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The University, The Professions, and The Law[†]

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THIS NEW LEGAL CENTER proudly carries a name synonymous with the law's responsiveness and concern. The Earl Warren Legal Center is a commitment to professional social action. Ours is a society in transition. Our aspirations are high. Pride has been great. Control over nature has increased. The society, or at least a considerable portion of it, is affluent. But these factors makes less acceptable our present situation. Urban squalor and crime, the contamination of the environment, our failures in education, the inequality of citizenship for the poor, the consequences of continuing war—all these press upon the conscience of the community. For the quality of life in a society in transition, the role of law is pivotal. The law's procedures providing means for participation and fulfillment of the sense of fairness can draw the society together and give stability in change. Moreover the operation of the legal system causes or retards change. This new Law Center expresses a confidence in the relevance of the work which can be accomplished here, both for the quality of life in our present society and for the movement toward the realization of those persuasive, albeit changing, goals, which we have set for ourselves.

Custom, cohesiveness and collective responsibility are of enormous importance to our calling. Perhaps this is why the Inns of Court remain as a romantic ideal for the American lawyer, even though centuries ago the rise of easy printing disrupted the enforced comradeship among lawyers and law students, and made less important the relationship of judges as teachers with the students' box in the court room.¹ The ancient

[†] This paper was delivered on January 2, 1968, as an address for the dedication of the Earl Warren Legal Center at the School of Law (Boalt Hall), University of California, Berkeley. It is reproduced without substantial change, except for the addition of footnotes.

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¹ R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 91 (1953).

college, established as a residence unit in part to keep the "undisciplined swarm of rowdy, irresponsible, and often dissolute boys and youths from fourteen upwards" off the streets where their "riots and misdeeds" were a public nuisance,² in the modern age has become the basis of a special environment for law students within the larger university. Now the Law Center, through seminars, workshops, continuing education for judges and lawyers, law revision and research, at least symbolically—and perhaps with more reality than that—extends this environment to the profession as a whole.

It is characteristic of our age that the Law Center, an institution intended to conduct and translate research into service and action, should be located within a university. There are today insistent voices stressing the service duties of universities. One such strong voice is that of Secretary of Health, Education and Welfare, John Gardner. The Secretary points to the enormous problems to be solved. He writes: "We can build gleaming spires in the heart of our cities, but we can't redeem the ghettos. We can keep people alive 25 years beyond retirement, but we can't assure them they can live those years in dignity. We choke in the air that we ourselves polluted. We live in fear of a thermo-nuclear climax for which we provided the ingredients."³

The Secretary is not too complimentary about what universities have accomplished. "Consider," he says, "our most grievous domestic problems—the cluster of interlocking problems centering around poverty, the cities, and the Negro. . . . There are brilliant and effective members of the academic world who have contributed to our approach to these problems. But generally speaking . . . one cannot say the universities are a significant intellectual base for the main attack. In fact, a good many university people . . . barely understand what the relevant problems are. Many are debating policy alternatives left behind five years ago."⁴

The Secretary then calls upon the universities to manifest "a focused, systematic, responsible, even aggressive concern for the manner in which the society is evolving"⁵ "We need," he writes "to be told how to build a better society, and how to get from here to there. Most of all, we need help in the difficult business of changing institutions."⁶

There are quite a few professors who might be willing to tell the Secretary how to build a better society. Their advice might not always be usable. The chairman of the English department in a technological uni-

² 1 C. PREVITÉ-ORTON, *THE SHORTER CAMBRIDGE MEDIEVAL HISTORY* 625 (1952).

³ Gardner, *Universities as Designers of the Future*, 48 EDUC. REC. 315, 317 (1967).

⁴ *Id.* at 318.

⁵ *Id.*

⁶ *Id.*

versity has recently bitterly denounced the misuse of the study of literature.⁷ Instead of seeing an increasing number of students and courses in this area as a response to the opportunities of the leisure society, he ascribes this growth to the necessity of capitalism to expand to avoid collapse. In his view, the university's institutional function is to contribute to the technological triumphs of capitalism, and departments of literature are as deeply involved in this as departments of industrial management. "The more Vietnams," the professor writes, "the more endowed chairs."⁸ Instead of viewing the study of an art form as in inquiry into models of excellence, his position is that the study of literature should be an instrument of social change, beginning with an examination of social needs. Literature should be used as a form of agitation to undermine the status quo, to touch the raw nerve, "to remind students of human possibilities, of the reality of feelings, of both horror and beauty," even though this won't "stop the butchery in Vietnam."⁹

