

Winter 12-1-1953

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Womble, Carlyle, Marting & Sandridge (Winston-Salem, NC)

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Recommended Citation

Irving E. Carlyle, An Older Lawyer Views Legal Education, 6 S.C.L.R. 185. (1953).

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AN OLDER LAWYER VIEWS LEGAL EDUCATION

IRVING E. CARLYLE*

It is an honor and a privilege for me to appear before this group as a friendly critic of legal education. I have had long and pleasant associations with law teachers while trying to help them in a small way to improve legal education. Consequently, I have participated to a limited extent in what Dean Pound has described as "the heat of the struggle for improvement of the training of the profession".

One of the significant and healthy aspects of the recurring criticism of the law schools is that the law teachers themselves have been the most severe and outspoken of the critics. This has been especially true as regards the lag between curricula and the swiftly changing law. It was only a few years ago that the law as taught was considerably behind the law as practiced. This was a glaring fault, but happily it has now been largely corrected by the law schools on their own initiative. No informed critic can say, I think, that the courses taught in the modern law school have failed to keep abreast of the law and the times. But to keep them so will require constant attention by the law school authorities. And if the fault-finders are to be answered fully, the quality of the instructors and the instruction must constantly improve.

Although much of the criticism has been constructive, some of it has been extreme and unfounded. Lawyers specializing in the trial of cases and in business law have frequently criticized what they claim to be an undue emphasis by the law schools upon the theoretical to the neglect of the practical features of the practice of law. These critics blame this and other alleged deficiencies in legal education upon the inadequacy of the professors. They complain that men without ability and experience in the practice of law are not equipped to teach others how to practice. Their views were echoed by Harold J. Laski, who happened to be an admirer of American law schools, particularly of Harvard, in a letter he wrote to Justice Holmes in 1929, where he said bluntly in speaking of British law schools—"the law teachers are a very inferior set of people who mainly teach because they cannot make a success of the Bar."

Of course, any person with only a limited acquaintance with law teachers knows that that statement could not be made truthfully about

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the law teachers of America. It is none the less true that a similar low opinion lurks behind some of the criticism by lawyers of the law schools, even though it seldom gets into print. The true answer to such attacks is that the teaching of law is just as much an art as the practice of law; that as high a degree of intellect is required to instruct a student as is required to win a verdict or to convince a judge; and finally, there is the inherent right of every man to follow his own taste. The practical answer to that kind of criticism will best be given when the law teachers of America as a whole are paid the salaries to which they are entitled, and which they are not now receiving. But that is the task of the Deans and their alumni and Trustees which does not belong in this discussion.

With those preliminary observations behind us, I now come to my theme which is one area in which legal education is not doing its job. It seems to me that legal education of today is not laying the necessary foundation for the total education of the student as a continuing process. Too little of the atmosphere of the classroom goes with the student into the years of his practice. It does not adequately start the student on a career of endless intellectual growth. Possibly, its vision is still too close to that of the trade school. It takes the student by the hand and leads him up to and just beyond the pearly gates of admission to the Bar but from that point he is largely on his own as he seeks admission to the profession. It puts the tools into his hands but it does not give to him a satisfactory blueprint for their use in future years. It ignores too much the fact that the education of a true lawyer does not end until his shingle is taken down and put away for good. It attempts to do a turn-key job when as a matter of fact the structure is not finished until the last day of the lawyer's career.

This deficiency in legal education will decrease and a large part of the criticism of the law schools will subside when the critics understand and the teachers take more into account what Edward Gibbon said — "Every man who rises above the common level has received two educations: the first from his teachers; the second, more personal and important, from himself." My view, in brief, is that our law schools are giving too little direction to the second phase of a legal education. Therefore, the failure of the lawyer to educate himself must be borne in part by the law schools.

The first thing to be said about the type of education required for a modern-day lawyer is that it must extend beyond the classroom. Gone forever, and rightly so, are the days when a lawyer can make a go of it by simply having a law degree, a license, a form book, a

copy of the statutes, a set of the State Reports, some reference books, and the lung power to get up and holler before a jury or court. The society in which we live and the business from which men now get their living have become too complex for a lawyer having only those simple tools and the limited skill required for their use.

