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IS LAW DISAPPEARING?\*

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IT is now some years since I visited your attractive Panhandle State, and I find it good to be back. When I was here in 1929, I began my visit by attendance at the State Bar meeting in White Sulphur Springs, where the College of Law presented its now famous report on the improvement of the administration of justice and the reform of civil procedure.<sup>1</sup> Then, after a delightful motor trip through the Blue Ridge with your colorful Dean Arnold and his wife, I came at length to Morgantown and enjoyed the hospitality of the University for an all too brief stay. Perhaps I did not repay your kindness too well, for I left with designs on your dean, which shortly thereafter came to fruition when he came to Yale and on to that vigorous public career now a part of American history. But I really felt no compunctions in so doing, because I knew you had an admirable successor right at hand in my old friend from Yale days on, Dean Hardman. We from Yale are proud of the effective work for law and legal education he and his colleagues are doing; and it is in part, at least, because of my sincere desire to pay tribute to his work that I was willing to brave the now serious difficulties attending even a brief trip across country.

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\* Address delivered at Alumni Day exercises, West Virginia University College of Law, June 1, 1946. Footnotes have been added.

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<sup>1</sup> *Report to the Committee on Judicial Administration and Legal Reform of the West Virginia Bar Association Containing Suggestions Concerning Pleading and Practice in West Virginia* (1929) 36 W. VA. L. Q. 5; Clark, *Methods of Legal Reform* (1929) 36 W. VA. L. Q. 106.

In his invitation to me, your dean showed either sublime confidence or shrewd foresight. For he declined any commitment whatsoever as to the nature of my address or its subject matter. Quite in passing, however, he was betrayed into disclosing two facts which stirred my thoughts in a direction which seemed promising. One was that this occasion marked the resumption of alumni gatherings suspended during the war. The other was that recent speakers who had preceded me on this platform had included West Virginia's distinguished son, the Honorable John W. Davis, leader of the American bar, and the dean of legal educators, Harvard's Roscoe Pound.<sup>2</sup> It seemed therefore fitting at this time to turn my thoughts and yours towards the kind of law, the state of legal thinking and of legal adjudication, to which the veterans are returning. And this appeared the more appropriate because of the apparent deep concern of many distinguished persons as to this very matter. One must live in an ivory tower, indeed, far away from current legal writings, speeches, and other judicial diversities, if he can remain oblivious to the disquietude evinced by our bar leaders over present-day trends as to legal verities in general, and the courts, the constitution, *stare decisis*, and the law professors in particular.<sup>3</sup> It so happens that your last speaker, Dean Pound, has expressed this view in his many public addresses with the erudition and the intellectual resourcefulness we have come to expect from him on matters about which he feels deeply. And I found a title for my few remarks here in a speech he made not long ago to the lawyers of Alabama on the intriguing topic, "Disappearance of the Law."<sup>4</sup> That law had disappeared was, I gathered, an established fact; all that remained was to initiate a coroner's inquest to discover how, and perhaps why.

Now I do not share these pessimistic views. Indeed, holding rather strong convictions to the contrary, it seemed to me I should speak the faith which is in me, however inadequate my testimony might be.<sup>5</sup> I do not share this pessimism even as to the area most usually thought of as one of receding law, that now occupied by the administrative agencies. For this, too, is law, vigorous and original, involving only that natural specialization of function which is in

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<sup>2</sup> Pound, *What is Law?* (1940) 47 W. VA. L. Q. 1.

<sup>3</sup> Some of these are cited below, including that amazing conjointment of Holmes with Hobbes and Hitler, *infra* note 15.

<sup>4</sup> (1941) 2 ALA. LAWY. 363.

