

## THE PLACE AND USES OF JURISPRUDENCE

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### INTRODUCTORY REMARKS

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STATISTICALLY, at least, the Jurisprudence Round Table was the outstanding success of the 1948 annual meeting. The auditors burst the bounds of the Round Table room and almost filled the General Assembly room, to which the conference was transferred. It was a surprising, indeed a startling, occurrence. And I do not believe I exaggerate when I say there was much gratification among teachers who had struggled many years to win a place for jurisprudence in the law school curriculum.

Given the statistical fact, one may interpret its meaning according to any hypothesis which will survive critical scrutiny. My interpretation is that it has become widely recognized (1) that jurisprudence occupies a place of unique importance in legal education, if, indeed, it is not the foundation of the entire legal curriculum; (2) that jurisprudence is useful—it increases the resourcefulness of lawyers in their daily efforts to solve the more difficult legal problems; and (3) that in the present-day world, jurisprudence is essential to the sound solution of national and international problems; hence no more important contribution can be made by the law schools than the jurisprudential education of the bar. If these interpretations are not the mere preferences of a devotee but, instead, represent sober, accurate reports of a fundamental change in the attitude of legal educators, the implications are no less than momentous.

A brief glance at the history of teaching jurisprudence underlines the significance of the recent development. We ought, first, to note and give due weight to the fact that the education of Jefferson and his contemporaries included the study of "moral and political

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philosophy" at the same time the courses in positive law were studied; and that this stands out in sharp contrast to the recent past, when, until about a decade ago, jurisprudence was taught in only a few law schools. Except for two or three seminars, especially those of Pound and Patterson, and Cook's lectures on scientific method, the typical course was a narrow, traditional one, usually on analytical jurisprudence, with Holland or Salmond providing the text.

About a decade ago, several important changes occurred. The textbook was largely abandoned; instead, and well before the impact of the Great Books movement, original source materials selected from the texts of the legal philosophers were read. The field expanded from analytical jurisprudence to include the philosophy and the sociology of law. The course was increasingly offered in law school curricula. Indeed, in a goodly number of schools, although the courses are designated in diverse ways, jurisprudence is taught in introductory, as well as in later, courses; and in a few schools seminars in jurisprudence have been added to the regular course. Thus, at Harvard a course in jurisprudence has been added to the seminar. At Indiana, a seminar has been added to the course. The like expansion has occurred in other schools, although there is a surprising omission of jurisprudence in the new, required three-year curriculum at Chicago (except for the Introduction). Finally, it is evident that jurisprudence has permeated and influenced the teaching of many courses, *i.e.*, many scholars who do not teach the jurisprudence course are, in effect, legal philosophers who utilize a specific subject matter to illustrate and illuminate general theories. It is difficult to measure this effect of jurisprudence on the teaching of the various courses, but it does not seem rash to assert that it is perhaps the most important of all the changes ushered in by the renaissance of jurisprudence in the recent past. In this expansion of jurisprudence in the law school curriculum, the most important single step was that taken at Columbia several years ago when the course in jurisprudence, given by two of the ablest members of the faculty, was required of all third-year students. (If I am not mistaken, it is the only third-year required course.) Whether one approves the requirement or not, the significance of the Columbia position cannot be underestimated. Representing the considered view of a brilliant and practical-minded faculty, the Columbia provision must command careful consideration. It represents the high-water mark of recognition of the importance of jurisprudence in the equipment of the modern lawyer. Although there is a goodly basis for some satisfaction with the situation in an increasing number of schools, it remains true that many law schools still offer no

work in jurisprudence and even the best schools offer only two courses, a "regular course" and a seminar.

In my opinion, the next objective should be enough work in jurisprudence to occupy the full time of one member of the faculty or, perhaps better, of half the time of two or three teachers, *i.e.*, ten to twelve semester hours in the field. This is not the place to support such a proposal in detail, but two or three grounds may be briefly noted. The creation of such a chair or chairs in each law faculty would establish the legal philosopher as an equally important member of the concern, with various beneficent results. For example, a minority of young scholars could be trained to fill such positions. They might add a Ph.D. in philosophy to the law degree and, in any event, the official acceptance of legal philosophers in all law faculties would be a spur to specialized preparation for such positions. The prospect of founding and successfully conducting an American Journal of Jurisprudence would be greatly increased and this, itself, is surely a worthy objective. Again, such a program in the law schools would attract the favorable notice of the philosophy and social science departments, with resulting interchange of students and other cooperation. But the final and most decisive test must, of course, be the value of a knowledge of jurisprudence—its value to practicing lawyers and to the community and country they serve.

