Law and the Intellectuals

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BY "INTELLECTUALS" I do not mean the European type of writer, newspaperman, or philosopher who engages actively in politics. And although some intellectuals may also be experts, I shall not be concerned with expert knowledge. The principal problems of our times lie elsewhere, especially because in a democratic society, experts should not make the important decisions of policy, nor are they as well qualified to do that as are thoughtful laymen who have a rounded view of life. I am concerned, instead, with that much larger class of well-educated persons who have a wide intellectual interest. My thesis is that the active collaboration of these intellectuals is needed to solve the principal legal-political problems which challenge us, and that if their collaboration is secured, the values of democratic civilization will survive and prosper.

We live in a political age. It is predominantly political not only because of the universal interest in politics, but also because of the importance of political controls in an age when the masses of the people must somehow be taken into account as well as the powerful new technology. In this combination of circumstances, the salient fact is the possibility of the quick, utter annihilation of mankind. It is fortunate that most of us do not dwell too long upon these realities and that the daily task engenders wholesome attitudes. But thoughtful persons cannot thrust aside the principal challenge of their times. They must come to grips with it.

The problem exists, and the challenge arises from the clash of values which motivate human beings. There is nothing inherently evil about airplanes, radios, and nuclear energy; indeed, they are among the most valuable of human resources. But when the control of these forces is in the hands of dictators who know how to manipulate mass opinion, we face acute problems which cannot be exorcised out of existence or met by exhortation.

Even in the democratic states, we are far from an ideal solution regarding the use of modern technology. But its most serious abuse is excluded because of the basic values of democratic societies and their methods of solving problems. The values center on the importance of the individual personality, and the methods are rational ones. What is distinctive about democracy is that both its values and its methods are
protected and assured by law. In their legal institutions lie the uniqueness and the strength of democratic states.

The importance of democratic legal institutions is evident when one considers that similar values are to some extent cherished in non-democratic states. For example, there has been, or is, a deep sense of individuality and a religiously oriented respect for personality in some dictatorial states, and even freedom of speech may be valued. But in democracies, these values are protected by the rule of law. Courts, officials, and the might of the democratic state operate regularly in established legal institutions to assure the realization of the community's values.

These values, which are apt to be taken for granted, include the security of the person, respect for personality, the privacy of the home, the pursuit of a profession, the exchange of ideas, uncontrolled education, and communication by newspapers and radio. Each of these values is protected by definite laws. The criminal law, the law of torts, of contracts, property, constitutional, and other law provide powerful instrumentalities which safeguard these values. If any of them is interfered with, the power of the state functions in legal channels to compensate, redress, punish, and deter the recurrence of such violations. Moreover, these laws are not something handed down to democratic people. They are the discoveries and creations of the people, the slow accumulation of centuries of free, thoughtful experience. The law of democratic societies is, thus, an expression of self-control.

The methods of making this law, in a larger sense than the term "legislation" usually suggests, and the methods of adjudication are rational methods. The presupposition of the relevant philosophy is that there are better and worse solutions to social problems; and legal methods, expressed in specified rules of pleading, procedure, and evidence, represent rational ways of determining issues that concern violations of the values. They are methods of arriving at sound solutions. When the citizen of a democratic state gets into a dispute, he is content to abide by the process of law because he also knows that the outcome will not depend upon the whim or partiality or even the sound judgment of someone in power, but that the rule of law functioning in rational channels will probably settle the matter satisfactorily or, at least, that any alternative is much less desirable. But there are always threats and frustrations, even in democratic states. And when powerful forces arise in the world which are not subjected to democratic controls, all values are imperiled.

