Preface for the Initiated Reader

I. NEED FOR INTRODUCTORY WORK

Throughout the nineteenth century Blackstone’s *Commentaries* was used everywhere in the United States as a first book for legal study. Doubtless this work served very well in the period immediately following the Revolution. Blackstone gave an exposition of the English law as it stood right after the middle of the eighteenth century. Our law had its origin in English law, and the prime task of American lawyers and judges was to adapt that law to our conditions. But by the end of the first decade of the twentieth century, almost everyone had come to see that Blackstone was no longer a suitable text for the use of American law students, for two reasons: First, a century and a half of development had so transformed the American scene that the study of Blackstone had become a study of historical antiquities; or perhaps one should say, a study in comparative law—a comparison of English law in the eighteenth century with American law in the twentieth. Second, one of the most characteristic features of American law was our constitutional organization; written constitutions and the judicial power of review over legislation permeated everything that the American lawyer did and must know; Blackstone knew nothing of these institutions. For these and perhaps other reasons the use of Blackstone was everywhere abandoned.

1 This Preface is intended for the information of the person already trained in the law—lawyer, judge, or law teacher. I shall also have occasion now and then in the later chapters to include some side remarks for the ear of the initiated reader. These will be put in special footnotes indicated by an asterisk and introduced with the initials: I.R. The ordinary footnotes, which are intended for the beginning law student and which accompany the text, will be numbered in the usual manner.
Since then, there has been a great deal of talk about the need for some kind of introductory book to fill the place once occupied by Blackstone. But until very recently all this talk was like the common talk of the weather—nobody did anything about it. This was remarkable in view of the fact that in all other important fields of human knowledge such as economics and sociology one finds a plenitude of introductory treatises, and in view of the further fact that in civil law countries of Europe and South America the study of law invariably begins with some kind of introductory course. Indeed, it is always a matter of astonishment to civilian lawyers who come to this country to study American law and who ask to be referred to an elementary text on the subject, to be told that there is no such book.

Of the American student’s need for an introduction to the legal system there can be little doubt. For the last several decades the beginning student has been projected into the midst of the law as a person might be thrown into the river, and told to swim. He started reading cases and discussing legal problems without any preliminary explanation of the character or operation or aims of the legal system. If any explanation at all was given, it was furnished quite informally and one-sidedly by individual instructors at the commencement of particular courses such as Contracts, Torts, Crimes, etc. That some students lost heart and failed because of the lack of introductory assistance is not improbable; it is certain that many remained confused and bewildered throughout a large part of their first year’s work.²

² Compare the following from the preface to Dowling, Patterson and Powell, Materials for Legal Method vii (1946):

"Both teachers and students in American law schools have long regretted the groping and confusion of beginning students when thrown simultaneously into three to five courses presenting, principally through collections of cases, as many different branches of substantive and procedural law. The instructor in each of these courses has heretofore found it necessary either to ‘break in’ the student by devoting much time to what is here called ‘legal method,’ or to plunge ahead in his subject with the hope that the student would somehow or other, by the end of the course, acquire a minimum understanding of legal
In the last few years different law schools have attempted to meet the need for some sort of introductory work on law, among them the school to which I am attached. The present volume is the fourth version of my efforts to produce a suitable book of this character. A substantial part of the material was delivered two years ago in a series of public lectures, known as the Cooley Lectures. Revised and enlarged, it is now published as the third volume in the annual series which bears that name.

2. What Kind of Introduction

As these materials are not quite like others that I have seen, I feel that it is incumbent on me to refer briefly to possible types of introductory courses which are, or which might be, adopted; and to give the reasons for the particular approach that I have chosen and for the particular materials here offered.

A study of the history of legal institutions may be undertaken by way of introducing the beginner to the study of law. Such historical study is very useful to the lawyer and therefore has a proper place in any legal or prelegal curriculum. In fact I see no objection to the inclusion of method. Either of these practices is believed to be wasteful of effort and likely to delay unduly the progress made by the great majority of students in the class. The institution of a course on Legal Method and the preparation of this volume as the basis for such a course, are founded on the belief that the job of introducing the student to the study of law can be more efficiently done by concentrating upon it at the outset."

