

June, 1933

# University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School.  
Copyright 1933, by the University of Pennsylvania.

---

---

VOLUME 81

JUNE, 1933

No. 8

---

---

WHY NOT A CLINICAL LAWYER-SCHOOL? \*

JEROME FRANK †

## I

The method of teaching still used in some university law schools (and accepted by them as more or less sacrosanct) is founded upon the ideas of Christopher Columbus Langdell. It may be said, indeed, to be the expression of that man's peculiar temperament.

Langdell unequivocally stated as the fundamental tenet of his system of teaching "*that all the available materials . . . are contained in printed books*". The printed opinions of judges are, he maintained, the *exclusive* repositories of the wisdom which law students must acquire to make them lawyers.

Now it is important to observe the manner of man who impressed those notions on American legal pedagogy for more than half a century:

When Langdell was himself a law student he was almost constantly in the law library. His fellow students said of him that he slept on the library table. At that time he served for several years as an assistant librarian. One of his friends found him one day in an alcove of the library absorbed in a black-letter folio, one of the year books. "As he drew near", we are told, "Langdell looked up and said, in a tone of mingled exhilaration and regret, and with an emphatic gesture, 'Oh, if only I could have lived in the time of the Plantaganets!'"<sup>1</sup>

---

\* This paper is a report made by the writer, in June, 1932, to the Alumni Advisory Board of the University of Chicago Law School.

† Ph. B., J. D., 1912, University of Chicago; member of the New York and Illinois bars; Research Associate, Yale Law School; author, *LAW AND THE MODERN MIND* (1930), and contributor to legal periodicals.

<sup>1</sup> It is said that, when a law teacher, Langdell once referred to "a comparatively recent case decided by Lord Hardwicke".

He practiced law in New York City for sixteen years. But he seldom tried a case. He spent most of his time in the library of the New York Law Institute. He led a peculiarly secluded life. His biographer says of him: "*In the almost inaccessible retirement of his office, and in the library of the Law Institute, he did the greater part of his work. He went little into company.*" His clients were mostly other lawyers for whom, after much lucubration, he wrote briefs or prepared pleadings.

Is it any wonder that such a man had an obsessive and almost exclusive interest in books? The raw material of law, he devoutly believed, was to be discovered in a library and nowhere else; it consisted, as he himself said, solely of what could be found in the pages of law reports. One of his biographers praises him because he sought "*the living founts*" of law in the works on the library shelves! Practicing law to Langdell meant the writing of briefs, examination of printed authorities. The lawyer-client relation, the numerous non-rational factors involved in persuasion of a judge at a trial, the face-to-face appeals to the emotions of juries, the elements that go to make up what is loosely known as the "atmosphere" of a case,—everything that is undisclosed in judicial opinions—was virtually unknown (and was therefore meaningless) to Langdell. A great part of the realities of the life of the average lawyer was unreal to him.

What was almost exclusively real to him he translated into the law-school curriculum when, in 1870, at the age of forty-four, he became a law teacher at Harvard. The so-called case system (the "Harvard system" which the university law schools adopted and by which some of them are still largely dominated) was the expression of the strange character of a cloistered, retiring bookish man. Due to Langdell's idiosyncracies, *law school law came to mean "library-law"*.

It was inevitable that those who have administered those numerous university law schools which are shaped according to the Langdell pattern should, for the most part, seek as law teachers those who have had little or no contacts with or a positive distaste for the rough-and-tumble activities of the average lawyer's life. It is significant that an official historian of Harvard Law School wrote in 1918 that, for law teaching, "*previous experience in practice becomes unnecessary as is continuance in practice after teaching begins*". For Langdell, the founder of the Harvard method, had said in vigorous fashion: "What qualifies a person to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes—not experience, in short, in using law, but experience in learning law. . . ."

Did not President Eliot of Harvard boast that Harvard Law School was revolutionary because its faculty consisted of a "body of men who have never been on the bench or at the bar"? Not long ago an official publication

of the Harvard Law School stated that practice of law for any length of time has marked "intellectual disadvantages" and that "a school conducted chiefly by persons drawn from the bar after many years of practice would lack the scientific intellect" essential to a first-rate law teacher.

Unavoidably, then, the acceptance of the Langdell-Harvard method meant that the university law school teachers, with few exceptions, were those who had never practiced or practiced for only a brief interval. It is probably true that a majority of the teachers in some of our university law schools have never met or advised a client, consulted with witnesses, negotiated a settlement, drafted a complicated contract, lease or mortgage, tried a case or assisted in the trial of a case or even written a brief or argued a case in an upper court. Just the other day one of the most brilliant university law teachers (who is an exception to the rule in that he himself engaged in active practice in addition to teaching) commented to the writer that most of the professors in some of our university law schools have seldom, if ever, been inside a court room.

A brief outline of the history of legal education in American universities is helpful as a preliminary to some tentative suggestions for changes:<sup>2</sup>

It began with the apprentice system. The prospective lawyer "read law" in the office of a practicing lawyer. He saw daily what courts were doing. The first American law school, founded by Judge Reeves, in the 1780's was merely the apprentice system on a group basis. The students were still in intimate daily contact with the courts. Then (about 1830) came the college law school with teaching on the college pattern of lectures and text-books. This step is ordinarily pictured as progress. For the student now devoted full time to his books and lectures and the distractions of office and court work were removed. A more unpleasant story could be told: The student was cloistered; he learned of court doings from books and lectures only; the *false* aspects of theory could no longer be compared by him with the actualities of practice.

