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Education For Professional Responsibility

*Robert E. Mathews**

There are three reasons why I am happy to be here today. Most obviously, it is an honor of major proportions to be invited to participate in a Centennial of a great university. I am not accustomed to participating in centennials and I suspect that I may not be very good at it; in any event, I've never once been invited back to the second centennial of any institution that has invited me to the first. So perhaps I should more wisely note that this is also the 54th anniversary of a great law school and the 29th of a great medical school. Thus, at least in terms of the mortality tables I do not enhance my prospects for a return engagement.

Moreover, I like speaking on this topic. Each time I do it, I try again with renewed hope that at least I may have found a new way to express a thought that, I believe, has real significance. Thus am I grateful for this further opportunity to have another try.

But I have a third reason that is very close to my heart. Almost sixteen months ago your law school lost one of the truly great members of your faculty. At one time he was a student of mine; for over 12 years he was a cooperating editor with me on a three-volume work and later its chairman; throughout his whole life he was a true scholar, a man of principle, a man of great personal courage and magnificent character. I consider my visit here as something of a pilgrimage, an opportunity to pay this homage to a man who exemplified better than any words the subject of this talk: Charles A. Reynard.

Dean Wade has given us a searching analysis and a refreshingly new approach to the ideals of our profession. It is my not-so-small task to discuss how it is that we may better inculcate in our students the desire to attain them. Superficially this is a misleadingly easy topic to discuss; it lends itself admirably to vacuous generalizations. On the other hand, it is one that is extraordinarily difficult to discuss with any real prospect of usefulness.

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For one thing, the subject matter has been aired so often as to have lost its freshness. Both words and ideas tend to do so even precious ones, like freedom, democracy, and the dignity of the individual. So it has come to be with professional responsibility. These are words that have been repeated so often as to have lost their capacity to evoke response, to induce critical thought; much as, I am told, the effectiveness of penicillin decreases with the repetition of its use.

I should gravely doubt that the intern who gives inductees their anti-tetanus shots at the rate of 85 to 100 an hour gives thereby a less effective shot to the hundredth than to the first, but his own responses must have become increasingly dulled, free of thought, of considered judgment; must have degenerated to a mechanical act whose supervision has been abandoned to the lower reaches of the nervous system. With a speaker, this risk is doubled. Not only is there danger that he himself has lost his freshness of approach but, unlike the serum, his message too may have suffered in the same way. It could well be that Mrs. Malaprop, were she to have heard any two of his discourses, would have observed in some pain how "directly the similitude struck her."

How then does one get below the surface of a topic like this? A philosopher would have resources of his own and a minister of the gospel could call for Divine Guidance with some reasonable hope of succor. But where does a lawyer go for aid, one who is but an untrained layman in the subject he finds himself discussing?

For one thing, he can avoid definitions. They are snares for both definer and definee. Moreover, they are tedious. Even the Taft-Hartley Act, scarcely an outstanding source of gaiety and badinage, has relegated its 13 definitions to Section 2 and opens with a series of policy statements that by comparison are sheer delight.

While I realize that I am fully entitled to assume that a university audience shares a common understanding, however vague, of the nature of what we call education, I shall for the sake of good measure, as it were, toss in a sentence from Whitehead. After some devastating remarks on the pedantry and harmfulness of inert, unused ideas, he commends warmly the relation of ideas "to that stream, compounded of sense perception, feel-

ings, hopes, desires and of mental activities adjusting thought to thought, which forms our life." He then concludes: "Education is the acquisition of the art of the utilization of knowledge."¹

Quite obviously there is implicit here a value judgment that the utilization will serve desirable purposes. Here it is, I think, that we come upon the concept of responsibility. Perhaps I shall be forgiven if I make a tentative assumption here, this time with no Whitehead to point it up, that a university audience shares also a common sense of the nature of responsibility. I am not referring to the perception that each of us senses so clearly of the responsibility under which other folks labor, for that is a perception that all people share, not merely this audience. Rather, I have in mind a sense of self-responsibility sufficiently perceptive to make further definition of it here unnecessary. At the risk then of seeming irresponsible in failing to define responsibility I must leave these assumptions and get on at once to something closer to the topic of this conference — in short, to what it is we mean by "professional."

