The Problem of the Law School*

The law schools of this country have never faced their problems. Like most institutions coming down from generation to generation, they have been slow to inquire into the original justification of their plans and programs, or to seek to learn whether what was once justified still retained its reason for being. Taking for granted that the original scheme was not only adapted to the purposes of the time of its creation, but was fundamentally and permanently sound, the only development that has been made during a century in the American law school has consisted, speaking generally, in raising its standard of admission and in extending the period of study. There is only one innovation of significant and essential importance that has been introduced. This innovation was in the method of instruction and was due mainly to the initiative of one person, Professor C. C. Langdell. The application that he made of the inductive method to the study of law has been well nigh revolutionary in its effects. Nothing more helpful to the cause of legal education could well have occurred. The teaching of law has been transformed from mere empirical instruction to a rational scientific discipline. This method of investigation and of teaching not only conduces to the greater intellectual development of the student, but is the key to all accurate historical study of law and to all logical reform thereof. It is the one signal achievement of the American law school.

I ought, possibly, to say one word of caution: In using the expression “American law school,” I do not have in mind any comparison with foreign law schools. The American law school

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holds a place of its own, and it is only with its functions and
development that we are at present concerned. Any compari-
sions that are in my mind or that I would suggest are between
what the American law school has been and is, and what it
may be.

Now, even after acceptance of the inductive method by Amer-
ican law schools, and such adoption is by no means universal,
the American law school is still only in the position in which
the American medical school was after it had been stirred by
the influence of scientific methods of research and teaching, but
had not taken the great onward and outward steps that have
so signally marked the progress of more recent medical educa-
tion.

Our law schools would incline, I believe, to group themselves
into two classes: one that aims more at the production of the
scholarly lawyer, and another that aims more at the produc-
tion of the practical lawyer. Unfortunately such classification
is not sound; for, as a matter of fact, the law school that is
the more scholarly in character is on the whole the more prac-
tical. The main difference in fact between the two groups
is, that the second group, while perhaps using the same methods
and having a nearly identical curriculum, has a less cultured
and less well trained material to work with.

My purpose today, however, has not to do with any dissect-
ing of our actual law schools, but rather with an attempt to
indicate very briefly some of the objects and ideals of a great
and sufficient American law school. Yet something needs be
said to show that there are grounds for dissatisfaction and that
when a new law school is emerging existing types ought not to
be followed blindly. The high degree of success attained
by our best law schools and the rather admirable work done by
very many, have led very naturally to the conclusion that all
that was necessary for a new school to do was to duplicate that
school whose standard it could most nearly reach in curricu-
atum, in method, in library equipment, and in faculty. And such
consummation is largely a matter of money.

The proper readjustment of the law school to the demands
and spirit of the times, it may be urged, will come anyhow in
due course without anxious premeditation. But if this be so,
we are, while we wait, in a situation of some danger. The dis-
satisfaction that exists with reference to the making, the prac-
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tice, and the administration of law will cause criticism to turn on the law school, also, as one of the offenders. Whether, in the face of that criticism when it comes, the reformation of the law school would be carried out on sound and rational lines, may be very much doubted. The danger that would then arise would be that the remedy would be wrongly applied. Is it not the part of wisdom calmly to re-examine the work and the curriculum of the law school and consciously and deliberately plot out its scope and define its character? To my belief, the great law school, rightly planned and rightly manned, will be one of the mighty contributing agencies in improving the law, whether in legislation, in the practice of the profession, or in the procedure of administration.

