

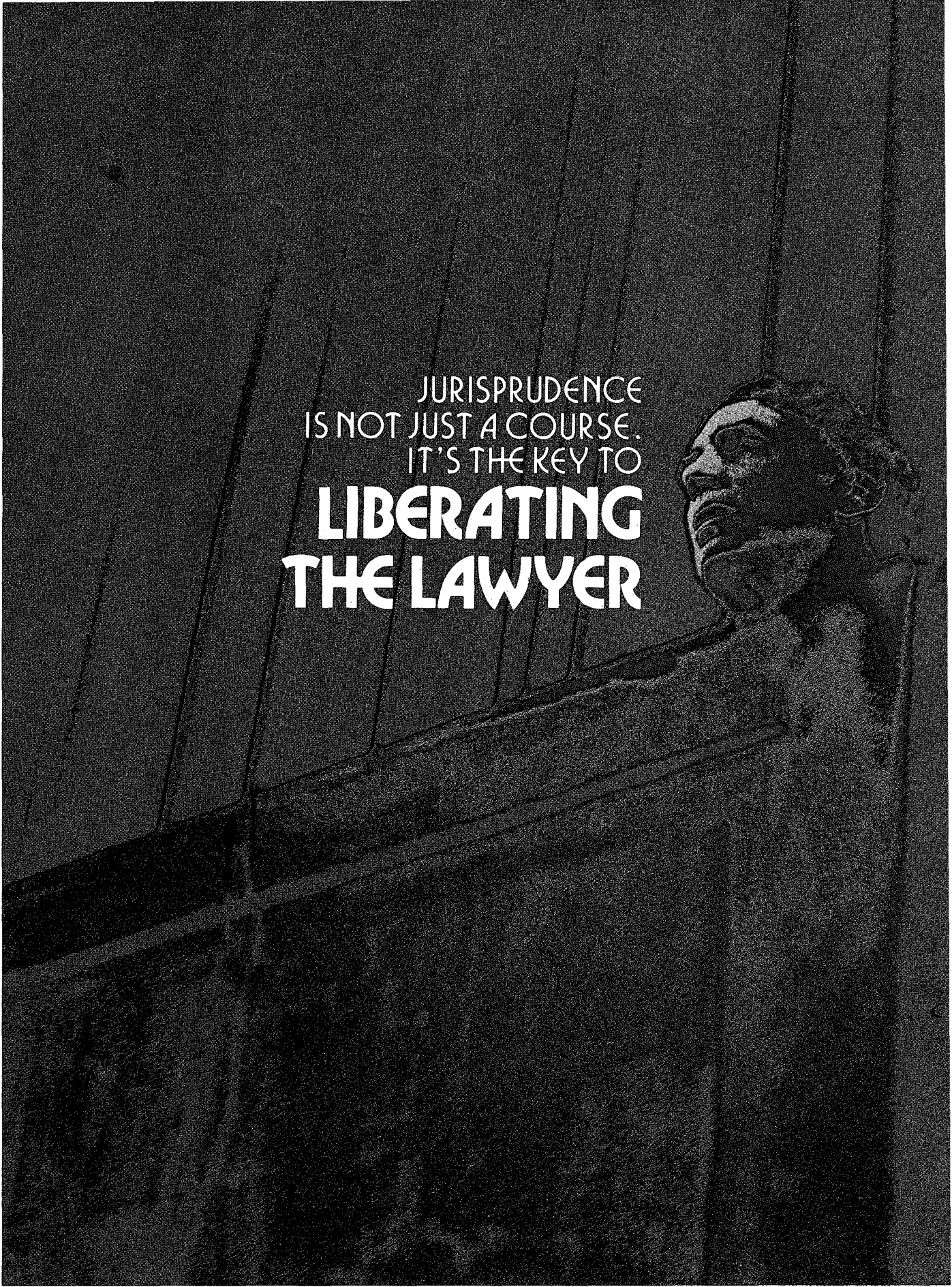
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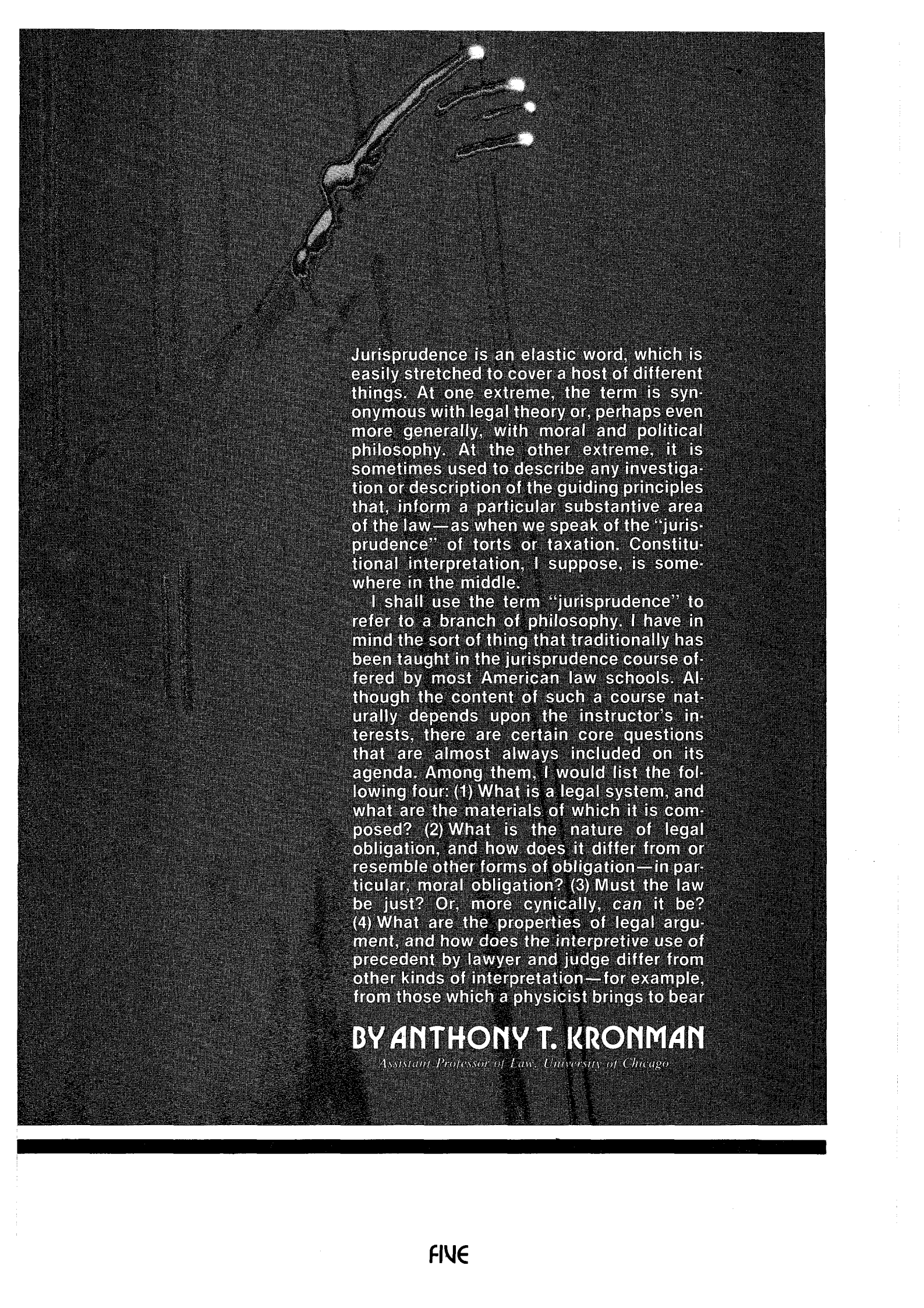