There is, I fear, no proper way this time to by-pass a definition. As in Taft-Hartley, at least this vestige of Section 2 must of necessity remain. And the reason is close at hand. Even though a mutual understanding of "education" and "responsibility" may, in generic terms, be taken for granted, their application to the professions is quite another matter. One must have given thought to what it is that is a "profession" before he can speak, with any hope of successful communication, of what its responsibilities may be and how he would educate for them.

Perhaps the best known definition of a profession is the one just quoted by Dean Wade. It was uttered only seven years ago by Roscoe Pound.² To him a profession is "a group of men pursuing a learned art as a common calling in the spirit of a public service."

My medical friends will agree, I am sure, that the major factor that sets our occupations apart from other honorable but non-professional callings, is the final thought: the spirit of public service. Moreover, take note that it is a service that is public; that is, in other words, not merely to one's private clients and patients but to others as well. Without this sort of service in substantial degree, what we are devoting our lives to is unworthy

1. WHITEHEAD, *THE AIMS OF EDUCATION* (1932).

2. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

of the privileged title "profession." It is education for this service that concerns us here today.

I believe that the world will concede, not grudgingly but warmly, that in one vital respect we are serving our clients and patients well; we are giving them the protection of high skill and competence and we are giving it with sound discretion and wise judgment. But for a professional man competence is not enough; competence is minimal only, even though supported by knowledge and guided by wise judgment. One of the great law teachers and scholars of all-time, Floyd Russel Mechem, once said:

"Think what it would mean if the thirty-five hundred or so of young men who now go out yearly from these law schools to every town and city in the land could go with not only the best possible training in the law, but with the highest possible ideals as to its duties and responsibilities and the strongest possible ambition for its improvement and advancement."³

That was a magnificent dream, a moving challenge to those who were then our teachers; to us who are their successors. It was 54 years ago that he uttered these words, the very year this great law school was established. The young men of whom he spoke are now in their middle seventies. It is their grandchildren who now fill our classrooms. Instead of 3500 there are today over 9400 who go out into our land each year.

Not many years later, at the dedication of the Michigan Law Quadrangle, Mr. Justice Stone set forth with significant candor that

". . . Even those of us who have the most abiding faith in our profession, and the firmest belief in its capacity for future usefulness, . . . [must] admit that in our time the Bar has not maintained its traditional position of public influence and leadership."

He then passed the responsibility directly to us, who educate for the profession, by concluding:

"We may well pause to consider whether the professional school has done well to neglect so completely the inculcation

3. 5 MICH. L. REV. 344, 346 (1907), a paper read at the Annual Meeting of the Association of American Law Schools, August 28, 1906.

of some knowledge of the social responsibility which rests upon a public profession. . . . It is not [he added] beyond the power of institutions which have so successfully mastered the art of penetrating all the intricacies of legal doctrine to impart a truer understanding of the functions of those who are to be its servants."⁴

Now, a half century after Professor Mechem's dream of a great contribution, and a quarter century after the Chief Justice assigned us the proper but baffling task of giving it reality, we come together to take stock of the meager responses we have made.

The service of a professional man must exceed his competence in ways that are both qualitative and quantitative. His is a service of devotion and loyalty, so consuming as to place the welfare of client or patient beyond the convenience, beyond the comfort and, upon occasion, even beyond the personal welfare, of the lawyer and physician. Moreover, it must be a service that extends beyond this immediate relation of client or patient; it must be a service to the community, to the unknown, unidentifiable human beings who make it up, who are, in a biblical sense, our "neighbors."