<sup>5</sup> Cf. Clark, *The Function of Law in a Democratic Society* (1942) 9 U. OF CHI. L. REV. 393.

keeping with modern trends of professional knowledge.<sup>6</sup> Nor am I despondent as to the development of law in its broader jurisprudential aspects, in its expressions of the social relations of man to man, of man to the political state, of states and nations to each other. On the contrary, it seems to me that law is now coming of age, that it is showing maturity and sophistication, along with a like development in our political thinking. Parenthetically may I remark—for it is somewhat outside the immediate scope of my subject—that the most hopeful sign to me as to international affairs is this very sophistication or cynicism, if you will, that prevails today. It is much better to know and recognize the truth, for it is the truth, unadorned and repulsive as it may at times be, which makes the minds of men free. Absence of the old clichés, of the level of merely conceptual thinking, which led us astray after the last war is our greatest promise for the future. And so, too, in law, I think the gain over even a decade or two in directness of thought, in unwillingness to fool one's self, in courage to follow through on one's thinking, is immeasurable. And that we owe, as I hope to point out later, in substantial measure to the leadership of the law schools in emphasis on straightforward and hard thinking.

That there has been a substantial, indeed revolutionary, change in the direction and trend of the law within the last ten years is of course now one of the outstanding facts of our time. Probably we who are engaged directly in the administration or practice of the law in metropolitan areas tend to overestimate the striking and pervasive elements of public law while we overlook the stability and comparative certainty of the greater part of private law. I expect that a careful survey would show the practice of the law in many parts of the country not changed in essential essence from what it was a generation ago. But to the minds of many, particularly to laymen not themselves in the toils, law means public and constitutional law; and the trends in that field condition and color all else. Such a view is increasingly justified as more and more the activities of government touch the ordinary citizen. So we do look to the courts, and particularly the Supreme Court, for exegesis of law of the modern world in which we live. And there the constitutional change of the last decade, the movement variously considered as "back to the constitu-

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<sup>6</sup> LANDIS, *THE ADMINISTRATIVE PROCESS* (1938), and GELLHORN, *ADMINISTRATIVE LAW* (1940), both ably state this point of view.

tion" or "away from fundamental moorings," depending on the point of view, has been swift and complete.<sup>7</sup>

I have had a unique and forceful demonstration of this change this spring in some personal activities of my own. The Yale Law School, being faced with the influx of veterans which is the outstanding phenomenon of legal education at the moment, asked me to return for some work in course; and I have been busily engaged in fulfillment of the rash obligation thus too blithely assumed. It so happens that ten or a dozen years ago, Professor Walton Hamilton and I initiated a course at that school which we called "Judicial Process." This was an attempt to illustrate the ebb and flow of judicial decisions, the response of the legal precedents to the felt needs of society, as of different periods, through the medium particularly of Supreme Court decisions on grave constitutional problems. One of the striking illustrations was the history of due process from its early limitations, following English precedents, to the assurance of fair and just procedure, down through its tremendous expansion with the business development after the Civil War, its contraction and expansion in early years of this century, and finally its extreme extension in the early thirties.<sup>8</sup>

Formerly in presenting this material the teacher was aided by a dramatic quality in the story, particularly as it was highlighted by the striking divergence between scholarly sentiment and constitutional practice of the time. Thus I had occasion some years back to examine the law review comments upon the *Hoosac Mills* case, *United States v. Butler*, outlawing the AAA, and those upon the *Carter* case, striking down the labor-control provisions of the Bituminous

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<sup>7</sup> This change is well reviewed in Stern, *The Commerce Clause and the National Economy, 1933-1946* (1946) 59 HARV. L. REV. 645, 883. Compare the contrasting addresses before the American Bar Association in 1939: Hogan, *Important Shifts in Constitutional Doctrines* (1939) 25 A. B. A. J. 629; (1939) 4 JOHN MARSHALL L. Q. 554; Byrnes, *The Constitution and the Will of the People* (1939) 25 A. B. A. J. 667; and Jackson, *Back to the Constitution* (1939) 25 A. B. A. J. 745. The latter title was also used in an address by E. N. Griswold [1936-37] N. H. B. A. Rep. 149. See also note 13, *infra*.

<sup>8</sup> Hamilton, *The Path of Due Process of Law*, in THE CONSTITUTION RECONSIDERED (1938) 180; Clark, *Individualism and the Constitution* (1934) 6 N. Y. ST. BAR BULL. 81, (1934) 57 REP. N. Y. ST. BAR ASS'N 325. The history of due process has been so often and so ably recounted that citation is superfluous; but still pre-eminent among all are those masterpieces, Hough, *Due Process of Law—Today* (1919) 32 HARV. L. REV. 218, and Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454, as well as the many essays of Professor E. S. Corwin.

