

4-1-1963

Commentaries on Mr. Shea's Lecture

Louis L. Jaffe

Harvard University Law School

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Legal Education Commons](#)

Recommended Citation

Louis L. Jaffe, *Commentaries on Mr. Shea's Lecture*, 12 Buff. L. Rev. 280 (1963).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol12/iss2/8>

This Commentary is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact law scholar@buffalo.edu.

COMMENTARIES ON MR. SHEA'S LECTURE

LOUIS L. JAFFE*

I think that most of you were, or should have been somewhat puzzled by Mr. Shea's paper. Those of you who are old and sophisticated in the ways of the world would be able to get a clue but perhaps a number of younger people and a number of less-informed people would have had considerable wonder about it. I think there are two clues to it and I'll give you the clues—I wouldn't think of holding them back—but if you will analyze that speech you will find that there are some very curious things about it. You will find that the most important thing is to write well and to speak well and that the colleges should train you for that or probably the high schools. There is, however, a suggestion that they probably won't do it but they should and that we won't. Then if you look on the other side, you will find that the really great legal education in this country is something in which we far excel the English. It is this marvelous apprentice system and I am sure that any one of us would pay thousands of dollars to be trained in the Shea and Gardner office. I assure you that it would be worth every penny that you would pay even if it went on for ten years. You would end up a really magnificent product. But where does the law school come in? Well, not particularly with respect to teaching subject matter. Subject matter doesn't make that much difference. Whether you have learned much law or not, you will pick it up somehow or other. It is true that research would be a very good thing but of course research takes some time trickling down to the students, and the more zealous researchers usually don't like to see any students because it interferes with their activities, with their research. Well, there *is* one thing. You might have a professor who will spend three months on one case, but there aren't very many Frankfurters as any appointments committee will tell you, and as the Dean of the Buffalo Law School is constantly finding out. As you can see, that all presents a rather curious picture. One wonders whether the law school really has any part to play in legal education. Maybe the answer is obvious. I mean, I often think so. And then I've grown old enough to accept practically any conclusion as long as I am earning my salary. But I think, as I said, there are two clues to this speech.

In the first place it expresses the fact that Mr. Shea is really, and I say this in all sincerity, a magnificent lawyer, one of the most sought after lawyers in Washington and in the United States; and one of the things a lawyer is really most competent at is stating the issue and sticking to it. The theme that was set for this discussion was "for what," do you see, are we educating people, not "how" and Mr. Shea presented to us a really splendid picture of the role

* Byrne Professor of Administrative Law, Harvard University Law School. A.B., Johns Hopkins University; LL.B. and S.J.D., Harvard; former Professor of Law (1936-48) and Dean (1948-50), University of Buffalo Law School.

of the lawyer as it is today, as he thinks it will be—which is more or less an extension of what it has been—and of the satisfactions it provides and the great opportunity for both personal and general realization.

And so he left a little hazy the “how” but he really didn’t leave it so hazy as I am making out. Here and there in his talk he suggested that legal education is not really a question of method or subject matter or gimmicks and that one hardly knows just precisely how you achieve this thing called legal education because it is a so much more complicated thing than any particular formula that you espouse. I agree with him completely, except at one point to which I shall shortly come. I think that Americans are infatuated with talking about education. They believe that about every ten years you can survey it in terms of a thing called the future which nobody knows anything about—to be able to recognize the present is in itself a terrific achievement. They are always surveying *everything* and lamenting our failures. “We haven’t succeeded in doing this or that,” they exclaim. Look at the unsolved problems of the world! We have five million people unemployed! Education has failed! It is obvious that the colleges should be teaching something else or they should be teaching it in a different way. Many distinguished people indulge in this with a great appearance of sincerity.

I agree really with Mr. Shea who is suggesting that legal education is simply part of general education. It is part of becoming something adequate in the world and adequate to yourself and adequate to what role you can play, what use you can be. It begins in the cradle, and it does go through the high school and the college, and law school is a kind of pointing-up interlude. It is part of the stream, and the law school cannot educate you unless you are pretty much otherwise educated before you get there and unless you are prepared to continue to be educated as you go along for the rest of your life. I don’t know whether this sounds rather gloomy for Deans or rather relieving. If they don’t have to do anything in particular, it would seem to make their task easier.