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JURISPRUDENCE
IS NOT JUST A COURSE.
IT'S THE KEY TO
**LIBERATING
THE LAWYER**



Jurisprudence is an elastic word, which is easily stretched to cover a host of different things. At one extreme, the term is synonymous with legal theory or, perhaps even more generally, with moral and political philosophy. At the other extreme, it is sometimes used to describe any investigation or description of the guiding principles that, inform a particular substantive area of the law—as when we speak of the “jurisprudence” of torts or taxation. Constitutional interpretation, I suppose, is somewhere in the middle.

I shall use the term “jurisprudence” to refer to a branch of philosophy. I have in mind the sort of thing that traditionally has been taught in the jurisprudence course offered by most American law schools. Although the content of such a course naturally depends upon the instructor’s interests, there are certain core questions that are almost always included on its agenda. Among them, I would list the following four: (1) What is a legal system, and what are the materials of which it is composed? (2) What is the nature of legal obligation, and how does it differ from or resemble other forms of obligation—in particular, moral obligation? (3) Must the law be just? Or, more cynically, *can* it be? (4) What are the properties of legal argument, and how does the interpretive use of precedent by lawyer and judge differ from other kinds of interpretation—for example, from those which a physicist brings to bear

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on the results of his experiment, or a literary critic on his text, or a psychoanalyst on his patient?

