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American Realism's New Proposals for Legal Education: Legal Clinics and Law & the Humanities

Between the late 1800s and early 1900s, the case method developed by Christopher Columbus Langdell became widely established in the United States. On this method, instead of studying precedent in virtue of its *ratio decidendi*, some particularly important landmark cases would be identified as capable of having an influence on the life of the law and were thus "mechanically" applied. As is known, this method, along with the influence of John Austin's analytical jurisprudence, helped formalism establish itself in American legal thought. The reduction of law to a set of concepts organized into a system made obsolete the traditional method of legal training, by making it useless to study the law as a practical activity: all that a law student needed to this end was a study room, a casebook, and an instructor. This method was resisted by the sociological jurisprudence advanced by Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo and in particular by the American legal realists, whose battle cry–as Morton J. Horwitz calls it in *The Transformation of American Law, 1870–1960*–is Holmes's statement that "the life of the law has not been logic, it has been experience" (Horwitz 1992, 188–89).

In order to counteract the degeneration of legal science, which according to Roscoe Pound's famous definition had become a mechanical jurisprudence, new educational proposals were outlined which included legal clinics and Law & the Humanities. In a 1933 article titled "Why Not a Clinical Lawyer-School?" as well as in an article published the same year under the title "What Constitutes a Good Legal Education?" Jerome Frank (1933b, 1933a) claimed that legal clinics need to be integral to the legal training offered at law schools, in such a way that students, professors, and lawyers can work closely together. The practice of law (law in action) is not a science but an art, and only in part can this art be learned from a textbook study of law (law in books).

As in all arts, from painting to music, so in the art of law the most effective learning is the kind that is acquired by practicing its skills with experts in the same art, and where law is concerned, this also means bringing other social disciplines to bear, such as psychology, literature, ethics, economics, and anthropology.

As Frank wrote in 1933:

> What would we think of a medical school in which students studied no more than what

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> was to be found in such written or printed case-histories and were deprived of all clinical experience until after they received their M. D. degrees? Our law schools must learn from our medical schools. Law students should be given the opportunity to see legal operations. Their study of cases should be supplemented by frequent visits, accompanied by law teachers, to both trial and appellate courts (Frank, 1933b, 916).

As these words suggest, legal clinics are valued by the American legal realists because they are an effective way to lead law students through the complex and multiplex world of law in action, away from the artificial world of law in books into which they had been confined following Langdell's case method. But legal clinics are also valued for the social role they can play.

A few years later, Frank made an essential contribution to the Law & Humanities movement, whose beginnings in the United States can be traced back to two essays of the early twentieth century: one in 1907 by John H. Wigmore (1907–08), titled "A List of Legal Novels" (Wigmore, 1907–08); the other in 1925 by Benjamin Cardozo, titled "Law and Literature" (Cardozo, 1925; cf. Cardozo 1931). This line of investigation was resumed by Frank with two mid-century essays titled "Words and Music: Some Remarks on Statutory Interpretation" (Frank, 1947) and "Say It with Music" (Frank, 1948). In these two essays Frank looks at law next to music so as to develop the thesis that the activity of interpreting the law is not a science–in the sense of a set of impersonal rules beyond the reach of the human emotions behaviour–but is instead an art: as such it cakes emotion and behaviour into account as the raw materials from which the law in one way or another is distilled. The judge's activity of interpreting the law can accordingly be compared to that of someone performing a piece of music (such as a pianist, violinist, or an orchestra conductor). Only when the music is performed does it exist, and the composer does not have complete control over the performer: in this sense, the moment a composer hands his music to a performer, he become "helpless," a "passive onlooker" (Frank, 1947, 1261). Just like a composer, the statute-maker must leave it to others to interpret his statutes. This applies mainly to judges, whose creativeness, within limits, is not a liability but an asset–a boon and not an evil, says Frank–for the enterprise is cooperative: the judges cooperate with the legislature in an effort to apply what it "really meant, but imperfectly said" (ibid., 1263). In other words, just as the musical performer needs to put himself in the composer's shoes and try to reconcile his "imagination" (ibid.) with the principle that he needs to closely follow the composer's instructions, so must the judge do the same with the text of the law.

