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ADDRESS

of

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before the

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On an occasion such as this, I always envy the gifts of a former colleague of mine. Versed to an extraordinary degree in continental history, his answers to modern problems always found suggestive roots in the dim past. Indeed, it was sometimes said of him that you were fortunate if he only began his answer with events in the time of Dicoletian and didn't insist that for the solution of a matter of seemingly everyday academic policy some search back beyond the Empire was essential. And yet it was amazing to see him grasp some galvanic current moving from the past and with that distant spark illumine a modern problem.

In the field of education such a technique is or should be commonplace. As one grasps for shadow better to view sunlight, so your presidents stand in the shadow of an ever-lengthening past. To its depth and its quality, at Harvard three centuries already can testify.

But that attitude is not a prerogative of presidents alone. It is the privilege of all those who care about education, for there, perhaps, more than anywhere one has to try and pierce the brilliance of continuing dawns.

Some hesitation naturally attended my acceptance of the invitation to speak before this gathering. Closeness to political life and absence for some years now from the academic scene, made me doubt just what I could contribute to this occasion. On the other hand, I was anxious to come. I was anxious to get, if I could, some better sense of what Harvard men were thinking and where the drive of their objectives lay. I thought that in return for that I might, perhaps, essay some contribution from the firing line where law is being made, in terms of the relationship of that process to Harvard's traditions.

That the Law School has the richest shadows in all American legal education is, or course, accepted everywhere. Its use of them as vantage points rather than as retreats is emblematic of its traditions. But let me touch for the moment upon some of those that seem to me central so that we can properly set the background of our thinking.

First, we may mention the insistence upon technical competence. Just as those who would make music a profession submit to the stern discipline of daily drill and finger exercises, the student of the law needs to master, and master effectively, the methods of handling the materials ready to his hands. It is the insistence upon competence in the method of inquiry upon realism in the articulation of premises, upon relevancy in reasoning from them, that strikes the entering student of the law school with emphasis. Indeed, where in the first excitement of the search for knowledge he hopes to find answers to the many problems of the law, he finds at first no answers, instead analysis of methods for searching for them. It is drill, to be true, sometimes dogged determined drill, and yet the type of ground school training without which no flight can be safe. This tradition, of course, we dare not sacrifice; nor on the other hand dare we prolong it so long that the very urge to fly leaves before the opportunity arises.

A second tradition that, perhaps, should be integral to the very idea of education and yet so often is missing, is the insistence upon the centrifugal forces of instruction. From an administrative standpoint, to search for men with varying minds, varying outlooks, is imperative. As illustrative one can recall the contribution made by the combination of James and Royce in the early days of the Philosophy Department at Harvard, a contribution duplicated elsewhere and especially characteristic of the Law School. The bond

of a faculty can never be loyalty to particular truths, but the deeper one of loyalty to the idea of truth. Such a bond made of the Law School a hub from which the spokes ran out to far horizons. Under the shelter of such an idea men of diverse legal creeds, diverse social outlook, could gather, and by their example, make of the profession of the law an avenue for the attainment of varied ideals.

A third tradition of the Law School, indeed the tradition that even before the days of Langdell brought it pre-eminence in its field, was that of not only a willingness but an eagerness to pioneer - an attitude that embraced not only the instructional method but also went to critiques of the substance of law. To see how true this is, one need only think of Langdell's conception that the best method of forging ideas was not through didactic pedagogy but upon the anvil of debate. His realization that no uniform architectonic qualities could dominate structures that each man had to build for himself, led him away from the effort to impress formulated conceptions of the law upon his students, and to the effort to encourage them to select and build, stone by stone, their own structures. This contribution, commonly known as the case system of instruction, was perhaps the most effective force in the revitalization of legal training in the Nineteenth Century. Or, again, one need only turn to Ames to realize how the ethical content of the law was enriched by his efforts to search for principles of action and decision, not fashioned for the occasion, but finding their verities in the deep crucible of the past. To him history was never inert knowledge, but the source of ideas from which to understand the present. Or James Bradley Thayer, who gave constitutional and other forms of public law the recognition that its major decisions rested so much upon considerations of wise statesmanship. Or Pound, who envisaged that the major problem of Twentieth Century American law was the need for its adaptation to a modern industrialist society, and with that vision flung his challenge to the lawyers that such an adaptation could be made effectively only by the absorption into the law of the content of the other social sciences.

The picture of these men is one not of persons tending a formal garden, rearranging it here and there to suit a passing taste, but rather one of daring on the frontiers of knowledge.

These three aspects of the Harvard tradition fit into a harmonious triptych. The emphasis on technical competence protects us against newness for the sake of newness, instilling as it does the discipline that one must know the present progress of an art before one essays its further advance. The emphasis upon centrifugal forces means absence of moulds of opinion, the freedom of choosing one's own way of living, and the joy of finding that the law can be its avenue. The tradition to pioneer, means more than the glory of exploration. It means the insistence upon refreshing the law through continual reference to the needs of a nation.

The needs of the nation today with respect to law may seem to us endless, complex, and novel. There can be no doubt of their great number or of their complexity. But I do not believe that with reference to the springs of their origin they present anything essentially new. From decade to decade our needs with respect to law have varied, but they have varied only in form or in the intensity of demand. They can all be related to the continuing existence of two fundamental desires. The first is the constant clamor of a changing society for the recognition through law of new rights, new claims,

new liberties. The second is a demand for the fashioning of new machinery to give old rights their intended effects - a demand that arises because the complexities of such a society tend to dull the effectiveness of the old machinery to realize the old rights.