It was "a certain lawyer," you will recall, whose inquiry brought forth the famous parable of the Good Samaritan; who asked Jesus the question, "Who is my neighbor?", and who, when the victim of the thieves had been identified as the neighbor, was told by Jesus, "Go and do thou likewise." There is, I think, a peculiar relevance today, this very afternoon, in the fact that it was to a lawyer that Jesus was speaking when he commanded him to do as the Good Samaritan had done, to go to the aid of the afflicted and the victimized. Nor is it inappropriate to point out to our professional friends that the immediate assistance given the victim was actually medical, for you will recall, "he bound up his wounds, pouring in oil and wine, set him on his own beast and brought him to an inn and took care of him." So it is, that in one simple story the way has been pointed out to both of the professions whom we honor here today.

While it is not impossible that contemporary logic is based on the Gospel according to Luke, I suspect that it is fully as plausible that it is based on the circumstances that accompany all professional education. After all, professional persons have

4. *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 3, 13, 14 (1934).

received far more from their educational institutions than they will ever repay: free schooling, college tuitions that are scarcely more than nominal, and a professional education that exceeds by thousands of dollars our student fees. This means, of course that it is the people of our states who provide these funds, the people whom the Good Samaritan, were they in need, would deem to be his neighbors. Those who have received so much, I claim, are morally bound to make contribution of services to the communities that have afforded them these opportunities that so few can enjoy. Moreover, it would be my conviction that, regardless of cost, those whose natural gifts have been enhanced by the knowledge and training that only professional education affords, have an abiding responsibility to use these gifts for the social good as well as for their personal gain.⁵ This is no more than minimal brotherhood.

But, you ask, how shall we educate our young people to sense these responsibilities so deeply that they become in integral part of their professional being?

Dr. Paul Tillich, a great theologian, has recently stressed the importance of applying the "healing process" to the whole man; conversely, he has warned us of the risk of healing a bodily ailment without regard to a psychological or spiritual disease from which the patient may equally suffer, and of the risk that a healing in one area may occasion new dislocations in others. It is here, certainly, that the ministerial and medical professions have pioneered far ahead of us in law. Dr. James L. Adams, of the Harvard Divinity School, has recently said, "the minister is usually concerned with the total human person; he performs diffuse or generalized functions"; his "status depends in part upon technical competence of the sort represented by the theological discipline, theoretical and practical; but his status in the church and community requires of him also that he maintain a generalized responsibility which is not so clearly based upon strictly professional skills."⁶

Deans Severinghaus and Carman have emphasized this same broad frame of reference in the field of medical education:

5. Chief Justice Stone, in another environment, expressed a not dissimilar thought: "It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." *Steele v. Louisville and Nashville R.R.*, 323 U.S. 192, 202 (1944).

6. *The Social Import of the Professions*, BULL. 23, AMERICAN ASSOCIATION OF THEOLOGICAL SCHOOLS 152, 163 (1958).

“Only as the physician ‘increases his resonance and ability to respond to social human, and spiritual values,’ [they say], will he achieve his full professional and personal stature.”⁷

And a somewhat longer time ago a gentleman named Plato observed: “To heal even an eye one must heal the head and indeed the whole body.”

So it should be in preparing for the practice of law. Our aim should be far beyond the development of competence in technical and dialectical skills. It should comprise the “whole lawyer” in all those relations into which the responsibility of professional status will bring him.

Lawyers will be more than practitioners and judges. They will also be legislators, corporate officers, and community leaders. For such tasks they must be fully educated and imbued with a sense of obligation to use their competence in measurable degree for the benefit of others. This, after all, is but saying again what Professor Mechem and Chief Justice Stone said so well not many years ago.