Some might call the critic a dissenter. Secretary Gardner recognizes that he would "not wish to see anything happen that would alter the character of the University as a haven for dissent and for creative scholarly work."¹⁰ So the statement of the discussion of the Trustees of the Carnegie Foundation for the Advancement of Teaching concludes that public service is one of the three functions of the modern university but cautions that public service also means sanctuary for the dissenter. The caution is appropriate. An institutional approach to the solution of problems would restrict the freedom of the individual scholar. The resignation of the Quakers from the government of the colony of Pennsylvania when there was a war to be fought with the Indians was probably good for both the Quakers and the colony. But it is not the function of a university to govern, and a university needs dissenters because ideas are important. I should add an implication that dissenters can find their only sanctuary within a university ought to be—and I think is—an unfair description of our society. It is similar to the view that the universities must support the performing and creative arts because no one else is interested.

When Secretary Gardner asks for a more intentional direction of effort toward solving the problems of society, he is asking for professional work. Professional work carries its own responsibilities. The scholar's concern and even his complete personal involvement is not sufficient to create a profession. Contrary to the modern view, there was a time when

⁷ Kampf, *The Scandal of Literary Scholarship*, HARPER'S, Dec. 1967, at 86.

⁸ *Id.* at 88.

⁹ *Id.* at 91.

¹⁰ Gardner, *supra* note 3, at 317.

universities were much more professional than they are now. The medieval university directed its work toward the needs of the three major professions of theology, law and medicine. These callings exercised sovereignty over large realms of knowledge and action. Knowledge was viewed as both unified and purposefully related to a discipline with responsibility for its application. There was less specialization but also less freedom. It is not at all clear that the literary critic's view of international relations, philosophy, and economics would have been considered appropriate within that framework. Today with the growth of specialization and freedom, we ask of the individual scholar only that he formulate his views so that they may enter into some kind of a market place for rational discussion. It is assumed that exchange of ideas will build upon the individual work of many persons, and we rely on this process to achieve a kind of coherence. Furthermore, there is no one profession for the social sciences—no profession which monitors and brings together knowledge and experience to answer grievous domestic problems. Perhaps the universities have not been the significant base for an intellectual attack upon many of these problems. But there has been no effective substitute for the universities either.

A learned government consultant, an expert on universities, has catalogued the assets which the university has to aid in building the great society.¹¹ These are staff, buildings and grounds, a climate within and prestige without, objectivity, a commitment to search for new knowledge, and the fact that universities have values and stand for something. He includes human talent, but remarks there is substantial evidence that neither the government nor the universities hold their share of superior intellects. This is because the rewards of the profitmaking world are so much greater. This catalogue, while correct, is harrowing. Objectivity, the commitment to values and the search for new knowledge can be lost or distorted if the university is misused. The climate within can be ephemeral. Staff, buildings and grounds and prestige do not make a university. The suggestion that lesser talent must be sufficient because the better minds are in commercial fields either demeans the complexity of the problems to be solved, or suggests the universities cannot be the best place to solve them. The essential power of a university is the power of the individual mind, disciplined by the requirement that ideas be objectively stated and reexamined. The objectivity required is analogous to what is meant by the rule of law and not of men. Just as the rule of law summarizes a relationship among institutions and men which protects freedom, so the rule of ideas is essential to the accomplishment of the modern university. The idea must be objectively stated so that it is free

¹¹ Corson, *If Not the University*, 48 EDUC. REC. 153 (1967).

from its originator, can be translated and reexamined in the light of other disciplines and many cultures, and meets the tests and the corrective process imposed by the force of other ideas. This is the rational process. It is sometimes attacked because the unconscious, the emotional, the concern for human values and the need for action are thought to compete or override the rational approach. These are also sometimes suggested as tempting reasons for bypassing the rule of law. But the nature of the subject matter to be examined, the agony or accident of discovery, the intentions or commitment of the individual scholar do not substitute for the rethought objective statement. Yet all would agree that somehow ideas must be made more relevant to present problems.

This is the function of the professional school and of the professions. It is through the professions that ideas developed and discussed within universities find their way to treatment and application. It is through the professions that a better conception of problems to be met are brought to the universities for analysis. The relationship is intricate and continuing. The profession itself is involved in the creative process. It develops institutions of its own to facilitate the bringing together of ideas and problems. It has its own customs, its own sense of group responsibility and purpose. It develops the craftsmanship necessary for understanding and application—a craftsmanship which itself reflects a group judgment as to what the main problems are. It is concerned with the continuing education of its members and the training of successors. The professional schools within universities reflect this concern. At the same time they represent the profession in the examination of basic problems and relevant ideas. The prototype of the overall relationship can be seen in medicine where the physician, the institutes, the hospitals, the medical schools and the universities form an interrelated complex. When the system operates properly—and this is a problem for any profession—the exchange of ideas as to problems and theories is continuous. The physician, whether or not he is on a medical school faculty, or in a university hospital, or in a group clinic, or in practice by himself, has a relationship to the continuing research of the universities and institutes. And the profession provides group action for the solution of problems—that, after all, is what a hospital is.