This means that the task of educating the true lawyer is too large for the law school alone. It may be presumptuous for a practicing lawyer to tell this group what the function of a law school is, but I venture to do so just the same, with your indulgence. The primary object of the law school is to develop in the student a legal mind—to train him to think like a lawyer. It must go further than this and teach him what the law is about, and something, but not all, about what the law is and where the legal principles applicable to a given state of facts may be found. It must teach him to analyze a set of facts and to give to each fact its proper relevancy in the framework of a legal problem. It should even point out to him wherein the law “as is” falls short. It must teach him to recognize the tools which he will use, but, as matters now stand, he will have to look largely to himself rather than to his teachers for his training in the use of those tools.

And there, it seems to me, you have it—just a skeleton to which the flesh and the blood and the life and the action will have to be supplied by the student himself in the years ahead. My question is: Are the law schools giving to him the incentive, the technique, and the “know how” for his part of the educational process? Is there a hiatus between the education given to him by his teachers and that which he must give to himself? Is there a sufficient carry-over from the first to the second?

I have mentioned the tools upon which his success or failure as a lawyer will depend. As a practicing lawyer sees it, they are primarily words and books and legal principles and legal thinking and experience, the latter being so well summed up by Justice Holmes when he said that “the life of the law has not been logic; it has been experience.” The after-school education of the lawyer in the use of these tools has been made extremely difficult by the heavy demands now being made upon him. These extend from the strict practice of the law to helping to solve the social, economic and political problems of his times.

Some conception of the broad scope of the self-education required of a lawyer is gained by our recalling that in the more than three thousand counties in America, in all the cities and towns in the nation,

in all the forty-eight state governments, in the Federal Government itself, in every business, incorporated or unincorporated, and whether large or small, the guidance of a lawyer is constantly required. The effects of that guidance can be far reaching for good or evil, depending on how well the lawyer has educated himself. The impact of high taxes, the inter-dependence of individuals, the lifting of the standard of living, the improvement of transportation and communication, and many other factors have made the average citizen of today more dependent upon the services of a lawyer than ever before.

And, in addition, the climate of a community with respect to freedom, progress, culture, tolerance and its business ethics can be, and should be, greatly influenced for the better by the lawyers of that community if they are men of education and high standards. But obviously the lawyer equipped only with a classroom education will not be able to do that job. Therefore, the continuing education of the lawyer is essential for the good of society as a whole.

Even when operating solely in the legal field, legal education, formal and continuing, has made a tremendous contribution to the country. The history of each state and of the nation shows that the role of the courts, the judges and the lawyers in economic and social progress has been decisive. The greatest contribution made by the Anglo-Saxon to civilization is his respect for law and order. Throughout the English-speaking world that respect is second nature. As lawyers and law teachers, we should take pride in the fact that of all the institutions in America none has been more influential and none has more controlled and directed the development of this country than the United States Supreme Court. And the reason is that from the founding of the Court down to the present, one or more lawyers superlatively educated by their teachers and by themselves have sat upon that Bench. Upon the pages of that Court's epic decisions destiny has been written so that all could read and understand. *Marbury v. Madison*, *Dartmouth College v. Woodward*, *Dred Scott v. Sandford*, *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, and *Erie v. Tompkins*, just to mention a few of the historic cases, have changed the course of our national existence. All of us know that there will be others to follow in the years that lie ahead, and probably in the months just ahead.

There is still another reason why the educational demands upon the lawyer of today are so severe, and that is because ours is the most competitive profession of all. I am convinced that this fact is badly neglected in legal education. Doctors and teachers and

preachers pull together when thrown with each other, but more often they "go it alone" in the performance of their work. On the other hand, lawyers frequently pull against each other on opposite sides of a controversy by the very nature of things. Not only do its members actively and openly compete with one another, but much of their work is carried on in an atmosphere of conflict. Every client wants his lawyer to make a good fight. In court and in the conference room the lawyers for the opposing sides are constantly matching wits and measuring swords for all to see, particularly for their clients. In the forum of public opinion the lawyers are being constantly measured and judged.