There is, or so I believe, one particular ethical value so basic that if we can communicate it to students it will serve as a point of orientation for all their professional life. It is the value that political democracy is built upon and which democratic institutions are established to preserve. It is the one value, which more than all others, is accepted as having a spiritual source. It is indeed the value that moved the Good Samaritan. It relates intimately to human personality; it is, as best I can put it, *the recognition of the existence and worth of human personality*. It is my thesis that this is what determines all other ethical values; that sincere and complete acceptance of this as a fundamental tenet will guide conduct so truly that recognition and observance of other values will follow as night the day. To whatever extent this acceptance is accomplished, be it ever so large or ever so small, to that extent will there be assurance of an ethical sense of responsibility. If this be so, our principal concern should be to devise ways to convey a perception of this value and to convey it so persuasively that it is consciously and voluntarily accepted and that its acceptance is so sincere that it

7. SEVERINGHAUS, CARMAN & CADBURY, PREPARATION FOR MEDICAL EDUCATION IN THE LIBERAL ARTS COLLEGE 248 (1953), quoting in part, SMITH, EDUCATION FOR PROFESSIONAL RESPONSIBILITY (1948).

will remain an ever present guide in the professional years ahead.

Just how to accomplish this is, I venture to say, the single most baffling problem in legal pedagogy. Traditionally we have been guided by two views as to the teaching of ethics: one, that the personality of the upright teacher radiates virtue, as it were, so as to move the students to emulate his character; the other, that the upright teacher uses every proper occasion in the midst of his professional subject matter to elicit or to express an opinion as to the propriety of the actor's conduct. That there is a measure of merit in each of these contentions goes without saying. Our teachers have accepted these views from time immemorial yet, to our regret and shame, we must face the fact that there still remains much that our students have failed to learn regarding both the proprieties of their practice and their public responsibilities.

What might be called the "noble exemplar" method operates, in a sense, of its own accord, since the one *sine qua non* is readily available, we are pleased to assume — namely, the upright teacher. But the practice of pervading the curriculum with ethical values requires an upright teacher who is also particularly gifted and dedicated — a man of perception, imagination, initiative with a sense for systematic planning and a will to undertake a careful analysis of the opportunities at hand. A few years ago a committee of the Association of American Law Schools were told by the deans of 45 of the member schools that at least one faculty member on their staffs was using this approach. The names of 112 such teachers were provided. Individual follow-up letters to each of these professors elicited the somewhat surprising replies that in fact only 26 of them actually did so.⁸ This, I suggest, may be revealing in at least one of several ways. It may show how little deans know about what is going on among their faculties; or how optimistic deans are; or how extravagant will be their assurances when they detect no prospect of being found out; and, in any event, it does show how rare in fact is any planned systematic effort to introduce ethical issues into non-ethics subject matter.

A more direct approach is used in over half our law schools; this is by means of courses called Legal Ethics or Legal Profes-

8. *Reports of Committee on Education for Professional Responsibility*, PROCEEDINGS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 169 *et seq.* (1958), 98 *et seq.* (1959).

sion to which is entrusted virtually the entire responsibility of turning out lawyers of proper moral character. So designated, these courses are, unfortunately but not unnaturally, suspect in student opinion, and communication falls upon ears that are not as welcoming as we should like for effective teaching.

In all frankness, however, it should be admitted that courses listed as ethics courses face two other handicaps as well. One is often the absence of a current practitioner to give a special reality, a visible assurance that much at least of Northrop's "professed norms" are "living norms" as well. Another is the nature of the casebooks now in use. These suffer from two detractions: they largely concern peripheral or pathological conduct in which, one is relieved to believe, students from our better schools will rarely be involved; the other is that they contain an unconscionable number of opinions of Bar Committees, which are, if I may say so, outstanding illustrations of how potentially interesting subject matter can be desiccated by a style that is dull, pedantic, and pedestrian, with all the fascination and excitement of Browning's *Sordello*.⁹

But this need not all be so hopeless. Interest can be greatly stimulated by a series of prepared episodes, or problems, presenting predicaments of conduct facing a hypothetical lawyer. These can be improvised from court opinions, committee opinions, or best of all, from actual experience, and can be used as the basis of class discussion, with the casebook retained as a repository of source materials to throw light on the solutions.