Frank completes the analogy by noting what needs to happen on the other side of the equation: "Just as, perforce, the musical composer delegates some subordinate creative activity to musical performers, so, perforce, the legislature delegates some subordinate (judicial) legislation–i.e., creative activity–to the courts" (ibid., 1272). It will not have escaped our notice that, whether we are dealing with legal clinics or with Law & the Humanities, Frank defines the law not as a science but as an art.

Hence the need to provide the jurist with training that is not just technical but is open to the insights and suggestions that may come from the human and social sciences–an education responsive to the pedagogical ideals set out by John Dewey,

the venerable father of American legal realism. These ideals consist in rejecting rote learning, which only makes students passive, while at the same time laying emphasis on concrete experience (the idea behind legal clinics) and developing the active powers of the imagination, including be recourse to music, theatre, and the arts (the idea behind Law & the Humanities).

Recently Martha Nussbaum has herself underscored the fundamental role that Dewey played in changing the way education is done at every level in American schools, and in so doing she revived the Socratic ideal that Dewey shared: this is the ideal of a culture that urges us to think critically, nurturing freedom of thought and speech and independent judgment, as well as to transcend local allegiances so as to effectively address global problems, and to develop our powers of imagination and sympathetically imagine the predicament of others–all abilities that the humanities are particularly suited to fostering. The humanities, Nussbaum argues, can "make a world that is worth living in, people who are able to see other human beings as full people, with thoughts and feelings of their own that deserve respect and empathy, and nations that are able to overcome fear and suspicion in favor of sympathetic and reasoned debate" (Nussbaum, 2010, 143): this, in other words, makes for the kind of life in common with the shared experience and exchange of ideas that distinguishes democracy understood as a process always in becoming.

The humanities therefore need to form part of every kind of training, including that of the jurist. The question of training and education is also central to the more recent phase of the Law & Literature movement, in which Nussbaum is among the leading figures.

The thinker recognized for giving start to this second phase is James Boyd White, who in 1973 wrote *The Legal Imagination* (White, 1973) and then a trilogy that includes the books *When Words Lose Their Meaning* (White, 1984) and *Heracles' Bow* (White, 1985). In these and other works, White argues that law ought to be made integral to a cultural system in which the jurist should constantly drawing on, and he takes issue with those cultural currents of the mid-1950s which gave us the illusion that there is no connection between law and other languages, or indeed with the humanities at large, and which consequently forced legal education into a technical mould based exclusively on the imperative to learn the rules of the law.

It was in this climate that in the 1970s in the United States a debate was rekindled on the relation between law and the system of values and the social and cultural context in which it is embedded–a debate that also took up the question of the tools of critical analysis that law students should be provided with. In the same period, law clinics cropped up all across the United States, and now most law schools offer a clinical legal programme.

Elsewhere, in Italy, as will be more extensively developed in another contribution to this workshop, at about the same time that Frank was setting out these ideas, the well-known lawyer and jurist Francesco Carnelutti was sounding a similar note, commenting that "of all the instruments of law, there is only one that we allow students to put their hands on: the law code. It may be that this privilege can be explained by the fact that the code is a book. But everything else

students must look for themselves, or it will remain unknown to them" (Carnelutti 1935, 172; my translation).

What is missing from legal training, Carnelutti argues, is an effort to "provide students with that combination of understanding and experience that relates not so much to knowing *that* something is the case as to knowing *how* it is done–where the point, in other words, is to teach students how to apply the rules that knowledge consists of; a case is presented to the student, and he is shown what to do; where physicians are concerned, the case is the sick man [...]; where we are concerned, the case will be, for example, a contract or a crime, and so an agreement or a clash between two men" (ibid., 170). Like Frank, Carnelutti underscored the importance of law clinics, not only as a tool of legal training but also in virtue of the social role they play.

Also in the 1930s, precisely one year after the essay by Carnelutti, in 1936, a work came out that for the first time in Italy offered a systematic treatment of Law & the Humanities: it was titled *La letteratura e la vita del diritto* (Literature and the life of the law), and in it Antonio D'Amato (1936) proceeded from idealist premises to show how law and literature are two manifestations of what our collective consciousness aspires to, marking two different moments in the path leading to the concretization of the spirit, which first expresses itself in literature and then formalizes itself in the law.

