



Volume 52 | Issue 1

Article 2

December 1949

Lawyers: What of the Law--and Law Schools?

Erwin N. Griswold
Harvard Law School

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Legal Education Commons](#)

Recommended Citation

Erwin N. Griswold, *Lawyers: What of the Law--and Law Schools?*, 52 W. Va. L. Rev. (1949).
Available at: <https://researchrepository.wvu.edu/wvlr/vol52/iss1/2>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

WEST VIRGINIA LAW REVIEW

VOLUME LII

DECEMBER, 1949

NUMBER 1

LAWYERS: WHAT OF THE LAW--AND LAW SCHOOLS?*

ERWIN N. GRISWOLD**

There are at present some 55,000 law students in the United States. I am not one who deplores this figure, although I recognize that it raises some practical questions with which lawyers and law teachers and law students must deal. I am concerned with the problem of overcrowding in the legal profession, but I find myself more concerned about our ability to meet the needs of society for legal services and training. We may be on the threshold of a great expansion in the usefulness of our profession. If we are not, we should be.

In saying this, I am not meaning to imply that lawyers today are not filling an important, indeed, an essential place in our society, nor do I mean to intimate that lawyers generally do not live up to their responsibilities. On the contrary, I have great faith in our profession and high respect for its members. But I am suggesting that we now do only a relatively small proportion of the legal work that could be done and that our profession will better fulfill its responsibilities if we can work out ways by which we can more nearly meet the public's needs.

This is a very large proposition. It involves looking into the future which, as Mr. Dewey and the poll-takers found last fall, is a hazardous undertaking. I am not going to try to chart the future for you or to essay any details of the course which developments may take. What I am going to try to do is to discuss some of the factors which lead me to think that there is much for lawyers to do. These factors are more or less unrelated and independent. I have not undertaken a complete catalogue. In presenting and discussing

* Address delivered on Alumni Day, 1949, at the College of Law.

** Dean of the Harvard Law School.

them, I will naturally speak somewhat from the point of view of legal education and will try to say something of the opportunities and of the responsibilities of the law schools in broadening the field of legal service.

1. My first point can be put under the general observation that *lawyers do not advertise*. Because of this, I think it is a fact that the public is woefully ignorant about what we do. I do not suppose that I have a very accurate idea of the layman's picture of a lawyer but I am sure that for most laymen it is foggy and sketchy at best. The layman sees the lawyer in the movies or on the stage—where he is likely to be either a spectacular trial lawyer or a pettifogging shyster, which most lawyers are not. Or the layman may have a friend or neighbor who is a lawyer. He is likely to think of his lawyer neighbor as a sober, conscientious person, who can be counted on for help in an important community task, if he is not too busy. But even then the ordinary layman can have very little idea of what the lawyer actually does in his office, of how he spends his busy hours.

One of the rubber companies has for a number of years published a series of advertisements which I have found most interesting. Whether they have affected the amount of rubber I buy or, in particular, the amount of that company's rubber I buy, I do not know. But these advertisements take up a particular problem which has confronted some person in industry and then show how that company's research department has been able to solve that problem by a new and better use of rubber. I think a very interesting and on the whole rather striking series could be done on the way that real and difficult problems have been resolved by law and lawyers.

I do not want to press this analogy too far, particularly as I have no desire that lawyers should engage in advertising. My point is that I think that there is in fact a great latent demand for legal services that are not now rendered. This is a matter which, I think, works both ways. There is much that lawyers do and can do that the general public does not know about. And there is much that the public needs to have done that lawyers do not now know about or undertake to do. In these unfulfilled wants there is, I believe, a power which will mean a considerable extension in the availability and utility of legal services in time to come.

2. For the second of my factors, I suggest that *lawyers are versatile*. The functions of the profession have, I believe, considerably expanded in the past generation. Of course the situation varies in different places and with different lawyers but it is my thought that lawyers as a class are fulfilling a broader function than was the case some time ago. Not only do they do much now besides appearing in court but their office practice is, I think, much more diversified than it used to be.

There are of course many influences which have brought this change about. One is the generally increased standard of living of the community. Another is the great increase in the contacts between government and business. The fields of taxation and labor relations, to mention only two, have opened up new responsibilities for lawyers. But there are, too, all the problems of regulations, state and local as well as federal, to which business activities now are subject. More and more businesses are turning to lawyers not merely for strictly legal advice but for guidance on general matters of policy. In the past, business executives usually came up through the production or the sales departments. In recent years, they have often been chosen from the legal department or have been outside counsel for the company.