There followed the period when the leading law schools were dominated by the great systematic text-book writers, the makers of so-called (American) "substantive law", substantive law which was divorced and living apart from procedure. The rift widened between theory and practice.

Then came Langdell. Noting his plea for induction, his efforts to avoid the glib generalities of text-books, one cannot help feeling that he was seeking obliquely and fumblingly to return to some limited extent to court-room

---

<sup>2</sup> The next few pages contain matter taken, with slight modifications, from Frank, *What Courts Do in Fact* (1932) 26 ILL. L. REV. 645, 667.

The writer, more or less out of laziness, has used his own published writings. Other material more or less along the same line will be found in the writings of such men as Arnold, Green, Llewellyn, Radin, Bingham, Clark, Cook, Yntema, Frankfurter, Corbin, Douglas and Oliphant. See for partial bibliography Llewellyn, *Some Realism About Realism* (1931) 44 HARV. L. REV. 1222, 1257.

actualities. But he was patently thinking of the lawyer as brief-writer and nothing more. Consequently, the material on which he based his so-called "induction" was hopelessly limited.

Ostensibly, the students were to study cases. But they did not and *they do not study cases*. They do not even study the printed records of cases (although that would be little enough), let alone cases as living processes. Their attention is restricted to judicial *opinions*. *But an opinion is not a decision*. A decision is a specific judgment, or order or decree entered after a trial of a specific lawsuit between specific litigants. There are a multitude of factors which induce a jury to return a verdict, or a judge to enter a decree. Of those numerous factors, but few are set forth in judicial opinions. And those factors, not expressed in the opinions, frequently are the most important in the real causal explanation of the decisions.

As stated above, the Langdell system (even in its revised version) concentrates attention on the so-called legal rules and principles found in or spelled out of the printed opinions. Now no sane person will deny that a knowledge of those rules and principles, of how to "distinguish" cases, and of how to make an argument as to the true *ratio decidendi* of an opinion, is part of the indispensable equipment of the future lawyer. For such knowledge is of some limited aid in guessing what courts will do. And in arguments made to courts lawyers are required to employ terminology in accordance with the fictitious assumption that the rules and principles are the principal bases of all decisions.

But the tasks of the lawyer do not pivot around those rules and principles. The work of the lawyer revolves about specific decisions in definite pieces of litigation. When he draws a will or passes on a mortgage to secure a bond issue, organizes a corporation, negotiates the settlement of a controversy, reorganizes a railroad, or drafts a legislative bill, the lawyer is as truly concerned with how the courts will act in some concrete case as when he is trying such a case. A lawyer tries to answer these questions: "What will happen if these specific documents or transactions should hereafter become a part of the drama of a lawsuit? What will a court decide is their meaning and effect?" For the legal rights and duties of the client, Jones, under any given document (a promissory note, a deed, contract, etc.) or in connection with any given transaction, mean simply what some court, somewhere, some day in the future, will decide (not what it will say in its opinion) in a future concrete lawsuit relating to Jones' specific rights under that specific document or in connection with that specific transaction.<sup>3</sup>

---

<sup>3</sup> Occasionally, too, the lawyer when advising his client, Jones, must consider what some court somewhere has already actually decided (not what it said in its opinion) in a specific lawsuit, which has already terminated, relating to Jones' specific rights under a specific document or in connection with a specific transaction.

Accordingly, laymen turn to the lawyer because the acts of laymen may give rise to, or have already occasioned, litigation. What the courts will decide in specific cases involving the rights of specific clients under specific acts, documents or transactions must, therefore, be the center of the lawyer's thinking.

Roughly speaking, then, the task of the lawyer may be summarized thus:

(1) A lawyer tries to predict and anticipate a future enforceable court decision (*i. e.*, a judgment, order or decree) in a specific lawsuit relating to a definite client.

(2) A lawyer tries to win a specific lawsuit; that is, to induce a court in a specific case to render an enforceable decision (*i. e.*, judgment, order or decree) desired by a definite client.

For the practicing lawyer and his client, the specific decisions of actual specific cases are ultimates. Decisions, not opinions. What the lawyer and his client want are concrete judgments and decrees—regardless of the presence or absence of concomitant opinions, irrespective of the contents of the opinions, if there are any. Since the opinions—and the works of those commentators who discuss opinions—are emasculated explanations of decisions, they are of limited assistance to the practicing lawyer. Not only do they disclose merely a fractional part of how decisions come into being, but, if the lawyer takes them as adequate explanations of how decisions are reached, he will act with a treacherously false sense of certainty in advising clients, drafting instruments, writing briefs—or any other work he has to perform.