Specialization in the three-year curriculum is usually discountenanced because the student cannot predict the particular branch of law which will be his future vocation and because a general legal foundation is considered essential. The student does know, however, that he will be a citizen of a democratic society, and jurisprudence is obviously important in the fundamental education. Hence, the question which the law schools should seriously consider is whether concentration in jurisprudence to the extent above indicated is warranted under present conditions. Without any wish to indulge in sentiment or rhetoric, I must say that in my opinion no more serious question confronts the law schools. We have some inkling of the kind of world we shall live in for an indefinite future. And it can be predicted confidently that a bar composed of 170,000 legal philosophers would make a vast difference—perhaps all the difference necessary to preserve and expand democratic society. I do not pursue the matter further because I believe the blight of extreme vocationalism so sears law school thinking that what I urge will be quickly dismissed as impracticable. The law schools have already abdicated much of their proper sphere of influence; and I should not be surprised to see them reduced finally and flatly to technical training schools, with citizenship, statesmanship,

scientific research, and leadership wholly allocated to other divisions of the university. Certainly it is inertia rather than resourcefulness or imagination on the part of the law schools that still allows them some participation in the pursuit of these broader objectives. The problem is obviously not an easy one,<sup>1</sup> and, since judgment in these matters is largely formed by the past, one must expect opposition to any proposed marked expansion of courses in jurisprudence. Yet expansion there has been during the past decade. This should persuade legal educators to encourage the teaching of jurisprudence even though they do not commit themselves to any proposed program of great expansion of that subject.

The progress of instruction in jurisprudence in the past decade has led to the use of various pedagogical methods—discussion, lecture, question and answer, reports by students with quizzing by the class and comments by the instructor, seminars, and even research. It is impossible to elevate any particular method of instruction above all the others, especially in the teaching of jurisprudence, in view of the fact that various combinations of circumstances influence individual decisions in the matter.

Certain questions, however, may profitably be raised with regard to the discussion method and the lecture method. Law teachers are apt to prefer a discussion method and perhaps, simultaneously, they are apt to discount the lecture method, and for obvious reasons. But the fact that the discussion method is superior in most law courses by no means demonstrates its superiority in a jurisprudence course. No doubt it is easier to carry on a conversation than to prepare two or three thoughtful lectures each week and present them in a stimulating manner. It is also much more difficult to conduct a discussion of jurisprudential issues which will accomplish what can be done by a good lecture. Moreover, the experience of some teachers, at least, is that during the first part of the course, *e.g.*, the first third of it, most law school students require a distinctive orientation if they are to read jurisprudence intelligently. Their discussions in the first weeks are apt to be hollow, curbstone reactions. The inculcated reliance on authority must give way to reliance on more subtle uses of the understanding. Well-prepared lectures, supplemented by answers to specific questions, facilitate the transition, give the students some solid foundation on which to stand, and prepare for entrance into a second stage of the course where discussion is more encouraged because it can then be relatively informed. In the hands of some teachers, these objectives

<sup>1</sup> Cf. The writer's essay, *Toward a Liberal Legal Education*, 30 IOWA L. REV. 304 (1945).

may be attainable by discussion, interspersed with short comments (lectures?), but the likelihood is that this is the more time-consuming way even if it does not discourage the better students who have had some training in philosophy and are unhappy when they are long subjected to the superficial discussion of their classmates. After some weeks of stimulating, informative lecturing, paralleling but not summarizing the materials read, the entire class has been provided not only with a set of common ideas but also with some fair apprehension of an attitude toward, and a method of studying, jurisprudence. I do not mean to assert that there is any one "best way" of teaching jurisprudence for all instructors, classes, and conditions. The principal intent in these remarks is to challenge what I regard as a bit of law school mythology regarding the lecture method. In a course like jurisprudence, where, as Professor Patterson put it in his discussion at the Round Table, a knowledge of the most important ideas of jurisprudential thought is a major objective, the lecture can be of the utmost importance.