Coal Act.<sup>9</sup> Of some thirty or forty comments on each case there was just short of unanimity of agreement in criticism of the rigid opposition to welfare legislation then made a part of the due-process concept.<sup>10</sup> Such divergence of view forecast a definite breach in constitutional trend; and when it came, it came sharply and violently. The other night I looked over, somewhat ruefully, a constitutional amendment I drafted in 1936 which, if passed by the necessary states, would have supported some of the social-welfare legislation then under debate. This proposal had some vogue at the time because it was taken up by the National Consumers League and others interested in welfare legislation as a desirable way out of the constitutional impasse. In effect it called for an expanded definition of interstate commerce to include the production, manufacture, and distribution of commodities destined for interstate transportation or in competition with commodities so destined, for protection of civil liberties by extension of the First Amendment to the states, and for a return in definition of due process to its earlier meaning of due procedure, rather than its expansion to include the "fair substance" of legislation, *i. e.*, "due law," in preference to "due process."<sup>11</sup> Now, how antiquated and limited appear my suggestions! In sequel, it has turned out that, without amendment and in a few short years, the things now unquestionably permissible to the legislature have gone far beyond our conceptions of that short, but now quite bygone, time.<sup>12</sup>

Moreover, except perhaps as to Jehovah's Witnesses, due process has now gone into the background of our legal thinking. It has yielded the spotlight to other and, I believe, more pressing and more presently real legal battles. And the point I wish to make is that this particular development was so essentially inevitable that, so far as I can discover, the criticism of the courts now current does not attack that fundamental change. No one apparently now believes that minimum-wage or social-security or labor-relations laws should be held to take private property without due process of law. The criticism is rather as to the speed of change, the uncertainty of the prec-

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<sup>9</sup> *United States v. Butler*, 297 U. S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

<sup>10</sup> See *Hearings before Senate Committee on the Judiciary*, 75th Cong., 1st Sess. (1937) 1872-1880.

<sup>11</sup> *Clarifying the Constitution by Amendment*, Addresses made at the Thirty-seventh Annual Meeting of the National Consumer's League, Dec. 15, 1936, 16-22; 81 CONG. REC. 905 (1937).

<sup>12</sup> As shown by Stern, *supra* note 7.

edents, and perhaps the lack of continuing respect for what has been done in the past.<sup>13</sup> I need not weigh here the validity of such criticisms. That is the proper and appropriate subject of present-day constitutional debate; and there may well be concern as to disruption of settled practices, however inevitable it may turn out to be in a period of constitutional change. But this is not a disappearance of law. Far otherwise, it is the inevitable restoration of balance which was sure to come after a period of repression of legislative initiative.

But, going beyond this, there seems to me a more direct lesson for lawyers, for those who would look to the law of the future, than merely a recession of the pendulum. This, in effect, has been a restoration of law to its proper position of the servant of social needs, not the master. Almost invariably in countries of the world, law follows the course of the prevailing sentiment of the community. Only in America do we try to make the law control; or pride ourselves on subservience to a government of laws and not of men, wresting Harrington's famous phrase away from the thought from which it arose.<sup>14</sup> Of course, I am sensible of the immediate retort. Knowing as we now do the horrors of Nazi justice, do we not need the ideal of a law over and above the individuals who temporarily comprise the government? By all means yes, provided, however, we remember that law is not the end in itself, but only the means to the end of a government of, by, and for people, not protected and sheltered minorities. And that, I conceive it, is the wholesome trend of present constitutional expression.

In much of traditional constitutionalism, there was a paradox of which the protagonists appear to hold themselves quite oblivious. I see it in current and quite extensive condemnation of Justice Holmes as only a materialist, a believer in force—"Hobbes, Holmes and Hitler," to quote a recent title in the American Bar Association

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<sup>13</sup> As in Ballantine, *The Supreme Court; Principles and Personalities* (1945) 31 A. B. A. J. 113, or Armstrong, review of Swisher, *THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES* (1946) 32 A. B. A. J. 333; or even in more extreme statements, such as Kennedy, *Portrait of the New Supreme Court* (1944) 13 *FORDHAM L. REV.* 1; (1945) 14 *id.* 8; or Moley, *Second Rate Men on a First Rate Court* (1946) 28 *NEWSWEEK* 108; cf. Sears, *The Supreme Court and the New Deal—An Answer to Texas* (1945) 12 *U. OF CHI. L. REV.* 140.