For the law student to learn whatever can be learned of (1) the means of guessing what courts will decide and (2) of how to induce courts to decide the way his clients want them to decide, he must observe carefully what actually goes on in court-rooms and law-offices. As noted above, the opinions of upper courts conceal or fail to disclose many of the most important factors which lead to decisions. The "hunches" that produce many judicial decisions,<sup>4</sup> the numerous stimuli that cause verdicts to be rendered by juries, cannot be discovered in the printed opinions of upper courts. For, as noted above, a judicial opinion is not only *ex post facto* with reference to the decision. It is a *censored exposition*, written by a judge, of what induced him to arrive at a decision which he has already reached. The conventions prevent the judges from reporting many of the influences that induce their de-

<sup>4</sup> See Hutcheson, *The Judgment Intuitive: the Function of the "Hunch" in Judicial Decision* (1929) 14 CORN. L. Q. 274; Douglas and Shanks, *Insulation From Liability Through Subsidiary Corporations* (1929) 39 YALE L. J. 193; Frank, *supra* note 2, at 761; Frank, *Are Judges Human?* (1931) 80 U. OF PA. L. REV. 17, 232; Arnold, *The Role of Substantive Law and Procedure* (1932) 45 HARV. L. REV. 617; FRANK, *LAW AND THE MODERN MIND* (1930) 100-159; Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking* (1932) 18 CORN. L. Q. 568, 598-599.

cisions. To study those eviscerated judicial expositions as the principal bases of forecasts of future judicial action is to delude oneself. The lawyer will go wrong who believes that (in advising a client, drafting an instrument, trying a case or arguing before a court) he can rely on the so-called reasons found in or spelled out of opinions to guide him in guessing what courts will hereafter decide. To do so is far more unwise than it would be for a botanist to assume that plants are merely what appears above the ground, or for an anatomist to content himself with scrutinizing the outside of the body.

Students trained under the Langdell system are like future horticulturists confining their studies to cut flowers, like architects who study pictures of buildings and nothing else. They resemble prospective dog breeders who never see anything but stuffed dogs. And it is beginning to be suspected that there is some correlation between that kind of stuffed-dog study and the overproduction of stuffed shirts in the legal profession.

Where the Langdell system is most seriously at fault is in its naive assumption of the inviolability of the *stare decisis* doctrine and its corollaries, in its implied belief that in a study of the precedents and nowhere else is to be found the answer to the question, "How does a court arrive at its decisions?" It assumes that if a lawyer learns, from a study of judicial opinions, the legal rules and principles, he can ascertain his clients' "rights" and "duties". There are many reasons why *stare decisis* is of limited value in guessing what courts will decide. But the major reason is that already indicated, *viz.*: Before a suit has begun a lawyer cannot tell from a study of the precedents (1) whether or not a question of fact will be raised and, if so, (2) what conflicting testimony will be introduced, and (3) what will be the reactions to the conflicting testimony of the judge or jury that may happen to try the case.<sup>4\*</sup>

---

<sup>4\*</sup> As the writer has said elsewhere, "Before and until a specific enforceable judgment has been entered, every bit of advice a lawyer gives about any man's legal rights and duties, and all the rights and duties under every document a lawyer prepares, are subject to that unavoidable uncertainty which results from the fact that no specific rights or duties can be known until a specific enforceable judgment has been entered in a future lawsuit pertaining to those specific rights or duties—a judgment which, so far as anyone can tell, may turn on conflicting testimony, a judgment which is therefore unguessable. . . . The legal rules unquestionably have some effect on an honest judge while he is making up his mind how to decide a 'contested' case. (A 'contested' case here means a case in which a question of fact is raised and in which conflicting testimony is introduced with respect to that question of fact.) Many of the legal rules are so unsettled that their effect on the judge's thinking is vague; but, more important, the rules, however exact, are only one among the many kinds of influences which affect him while trying to reach his decision. The judge's knowledge of the rules combines with his reactions to the conflicting testimony, with the sense of fairness, with his background of economic and social views, and with that complicated compound loosely named his 'personality', to form an incalculable mixture out of which comes the court order we call his decision. It is future specific, enforceable decisions (judgments, orders and decrees) which determine all legal rights and duties. Enforceable decisions, not legal rules. But there is prevalent a gravely mistaken notion that legal rules control and cause decisions. This is partly due to the fact that the judges, when they are entering their judgments, sometimes publish little essays, called 'opinions' in which they quote the rules and write as if their judgments had been produced by the rules, as if the rules had been the only in-

After the trial in the lower court has been concluded, then, on appeal, knowledge of the precedents, so far as they are crystallized and clear, sometimes becomes more important. If (as in some jurisdictions in many cases) the doctrine purports to prevail that the upper court will not disturb the fact-finding of the lower court, then the outcome of an appeal—if there is one—will appear (although appearances are deceiving) to turn on the precedents. But, even so, that does not mean that before suit was begun in the lower court, a lawyer can know, by the aid of *stare decisis*, what the decision will be. And in those cases where the upper courts are doctrinally free to disturb the fact-finding of the lower courts, the lawyer cannot know from the precedents what the upper court will find as “the facts” after reading the conflicting testimony in those numerous cases where there is conflicting testimony.

The trouble with much law school teaching is that, confining its attention to a study of upper court opinions, it is hopelessly oversimplified. Something important and of immense worth was given up when the legal apprentice system was abandoned as the basis of teaching in the leading American law schools. This does not mean that we should return to the old system in its old form, that we want mere apprentice-trained lawyers or law schools which are merely “expanded law offices”. But is it not plain that, without giving up entirely the case-book system or the growing and valuable alliance with the so-called social sciences, the law schools should once more get in intimate contact with what clients need and with what courts and lawyers actually do? Must we not execute an about-face and return to Judge Reeves’ 18th century <sup>4b</sup> apprentice method, but on a higher, more sophisticated level?