Lawyers at their best are flexible. They are accustomed to encountering new and novel problems. They are trained to analyze and organize facts and to come to reasoned conclusions. I do not say that it is necessarily wise, or that it is inevitable, that lawyers should take over greater responsibilities in business. I do say that it is happening, that it is happening because to an ever greater extent the problems which arise in business involve the relations of business to government and to society, and that lawyers as a group are well qualified for many business tasks because they are accustomed to the work of analyzing problems and working out solutions for them.

3. The next factor I would mention is that *lawyers are able*. Necessarily I am speaking of the group, not of every individual. But it is one of the responsibilities of our profession that we attract to our work a very considerable proportion of the brains of the country. I do not want to be misunderstood. We do not get all the brains of course. There are many men of great ability who

go into medicine, science, business and other work. But the figures show clearly enough that a high proportion of the intellectual ability and capacity of the country goes into the legal profession.

This is a fact that is well known in the colleges. It is apparent to admissions officers in law schools. I suppose it is one of the reasons why it is so pleasant to teach in law schools. It is definitely one of the reasons why being a student in a law school is such a stimulating experience. And it is also, I think, a reason why lawyers are assuming more important places in many walks of life.

Ability is a responsibility as well as a privilege. It seeks outlet, as it is sought by those who need leadership and guidance. It is because I think there is a high concentration of ability, of abilities of many sorts, in the legal profession that I foresee great and increasing opportunities for lawyers in the years to come. There may be too many lawyers but there will never be too many good lawyers. Real ability is on the whole a rather scarce commodity and our society needs the aid of all the able lawyers it can get.

4. My next point relates both to the law schools and to the profession. *Legal education and the profession are not as narrow now as they once were.* No doubt both have far to go but I think they are on their way.

In the past hundred years, our understanding of law, our notion of the place of law and of lawyers in society, and our methods and objectives in the teaching of law have undergone a continuous evolution and development. During much of the nineteenth century, historical and analytical views of jurisprudence were generally dominant. Under the historical view, the road to truth lay in tracing doctrines back to their origins and in watching doctrines unfold and develop, apparently largely of their own accord. There was not much that we could do about it except to record the events as they occurred. Under the analytical point of view, law was the command of a sovereign. It was developed by purely logical processes but we have come to recognize that the premises on which these developments rest are not always clearly perceived or understood. Under both views, law was to a very considerable extent a science separate and apart from all other human experience. One could be a lawyer by studying law and law alone. Indeed, one would probably not be a very good lawyer

if he studied much of anything else. He might contaminate and confuse the pure law.

All of this has considerably changed now. For one thing we have searched harder for premises. We have found that when better understood they lead into other fields and that the lawyer cannot properly deal with legal problems unless he has some understanding of these other fields. How to deal with these in law school has been a real problem. Separate courses in such subjects as economics, sociology or accounting take much time and are rarely organized to meet the needs of lawyers. The best way is ordinarily to incorporate the approach and the materials directly into the law school courses themselves. This requires an unusual sort of teacher and the preparation of teaching materials which are usually not readily available and which must be carefully developed over a considerable period of time.

This problem is by no means fully resolved as yet. But we have made progress. We have recognized the problem and to a very considerable extent we have changed our outlook. With that much done, I am not too much concerned about developments. They will come. More and more I hope lawyers will not be trained as mere guardians of a rather secret and artificial ritual. They will be trained as servants of the public, guiding and controlling forces of wide consequences for society as a whole.

5. That leads me to my next point, which is perhaps a sort of correlative of the last one. That is that *lawyers as a class are becoming more open-minded in their outlook*. I do not say that lawyers are too conservative, because I believe that lawyers should be conservative. But conservatism does not require or imply blind and automatic resistance to change. It is not always truly conservative to hold out for the status quo. The fact of change is the one clear lesson of history. We cannot hold back the course of time.

Too often in the past lawyers have been the most vigorous resisters of needed and long overdue reforms. Many lawyers seem to be opposed to change for the sake of being opposed to change. On the whole it is an emotional opposition, not intellectual. It is instinctive and virtually automatic, rather than a carefully considered conclusion.

