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PHILOSOPHY AND THE FUTURE LAW SCHOOL CURRICULUM

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THE PLACE of philosophy in the future law school curriculum must be viewed in the context of the changes that are occurring in the social and political structure within which lawyers practice and the consequent changes in the legal profession itself. This context has been discussed by Wilbert E. Moore[1] and Robert B. Yegge[2] and the comments that follow are premised upon their discussions.

Dean Yegge indicates that a hallmark of the current situation is man's increasing mastery of change, not only in reaction to it but also in the creation of changes deemed necessary or desirable to attain certain goals, short and long range, and in the potential that man now may set the direction for his future. Human power in decision making coupled with the rapidity of change seems to compress time — the future becomes but the short step of implementing plans made in the present.

However, there may be surprises. Further, man is an historical creature. He cannot deny or escape the past which provides the matrix for his understanding of reality. Because he is a creature, he cannot avoid philosophizing about the nature and purpose of reality and human existence. The co-relation of man's historicity and creatureliness emphasizes the relativity of his philosophy. Thus, the legal realists of the early decades of the 20th century exposed the shortcomings of a self-contained, logically consistent, fully integrated philosophical system of law which seemingly was independent of those charged with its implementation. World Wars I and II again put in question the resort to authority as the final test of the right for the law. Man's dominion over his physical environment has injected new dimensions into the means-ends problem. As a result, the law today may be characterized as being in search of norms for its proscriptions and prescriptions. This search drives its inquirers to the more basic question, "What is the law?"

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[1] W. Moore, Changes in American Social Structure (paper prepared for Curriculum Comm. Conference, Ass'n of Am. Law Schools, Sept. 30, 1967), *reprinted supra* at 1.

[2] R. Yegge, The Future Legal Practitioner in the United States: What Training He Must Receive (paper prepared for Curriculum Comm. Conference, Ass'n of Am. Law Schools, Sept. 30, 1967), *reprinted supra* at 12.

Set free from a prior philosophical underpinning which found answers in the method of logic, and in quest for its identity and the guidelines to direct the planned change which is within the purview of lawmen, the law school is confronted with the fact of differentiation within the structure of the profession in American society. As Moore has pointed out, specialization is the trend and collective decision making the format for law practitioners in this society. In the process, new tasks emerge and old skills become diluted.

The development of new tasks entails anticipation in the training of new skills. The dilution of old skills creates pressure to spin off segments of the profession which can better be served by specially trained technicians. At the same time, a new perspective is called for which enables the specialized-collectivized practitioner to see the relation of his sphere of activity to the whole task and challenge of the profession in society lest he be lost in a sense of disengagement. Conforming to the niche of his speciality, he is subject to pressure to become a professional "drop out."

Whereas the 18th century lawyer was seen as a legislator, and whereas the 19th century viewed the lawyer as a judge, the 20th century image of the lawman is in flux. The lawyer has been popularized as the advocate of justice and the rights of man by the mass media. He has been characterized as an architect of order whose task is to form the order for a changing society. He may also emerge as an important go-between who mediates and manages tension.

Cast off from the solidarity of an all encompassing philosophy, caught in the progression of specialization, and confronted with the opportunity for change, the diagnosis of the place of philosophy in the current law school curriculum is rather dismal. As stated in the resolution presented to a section at the 1965 meeting of the Association of American Law Schools,[3]

> While individual scholars in many law faculties have pursued the study of law as a theoretical, cultural discipline, the fact is that vocationalism tends to set the tone of the law schools — instruction in numerous unorganized "courses," minute specialization in most of them, lack of intellectual content in many of them that is usually expected in university study, and emphasis on technical competence. In this atmosphere scholarship is subordinated to standards of professional success; leadership both in scholarly contribution and in the formation of public policies has been lost to other disciplines. Non-legal scholars, however, are not equipped to meet the current challenge adequately. The fact is that the theoretical study of law has fallen in neglect between the law schools' vocationalism and the lack of legal training of social scientists, historians and philosophers.