Examples of the first desire - for the creation of new rights and new liberties - are to be seen most frequently under conditions of national economic stress, or under conditions where a slow shift of power in society from one group to another occurs. The recognition of this need comes about sometimes dramatically through legislative action, at other times imperceptibly in the course of litigations that offer opportunities for judicial lawmaking. The history of our law is replete with illustrations of the creation of new rights. In the employer and employee relationship, the right of employees to quit work together for the simple end of improving the conditions of labor found recognition only in the early Nineteenth Century. Indeed, the right to strike and through such economic pressure to force collective bargaining found no recognition in this country until the turn of this century, and even today in many states it is still of doubtful standing. But the insistence upon collective bargaining refuses to stand still. It is pushing itself now from a claim to use economic pressure towards the accomplishment of this end, to an insistence that the law itself shall impose a duty upon the employer to endeavor conscientiously to arrange a collective labor contract with his employees when a majority of them so desire.

In the same field we have witnessed for some years the effort of employees to bring about recognition of their claim to be free to persuade others to refrain from taking their places, who, by such action, would diminish the effectiveness of their own economic pressure. In recent months we have seen the advancement of a new claim to take measures that will effectively prevent all production until grievances are satisfied - action that in its economic effects is the counterpart of the lockout, but because of the absence of any relationship such as the lockout possesses to property, finds itself with doubtful traditional legal justification. The eventual outcome of such a claim will depend in part upon the emphasis that law will give to the concept of property and its inviolability in its industrial and corporate setting to economic pressure of this type, - and in part, perhaps, on the capacity of our law to devise new concepts and mechanisms to meet the needs out of which this type of economic pressure has been born.

Elsewhere in the industrial field other claims are being advanced, such as the claim that society must exact as a condition precedent to the existence of an enterprise a duty upon its part to pay its employees a living wage. In the consumer field, claims to new freedoms are similarly being asserted - the claim for more truthful presentation of the product that is offered whether that product be a cosmetic or a security. In the field of corporate organization the stockholder is clamoring for protection against complexity in the corporate structure, against the divorce of ownership from control, against the uneconomic combination of business units into a far flung enterprise. In the field of merchandising, complaints not unlike those that shippers made some sixty years ago against carriers are coming to the fore - discrimination in price - without relationship to quantity or quality, and the presence of a host of unfair trade practices that can so readily conceal themselves amid the complexities of modern methods of distribution. In the field of agricultural and mineral production, producers themselves inveigh against the wasteful use of limited natural resources by competitors.

The desire for new machinery to make more effective the protection of old rights arises out of depreciation and obsolescence in the established mechanisms of the common law. The normal processes of litigation prove themselves, for different reasons, to be ineffective in bringing about the practical recognition of recognized rights. They fail either because of the cost that attends the process, because of the delay that it involves, or because of the inability of men not expert in highly specialized fields to apply accepted principles to new situations. But the instinct for a living law refuses to accept frustration. It simply seeks other forms for its realization. Chief among them today is the administrative process which is only a different form for the assertion of law. It behooves us to recognize the extent to which rights formerly the exclusive concern of courts now seek their realization largely through administrative tribunals. Practically all the relationships of the individual with carriers and with utilities are under the immediate guardianship of such tribunals. In numerous fields, such as banking, insurance, immigration, stockyards, commodity and security exchanges - to mention only a few - protection of individual rights, mediately or immediately, is in the hands of such tribunals. The economy of this process, its capacity within itself fairly to dispose of controversies, its ability to do so with dispatch and without insistence upon some of the technicalities that the ordinary law demands, the relationship of court review to administrative action, are all the concern of the present-day lawyer.

Administrative law in this sense finds only sparce recognition today at the bar or in the schools. In court and out of court, it remains something of a stranger regarded suspiciously because of its intrusion upon traditional patterns. Yet fundamentally it is the outstanding response of our generation to the demand for a modern machinery to protect our old liberties.

In the field of legislation, articulation of legal principles grows apace. Principles of law, formerly left to enunciation through cases, are finding their way with rapidity into statutes. The content of the law contained in statute books could once be conveniently ignored. Today, legislation, instead of being a sporadic characteristic of law, tends often to be the sub-structure from which the major portion of rights and obligations derive. It calls for independent study not only of its content but of the processes that bring it into being.

These, then, are briefly some of the vital needs of the nation, needs which will inevitably determine the pathway of the law. And the life of any school will rest upon its capacity to divine that pathway. The challenge that it must be able to meet lies upon the frontiers of today's knowledge, the frontiers of social and economic change where the patterns of the legal order still are confused and where the role of law itself is still in doubt.

But such a challenge is ready-made for the traditions of Harvard. These traditions to me spell lawyers conscious of their role not as craftsmen but as mediators of human affairs, eager to understand the new claims, anxious to weigh their merit in the light of the cross claims to which the new claims give rise, and fearful not of change but of the want of understanding. So, also, the traditions spell a school in the forefront of fashioning and refashioning the substance and the machinery of law to effectuate the aims of today's and tomorrow's society. To seek safety by retreat to the shadows of a past has not been our history. Instead, our strength has lain in the inculcation of discipline, in the variety of outlook, in the boldness to pioneer.