

Maurer School of Law: Indiana University

Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1966

Theoretical Considerations and Practical Proposals

Jerome Hall

Indiana University School of Law

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>



Part of the [Legal Education Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Hall, Jerome, "Theoretical Considerations and Practical Proposals" (1966). *Articles by Maurer Faculty*. 1448.

<https://www.repository.law.indiana.edu/facpub/1448>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

THEORETICAL CONSIDERATIONS AND PRACTICAL PROPOSALS

JEROME HALL*

In the course of my remarks I shall be criticizing current legal education from the perspective of theoretical study, not as professional education per se. I do not believe practical thinking is less indicative of a high order of intellectual competence than theoretical inquiry. Nor is anything said here intended to cast blame on anyone. I feel like the late T. R. Powell must have felt when, asked why he did not criticize the Supreme Court, replied: "Why should I? The Court has kept me alive for 40 years!" The law schools have done as much for me; besides I have had a share, if not in the construction, certainly in the maintenance of that interesting mélange we call "the law school curriculum," even if some of my young plants have withered in the desert air.¹ There are, moreover, many advantages in being a member of a law faculty, and I hope nothing I say will be interpreted as a lack of appreciation of them. Nor, finally, should anything I say be construed as a preference for foreign legal education. American legal education, like other American professional education—engineering, medicine, dentistry—is probably the best professional training in the world. A profusion of resources, the number and competence of teachers, the size of libraries, and the intensity of study on a graduate level comprise an aggregate which, I am confident, is excelled nowhere.

It is this richness of talent and resources which gives rise to doubts about their use; it is that which raises hopes that professional legal education can be greatly improved by reliance upon theoretical advances, *e. g.*, in enlightening every technical subject, in the unification of numerous courses into a few organized fields, in providing over-all views of the curriculum and in many other ways. But, as stated, my principal present concern is the theoretical study of law.

For persons of predominantly theoretical bent, there is considerable frustration in the environment of professional legal education. Of course, one must take care, in this age of psychological sophistication, to avoid making a scapegoat of one's vocation. Besides, not only is it impossible to separate theoretical from practical work, it may well be the case that some theorists find their best stimulation in the law schools. Despite this, and taking account of other positive factors that readily come to mind, it is still true, by and large, that the philosophical and cultural study of law does not find the conditions for its most propitious cultivation in the professional atmosphere of the law school. One gathers, *e.g.*, that many students who would like to study law in the ways the humanities are studied are not drawn to the law school and among those who do enter, some return to the department of history, philosophy or political science.

* Distinguished Service Professor of Law, Indiana University, Bloomington, Indiana.

¹ A 2-2-2 Plan for College-Law Education, 56 HARV.L.REV. 245 (1942); *Toward a Liberal-Legal Education*, 30 IOWA L.REV. 399 (1945); *An Open Letter Proposing a School of Cultural Legal Studies*, 45 AMER.POL.SCI.REV. 1157 (1951).

These facts should not surprise anyone even if one cannot point directly to what it is about professional atmosphere that is uncongenial to theory. Its influence is rather subtle, but it is nonetheless potent. It cannot be discovered by focusing on the ideal lawyer; for we may then find ourselves indulging in wishful generalities about non-existent professional training.

If, instead, we stay close to the present facts of legal education, we find a set of values which, however apt for professional goals, are barriers to the theoretical study of law. There is, obviously, the bar examination which exerts considerable influence even in foreign law schools that profess freedom from such constraint because other agencies offer more practical studies. Other salient features are a proliferation of disconnected courses, some of which are not conspicuous in their intellectual content, concentration on case-books and on numerous detailed rules lacking the significance of relevant theories and, in sum, the limitation of analysis and synthesis, the range of imagination and the depth of inquiry by what is directly pertinent to the practical problems of the lawyer.

It would be very difficult to discover how many potential law students of speculative temperament do not enter law school or, of those who do, how many discontinue that study because they find it intellectually unsatisfying. In some schools, every student must take one or two cultural law courses, and a bulletin may list many such courses. But what portion of the total curricular requirement is devoted to those subjects? What portion of the student's time is spent there? What teacher of jurisprudence or legal history has not tried to convince his students that the study of those subjects will prove useful in practice? Perhaps I betray my particular limitation but I confess that it has been only in recent years, after 25 years of teaching, that I have had the courage to lay aside any pretension to utility and to rest the case simply on the interest of jurisprudential inquiry. The lawyer in our society is not the whole man; why should not the man enjoy that quest for and in itself, without inhibition or feelings of guilt? I do not imply either that jurisprudence does not increase a lawyer's resourcefulness or that efforts to make jurisprudence useful are unworthy. What troubles one is the professional assumption that only what is useful is worth study. There is, of course, much pleasure in solving practical problems, and theory may be assumed to be "ultimately" useful. But the theorist should be freed of the pressure to restrict his work to what is important in the practice of law, as that is generally understood.

