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Preface

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PREFACE

The papers which follow were presented as part of a Conference held on November 16 and 17, 1962 to celebrate the 75th Anniversary of the founding of the University of Buffalo School of Law, which since September 1, 1962, has been the School of Law, State University of New York at Buffalo.¹

The Faculty of the Law School was asked by the Alumni Committee to suggest a theme. From its deliberations, the conclusion emerged that a useful purpose might be served if an effort were made to focus on an aspect of law in the contemporary world which has received little explicit attention. Much attention has been devoted to developments in public law and the growth of its domain. But the shifting boundary line is always being influenced by the judgment as to how well the tasks left for the private ordering of affairs are being done. Some value, it was felt, might be derived from a critical look at this problem. The theme was accordingly formulated as *The Challenge to Private Law* in the United States and explained as follows:

The Law School was founded in 1887, the year of the passage of the Interstate Commerce Act and three years from the passage of the Sherman Act. The dominant idea in American life was still, in the words of Professor Willard Hurst, "private property as a system of legally guaranteed dispersion of decision-making power through the community" with the marketplace as "the typical arena of expression for these many semiautonomous centers of decision." In the 75 years that have elapsed, public controls have swept across many areas of commercial and private life. In many different ways, the scope for legally sanctioned private exercise of decision-making power has been cut down. Today, we remain deeply committed to retain this private decision-making as far as possible. While the boundaries of the possible are fixed by the prevailing philosophy of our government, they are also fixed by the efficacy of private law making to perform the tasks left for it. A major problem confronting American Law in the years ahead is to assess the ability of private law to function well in those areas and to strengthen it where necessary. The purpose of this Anniversary Conference is to examine some of the significant fields of law in which this problem exists.

It was apparent that not even a cursory survey of so extensive a matter could be accomplished in a brief conference. An effort was made, then, to single out a particular aspect of the problem, exploration of which might be of interest in itself and also stimulate further thought in similar directions.

Not surprisingly, taxation emerged as the aspect for consideration. And we were fortunate in the quality of the speaker and commentators who were willing to come and address themselves to the question: "Are the Federal Tax Laws Distorting the Substantive Law of the States?"

The principal paper, which was also the James McCormick Mitchell Lecture

1. A history of the School has been published—"Buffalo Law School 75 years—1887-1962—A Short History," by Gilbert J. Pedersen.

for 1962,² is printed in the pages that follow along with a corrected but not recast version of what the tape recorder heard the commentators say.

The writer, not a tax man, has the feeling that the participants, all tax men, tended to minimize the consequences for private law of the continuous pressure which the tax environment, like a field of force, exerts on all private decision making and planning these days. But if the participants are correct, then it is possible that this aspect of public law is not seriously distorting the development of private law.

The second day of the Conference was focussed on legal education. Four former deans of this School, one, the principal speaker, now a practitioner, one of the others a judge, and the other two engaged wholly in legal teaching and scholarship, presented a sparkling piece of intellectual chamber music. If they did not solve the problems of legal education, they added some bright themes and variations to the discourse about those problems.

Featured speakers at the celebratory meals added specific suggestions for the School to ponder in shaping its course for the next seventy-five years. Chief Judge Desmond of the New York Court of Appeals, a great judge who has recently been exercising distinguished leadership in New York's rapid progress toward effective administration of the judicial machinery, requested collaborative help from the School. He said, in part:

The school of law which was for decades a department of the University of Buffalo and which has almost fortuitously become an appendage of a many-splendored and all-enveloping something called S.U.N.Y. has a prime and public function of providing professional training for most of the lawyers who serve the nearly 2,000,000 residents of the Eighth Judicial District. The law—we have it on the word of Edmund Burke—is “one of the first and noblest of human sciences, a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together” With those as the two premises of a simple syllogism, there is an inevitable conclusion: our proper business on this anniversary is, besides nostalgic old-grad maunderings, to peer into the future, to descry if we can what will be and what should be the continuing role and place of the school in this its territory.

