PHILOSOPHY IN LEGAL EDUCATION

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American legal education displays a privation when philosophy and its methods play no or only a casual role in molding the modern lawyer. The satisfaction of this need for philosophy brings with it multiple benefits for the law student. I hope to clarify and expand this thesis in what follows.

The Need for Philosophy and Specific Courses to Meet the Need

Now the legal profession is a profession where much turns on the argument, its development, and evaluation; arguments are essential parts of any trial, brief, or opinion. The profession should then necessarily be concerned with developing good arguers. The question is how. On the one hand, there is the view or, more accurately, myth, that legal argumentation is a peculiar breed or separate department of reasoning. At best, this orientation provides a glass house asylum for those holding that law schools teach law students to think like lawyers. For it is the case (and this is the other school of thought) that right thinking in the law involves nothing more than the traditional modes of inference—inductive and deductive.[1] On this view, it is conceded that legal reasoning draws on a specialized vocabulary and particular modes of analysis more so than other areas of inquiry and problem solving. But that we see more occurrences in legal discourse of analogical reasoning, balancing tests, specialized talk of the interests of society and the individual, costs and benefits, good faith, and reasonableness does not imply that the *reasoning* involved is unique or at all departs from the fundamental principles of human ratiocination.

If so, it follows that only good thinkers can be good legal thinkers. And since philosophy and logic are where one turns to build logical muscle tone, the good legal thinker should have some philosophy under his belt. While I am not suggesting that anyone needs a course in logic or training in philosophy to think, it is the case that philosophy is the province where the principles of thought are analysed and employed in their strictest form such that students exposed to it cannot help but become better, more careful arguers.[2] It thus

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[1] As is probably already apparent, I am writing, to a certain extent, from a testimonial posture, offering what may be analogous to the informed opinion or conclusion of the expert witness in the courtroom. *Arguments* as to why legal reasoning should not properly be considered as a unique mode of reasoning, I believe, are more appropriate for our journals of jurisprudence and legal philosophy.

[2] Hume made the point that philosophy can be helpful to all of the arts and professions, including law: ". . . we may observe, in every art or profession, even those which most concern life or action, that a spirit of accuracy, however acquired, carries all of them nearer their perfection, and renders them more subservient to the interests of society. And though a philosopher may live remote from business, the genius of philosophy, if carefully cultivated by several, must gradually diffuse itself throughout the whole society, and bestow a similar correctness on every art and calling. The politicians will acquire greater foresight and sublety, in the subdividing and balancing of power; the lawyer more method and finer principles in his reasoning; and the general more regularity in his discipline, and more cautious in

seems that some course in practical or applied logic and the construction of arguments would be well suited for a law curriculum.

Besides instruction in logic, it would seem that to avoid a shallow grasp or even a total failure to apprehend the jurisprudential and moral underpinnings of our legal system, a course in legal and moral philosophy should occupy some claim on the law student's time. By moral philosophy I do not mean simply a course in professional ethics where a survey is made of how the former canons or the present disciplinary rules have been interpreted in disciplinary proceedings. I speak of exposure to fundamental values upon which the legal system rests. Few are aware of historical and contemporary thought on the value of freedom for a legal system. Awareness, however, of the foundational Enlightenment view that without freedom one cannot function as a moral agent and the contemporary expression of the theme—that the development of healthy personality and society is intimately intertwined with one's ability to act freely—gives important content to values as freedom. Without such a firm root in reason and experience, such values can be treated more as sacred entities to revere and preserve for their own sake rather than as valuable commodities that we need for a well functioning society and legal system. Without this content, erosion of such fundamental values cannot be *understood* as being a threat to the healthy development of society.

Another reason for such instruction is this. In law, concepts as the "legal system," "legal and moral rules," "morality," "human nature," "the good of society," "good," "bad," "right," "wrong," "justice," "injustice," "rights," "duties," "privileges" and the like are all tossed about undoubtedly as responsibly and accurately as is practicable. But lawyers and judges are engaged in the demanding pursuit of the resolution of practical legal problems and have neither the time nor equipment to obtain a very precise understanding of these vitally functional concepts. Accordingly, they *need, and should demand,* professional assistance in acquiring such information and the only group specifically trained in the careful analysis of such are legal and moral philosophers. This is not only a call for the legal profession to turn to philosophy but also for philosophers to recognize that their audience need not be other philosophers which has been the cause of much inbred debating both to the disservice of the profession of philosophy and the public.

Bonus Benefits from Studying Philosophy

The study of philosophy is replete with benefits. In the pursuit of any form of philosophy, one always prospers by acquiring, in addition to an exposure to the subject matter, more powerful, analytical reasoning abilities. One becomes more logical and can more readily perceive errors in reasoning. Now it is the case that the law student expends no special effort to search for and uncover logical error in judicial reasoning. Let us explore this observation. Along these lines it is interesting to contrast the orientation of the law student with that of the philosophy graduate student. Both are re-

his plans and operations." D. Hume, *An Inquiry Concerning Human Understanding* (1748). If we can agree with Hume that the rewards of philosophy are great, it seems we should be willing to insure that professionals, lawyers included, are exposed to it rather than embracing, as Hume did, a blind confidence in the spirit of philosophy diffusing through society.

quired to construct and analyse arguments but each perceives quite differently the discovery and existence of logical error. The philosophy graduate student searches for it and considers it fatal for an argument whereas it seems to play a lesser role in the world of the law student.