---

fluences affecting them. These opinions do not refer to the other kinds of stimuli which influenced them; but that does not mean that the other undisclosed factors were not as or more important in reducing their decisions. The uncertainty of most legal rights and duties is then due to their dependence on the decisions in future specific lawsuits which, in turn, are affected by at least these three elements of uncertainty: (1) Many of the legal rules are unsettled or vague. (2) Some legal rules are clear and precise. But the guess of the judge or jury as to the facts in a contested lawsuit is unguessable, even when the legal rules are exact. And no one can prophesy which lawsuits will be ‘contested’ or what conflicting testimony will be introduced in any lawsuit. (3) The reaction of the judge to his guess, or the jury to its guess about the facts of a ‘contested’ suit, is unpredictable. There is moderate uniformity in the way the judges quote the rules. But there is a lack of any known relation between the exactness of the rules (even when they are exact) and the predictability of any concrete future decision (*i. e.*, a court judgment or order) in a ‘contested’ case. While there may possibly be some certainties or uniformities in the predictions of decisions in ‘contested’ cases, they have not yet been discovered or formulated.”

<sup>4b</sup> As the writer said *supra* note 2, at 779: “A few years ago we began to hear much of a great metaphysical problem in the law schools. It might be phrased this way: Why is ‘Law’ not like ‘law’? Why is what law school teaches unlike ‘law’ as it is practiced? What was really in mind was this: Why is law-school law dissimilar to what courts and lawyers do? It had begun to be moderately evident that law-school law, restricted as it is to the so-called legal rules of so-called substantive law, had come unduly to dominate legal teaching. The law schools had a little too obviously impoverished the subject matter to be studied; they had focussed on the Rules; they had withdrawn from the gaze of the student, the complicated, shifting and changing material which the practicing lawyer must encounter. The movement once more to enrich the materials of study took the form of a demand for ‘sociological jurisprudence’: Law, it was said, must be recognized as one of the social sciences; the law

## II

To be more specific, the following ideas are recommended for consideration:

I. *A considerable proportion of law teachers in any law school should be men with not less than five to ten years of varied experience in the actual practice of law.* They should have had work in the trial courts, appellate courts, in office work, in dealing with clients, in negotiation.<sup>5</sup> Their practical experience should not have been confined chiefly to a short period of paper work in a law office.

This does not mean that there are not some highly capable teachers with little or no practical experience. For some teachers are brilliantly intuitive and to some extent make up for their deficiencies in experience by imaginative insight.<sup>6</sup> No student who was taught by Ernst Freund needs to be told that much can be learned from men who have not practiced law. To sit at the feet of brilliant men such as Walter Wheeler Cook, Thomas Reed Powell, Underhill Moore, Herman Oliphant, or Arthur Corbin is an invaluable vital event in the life of any law student.

Nor is it intended to say that mere experience in practising law will make a man a good law teacher. By and large, teachers are born, not made.

Professor Thurman W. Arnold is an excellent illustration of the ideal law teacher. He practiced law in Illinois, Wyoming and West Virginia, where he enjoyed the most varied kind of experience. He is now Professor at the Yale Law School, where he is able, with wit and brilliance, to make the students feel and understand the relation of the work of the trial court to every aspect of the undertakings of the lawyer. Any law school in which the majority of the faculty consisted of men like Arnold or Frankfurter would speedily reorganize its methods of teaching so as to combine a profound knowledge of what is in the books with a thorough comprehension of what courts and lawyers do in fact.

Of course, there is room in any school for the mere book-teacher. Part of the job of the lawyers is to write briefs in which, according to current conventions, it must be made to appear—contrary to the truth—that the legal rules and principles and the precedents are the principal bases of courts' decisions. The lawyer must learn the jargon of the courts, the art of judicial

school must mesh with the departments of economics, political science, psychology, and history. Splendid, that notion. May it flourish. But it did not go far enough. Chesterton says that the Christian medieval ideal was not tried and found wanting; it was tried and found difficult—and given up. That is an observation worth pondering. It is wise to see that the older generations were sometimes sounder than we are. Change does not necessarily mean progress. It is sometimes possible to back and find valuable ideas in the past."

<sup>5</sup> It is not intended to suggest that this experience can be best obtained in large offices or in large cities.

<sup>6</sup> But they are few. And why should all teachers be asked to guess by brilliant intuition what they are far more likely to learn and know more accurately by direct experience?



rhetoric. The exclusively book lawyer can perhaps best teach such "library-law". But the "library-law" teacher should cease to dominate the schools.<sup>7</sup>

Unfortunately, attempted reform of legal pedagogy is frequently in the hands of the "library-law" teacher. With the best will in the world, such a teacher often finds it almost impossible to warp over the old so-called case-system so as to adapt it to the needs of the future practicing lawyer. For, as above noted, that system is centered in books. So long as teachers who know nothing except what they learned from books under the old case-system are in control of a law-school, the actualities of the lawyer's life are likely in that school to be considered peripheral and as of secondary importance.