<sup>14</sup> CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) 102-148; FRANK, *IF MEN WERE ANGLES* (1942) 190-211; Clark *supra* note 5, at 395; Brown, *A Government of Laws and Not of Men* (1943) 17 *FLA. L. J.* 179, (1944) 5 *ALA. LAWY.* 77; Guiseppi v. Walling, 144 F. (2d) 608, 615, 616, 155 A. L. R. 761 (C. C. A. 2d, 1944).

Journal.<sup>15</sup> I see it in that striking plea for a *partial* return to the past—apparently no more can even be claimed—by Professor Vreeland, “The Twilight of Individual Liberty.”<sup>16</sup> And the paradox seems to me all prevailing in these arguments for a return to a more glorious past. It is that we are losing our liberty, our freedom, our sacred political heritage through denial of judicial invalidation of legislative attempts at amelioration of social wants and unfairnesses. A fairer and a more general and even opportunity to share in the good things which American life can offer—that would seem the essence of true democracy or of the representative republic envisaged by our constitution makers. When a government fails to support “all men” in their “unalienable Rights” to “the pursuit of Happiness,” then the people should abolish it for a “new Government,” “organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”<sup>17</sup> Such was the conception of our ancestors in announcing the principles of the Declaration of Independence. I suggest, therefore, that not for long could social-welfare legislation, however misguided or doubtful in details, be considered a violation of fundamental constitutional rights, as a deprivation of the liberty to oppress and restrict the activities of fellow citizens.

Indeed, the movement for government to act for the benefit of all classes, even those the least privileged in any society, was bound to outrun the confines of any slow-moving constitutional abstraction. In 1887, President Cleveland vetoed a bill carrying an appropriation of \$10,000 for a special distribution of seed in the drought-stricken counties of Texas, saying, “I can find no warrant for such an appropriation in the Constitution and I do not believe that the power and duty of the General Government ought to be extended to

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<sup>15</sup> Palmer, *Hobbes, Holmes and Hitler* (1945) 31 A. B. A. J. 569; Palmer, *Defense Against Leviathan* (1946) 32 A. B. A. J. 328; and see Nossaman, *Letters to the Editors* (1946) 32 A. B. A. J. 615. Among other recent articles may be cited Gregg, *The Pragmatism of Mr. Justice Holmes* (1943) 31 GEO. L. J. 262; Simms, *A Dissent from Greatness* (1942) 28 VA. L. REV. 467; Gannon, *The Moral Law* (1945) 14 FORDHAM L. REV. 1, (1945) 17 N. Y. ST. BAR BULL. 49, (1945) 68 REP. N. Y. ST. BAR ASS'N 383; Lucy, *Natural Law and American Regal Realism; Their Respective Contributions to a Theory of Law in a Democratic Society* (1942) 30 GEO. L. J. 493; Dore, *Human Rights and the Law* (1946) 15 FORDHAM L. REV. 3; Kennedy, *supra* note 13; Vreeland, *infra* note 16.

<sup>16</sup> VREELAND, *THE TWILIGHT OF INDIVIDUAL LIBERTY* (1944), as reviewed by Falk, (1945) 14 FORDHAM L. REV. 261.

<sup>17</sup> Declaration of Independence, 2d and 4th sentences.

the relief of individual suffering which is in no manner properly related to the public service or benefit."<sup>18</sup>

How strange that now seems! Recently a law review devoted an entire issue to "Unemployment Compensation" and the impact of federal grants and control upon the relief and employment laws of all the states.<sup>19</sup> The importance of this is not merely the substantial federal funds involved, but the complete and complex interrelationship of federal and local legislation, regulations, and rules. Even though I have been adjudicating cases upon this and similar legislation for some time, I found the extent of the intertwining fairly amazing. I suggest that the simple dichotomies of the *Lochner* and *Adair* cases,<sup>20</sup> not to speak of those concerning federal-recovery legislation of the thirties, would have proved inadequate for such fields of juristic thought in any event. These are literally fascinating problems among which the young lawyer and veteran may find industry and pleasure in orienting himself. I believe he will be entirely thankful that he can approach them with good, tough-minded thinking and not the legal clichés unfortunately so justly viewed as a near monopoly of our profession in the past. The motto we may well take to guide us is that urged by Justice Brandeis in his famous dissent in the *Oklahoma Ice* case, "If we would guide by the light of reason, we must let our minds be bold."<sup>21</sup>