However, I don’t draw that conclusion. I’m conservative and I believe very much in going on in the tried and true ways and in adding here and there. Well, the first thing I start with is just a derivative of another aspect of what I have been saying and that is that I have come more and more to believe that education is self-education, that the student body counts most. The better the student body, the better the self-education is. It is a business of constant discussion, constant friction between individuals who are pretty much in the same situation, faced by the same kinds of problems. The School comes in, in various ways as a pointer, serving various kinds of functions. It directs. It channels the potentiality of the people who are there. It gives examples of how the thing is to be done; that is, it provides models, the best models possible both of the particular profession and of the relation of the profession to the larger world.

As to legal education, you might think of it, as we all do think of it, as

breaking into three rather large headings. We start with method and technique. It was interesting to see how very advanced Judge Desmond was last night because he apparently was able to say in three or four sentences what we are slowly thinking might be true, namely that the case method is a very good thing in the first year and then you might as well forget it. Well, he has really gotten way on ahead of us, but then he is probably less devoted to the cliches of legal education than we professionals. Anyhow, the first year is basic and it is important. You could learn it some other way but the purpose of the law school is to try to give you a very good example of how this thing is done. There is the way that lawyers talk, the way they think, the kind of things they think are relevant and the things that somehow they have a sixth sense about and know are irrelevant. It is amazing really that sense of relevance which seems to be the peculiar characteristic of the legal profession. The most relevant things in the world to a person who is not a lawyer are immediately understood by a lawyer to be completely irrelevant. Now I suppose the point at which I have to disagree with Mr. Shea—or what we do is all wrong and very stupid—and that is his seeming to say that we need not teach any law. One will sort of pick up the law by spending a great many hours on one case with Professor Frankfurter or in the law office. I didn't take that course, and I've never gotten over the fact of the advantage that Frank Shea and Ernest Brown had in taking that magnificent course and I'm really very, very jealous—its sour grapes. And most of you are obviously aware that you are not going to have the advantage of being educated in a really great law office, and I say that because it *is* a great education to be educated in such a law office. But most of you won't have that advantage and most lawyers do not have it. There will always be a great many who will be individual practitioners, who will be going out from school and will have a very slight contact with somebody else who has been an individual practitioner. And so the student should go out from law school, as most of you do, with a strong sense of the structure of the law. I agree absolutely with Frank Shea that all of the effort we put out over detail, over whether the law is this way or the law is that way, or which is the better rule, all of that is just part of what's necessary to keep things going and to make the discussion realistic. But the very big things, the structure of the law, that is its main big ideas, torts, contract, property, procedure, taxation, constitutional law, administrative law, it will be true of many of you that if you don't have a well-grounded sense of those things, you are very limited in your ability to function in any very general way. You can become a person who can do small routine things but you won't have the large structure, and it is the business of the law school to give you that. We are used to saying that it doesn't make any difference what we teach, that it's the method or how you teach that counts. That can't be right because we do have these many, many courses and we are very concerned to teach them, and each professor wants more and more time to teach more and more of his course. So the courses must

be important! But I do think this: it is not terribly important whether we have lots of subject matters which recognize the existence of the present world or that more glowing thing, the future. In fact, I have a rather special view about that from my experience in the New Deal. I think the most magnificent and brilliant and forward and imaginative administrator was Warren Madden, under whom I served for a year; he was the Chairman of the National Labor Relations Board which put on a really powerful, magnificent show such as no administrative body has ever put on before or since, and if he was not looking into the future and recognizing the present, then nobody else was.