This is a formidable list of questions. But the questions are by no means of interest only to teachers of jurisprudence. In one way or another, they work themselves with regularity into our substantive law courses—into contracts and torts and taxation and administrative and criminal and constitutional law. It is a rare law school class that has no jurisprudence in it. Like Moliere's prose-speaking gentleman, we are doing jurisprudence all the time. I hasten to add that the comparison is not really apt, since I suspect that my colleagues are fully aware of what they're up to.

Jurisprudence is everywhere in the law curriculum. I cannot imagine, for example, teaching the doctrine of promissory estoppel to my contracts class, or exploring with them the notions of duress and unconscionability, without talking about the relation between legal and moral obligation. The concepts of fault and causation in tort law, the notoriously difficult problem of criminal punishment, the use of the tax system to achieve a just distribution of wealth, the constitutional conflict between the express right to freedom of speech and the judicially implied right to privacy, the idea of ownership, the use and abuse of precedent in every field of the law—all these raise jurisprudential issues, or more precisely constitute jurisprudential issues, since they cannot be "got at" without doing some philosophy.

The jurisprudence course, then, has no monopoly on jurisprudential questions. But, if this is so, it is more difficult to see what marks jurisprudence off as a special discipline, and unless we know what sets it apart, it is quite impossible to describe its place in the law curriculum. If we have difficulty identifying what jurisprudence is all about, I think it is because we expect it to have a substantively distinct subject matter of its own (like federal taxation or bankruptcy or civil procedure).

This expectation, however, is a misleading one: what distinguishes jurisprudence as an enterprise is not so much the questions that it asks as the way in which it asks them. Questions about law and morality and the nature of a legal system and the function of precedent arise routinely in every course in the curriculum. But in the jurisprudence course they are treated in a peculiarly abstract way. It is the abstractness of jurisprudence that sets it apart.

The single most striking fact about the teaching of jurisprudence in American law schools is that it is typically *not* taught by the so-called case method. Most jurisprudence courses are taught from texts, from books and articles, and if a case comes in now and then, it is by way of illustration, to embroider an idea and perhaps give it some added poignancy. But it is not the cases that are important, and few jurisprudence teachers would argue that the subject can be taught best or most economically by the case method. Jurisprudence is a branch of philosophy, and at least since Plato the advocates and practitioners of philo-

sophy have instructed us to direct our attention to principles rather than particulars. Of course, to paraphrase a very famous remark of Kant's, if particulars without principles are blind, principles without particulars the empty. In legal education the particulars are the cases or, more precisely, the cases and the materials that today cutomarily accompany them.

Of course we do not serve up the particulars blindly, but attempt to give them some coherence and meaning by drawing out their principles, often at a length exasperating to teacher and student alike. But in the courses taught by the case method, it is the particular case or statutory provision that is ultimately the important thing. Although a teacher of jurisprudence may be unable to do without an occasional case or two to illustrate his point, it is the conceptual proposition (whatever it might be) that he regards as interesting and important. In the jurisprudence course, one has an opportunity to linger at a level of abstraction which, if reached in other courses, must be abandoned almost as soon as it is attained. What place we assign jurisprudence in our law curriculum will depend upon the role we think this kind of abstraction should play in legal education.

I happen to think that the role ought to be a rather substantial one. There is however, a traditional argument for suppressing abstraction in legal education. I should like to say a word or two about it.

LAW: A TRAINING IN SKEPTICISM

It is often said that one of the great strengths of a legal education at an American law school is that it dissolves the misplaced optimism that most undergraduates tend to have concerning the power of ideas. There is much to this, I think. The students in my contracts class are very good at handling abstractions. This is precisely what their undergraduate training has prepared them to do. They are less good at handling cases. I am overgeneralizing, to be sure, but it seems to me that my first-year students find it very easy to state the principle of a case and very difficult to say what the principle, as applied to that particular set of facts, actually means or may be said to stand for. The Socratic method of interrogation is intended to repair this deficiency. Under Socratic fire, the student is disciplined to think about the facts and is made to see, that it is the facts that are all-important—not the rules of law.

The sensitivity to the facts is something that must be learned or acquired in the first year of law school. The beginning law student must have his (or her) nose rubbed in the facts: everything else one does in law school depends on it. This is often both a painful experience for the student and an exhilarating one. It is painful and exhilarating for the same reason: the facts are something new, at best only rarely encountered in one's undergraduate years.