A not-to-be forgotten significance of this 75th anniversary attaches to the fact that this little old law school first appeared on the scene at a time when American legal education was undergoing drastic and painful surgery, not only plastic but organic. Up to the eve of the American Revolution the colonies had sent scores of Americans to be educated at the English Inns of Court and most of the other American lawyers of the time were learned and accomplished men, graduates of the earliest American colleges such as Yale and Columbia and Princeton. But from the Revolution till the Civil War and afterwards, economic depression plus libertarianism plus unpopularity of lawyers were deprofessionalizing influences which resulted in minimum or no qualifications for lawyers except at the very top levels, scanty educa-

2. A list of the Mitchell lectures and their topics follows this preface.

PREFACE

tional facilities and rare exercise of discipline by the courts. Beginning about 1870 came a revival of professional organizations which working through such new groups as the A.B.A. Section on Legal Education and the Association of American Law Schools to improve legal education and eliminate the charlatans.

The law schools which survived the purge committed themselves firmly and ardently to the case method of instruction. The law was to be learned by analyzing the infallible pronouncements of the appellate courts. Close and word-for-word exegeses of these opinions would not only inform the student of the true content of the living law but would refine and illuminate his own thinking as he pondered these perfect examples of flawless logic and serene and lofty literary style. No more was the law student to doze through dull, dry lectures. The text writings of the learned were put in dead storage. No time was to be wasted on the legislative product. The minutiae of local court procedures were to get minimal and passing attention only. As for trade-school training in how to practice law, the attitude was: "our curriculum is much too crowded already—you will just have to pick it up on your own when and if you find clients."

The case system had and has its points. Some opinions of some judges in some courts do lend themselves to close analysis and reward the eager delver with closely reasoned, carefully bottomed and clearly expressed statements of law. Devoted teachers ruined eyesight finding these judicial gems of purest ray serene and generation after generation of law students passed on to successor students the dog-eared notes of case analyses. But disenchantment arrived as it always does in the halls of Academe as elsewhere. The case system of instruction and learning disclosed its own dangers or rote and repetition. True, it told the student what today's judges thought today's law to be but except under most skillful teachers the method took little heed of what the law had been or would be, of how it got to be the way it is, of whether it had become confused or contorted, of what was its justification, of whether it was so fashioned as best to serve this or a future day. The worst effect of the overuse of this case method was to suggest to the student that there was to every law problem a pat mechanical answer as in algebra. Late came the knowledge and acknowledgment that the most precise and painstaking analyses of any number of decided cases could never produce a true and complete man of law. We discovered the truth that if the law is to serve by maintaining a never-finished but always serviceable set of rules for our ever more complex society, as well as provide a constantly replenished corps of practitioners to advise the citizen, and be heard on his behalf in the courts, then the law schools must do a whole lot more than assign cases, teach the elements of procedure and supervise a little moot court work and law review writing on the side. So came a sort of revolt with case analyses now largely confined to the first year, and in the later years new emphasis on modern writings plus much more attention to the solving of problems and learning to be a lawyer. The modern law graduate needs to have training and experience in the methods of approaching and solving law problems.

Rumors are current that our own Buffalo Law School is to forsake the hallowed precincts of West Eagle Street, exchange its asphalt

alley campus for the shaven lawns of Main Street and, enshrined in marble halls, begin a new and more elegant history removed from the clamor of the lawyers across the street in the courthouse and the clatter of the dishes here in the Athletic Club. A new building there should be and may it be commodius and dignified, even opulent. But let it be modern in more than air-conditioning and acoustics and library. Let it have a new and broadened curriculum in its new and broader corridors. Let its new outlook take in not only the fresh green verdure and monumental buildings of Main Street but more importantly the fresh new ideas of how a law school may best train twentieth century lawyers and fit them for twentieth century service. As one of the old, old alumni and as a part-time law teacher in another place I offer a modest and incomplete bill of particulars. None of its items will be startling or remarkable, all have been better expressed already by others more competent. My only excuse is the length of my professional and judicial experience and the sincerity of my effort.

I would hope that our law school will intensify and enlarge its selective admission procedures so as to screen out those whose aptitude and true attachment to the law is minimal, whose only discoverable purpose in applying is to postpone for three years, immersion in the cold waters of the working world. A suggestion like this is customarily met with a reminder of the Abraham Lincoln story and a warning not to be so snobbish. This misses the point. Adequate scholarship aid and low tuition should keep the doors of the old law school open to the best qualified, regardless of financial standing. Let the others go elsewhere.

