Michigan Law Review

Volume 47 | Issue 8

1949

HENRY MOORE BATES

Roscoe Pound
University of Michigan Law School

IT HAS been my uniform practice never to read from a manuscript or use notes when I am speaking to an audience, but in speaking of so old and dear a friend I feel a certain inhibition of emotion that stands in the way of an adequate oral speech. Moreover, when I think of Dean Bates' unswerving adherence to exact, accurate statement, his abhorrence of all exaggeration, of all overstatement, I feel that he would not he satisfied with one who followed the relatively loose method of oral statement instead of adhering to a carefully and meticulously prepared manuscript for every word of which he could vouch.

Although I had seen Professor Bates, as he was when I first knew him, at meetings of the section of legal education of the American Bar Association, I think probably from 1903 on, I first began really to know him when we both taught in the summer quarter in the University of Chicago in 1909. It was a rather notable group who taught in that summer quarter. There was, of course, Dean Hall of the University of Chicago Law School; the elder Professor Burdick, one of the best known authorities on commercial law, I suppose, in the history of law teaching in this country; Dean Richards of the University of Wisconsin; Professor Woodward, very well known as a teacher at Northwestern, Stanford and later at Chicago; Professor Keedy of the University of Pennsylvania Law School; Professor Hohfeld of Stanford, who afterwards made his great reputation at Yale; and Dean Bates and myself. It was then that I came to be thoroughly acquainted with Dean Bates, whom it was my good fortune to reckon as a very dear and true friend ever since. Afterward I looked forward to seeing him each year at meetings of the American Bar Association, of the Association of American Law Schools, and later, of the American Law Institute. We served together on committees in the old days when the committee of the section of legal education of the American Bar Association and the committees of the Association of American Law Schools used to hold joint meetings in order to see that the two bodies which were working for improving legal education and raising the standards of admission to the bar cooperated and to arrange programs so that there would be no duplication or conflict.

Also, I taught under his auspices one summer session at Michigan

and he taught one school year under mine at Harvard. For some years after 1916, while fundamental questions were agitating the law school world, Dean Bates, Dean Stone of Columbia, afterwards Mr. Justice Stone, Dean Hall of Chicago, and myself, then Dean at Harvard, used to meet informally to discuss law school problems, feeling strongly the importance that our schools should work together toward common ends of improving the law as well as improving legal education, all of us agreeing to take no radical steps without notice to the others. In this way in the period of reconstruction after the first world war the four schools presented a united front. I should add that Dean Bates and I served together on the committee in 1915 to investigate the New York bar examinations as conducted under the regime of Mr. Danaher. Thus I speak of him from nearly fifty years of close association in the field to which he gave his energy and devoted activity—legal education as a means of advancing the administration of justice.

In the thirty-six years from the time Dean Bates in 1903 took up law teaching as his life work till his retirement in 1939, taking the country as a whole, much more progress was made in legal education than had been made in two generations before. In those years in which he was one of the chief actors, the academic law school rose to a commanding position in professional education, the law teacher gained a position among the leaders of the profession, cooperation between bar associations and law teachers and the Association of American Law Schools grew up, cooperation between law schools and bar examiners developed, and the views of law teachers as to the preliminary education to be required of those entering upon the study of law came to be adopted by the profession and more and more to be put into effect in the several states.

One who came into full time academic law teaching in 1903 found himself in a very different position from that of the beginner in the law school of today. Not only have the conditions of legal education and of admission to the bar put the law school in a commanding position, since today the bulk of the profession and those who make its policies come from the university law school, but the full time teacher in the university law school of today has the confidence and respect of the profession where fifty years ago he was regarded as an impractical theorist not worth listening to. In the greater part of the land the law teacher of today has to use up no part of his energy arguing for good standards of admission to the bar or for recognition of legal education conducted by full time teachers in a full time law school or for recognition by the lawyers as one of

themselves entitled to speak with authority on questions of law and problems of the administration of justice. He can devote himself to his teaching and to research and scholarly publication without having to be continually on the defensive as to his type of school and methods of teaching and his qualifications for teaching. I speak with assurance here, for in September, 1903, when Dean Bates was beginning as professor of law, I was delivering an apologetic inaugural as dean of the Law School of the University of Nebraska where I proposed a three year course with high entrance requirements and full time teachers.

In the part he played in creating understanding by the bar of the professor of law who was not a retired judge or a retired practitioner or an active practitioner giving a fraction of his time and energy to teaching, and no less in the part he played in making for understanding of the bar by the full time teacher who had never practiced or had no substantial experience of practice, he was a leader.

Dean Bates deserves to be remembered in the history of legal education. Such things do not appear in the books. What was achieved was done by his strong but attractive personality and high character, meeting with lawyers at bar associations and making them feel that one could be a full time university law teacher and yet a sound lawyer and that the university law school could turn out better and more effective practitioners than the law office or the apprentice type of school. Nor was this all. A type of full time teacher appeared, some of them very able men and excellent teachers, who had no interest in the practising profession, did not get admitted to the bar, and would keep the law schools and practitioners wholly out of touch. Some of these were not always easy to handle. But I saw Dean Bates deal with them so understandingly and tactfully on more than one occasion in the Association of American Law Schools as to compel my admiration.

