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The Idea of a Metropolitan University Law School

The Honorable Henry J. Friendly

In describing how the modern law school deviates from the ideal metropolitan university law school, the author indicates it is unfortunate that metropolitan university law schools fail to take full advantage of their locations, both with regard to involvement in the severe problems of the modern large city, and with regard to realizing the full value of the potential interdisciplinary play existent in a modern university. He also notes the inadequacy of the traditional approach for students who will not receive proper apprentice training. The address concludes with a challenge to the new Dean and his faculty to reshape Case Western Reserve Law School to conform more closely to the ideal metropolitan university law school.

IN THOSE very remote days when I was an undergraduate, Professor Edward Channing regularly began one lecture in his course on American history at Harvard by saying that 1869 had witnessed three inaugurations — of Ulysses S. Grant as President of the United States, Charles William Eliot as President of Harvard, and James B. Angell as President of the University of Michigan — and that of the three the first was the least important. On a parity of reasoning, one might say that of various events associated with 1892 — the election of Grover Cleveland to a second term as President, the celebration of the 400th anniversary of the discovery of America, and the founding of this law school, the last we can fairly regard as the most important for us today. It is a happy coincidence also that 1892 was the 75th anniversary of the founding of the Harvard Law School, with its quartet of great scholars and teachers — Langdell, Ames, Thayer and Gray — at the very height of their powers. Whether there was any causal relation between the spark they had given to legal education and the institution of this school I cannot say. Certainly Harvard did not help much when it seduced Professor Wambaugh, who had accepted appointment as your first dean, before this law school had even opened, but in giving you Dean Toepfer it has made belated amends. Happily it does not require a computer to calcu-

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late that this year will see the Harvard Law School attaining an age exactly twice that of Western Reserve or to conclude that the relative disparity in age will never be so great again. I am sure Dean Griswold will agree, in the light of your new dean's achievements at Cambridge, that the relative disparity is going to close in other respects as well.

In taking as my title, "The Idea of a Metropolitan University Law School," I have sought to focus on three elements, each of which must receive appropriate emphasis if this institution is to fulfill its promise and its responsibilities. While it must be a law school, it is also part of a great university, now to become even greater, and, because of its location and the traditional source of its students and place of practice of its graduates, should play a significant part in the life of a metropolis.

The prime function of a school of law must, obviously enough, be to educate young men and women for becoming lawyers. I underscore that precise phrasing, which I have borrowed from Dean Neal of the University of Chicago Law School,[1] for a reason to which I will later advert. The task of doing this in the short span of 3 years is one of incredible difficulty. Students come to most graduate disciplines with some knowledge of or, at least, with good preparation for what lies ahead. Medical students have had the required premedical education and often very much more; engineering students have had grounding in science and often some engineering as well; for most candidates for the Ph. D. degree graduate work is merely a continuation of studies already long pursued. In contrast, students come to the law school without any significant knowledge of law, and it is best they should.

Indeed, neither they nor their teachers know exactly what law is. The uniqueness of the study of law in this respect was noted by the British lawyer-philosopher H. L. A. Hart, when he wrote:

> No vast literature is dedicated to answering the question, "What is chemistry?" or "What is medicine?" . . . A few lines on the opening pages of an elementary text-book are all that the student of these sciences is asked to consider; and the answers he is given are of a very different kind from those tendered to the student of law.[2]

That scores of law schools nevertheless do a good job and some a superb one in teaching students how to become lawyers is truly a

[1] Neal, *The Function of a Law School*, 48 CHI. B. REC. 7, 9 (1966).

[2] H.L.A. HART, THE CONCEPT OF LAW 1 (1961).

miracle. Indeed, I should think that on commencement day a law school dean would feel like making the comment of an old Kentucky moonshiner. When apprehended with some bottles of a whitish liquid and asked what they contained, as he could have been in those unenlightened pre-Miranda days, he said it was water; after an analysis disclosed the presence of something stronger, he exclaimed, "The Good Lord has worked a miracle again!"

There is more agreement on how this miracle is not to be performed than on how it is to be. It is not to be performed simply or even primarily by having the student accumulate information through listening to lectures or memorizing texts. This was the great insight of the man appropriately named Christopher Columbus Langdell. Though many of Langdell's theories are no more in favor today than were some of his namesake's a century after the great discovery, he cannot be deprived of the glory of first making plain that the task of a law school is to fit students to "do" law, as philosophers today say they "do" philosophy. The essential is that the student acquire a legal mind — more accurately, since even 20th-century medicine has not, or at least has not yet, developed a method of inserting a new mind into the brain case, he must make his mind legal.