But there is, in my opinion, a vast area of yet unexplored opportunities for a systematic planned introduction of ethical values and standards into non-ethics courses; for what some of us, in the language of the late Dr. Edwin E. Aubrey, have come to call "the pervasive approach."¹⁰ I would suspect that this may well be true in medical pedagogy too, but the probabilities are far better in law because we are dealing with rectification of harm done by the conduct of people, rather than of bacteria, viruses, chemistry, or physics. If the teacher can bring himself to accept the proposition that discussion of the propriety of con-

9. According to the late William Lyon Phelps, one of the great teachers of English of all times, there are only two lines of this two hundred page poem that he could understand, the first and the last, and both of them are false. They read: "Who will, may hear Sordello's story told" and "Who would, has heard Sordello's story told."

10. See STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY 245, 385 (1959).

duct of people other than lawyers is helpful in the sense of transferability to the conduct of lawyers themselves, and if he will take a few hours from a busy week and analyze his course case by case and class-note by class-note, he will be amazed at the discoverable number of ethical issues that are implicit in every hour of class discussion, that are latent, ready for delineation and discussion, that pervade, in fact, the entire course.

This is an approach that has scarcely been explored. It offers one great pedagogical advantage over today's neatly labeled ethics courses composed entirely of questions involving the conduct of lawyers. It will be the advantage that ethical problems, involving values comparable to those faced by lawyers, will be identified and discussed in non-ethics environments in which the student will accept them as relevant.

Two other approaches are now emerging from their experimental period. One is a special course, constructed out of non-ethics subject matter but made up of problems selected because they include a particular ethical value that the instructor believes important. Often, because of the prevalence there of the value of personality, this is in the civil liberties area, but for the same reason, a course in family law, criminal law, or trusts would also be suitable. In my own case, I have projected a series of problems all relating to what I have called the ultimate value, respect for the dignity of personality. The subject matter commences with a problem on the nature of freedom and the burden of decision-making that goes with it; it continues with individual rights under international treaties; then the right to travel and a sequence of problems concerning the nature of a fair hearing before courts, legislative committees, administrative bodies, arbitrators, and disciplinary proceedings in labor unions. In each, the core issue is the place of the individual, the respect due him as a person and the restrictions on his freedom necessitated by the safety or welfare of society.¹¹ Training is in research and analysis, but the important by-product is the significance of the individual.

What seems, however, to show perhaps the greatest prospect of usefulness is the cooperative lawyer-student discussion groups. With the splendid and sympathetic aid of the Columbus Bar Association I have experimented with this approach for now five years.

11. For discussion, see *id.* at 403.

It has one risk: the dire one that the lawyers, quick to seize so enticing an opportunity to indulge their principal professional weapon, loquacity, will make speeches or reminisce about the many youthful errors from which they have learned so much. A reasonably sure protection, however, is the preparation of a series of problems, distributed in advance to both lawyers and students and used for purposes of question and answer, analysis and conclusion.

There must be, of course, an orderly pattern of topics at these discussions, but if six or seven problems, written in the form of hypothetical questions, are prepared for each subject, they are certain to yield a valuable two-hour discussion. They should all, of course, concern issues of personal conduct faced by lawyers and the discussion should be directed to the propriety of what they did or should do, and why. In the program with which I am familiar we cover, among others, the ethical aspects of building a law practice, fee charging, preparation and conduct of trials, conflict of interests, confidential communications, and the responsibilities of the lawyer in the life of his community.

An almost overwhelming advantage of this is that the students meet and actually get acquainted with practicing lawyers. They come to realize from personal contacts that lawyers *do* have standards that they actually *do* apply to their own conduct, and that what the students have read is no mere facade, set up to conceal activities and ideals far different from those professed by bar associations and law professors. In short, they come to realize that the leaders of our bar believe and hold to what I have called the basic value of respect for the personality of another.¹²

But another aspect of this value should be pointed out. In the area of group action it is fully as basic as is respect for the individual in his personal relations.