But great as was his part in putting the American university law school in the place it now occupies, it is far from all of his achievement. His main interests were legal education, reform of procedure and improvement of the administration of justice, and constitutional law, where he had to adapt and supplement the great tradition of Cooley to the exigencies of the complex urban, industrial, society of today.

A word about each of these. He saw clearly that a university law school had to develop legal education beyond the mere training in use of the tools of the lawyer's art which was the aim of the apprentice type of school. He saw that law must be thought of as a specialized form of social control and studied in relation to all the agencies of social control, the ends of social control, and the means of attaining

those ends. Hence there was increased need of research and of publication and of a broader legal scholarship. What he achieved in this direction you well know.

As to reform of procedure, he was a steadfast advocate of the movement which has led to the overhauling of procedure in so many of the states in the last two decades and culminated in the Federal Rules of 1938. He was an effective advocate when advocates were sorely needed; not, however, goading the bar, as I fear some of us did at times and many at all times, but speaking and writing persuasively with clear understanding of the views of the practitioners and the reasons behind them and full allowance for the difficulties which stood in the way of acceptance at once of the proposals of reformers. I doubt whether the help he gave in bringing about a modern legal procedure in this country will be appreciated hereafter by those who write the history of the movement simply from the books and periodicals. The effect of his quiet but persuasive persistence in talking procedural reform to the profession on all occasions is something which is not in the books and is known only to those who were for a generation in the thick of the fight.

Those who may some day write the history of American law in what I venture to think they will recognize as a new formative era, namely, the twentieth century, are not unlikely to go only upon what was printed in the beginnings of that era and so miss a great influence which was felt rather than heard. For Dean Bates' output in print will appear meagre to them. They will not realize that the first dozen years of his deanship were taken up with a heavy task of reconstruction in addition to the normal load of administrative work which kept most of the law school deans of that time from the publishing they would have liked to do and many would have been able to do otherwise. Then nine years, 1922-1931, were taken up by planning and supervising the magnificent group of buildings made possible by the gift of Mr. Cook. From experience of the very much lesser task of rebuilding and adding to Langdell hall, a task of three years, not of nine, I know something of how effective such a task, added to the everyday work of teaching and administration, is to prevent a dean from writing anything. Then followed eight years of organizing and planning the research he had foreseen and Mr. Cook's munificence had made possible. Thus the tale of his deanship is complete, and the time for productive writing has been wanting.

Going over his writings as they are listed year by year in the indexes to legal periodicals, Dean Bates' publications fall into three classes: papers and addresses on legal education, papers and addresses

on law reform and improvement of the administration of justice, and writings on constitutional law and the rise of the service state. Notable in the first category is his brief paper, "The Needs of a Law School," (1926) responding to Mr. Cook's magnificent gift. The keynote is: "We think of law today . . . as an instrument with which we may work for the social welfare of the race. So considered, law ceases to be merely a set of rules for the guidance of conduct. Rather it is a plan of life, reaching down into every phase of human existence." What is to be remarked in this paper is recognition of the service state which a decade later came to claim the whole stage, and yet the balance and sound judgment which enabled him to see it in proportion and perceive also the place of law in our American polity in enabling our institutions to function with a minimum of friction. Neither the grip of the ideas in which his generation had been brought up, which could see only the general security and a state primarily concerned with maintaining it, nor the momentum of the movement for an omnicompetent state by which all human needs and even desires were to be satisfied, could disturb his balanced judgment.

In his paper "Defects in Our Legal System,"[1] there is an admirable discussion of the then prevailing lack of adequate training of the bar for its immediate tasks. Indeed, the need of adequate educational requirements for admission to the bar was something he kept hammering upon in the days when this sorely needed urging. Even as late as 1915 in a brief but excellent paper in *Case and Comment*[2] (note, not in a law school periodical but in one sure to reach the element in the profession which had come from office training or from apprentice-type law schools) he is careful to show the difference between the office training of a generation before and such training as was possible in the second decade of this century.

In an address before the Illinois State Bar Association in 1914[3] he urges the law schools to develop leaders in juristic thought and shows how procedure has suffered from rule of thumb treatment in the apprentice-type schools. His feeling for the importance of reaching the practicing profession and appreciation of the needs of the practitioner of which the latter was not always conscious is brought out in a paper on "Legal Institutes for Practising Lawyers," read before the section on legal education of the American Bar Association in 1937. It is eminently practical, in the best sense of that much abused

[1] 12 MICH. L. REV. 167 (1914).

[2] "Should Applicants for Admission to the Bar be Required to Take a Law School Course?" 21 CASE AND COMMENT 960 (1915).

