Tulsa Law Review

Volume 10
Issue 1 *Dedicated to John Rogers*

Article 4

1974

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William H. Rehnquist

TULSA LAW JOURNAL

Volume 10, Number 1 Dedication Issue

LEGAL EDUCATION: A CONSUMER'S POINT OF VIEW

William H. Rehnquist,
Associate Justice, United States Supreme Court

This article was originally delivered as the dedicatory address on the occasion of the dedication of John Rogers Hall, the new College of Law facility at the University of Tulsa, January 23, 1974.

It is both a pleasure and an honor to be invited to speak to you on this auspicious occasion. My previous contacts with your fine city, its University, Law School, and bar have been minimal. The first time I ever saw Tulsa was in the early morning of a day in March, 1944, when I was traveling under army orders to Will Rogers Field in Oklahoma City. Having grown up in Wisconsin, I had never been as far west as Tulsa before, and I was awakened from a fitful doze on one of the Frisco Lines passenger cars by the conductor shouting, "Tulsy! Tulsy! Change for Muskogee, Okmulgee, Chickasha," and other points whose names now escape me. I felt I had really arrived in the Wild West.

It is merely stating the obvious to say that your city bears no recognition today to the fitful glimpse of it which I caught thirty years ago. This morning we dedicate John Rogers Hall, the splendid building in which the University's College of Law begins its second half century. When one contemplates the changes that the world has undergone in the first half century of the existence of the College of Law, the task of predicting the developments of the next half century

should make even the most audacious of prophets pause. Who would have thought fifty years ago that the city of Tulsa would be a center of maritime activity, and the University's College of Law called upon to turn out proctors in admiralty as well as landlubber lawyers? Today the College of Law stands, with the student body five hundred strong, on the threshold of what seems bound to be a second half century equally as challenging as its first.

It seems appropriate that on this occasion the dedication address should deal with legal education. Since I have not the shadowiest of credentials as a legal educator, this felt necessity of the occasion might at first blush seem to pose a problem. But even though I may not qualify as one who knows how to produce lawyers, I can qualify in two other respects as a judge of the product. As a one-time practitioner in a small law firm concentrating on civil litigation, and as a judge who every year hires three law clerks and who hears approximately three hundred lawyers orally argue cases each year, I feel that my standing as a consumer is indisputable. In addition, more than twenty-odd years ago, I too was in law school, and was a part of the raw material that was being processed into the finished product which law schools put out. In this day of the class action, perhaps I may broaden my comments to reflect the interests of other consumers of legal services, which in this day and age would certainly be a staggeringly large class.

One occasionally gets the feeling today, in talking to law students or very recent law graduates, that they consider law school to be primarily a three-year period of incubation. It is in their eyes a requirement imposed by those already in the practice to make sure that they are not inundated with competitors; it is a way station where the aspiring lawyer must spend a certain amount of time before he is licensed to display the talents which he has presumably had from birth. Such brash self-confidence, when properly polished and honed by education and practice, can be an invaluable attribute for a lawyer. But no law school worthy of its salt should let its graduates emerge unshaken in their skeptical belief that they could have gotten along pretty well without it.

Law school, particularly first year law school, is for many, and ought to be for all, a period of genuine intellectual awakening. Why is this? Legal education is surely not the only branch of scholarship which deals in great questions, challenging ideas, or thought-provoking hypotheses. As one who had concentrated in the field of political

philosophy before going to law school, I was no stranger to "great issues" debates and arguments lasting long into the night when I began my legal education. But the great difference which I found between the sort of discussions which I had come from, and those which I entered upon in law school, was the role of facts and the analysis of facts.

A legal maxim current in my student days, and perhaps still current, is that a lawyer "doesn't have to know the law, he only has to know where to find it". I suspect the kernel of truth in this maxim stems from its recognition that perhaps the major acquisition of a law student from his three years in law school is the sharpening of his analytical abilities, rather than the compiling of large amounts of knowledge about the various substantive areas of the law. And, taken in this limited context, there is undoubtedly an element of truth in the maxim; legal education, I would suppose, unlike some other branches of graduate education, is not primarily devoted to the storing up of knowledge, but instead to the sharpening of the methods by which we analyze knowledge.

Just as other graduate disciplines pose the same sort of significant policy choices as does legal education, so, too, other graduate disciplines demand the same and perhaps greater rigor of analysis from their students. It would surely be a bold lawyer who was prepared to insist that the sheer mental effort required of him was greater than that of a graduate student in advanced mathematics or physics. I think that the unique aspect of legal education is that it has traditionally integrated into a single discipline the thought provoking policy questions which inhere in any study of how man is to be governed with the same demand for rigorous analysis which is found in the world of the sciences.