Long before the atomic bomb was discovered, there were weapons and bacteria potent enough to destroy humanity, although it would have taken longer and been less dramatic. There was, however, no universal
slaughter, partly, no doubt, because no dictator or elite had a monopoly of the instruments of destruction. In the democracies, there were also unselfish, though no less potent, controls. Human beings, if the conditions which develop normal personality exist, become social and rational in sufficient degree to provide the necessary restraint. These conditions and values lie at the foundation of the modern democratic state which maintains an equilibrium between the individual's drives and the community's welfare. It combines the two forms of activity harmoniously so that, by and large, the individual's best interests intermingle with the best interests of the community. Although the equilibrium is sometimes a precarious one, it is easy to understand and support its vital role in the family, state, and nation. Solution of the present crisis in human affairs depends upon the extension of this understanding to encompass the entire world and upon our ability to strengthen and forge international institutions which assure not bare survival from aggression, but also the values of democracy. As Socrates expressed it, not life, but "a good life" is the objective.

If we are to get effective cooperation to achieve that goal and not merely tepid approval, it is necessary to persuade intellectuals that they have a stake in the democratic legal order which is sufficiently valuable to secure their persistent active support. There would have been no need for such persuasion in the democracy of ancient Greece. While there was no legal profession in Athens, all intelligent Athenians were lawyers. All male citizens, at one time or another, held governmental offices and participated in the trial of cases. The reverent attitude of the Ancient Greeks towards their law is shown, for example, in Pericles' Funeral Oration and throughout Plato's dialogues, where the law-giver is exalted far beyond military heroes and poets; indeed, he comes closer than any other mortal to the ideal philosopher-king. In that relatively simple environment, it is easy to recognize the basic function of law as the principal guide to the achievement and preservation of "the good life"—the enjoyment of intellectual and spiritual values.

In the early years of the American Republic, we had a similar situation here, with local government strong, contacts personal, and discussion among thoughtful citizens and officials in small meetings a potent method of arriving at sound decisions. But for some seventy-five years, concomitant with the vast expansion of the country, there has been a progressive weakening of such influence and methods. Distance, mobility, and accelerated change have isolated the intellectual citizen and have made him dependent upon specialists in law and politics. Indeed, it is becoming all but impossible for intellectuals, who are not apt to be members of either trade unions or businessmen's associations, to exert any
influence on the making of vitally important legal and political decisions. The complexity of affairs and the expansion of controls accentuate the loss of the intellectual's influence. One need only refer to the law of taxation, the growth of criminal law, and that of inheritance and the regulation of business, including the media of mass communication, to indicate the vastly increased influence of law and government on all of us. Taxation, for example, has enormous effect on wealth, economic incentives, public and private expenditure, and so on. It is equally true that the complexity of these and many other laws and their administration raises difficult problems whose solution depends on the availability and use of expert knowledge. But although the experts make an essential contribution, they cannot determine the goals and values which should be implemented.

While legal controls strongly influence the lives of all, the stake of intellectuals in sound law and government is greater than that of most citizens. Intellectuals have a greater need to share in the economic prosperity of the country, which law and government strongly influence, because they desire university education, travel, and expensive entertainment, such as that provided by books, the opera, and the theater. But these are only the more superficial aspects of the intellectuals' stake. To be an intellectual, in the best sense of that term, means to appreciate the so-called higher values in their various manifestations. It means sensitivity to the creations and discoveries of the best minds. More than that, it implies not only enjoyment of these values, but also their conservation for future generations and, finally, a positive contribution to increase these eternal goods. It follows that intellectuals thrive in a world which permits such tastes and aptitudes to be pursued freely, without fear or inhibition.

The dependence of cultural pursuits, research, and communication on the character of the legal order is evident in recent and current history. In Fascist Italy, Nazi Germany, and Communist Russia, there have been not only relentless degradation of intellectual inquiry, but also brutal banishment and slaughter of untold millions of intellectuals. In Germany, physics was purged of non-Aryan elements, and in Russia, genetics has been compelled to conform to Communist dogma. Artists and writers must follow the party line and, of course, newspapers and schools are under strict censorship. Criticism of the government is a serious crime, and secret police, in closed hearings, judge and execute the dissident. It is all the more incumbent upon American intellectuals to keep alive and to foster the humanities and pure sciences. But the principal need is to appreciate the fact that there are conditions which permit such pursuits to flourish, and those conditions are expressed and preserved
in the legal order of democratic societies, which encourages their cultivation as ends in themselves. Accordingly, intellectuals, more than any others, have a vital interest in a country and a world of law and freedom. That is the intellectual's primary motivation; and the pertinent question is—what can intellectuals do to preserve and expand the necessary conditions?