Well, what was Warren Madden? Warren Madden was a professor of Property Law from Pittsburgh. Now maybe that's the answer, maybe it's Property Law. We all ought to study Property Law with the greatest rigor because it trains the mind. Essentially a great lawyer is somebody who sees things very clearly, very precisely, and who has also great integrity and disinterestness of mind. So I'm not so terribly much for the idea that we *have* to have this or that fashionable subject matter. On the other hand, I welcome any subject matter which is an expression of the professor. The professor who sees something he wants to teach is by that very reason doing a very useful thing; he is doing what there is to be done in education. You don't have to have a course in this, you don't have to have a course in that, but if you have somebody who wants to teach a course in something or other, however forward looking, that's a great thing. An important thing in the curriculum is the opportunity given to a professor who may have something to say, to experiment.

And that leads me into the larger point. I have a feeling connected with the point I have made before that the aspect of general education in the law school is extremely important. I have said I think professional education is important in the sense of understanding the structure of law. I agree absolutely with Mr. Shea that trying to reproduce the conditions of practice in law school and practical problems and all that is apt to be a tremendous waste, it's an illusion. You never can reproduce in a law school the reality of life, the pressure of having to make a decision. It takes an enormous amount of money and resources to work that way. So I am agreeing with him when I say that the basic thing in professional education is the idea of structure, the big structure of the law. But I also believe that the thing a law school can do—is to give general education. To me there is nothing more important, not just for the life of the law and the life of society, but for the life of the lawyer himself, than the lawyer's feeling that he is part of a very large professional cultivated enterprise, that stretches back, that has been in existence for thousands of years, that is related in the largest intellectual and moral sense to all the great currents of history and of the community. This dignifies a person in his own eyes and if he can take it, dignity is a wonderful thing to have. It gives a man a sense of his purpose. And, of course, because he feels that he is committed to something rather larger than his own particular day-to-day means of existence, he is that much more

useful. It's that that gives him the power and the capacity to deal with new issues, to wrestle with large issues. It is much more important, to my way of thinking, to have a good course in legal history than a course in labor law. I mean that it may be more important even for practicing labor law. You will be able to deal with the new things in a larger way, provided also that you have the capacity, you have the intelligence, you have the spirit and you have the right kind of general technical training. So I think that what is now at the heart of the present progressive movement in legal education is general education in a whole variety of ways that Frank Shea spoke of: legal history, general economic institutions. This is a movement back, away from the rather trade school ideas that we were very concerned about when I first came here to this law school about twenty years ago, and I think is an extremely useful movement. So you will see that really I agree with Frank Shea in every way.

MARK DEWOLFE HOWE*

Well, one thing in Jaffe's remarks is true. If I understood him correctly he said "Mr. Shea left a little hazy the how." That was truly an understatement. There is nothing more difficult, I think than commenting on another paper when the other paper really says the things you believe. I still have my feeling of respect for Dean Shea. I haven't lost the sense of awe, as apparently Mr. Jaffe has through the years. He didn't used to talk this way when the Dean was in the office; but I still feel responsibility to my superiors, to respect their views. But it is not only that feeling of obligation but in fact a sense that I do share his views that makes comment very hard. But let me see if perhaps by approaching one or two of the problems that he opened up I can say something that will at least give a different emphasis to some of our common attitudes.

I can start by discussing a problem to which Mr. Jaffe gave some attention: that is, the extent to which the law school can fairly ask of the colleges or perhaps of the high schools that they do more to prepare students for the law. This is certainly a problem which worries every law school—whether it should set some kind of requirements, perhaps in the area of government, perhaps in the area of history or perhaps English composition or any number of subjects which might be suggested. I am inclined to think, and I suspect that Mr. Shea may agree with me, that though it would be very desirable in some ways to prescribe a pre-legal course of study it really wouldn't in fact work. I believe this partly because of some of the reasons that Mr. Shea has emphasized in dealing with legal education. Just as legal education depends very largely on the teacher, rather than the subject, so I think the kind of pre-legal education which is going to count cannot be identified simply by names

* Professor of Law, Harvard University Law School. A.B. 1928 Harvard College; LL.B. Harvard; former Professor of Law (1937-44) and Dean (1940-44), University of Buffalo School of Law.