The method by which this synthesis has been traditionally obtained is the study of cases. The cases, as law students eventually find out, are not ends in themselves, but only means of showing the endless factual variations with which judges and lawyers are confronted. The difficult aspect of legal education for the student is coming to understand why the holding of the case he has just read is inapplicable to the case immediately following it in the textbook. He must learn to see that as the facts are dissimilar, the conflicting social policies which the law embodies come out differently balanced in one case than in another. This is why a good memory is no guarantee

of success in law school; recalling the governing rules is not the end, but the beginning, of the solution of a legal problem.

One of the great paradoxes of the art of government is that one can put two candidates for public office or, for that matter, two lawyers, in opposite rostrums, and listen to them discuss general principles, and come away with the view that they are 180 degrees apart in their view of the subject discussed. But put the same two candidates, or two lawyers, at a table with a specific factual problem to solve, and their proposed solutions, while doubtless not identical, will be sufficiently close so as to totally belie the notion of foursquare opposition to one another. This is the great virtue of facts, because facts force the mind to focus on a precise situation.

A somewhat flip description of the purpose of legal education current in my day was that it was supposed to teach one to "make a noise like a lawyer". Doubtless the analytical skills which should be imparted by legal education are bred in part by the encouragement of dispute, argument, and contention in the classroom, in moot court competitions, in after-class discussions, and in the real courtroom itself during clinical phases of legal education. But it would be the grossest error to suppose that a few facile off-the-cuff arguments on behalf of one's client, or a few generalized and superficial enunciations of "policy considerations" in support of one's argument, were in any sense the equivalent of a truly lawyer-like presentation of a case.

In this respect I cannot possibly improve on the comments made by Erwin Griswold, for many years Dean of the Harvard Law School and later Solicitor General of the United States, about his hopes for Harvard Law School; whether or not he would agree that these thoughts might be made generally applicable to all law schools, I think they can. In a talk which he made in 1970, he expressed his hopes that:

> The school will never yield in maintaining the highest intellectual standards, including rigor and intellectual honesty, and the recognition that thought in our field does not come easily and superficially. . . .

He went on to extol the "scorn for shoddy and wishful thinking, and an understanding of the power of the mind when applied with rigor and discipline" which was obtainable in law school.

I felt when I was in law school, and have continued to feel in the more than twenty years since I graduated from it, that one of the great virtues of the Socratic method of teaching law is that it enables the

student to almost unconsciously realize how differing policies of the law conflict with one another. As facts are added or subtracted in a particular hypothesis, the mind of the student sees the argument in favor of one policy strengthened, the argument in favor of another policy weakened. When discussion of important social or political issues takes place in an atmosphere of generalization or abstraction, participants are free to choose their own first premises and generally leave by the same door whence they entered. But if the question as to what rule rightly ought to govern conduct is focused on a particular factual situation, the discussion is necessarily sharpened, and the bases for reaching a particular conclusion necessarily brought into clearer focus.

The emphasis in legal education on improving analytical skills is noted in a recent motion picture, *Paper Chase*. It tells the story of the interplay between a crusty law professor of the old school and an emancipated law school student of this generation. The professor's name is Kingsfield, and I am not in a position to know whether the University of Tulsa College of Law has any counterpart of his on the faculty or not. But if we put to one side Professor Kingsfield's sadistic streak, there is a good deal of truth to his comment to the assembled students that "we perform brain surgery in law school". It is symbolic surgery, only, of course, and it is done not in the operating room but in the classroom. But the graduating law student should leave with a significantly more developed set of analytical skills than those with which he entered. This, to me, is one of the great things which a law school can and should impart to its students, and law schools should have no hesitation in saying that such skills do not come easily, and that they are absolutely essential for the practice of law.

I think there may be a tendency on the part of some students, and indeed on the part of some practitioners, to rely too much on the maxim which I earlier mentioned, that a lawyer doesn't have to know the law, he only has to know where to find it. The first flaw in the maxim will be apparent to anyone who has practiced the profession. The trial lawyer sitting at counsel table during the trial, suddenly confronted with his opponent's offer of a damaging exhibit in evidence, had better know the law of evidence right then. Discovering several days later a case which might have been the basis for a successful objection is little consolation to the lawyer, and none at all to the client. Nor is the necessity that a lawyer at least know some law confined to a litigation practice. If the manufacturer calls his attorney telling him that a truckload of parts which appear not to conform to specifica-

tions is at his delivery dock, and asks if he should accept delivery or not, he does not want an answer next week; he wants it in the course of that telephone conversation. Even a very experienced lawyer cannot on such short notice give as sound an answer as he could after several hours' research, but he is going to have to give it nonetheless, and to do it he had better have at least a nodding acquaintance with the law governing sales, negotiable instruments, and credit transactions.