Undergraduate education is primarily theoretical. Even a very successful undergraduate, who is comfortable and competent with theoretical questions, is likely to lack a feel for the facts. This requires good judgment, and judgment is something altogether different from intelligence. A legal education is a training in

judgment: intelligence is only the raw material on which it works. So it is sometimes said that one of our main tasks, as law teachers, should be to discourage abstraction (or at least philosophical abstraction), to continually insist upon the limits rather than the power of ideas, because only in this way will our students be led to abandon their adolescent enthusiasm for thinking and to become men and women of good judgment.

Although I have overstated this view in order to criticize it, it does point to one of the great strengths of the case method of instruction. An American legal education is in good part a training in skepticism, and, if it is tempered with an appreciation of the importance of ideas (not just in the law, and not just as instruments, but in human life generally and for their own sake), such skepticism is a powerful—indeed, an indispensable—aid to clear thinking. I have found in my own experience, in conversations with philosopher friends, that a pointed hypothetical is often the most economical way to make a point or to deflate one. Lawyers, on the whole, are no smarter than philosophers, but their case-hardened caution about ideas makes them slower to accept an abstraction that hasn't been baptized by the facts. This is often infuriating to philosophers, but the lawyer's propensity to test the reach of an idea with cases not only is a healthy counterweight to what might be called the exuberance of thinking—it also makes him a formidable opponent in any philosophical argument.

THE VALUE—AND LIMITS—OF ABSTRACTION

This is the positive side of the case method. There is however, a negative side as well. The case method is designed to erode the student's naive confidence in the power of ideas by keeping constantly before his eyes the difficult borderline case that strains principled distinctions to the breaking point. Undoubtedly this is a painful experience for many students, since it strikes at the heart of their intellectual self-confidence, and the temptation is great to combat the pain by denying that ideas have any power in their own right, apart from their use as counters in the struggles of practical life.

No one is more likely to feel the seductive appeal of this kind of anti-intellectualism than a harried first-year law student who has been Socratically battered from pillar to post. In fact, once they have discovered the trick, most law students (or at least the best ones) appropriate the Socratic engine for their own purposes and begin ruthlessly grinding one another down in a kind of mock combat in which they try to anticipate what it will be like to think and act like a lawyer.

All this is perfectly understandable: it is part of learning the craft. But as Karl Llewellyn noted in the *Bramble Bush*, the line between skepticism and cynicism is a thin one. We want to teach our students to be sensitive to the limits of ideas so that they may practice law responsibly. At the same time, we must guard against the smug conviction that thinking is a luxury, a self-indulgence, a kind of pale reflection of the robustness of practical life.

Most of our students, when they come to us, are infatuated with theory. And by and large they are very good at theory because abstract thinking does not require experience. For them, the first year of law school is a disenchantment. But when we have taught our students how fragile and unsure any abstraction really is, we must help them to regain something of their old confidence in the power and importance of thinking. This restorative task is, if anything, more difficult than the destructive one. But it is just as important: we want our students to be able lawyers, but we also want them to be intellectually mature men and women. It is a sign of intellectual maturity that one affirms the value of thinking in full awareness of its limitations.

Our one great object as law teachers should be to help our students experience for themselves the tension between the value and the limitations of abstraction. But in order to do so, we must undermine their uncritical confidence in ideas without destroying their native enthusiasm for theory. Only in this way do we meet what I think is the basic obligation of every teacher: the obligation to give his student what he himself prizes and has found worthwhile in life.

EXPOSING PHILOSOPHICAL UNDERPINNINGS

Why is jurisprudence so important to a law student? First, I suppose, because it increases his facility with ideas, making him a better practitioner and advocate. When Karl Llewellyn told his jurisprudence students that the course in jurisprudence was the most practical bread-and-butter course they would take in law school, I expect he had something like this in mind. Second, the jurisprudence course exposes the student to a body of ideas—and, more important, of writings—with which every educated lawyer should be familiar. There are relatively few classics in jurisprudence, and in my view they should form an indispensable part of every law student's education. If familiarity with these few texts does not in any obvious way sharpen the student's rhetorical skills, it will certainly broaden his empathetic capacities by exposing him to what Max Weber called the "polytheism of ultimate values." If the practice of law requires empathy, then this is another way—an indirect one—in which the jurisprudence course is useful to the practitioner.