There are two chief faults that I would ascribe to the American law school. It is neither extensive nor intensive enough. It does not, on the one hand, lay a broad foundation in the history and theory of law, the rationale of legal institutions; nor, on the other hand, does it prepare with precision and definiteness the student with the technique and special equipment for the practice of his profession. Harvard Law School has recently taken steps which seem to admit in a partial way the former deficiency, but in doing so it has become dangerously near to inverting the pyramid. Of the subjects which Harvard is placing in a fourth year, I would place some in the first of a four-year course, and the remainder I would distribute through the several years of the course. The last year,—whether that be a third year or a fourth year of legal study is open to other considerations,—should, so far as the great majority of students is concerned, prospective attorneys, be devoted especially to preparing such students for the efficient taking up of the practice of the profession. The mere adding of one year, either at the top or at the bottom, without reviewing and revising and readjusting the whole scheme, is vain and illusory. The addition of Harvard's fourth year can serve, normally, the purposes of only one small class, the intending teacher of law. For the practitioner, usually the worst thing he could do, after he had substantially completed his preparation for the bar, would be to stay on at college attending lectures on the history and philosophy of law. Reverse the process, however, with the proper modifications, and you will tend to turn out lawyers, on the one hand with intellect broadened by a view of the his-
tory of legal institutions, by acquaintance with the development of legal principles, and by a comprehensive survey of the whole scope of their splendid profession, and, on the other hand, with faculties refined and sharpened, by a course of gradually increased intensiveness, for the immediate and practical discharge of their duties as attorneys.

To understand our problem, we must recognize the fact that law is a living principle, even as medicine is an advancing science. Law is in process of constant becoming. It is ever being re-created, not only through legislation, but through a sort of self-reproduction. If it were a mass of dead rules, it could be learned in a corpus juris, or in the four codes of California. The position is often taken, indeed, that the common law is no longer a re-creative force, that that function was exhausted in the Middle Ages. This view is shared not only by the laity but also by many judges and lawyers. The consequences of such a conclusion are deplorable in the extreme. For such a view implies that a large portion of our law is mediaeval in the most reproachful sense of the term. That there is just ground for the charge that the law is mediaeval is due to the very fact that too many of our lawyers and judges do not know the history and development of our legal principles; do not know when an old principle is dead and when a new principle is born; do not know the spirit of the common law; do not know that, through the hands of the judiciary, the common law can and should give protection to new conditions as they arise, and so constantly give birth to new legal rights. In demonstration, I should like to present two or three illustrations.

Out of the many instances that might be chosen, let us take three that fall under the branch of law known as torts, where injury to person or property is redressed by a civil suit. These instances show that the principles of the common law are at the present day as strong in reproductive power as they ever were. It was held by the courts so long ago as the fourteenth century that any unjustifiable interference with legal status, whether within the narrower family tie or in the relation between master and servant, as by inducing a servant or apprentice to leave his master's employment, constituted ground for civil liability. The stranger to the relation who interfered with
status recognized by law was liable in damages to the person who was injured thereby. This is our first illustration.

In the course of the following centuries there was coming into fuller realization Sir Henry Maine's famous proposition, that the movement of progressive societies is a movement from status to contract. In 1853, in the leading case of Lumley v. Gye, the question was presented to the Court of Queen's Bench whether interference with a contractual relation existing between two persons by a stranger thereto would lay the basis for an action. The majority of the court took the broad ground that such interference, unless justified for one legal reason or another, would constitute a violation of legal right. The fact that there was no direct precedent on which the decision might be based cut no figure with these majority judges. Their decision was in accordance with the spirit and living principles of the common law, and that was enough for them. Justice Coleridge, on the other hand, resisted what he regarded as an innovation and unwarranted extension of the law, on the ground that the relation here interfered with, that between a noted opera singer and an impresario, did not fall within the category of personal service which had been protected by the common law in the Middle Ages. But the principle of the decision as announced by the majority of the court was affirmed in 1881 by the Court of Appeal and in 1903 by the House of Lords. In the meantime the same question had come before many of the American jurisdictions and, in most cases, received the same sanction as in Lumley v. Gye. Naturally, some of the American judges took the same view as Justice Coleridge, finding no precedent for the decision, and not perceiving that a condition had arisen calling for protection, an inchoate legal right, which justified, if it did not demand, spontaneous recognition by the courts. And the value and validity of the rule established by Lumley v. Gye cannot be regarded as impaired by the fact that California, almost alone among the States in which the question has arisen, has chosen to follow the lead of Justice Coleridge's dissenting opinion (Boyson v. Thorn, 98 Cal. 578).