But the more serious flaw in the notion that a lawyer need only know where to find the law is the negative implication which some seem inclined to build on its rather narrow foundation. Their hypothesis would presumably run this way: We have come to law school to learn the law; we now find out that we don't need to know the law, but only where to find it; therefore, a good course in legal bibliography and research is about the only useful thing that we can take away from law school. If this were the case, of course, it would be an outrageous reflection on the law schools of this country to detain their students for three years. But of course it is not the case.

The proper implications to be drawn from the idea that a lawyer need not have an encyclopedic knowledge of the law is that the development of the lawyer's skills and judgment require a good deal more than simply storing up of knowledge of legal doctrine. The development of the analytical skills which are the primary intellectual tools of the lawyer does not result simply from walking in and out of classrooms in law school, but from intensive examination of the statutes and the case law, and a discussion of how the rules which may be derived from them apply to varying fact situations. The fact that the cases and statutes need not be committed to memory does not mean that the process of using them and considering them is not an absolutely essential part of the lawyer's education.

If law school graduates at the time of their entrance to the bar possessed these analytical skills in full measure, it might well be asked why a lawyer of twenty years' experience is better paid and has a higher reputation at the bar than one whose skills are thus freshly acquired. There are several obvious answers, and perhaps the shortest one is that the older, experienced lawyer tends to have the clients who can afford to pay his bills. But an equally obvious answer, and probably a more satisfactory one, is that lawyers undergo a seasoning process just as do the practitioners of any other art.

Part of this seasoning may consist in the learning of a great deal about a particular substantive area of the law. They say that you will

never know more law than at the time you graduate from law school, and, speaking in terms of the whole field of legal knowledge, I would guess that this is probably true. But those who specialize in a particular branch of the law do develop a thorough knowledge of a field which simply can't be imparted in one or two courses in law school. Those who specialize in courtroom practice develop a feel for procedure in evidence which is both broader and deeper than can be acquired from simply taking standard courses in those subjects.

But more fundamentally, if the lawyer continues to practice he develops a fund of experience which, while perhaps dulling his analytical skills, improves his judgmental ability. Experience teaches him that even when the black letter law seems to be all on the side of one's client, the client may nonetheless not prevail if his position is morally reprehensible. And it teaches him the converse: That if his client has a tremendously appealing case from a common sense point of view, even the fact that the decided cases are against him does not necessarily doom the cause to failure. It is a sense of the importance of facts, in the practice of law as well as in legal education, that seems to me to be an indispensable condition for success.

I remember a remarkably able oral advocate once saying that he didn't much care what side of a case he was arguing, because he thought a first rate lawyer should be able to win by his persuasive ability even though the facts were against him. I was tremendously impressed with the self-confidence of the man at the time, but have since come to feel that the remark evidences a considerably less than perfect understanding of the law or of the legal profession. If we deal again in maxims, one that I picked up in the first year of law school, the truth of which has become more apparent to me in each succeeding year of experience in the profession, is that "hard cases make bad law." It is true in a criminal case and in a civil case; it is true in the court of the magistrate and the justice of the peace, and it is also true in the Supreme Court of the United States.

It is the ability to judge the importance of the facts, and their moral and social implications, which is a significant part of the ability of every mature practitioner of our profession. And if facts are that important, certainly no law student should leave law school without the conviction that the first duty of the lawyer upon accepting a case is not to rush to the appellate decisions to see what the law is, but to rigorously question his client to find out what the facts are.

This insistence on knowing the facts, and an understanding of

how variations of factual situations may change the rule of law which is applicable, are two of the most fundamental ingredients of a lawyer's training. They should make him inquisitive and thoughtful, as well as contentious. They seem to me to be the essence of what may be called an analytical mind.

Just as there is a silver lining to every cloud, there is presumably a cloud for every silver lining, and respected thinkers have ventured the observation that a legal education is not an unmixed blessing. One criticism has been that while the traditional legal education sharpens the mind, it also narrows it.