When practical incentives are directly operative the quest for knowledge is "cabined and confined." The short cut tempts; publicity and influence become ends in themselves. From a professional point of view, holding a political office may be more important than making a theoretical contribution. Although I am far from advocating total isolation in the ivory tower (even Plato tried his hand at politics, but that experience is hardly the chief ground upon which his immortality rests), I submit that the values of practical success and professional education do not coincide with those of contributions to knowledge and the search for truth. If scholarship is paramount in the perspective of theory, the members of this Society should act accordingly; we cannot expect theoretical work to prosper in institutional conditions which confuse the respective values.

In the abstract, a legal philosopher can tackle any problem, no matter how large and complicated it may be. But the fact seems to be that professional

environment restricts even the imaginative conception of problems. For example, ethical problems permeate almost every branch of contemporary thought but rarely does a legal philosopher enter the center of the arena with a view to improving ethics; hardly ever does one ask, as Kant did, whether jurisprudence is essential to the construction of a sound ethical theory. Again, is it accidental that the principal contributions to legal anthropology have been made by scholars outside law faculties? Studies of primitive law are not easily recognized as relevant to technical courses or to the latest regulations. At the same time, what legal philosopher, reading studies of primitive law, has not thought that a knowledge of law and jurisprudence would have been helpful? There are large fascinating questions concerning the evolution of legal systems, the rise of phenomenological and existentialist jurisprudence, Marxist theories of law, jurisprudential aspects of psychiatry, etc. which may also have no immediately discernible practical significance. One could with small effort compile a long list of intriguing subjects which at one time or another appealed to one's theoretical bent but which, often for unconscious or at least unarticulated reasons, were laid aside; flowers do not flourish in an indifferent soil and even legal philosophers need an audience.

The obstacles faced by legal historians in law faculties, including the lack of appreciation of American contributions to legal history which in some instances have reached the highest peak of scholarly achievement anywhere, are even more serious; that here and there a legal historian has carried on to the full reach of his imagination is hardly relevant. The lack of a "sufficient" number of able historians in our law faculties means that there are no established standards of evaluation and that forms of encouragement common in other fields of scholarship are lacking.

I hope I have sufficiently established the thesis that, without fault by anyone, the institutional conditions of professional legal education are not the most stimulating ones for the philosophical study of law (in which, as stated, I include not only the philosophy but also the history and the social theory of law). No doubt, others would emphasize matters which I have omitted; some might challenge this or that generalization and, indeed, any generalization is vulnerable. But for the present purpose and within the limits of the allotted time, I hope I have outlined a defensible thesis which the discussion to follow can render more precise and more complete.

In any case, I must move on to a consideration of certain practical proposals, for then the problems become more complicated and new insights are gained. Perhaps I should say directly that while I favor them "in principle," I am not advocating the following proposals in their present incomplete form; my principal purpose is to draw attention to relevant considerations.

First, we cannot assume that current legal education is a finished entity; we know in fact that it has been constantly changing. But former areas of flexibility which encouraged reform have become rigid, *e. g.*, the prerequisite of graduation from a four-year college is as fixed as Gibraltar and a fourth law school year has become an unmentionable topic. But why not seek a radical change in the content of the three-year law curriculum, in the character and interests of the faculty, and in the time devoted to the theoretical disciplines, especially since there is little, if any, evidence that the present curriculum is the

best preparation for legal practice? I hope no legal philosopher will be surprised if it is accordingly suggested that one-third of the law school curriculum be allocated to jurisprudence and legal history and that one-third of each year of the students' time be devoted to subjects interpreted in the perspectives of those disciplines. Various possible combinations, the use of jurisprudence and history in many courses, and related questions cannot, *e. g.* the extent to which such a program should be elective, be discussed by me.

We must pause a moment, however, and consider a possible consequence of the adoption of this proposal. Those inclined to favor it may also tend unconsciously to project an image of the legal philosopher they represent or prefer. But suppose the consequence would be to augment the study of legal philosophies that are hostile to one's views and heartily condemned. Would one then prefer to perpetuate the present concentration on a realistic treatment of practical problems that is characteristic of sound professional legal education, especially when there is also a haven for a few theorists? I would definitely answer "No"; we should simply need to exert greater efforts to provide an atmosphere conducive to discussion.