The same thought was steadily expressed, and was repeated in what I think was his last public appearance, by another famous dissenter who at length came into his own as his famous dissents became the law of the land, our beloved Chief Justice, the late Harlan F. Stone. On March 16, 1946 Justice Stone spoke in New York at an anniversary meeting of the Association of the Bar of that city; and his address, which deserves wide reading, is reprinted in the May number of *The Record*, the magazine of the Association.<sup>22</sup> His closing remarks were a quotation from Samuel J. Tilden's address at the formation of the Association in 1869 that the Bar, "bold in defense, and, if need be, bold in aggression," doing its duty to the profession, "can do everything else. It can have reformed constitutions,

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<sup>18</sup> Quoted in CORWIN, *op. cit. supra* note 14, at 149, from 8 MESSAGES AND PAPERS OF THE PRESIDENTS 557.

<sup>19</sup> (1945) 55 YALE L. J. 1-264, articles by fourteen authors on "Unemployment Compensation."

<sup>20</sup> *Lochner v. New York*, 198 U. S. 45 (1905); *Adair v. United States*, 208 U. S. 161 (1908).

<sup>21</sup> *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932).

<sup>22</sup> 1 THE RECORD 144, 154 (1946).



it can have a reformed judiciary, it can have the administration of justice made pure and honorable." But the Chief Justice did not limit himself to merely stirring admonition. In the course of his address he repeated the regrets, expressed in earlier addresses,<sup>23</sup> at the mistake which the legal profession had made in devoting very generally its energies to an unsuccessful resistance to the adoption of the useful device of the administrative agency. "In this," he said, "it has sometimes seemed to me that the Bar did much to dissipate its influence and to make a wasteful use of its specialized competence," better devoted to guiding the organization of the agencies and promoting their more efficient and just operation. The creation of these agencies "has given rise to new problems, whose solution must ultimately be found by those skilled in the law. Lawyers ought not to permit themselves, by their indifference to those problems, to add a second to their first mistake." Recalling his notable address before the American Bar Association in 1928,<sup>24</sup> where he had pointed out the ready constitutional means of expanding federal power through exercise of Congress' power over interstate commerce, he stated that clear thinking should have recognized this when it came, for it was "a legislative and not a judicial revolution"; and he added that "for those who wished to play the role of counter-revolutionists, it was a legislative and not a judicial remedy which was needed."<sup>25</sup>

I do not know how far these last admonitions of the Chief Justice will be taken to heart by our profession. It would seem obvious that in the immediate future the chief counter-trend against past expansion of federal power must come, as he said, in the legislature; and in truth this is the outstanding political phenomenon of the moment. But the ebb and flow of constitutional doctrine has been so marked a feature of our history, the resort to the felt protective influence of the courts so ingrained a characteristic of our thinking, that further appeals to judicial protection are likely to be made and, at least occasionally, to meet with favorable response. In the lawyer's duty to represent all interests and to present diverse points of view to the courts, he may well be called upon to seek judicial reversal, or limitation, of present constitutional concepts. But the

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<sup>23</sup> Stone, *The Public Influence of the Bar* (1934) 48 HARV. L. REV. 1; Stone, *The Common Law in the United States* (1936) 50 HARV. L. REV. 4.

<sup>24</sup> Stone, *Fifty Years' Work of the United States Supreme Court* (1928) 14 A. B. A. J. 428, (1928) 53 A. B. A. REP. 259, (1929) 8 ORE. L. REV. 248,

<sup>25</sup> *Supra* note 22, at 149.

Chief Justice, with his gift of apt description has given us the proper designation of such a trend by referring to it as an appeal for "counter-revolution," and its protagonists as "counter-revolutionists."