A medical school dominated by teachers who had seldom seen a patient or diagnosed the ailments of flesh-and-blood human beings or actually performed surgical operations, would not be likely to turn out doctors equipped with a fourth part of what doctors ought to know. But our law schools are not doing as much for law students.

*Many of our law schools are so staffed that they are best equipped not to train lawyers but to graduate men able to become book-law teachers who can educate still other students to become book-law teachers—and so on ad infinitum. They are not lawyer-schools (as they should be primarily) but law-teacher schools.*<sup>8</sup>

It is significant that Dean Clark and Dean Green (the respective chief executives of two of the three law schools most alive to the needs of revision of legal pedagogy) are men who were seasoned lawyers before they became law teachers.

What is here suggested is not that all law professors should have had first-hand contacts with courts, lawyers and clients, but that a very large proportion of the professors should be men with such records. The law schools need for men like Frankfurter, Clark, Green, Douglas, Sturges, Llewellyn, Arnold, Medina, Smith, Dickinson, Morgan, Magill, Mack, Michael, Handler and Berle.<sup>9</sup>

<sup>7</sup> More than that, some of the teaching of the art of persuasive "reasoning" in briefs might well be done by men who have written many real briefs for real courts. See Bacharach, *Reflections on Brief Writing* (1932) 27 ILL. L. REV. 374.

<sup>8</sup> The writer's associate, Mr. Lee Pressman, calls attention to the effect of the Langdell type of law school on even those few teachers who had previously been practitioners. The spirit of Langdell so dominates some of the university law schools that the practitioner who becomes a teacher in such a school often succumbs to that spirit and forgets the difference between the theory he is teaching and the actual practice which he had previously encountered. In some instances this forgetfulness is due to the character of the individual teacher; he may have found practice distasteful and lacking in that certainty which he craved, so that he shifts with delight to a system in which far greater (but illusory) certainty seems to be a reality.

In some notable instances this is not the case. Men like Llewellyn after but a few years of practice become teachers who transmit to their students a keen awareness of the difference between the contexts of the law reports and the practice of law.

<sup>9</sup> The mention of these names does not indicate any belief that there are not others of equal worth and ability in the university law schools.

2. *The case-system should be revised so that it will in truth and fact become a case-system and not a mere sham case-system.*

A few of the current type of so-called case-books should be retained to teach dialectic skill in brief-writing. But the study of cases which will lead to some small measure of real understanding of how cases are won, lost and decided, should be based to a very marked extent on reading and analysis of *complete records of cases*—beginning with the filing of the first papers, through the trial in the trial court and to and through the upper courts. *Six months properly spent on one or two elaborate court records, including the briefs (and supplemented by reading of text-books as well as upper court opinions) will teach a student more than two years spent on going through twenty of the case-books now in use.*

In medical schools, "case histories" are used for instruction. But they are far more complete than the alleged case-books used in law schools. *It is absurd that we should continue to call an upper court opinion a case.* It is at most an adjunct to the final step in a case (*i. e.*, an essay published by an upper court in justification of its decision).

3. But even if legal case-books were true case-books and as complete as medical case-histories, they would be insufficient as tools for study. What would we think of a medical school in which students studied no more than what was to be found in such written or printed case-histories and were deprived of all clinical experience until after they received their M. D. degrees? Our law schools must learn from our medical schools. *Law students should be given the opportunity to see legal operations.* Their study of cases should be supplemented by frequent visits, accompanied by law teachers, to both trial and appellate courts. The cooperation of judges could easily be enlisted. (In the days of the Year Books the judges apparently went out of their way, at times, to instruct law students who were present in the court room. If Langdell had but taken that hint when he was sighing for the days of the Plantagenets!)

The "up-stage" attitude of the bookish-trained teacher towards instruction in the actualities of trial-practice is prettily illustrated in the following excerpt from *The Centennial History of Harvard Law School*:<sup>10</sup>

"Efforts have been made from time to time to give students some experience in the trial of cases by substituting a trial of the facts before a jury for the argument of questions of law, whether in the law clubs or in the obsolete moot court. Interesting experiments have been made in acting out a legal injury and summoning the witnesses of the event to testify; and on the other hand in coaching witnesses on the points of actual testimony in their reported trial and having them reproduce the testimony in the Practice Court. *Such experiments have been more suc-*

<sup>10</sup> THE CENTENNIAL HISTORY OF HARVARD LAW SCHOOL (1918) 84.

*cessful, in affording amusement than in substantial benefit to the participants. A fact trial now and then is well worth while, but only as a relief to the tedium of serious work."*

One cannot but agree, in part, with that writer. Such *fake trials* are poor substitutes for careful observation of trials. Would any medical school substitute pretend-surgical operations for real operations as means for instructing students? Obviously, as said by the writer just quoted, such sham law-school trials can do little more than "afford amusement" or serve "as a relief to tedium". They are, indeed, not the equivalent of serious work.

Is it not absurd that during his law-school career a student should not be encouraged frequently to visit court rooms? That absurdity is a direct product of Langdell's attitude; his biographer tells us that it was a fundamental part of Langdell's intentions completely to exclude the "methods of learning law by work in a lawyer's office, or attendance upon the proceedings of courts of justice". Consequently, some of our university law schools by their unspoken attitude encourage indifference on the part of students to the actual work of courts and lawyers.