LAW—LAW SCHOOLS

There is a somewhat related problem which gives me considerable concern at the present time. There is naturally and legitimately much discussion about communism and communists, in our country, in our government, and in our educational system. As is so often the case, though, the word "communist" has many meanings. It may mean a member of the communist party or someone who seeks the overthrow of our government by force. If the word could be confined to that meaning we might be better able to consider the problems that are raised. But the word is very loosely used in some quarters. It is sometimes applied to anyone who would like to maintain peace with Russia, to any person who thinks we could have a better and more equal social order, indeed, to any person who has a mildly liberal point of view. If such persons are not communists, then they are fellow travellers; and if they are not fellow travellers, then they are dupes.

We forget too easily, it seems to me, that our best defenses against real communism are affirmative, not negative. We will not have communism in this country if we really make this country the place to live in that it can be made. But there is much to be done here—including the extension of education and broadening equality of economic opportunity without regard to race, creed or background. These are only some of the matters on which our own system is yet vulnerable and the solution of which is in the long run more important in the fight against communism than some of the current witch hunts.

As lawyers come to recognize more fully their obligation to help in the development of our own political and social organization, they will find great opportunity for their talents. They should be leaders in developments, not just the brakes and balance wheels. There is in this whole area a great potential field of usefulness for lawyers; and a broadening of outlook may mean that their talents will be more effectively utilized.

6. Now I come to my next point. *Lawyers are not effectively organized to deal with public problems.* I do not know the solution to this. Lawyers have traditionally been individualists, and many advantages have come from this. One consequence of this, however, is that lawyers' organizations are, for the most part, relatively weak and ineffectual. About the only way that lawyers have of

working together is through bar associations. In most states, however, bar associations are voluntary agencies and they do not by any means include all lawyers in their membership. Not one lawyer in five in the country belongs to the American Bar Association. A higher proportion belong to state and local associations but they are still far from comprising the whole profession. It is inevitable, I am afraid, that lawyers' groups should often be ineffectual, when we consider how they are organized. For they are made up of men who have to earn their livings from other activities, men who are necessarily and legitimately busy at their own tasks. Their members are widely scattered and except for an executive secretary or some such officer there is rarely anyone who can devote more than passing time to a bar association matter. Many men do give devotedly of their time and energy to these tasks but it is hard for them to be generally effective when the work is necessarily done on a part-time and intermittent basis.

My object in mentioning this topic is not to criticize bar associations and their officers and members. On the contrary, I think it is remarkable that they do as well and as much as they do, under the conditions as they exist today. My purpose is quite the contrary, to try to suggest that there is a large opportunity in this area for organized activity in the legal field and that lawyers will be better able to meet their public responsibilities if they can find means for enlarging and strengthening their professional organizations.

7. So far I have not said a great deal about *the need of the public for greater general legal services*. This is a problem on which many people have worked for a long time. As a result we have rather extensive legal aid organizations in many cities. That problem is one which the organized bar should meet and, though something has been done, there is room for much further development. And there is need, too, for better legal service not only for poor people but also for persons of moderate means. Bar associations in some cities have started developments of this sort but they are still rudimentary for the most part. The effective handling of such work requires organization so that many relatively small matters may be efficiently handled. It might also be an effective means of providing excellent practical experience and apprentice work for young lawyers.

In the field of medicine, there are great pressures towards some system which will make adequate medical care available to everyone who needs it. The problem with respect to legal services is somewhat different. Almost everyone needs a doctor from time to time. Not everyone needs a lawyer very often, though when he does the need may be quite acute. We can probably handle these problems better professionally than we can if some sort of system is imposed on us by government. But the fact is clear that there is much legal work to be done. I hope that we will find ways to expand the availability and usefulness of the legal profession.

8. Finally, I come to a most important point. That is *the great challenge of the untapped field of legal research*. Here is a place where the law schools have major responsibility and opportunity. For that research for the most part should be done under the auspices of universities, just as research has long been done in physical sciences and in medicine.

But, it may be asked, has not research long been carried on at law schools? Do we not have the great works of Williston and Scott and Wigmore and many others—not to mention all of those who have preceded, Story, Ames, Gray, and many more? And my reply will be that I think that the field of legal research is so far scarcely touched.

As far as I know we have never organized legal research on a separate full-time group basis, except perhaps in the specialized work of some legislative drafting bureaus or law revision commissions. Research of the sort which has been mentioned, that done by Williston, Scott and others, has been done by individuals whose primary occupation was something else, teaching. It has been work which could be done almost entirely in a library and an office. It has organized and systematized the material out of other law books. It has been great work but it has not been legal research of the sort I have in mind.

