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## Law Professor--Post-War

Harold Gill Reuschlein

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## LAW PROFESSOR—POST-WAR

By HAROLD GILL REUSCHLEIN\*

## I. BLUEPRINT

NOW that the war has been concluded, the law schools must be rehabilitated. It is a propitious time for making fresh starts in the building of law schools and law faculties.

Law professors are important people. They admit it. We do, however, have more than their own strut to back up the assertion. The history of our country indicates a substantial influence exercised by law teachers upon the course of political thought.<sup>1</sup>

I think it would be admitted today, despite widespread active prejudices, that lawyers are important people. They are entrusted with or lay hold upon so much that is of public consequence that their influence upon the development of national life is out of all proportion to their number—and their number is large. Therefore they ought to be quality products. Allowing for the inevitable exception, a lawyer is only as good as the people who make a lawyer out of him. His teachers are responsible in no small degree for making him what he is. Invariably, a man, who, by the common consent of men of trustworthy judgment, is a leader at the Bar, points to one or more great teachers as being entitled to the glory. Really good law teachers are unbelievably few in number. It is not that we suffer so much from a shortage of scholars who are ornaments of a sort to our law faculties, but we do suffer acutely from a shortage of men who can meet what ought to be the specifications for a teacher in a first class law school.

What goes to make a good law professor? It should be stated

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<sup>1</sup>Witness the role of the law professor in public administration during the past dozen years, particularly in the federal field. But law professors were important people even before they became such doers. See my paper, *An Outline of Taught Law—The Beginnings to Holmes and Pound*, (1943) 28 MINNESOTA LAW REVIEW 1.

that if the school is a large one, the work of the several faculty members may be specialized to such a degree that some may be "research professors." I am not discussing the man engaged to do research and research only. I am talking about the man whose primary job as a law professor is to teach law. What shall we seek in him? I think we should expect him to meet six specifications:

1. He must be a scholar.
2. He must be able to express himself simply, adequately and gracefully, both orally and by the pen.
3. He must be sufficiently interested in research to make some contribution to the literature of the law.
4. He should have at least some experience in the workaday world.
5. He should appreciate the law for what it is—an instrument of social control.
6. He should have such a home as will permit him to teach in it—and then do some teaching there.

All of the above are freely admitted to be "old stuff." To say that is but to point the fact that, though "old stuff," these specifications have not been understood, or if understood, either not believed or acted upon.

## II. NOTES ON THE SPECIFICATIONS

### 1. *He must be a scholar.*

"Of course," say the law school deans, trustees, regents and such persons. But, judging from pre-war and current faculty rosters, they do not mean what I mean. I mean a man who is learned—not so much in the sense of being erudite and even less in the sense of being a human warehouse for facts and figures—but rather in the sense of a man so grounded in the law and other disciplines as to make him proficient in interpreting, as distinguished from merely parroting, his subject for the student. Proficiency and adeptness are not the equivalent of some such gobble-de-gook as "mastery of Techniques."

### 2. *He must be able to express himself simply, adequately and gracefully, both orally and by the pen.*

A lawyer must learn to express himself—both orally and by the written word. That a man should be a first rate law professor and not be able to do both is just about inconceivable. I said *both*.

Invariably law faculties have been filled by men who *write*, though just the other day I asked the dean of a law school whether one of his professors could write a good memorandum or a letter and, believe it or not, he said, "I don't know, but he talks beautifully." Not too much attention has been paid to the quality of the writing. It has been often thought more important that a man write much and often. Some awful vengeance ought to await those who have made most of our law reviews such dull and barren waste.<sup>2</sup> That sin has been perpetrated by professors (aided and abetted by their mimics at the Bar who should know better). I would have the law professor express himself *simply, adequately and gracefully*. Not all of the periodical writing by law professors has been dull and heavy—a considerable quantity has been glib and flippant and some of it has been explosive with wise-cracks which has proved mildly entertaining when taken in small doses. Some of this has been simple in one sense of the word, but as criticism it has hardly been adequate (though somewhat effective) and it has had about as much grace as the slapstick of the sawdust ring. What's the answer? I should think the answer is to (a) find a scholar and (b) expect him to produce not too much and not too often, but well—and that means well enough to make himself understood by those he must convince.