There is no simple answer to that difficult question. The extremely unfortunate and dangerous situation which now isolates intellectuals from the centers of legal and political power is aggravated by the specialization of knowledge that characterizes our culture. It is rare that even intellectual laymen understand much about the legal order, and the most important institutions are thus abandoned to the care of specialists and the whims of chance.

Modern specialization has not only discouraged laymen from studying law, it has also established a rigid departmentalization of knowledge in which, for example, law and government are taught by separate faculties. But the political process is expressed in, and becomes intelligible by reference to, laws and their administration. This is inevitable, because social problems have duration and they recur; they, therefore, require more or less permanent solutions, and that implies law. The dominance, during the eighteenth and nineteenth centuries, of a formal view of law as "commands of the Sovereign" influenced political scientists to turn their inquiries towards purely factual issues and knowledge—e.g., to the study of power, the statistics of elections, the organization of parties, the psychology of leadership, methods of propaganda, and so on. But in this century, the current of jurisprudential thought, especially during the past twenty-five years, has flowed in deeper, wider channels. Law is now understood as a cultural fact, as the embodiment of factual processes, and as the expression of social values. Moreover, law includes and represents rational efforts to solve problems. It represents relatively firm social judgments regarding the solution of pressing issues; hence, the neglect of the legal institution not only leaves political inquiry vague or arbitrary, but by omitting the rational aspect of conduct, it also becomes misleading and demoralizing.

The exclusion of law from liberal education and from the interest of lay intellectuals also results from the persisting opinion that law is technical. But that is a great exaggeration, and if the whole corpus juris is considered from the principal viewpoints which have engaged the attention of thoughtful intellectuals through the ages, it is evident that only at the periphery are law and the knowledge of it technical. It becomes clear that law is technical only from the viewpoint of the qualifica-
tions to practice law and that this does not affect the rôle or opportunities of intelligent citizens.

Throughout western civilization, law has been important in three fundamental contexts, the first and oldest of which are situations concerning obedience to a government. Here, the moral validity of the commands of the State was and is of paramount importance; and in the philosophy inaptly termed “Natural Law,” which developed in this perspective, the rightness of the government's commands is essential to their being “law.” Second, there is the perspective of the legal scientist who is interested in the operation and effects of law, the interrelations of law and other variables, and so on. The legal scientist requires a factual subject matter, and that is found in the behavior of persons in legally significant situations. And, third, there is “lawyers' law,” where the primary question concerns the likelihood of action by the state with reference to particular persons and transactions. Here, at least initially, neither the moral validity of law nor its operation in fact is of primary concern. The pertinent question is—has the State issued certain commands? In democratic states, however, all three perspectives and types of influence intermingling to determine the quality of the most important parts of “lawyers’ law.” Although the distinctions noted remain important for many purposes, the lawyers' law of democratic states is in large measure morally valid and popularly supported. Since it has arisen from the free discussion and free action of the community rather than from coercion or imposition, it is apt to embody defensible social values and to reflect current knowledge. Accordingly, the principal ways of improving such a legal order concern the deliberate application to it of empirical knowledge and sound critical evaluation.

How can the universities contribute to this? Specifically, how can the colleges give their students a greater understanding of law and legal institutions than they now receive? Presumably the need could be met by departments of government; but other disciplines are relevant to legal problems, and current specialization, as noted, is also often a bar to such an apparently simple solution. In some universities, legal scholars are urging that the colleges add certain courses in law to their curricula. But it is not surprising to find little enthusiasm for what seem to be rather practical law courses. Indeed, since American legal scholars have brought legal education to a high vocational pitch, as compared, for example, with university legal education in Britain, it is little wonder if academic scholars are apprehensive that the introduction of law courses into college curricula may have a similar effect on liberal education.