I realize that in using this example of medicine at a law gathering, I have done worse than carry coals to Newcastle. The error in prototype is that it doesn't quite apply outside its field. Moreover, medicine, while a favorite analogy used by legal educators—think of the phrase "legal clinics"—has its problems of organization. The social ailments with which law must deal have their own difficulty, although both law and medicine are confronted with contagion and group problems, and both are con-

cerned with conditions closely related to the structure and operations of our society where individual effort by the most dedicated professional may seem ineffective. In any case, I have idealized both the universities and the professions. The relationship between them is frequently not that close or rewarding. Arrangements may look fine on the surface but there is not much underneath. The professions like to be masters in their own house. They determine what the house is. The scope of a profession is determined by the institutions it serves, custom and theoretical structure. Of course no profession can know everything. It must delimit its boundaries. Yet in doing so, it may fail to examine the very problems which should be at the focus of its attention. If the poor have no legal problems, or at least no problems interesting to law students, perhaps this should be a major concern for the law schools and the profession.

There is a natural lag in the perception of problems. The fragmentation of knowledge has increased this tendency. This fragmentation is matched by the proliferation of professions or quasi professions. There is competition among advice givers. Remedies which are proposed are likely to reflect the particular bias of a segmented discipline, and often without the process of consultation and growth which a profession ought to give. Perhaps all of this is grist for what is called the decisionmaking process in a democratic society. But it removes the thoughtful coordinating influence of a profession at the point where it is most needed. This underlines again that there is no one profession for the social sciences. To reuse the medical analogy, if there is to be no first, general, or coordinating physician in the modern world, then some kind of new institutional arrangements will have to develop to replace him.

But the lawyer, even though the bar also reflects the growth of specialization, has always prided himself on being a generalist. His discipline touches most aspects of men in society. He deals in persuasion and therefore is required to believe in the liberal arts, which are a generalizing influence. James Madison advised a young friend to study law because, Madison said, "It alone can bring into use many parts of knowledge you have acquired and will still have a taste for, and pay you for cultivating the Arts of Eloquence."¹² I regret to say he adds while he commends his friend's "determined adherence to probity and Truth in the Character of a Lawyer," he fears that "it would be impracticable."

The profession honors, in tradition at least, the connection between the discipline of law and other sciences which relate to human nature. The case method has chased out of the modern law school most of the lectures on moral philosophy which once adorned the university study

¹² 1 THE PAPERS OF JAMES MADISON 96 (W. Hutchinson & W. Rachal eds. 1962).

of law. But the discussion of cases themselves is in the liberal arts tradition of the examination of men, motives and, sometimes, consequences. And the lawyer sees himself as a coordinating influence, a strategic intermediary between people, between the government and the individual, between ideas and their application. Listen to Karl Llewellyn's description: "the essence of our craftsmanship lies in skills, and in wisdoms; in practical, effective, persuasive, inventive skills for getting things done, any kind of things in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field; and then in skills for *regularizing* the results, for building into controlled large-scale action such doing of things and such moving of men. . . . we concentrate on the areas of conflict, tension, friction, trouble, doubt—and in those areas we have the skills for working out results."¹³

The Earl Warren Legal Center will find its greatest opportunity for service if it takes seriously the ability of the lawyer as generalist and as a coordinating influence. This occasion cannot help but emphasize the central task of law in perfecting basic values. The questions to be answered are the perennial great ones. Witness the resurgence in our time of natural law questions: If the ordinance which is contrary to higher authority need not be obeyed, why should the law which is contrary to higher ideals be enforceable? What is the place within our society for civil disobedience? The Supreme Court indeed in our own times has had to determine a question of massive civil disobedience. In the history of our country the record of the Supreme Court of the United States under the leadership of Chief Justice Warren is unparalleled in the effective attention given to the development of constitutional doctrines to safeguard the dignity of the individual. The accomplishment is awesome. It ranges from the basic rights of accused defendants, to the reapportionment of legislatures, to the protection of free speech, assembly, teaching, association and freedom of conscience, to the right to equal education. And any lawyer could add to this list. The Court has thus been concerned with the wellsprings of our society. But I am sure the Chief Justice would agree that many of the decisions point directions for work which cannot be accomplished by the Court by itself. New tasks have been presented for the bar and for public and private agencies; new responsibilities have been imposed upon the individual citizen.