[3] Dorsey, *Formation of American Section of International Association for Philosophy of Law and Social Philosophy*, 18 J. LEGAL ED. 63 (1965).

To pick up the theme of Yegge's remarks, how do we get from here to there?

I. PHILOSOPHY AND CHANGE

It is tempting to place man at the helm of his destiny and frame a philosophy of law based upon human perfectability and power to determine the future. Scientific and technological advances seem to bring this possibility within the closer range of probabilities. Each step of progress, however, accentuates the necessity to consider anew man's purpose in it all. In a time when means and goals are problematical, the need for guidance in the choice of alternatives becomes more acute. When man both chooses the means to attain particular goals and decides between several goals in relation to these means, then the criteria for his decisions are of paramount concern for those who follow in addition to those who lead.

If lawyers are to provide order in the context of change — order that both contains that which is, and provides for that which is becoming — then the lawmen will need a philosophy adequate for the task. The inadequacy of any prior philosophical understanding of the law does not require its being ruled inadmissible because irrelevant, immaterial, and failing to prove or disprove an issue. The analysis of the internal structure of law does not lose its importance. Nor is the question of sovereignty and power beside the point. Also, it would be foolhardy to argue that the historical school of legal philosophers added nothing to an understanding of the nature of law. But these and other philosophical perspectives of the law do not exhaust the demands upon a philosophy of law confronted by purposeful change.

A view of the law is called for which is broader than substantive rules and hierarchies of power. Habit, custom, and the mores need to be kept within the framework of their relation to the jobs performed by those who can be identified as law professionals. In order to meet the challenge of change as now being understood, the law must be conceived as more than the legal order, law rules, or the judicial and administrative processes.[4] It must include the process of ordering which is the special responsibility of lawyers. The concept of law is thereby turned to focus upon a particular way in which social relationships are ordered by identifiable actors who behave within the limits of certain controls over them because of the things they do and who thus have become accustomed to fairly well defined expectations. Ordering in this sense includes the ideological dimension of activity which justifies requiring conformity to norms in social

[4] This trilogy has been suggested by Roscoe Pound in many of his writings. *See, e.g.*, Pound, *Sociology of Law*, in TWENTIETH CENTURY SOCIOLOGY 300 (G. Gurvitch & W. Moore eds. 1945).

relationships and also the initiation of new relational forms in the search for the right. It is preservation and creation in relation to certain ideals.

Within this perspective of the law, the lawman is conceived of as more than a purveyor of rules, a channel in the system of legal logic, an adjunct to an arm of political power, or a captive of his geography and history. The lawman is a participant in an ordering process which is directed toward the realization of higher objectives, conscious and unconscious, realized and unrealized. As a participant in this process, the lawman makes specific contributions toward the relative fulfillment of goals through the particular arrangements he devises, the rules he promulgates, the procedures he initiates, and the policies he declares. He is the high priest in the process toward order in the face of rapid change. As such he is in the position of leadership which offers the prospect of influence over the actions of others.

A caveat must be introduced in this discussion of change and the potential for determination of the future by human effort. Man is not perfect. He is finite and limited — as are his plans and predictions. In addition to the ubiquity of change which calls forth the serious look ahead, man experiences the reality of an ubiquitous evil as a source of strain which tends to produce change.[5] Moral man lives in an immoral society.[6] Ideals are not realized. Above all, man has the freedom to cheat.[7] A philosophy of law which conceptualizes law as activity must therefore take seriously the imperfect nature of the ordering process in which the lawmen participate.

The lawman as participant in the ordering process which is the task of the law in American society will thus function within the limits of tension between that which is and that which ought to be. Such a lawman needs a view of the law which provides him with understanding of his role-status within the law process and also with the criteria for deciding among the various means and ends that are viable options in getting from here to there.