There is a related point which deserves mention, namely, the tendency in law schools, if I am not greatly mistaken, to "talk down" to the students, especially if discussion is the only method used. In many courses, it may be defensible to conduct the discussion within the intellectual limits of the large majority, and allow the best and the worst to shift for themselves. In jurisprudence, however, it seems to me that there is a particularly impelling challenge to stimulate thinking by appealing suggestively to the higher ranges of understanding and imagination. The majority learn even if they miss the nicer points of the discussion or lecture; the ablest minority (say 25 per cent) keep interested; and all are encouraged to develop their speculative, intuitive powers. Of course, this does not mean that a vast array of names, "schools," and recondite information must be emphasized. It means thorough analysis of jurisprudential ideas, an absence of authoritative determination, and a cultivation of the speculative mind. It is better, I think, to have the average student of jurisprudence occasionally puzzled, even mystified, than to simplify and present an *a,b,c* account of legal philosophy.

It is possible greatly to increase the significance of the major jurisprudential ideas and to avoid a sterile history of legal philosophy if the instructor parallels the materials with apt lectures and comments which represent his own viewpoint. What I have in mind was very well stated by Professor Max Radin, a member of the Council of the Jurisprudence Round Table, in a letter commenting on the selected

subject. I take the liberty of bringing his remarks to the attention of law teachers generally. Mr. Radin wrote:

What I have in mind is something like the following. Every person who teaches a course in Jurisprudence should develop a theory of his own. He will not have to be a profound philosopher or thinker to be capable of acquiring one. However he acquires it, by deep and protracted study or by hasty improvisation, he should get one. It need not be original, but it should be his.

He may, if he likes, obediently and reverently follow in the steps of a Master, but if he does he should omit saying anything about that fact except possibly at the beginning or the end of his course. It makes no difference who the Master is. It may be Hegel (whom God curse!) or Kant (upon whose name be prayer and peace!) and there is no reason why it may not be some thoroughly modern and American like Llewellyn or Dewey or anybody else. And it may well be an eclectic arrangement of doctrines into a more or less consistent pattern, or at least, a consciously inconsistent pattern. But the main thing is that the person teaching Jurisprudence should work out his theory and present the Law to his students in relation to it.

In aid of future Councils of the Jurisprudence Round Table, it may be well to record the opinion expressed at the meeting that future Councils should feel no compulsion to confine the program to the pedagogical aspects of jurisprudence. The present situation is this: the Jurisprudence Round Table meets every other year, and its programs have been rather largely restricted to the teaching of jurisprudence. One has only to compare this situation with the facts in many foreign countries to see immediately that the state of the legal philosopher in the United States is a very sorry one. Elsewhere there are societies of legal, or social and legal, philosophy, two or three annual meetings, much discussion of major problems, collaboration, communication, publication in journals devoted to legal philosophy, etc. We can and, in my opinion, we ought to make definite beginnings in those directions in this country. We are almost required to start with the Jurisprudence Round Table; but we can meet annually and we can free the discussions from the limitations of pedagogical aspects of jurisprudence, although, of course, we may occasionally wish to discuss that problem. These are specific, feasible objectives which can be attained in short order if the teachers of jurisprudence wish to achieve them.

The following papers, which were the principal addresses presented at the Round Table, are excellent illustrations of the wealth of suggestive thought which it is the particular province of jurisprudence

to contribute to the curriculum. The papers speak for themselves. Professor Fuller, as usual, has something important to say and he says it in a felicitous style, addressing himself very specifically to immediate questions. On the other hand, Dr. Northrop, uninhibited by years of insistence on sticking to the material "operative" facts, takes a very broad view of the subject. I would not presume to relate Dr. Northrop's thesis to immediate problems of legal education, though one may hope that he will give us the benefit of his further attention to that question on a somewhat lower level of abstraction. In any event, I am persuaded that legal philosophy and education in this country can profit greatly from Dr. Northrop's far-flung challenge. Let me note a specific fact or two in support of this assertion.

The work of the Committee on a Twentieth Century Legal Philosophy Series has brought the committee and the Association into contact with the legal philosophers of many foreign countries. Everywhere there is great interest in the work being done in this country; there is a strong desire for closer association, collaboration, and greater mutual understanding. This sometimes takes the form of specific proposals; *e.g.*, only recently an official in the Ministry of Justice of Portugal extended an invitation to American legal philosophers, through the committee, to submit their writing for translation and publication in Portuguese journals; the same request was made by the Kuratorium of the revived *Archiv für Rechts-und-Sozialphilosophie*. Similar evidence could be adduced—evidence of the implications and responsibilities of this country's central position in world affairs, and that its legal scholarship is proportionately significant. What needs particular emphasis is that jurisprudence is free from the limitations of positive law. Within its ample boundaries the American scholar can communicate with the legal philosophers of all the other nations. This is a unique place in the curriculum where we can nurture a branch of universal culture whose significance cannot be exaggerated.