What do we mean by a legal mind? One could say a mind equipped to deal with legal matters — like a book I recently read which defined philosophical questions as questions normally considered by philosophers. Or one could quote the well-known witticism of Professor T. R. Powell: "If you think you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind."[3] But we can do a bit better and note some characteristics even though I cannot formulate a comprehensive definition. The legal mind is an inquiring mind; its favorite word is "Why." Judge Hough, one of the great although now nearly forgotten judges of the court on which I sit, said, "the legal mind must assign some reason in order to decide anything with spiritual quiet . . . ."[4] It is an analytical mind; it picks a problem apart so that the components can be seen and judged. It is a selective mind; it rejects characteristics that are not significant and focuses on those that are. It learns to know that it doesn't matter whether an accident takes place on

[3] Quoted in Arnold, *Criminal Attempts — The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 58 (1930).

[4] United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1008 (S.D.N.Y. 1915).

Monday or Tuesday, though some old cases indicated one ought never to be injured on Sunday, but that it may matter whether the accident was caused by an automobile, an airplane, or an atomic explosion. It is a classifying mind; it finds significant differences between cases that superficially seem similar and significant similarities between cases that at first seem different. It is a discriminating mind; it has a profound disbelief in what Professor Frankfurter used to call "the democracy of ideas." Learning to ask the right questions about a problem, all the questions, not just the obvious ones, to have some notion how to go about seeking the answers, and then to exercise the priceless quality of judgment — these are the prime skills the student of law must be helped to acquire. The job of the law school is thus to teach a technique, a method of analyzing a problem and applying relevant materials, not to inculcate information.

I do not believe it matters overmuch just how this is done. There are, of course, certain basic concepts, contract, tort, property, crime, and the procedures whereby legal interests are enforced, by which every law student must sometime come and I am old fashioned enough to think it well that he be made to come by them quickly. On the other hand the law has grown so much since Holmes called it, exactly 70 years ago, "a finite body of dogma which may be mastered within a reasonable time"[5] that no law school could teach it all in 3 years, or even in 3 times 3. There are a few subjects, such as the taxation of incomes, estates, and gifts, and the Uniform Commercial Code, which I would require because they are so complex that the student will find it exceedingly difficult to learn them by himself and so important that he will be a menace without them. Beyond that I would give as wide a range of choice as the number and talents of the faculty can furnish without diminution of excellence — that wide and no wider since I do not think it vital that every law school should offer a course in admiralty, pleasant as that subject is and well as Dean Toepfer could teach it, or even, heretical though this may seem, a topic so much in the cry as international legal transactions. What is important, in addition to the quality of the teachers, is that the content of such courses as are offered should be continually revised so as to give emphasis to the problems at the center of the stage today, or, even better, to those that will be at the center tomorrow. Intellectually fascinating as was my Harvard Law School course on

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[5] O.W. HOLMES, JR., *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 169 (1921).

feudal land tenures and the destructibility of contingent remainders, it would have been more meaningful had it dealt with restrictive covenants, with eminent domain and with the then incipient subject of zoning.

I likewise cannot get greatly excited over the debates whether the case method should be supplemented or even in more advanced courses supplanted by a problem method, like that used in schools of business administration, wherein the students are given sets of facts and are asked to devise courses of action which are then dissected and criticized. Whether their needs will be best met by one method or the other, by some combination of the two, or something different still, will depend primarily upon the teacher and the time and money available to him, and each man is likely to find the method of teaching best adapted to his own gifts. Even in the heyday of the case method at Harvard, this was one thing in the hands of the true Socrates, Samuel Williston, another in those of so gifted a teacher as Austin Scott, and still another in those of Felix Frankfurter, whose course on utility regulation was sometimes called the "Case of the Month Club." I have heard Professor Clarence Morris of Pennsylvania say that when he unexpectedly became dean of a rather small law school, he enforced only two rules: first, that each professor could teach anything he wanted, and, second, that no professor need teach anything he didn't want. Perhaps that is a shade too idyllic as to subject but it has much wisdom as to method. The chief merit of the business school approach is that use of it might be of some help with the problem I shall next discuss.

This goes back to my statement that the law school trains young people to *become* lawyers, not to *be* lawyers. That should not be surprising or in itself alarming; no one expects a medical school in 4 years to turn out a physician equipped to practice. What does afford concern is the lack of a program for completing the law graduate's education anything like the elaborate systems of internships, residencies, and now, in many cases, post-residencies, afforded through that wonderful instrument, the teaching hospital. I am not so much worried about the gaps in legal knowledge of which I have spoken; a student who has learned his lessons can fill these — just as I had to do in many areas even after 30 years of practice when I was appointed to a federal appellate bench and still must do every day. Neither am I troubled over the minor how-to-do-its that seem to concern so many interested in graduate legal education so much — where to find the right courthouse, or the county clerk's

office, how to make out a tax return, or to serve a complaint or bring a motion on for hearing. The young lawyer without enough sense to pick up these mundane minutiae from the many ready to help him had better quit then and there. The problem is the lack during the law school years of what our medical friends would call clinical experience. This is the business of dealing with clients, with their economic or family adversaries or advisers — the latter sometimes more dangerous than the former — and with other lawyers, of drafting legal instruments ranging from a simple contract or will to a registration statement or indenture, of preparing a case for trial and trying it, and above all, of evaluating a situation and knowing what should be insisted on, what had best be relinquished, and how to convince a client that is so — in short, the skills and the judgment which make the difference between a person who has learned legal analysis and a few legal principles, and the mature lawyer who can give wise counsel, draw a good contract, and effectively present a case to a court or an administrative agency.