II. Identity and the Search for Norms

The question, "What is law?" is not new; nor is the search for norms to guide the legal structuring of relationships of recent origin. The new dimension for these questions is to pose them for an industrialized, bureaucratized, urbanized, secularized society. Philosophically and theologically the understanding of ultimate reality is

[5] W. Moore, Social Change 19 (1963). Moore uses the word "sin" which has certain theological connotations.

[6] R. Neibuhr, Moral Man and Immoral Society (1932).

[7] P. Berger, Invitation to Sociology 151-63 (1963).

no longer an unquestioned given but one in which man in some measure participates. His stance in creating reality is that of a partner — with varying views regarding the identity of the other members of the partnership. The ontological understanding of the law is subject to like forces of relativity. Even the methodology of law has been put in doubt. Holmes challenged the method of logic as the life of the law in the late 19th century. The waters that were then muddied have yet to clear. As has been argued, many of the gaps in the lawyers' training are traceable to "an insulation from reality . . . which unduly emphasizes the study of precedent."[8] Yet, precedent has a place in the task of the law to structure the relationships of contemporary society, especially in a time when change so accentuates the teleological questions which confront the lawmen in this task.

These several issues are not discrete but are interrelated. They are raised in a time when legal education is under close scrutiny as a result of the changes that are occurring within society and the legal profession. One change of particular note is the introduction of the behavioral sciences to dialogue with law professionals and the implications of this dialogue for a philosophy of law. The gradual appearance of courses in law school curricula dealing with law in process, law and society, anthropology of law, sociology of law, and the like, signal subtle changes of outlook within the profession. These courses may mark the initiation of a new concept into the law, or they may reflect changes resulting from the evolution of the idea of law. Be that as it may, attention to such subject matter and the defense of its integrity in the law school curriculum are evidence of a new look at the philosophy upon which the law has been taught for the past generations and its adequacy for the present time.

Meaningful interchange between behavioral scientists interested in the law and lawyers must be more than the refinement of tools for the kit of the law practitioner and the suggestion of problems which may be of interest to the student of society. This interchange requires a new look at the nature of law and the sources for norms which are given form in the ordering of the society. No longer is it necessary to justify the dialogue between the disciplines. Rather, it is time to look at the bases and the consequences of looking at the law in terms of the behavior of people in relation to stated and assumed ideals of law and the function and functionaries of law in society.

The interrelation of factors relevant to the introduction of a behavioral science understanding of the law to the law school curriculum and the development of a philosophy of law sufficient to undergird the task of law in a society marked by purposeful change

[8] R. Yegge, *supra* note 2, at 21.

is complex. It is not necessary to unravel the fabric of culture and the accumulation of knowledge to recognize the increasing literature based upon an attempt to understand what lawyers do and what the law does in society. For example, Lon L. Fuller has sought to formulate a philosophy of law based upon a conceptualization of law as activity and the legal system as the product of sustained purposive effort.[9] Fuller's schema is a "new" natural law. Although the term "natural law" carries with it some unfortunate baggage from a prior time, the attempt to articulate a natural law philosophy for the contemporary lawman is grounded upon an understanding of man in social relationships and the elements of the human condition. Philip Selznick has examined the foundations upon which to build a fruitful collaboration between sociology and a natural law philosophy which suggests that the data of human experience may provide a basis from which norms may be formulated to guide action in the law ordering of society.[10]

Although still emerging and far from being free of debate and doubt, the effort to formulate a philosophical understanding of law which identifies law as process, as activity, as what is being done by and within a group of practitioners in society is being made. Such a philosophy is required not only as a response to the demands of change and the invasion by behavioral scientists upon the sacrosanct domain of the law tradition, but also to suggest the parameters for that which is to come. Thus, as the lacunae between the claims of the law and the behavior of people are exposed by systematic investigators, lawyers recognize that if they are to perform their tasks responsibly as high priests in ordering a better society, then they must have a perspective consonant with the challenge and a new look at the data of human experience.