[3] "Law Schools and Reform in Procedure," PROC. ILL. ST. BAR ASSN. 399 (1914).

word, in its handling of a subject on which there has been much wasted writing and speaking. He saw what was needed, what stood in the way of providing it, and what could be done profitably and what not. Characteristically unpretentious, it yet says about all that can be said after there has been a decade of further debate. Nor must I omit in this connection to note an interesting review of a book, "The Story of a County Prosecutor,"[4] which shows the appreciation of the facts of administration of justice which has been so much preached by the American realists, but with at the same time clear understanding of how far they tell the whole story, how far they are fundamentally significant, what may be done about them, and what is inherent and beyond reach. In this brief review there is more than in many pages of what has been written about juristic realism.

Passing to the second category, namely, law reform, one must first notice his address on "Defects in our Legal System"[5] before the Michigan Bar Association in 1913. Here, anticipating what was always thrown at us by the practitioner in those days, he admits that law and lawyers have always been subjects of attack and that in American history prejudices brought over from seventeenth-century England had died out slowly in America and had been for a time intensified by economic conditions after the revolution. Also he recognized that much of the then current criticism of law and the administration of justice was unreasonable and unreasoning. Conceding this, he went straight to the valid grounds of complaint. One was the condition of procedure, thoroughly reformed in England a half century before, but in America still obstructing effective application of the substantive law. A second, he pointed out, was the imperfect organization of our courts, pointing out in particular the deficiency of provision for petty cases, which still prevails in too many states, the want of coordination in the higher courts, and the lack of an administrative head "to give coherence and unity to the activities of the component parts."[6] Third, he stressed lack of adequate training and inefficiency of the bar considered collectively. Fourth, he blamed "a certain sentimentality and a lawlessness on the part of great masses of our people, due to our political origin, our early history, and perhaps to our national temperament . . . ."[7]

An especially strong part of this paper treats of organization of

[4] 41 MICH. L. REV. 915 (1943).
[5] Supra, n. 1.
[6] Id. at 173.
[7] Id. at 172.

courts: expensive and time-consuming multiplied appeals, conflicts of courts of concurrent jurisdiction, the system of courts of general jurisdiction of first instance as "a series of separate compartments and they in turn divided into sections and then cross sectioned," so that litigants too easily got in the wrong compartment to their undoing. He also points out how the ultimate court of review is needlessly burdened by unrestricted access to it so that eight justices had to hear arguments, read briefs and records, and decide a litigation which had already gone through two courts as to the ownership of a hen turkey. He discusses also the multiplication of specialized courts and the bad system of rotating judges. Much of this is still to be corrected in many states and pressure to multiply courts is always with us. In 1913, before much had been done to modernize the organization of courts in this country, it was a timely exposition and much of it will have enduring value. What is significant, as we look back to the time when it was read before the state bar association, is that it was read by a law teacher, speaking to a bar association as one of them urging upon the practitioners the primary purpose of a bar association, to advance the administration of justice, to serve the law, not the lawyers, but with a mastery of the subject compelling respect, where there had been too much ill-directed general denunciation and proposals dictated by enthusiasm with no basis in experience or in knowledge of the real causes of ills felt but not understood.

On his main interest, constitutional law, he published little. But his account of Chief Justice Stone, at the time of the latter's appointment as Chief Justice, shows a mastery of the subject as it stood at the critical time on the eve of our entering the second world war. His address to the state bar of California as Morrison Foundation lecturer in 1936, entitled "Trends in American Government," shows appreciation of the development of the service state, which he had foreseen a decade before at the dedication of the law club building, and is a well balanced appraisal of the movement and of the swing to administration and away from adjudication which it involves. He shows why complete return to the nineteenth-century idea of the state is not possible and yet why the carrying out of the service state to its furthest logical possibilities is equally impossible under our polity. It is as timely today after the second world war as it was before the overturnings which that war has contributed to bring about. The same clear insight and balanced judgment may be seen in a review of a book on the contract clause by a teacher of political science, published in a Canadian legal periodical in 1929. This should be said also of a review

of Laski's *Studies in the Problem of Sovereignty*.[8] He remarks that "Most of us who must confess to origin in the now much despised Victorian period, are probably not prepared to have the state reduced to the level of a public-service company. . . ."[9] But reducing it to that level and giving it a monopoly of all public service, with an all embracing definition of public service, is not unlikely to elevate it to a higher level of power. As Dean Bates points out, "The state will never be absolutely secure and no unsupported theory is likely long to seriously increase or diminish the germs of conflict and danger which lie in any human society."[10]

What stands out in my memory is a natural leader; a sterling character; an attractive but firm personality; a scholar without a scintilla of display, patient except as to trifling by those who should be at earnest work and as to pretense and pseudo-scholarship and wisecrackery; zealous to make the law school effective toward the advancement of justice while not neglecting its immediate task of turning out competent lawyers; forgetful of his own fame and putting aside the writing of which he was entirely capable in order to give first place in his energies to his tasks as teacher and administrator; withal a true and loyal friend. May I say of him what I had to say formerly of another dean of like devotion to his life's work, to justice, and to scholarship, and like strength of conscience: "In hand and foot and mind foursquare, fashioned without flaw." Such was the Greek ideal, and such, I say, was Dean Bates.

Roscoe Pound

[8] 31 HARV. L. REV. 1171 (1918).
[9] Id. at 1173.
[10] Ibid.