If you have the man who can write, the chances are that his facility of expression is not a blessing to be conceived of as a certain manual dexterity in wielding a pen. It is more likely a quality of mind which extends to that man's every attempt at expression. If he writes clearly, he probably speaks clearly because he thinks clearly. But you must be certain of that. Law school corridors abound with able students who spend precious time and energy cussing out some professor (who may be young or old) who, though reputedly able to write, cannot make what he does in the class room mean a thing. I know it is not all traceable to the failure of the gift of adequate oral expression on the part of a professor. He may be glib-tongued and yet not have the remotest idea of what to do with the particular subject assigned to him in the particular class room wherein he teaches. For no subject is there a standard operating procedure. One man may teach a subject by talking about it all the time. I have been well taught that way in one or two subjects. Another man may use the problem method or still another may treat cases as so many one act plays and huff and puff his sub-

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<sup>2</sup>See Fred Rodell's paper, Goodbye to Law Reviews, (1936) 23 Va. L. Rev. 38.

ject out in multiplied melodrama. What matters so long as the professor has gift of expression to do what he must do in the classroom (and what he does in the classroom should, by no means, be the sum total of his teaching) in the way he can best put his subject across.

If, as Gibbon insisted, history is for the philosophic mind, so too is law teaching. So your man who expresses himself adequately, simply and gracefully must be an imaginative man and, if he is not, he will not so express himself. One of the chief sins of the law teacher has been compartmentilization. If the student somehow gets the idea that the law is a web, albeit a seamy web, very few law professors can legitimately claim credit for the realization. Teaching law as it should be taught requires as a prerequisite in the teacher a real appreciation of the interrelation of law with not only the social sciences (whatever they are) but with those far more significant and meaningful disciplines, philosophy and ethics and history.

I am not attempting to minimize the need for technical knowledge of the bread and butter subjects outside the law curriculum such as accounting and certain courses in business economics and finance. If one examines the roster of teachers at so-called approved schools one would be impressed by the fact that the vast majority give evidence of knowing only the law. One could segregate a small group who knew something of business and that is ever so much to be desired. But the law teacher who walks familiarly with, not only the law, but also with philosophy, history and literature as well, is difficult indeed to find. I have been told that in drawing my specifications for, not the ideal, but the acceptable law professor, I have insisted upon too much and that enough men to fill the specifications are not to be found. My persistent answer to the objection is a double-barrelled one:

- a. I know that a man cannot teach law as law ought to be taught if he does not meet these specifications, and
  - b. I doubt that we have half tried to find the kind of men I am talking about.
3. *He must be sufficiently interested in research to make some contribution to the literature of the law.*

It is awfully important to understand what I mean about this. Most university administrators do not. There is everywhere, despite assaults made upon the notion, the feeling (which has become a principle for action) that a man is good as a law professor di-

rectly in proportion to the quantity he has published. He has written much, ergo he is a whale of a teacher. There is so much the matter with all this tragic non-sequitur. A man to be a good law professor must be able to write not much but well—he must have made or be making some real contribution to the literature of the law. For one man it may be ten volumes on the law of Evidence, for another it may be a compact essay on Legal Education and Public Policy. Each has made a real contribution and each has filled my specification. The man who publishes articles in the law reviews in prodigious quantity may be a poor teacher primarily because he writes so much.

This principle for action, i.e., that the ability to write indicates the ability to teach, has to a considerable degree accounted for the practice of turning to editors-in-chief of the law reviews for faculty positions. It is true that, all things considered, the law review editors are perhaps the most promising group of youngsters from which to make appointments to law faculties. More often than we should like to admit, however, appointments have been made with not over-much discernment upon the assumption that because he was a great editor, he'll be a wow of a teacher. Maybe he won't.