Many years ago an aggregation of young men framed the structure of the government we revere today. Like many men still in their twenties and thirties, they had daring, a capacity for decision making, and a determination to carry out their chosen plans. But if these had been their only qualities who can say what protections would have been afforded those basic

12. Undoubtedly the most complete and most thoughtful discussion of these various approaches is found *id.* at 223 *et seq.*, where lawyer-student programs are presented.

freedoms of the individual that are today the hallmark of the Free World.

When one considers how young these men were he can hardly avoid the question: would today's young men have done as well? Surely they have courage, decisiveness, determination. All these we saw brilliantly displayed in the late war. For these we shall always give our gratitude and admiration. Our uneasiness must lie elsewhere. It lies, I believe, in our uncertainty as to their sense of values, as to what it is that matters to them most deeply; what it is that stirs their imagination, gives them vision and impels them to action.

If that dread happening should ever come about, a military conflict with weapons of annihilation, there will be no time to mobilize and apply the brave qualities of our young men of 1941-45. Our only chance of survival is now, in the immediate years ahead, when world conflict is still at the level of ideas. "Since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed." So speaks the Constitution of UNESCO. It is to us in the professional schools that has been entrusted the guidance of those minds that more than any others will be making tomorrow's decisions. It is our particular responsibility, then, to inculcate into these minds those same values that gave us a leadership capable of building the structure that Gladstone so undyingly pictured, on the occasion of another centennial, as "the most wonderful work ever struck off at a given time by the brain and purpose of man."¹³

The foundation stone of that structure is the respect for the personality of the individual. Originally considered implicit, it became explicit in 1791 when principles that had been assumed by many as obvious were made an integral part of our Constitution. It is this respect, this single fundamental value, that assures our people freedom and dignity, that distinguishes the great democratic tradition from the totalitarianism of Soviet Russia. Also it is this same respect that in our smaller world stimulates community leadership and service; that leads our lawyers and our doctors into the acceptance of the responsibilities that make them truly professional men.

True respect for the person finds institutional expression in

13. *Kin Beyond the Sea*, NORTH AMERICAN REVIEW (Sept. 1878); later repeated in substance in his letter to the Committee in charge of the celebration of the Centennial of the American Constitution, July 20, 1887.

the kind of government we call American democracy. To lawyers this is the Bill of Rights and procedural due process of law. It is respect for the individual embodied in the structure of government itself; two facets of the same value, the one the idea and the other the group form in which it finds expression.

Respect for our institutions of government must inevitably mean respect for their functions and their pronouncements. In our responsive form of government, the means are always at hand to bring about change. Lawyers above all know this. They also know that it behooves them, of all people, to honor the declarations and adjudications of these institutions so long as they remain unchanged by orderly process. The fundamental right of freedom to criticize must be exercised against a background of law observance. This too is a professional responsibility. Unhappily, it is a responsibility that the organized bar has been far too slow to appreciate. It is a responsibility which it is our particular obligation to communicate; for lawyers who seek to put themselves beyond the law do no honor to either our law schools or our profession.

By the very nature of their calling, no persons are as well qualified to perceive these duties as are lawyers. For three short years we who teach law have them in our classrooms, ready at hand to learn to think and act like members of an honored profession. As we pause here for a few moments in the halls of a great institution of learning, celebrating its full century of service and commemorating the achievements and ideals of two distinguished professional colleges, it is fitting that we take note of this: it is at once our great opportunity and our great obligation to encourage these future lawyers and doctors to understand the one value on which all ethics rest and which American institutions were built to serve — the value of human personality. Our principal challenge today is to devise a way to make this so clear, so significant, so precious, that our students will some day dedicate their careers to make it live. That, I believe, is the major responsibility of us who have undertaken to educate the professions of the future.