My second proposal is in some respect well known; it is to establish a Department of Law in the college and graduate school. It would teach from philosophical, historical and social-theoretical points of view; any synopsis or dilution of professional law courses would be barred. The members of this department would be recruited principally from existing departments of the university and from the law school. In my university there are now inter-departments of comparative literature, linguistics and regional or area studies. The new Law Department would provide instruction for those who wished to take one or two courses as well as for those interested in a "major" or in graduate study.

It will, of course, be asked, "Why is such a Department of Law needed? Since most of the faculty are already on campus, why add an additional department to an already cumbersome organization?" Obviously, no mere setting up of a formal structure would suffice; there must be changes in association, functions and attitudes, as well as in the symbols and habits related to the questions, Who are my colleagues? Whose standards of theoretical work are most apt? There would be the mutual advantages noted above—for the lawyers, a more challenging environment following their re-entry into wider currents of thought; for the lay scholars, easy access to the contributions legal theorists can bring to the re-thinking of many disciplines. To give only one example; if, as seems to me, the sociology of Durkheim and Weber is law-oriented and also in view of the centrality of norms in social and political action, many relevant questions arise concerning the reconstruction of the current social disciplines.² In more general terms, the legal scholar, terminating his passive role as beneficiary and adapter, would become a participant in the progress of philosophy, social theory and other humanities and disciplines.

But if we press on to examine the specific implementation of this proposal, we again encounter a serious problem. Optimism is often the product of innocence. In fact, *e. g.*, there may be philosophy departments where speculative scholars, analytic philosophers, and specialists in scientific method are in un-

² JEROME HALL, *COMPARATIVE LAW AND SOCIAL THEORY*, ch. 6 (1963).

easy or even unpleasant proximity. More specifically, in regard to an Inter-Department of Law, what would be the role of our colleagues in the Political Science Department, assuming they were interested? No one has in recent years proposed that the two faculties be merged in a School of Law and Politics; but would not the same difficulties be met in an attempt to organize an Inter-Department of Law? What, *e. g.*, if the result were the influx of political scientists representing types of thought that are palatable only if taken in small quantities? I would again answer in the terms stated above concerning the first proposal, emphasizing the need to provide conditions which would stimulate an on-going dialogue among legal philosophers of diverse points of view as well as among legal and non-legal scholars. I am far from implying that a coherent body of "truth" would necessarily emerge. But I do think that given hospitable conditions and skillful administration, areas of disagreement would be narrowed, there would be definite assurance that students were "exposed" to divergent doctrines, and a more interesting time would be had by both teachers and students.

My third and last proposal concerns the establishment of a national institution devoted to the philosophical and cultural study of law. I have in mind an institution somewhat similar to the recently organized Center for Hellenic Studies in Washington, D. C. It will be immediately seen that this raises questions quite different from those I have thus far discussed; for despite the fact that there are perhaps a dozen great departments of classics in as many universities, it was found necessary and desirable to organize the national institution.

As I now envisage the proposed institution, it would at first have a very small permanent faculty, perhaps two or three scholars and a Director; it would largely depend for some years upon scholars on leave of absence from their universities, who would spend one or two terms and who might be drawn occasionally from other countries; and finally, there would be frequent visits by scholars who would spend from one day to several weeks at the Institute as consultants or visiting lecturers. The students would be law school graduates whose entire scholastic records indicated very high promise of outstanding achievement; the Master's and Doctor's degrees would be conferred. I have no opinion now as to whether a research organization should some time in the future become part of the plan, but I think research should be no more than the tail (*e. g.*, limited to pilot studies), never the main body of the institution; nor is it feasible to speculate now about the more permanent form which such an institution might take.

The dependence of the success of such a national institution upon the cooperation of the law schools is evident just as that of an Inter-Department of Law depends on the cooperation of the colleges and graduate schools. Despite obvious difficulties, there are impelling reasons to proceed in the indicated directions, in addition to those discussed above. We do not have the European custom of allowing and encouraging law students to study at two or three law schools; there, prestige and sentiment center in the scholars under whom one has studied while with us, the school tie dominates. One must also take account of the dispersal of legal philosophers and historians among many law schools.

Tradition, influence, and other factors rooted in our culture and reflected in professional schools raise obstacles to the attainment of the goals I have so briefly delineated. It would be fatuous to think that even very large institutional changes would immediately usher in the golden age of theoretical legal studies. But who, reflecting on the place of law in our society and in the world and the available resources and American responsibilities in this area, can repress the belief that ways can be found to improve the present situation?