In calling attention to the competitive nature of the legal profession, I am not advocating the teaching of belligerency by the law schools. The true lawyer is first and foremost a gentleman. But if he is to survive the conflicts in the practice of the law and still remain a gentleman, he must be conditioned in mind and spirit to meet those conflicts, and that process should be commenced in the law school and be continued day by day thereafter.

Conceding as we must that the lawyer whose education ends when he leaves the classroom is no lawyer worthy of the name and never will be, and that the law school has the duty to lay the foundation for the student's continuing education, what can be done in a practical way by the school to meet the obligation? A few simple illustrations will suffice. In calling these to your attention, I do not mean to imply that nothing is being done by the law schools along this line because here and there will be found some faithful law professor with an eye to the future growth of his students who is giving them, or similar tools, to his students. But I do suggest that the practice among law teachers of instructing the students how and why they must continue their legal education through all the years of their practice is not general enough.

In the first place, every student at some point in his legal education in the classroom should be encouraged, if not required, to commence his own digest of the opinions of the Supreme Court in which he intends to practice and of the Supreme Court of the United States. This means that he should start reading all of the opinions of these two Courts as they are handed down and published in the Advance Sheets. If the student has already decided to be a tax lawyer, his reading for his own digest should be confined to the tax cases of those Courts and to the opinions of the principal tax tribunals. As each opinion is read, a reference of two or three sentences should be entered in his digest, giving the key facts, the result of the case, the

name of the case and the volume and page at which it may be found. Such a digest as this is far more efficient than any commercial digest, and what is far more important, in the preparation of the digest the student at first and the lawyer later has read the decision and has pinpointed its holding. In making this kind of digest he comes to learn the case law of the state and of the Supreme Court of the United States, past and current, from cover to cover in the course of a very few years. I regard the faithful keeping of such a digest as a "must" in the education of a true lawyer. The teacher of law is in the ideal position to stress the importance and to inculcate the habit in the student of shaping and using this simple educational tool.

In the second place, the student should be taught the importance of a thorough daily reading of the newspaper of his community. Only by such reading can he acquire a full knowledge of the life of his town or city. The importance of this is apparent at once when we recall the statement of Justice Holmes that, "The life of the law has not been logic; it has been experience;" and that Terrence said, "Ye shall know by experience;" and the statement by Tacitus that, "Experience teaches." For after all is said, the daily paper of any community is but a day-by-day account of the public experience of all the people; therefore, it is a substantial part of that total experience.

More than any other profession, the education of the practicing lawyer is broadened by the daily reading of his newspaper, and that includes as much of the paper as time will permit. For instance, he should even delve into the social page, because if some day juror X turns up in the box, and he goes to parties given by the plaintiff, then the attorney representing the defendant will be a fool to let X sit on the case. The viewpoints and the bias and the prejudice of a person are determined by what he does, or what his company has been doing recently, by what has been going on in his community, and by the total atmosphere of the community in which he lives. In other words, the daily newspaper is an excellent source of knowledge of the experience of the people which is the basis of the law under which they live.

And above all, the lawyer in search of an education must be taught and must learn the value of the solid reading of good books in all the various fields — law, politics, government, economics, education, history, philosophy, and even a good novel occasionally. Thirty years of association with lawyers has convinced me that this phase of our education is being badly neglected. It is appalling to find how few lawyers read anything worthwhile in the field of law or otherwise. In our reading habits we rank far below the preachers, the teachers, the

newspaper men, the doctors, and even below the bankers. I would say that we rank not too far above the dentists in this respect.

I am sure that many of you have read the Holmes-Laski Letters, running to about 1,500 pages in two volumes, published a few months ago by the Harvard Press. You will recall that they are primarily a week-by-week chronicle of the books that each man was reading, and his brief comments thereon. The amazing thing to me about these letters is their revelation of the tremendous reading habits of Justice Holmes. It is no wonder that he became one of the outstanding thinkers and philosophers of the law throughout the English-speaking world, and a great ornament to our profession in America.