The court system is indeed the guardian of basic rights which are the law's special concern. But I trust the Earl Warren Legal Center will not have as its emphasis the study of the work of the Supreme Court

¹³ Llewellyn, *In the Crafts of Law Re-Valued*, 15 ROCKY MT. L. REV. 1, 3 (1942), reprinted in K. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 318 (1962).

of the United States or the Supreme Court of California. In the work of these and other courts there is much to study, and much to interpret and clarify. This is what the law schools have been doing for years. No doubt they will continue to do so. But as the career of the Chief Justice himself shows, there are other law agencies, and there is the bar itself. The separation which we see today between court and legislature, itself an example of specialization, should not hide the fact that the obligation for perfecting law is at least as much on the legislatures, and some would say more, as it is upon the courts. And lawyers who are member of legislatures should hardly be thought on that account to have removed themselves from the tasks of the profession. It is of course true that the courts have possession of the wand, goad, or hammer of constitutionalism. I do not join some of the critics of the courts, who review cases and opinions as though they were plays, in deprecating the growth of constitutional doctrine. But this does not prevent the expression of sorrow, which all members of the bar should feel, that so many steps, which should have been taken because they are wise, were only taken, and if then, when the courts made them necessary. Moreover, it should be said that in so many instances the constitutional decision cannot by itself settle the larger problem, and the true effectiveness of decisions must wait until the other agencies of the bar and of society catch up.

The Earl Warren Legal Center has the opportunity to examine in depth some of the pressing social problems which mark a society in transition. I refer to Secretary Gardner's listing of those issues which weigh upon everyone. He mentions the cluster centering around poverty, the cities and the Negro. Of course, these are not just legal matters. But they do involve the law in many ways. They have a legal base, and we are supposed to be the generalists and coordinators. Think of some of the characteristics of our public school systems. The average current expenditures in 1965 for the East South Central states was 354 dollars per pupil in the primary and secondary public schools. The comparable figure was 732 dollars for the Middle Atlantic states. Of course the cost of living varies, and there is no reason anyway to suppose that one dollar for education has the same value for all places. Nevertheless, the difference is rather great and does mark a national problem. These discrepancies also occur within a single state. They occur between suburbs surrounding a single city. For example, the expenditure per high school pupil in a suburb to the north of Chicago is 1,283 dollars; in a suburb to the south of the city it is 723 dollars. The expenditure per elementary school pupil in a northern suburb is 919 dollars; in a southern suburb it is 421 dollars.¹⁴ Major differences occur between the suburbs and adjacent cities.

¹⁴ I am indebted to Dean Roald F. Campbell, School of Education, University of Chicago

And within cities. The students are compelled by law to go to school. It is state action which brings them there. It is state action also which has made the school districts. "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."¹⁵ Is there reason to believe that the opportunity for required education is really equal when there are these extraordinary differences—and the examples are many—which occur between suburbs of the same city within the same state? And is this discrimination in the operation of this most important function of state and local government to be justified because this is the way the ball bounces; that is, this is how state action happens to collect and happens to allocate funds for the education it requires of all?

I have stated the questions in this form to suggest, as I believe, that there is a strong argument to be made for the unconstitutionality of certain aspects of the present system. But I would hope this and other legal centers would take problems of this kind in their larger dimension. Not only law is involved. Methods and systems of education, the governance of the suburbs and adjoining areas, the tax systems which make for inequalities—all these and more have their impact. If coordination can be provided for these problems, concentration given and followed through, the relevant social sciences brought to bear, their interest awakened by the larger picture, then a magnificent contribution can be made. I am not speaking of a conference. I am speaking of that relationship between research and alternatives of thought-out action which can draw to itself the ideas to be found within the universities and from the concerned professions, of on-going work which will build upon itself and will stay with the problems until solutions are reasonably worked out and made clear. And then explained, reviewed and corrected through the instrumentalities of continuing education.

This is not a new call for research and action. It has been made to the law schools many times. The Earl Warren Legal Center should make possible that kind of thoughtful research and coordination which will make a difference. Perhaps this will be beyond the capability of the law centers. But this Center is so nobly named, it should not fail in its mission.

for data on the per pupil suburban expenditures. For a discussion of some of the issues, see papers by Arthur E. Wise and Philip Kurland to be published by the University of Chicago Center for Policy Study.

¹⁵ *Brown v. Board of Education*, 347 U.S. 486, 493 (1954).