And so it seems to me we are witnessing the growing maturity, not the decline, of law, its adaptation to the needs of modern society, its growth and adaptability as a device of social control to secure and advance democratic needs and ideals. We have seen a revolution not merely in the distribution of power, but also in ways of thinking about our social problems and their control. In all this the American law schools have played a part of significant leadership which must be stressed in any account of our times.<sup>26</sup> In their stress on clear analysis of concepts, of admissions of presuppositions and generally inarticulate major premises, of the function of law in modern life, of avoidance of cliché thinking, they have made our legal discussions direct and clean-cutting. Now a division of opinion in the court—deplored in some quarters, though Judge Evans, among others, has shown the value of dissenting opinions as clarifying views in the close questions before a court of last resort<sup>27</sup>—has the merit of give and take on the policy consideration of the issue. This has been the insistence of the law schools; they have striven for an approach which is hard headed and realistic. Indeed, this has developed into the form and size of a movement, learnedly discussed in articles and books—American legal realism.<sup>28</sup> In fact, it has been installed, along with Justice Holmes, as the arch villain of the story. The idea now often reiterated is that Holmes seduced the law schools,

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<sup>26</sup> Clark and Douglas, *Law and Legal Institutions, 2 Recent Social Trends in the United States*, REPORT OF THE PRESIDENT'S RESEARCH COMMITTEE ON SOCIAL TRENDS (1933) 1430-1433; Clark, *Legal Education in Modern Society* (1935) 10 TULANE L. REV. 1.

<sup>27</sup> Evans, *The Dissenting Opinion—Its Use and Abuse* (1938) 3 MO. L. REV. 120, (1938) 43 COM. L. J. 468, (1938) 3 JOHN MARSHALL L. Q. 570; HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH (3d ed. 1942) 107, 108.

<sup>28</sup> See bibliography in GARIAN, LEGAL REALISM AND JUSTICE (1941), and, *inter alia*, Yntema, *Jurisprudence on Parade* (1941) 39 MICH. L. REV. 1154; McDougal, *Fuller v. The American Legal Realists; An Intervention* (1941) 50 YALE L. J. 827; Llewellyn, *On Reading and Using the New Jurisprudence* (1940) 40 COL L. REV. 581, (1940) 26 A. B. A. J. 300, 418. The terms "realism" and "realists" have now become so popular among friends and critics that they probably will stick; but they are unfortunate, as being "boastful" and misdescriptive and as referring indiscriminately to a large number of legal scholars who do not form a homogenous group. Probably some of the misconceptions of what some at least of these scholars have in mind, see notes 13, 15 *supra*, and 30 *infra*, stem from these labels. See Frank, *IF MEN WERE ANGELS* (1942) App. V, *Comments on Some Criticisms of the So-called "Realists"* 276-215.

who, in turn, misled the Supreme Court.<sup>29</sup> How the old Justice's eyes would sparkle at the very form his posthumous fame has taken. It is an amazing, but a deserved, tribute to a great figure. And it is a concession of the strength and force of this new development in education.<sup>30</sup>

I wish there were time to trace more fully the growth and advance of the American law school, for it is a fascinating story of educational leadership. Seventy-five years ago the schools in the main were little more than the places where distinguished lawyers and judges gave their formal lectures. It was the distinction of the lecturer that was all important; the school as an integrated unit had not yet found itself. But when President Eliot called Christopher Columbus Langdell to Harvard, the opportunity was at hand. How brilliantly it was embraced is now history. Three cardinal principles were the basis of Langdell's planning: First, there must be the full-time law teacher whose career was part and parcel of the school itself. Second, there was required the graduate level of instruction, signalized by the requirement of college training, thus insuring a student body of sufficient intellectual background to assimilate the tougher training now proffered. And third, there was the famous case method of instruction, substituting the live material of concrete experience for the dry abstraction of formal dogma. For a time the new system had to struggle to win its way. But the gain in deftness

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<sup>29</sup> The thesis in particular of Dean Kennedy, *supra* note 13; compare also the articles in note 15, *supra*.