The solution, it seems to me, is not to offer diluted law courses in the colleges, but to provide courses in cultural legal history and in the science
and philosophy of law. Some legal scholars are available to participate in such a venture as are some historians, anthropologists, political scientists, economists, and psychologists. The objective would be not to impart practical information about rules of law, but to impart knowledge of the fundamental principles, methods, and functions of law. If such projects enlisted the cooperation of scholars representing various disciplines or, preferably, of scholars who have devoted themselves to relevant interdisciplinary study, liberal education would gain very significantly. Let me indicate some of these possibilities of making important contributions to liberal education.

A cultural legal history would place the history of law in social-economic-political contexts. It would focus on the functions of law in relation to human needs and aspirations in different periods, the interactions of law and other evolving institutions—e.g., the impact of the Industrial Revolution, and the dependence of legislation and adjudication upon the contemporary store of knowledge, as well as the contributions made to that knowledge by legal agencies. Within such a framework, various special problems would be explored, for example, the rise and operation of a system of precedent, changes in the modes of trial and fact-finding, and the growth of legal terminology to attain objectives under varying historical pressures. Such a cultural legal history could illuminate important current problems, for example, by revealing the painful and heroic struggles which were required to assure the civil liberties that are expressed in our Bill of Rights.

A cultural history of law would contain descriptions of specific events, so selected and organized as to provide a concrete background for the more general types of inquiry included in the philosophy and science of law. Here, again, the objective of the course in the philosophy and science of law would be not to communicate practical information about rules of law, but to increase theoretical knowledge of a fundamental type. The opportunities provided by appropriate instruction in the philosophy and science of law are unique because of the inclusiveness of the subject matter. For example, the oldest classification of knowledge in western culture is the three-fold one: physics or, rather, empirical science, ethics, and logic. In terms of subject matter, we have, consequently—fact, value, and formal relationships. In numerous courses in the college curriculum, scientists investigate facts, logicians explicate formal relations, and ethicists discuss values. In some of them, unavoidably, more than one perspective operates; and, no doubt, some scholars have introduced various dimensions of thought into their disciplines. But in the philosophy and science of law, one cannot avoid dealing with any of the basic dimensions or their fusion in a comprehensive union of meanings.
and institutions that require interdisciplinary study. Moreover, the sanctions of law include physical ones—hence the ethical issues are of the compelling type that is paramount today in the nation and internationally.

Perhaps the simplest illustration of how these types of subject matter and experience are expressed in law is that of a criminal law and its references. Thus, “one who deliberately kills a human being” refers to events and actions—types of fact. “Shall be punished” thus and so, also refers to certain facts. But joined in a rule of law to the above description of a social harm, it also embodies a moral judgment. Finally, that entire proposition exhibits a distinctive structure and, in relation to other propositions in a penal code and that expressing the finding of a trial court, it has formal significance. Whether the substance of a legal rule refers to a labor problem, infringement of a patent, the paternity of a child, personal injury, or any other of the innumerable events and transactions which concern the legal order, the need for accurate fact-determination and for use of the best relevant empirical knowledge is evident. And since every rule of law is in its entirety a normative judgment signifying, also, what must be done under the circumstances, it is equally apparent that the need for critical evaluation is invariably present.