Among the several thinkers belonging to this first phase of Law & Literature in Italy, two that stand out are Ferruccio Pergolesi and Piero Calamandrei. Pergolesi wrote extensively in this area beginning in the late 1920s, with his 1927 article "Il diritto nella letteratura" (Law in literature: Pergolesi, 1927), but it was in the 1940s and '50s that his thinking in this area grew to maturity, most notably with his book *Diritto e giustizia nella letteratura moderna narrativa e teatrale* (Law and justice in modern narrative and theatrical literature), which came out in 1949 (Pergolesi 1949) and was republished in an updated edition in 1956 (Pergolesi, 1956). Calamandrei, for his part, rose to prominence with a 1924 essay titled "Le lettere e il processo civile" (Literature and the civil trial), in which he observed that "by reading certain novels where the devices of the law in action are described in layman's terms, it is often possible to gain a clearer understanding of the law than what can be gleaned from a commentary written in a jargon or in a professorial style, appreciating the way in which reality reacts to the law, and how inadequate the laws are in achieving the goals of practical life which the lawmaker pretends to achieve by that means" (Calamandrei, 1924, 202).

Even though, as Carnelutti's essay testifies to, the need for a practical approach to the teaching of law has been felt for several decades, there is little that has been done in Italy to address that concern, and only recently have some universities begun to offer elective courses based on clinical legal education (the first legal clinic was set up in Brescia in the 2009/10 academic year). These course offerings can vary widely, but they do share a common denominator, in that they all focus on the study of cases through the method of learning by doing (the practical know-how described by Carnelutti). Only by doing can the student develop the critical and creative attitude necessary to practice the legal professions, an attitude that consists in the ability to solve problems, finding the concrete solutions to the case at hand, and to commu-

nicate appropriately and effectively with all of the participants involved, while also assuming the responsibilities that come with the role one has been entrusted with.

In addition to legal training, come law clinics also offer services in collaboration with community organizations and street law projects. Over the last forty years we have also witnessed a "rebirth" in the study of Law & Literature through the effort of scholars working in different disciplines. Apart from engaging the disciplines that have traditionally been attuned to the need to couple the study of law with that of literature–such as the philosophy and the sociology of law and the history of ancient law–this approach has recently attracted the interest of the theory of law, political philosophy, cultural psychology, and some branches of the law, from constitutional law to private and trial law, and especially comparative law (indeed literature is valued by the comparative lawyer as an effective lens through which to understand the differences between legal systems and cultures).

James Boyd White has commented that legal training in the United States consists for the most part in learning the rules, and even if this if this does not describe the scenario in Italy–where the study of law, since the Middle Ages, has gone hand in hand with that of history and philosophy–there is no doubt that many code-based areas of study still follow a strictly formalist approach to law, an approach that tends to be tempered in other subjects of study, such as philosophy, the sociology of law, and comparative law, preferring to approach law as a cultural historical phenomenon, that is, as a living organism.

And so, mainly at the initiative of those who teach these subjects, several legal clinics have sprung up in Italy, along with the first courses in Law & the Humanities. As much as Law & the Humanities and legal clinics pursue research and offer training in different areas, they both proceed from the common premise that the law is not a freestanding universe but is a social practice. It is my opinion that by offering this kind of training in law we can go a long way toward helping law students to manage their legal knowledge and to appreciate that the law is not just a set of rules but is organic to the social context in which it is embedded, in such a way as to be attuned to the problems of justice and develop a sense of social responsibility.

I want to close by going back to Martha Nussbaum, who in *Not For Profit* underscores that at any educational level it is essential to develop the active powers and the creative imagination. This means that we need to cultivate, on the one hand, a capacity to imagine what it's like to be in someone else's shoes–to understand their emotions, expectations, and goals, and thus be an intelligent reader of that person's story–and, on the other, a capacity for independent reasoning, without blindly following tradition and authority (see Nussbaum 2010, 95–96).

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