4. And now we come to a point which the writer considers of major importance. It was stated above that law schools could learn much from the medical schools. The parallel cannot be carried too far. But a brief scrutiny of medical education suggests the use of a device which may be employed as an adequate method of obtaining apprentice work for law students:

Medical schools rely to a very large extent on the free medical clinics and dispensaries. There exist today legal clinics in the form of the Legal Aid Society. Today that agency is by no means the equivalent of the medical clinics and dispensaries. The ablest physicians devote a considerable portion of their time to medical clinics while the Legal Aid Society is, on the whole, staffed by men who are not outstanding in their profession. The leading lawyers of the community do not actively participate in its activities. The Society is limited in the kinds of cases it can take, and the law teachers have little, if any, direct contact with its efforts.

*Suppose, however, that there were in each law school a legal clinic or dispensary.*<sup>11</sup> As before indicated, a considerable part of the teaching staff of a law school should consist of lawyers who already had varied experience in practice. Some of these men could run the law school legal clinics assisted by (a) graduate students; (b) under-graduate students; and (c) leading members of the local bar.

The work of these clinics would be done for little or no charge. The teacher-clinicians would devote their full time to their teaching, including such clinical work, and would not engage in private practice.

<sup>11</sup> Cf. FLEXNER, *MEDICAL EDUCATION* (1925) 269.

The law school clinics would not confine their activities to such as are now undertaken by the Legal Aid Society. They could take on important work for governmental agencies or other quasi-public bodies. The professional work they would do would include virtually every kind of service rendered by law offices.

In this way, the students would learn to observe the true relation between the contents of upper court opinions and the work of the practising lawyers and the courts. *The student would be made to see, among other things, the human side of the administration of justice, including the following:*

(a) How juries decide cases. The factors that count in jury trials. The slight effect of the judges' instructions on verdicts. The hazards of a jury trial.

(b) The uncertain character of the "facts" of a case when it is "contested", *i. e.*, when conflicting testimony is introduced. The difference between what actually happened between the parties to the suit and the way those actual happenings can be made to appear to a judge or jury. The transcendent importance of the "facts" of a case. The inherent subjectivity of those "facts" in "contested cases".<sup>12</sup> The inability to guess future decisions (even when the "legal rules" seem clear) because it is impossible to guess, before a suit has been begun, whether there will be an issue of fact, and, if so, whether conflicting testimony will be introduced, what judge or jury will try the case and what the reaction of that unknown judge or jury will be to that unknown testimony.

The student should learn that "legal rights and duties" are inextricably intertwined with litigation,—that, for instance, there is no such thing as "the law of torts" as distinguished from decisions in lawsuits, and that the so-called rules and principles of torts are only some among the many implements employed by lawyers in their efforts to win lawsuits.

(c) How legal rights often turn on the faulty memory of witnesses, the bias of witnesses, the perjury of witnesses.

(d) The effects of fatigue, alertness, political pull, graft, laziness, conscientiousness, patience, impatience, prejudice and open-mindedness of judges. How legal rights may vary with the judge who tries the case and with that judge's varying and often unpredictable reactions to various kinds of cases and divers kinds of witnesses.

(e) The methods used in negotiating contracts and settlements of controversies.

---

<sup>12</sup> See Frank, *supra* note 2, at 658-663, 782-784; and *supra* note 4, 80 U. OF PA. L. REV. at 33-38, 46-49, 233-242.

(f) The nature of draftsmanship: How the lawyer tries to translate the wishes of a client (often inadequately expressed by the client) into wills, contracts or corporate instruments.<sup>13</sup>

What is intended is not that (as a scoffing neo-Langdellian recently suggested) the student should in his law-school days learn "the way to the post-office" or "the mechanics of the short-trial list". What is intended is that, almost at the beginning of and during his law-school days, the student should learn the very limited (although real) importance in the actual legal world of so-called substantive law and of so-called legal rules and principles. He should learn that "legal rights" and "duties" mean merely what may some day happen at the end of specific lawsuits. And that all so-called legal rules—including the so-called rules of substantive law—are "procedural"; *i. e.*, among the many implements to be used in the kind of fight, conducted in a court room, which we call "litigation". He should learn that judges are fallible human beings and that legal rights often depend on the unpredictable reactions of those fallible human beings to a multitude of stimuli, including the rules, but also including the fallible testimony of other human beings called witnesses. The student should become aware of the slippery character of "the facts" of a case, when there is conflicting testimony, and of the marked importance of what happens in trial courts.

Recently Judge Crane of the New York Court of Appeals thus characterized the graduates of many university law schools:

"With the practical working of the law he has little or no familiarity. He may come to the bar almost ignorant of how the law should be applied and is applied in daily life. It is, therefore, not unusual to find the brightest student the most helpless practitioner, and the most learned surpassed in the profession by one who does not know half as much.

"Strange as it may seem, there were some advantages in the older methods of preparation for the bar. As you know, the law school is relatively a matter of recent growth. Formerly, a student, working in the office of a practitioner, combined the study of law with its daily application to the troubles and business of clients. He had an opportunity of hearing the story at the beginning, of noticing how it was handled by his preceptor, of reading the papers prepared to obtain a remedy; he accompanied the lawyer to court and became acquainted with the manner of the presentation of the case to the judge or to the jury. . . .