In view of the fact that colleges have long sought to construct a curriculum which would provide a broad synthesis without sacrificing the critical disciplined work that accrues from intensive study of narrow fields, it is worth repeating that the proposed science and philosophy of law would supply an inclusive view that is lacking in the current severe departmentalization of study and knowledge. For, what is unique about law is not its separate components of fact, value, and form, but its fusion of all three in a single unity. If one reflects on the implication of this, for example, in relation to the classification of knowledge, it becomes clear that a thorough study of the fundamental processes and functions of law not only requires close attention to the various departments of knowledge; much more important, it also requires a synthesis of that knowledge, a bringing-together into significant juxtaposition of the various types of knowledge, empirical and moral, to bear on the solution of important problems. It may be possible to achieve a similar synthesis elsewhere. I know of none that is as feasible or as important for intellectual citizens as that whose subject matter is the law of a democratic society. If these citizens can thus recapture Plato's insight into the significance of sound law as the avenue to the good life and his estimate of the law-giver as the wisest of mortals—realizing what that implies in terms of knowledge and virtue—they may succeed in preserving the kind of world in which intellectuals can thrive.
The dependence of effective leadership upon an informed citizenry suggests that the extension centers of the universities might be expanded to perform certain important functions in which intellectuals could participate. The extension centers are now used principally to provide university training. But what of the masses of people who, by lectures and discussion, could be informed regarding the great issues of the times and the knowledge that is relevant to their solution? A forum for working people, farmers, and women, that heard able speakers and in which the educated citizens participated, could, over a period of time, produce a public opinion which was informed and helpful to the leaders in the solution of serious problems. Anyone who has reflected on "the revolt of the masses" which is characteristic of this century, though he may repudiate the cynical versions of that thesis, will appreciate both the need and the vast potentialities of imaginative adult education.

Although college curricula and adult education are primarily problems of the universities, their alumni could undoubtedly influence and assist their expansion and improvement. There are other simpler methods of developing intellectual interest in law and government. In discussion groups, clubs and societies, and reading groups, programs of informal studies could be arranged which would probe much more deeply than is usual into important legal-political problems along lines suggested above. And there remains the most important method of all—that of self-education.

It is evident from the magnitude of the tasks suggested that the legal profession alone cannot perform the indicated functions. At best, lawyers can serve only as special conduits, using their skills to bring some of the available knowledge to the solution of the community's problems. Indeed, because of the dominant vocationalism of legal education, the number of lawyers who can do that is small. But even if we had many statesmen-lawyers of the type Plato had in mind, that is, many masters of the methods of increasing and using interdisciplinary knowledge, they would still be dependent not only upon experts, but also, and even more, upon lay intellectuals whose knowledge, experience, and judgment are essential to solve the most difficult problems.

It is also vitally important to assist lawyers in their efforts to perform tasks which are sometimes very unpopular. For example, in democratic countries there are constitutional guarantees of fair trial, the presumption of innocence, the right of every person accused of a crime to be represented by a lawyer, and other safeguards. Although the duty to discharge these functions rests directly on the legal profession, pressures from a hostile community which does not appreciate the value of basic constitutional guarantees raise serious, sometimes insuperable, obstacles,
It is both unfair and short-sighted to act as if the entire obligation to make the constitutional protections effective rested upon lawyers, for they, like other individuals, have personal problems and needs. Thoughtful citizens can understand the value of the constitutional guarantees and the significance of legal procedure as an implementing form of rational inquiry. They can understand the importance of the social functions of lawyers in a democratic society and appreciate the fact that lawyers are carrying on the community's business. They can lend the support of an informed opinion which renders the effective discharge of those duties feasible.

What I have been urging depends in large measure upon the cultivation of a philosophy of law which is relevant to the pressing problems of our times. If one wishes to construct a platform upon which the free thoughtful people of all countries can stand, where can one turn for more likely timber? The peoples of the world differ in their language, history, religion and economic organization, as well as in their particular political-legal institutions. Science and morality are the two spheres that promise most in terms of potential universality; and the exigencies of the times require that they be focused upon law and legal institutions. In that direction lies the possibility of rational, decent control of the powerful forces of the present age. That, in one form or another, is the principal question of all law-making and administration; and the philosophy of a morally valid legal order offers the widest perspective in which that problem can be solved. On that platform the intellectuals of East and West can stand and will stand—if they are permitted to do so—because there it is possible to transcend the particularities of national cultures and to arrive at common decisions which will assure the future of democratic civilization.