The benevolent suzerainty of S.U.N.Y. should make possible not only a better qualified student body but a larger faculty and even a few professors giving their time and efforts mainly to research. Here again I deny any snobbery or preciosity, any attachment to that meretricious air of mystery which poses as research while delving into such esoterica as the shades of meaning of obscure verbiage in one of the Year Books. Research is an abused word in the universities but there are people qualified and willing to plot the trends of the law, to identify errors and trace them to their sources and give scientific guidance to Legislatures, bar associations, Judicial Conferences and to society generally in plotting the forward course of the law as a regulator of institutions and people.

The Buffalo Law School of the future, better housed and staffed and supplied, should find time to inform the Bar and the public of the size and direction of rising tides in the law, such, for instance as the present day insistence on ever greater and more real protection for persons accused of crime and ever more realistic comprehensive remedies for those who are damaged by the more mechanized operations of our society. American life will take us more seriously if we explain it to itself.

With the reorganization of our court system there has come increased need and demand for qualified court administrators. Is it not appropriate that the one New York law school operated by the State itself should be active in training such administrators and in offering co-operation to the Legislature, the Judicial Conference and the State Law Revision Commission? I am proud of the successful pioneer efforts

PREFACE

of the Judicial Conference in enlisting the services and tapping the enormous resources of all the law schools of the State in post-graduate training of judges and I am grateful as Chairman of the Conference for the participation of law school professors, including our own, in training programs and discussion sessions for justices of the peace, supreme court justices and (next month) for county court judges. I have no doubt at all that the State University heads will encourage greater prominence by our own school in this new field of service.

Most earnestly I would hope—and here again I am on dangerous terrain—that in its quest for greatness and superiority our little old school will remember its origins, its history and its special obligation to Western New York, its ancient purpose of providing for local boys and girls of whatever means or none at all, entrance into the ancient and honorable public profession of the law, entrance to the great wide highway which is the law, to the land of service and opportunity and advancement which has been for generations at the end of the rainbow dreams of so many of our ambitious youths. I can understand the soaring dreams of a new Harvard Law School here at the foot of the Great Lakes, of a new Law Center to rival Yale or Michigan or Chicago. All power to the dreamers. But let us first set up a first rate local law school with selected students and faculty and a complete and practical modern program. Let us be sure our graduates are literate and articulate, that they have acquired some skill in solving actual problems and in drawing simple pleadings and documents and intra-office law memos, that (how earthy can you get?) they are able to pass the bar examinations. With all that accomplished, we can move onward and upward.

Frank C. Moore, who has contributed so much to the development of better state and local government in New York, as Comptroller, as Lieutenant Governor, as adviser to governors, and who now, as Chairman of the Board of Trustees, is helping to assure that the newly growing State University of New York will be a truly great state university, had some recommendations for the Law School's cultivation of the field which has been his life-long interest. He said in part:

Eleven weeks ago today, the University of Buffalo became a part of the State University of New York. Even before the merger, State support was extended to the expansion and improvement of facilities and programs here and you may be certain of continuing advances of the State University at Buffalo as a great center for education.

Although the State University now has medical schools in Brooklyn, Syracuse and Buffalo and may be required to add two more in the near future, we now have our first and only law school of the predictable future. Informal discussions among our trustees, . . . , disclose agreement that this Law School should be encouraged and assisted to achieve outstanding excellence. . . .

. . . .

Our first goal should be excellence of education rather than enlargement of enrollment.

In one of his longer, lovelier and less known poems, Browning said:

“Ah, but a man’s reach should exceed his grasp,
Or what’s a heaven for?”

To put it another way, I hope we never reach the point of complacent satisfaction with our progress.

Last evening, I was stimulated as you were by the Chief Judge’s concept of new and ever-better legal education. In its broad outlines, it deserves our vigorous support.

To move toward the excellence we seek, it would seem imperative that new and more adequate facilities be provided and that the new home of our Law School be located close to the great educational center of which it is an important part.

The new Law School should be designed to provide for an expanded faculty and staff, for an enlarged and better library and, like the law schools of Chicago and Columbia, include suitable facilities which will enable the students to observe from time to time our various courts in actual session.

There is need for substantial expansion of the full-time faculty, for adequate staff and for the maintenance of compensation levels that will retain outstanding talent and continuously attract new competence.

With emphasis on excellence, with adequate personnel and facilities there will be new eagerness for the exploration of opportunities for broader services—not only to those who seek a career in our profession and to the members of the bar and bench but also to the people we serve.