Two aspects of the state of legal philosophy in relation to the challenge of change to the law process have been considered — the need for internal reconstruction and the consequences of external contact with the behavioral sciences. External contact in the formulation of legal philosophy, however, cannot be limited to dialogue with behavioral scientists. In the search for norms and the task of sorting means and ends, lawmen also need to engage in conversation with ethicists. Just as dialogue is now in process with behavioral scientists, likewise bridges are needed for exchange with the professions which are engaged in the task of understanding values and articulating norms for human behavior based upon those values.

[9] L. FULLER, THE MORALITY OF LAW (1964). Fuller has written several items in this field. For a critique, see Summers, *Professor Fuller on Morality and Law*, 18 J. LEGAL ED. 1 (1965).

[10] Selznick, *Natural Law and Sociology*, in NATURAL LAW AND MODERN SOCIETY 154 (1962).

No panacea will be found for initiating interchange between law teachers and ethicists in all law schools. The addition of philosophers to law faculties, interdepartmental seminars for faculty and students at universities, or specially convened workshops may be answers for some law schools. Certainly, the experience gained in the introduction of behavioral science concepts and materials into law school curricula should be informative in these respects. In the first instance, however, concerted attention must be focused upon the needs for — and of — legal philosophy and the teaching of law.

The lawyer as high priest will not be all things to all men. He will be a specialist serving the narrow aspects of a particular need of some men. He will enlist cohorts in order fully to serve his client, be the client an individual or group, an actual or a fictitious person. How and where will the lawyer-specialist find the engagement which provides meaning for the relationship of his part to the whole? How and where will he be turned from vocationalism to a sense of the profession which gives leadership in the creation of social order? How and where will he see himself as more than a technician who dispenses rules of law to financially acceptable clients?

There is no single answer to these questions. But there is one experience common to all lawyers. All who are admitted by the elders of the profession to the campfire of recognition must pass through the halls of a law school. The law school is at the vortex of the socialization process whereby the law neophyte is transformed into the accepted professional. Therefore, the law school is in a strategic position in the formation of the law-professional's understanding of the law, its purpose, and its potential.

III. THE LAW SCHOOL AND PHILOSOPHY OF LAW

The law school, although strategic in the professionalizing process, is caught in the midst of the failure of philosophy to provide a theory of law compatible with the demands upon it, the increasing pressure for specialized training to equip lawmen for the tasks which they are called upon to fulfill, and the predicament of being compelled to lay the foundations for an order yet to come out of the uncertainty of the present situation.

The philosophy of law which supported the teaching and practice of lawmen for the past 50 years will not serve the next 50 years. It is not altogether wrong; it was the creature of its time and was not called upon to answer the questions which now perplex the law professional. New knowledge, the power of man over his environment, the consequences of technological advance, and the pervasive-

ness of an urban ethos are several of the factors which have revealed the shortcomings of prior systems of legal philosophy. Yet, this recognition does not automatically usher in a fully developed system of thought to take up their places. Consequently, the law school must teach lawmen for the tasks now anticipated and given meaning by a philosophy that is still nascent.

Three observations are in order concerning the stance of the law school in this position:

1. The law school has no choice concerning the philosophy of law.

2. It must accept realistically its place within the structure of the profession and not relegate its responsibilities to others.

3. It must maintain its freedom to seek out new ways to inject philosophy into the profession.

A. *The Lack of Choice*

The law school has no choice in regard to a philosophy of law in the sense that it can opt to ignore the problem and pretend that its curriculum is philosophy-free. The law it teaches, the perspectives it inculcates in its students, the courses deemed relevant to be taught, and the methods used in teaching them will reflect a philosophical point of view concerning the law. The absence of any concerted attention to legal philosophy as a scholarly discipline is no test of whether a philosophy is being taught. Such absence may more properly suggest a proliferation of legal philosophies.

The choice before the law school is to decide whether the philosophy which pervades its curriculum and teaching methods is sufficient for the task of the lawmen being prepared for service in the light of the changing structures of society. It is necessary to appraise the philosophical understanding of the nature of law which provides the foundation for the law school subjects being taught, their content, and methods of teaching.