"You know much more law after coming out of a university like this than these former students ever knew, but you know less about the method of its application, and how to handle and use it."

---

<sup>13</sup> Even the Langdell-patterned law school can do something in the way of teaching draftsmanship, although it must confine itself to "dead" materials; that is, it can do something in the way of showing the students how to draft mortgages or deposit agreements, or the like, which have a more or less stereotyped form. But "*creative draftsmanship*"—the use of fact-materials thrown at the lawyer by his client and worked out in negotiations with counsel representing the other party to the bargain—cannot be adequately taught in most university law schools as they are now conducted.

Is that not a shocking state of affairs? Think of a medical school which would turn out graduates ignorant of how medicine "should be applied, and is applied, in daily life". In this connection it is important to note that, according to Flexner, in the best-equipped medical schools, the student "*makes and sees made through physical examinations, painstaking records, varied and thoroughgoing laboratory tests, at every stage in the study of the patient; the literature of the subject is utilized; at one and the same time medicine is practiced and studied—teachers and students mingling freely and naturally in both activities.*" In this manner there has been "effected the fusion of bedside and laboratory procedures alike in the care of patients, in teaching, and in research. . . . It is obvious that teaching, thus closely intertwined with scientific investigation, must proceed by 'sampling'. It is neither necessary nor feasible to make the several clinics schematically complete. From the standpoint of research, as I have elsewhere pointed out, no single clinic, no single university can make itself responsible for total achievements; progress is made in the form of steps forward taken in many different places under as many different auspices, integration occurring in infinitely varied ways and under infinitely varied circumstances. From the standpoint of training, *fragmentariness, if stimulative and formative, is desirable rather than otherwise*, for the medical school, not undertaking to turn out a finished product, but rather to train the student in method and technique, would logically address itself to intensive and thorough study of relatively few patients rather than to extensive contact with many. *The student must at one and the same time learn the technique of scientific method, which he can acquire only through 'sampling', and he must acquire a vivid sense of the existence of breaks, gaps, and problems.* The clinics I am now discussing carry him from the patient in the bed to the point beyond which at the moment neither clinical observation nor laboratory investigation can carry him. There he is left, in possession, it is to be hoped, of an *acute realization of the relatively narrow limits of human knowledge and human skill, and of the pressing enigmas yet to be solved by intelligence and patience.*"<sup>13a</sup> Here is much that law schools should ponder carefully.

5. As a temporary device and until such time as clinical law schools are established, students, early in their student days, under the direct and sustained supervision of their law professors, should be working at intervals as apprentices in carefully chosen law offices. The practicing lawyers who assist in such apprentice-training should be made associate members of the law school faculty—perhaps with some compensation. Between the regular members of the faculty and such associates a plan of instruction should be carefully worked out.

---

<sup>13a</sup> FLEXNER, *loc. cit. supra* note 11.

Incidentally, the lawyers who, as associate faculty members, give the students apprentice-training, might be a source of supply for future law teachers. At the same time, many law teachers should be encouraged to some extent to continue in practice—to “keep their hands in”. The notable careers of such outstanding teachers as John Chipman Gray, Albert Kales and Mr. Justice Harlan F. Stone indicate that such a plan is both feasible and highly desirable.

6. It may be argued that there is not time for either apprentice or clinical work. But the law schools admit that at the end of a year or two under the present system the best students are often bored. The reason is that the dialectics which are the chief product of the present case system can be learned in a comparatively short time.

7. And here it should be remarked that in three years all legal subjects cannot be taught by the use of so-called case-books. Far greater recourse should be had in the law schools to text-books and general lectures in order to give the students an orientation with respect to many branches of law.

8. It will doubtless be urged in answer to the foregoing that the Langdell-patterned law schools have turned out our most successful lawyers. But that may well be *in spite of and not because of their method of instruction*. The experiment has not been a controlled experiment. For the students who attend university law schools are usually the pick of the lot. And they are not only the brightest students; they are the wealthiest, best connected socially and the like. Also, the fact of having gone to a university law school such as Harvard gives them prestige. Indeed for some three decades it was almost impossible for a man to obtain a legal education in a law school that was not Langdellian. The Langdell method became the prevailing method and most lawyers, dull or stupid, successful or unsuccessful, necessarily were products of that method. Most successful lawyers today do not wear beards, but it will scarcely be contended that the current habits as to hirsute facial decoration explain their achievements. And just so the correlation of Langdellian training and legal success may be accidental. In the days before the modern law schools arose, it could have been said, “Most successful lawyers have been educated under the apprentice system of reading law in law offices”. The point is that the two systems of legal education have never paralleled one another at a time when both were working with the same kind of student material. (Even today some of the ablest lawyers are products of the apprentice-system; ex-Federal Judge Hugh M. Morris of Delaware will serve as an example.)