The third extension of principle, going out into new but analogous conditions, is the right not to be interfered with in one's trade or calling, the breach of which, where recognized, constitutes a new and distinct tort. We get outside status here, and
outside contract, and approach very near to the broad generalization that the breach of any legal relation by one outside that relation is per se a breach of a legal right and lays the foundation of civil liability. We are not able to say, however, with the same positiveness with which we can speak of the doctrine of Lumley v. Gye, that interference with another's trade or calling has become recognized as a tort per se. The opinions of the highest courts of England, including the House of Lords, seem almost to declare this result. And the tendency of a large number of American courts runs in the same direction. California does not fall into line with this view; her position is even more definitely taken against it than against the doctrine of Lumley v. Gye.

Now, what is of especial interest and significance is that we find the courts that administer the common law, in all parts of the world, in England, the United States, Canada, Australia, Africa, not shrinking from the responsibility of being themselves the direct media for the assertion of new legal rights. But it is no wonder that the birth-throes of this new right are more severe, painful, and protracted than is usual, although few legal rights are born without a struggle. The rise of this new right is implicated with the great social and industrial contests of our generation. It comes into collision with interests which claim to have had prior occupation of the ground and hold themselves intrenched behind alleged vested rights. It emerges squarely on the battle line between capital and labor. It is involved in such sensitive and inflammable ideas as are indicated by the words labor union, strikes, boycotts, picketing, conspiracy, open shop, closed shop. All the elements of the great industrial strife are inevitably carried into the courtroom, and it requires not only the ablest, best informed and wisest, but the most fearless judges, to discern and to declare what is the nature and what are the limits of the legal right in question.

Allow me to mention another interesting illustration. Some years ago Mr. S. D. Warren and Mr. Louis Brandeis published several articles in the Harvard Law Review, the object of which was to show that there existed, under a true interpretation of the common law, what might be called a right of privacy, the right of the individual not to be made the object of offensive publicity. Their inquiry might be considered purely speculative, academic. There was certainly no authority in the writers
to establish any principle as a legal right. But the research was conducted in a scientific manner and was intended to interpret the spirit of the common law. Not many years elapsed before the precise question arose in the courts of New York. A young woman had been annoyed and humiliated by having her portrait displayed on flour barrels to advertise what was designated as the “Flour of the Family.” It is true that Judge Parker rejected Mr. Brandeis’ suggestion that here was a legal right within the living spirit of the common law, and held that because the young woman was not technically “libeled” by the advertisement, she had no grounds for recovery. Other courts, too, have taken the same position. But there are decisions the other way, and the criticism and dissatisfaction expressed at the rulings which refuse redress would seem to indicate that Mr. Brandeis rather than Judge Parker had reached a correct interpretation of the common law. The New York legislature promptly passed an act explicitly recognizing and protecting, within certain limits, a right of privacy.

Some acts call for direct acts of legislation. Perhaps Judge Parker was right in thinking that such was the case in this instance. But it would look as though he was not conscious of the real genius of the common law. Herein lies the difference that separates judicial rules that are drawn from a sacred repository of the dead past and those that are inspired by the immortal spirit of the common law.

Now, the professor should pursue his study of law in much the same way as the judge prepares his opinions. The former does not, indeed, take the concrete case and trace the question involved back to the sources of the principles on which it depends, but he takes rules announced by the court and traces them back to their fountain-head. He then justifies or rejects, academically, so to speak, the conclusion of the court. His method of investigation is substantially the same. His faculties are not sharpened by the conflict and struggle, by the drama that enacts itself before the court; but his historical horizon is larger and clearer, and, if he keeps free of the dangers of a pedantic and subjective view of his subject, he has the advantage of greater calm. He should be able to reach broader and truer generalizations. The law professor should be the complement of the judge, and should unofficially serve the community in that capacity.
Turning again to the interest of the law student, I believe that he should be trained, perhaps especially in a state university, all through his course, and with growing emphasis toward its close, on the law of the jurisdiction in which the school is situated. This question is involved in controversy, but I believe there is no gainsaying this view, and that it will come to be recognized and generally adopted. The necessary qualification for such intensification of study as preparation for the practical lawyer is that the curriculum should be correspondingly more extensive than it commonly is. Even the student who intends to practice in another jurisdiction will not be less well prepared because he knows thoroughly well the law and practice of one jurisdiction, rather than the law and practice of no jurisdiction in particular. Furthermore, our States fall into groups in respect to procedure and to the general view of law taken by their courts. A student thoroughly grounded in the practice of any one of the States composing a group will find himself readily at home in any other member of the group.