Finally, jurisprudence is important because it helps the student to discover that thinking is a pleasure in itself—day activity that men enjoy for its own sake and not merely because it promotes some other end. This is an important discovery, especially for the practitioner, because it helps him to recognize that there are many different ways in which human excellence may display itself, and that his way, the way he has chosen, is but one of these. The same thing should be said, by the way, for the theory-minded teacher who must confront the one-sidedness of his own chosen way in teaching philosophy to lawyers. This recognition is bound to be humbling one, regardless of whether one's vocation is in the world or in the university. In either case, it is a precondition to accepting responsibility for the vocation one has chosen—and this, I think, is what we mean by freedom.

(Please turn to page 54)



stop, a unit incapable of moral choice and thus of meaning.


This is not, by the way, the same thing as saying that man is trivial, with an almost infinitesimal life span in an almost infinite universe. Trivial is something; to be totally caused is to be nothing. This idea does not get full expression till well past the midpoint of the piece but it colors everything. It explains the beginning sections about the curse of consciousness—how can you take out after someone who injures you, when you *understand* both the attack and your counterattack to mean nothing. You're a couple of puppets set bumping into each other by the accidents of stage design. Man cannot injure and insult you if you understand nature's ultimate insult: that your behavior is nothing more than a fact.

His idea of the meaninglessness of factual man is also closely connected with his recurring references to man's wildness. Man is conscious of the possibility that he means nothing, and strikes out wildly, in purposefully irrational behavior, destructive of self or others, raging around in his prison of fact trying to persuade himself that he means something. To quote our hero, "whipping yourself may be very reactionary,

but it's better than nothing."

This raging is one of the things that destroys utopias, assuming that we can stay interested in their trivial materialistic advantages when confronted with our nothingness. But the raging is more important than that. Because it is, after all, in a determined world, pointless, and so, far from freeing man from his servitude, may simply be one of the bars. Yet it reflects man's ultimate refusal to accept the fact of his nothingness.

The ultimate acceptance of life is the *Notes* themselves. Why is he writing at all, he asks himself, and for whom? He knows that he's sending out bleak messages of pain, evil, irrationality and the total pointlessness of communication. But he also knows that he's sending out the message in a form that is brilliant, vital, often wildly funny and wonderfully exuberant. How can he justify writing that his writing is not justified—and with so much gusto? "Well," he says, "why not? There's something more impressive about it . . . it will be in better style."

So now I'll give my answer about what the humanities can bring to law. As I said before, "only style"; but that may be all there is. 

LIBERATING


(Continued from page 7)

These are some of the benefits jurisprudence has for the student. I should like to conclude with a word or two about the benefits that jurisprudence has for the law faculty itself. Law teaching is of course subject to the same pressures of specialization, the same division of intellectual labor, which in this century has transformed higher education and produced the modern university, with its atomized faculties and factory-like atmosphere. Although the process of specialization in law teaching has been slowed somewhat by the fact that most law teachers share a common educational background, and by the resistance to substantive curricular change in American law schools, the proliferation of complex statutes and the emergence of entirely new branches of legal scholarship (such as law and economics) have made it increasingly difficult to appreciate, or even to assess, the value of work being done in a field other than one's own.

At Chicago this difficulty has so far proved not to be a serious one. The relatively small size of the faculty and the rather remarkable eagerness of its members to keep abreast of one another's accomplishments have preserved a wholeness of spirit and understanding that is striking.

And yet, even here, the risks of specialization can-

not be eliminated altogether. Foremost among these risks is the danger that one may lose sight of the basic assumptions and value-preferences on which work in his specialty depends. Just as the fertility of a field requires that it be turned over regularly, the vitality of a discipline demands that its philosophical underpinnings occasionally be exposed to view so that they may be critically scrutinized. This is necessary if others are to understand what the specialist is doing and what his aims are. It is also necessary if the specialist himself is to retain the breadth of vision he needs to appreciate his place in the larger enterprise of which he is a part.

Jurisprudence—and now I am talking not so much about a course as about a mode of inquiry—provides a forum in which many of these basic methodological questions may be raised. It offers the specialist an opportunity to reflect on the foundations of his specialty and to compare his premises and values with those of his colleagues. In this way it helps him to combat the terrible tendency of every specialized organization to turn its members into the cogs of a machine. The simple questions that jurisprudence poses help us to remain masters of our own work rather than being mastered by it. In this sense, jurisprudence has a liberating influence. 

HIRED GUN

(Continued from page 21)

Most law schools have been reluctant to commit themselves to any of these paths. The traditional model has remained the dominant emphasis, but each of the modern trends has been incorporated to some degree without special emphasis on any one of them.

Here as elsewhere, the cumulation of people and resources in specific directions may provide uniqueness and special distinction.

Spreading resources over too many approaches may diminish the quality of each. Now is the time for law faculties to face the issue of the direction of their