Unanimity of viewpoint among all law schools is neither expected nor desirable. The first step in becoming aware of the direction toward which the law and the law schools may be headed is to look consciously at the philosophy of law now being proclaimed. Thereby the stage can be set to examine critically the sufficiency of viewpoints in the light of current knowledge.

Critical examination is but an initial step. To linger overly long with institutional introspection is to detour the development of the philosophy of law. It is incumbent upon the law schools to initiate the study of law as it relates to and is one of the processes of change now being observed.

B. *Law Schools and the Structure of the Profession*

In responding to the hue and cry for a philosophy of law compatible with the reality of social relations now becoming, the law schools must recognize and accept their place within the structure of the profession. Their responsibility must not be relegated to others. Two related ideas are involved in this injunction: The law school as an organization of law teachers has a function which is distinct from that of the law practitioners and more than "just teaching the law"; and, the responsibility for providing leadership in the development of policy may shift by default from the law schools to the bar associations.

The offering by a law school of studies in the law is conditioned upon a legal philosophy. As argued above, integrity in teaching requires realism regarding the philosophy which undergirds such teaching.

However, the differentiation which marks the change in social structures applies to the law schools. They are subject to the same pressures for change as is the law practitioner. Specialization, urbanization, inequality, and pluralism[11] impinge upon and affect the law school. It cannot divorce itself from history and plead immunity from the forces of change.

One dimension of differentiation — specialization — has particular significance for the law schools. Among other characteristics, the law school represents that segment of the legal profession which is analogous to the board of directors of a manufacturing concern. The teachers of the law are in a position to influence strongly law policy. The place of the law journal and scholarly writing within the profession of lawmen must be appreciated. They provide a communication network, formal and informal, for the exchange of ideas and the initiation of change.

Consequently, in the market place of matters pertaining to the law — its definition, function, and goals — the law school fulfills a vital function in exploring new vistas and offering new ways of thinking and acting. At a time when the law seeks to know itself and to locate its bearings for future action, the teachers of law have a peculiar opportunity and an especial responsibility to think through and articulate the philosophy upon which they proceed.

Responsibility for the development of legal philosophy is not the sole prerogative of the law teachers. It is patent that all lawyers — be they practicing attorneys, teachers, judges, or association administrators — function in relation to a philosophy of law and so have some responsibility for its formulation. A legal philosophy

[11] W. Moore, *supra* note 1.

undergirds their livelihoods and therefore, it can be argued, should be of concern to them. Responsibility in this general sense is important and hopefully more attention may be directed to it by all law professionals.

The concern at this juncture is with the law schools and the peculiar responsibility for a viable legal philosophy which is theirs because of the place of the law school in the training of lawmen. The existence of two organizations such as the Association of American Law Schools and the American Bar Association indicates that the interests of the lawyers who identify with them respectively may be distinguishable although allied in many respects. The growth of the American Bar Association and its aggressiveness in the meeting of new demands on the law may facilitate its assumption of leadership in developing a philosophy of law. Cooperation in the effort would appear to be advisable and consideration should be given to its enlistment. However, in the first instance the law schools are confronted with the possibility that default in understanding the nature and purpose of law from within their ranks may lead to a growing subservience of the schools to the organized bar in regard to the content of the law school curriculum and the philosophy which pervades the teaching of law. There is merit in maintaining the independence of the law school from the pressures of the organized bar associations in order to preserve the freedom necessary to the educational enterprise to permit experimentation and innovation.

C. *The Need to be Free*

The introduction into the law school curriculum of a philosophical view of law which conceptualizes law as process and seeks norms from an examination of the conditions of human behavior, when coupled with an increasing dialogue in depth with behavioral scientists concerning the function of law and lawmen in society, may open the door of a Pandora's Box, particularly if the law school loses its freedom to experiment in course offerings and research. The law school must retain the freedom which will enable it to pursue the truth from the perspectives of the philosophy of law which guides the curriculum and the areas of human behavior deemed critical for study. Freedom is a relative term and its limits will vary depending upon individual law schools. At least two freedoms are necessary in regard to the revivification of legal philosophy in the law school curriculum: the freedom to innovate, and the freedom to become involved.