The teacher of law knows better than anyone else that the lawyer who does not appreciate the value of books, particularly law books, who does not find delight in consulting the books, who is not at home with the books, is wasting his time and betraying his profession. In some better way than now in use he must impress this upon the mind of the student. In our efforts to accumulate fine public and private libraries, we should always keep in mind Victor Hugo's sage comment—"It is those books which a man possesses but does not read which constitute the most suspicious evidence against him."

If the members of the legal profession have become a non-book-reading group, in comparison with the members of the other learned professions, and in comparison with the members of their own profession of a generation or more ago, then I am convinced that the fault lies at the door of legal education. A love of the books and a commitment to their use in the education of the lawyer must be inspired first and foremost by the teachers of law. I doubt that they are now discharging that task, but some of the fault must be laid to radio and moving pictures and television.

I now come to one of the most important aspects of the education of a lawyer, and that is the cultivation in his make-up of professional initiative. It is the lack of this quality, sometimes incorrectly described as aggressiveness, which brings defeat and failure to so many careers at the Bar. It is the inner urge, the sense of mission, the grim determination to reach the heights, whatever the cost may be in sweat and toil. It finds expression in the studious preparation of the law of every case and of every problem dealt with. It is the one quality upon which success at the Bar is absolutely dependent. Born lawyers always have it, and those born without it must acquire it through education. It is sometimes confused with common sense. Its essential elements are firmness and fairness.

Its cultivation starts with the frank recognition of the challenge to the lawyer's higher self contained in every difficult situation. Every would-be practitioner and every practitioner of the law must realize that a career at the Bar is but a series of difficult situations, because the achievement of justice between men is not an easy business.

The teachers of law should ever be alert to detect and to develop in their students professional initiative. Those students who do not have it and who are incapable of developing it should be guided by their teachers into some other field of work. Observation of the make-up of the legal profession today discloses a good percentage of young men, almost totally lacking in professional initiative and incapable of its development who should have been led by their law teachers into some other career. It seems to me that this is one deficiency in legal education which needs to be corrected.

And finally, legal education should stress more the mastery of the written and spoken word. The success of every lawyer depends much upon his ability to persuade others to accept his views and his side of the case. Courts, juries, boards of directors and public boards of all kinds, legislative committees and committees of all kinds, and most of all his client will be listening to his arguments. Improvement in this field must be the lawyer's constant aim. Clear thinking and thorough preparation and a good memory are the chief essentials. He should never read an argument nor a speech, if at all possible. And in the words of Justice Cardozo, as contained in his wonderful article, published in the memorial number to him by the combined Columbia, Harvard and Yale Law Reviews — "Above all, don't be long winded." The short argument, confined to the bare essentials, backed up by sincerity and force, will always be far more effective than the long winded, wandering discourse, full of non-essentials and empty words.

It is needless for me to point out to this group how this quality should be taught, except to say that the example of the law teacher himself will be the most effective instruction. And the same is true with respect to teaching the love and use of books and the development of professional initiative. After all is said and done, it is the atmosphere created in the classroom by the teacher, carrying over into the after years of the student's life, that is the real foundation for the total education of the student as a continuing process. The lengthening shadow, if there be one, will be yours.

And in conclusion, may I remind you in all sincerity that the teacher, judge or lawyer who continues his education along the lines I

have discussed in this little talk will inevitably rise above the common level. What is more, he will be a noble personage in any community, and that is so because he is always responsive to human need; he stands always on the same high level of mental and moral integrity. He is as incapable of looking up as he is of looking down; he is equally without reverence and without condescension. He is the keeper of his own conscience; the creator of his own convictions and the author of his own thoughts. He serves as the leading guardian of liberty and as the unfailing foe of injustice. The cultivation of more lawyers of this type is the unending but rewarding task of legal education.