4. *He should have at least some experience in the workaday world.*

Out of the broadened activities of the past few years in the field of social control has come the belief that the study of the law prepares a man ever so well for positions of responsibility in government, industry and finance. The belief is just as erroneous as it is firmly fixed. The truth of the matter is that the *proper* study of the law prepares a man for such positions of responsibility. All this is something bigger than courses, methods and big name university law schools. It is a matter of many things. Principally it is a matter of surrounding oneself with men having background, perception and perspective and of correlating the law with all that it touches—and that is just about everything. How achieve the desired standard? Its achievement calls for something new in the planning and building of a law school. Look around you—you will not find a place that comes very close to being what a law school ought to be. It is here that the idea of balance in the faculty and program of the school become of utmost importance. It is inescapable that the job cannot be done as it should be done except by a faculty embracing men of differing outlooks, tastes and fortes.

I would not be misunderstood. Of course, the principal purpose

of a law school is the preparation of young men for the future practice of the law. I do not wish to minimize the importance of that job. I do not labor the point, because it is the obvious point of the story. The best lawyer was ever the man who knew not only the law, but much besides, and that was equally true with respect to both country lawyer and city lawyer.

But the market for law-trained men has broadened and there is every indication that government and industry will have abundant need for properly trained lawyers in the immediate post-war period.

Of course, no dean can go out and find a faculty each member of which is learned in every known discipline. The important thing is that when the faculty as a whole is appraised it be seen as a composite of law men with varying interests and approaches with each interest sufficiently matured and developed so as to spark the particular law man's exposition and to make him a reasoning enthusiast. It should be regarded as an impoverished faculty which cannot boast some men acquainted with the actual practice of the law. Equally poor is the faculty unable to boast a law man who is experienced in business, another experienced in public administration, another schooled in philosophy and ethics, another in economics, and still another (and a very important one) who is a serious student of history. This means a faculty of different men. The school which goes out to recruit a faculty of one type—as for example was done a decade or so ago by certain schools when it was thought that able law men trained as economics-bolstered fact finders and as human adding machines would make the law school par excellence—falls far short. All that was just another reflection of "everything matters but Everything" thinking. It fails to appreciate that economic facts stripped bare have no meaning, no matter in what numbers you may collect them. Yes, law, too, is for the philosophic mind.

Legal education in America has been beset by two evils—do-nothingism and fuddism. Those who have been charged with the important business of legal education have for the most part devoted themselves mightily to seeing to it that nothing happened to disturb the status quo. That, obviously, is do-nothingism. Those who have set about to "reform" legal education have devoted themselves to a mighty crusade in one direction with the result that one interpretation of the law (albeit an important one) was over-emphasized, sometimes to a degree approaching the grotesque—the result—fuddism, i.e., thinking about countless trifles, the thought proceeding in every direction at any and all times.

What is said above is not meant to imply that the status quo boys were not vocal about legal education. There was much beating the air about methods of legal education.

The long and tedious discussion about methods has been, for the most part, so painfully pointless. A method is a way of doing something. If you either have nothing to do or do not know what you ought to be doing, method really matters very little. In fairness it must be admitted that some attention has been given to subject matter, but again much of the criticism that starts off as substance shades off into mere discussion of method. Even more tragic than the fact that the talk has been about methods rather than content of curriculum is the fact that in talking about methods we have forgotten about men. Methods are not a substitute for men and unless and until the conception of what must be the minimum standards for a law faculty are revised upward as I have suggested we may just as well forget the chatter about methodology.

5. *He should appreciate the law for what it is—an instrument of social control.*

I realize that a specification such as this may become somewhat lighter than air. But appreciation means common sense, which means that anyone who appreciates the idea of law as an instrument of social control will have his feet on the ground. So many of the people who prate about social controls are fakers—and because they are the whole idea of effective social control, so completely basic to an ordered world, is brought into disrepute. I would bolt the doors of the law schools tightly to the people who are glib on this matter. My appreciator must be a man who knows the law as a lawyer with a client should know it. If he does not qualify on this score, he is worse than useless in a law school no matter how glib he talks about the law as an instrument of social control. The appreciation of the idea is basically necessary if a university law school is to justify its existence. A university law school cannot justify its existence if it is little more than a trade school graduating mechanics, even though they be good mechanics.