In here referring to the law that may be regarded as peculiar to a particular State, I mean nothing more than the attitude which may be taken by the appellate courts on questions of private law in general. If such attitude conforms to the habits and tendencies of the particular community, the lawyer who is to practise there ought surely to become acquainted with it as early as he may. If it represents departures from the better conceptions of the common law as held in England and in other parts of our country, and is not distinctly in harmony with the customs and inclinations of the people, but has come about through ignorance, shortsightedness, or mistake on the part of the judges, it behooves both the law school itself and the lawyers and judges whom it graduates to help bring about the restoration of true doctrines.

There is also another aspect of specialization. An individual State, either alone or as a member of a group, may have special interests or problems governed by special branches of law. Such in California are, particularly, the law of mining and the law of water rights. It is beyond question that the best provision possible ought to be taken for making such branches of law conspicuous features of the state university law school. Admiralty jurisdiction, it may also be remarked, is of much
greater importance in a State like ours than in a portless interior community.

California, again, occupies a unique position with reference to countries, some of them foreign and some of them under the American flag, which are governed by a system of law other than the common law. Roman law coming through Spanish channels has a special place in our law curriculum. The general elementary course in Roman law which we conceive to lie at the basis of legal education, should be followed in the last year by more advanced courses in Roman law and by such specialized courses in Spanish law as may be needed by particular classes of students.

Every university, and especially a state university, which, in addition to its general culture and general training, makes important specializations and exhibits marked adaptations to its environment, will be a conspicuous institution of pre-eminent usefulness. Our own university has at least two departments which in this way set it off from nearly every university in the country, and serve the community even in direct returns more than it costs to support the whole institution. I refer to the departments of agriculture and education. They accomplish this great service by identifying themselves with the interests of the State. It is no less feasible, and no less important and imperative, that the State University should assume a similar attitude toward the most transcendent interest of the State—the administration of justice, the vindication of private right.

Finally, the law school should be integrated with the whole life of the university. It is only by close association with the scientific activities and by becoming a part thereof, that the law school can fulfill its high functions. If any branch of knowledge calls for teaching of a university character, it is that of law. If any branch of knowledge should be cultivated by university methods and according to university standards, it is that of law.

I have but faintly touched upon a subject which might be treated with great elaboration. I have been speaking, too, of the law school in one of its aspects only, as a school for the training of lawyers. There is another great function, the development of legal research. Perhaps it is from that point of view that Johns Hopkins University, imitating her own brilliant example of building up a school of medical science rather
than merely a school for the training of medical practitioners, is contemplating the establishment of a School of Jurisprudence.

We are assembled here today to dedicate this building to the service of the highest purposes of the State. This edifice is destined to last as long as any civilization which we can conceive of shall endure. Flames cannot devour it; earthquake cannot overthrow it. It is builded into the very ribs of the earth, and the structure that rises above is firmer than nature's own accomplishment. That it should be characterized by strength and permanence is becoming the supreme intellectual and moral purpose which the building subserves. That in its beauty and simplicity it stands as a memorial to a distinguished and honorable minister of the law, is also a matter of special gratification. At the portals of this structure, then, we who are charged with the duty of teaching law in Berkeley, pledge to you, Mrs. Boalt, our utmost devotion in the performance of the great responsibilities laid upon our shoulders; and for the pleasure it may give you, and the honor it may reflect on the memory of your husband, we hope that you will see here an institution of noble and commanding influence. And, on behalf of the students, a portion of the choice product of this commonwealth, who are now utilizing and enjoying the opportunities afforded them by the library and all parts of the building, and who have taken upon themselves the conservation and cherishing care thereof, I thank you for the priceless benefaction you have made to them and their successors. To you, Mrs. Boalt, and to the generous lawyers and judges of the State, who enlarged your munificent gift and made it immediately available, and whose bounty is commemorated on the tablet over the door of the reading room, I pledge the combined efforts of faculty and students to cultivate, promote, elevate the law and spirit of justice, both here in these academic halls and abroad in the forum and marts of the world, with a mind and purpose directed singly to the service of society.

WM. CAREY JONES.