On the subject of historical introductions I can not refrain from referring to Holmes' *Common Law* (1881), a book frequently recommended in bibliographies for prelegal, and legal, reading. I defer to no one in my admiration for this author, and yet I believe this book is equally unsuited for perusal by prelegal students and by beginning law students. The *Common Law* was written seventy years ago. Its good analytical passages are blended with much antiquarian material in a way to make the book confusing and difficult for the beginner. Its use for an introduction to law is to my mind like starting piano lessons with Beethoven's *Appassionata Sonata*. Furthermore, even as legal history the *Common Law* is no longer satisfactory. No legal historian today would express the views, or choose the material for discussion, which Holmes did. All historians recognize that history needs to be rewritten every few decades. Finally, Holmes' views regarding the role of historical study changed
historical study of this sort in the first year of the law course if room can be found for it there. My only question is whether historical study provides the beginning law student with what he needs most. I am convinced that it does not. What is needed at the outset of legal study is a general picture of the legal system, an analytical and functional view of the American "system as is."

The sociology of law, laying special emphasis on the development and social background of the legal system, has also been used to introduce first year students to the study of law. No doubt a knowledge of sociology, like a knowledge of history, is important to the lawyer. The law student will profit immensely from prelegal preparation in sociology. The law teacher should be able and ready to make applications of sociological doctrine to legal materials whenever the opportunity for so doing arises. Furthermore, I believe wholeheartedly in including in the second or third year of the law curriculum a course or seminar which will treat the relations of law and society. But all this does not add up to the conclusion that the legal neophyte needs to begin his work in law with sociological material. Before he can appreciate the sociology of law he ought to have acquired at least a faint general picture of the legal system itself.

Even more questionable than the use of legal history and of sociology of law as ways of introducing the student to legal study, is the use of legal philosophy for this purpose. 

radically in the course of his life. At the time when he wrote the Common Law he was more or less imbued with an attitude which stressed history for its own sake. Two decades later he looked at the study of history functionally; he could warn of the danger of antiquarianism and declare that legal history is not important except as it gives us light for the conscious and intelligent development of our law. Only so far as man knows nothing better is he bound to adhere to the past; in Holmes' classical phrase (in a speech delivered in 1895), "Historic continuity with the past is not a duty but only a necessity." Collected Legal Papers 139 (1920). Certainly we can not blame the illustrious author for the uncritical use which later generations of teachers have made of his early work.

4 In this sense I have introduced some essential sociological background in the material which follows.
To put legal philosophy at the start of the law course is to put the cart before the horse. While I appreciate the importance of sound theory and careful analysis and while I appreciate that every lawyer will have a philosophy of law whether he knows it or not and will be well advised to make his philosophy explicit, I do not believe that it is advisable for the law student to begin with a consideration of legal philosophy. Philosophy and criticism of legal ideas, so far as they are to be introduced into legal study, belong well along in the student’s training rather than at the beginning.

3. The Material Here Presented

What is the nature of the material here presented? How does it differ from the types of introductory material just mentioned?

First, it is descriptive of the American legal system as it now exists, not of past law and not of legal systems in general.

Second, it portrays the legal system as an operating institution. I have made use of two basic ideas: acts and patterns for action, both sufficiently familiar to the beginning student. I have analyzed the operation of the legal system in terms of acts of individuals and officials and in terms of standards intended to control these acts. Too often legal writers of the past have analyzed in terms of high order abstractions which eliminate all elements of human activity and the guidance of human action. Acts and guidance are, to my mind, the most important features of a legal system.

Third, I have given a large place to the discussion of language in relation to law. Language is the lawyer’s primary

Like the study of comparative law, which introduces conceptions of other legal systems and presupposes an existing fund of legal conceptions with which to make comparisons, a critical study of general theory presupposes a fund of general ideas to be criticized and analyzed. By the time we reach section 7-45 of this course—where a brief excursion into legal philosophy is made—the student will have acquired such a fund of ideas.
tool. He works with it at every turn. A realistic discussion of
the operation of our legal system must be based on an under­
standing of the communicative processes.

Fourth, I have given a considerable amount of space to
a discussion of the ways in which statutes are made and
interpreted. This has been dictated partly by what I think
is the very real need of every student to achieve an early
acquaintance with these processes and partly by the conviction
(which many teachers share) that existing curricula put a
one-sided emphasis on common law and are calculated to give
a distorted notion of the lawyer’s field of work.