To appreciate the role of law in an ordered society is to be able to see the interrelations between law and other disciplines. We must study and learn a good bit about the social successes and failures of law in the past. He who knows not the past should not be permitted to tinker with the present or the future. The man who is to do any social engineering must understand the kinship of law and morals. Everybody has been jumping around for some twenty years whoop-

ing up the idea that we must study law and economics together. We certainly must. We have done that to some extent and the over-all result has not told us much. There is nothing to be said against the study of law with economics per se. There is telling criticism to be leveled at studying law and economics with the expectation that much will be achieved from the combination of those two disciplines without the addition of more. Whether by conscious definition or by accident, the kind of economics which has been mixed with the Blackstone heritage in the law schools has been a welter of facts. Again, certain it is that we must be strong on the facts, but the elaborate collection of factual data simultaneously with the reading of law does little more than fill dull books and magazines and waste money. There are, of course, other things that will do the trick, but, for the most part it is the application of history and philosophy to the stuff of the law and to the stuff of the other social sciences, including economics, which lights them and gives direction and meaning to our attempts to apply controls upon society. He who does not understand does not appreciate—and understanding means being possessed of something more than mere technical “know how.”

6. *He should have such a home as will permit him to teach in it—and then do so.*

So much of what has been said above is closely tied to the stubborn and eternal verity of that old saw about Mark Hopkins and a student at opposite ends of a log.

There was something tremendously worthwhile about reading law in a lawyer's office, if he were *the kind of man* who would talk to you and with you and share with you his invaluable experiences. Of all the teachers who worked over me, three or four, and *only* three or four, were great. They taught me in their homes. This is not the sole explanation of their greatness, but they would not have been great but for the teaching they did in their homes. I am not prepared to state that a man cannot be a great teacher unless he does some teaching in his home, but I very much doubt that he can. Facts, figures and rules can be taught in the library, the classroom and the professor's office but the only teaching that is worthy the name needs sitting down in comfort and talking things over. You don't do that in a library or classroom. You do not even do it in a seminar. Most people think you do it in a professor's office, but you don't. You do that kind of thing in a home. This business of sitting down together in the professor's home is not a matter of “dropping in for

tea," "open-house," and the like. It's not something that is just "nice to do." It's basic—so basic that there is little chance of first rate teaching on the university professional school level without the sitting-down-chewing-it-over-in-the-home business. The implications of such a specification are manifest.

### III. OVERTONES

The blueprint for a law professor outlined above prompts the trumpeting of old familiar passages. Platitudes and commonplaces they are. They are things that everybody knows and to which everybody in the business pays lip service—but about which nobody really does anything. There is much to be said for saying these things again. Platitudes and Commonplaces are so despised not because they are platitudes or commonplaces—but because they are most often so disturbingly true.

Number one among the first principles which must inspire our every act is: "Men really matter—not methods." When the law teaching profession gathers in solemn deliberation, there is much discussion of what the content of a course in this or that should be, how the curriculum should be arranged, how much of a page in a casebook should be devoted to footnotes and what is the mission of notes (foot and otherwise), etc. etc. It's all so unimportant when you consider that we might be talking about what is a law professor and what should he be? Not that we never talk about law professors—but when we do we talk about the professor as a personnel problem. That's not only useless—it's positively harmful.

I have watched a great variety of deans select a great many law professors. It is usually done on the basis of an academic record with little thought on the really important question: What effect is going to be produced by the impact of this fellow upon the students? A great many things other than academic records and an interview are necessary to answer that question. It's not easy to find the only kind of man who ought to be a law professor—and you just cannot find enough of his kind unless you reward him with a salary considerably more attractive than those now paid by all but three or four of the schools. It is extremely important also that a law school faculty be balanced on the side of the individual professors' accompanying disciplines. Each law professor must be something more than just a student (or even a master) of legal rules—he must be, in addition to being a law-man, either an economist, an historian, an engineer, a business man or a philosopher. It is important that every

law faculty strike a balance as to faculty members who qualify in these accompanying disciplines—for it is these which determine a man's approach to the law. It is important that the student be led to the law by men of competence through each one of these approaches and that he be led by men who will insist upon the cultural and moral value of what is taught. During the last seventy years no more stupid blunder has been committed than the pseudo-scientific divorce of law from morals in law teaching. To insist upon the separation—or even partial separation—is inane. Law is a discipline to enable men to achieve the good. Apart from that idea teaching law in a university loses meaning. You ought to teach law to help men to discern what is good and what is bad.