<sup>30</sup> Even so stimulating and fertile a book as NORTHROP, *THE MEETING OF EAST AND WEST* (1946) 254-260, is unfair to the "realists", and misstates their purpose as well as their impact on ancient legal formalism when he accuses them of lack of an ideal or a philosophy and as looking for mere facts alone. Indeed, he is guilty of a real howler in his reference to President Hutchins while at the Yale Law School "as he and his colleagues enthusiastically piled up the empirical social data" at the very time when lack of finances and the Dean's necessary engrossment in the administrative program which led later to the Yale Institute of Human Relations prevented any extensive data-collecting, as the writer hereof well knows. In this movement there was no lack of an ideal or philosophy, as has often been pointed out, *e. g.*, by Frank and McDougal, *supra* note 28; Frank, review of FRIEDMANN, *LEGAL THEORY* (1946) 59 *HARV. L. REV.* 1004, with earlier citations at 1010; Clark, *The Higher Learning in a Democracy* (1937) 47 *INT. J. ETHICS* 317, 327. In fact, the criticism now often made is that it was too direct, and immediately practical and purposive, as in the criticisms directed against the present Supreme Court, *supra* note 13. And the movement has obviously not yet produced a synthesis as far-reaching, as sophisticated, and as compelling as Professor Northrop's own dynamic reorientation of the world; but give it time! Certainly FRANK in *FATE AND FREEDOM* (1945) has directed his attention to philosophy, rather than data collecting! See also for another search for truth, Pekelis, *The Case of a Jurisprudence of Welfare; Possibilities and Limitations* (1944) 11 *SOC. RES.* 312.

of thinking, of grasp of analysis, of originality in selecting analogies and choosing theories and devices, told in results. In due course the modern methods triumphed everywhere. Then research in law came into its own. At first there was stress on investigation of legal history, on thoroughness of analysis, in short on doing better what had been done before. This in itself stimulated clear thinking, the rejection of careless or outworn concepts, the better reading and study of the legal materials already at hand. But it also led to a re-examination of what was being done and accomplished in the law, to the functions which law actually performed and accomplished, to the sociological and functional approaches to law, to modern legal realism, to the questioning and inquiring school of the present day.<sup>31</sup>

In many ways it was natural that Holmes should become the paragon, the exemplar, of the modern law school. In his early days he made legal and historical scholarship real as well as famous. Then in a long judicial career he took as his guiding star that attitude of inquiring cynicism about concepts which in due course the schools adopted as their own. Meanwhile he embodied these ideas in imperishable prose, so lucid and persuasive as to carry conviction by its very repetition. No one today has expressed or can express law school objectives and attitudes better than did Holmes two or three generations ago. But it is a mistake to suppose that all the schools show today is a warmed-over version of his philosophic principles. Indeed, we can see now that this development was inevitable as an intellectual necessity of scholarship in law. Had there been no Holmes, the ultimate development would have been the same. It was Holmes's fortune to be the forerunner in the movement and to give it standing, dignity, and intellectual power from the very beginning.

And now the law school is with us to stay; for better or for worse, legal leadership cannot be denied it. I know that many decry its power, and sneer at the "social engineering" which it now undertakes. Temporarily, the professor became an object of derision; but I think now there is more widespread appreciation of his worth, as

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<sup>31</sup> See note 26, *supra*. And it is a healthy sign of life that there are now renewed soul searchings among the legal educators. Lasswell and McDougal, *Legal Education and Public Policy; Professional Training in the Public Interest* (1943) 52 YALE L. J. 203; Vanderbilt, *The Law School in a Changing Society; A Law Center* (1946) 32 A. B. A. J. 525; the several articles in (1943) 43 COL. L. REV. 423-485; the symposiums *Legal Education After the War* (1945) 30 IOWA L. REV. 325-441; and the *Reports of the Committee on Aims and Objectives of Legal Education* (1945) PROGRAM ASS'N AM. L. SCHOOLS 11 24, give some of the flavor.

events show how unfortunate has been his departure from public service. I regard his potential contribution to the social order as invaluable; and I know that while he makes life often very uncomfortable to the judges, he makes it immeasurably more interesting. Who can say how much the stimulus of a stinging rebuke in the office from the law school reviews does in keeping judges on their mental best behavior? My law school days have been my happiest; and now I value the opportunity to come back to old school associations, to the bright evaluation of things of the mind which the law schools give. Those who would curb and hamper this intellectual freedom and variety are ill-advised. They are the ones who are pressing for the law's disappearance. For they are attempting to shut off the richest fountains of the law of the future.