9. As noted above, law teaching needs to be integrated with the social sciences. The law student should be taught to see the inter-actions of the conduct of society and the work of the courts and lawyers. The usual law

school curriculum largely omits such teaching. It relies on prelegal courses in the so-called social sciences. The result is that the law student is graduated with the vaguest recollections of his pre-legal work, an insufficient feeling of the inter-relation between law and the phenomena of daily living, and an artificial attitude towards "Law" as something totally distinct and apart from the facts. To avoid that unfortunate result, men who need not have first-hand experience in practicing law, but who are skilled economists, historians, political scientists, anthropologists or psychologists might well be made full-time or part-time members of the law faculty. The brilliant work of Walton Hamilton at Yale or of Max Radin at California is illustrative.<sup>14</sup>

Knowledge of the other social disciplines will help the lawyer to be useful to his clients. Moreover, it will enable him to take his place as a constructive member of the community. As draftsman of legislation, as lobbyist, as a member of a legislative body, as advocate, as judge, as statesman, the lawyer should be adequately "socialized".<sup>15</sup>

10. Professional ethics can be effectively taught only if the students while learning the canons of ethics have available some first-hand observation of the ways in which the ethical problems of the lawyer arise and of the actual habits (the "mores") of the bar.

11. First-rate courses in logic and psychology with specific references to legal thinking should form part of the curriculum. There the students can learn something of the importance of open-mindedness, of the folly of dogmatism, of the provisional, experimental and tentative nature of most conclusions—particularly those relating to the conduct of human beings.

12. And, too, factual studies of litigation and procedure such as those conducted by Yntema and Oliphant at Johns Hopkins could profitably be made part of student efforts, for they serve to disclose what courts and lawyers and clients are actually doing, how well they are doing it and how those doings can be improved.

13. The students in these and other ways should be encouraged to consider that an important part of their future task is to press for improvements of the judicial process and for social and economic changes through legislation, and wise administration, but, at the same time, that proposals for ade-

<sup>14</sup> In this connection, see the brilliant paper written by Leon Keyserling, *Social Objectives in Legal Education* (1933) 33 *Col. L. Rev.* 437. As the present paper was written in 1932, the writer did not have Keyserling's article before him when the present paper was written. The one grave defect in Mr. Keyserling's article is his failure to make reference to the admirable work done by Walton Hamilton at Yale.

<sup>15</sup> On the other hand, heed should be given to Alvin Johnson's comment on "the cross-sterilization of the social sciences".

And it must not be assumed that the so-called social sciences are or are likely to be "scientific" in the sense of any high degree of precision or exactness. Perhaps they would better be called "social arts" than "social sciences". See Frank, *supra* note 4, 80 *U. of Pa. L. Rev.* at 254-260.



quate improvements should be formulated on the basis of moderately accurate information as to how the judicial, legislative and administrative processes actually function.

14. Some considerable attention, too, should be given to the art of the judge. With the help of able judges, many of whom would be delighted to lend a hand, students can be taught something of how trials and decisions look from the bench. In that way those students who will later become judges can learn something about their future jobs.

15. A law school made more or less on the lines above suggested should not be and would not be a mere "trade-school"; its products would not be "mere technicians". Knowledge of what courts and lawyers do in fact would be coupled with visual demonstration of the possible values of a rich and well-rounded culture in the practice of law.

In the last analysis, of course, the kind of law school here pictured must depend on its teaching staff. To acquire a group of teachers of the desired quality is not easy; it will take time. But there are many able lawyers, capable of becoming brilliant teachers, who would be unwilling to make the sacrifices of time and money necessary to participate in the elaborate futilities of a stereotyped Langdell law school, but who could far more easily be induced to take part in a realistic lawyer-school.

16. In sum, the practice of law and the deciding of cases constitute not sciences but arts—the art of the lawyer and the art of the judge.<sup>16</sup> Only a slight part of any art can be learned from books. Whether it be painting or writing or practicing law, the best kind of education in an art is usually through apprentice-training under the supervision of men some of whom have themselves become skilled in the actual practice of the art. That was once accepted wisdom in American legal education. It needs to be rediscovered.<sup>17</sup>

---

<sup>16</sup> For the sake of those students who may become teachers, there should be some courses in the art of teaching law.

<sup>17</sup> That law teachers should have experience in practicing law was vigorously asserted in 1912 by Mr. Justice Harlan F. Stone, now Mr. Justice Stone of the United States Supreme Court. See Stone, *The Importance of Actual Experience at the Bar as a Preparation for Law Teaching* (1912) 37 A. B. A. REV. 747.

Judging from the comments in that and other papers, Mr. Justice Stone would not have agreed in 1912 with most of the suggestions made in the above. In part his disagreement would then have been due to his belief that the time required by the case system left little room for additions to the curriculum. The clear indications are, however, that, since that time, Columbia University Law School, like the other leading law schools, has reached the conclusion that too much time is ordinarily spent in the traditional study of case-books. See also Kales, *Should the Law Teacher Practice Law?* (1912) 25 HARV. L. REV. 253. Kales, who confined his practice almost entirely to writing briefs and oral arguments in upper courts, wanted law-teachers to be men engaged in that limited kind of practice. He had a curious contempt (often expressed) for the "office-lawyer" and an implied lack of respect for the lower court trial lawyer. Doubtless this was due to the limited nature of his own practice. As the bar is made up of all kinds of lawyers, it would seem wise that the law schools should be geared up accordingly. Most law teachers should therefore have had experience in (1) trial courts, (2) office work, and (3) upper courts.