Acquiring this training has not been a serious problem for most of the graduates of the most prestigious law schools or for the top graduates of the less prestigious ones; they find their way into offices, whether private or public, that are aware of their needs and set out to meet them. But the situation is quite different for the many graduates for whom such openings and tutelage are not available — the young man who hangs out his own shingle or joins with two or three others of like inexperience. My worry is not so much that these young lawyers will not get business as that they will. Human beings with real problems should not be subjected to law graduates without clinical training or supervision any more than to medical graduates; moreover, a bad start is likely to lead to further deterioration, sometimes of a most serious kind.

I think it fair to say that the law schools have generally neglected this problem; at first because it was inadequately realized, and later because it was not very important for the leading law schools and the lesser ones have considered it beneath their dignity to do something which the greater ones did not have to do. I have no ready solution to offer; one of the pleasant prerogatives of a speaker on such an occasion is to pose problems without the obligation of solving them. One difficulty for a law school of stature is that many students will wisely not wish to devote very much of these precious years to a training they will later acquire at the expense of a law firm; it is hard to spot the students who are likely to

be less fortunate and still harder to tell them so. One solution would be to offer some guidance along these lines as an elective, perhaps not subject to grading, which each student is free to take or not as he thinks best. By doing this much and gearing the amount of prodding to its place in the job market at any particular point of time, the law school will at least have acquitted itself of its moral responsibility. Another is to take full advantage of the current interest in legal assistance to the poor — an opportunity to serve two good ends if proper supervision is arranged.

I come now to the second of the words in my title. Western Reserve Law School is not simply a law school but a university law school. It will not have escaped your attention that I have plagiarized from Cardinal Newman, and this perhaps imposes the pleasant obligation to quote his eloquent definition of a university, as "a place where inquiry is pushed forward, and discoveries verified and perfected, and rashness rendered innocuous, and error exposed, by the collision of mind with mind, and knowledge with knowledge."[6] Still more pertinently, in explaining the difference between teaching in a university and out of it, he said that in the latter case a professor was "in danger of being absorbed and narrowed by his pursuit," whereas the university teacher "will know just where he and his science stand, he has come to it, as it were, from a height, he has taken a survey of all knowledge, he is kept from extravagance by the very rivalry of other studies, he has gained from them a special illumination and largeness of mind and freedom and self-possession, and he treats his own in consequence with a philosophy and a resource, which belongs not to the study itself, but to his liberal education."[7]

Perhaps I am wrong, but I have the distinct impression that almost all American law schools, including the greatest, have failed, as have most other professional schools, to live up to this ideal. I do not mean by this that they have been unworthy of bearing the name of the university; quite the contrary, as said by one who has looked at the law school both from within and from without: "The *esprit* and the spirit of the modern law school are the wonder of many graduate departments and professional schools."[8] But there has been too little of the fruitful interchange of which Cardinal Newman wrote. The deficiency has lain quite as much in the fail-

[6] Newman, *The Idea of a University*, in 28 ESSAYS ENGLISH AND AMERICAN 38 (W. Elliot ed. 1910).

[7] J. NEWMAN, THE IDEA OF A UNIVERSITY 166-67 (1852).

[8] Levi, *Law Schools and the Universities*, 17 J. LEGAL ED. 243, 244 (1965).

ure of the arts and sciences curriculum to give adequate attention to law as in that of the law schools to draw on other faculties for the help that can be afforded by such disciplines as political science, economics, sociology, psychology, and medicine.

Again it is easier to say what the solutions are not than to define what they are. No one would want law taught to political or social scientists in a manner that would lead them to believe they had acquired a lawyer's knowledge. On the other hand, as Professor Hocking of Harvard said somewhere, "to teach social studies without law is like teaching vertebrate anatomy without the backbone." Whether the answer lies in including in the arts and sciences curriculum some courses taught by specially qualified law professors, or in the sharing of responsibility for some courses, or in seeing to it that professors of political and social science and economics have had some grounding in law, I do not know; very likely the optimum solution will depend on the human material available in the particular university. On the other side, some law schools have added nonlawyers to their faculties, but I gather that in general the results have not been too heartening and would think a collaborative approach might be better. What is vital is that the law school and the faculty of arts and sciences should stop either ignoring each other or glaring at each other, and make a start on interdisciplinary programs, as this law school has done in connection with the school of medicine. Once they start to swim together, they will find the water fine.