The law school needs the freedom to introduce new courses into its curriculum without pressure from the organized bar toward the preparation of students for bar examinations. In the first place,

preparation to pass the bar examinations can be offered in well planned and executed bar review courses conducted in conjunction with or independent of the law school program. Secondly, the determination of subjects deemed relevant to the practice of law is a two-way street in which direction from the law schools to the organized bar is as essential as from the bar associations to the law schools. In this connection, the law school should have the option of changing the criteria for specifying the knowledge deemed to be of primary importance in the practice of law.

Thus, a philosophy which stresses the process of law and involvement in this process by law professionals may suggest that corporation law be viewed in terms of the locus and hierarchy of control and its consequences for a free enterprise economy, for the responsible use of natural resources, or for the distribution of purchasing power rather than in terms of the limits within legislative enactments to which powers can be conferred upon the fictitious entity called the corporation. Or, a course in contracts might focus more upon the nature of the contract as a means of arranging relations and providing a private law to govern individuals than in terms of offer and acceptance, consideration, performance, and the remedies for breach of contract. In addition, such a legal philosophy may suggest that required courses be in history, philosophy, and the legal process, leaving the electives to courses oriented toward learning law rules necessary in the practice of law.

The freedom to innovate should include the new dimensions of education now taking shape within the profession, for example, continuing education. The possibilities for retooling and introducing new ideas into the profession have yet to be exhausted within this field of activity. The format and content of specific courses offered to practicing lawyers will reflect a legal philosophy; a change in philosophy will require a change in the courses.

A third area for innovation is suggested by the programs conducted at law schools during the summer months at which law teachers assemble and engage in the process of cross-fertilization. The law schools can provide the sponsorship for conversations in depth by law teachers in regard to the implications of change for the teaching of law and its demands upon and for a philosophy of law adequate to give guidance to law teaching and practice.

The second freedom here suggested is the freedom to involve the law school in the processes of law in ways other than preparing lawyers-to-be for admission to the profession. A philosophy of law which accentuates the law process of ordering society may put in question the accustomed stance of the law school in remaining somewhat aloof from societal processes except for the published writings

of individual legal scholars. Such a philosophy may suggest that the law school has a responsibility for collective action in the political and social life of the community. The inclusion of a course in legal philosophy oriented toward process and change in the law school curriculum may entail involvement by the law faculty in ways not altogether within the patterns of past behavior. It is recognized that there is an element of activism in this suggestion. Perhaps this activism is one of the differentiating aspects of the new philosophy that is taking form. It may reflect a change in the understanding of human purposive effort in a time when man can effectuate his plans within known limits of probable success.

Conclusion

In conclusion, it has been argued that the time has come to recognize that the philosophies of law which provided the base for the teaching and practice of law during the late 19th and early 20th centuries are not adequate for the current time. Man has increased his control over the environment in which he lives and his powers for making decisions to plan and implement the structures for social life in accord with values deemed important enough to preserve. A new legal philosophy is needed which accounts for the changes that are incumbent upon the law-professionals in an industrialized, bureaucratized, urbanized, and secularized society.

In the context of these changes, the lawman is more than a dispenser of law rules; he is a participant in the creation of social order and his function as a professional takes on new dimensions from those of the past. The criteria for deciding between alternative means and goals now require examination; the lawman needs to understand the norms and the bases by which he sets the order for the future.

The law school is in a strategic position to develop, articulate, and implement a philosophy of law adequate for the task of lawmen in contemporary society. However, the place of legal philosophy in the law school curriculum will depend upon that philosophy and the source from which attention to the problem is derived. In this matter, the impetus needs to come from the law schools.