In our only state-supported law school, we should provide as a continuing activity, programs of legal research.

Last evening, Chief Judge Desmond suggested another need of our State—particularly since the reorganization of our court system—for programs for the training of court administrators.

Experience prompts me to suggest a still larger field of opportunity—an urgently needed new type of aid to the local governments of our State.

Since the end of the second World War—perhaps coerced by their difficulties in meeting the upsurging demands of our people for additional services, the vigorous competition among all governments for a greater share of the taxpayer’s dollar, and the threat of new area-wide agencies of local government—our local officials seem to have moved into an unprecedented period of willingness—even eagerness—to explore the opportunities for cooperation among our counties, cities, towns, villages and districts in tackling common problems.

Within the last five years constitutional and statutory roadblocks to intergovernmental cooperation have been eliminated and we have moved in New York State into a new era for progress in our local governments. The 1962 Legislature passed for the first time a constitutional amendment extending to all our counties, cities, towns and villages expanded powers for local legislation. Assuming its second passage by the Legislature and approval by the voters, our localities will soon have greatly increased powers of self-government unmatched in any other state.

Our local governments look to their legal advisors for leadership

PREFACE

in grasping these new opportunities. No law school in the State or nation provides adequate preparation for this field of law.

Last June, the Office for Local Government—established by our State three years ago—convened a two-day seminar for municipal lawyers in Albany and invited their attendance. We were agreeably surprised by the attendance of more than 200 attorneys including not only some newly appointed but many old-timers who sought refresher programs.

The Office for Local Government has been persuaded by those who participated in last June's seminar to continue annually its seminar for municipal lawyers but the program more properly belongs with the only law school of the State University.

I recall with admiration and enthusiasm the programs in the law of our local governments initiated here several years ago by Dean Hyman and Dave Diamond but since abandoned because of limitations of faculty, staff and funds. It would seem that our people are entitled to have the benefits of training by the only State-supported law school for those who provide such important leadership in their local governments.

Accordingly, I believe our Law School should resume and expand its conference programs for the lawyers who serve our local governments. When we have made substantial progress toward our goal of excellence, I hope our Law School will provide graduate programs leading to a Master's Degree in the law of State and local government.

This challenge has been accepted and the faculty has formulated plans for the development of a program of the kind suggested.

The ceremonies attending the celebration were, as is proper on such occasions, first of all a challenge to the faculty in whose hands the movement of the Law School towards greatness lies. We welcome the opportunity through the pages of the *BUFFALO LAW REVIEW* to keep before us the inspiration and suggestions the celebration elicited. We trust that others concerned with legal education will likewise find in them some stimulation for their own thought.

J. D. HYMAN, *Dean*

JAMES McCORMICK MITCHELL LECTURES

The James McCormick Mitchell Fund was established in 1950 by the generous gift of Mrs. Lavinia A. Mitchell in memory of her husband, James McCormick Mitchell, prominent Buffalo lawyer and outstanding citizen. By the terms of the gift, the income is to be used to provide lectures in the Law School on suitable subjects in addition to the regular course of instruction, and to publish such lectures if deemed desirable.

HON. ROBERT H. JACKSON, Justice, U.S. Supreme Court, "Wartime Security and Liberty Under Law"—1951

PROF. KARL N. LLEWELLYN, University of Chicago Law School, "Appellate Judging and Argument"—1952

DEAN ZELMAN COWEN, University of Melbourne, Australia, "Australia and the United States: Some Legal Comparisons"—1954

PROF. GEORGE DESSON, Yale Law School, "Forms of Public Order and Evolving Concepts of Criminal Law"—1955

PROF. MILTON HANDLER, Columbia Law School, "Anti-Trust and the Judiciary"—1956

PROF. JEROME HALL, Indiana University School of Law, "Reason and Reality in Jurisprudence"—1957

PROF. FLEMING JAMES, Yale Law School, "Tort Law in Midstream. Its Challenge to the Judicial Program"—1958

PROF. BENJAMIN KAPLAN, Harvard Law School, "Civil Procedures—Reflections on the Comparison of Systems"—1960

PROF. JOSEPH T. SNEED, Stanford University Law School, "Some Reflections About the Impact of Federal Taxation on American Private Law"—1962