Fifth, technical ideas and technical terminology have been
avoided as far as possible. I have drawn on the notions of
common experience wherever I can and have made use of
concrete cases to exemplify all major assertions. Illustrations
have been drawn mainly from the early part of the student’s
first year casebooks. The illustrative material has been chosen
with an eye to bring out essential connections between this
survey course and the rest of the law student’s courses. And
the arrangement of the material itself has been dictated quite
as much by considerations of convenience in teaching as by
notions of logical relationships. In short, I have tried to give
the student a better perspective of his chosen field; I have
told a story as little complicated as possible, but I hope not
so incomplete as to be misleading.

Sixth, there is need to impart a vast deal of plain informa­
tion about our legal system and how it operates. For this
reason I have cast the main part of this book in the form
of an expository text. Much of what I say is so familiar to
lawyers and teachers that it is quite taken for granted; as,
for example, what a lawsuit is, how statutes are enacted, and
what the judge’s normal functions are. Just because the
lawyer takes such matters for granted and because the layman
does not know them, the lawyer has difficulty in explaining
to the layman what a concrete legal situation really involves.
The law teacher, if he does not leave the student entirely to his own resources, throws in a bit of background here and there, in disconnected and unsystematic form, as the discussion of particular cases demands. The law student at the beginning of his course is in essentially the position of a layman. Much that the law-trained man takes for granted the student does not know. I believe that all this assumed background material should be brought together in a unified picture and explained in familiar terms, so that the beginner can see what he is doing and where he is going.

Finally, I have coupled with the textual material a variety of problems for discussion. This is in line with the problem method which we use consistently in legal instruction. The problems take the form of queries suggested for the student's consideration, of excerpts from various writers which are posed for critical discussion, and of briefly stated cases (though a few cases are stated in full). Problems are as necessary as the text. A bare text without problems does not take hold of one's mind. Problems are needed in order to develop an appreciation of the meaning of the text and to furnish exercise in its application. On the other hand, a casebook of the usual type seems to me impractical for the purpose of an introductory course. It does not furnish, or allow time to present, the much needed general picture of the legal system.

The material here presented can be covered fully in about thirty classroom hours. It can be covered in as little as fifteen hours if the last chapter is omitted and if parts of the other chapters are pruned to a substantial degree. The material can be used independently as a separate course; or it can be used, as it is here at the University of Michigan Law School, in conjunction with other introductory work such as

6 Some introductory materials recently published are open to objection on this account; they contain little, if any, descriptive material, restrict the range of discussion too narrowly, and force the instructor to stick too closely to the traditional method of case analysis.
instruction in legal bibliography and instruction in the history of the forms of action.

4. For Whom Intended

As already indicated, Our Legal System and How It Operates has been prepared primarily for the use of beginning law students. However I think it might also serve, in the hands of a properly trained instructor, as a textbook for juniors or seniors in college; I have never used it for this purpose, but I see no reason why it would be more difficult for the student to grasp than the standard treatise on economics.

The mature general reader, if he is curious about the legal system and desirous of obtaining general impressions of its nature and operation, may also find this book worthy of perusal.

The practicing lawyer or judge will find in this introductory book nothing of interest except the mode of analysis and the approach. If he has not been doing an extensive amount of "reading and using the newer jurisprudence," he may profit from a reinterpretation of familiar material in terms of this jurisprudence. Particularly he may find this a useful introduction to the items on legal theory which are suggested in the bibliography and which commonly assume that the reader is already familiar with the theoretical field.

The law teacher will see in this textbook chiefly an attack on a pedagogical problem. He will be concerned to see whether I have developed, out of familiar stuff, a useful teaching tool. On this score I have nothing to add to what

7 The teacher will note, for example, that I have put the discussion of Legal Policies and Policy Making at the conclusion rather than at the beginning of the course. Logically I might begin (and I do, with advanced students of legal method) with a discussion of legal policies, but pedagogically I am convinced—after trying both modes of arrangement—that the appreciation of the student develops more naturally if he is introduced first to the structure of the law and the acts and activities of the persons who make the legal wheels go around.
I have already said in this foreword and what will be obvious from a perusal of the text itself.

5. Debts

My general debts to Dewey, Pound, Holmes, Wigmore, Dickinson, Llewellyn, and others will be apparent to all who have read in the field of legal theory. However, I have not felt that it was necessary, as a rule, in a series of elementary lectures such as these, to acknowledge specific debts by citations. The lectures are intended for the information of persons unfamiliar with the field; citations would not be especially useful to them and would only clutter up the text. At various points in the book I have inserted bibliographies; these embrace the items to which I am chiefly indebted.