About two hundred and fifty years ago, Isaac Newton, without leaving his study deduced that the earth must be somewhat flattened at the poles and also stated what the extent of that flattening should be. Thereafter two Frenchmen named Maupertuis and Clairaut went off on an expedition to the steppes of Lapland, made measurements over great distances and came to the conclusion

that Newton was right. This led Voltaire to write a couplet, which goes as follows,

“Vous avez confirme dans les lieux pleins d’ennui
Ce que Newton connut sans sortir de chez lui.”

which can be rendered in English this way:

You have confirmed in the great open spaces
What Newton knew without leaving his chair.

Now we need our Newtons but they are very rare. In the physical sciences, it is well recognized that few things can be accomplished by the ordinary man who works alone in his study. Only recently, Dr. Philip Morse said: A single scientist, working all by himself, is today an unproductive anachronism.”

Although the situations are not entirely parallel, I think we may well recognize a similar development in the field of legal research. If we are to understand the workings of our laws, if we are to know how they should be changed and developed, there are many areas in which there are facts to be learned which do not appear in law books. Indeed there are fields, such as that of commercial law, where current practices are often quite different from anything one can learn in a law library. Both for teaching and for planning developments, we need knowledge not now available as to what people do, as to the consequences of legal rules and doctrines.

Legal research is extraordinarily difficult. In the area of ascertaining facts, great skill and patience are required. In the area of formulating revisions of rules and practices, the difficulties are even greater. It is hard enough to work out an idea. It is a vastly more difficult task to confine it into words, words which will adequately express it and will not be too broad or too narrow. Both of these tasks can best be done by group work, by teams. They can be best done, I believe, when the teams can spend full time on the task. And that obviously takes a lot of manpower and a lot of money.

In the legal field, the nearest development to research work of this sort has been that conducted by the American Law Institute. First there were the Restatements. Those were largely library jobs. But they were group undertakings and profited greatly from that

fact. More recently the Law Institute has turned to the drafting of statutes. It is now working on a Uniform Commercial Code which will be a great step forward from the earlier commercial laws. It is also working on an effort to redraft the federal income tax laws, a task of the greatest difficulty and complexity.

But all of these tasks take money, money in an amount far beyond the resources of any agency now engaged in legal education. In the field of medicine or physics, we think very little of millions for a new laboratory or a cyclotron. In the field of legal research, \$100,000 has been with rare exceptions an unobtainable amount. We simply have not educated the public and donors and foundations to the needs of research in this area. The problems are fully as great or greater than those which are dealt with in the physical sciences. Perhaps a few of them can be resolved, Newton-wise, in an arm chair. But even those solutions should be verified and many other problems can be broken down only after long and painstaking group work. Indeed we are so far underdeveloped in the field of legal research that we do not yet have clearly in mind a picture of what ought to be done and how we ought to go about doing it. I have no doubt though that we can make rapid progress when we can enable a few groups of able persons to devote all their time and energy to the task. A hundred years ago there was very little organized research in the physical sciences. No one then saw the problems to be solved, or even how to go about most of them. But by one means and another, in and out of universities, we developed extensive and effective research work and we are still devoting large sums to the task. I have no doubt that the expenditure of a million dollars a year would produce striking and important results in the legal and related fields. But there never has been money of that amount available for such work, there is not now, and it is not clear how it can be had.

I hope that our law schools will find some way to make a start on the handling of this problem and that they will in the course of time be able to build up well-organized and effective divisions of research. If they can be started, I think that they will produce significant results. We should not expect too much too soon. Having regard for the infinite complexity of human relations, with which law deals, developments will necessarily be slow.

Such divisions of research should be included in a law school not merely as a public service and for the improvement of knowl-

edge. One of their first products will be materials for legal education, which will enable us to improve the training of law students and to produce better lawyers, better able to deal with the problems which will be theirs to solve.

There are many other ways that legal services could be expanded. There is the whole field, for example, of international relations and world organization. That is an area where we must work out solutions if anything else is to be worth doing. I am sure that lawyers have much to contribute here. The task will not be done by wishing it. It takes energy, skill and patience, in negotiating and drafting, in adjusting and adjudicating. All of these are tasks for lawyers.

My objective has been to show something of the potentialities of our profession. I think there is great need for our work on every plane, that there are great opportunities in the years to come for men of legal training. If I am right in my appraisal of the social needs and pressures, there cannot help but be great and significant developments in our work in the next half century. If I may conclude in the vernacular of the market place, I would not sell law and lawyers short.