There is undoubtedly some merit to this criticism. The judgment of British historians is that lawyers have not tended to shine as members of Parliament, and perhaps it is for that reason. One of England's greatest parliamentarians, Benjamin Disraeli, himself Prime Minister in the nineteenth century, made his rather disparaging comment about the profession after he had sat next to a lawyer at a state dinner:

> He was a true lawyer, ever illustrating the obvious, explaining the evident, and expatiating the commonplace.

Another criticism that has been leveled at the profession, and not without reason, is that it is innately conservative to a fault. I suppose no practitioners of any art or profession who deal with a body of knowledge, and particularly a body of knowledge consisting primarily of rules and regulations, can avoid developing a vested interest in the continuity of that body of knowledge.

Perhaps because of the stress on analysis, and of breaking problems and issues down into their component parts, and because of this innate conservatism, lawyers tend to make better administrators than they do devisers of innovative programs. If this is so, it is surely not because they lack mental keenness, but because they tend to be limited by ingrained habits of thought. Thus to the extent that it were possible to alter the components of legal education to place more stress on other approaches to problems, whether it be by changes in the offerings of the law faculty itself or by the expansion of the concept of interdisciplinary programs, legal education would undoubtedly be the better for it. But, from the point of view of the consumer of legal services, let me urge you, as the saying goes, not to throw the baby out with the bath water.

It seems to me far better to run the risk of narrowing the mind while assuredly sharpening it, than to give up all pretense of sharpening the mind for fear of narrowing it. It is this inculcation of analytical

skills which is and ought to be an essential element of the legal education of every law student.

Speaking as one who hires three law graduates every year, from an employer's point of view it is virtually impossible to even guess at the level of legal skills possessed by an applicant for a job without some indication of how he fared in competition with his fellow students—and this indication is, so far as I can tell, usually in the form of grades. I am not suggesting the necessity or even desirability of any particular method of grading, but surely from the point of view of an employer there ought to be some way of knowing how a graduate stacked up against his peers during his time in law school.

Lest grades be thought to be an undue hardship on the students, or an arbitrary consignment of some to permanent second class citizenship, let me recall for you yet another maxim of my law school days, to the effect that the *A* students make the professors, the *B* students make the judges, and the *C* students make the money. A friend of mine who was in considerable scholastic difficulty in law school formulated his own corollary to this maxim, to the effect that the *D* students dropped out of law school, went into business, and hired the lawyers who made the money. This may or may not be true, and the maxim itself may or may not be true when rigorously applied, but like so many other such sayings it has a certain validity.

Lawyers deal with a body of knowledge which is subject to exposition in numerous case books and textbooks, which is the subject of endless commentary, which is capable of being assimilated and spewed forth by law students. The cultivation of an understanding of how to use this body of knowledge should be one of the great tasks of the law school, and in the process of learning how to use it the law student develops the skills which are necessary to a successful practice of the profession.

But this is only a two dimensional view of the profession. In the practice, the lawyer will be graded not by those who teach law, but by the judges and juries before whom he appears for his client, and by the client himself. At least a modest degree of proficiency in the lawyer's art is a necessary condition to success in the profession, but beyond this countless variables come into play which may elevate the professional standing of one lawyer whose strictly professional skills are modest over the standing of another lawyer whose strictly professional skills may be considerable.

This fact, and I believe it to be a fact, makes our profession one of which it may truly be said that it is a career opened to the talents. And the talents to which it is open are so broad, and so varied, that the mediocre student in law school is not doomed to eternally dwell in the shadow of the honors graduate. By dint of diligence, resourcefulness, and any number of other attributes, on any given day he may win a battle for his client against an opponent whose academic credentials are better. But surely one of the most important of these other attributes is a competitive instinct, and a willingness to dig in and work and fight for a particular cause. And to the extent that a law school may inculcate this virtue, it would seem to me that it can best be done by making law students compete, and to dig in and work, while they are in law school.

Thus it is my hope for the University of Tulsa College of Law, magnificently housed as it is in John Rogers Hall for its second half century of existence, that it remains true to the great tradition of our profession. May it never shrink from novel approaches to the education of a lawyer which may lessen the narrowing effect of traditional legal education, or offer additional perspectives and insights which that education has not offered in the past. May it likewise realize that at least up until now the essence of the lawyer's art has been the application of analytical skills which are sharpened and developed through a process of legal education depending to a large extent on the competitive testing of one's ideas and hypotheses against those of others in oral discussion and written exposition. Long may it prosper.