subjects can be adequately taught except in combination. They all center on a single law office problem: A client is in financial difficulties and something must be done. What is to be done requires a choice of some one of the above devices or courses of procedure. The best choice depends on the client. The difficulties of an individual with a few creditors might be adjusted quickly and cheaply by a common law composition; the affairs of a large corporation with a nationwide business and great numbers of creditors might be completely impervious to any such arrangement. For the lawyer to make his choice of devices he must not only know what the devices are, but he must also have studied them in relation to one another, and their adaptability to varying circumstances.

An isolated study of common law compositions would reveal the fundamental principle that the debtor may be discharged from liability in full by paying the creditors the amounts called for in the composition. A study of assignments for the benefit of creditors taken alone would disclose the equally fundamental principle that an assignment does not result in the discharge of the debtor. When assignments and compositions are considered together as part of a single study an idea becomes immediately visible: if a debtor wants to turn over all his property to his creditors and be discharged from liability, why not attain the latter objective by tacking a composition on to the assignment? A great number of additional illustrations could be given; they would not make any clearer the point that law can be taught so as to emphasize what a good lawyer should do as distinguished from merely the law he should know.

However, it is not necessary to whittle out new courses in order to capitalize the idea of teaching law for the purpose of making good lawyers rather than judges. The idea can be injected into a perfectly orthodox course like sales. This subject is already divided in such fashion as to emphasize certain forms of the sales bargain. Auction sales, sales on approval, sale or return bargains, cash sales, sales c.o.d., sales c.i.f., open price arrangements, etc., are likely to be specifically considered in any sales course. It is a simple matter to select the materials so as to emphasize the usefulness of the different types of bargain in meeting business problems. In Woodward, *Cases on Sales*,<sup>12</sup> progress has been made in this direction by frequently including with the materials on a subject like auction sales a footnote which points out the principal uses of such sales actually made in business.<sup>13</sup> Additional advances could be

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12. Third ed., 1933, by Vold.

13. *Id.*, at 52, n. 41.

made by the selection of the cases themselves with the same purpose in view.

However orthodox the materials in a casebook may be, they can still be presented in the classroom in such fashion as to emphasize the lawyer's viewpoint. In *Frech v. Lewis*<sup>14</sup> carriages had been sold on a cash sale, but the seller delivered them without receiving the cash. He made repeated efforts to collect, and about two and one half months later brought a replevin action. The seller lost his case. The court held that by treating the buyer as a debtor and attempting to obtain the price from him, the seller had treated the sale as a sale on credit, and had waived the right of a cash seller to regain the goods. The case is a good one on which to center a discussion such as this: suppose a client wants to sell goods to a person of doubtful financial responsibility, what kinds of sales device would be useful? Suppose the client makes a cash sale, should he be lenient in affording the buyer opportunity to raise the cash after delivery? Obviously not, for this case contains the moral that the law penalizes the lenient seller in a cash sale, that it is safer to be severe; either get the cash from the buyer or take away the goods. In the light of this case, what suit should attorney for the seller have brought? Plainly, he should have sued for the purchase price and taken an execution on the carriages or, in the proper case, an attachment against them. What are the disadvantages of this course of procedure as compared with replevin where replevin will lie?

Inquiries such as these are likely to center attention on procedure. Emphasis on procedure would be a valid ground for criticism of this approach if every course were to be turned into another course in procedure, just as fifteen years ago courses retold in wearisome detail the lessons of legal history. But it is not necessary in order to show the advantages of a replevin action as a means of asserting rights arising out of a sales bargain to re-discuss what replevin is.

Another useful means of injecting the lawyer's viewpoint into an orthodox course is the examination. Examinations like the rest of law teaching technique have been subject to the criticism that they encouraged students to fall into the mental attitude of judges. The typical examination question has been a set of facts presenting a controversy upon which the student is to pass judgment. The writer has had good luck in his public utilities course with questions of this type: client has a home in a newly developed residence district within X City. The neighborhood is not as yet heavily populated. It is not served with gas. Client wants such service. What steps would you take? Upon what points would you seek evidence?

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14. WOODWARD, CASES ON SALES (3d ed. 1933, by Vold) 65.

Enough has perhaps been said to illustrate the usefulness of Realism as a working point of view. As an impetus toward accomplishing much that is necessary in legal education it has much to offer. As a creed to be preached and "put over" it may become a burden by too much success, just as did historical jurisprudence in its day. There will continue to be schools of legal thought. Men in the forefront of legal education will continue to develop useful theories as new times stimulate new views, and fresh abuses require fresh correctives. When any one view threatens to usurp the field there will be needed law teachers with individualism enough to be *anti*. New thought may have a vanguard of impetuous error.