This is the case for the law student, I think, for two reasons primarily: (1) lack of exposure to strict logical argumentation and (2) his cognizance of the workings of the legal system wherein the conclusion of a judicial opinion, or the rule of law the case can be seen as standing for, is still law even if it was erroneously arrived at; he recognizes that at some later time the court can simply revise its reasoning and retain the conclusion; he is aware that the argument is not the be-all and end-all, since his discovery of error need not have any practical results. But because of this it does not follow that the existence of logical error should not be conceptualized by the law student as serious. It would be paradoxical for the results of ill-reasoning—logical error—to be taken lightly when a profession is using reason, of course informed by experience, as its primary tool to arrive at correct results. It thus seems that while we might not want our lawyers to be philosophers, we might agree that they should be more like philosophers with regard to their shared domain—reason and argument. If so, studying philosophy can be seen as an advantageous pursuit.

More needs to be said about our observations in (2) above. One of the serious dangers this presents is that it can lead to a confusion over the function of reason. That wrong reasoning may lead to a conclusion or rule of law we may be forced to stick to for a time does not imply that the reasoning itself is not terribly important and that any will do. The main purpose of the judicial opinion is not to give *an* opinion with which one may agree or disagree but rather it is to provide a *justification* for the decision, an argument for why the decision should be accepted by the community. The justification is to be a product of careful reasoning about the matter at hand, and the legal community is called upon to evaluate that reasoning. Accordingly, if such evaluation is to be cogent, there should be an attitude among members of the profession that one can tell when a piece of reasoning is faulty. Any other attitude would be sceptical and would lead to arbitrariness; it would deny what is true—that right reasoning proceeds via standards and it is by reference to such standards that we evaluate reasoning as right or wrong. Without such a means of attacking a faulty justification, the legal profession is forced to construct merely external critiques of opinions based on general principles of policy and models drawing on the lingo of economists and the business world to explain why an opinion may not be acceptable. In consequence, it may never get to the heart of the reasoning of the court. Training in philosophy could help prevent this.

Exposure to philosophy can also enrich the lawyer's analyses by providing models for arguing that go to the structure of thought itself. This is not to suggest that thought is to proceed in an uninformed manner apart from the advice of experience. Nor it is meant as an attempt to counter the Holmesian adage that "the life of the law has not been logic; it has been experience." For Holmes' insight, it should be noted, says something only about the law and not the life of the *legal profession*. About lawyers and the legal profession, Sir Robert Morton, the renowned defense attorney in *The Winslow Boy*,

makes the appropriate observation: "Cold, clear logic—and buckets of it—should be the lawyer's only equipment." [3]

Along these lines, it might be noted that one of the few models for dealing with problems that the law student is expected to conform to is that of the identification or spotting of issues concealed in narratives on examinations. His orientation becomes that of gaining a knowledge that certain problems exist, a *knowledge that;* he is without any formal training in, and exposure to, models for the cogent solution of problems, a *knowledge how.* His notion of solutions to problems might ultimately be cognized as predictions of how various courts might dispose of the issues. This can lead to a mind turning to case authority alone rather than employing a panoply of techniques to effect creative solutions that are consistent with but not solely dictated by precedent.

And the advantages of developing law students able to effect cogent and inspired solutions in addition to molding students knowledgeable of what the law is extend beyond simply creating more able lawyers. For much of the discourse of legal opinions is shaped by the manner in which the issues are framed and argued to the court. Accordingly, we expect that as the input mechanism is enriched, so too will the output.

A final benefit philosophy brings is that the law student becomes more attuned to the guilding ideals of legal systems as expressed by leading social philosophies. Awareness of the possibilities and the need for an informed choice is essential if one's operation within some system is to be directed toward a goal or be consistent with some overarching societal aims. Legal activity in the mind of the lawyer can be seen as divorced from the progress of society if society's goals are imperfectly perceived. On the other hand, activity that is goal directed is characteristically and fundmentally rational human activity; one actualizes his potential as a rational agent as he formulates plans in accord with clearly perceived long range goals and executes them.

Probably little can be said to dispel traditional and deep seated prejudices and misunderstandings about philosophers and what they are about. Philosophers are accused of spinning theories that fly in the face of experience; one is dubbed a philosopher when he points to unrealistic, idealistic solutions to pressing issues or when his contact with reality is tenuous. All such views are, however, wrongheaded and anyone holding them pragmatically self contradicts himself, as the very person making such charges that philosophers are out of touch is totally out of touch with what philosophers are really doing.

But the legal community is not forced to draw on the talents of those whom they may not trust, for whatever reason, in order to expose law students to philosophy. For there is an increasingly large number of lawyer-philosophers who have been trained formally in philosophy and law, who are sensitive to the interests, aspirations, and problems of law students, and who are, accordingly, well equipped to share with law students those aspects of a cognate area most beneficial to the law student.

[3] Rattigan, *The Winslow Boy*, The Law In Literature 131 (1960).

I leave the reader with a final thought. If he were presented with the following two blueprints for the American lawyer, which would he choose? The first is a design for producing the present product of our law schools, there being no doubt that the product is that of a competent professional. The second is of a lawyer that is a cleaner (in the sense of more precise) arguer, one who can argue more flexibly and innovatively within the confines marked out by the law, one who is aware of, conversant with, and has opinions about current and traditional legal philosophy and jurisprudence.

If the latter image is seen merely as embracing attributes that are needless flourishes, we might well leave things much as they are. But if the latter is more appealing, then we ought not simply to hoist the flag for the ideal and then march in the direction of the expedient but rather *create* a better state of affairs guided by the ideal we wish to achieve.