The third word in my title deals with Western Reserve's being a metropolitan law school. Only in recent years have we become aware how far the law has lagged behind increased urbanization. At the turn of the century less than a third of our population lived in cities; now the proportion has doubled and by the year 2000 four-fifths of our people will be there. This change, as said by a committee of the Harvard Law School faculty, has created social problems that are

> massive in every sense. . . . Governments concerned with metropolitan areas have to meet service needs — in education, health, safety, recreation, and so on — on an unprecedented scale . . . we have set for ourselves the goals of eliminating or rehabilitating slum housing, conserving existing sound housing, and building new housing as needed by the various income levels. . . . Public responsibility for coordinated transportation facilities covering the metropolitan areas is so new a concept that we do not yet adequately comprehend the nature of the problems either in economic and political terms or in legal terms. . . . The pressures on land

> and other basic resources have required the use of ever more sophisticated regulatory techniques — in zoning, subdivision controls, regulation of water and air pollution, traffic controls, etc. ... [G]overnment is trying to sharpen its uses of eminent domain, taxation, credit, and subsidies to carry out ambitious, affirmative programs for the growth and character of our cities.

In addition such old institutions as public education and the police are raising a host of problems requiring new legal solutions. Our failure to foresee such problems and deal adequately with them has been one reason for the exodus to the suburbs which in turn will create — or rather has already created — new political and legal issues of incredible difficulty; the income tax levied by New York City on all who work there is a recent illustration. Yet this is only a partial list — I have said nothing on issues so much in the limelight as voluntary defender work and legal assistance to the poor in civil matters.

At one time Cleveland stood high in the list of American municipalities for its awareness of its problems and its willingness to do something about them. It was no accident that one of the first important Supreme Court decisions on zoning was *Village of Euclid v. Ambler Realty Co.*,[9] and the survey of the administration of criminal justice in Cleveland by Dean Roscoe Pound and Professor Felix Frankfurter in the early 1920's was a pioneering effort in a field of such deep concern today. I trust I am not breaching the courtesy owed by a guest when I say that one does not have to go beyond your own newspapers or the report of the Cleveland Subcommittee to the United States Commission on Civil Rights to gather that this city does not enjoy the same position of primacy in municipal government today that it did under the mayoralties of Tom Loftin Johnson and Newton D. Baker. Less than a month ago, our New York press carried the report of a Cleveland citizens' committee that things were far from well with your housing and urban renewal programs. But Cleveland must retain enough of the Johnson and Baker spirit that it will not permit such a situation to go unremedied.

Western Reserve University Law School could play an important part in that task if given the wherewithal. The lawyer has the necessary talents for obtaining and weighing evidence, interpreting the contributions of other disciplines, and helping to devise solutions both feasible and fair. The university law school professor brings the added qualities of disinterestedness, of ability to locate and draw

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[9] 272 U.S. 365 (1926).

on other experts in the university, of prestige, and — hopefully — of time. Moreover, this is the kind of enterprise into which law students could usefully be drawn. It would give the very kind of extracurricular training that they need; indeed, it might afford them an expertise in these new areas even greater than their elders. It would help them also to realize their responsibilities as citizens and the capacity for leadership which their training affords them.

As I look back on these remarks, I am a bit frightened at the magnitude of the tasks I have assigned to Dean Toepfer and his faculty. They are to offer a training on how to become lawyers equal to the best; they are to take account of the fact that a larger proportion of their students than at Harvard or Yale may enter practice by themselves or with equally untrained associates; they are to see to it that law achieves its proper place in the arts and sciences curriculum, and to find ways and means of utilizing other departments of the university for the school's benefit; finally, they are to help Cleveland meet its host of urban and suburban legal problems. For a faculty of a dozen or so full-time professors this would be not simply a heavy load but an impossible overload that would ensure a blackout. My modest proposal would even tax the faculty of 18 to 22 full-time professors which the committee to study this law school recommended. Yet if Reserve is to be the kind of law school that it can and should be, all these tasks must in some measure be accomplished, and it is for the alumni and other well-wishers of the institution to make that possible. The great gifts of Mr. Hutchins and of the George Gund Foundation and family are magnificent and heartening steps, but only that. To paraphrase Mr. Churchill, give Dean Toepfer the tools and he will do the job, although you must not expect him to achieve all these goals in a year or even in several. But I hope that by 1992 a good part of them will have been accomplished so that your 100th-Anniversary speaker will have to search out further and still more challenging tasks for The Franklin Thomas Backus School of Law.