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## "if I were Dean. .. "

Moffatt Hancock

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*"It is the crowning glory of this law school that it has kindled in many hearts an inextinguishable fire."*

*Mr. Justice Holmes<sup>1</sup>*

Willis Reese's droll, colloquial, and slightly tongue-in-cheek remarks about what makes a law school "great" recall the success achieved by the law teachers of the late nineteenth and early twentieth centuries in establishing what came to be the exclusive system of legal education in the United States and building up those famous law schools that are its oldest exemplars. As late as 1890 the vast majority of law students were trained by a haphazard combination of clerking in lawyers' offices and private study. A much smaller number attended a type of law school that offered a course of lectures (usually for two years) followed by simplistic examinations or none at all. Graduation from high school was the normal entrance requirement.

In the 1870's and 80's, against a barrage of hostile criticism, the Harvard Law School introduced what President Elliott called "the catechetical method" of class instruction requiring diligent analysis of cases by the student *before* the class. Examinations were *not* easy and three years of study were required for the LL.B. degree. Entrance requirements were gradually raised until only college graduates were admitted.

In the competitive struggle to attract the brightest students by offering the best training for the bar, Harvard and the few schools that quickly adopted its methods demonstrated that their graduates became more competent practitioners than most of those trained by other methods. The alumni of the better schools carried the benefits of their superior instruction into teaching law as well as practising. In time all university law schools copied the Harvard system.

These historical events, through which the famous "national" law schools established their reputations clearly support Willis

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\*Moffatt Hancock, B.A., S.J.D., LL.D.; Marior Rice Kirkwood Professor of Law, Emeritus, Stanford University; formerly Viscount Bennet Professor of Law, Dalhousie University.

1. *Collected Papers*, at p. 48

Reese's suggestion that a "great" law school attracts highly qualified students, trains them well and so, over a period of time, produces a distinguished body of alumni. The distinguished alumni by their own achievements and their support of the school, attract highly qualified students to it in the future.

In considering the strategies by which a law school might attain this kind of greatness a distinction should, perhaps, be recognized between schools that receive direct financial support from the government and those that do not. The former are expected to respond with greater sensitivity to popular demand for a legal education, especially the aspirations of influential minorities. The private schools have greater freedom to limit their enrolment if they wish. Since they usually have to charge higher fees than do those having state support, a limited enrolment policy enables them to offer a different kind of learning experience with more small classes. (While I personally enjoy the dramatic tensions of a large class as Willis Reese describes them, I have no doubt that a good many students receive more encouragement and inspiration to study and take part in class discussion from classes of, say, 35 or less).

Since about 1950 the Stanford Law School has limited its entering class to 160 students. Since about 1965 it has received several thousand applications annually from very highly qualified students in every part of the United States. There is a strong consensus of faculty opinion that this limited enrolment policy has helped to create an environment that, directly or indirectly, attracts desirable students.

Willis Reese's contention that a school striving for greatness might harbour among its faculty persons who did not write and publish does not accord with the historical tradition described above. The teachers who established that tradition were not content merely to train students in class; they insisted upon demonstrating what excellent legal writing should be like. Their standards were high; many of them could read medieval Latin and law French. Some, such as Hohfeld and Bingham, undertook to recast the basic methodology of analysis, interpretation and evaluation of judicial opinions.

There is an inherent contradiction in the very idea of teaching as an activity distinct from writing because writing is part of the teaching task. No good teacher would want to leave his students with nothing better than his extemporaneous remarks in the course of a class discussion as a statement of his considered views. He will

naturally want to subject his hastily expressed ideas to the testing process of reducing them to writing. By publishing he can (1) secure a generous supply of reprints which his students can peruse in the library, (2) perhaps assist teaching colleagues in his field — judges, and others interested in it, and (3) modestly enhance his own reputation and that of his school.

From a dean's point of view the written product of a person whom he is considering for his faculty is virtually the only reliable guide to her or his intellectual caliber. Many senior professors consider classroom visitations undignified, unseemly and often unproductive. Student evaluations (through no fault of most of the students) are highly unreliable and downright dangerous. Some of the most brilliant teachers of the past would have received only a handful of affirmative votes in these thinly-disguised popularity contests. According to Stanford tradition, Wesley Newton Hohfeld was three times annually elected "All-American Son of a ----" by students of the Stanford Law School. If I were a dean I would never accept anyone on my faculty who had not shown talent and enthusiasm for excellent legal writing — by doing it.

The remarkable prestige of the better U.S. law schools (not just the top ten) is attested, not only by the eagerness of lawyers to hire their promising graduates (and of judges to hire them temporarily as clerks) but also by the schools' power to attract their very best graduates to a career of teaching and critical scholarship despite the alluring prospect of great financial rewards in practice. But few law schools are satisfied merely to carry on the successful traditions of the past. The spirit of innovation and experiment pervade their faculty and committee debates; new techniques in legal education are continually being discussed and tested. Time alone will tell whether these innovations will make any important improvement in the highly successful system that has been developed.

### *Clinical Training*

For ten years Professor Anthony Amsterdam of Stanford has been working on a teaching technique that gives the student the simulated experience of litigating a case through the phases of counselling, pleading, motions, trial, etc. In recognition of his work the school has received funding for a permanent chair in this kind of clinical instruction and a Carnegie grant of \$172,000 to support the program. In the words of Dean Charles Myers this technique marks

"the most significant advancement in legal education since the casebook".<sup>2</sup>

### *Extern Programs*

To satisfy the yearning of some students for a different kind of learning experience, a few schools will give full credit for one semester spent working in a government agency or clerking for a judge. The Associate Dean studies and approves each student's program before it is undertaken. The student is required to write a detailed analysis of his experience under professorial supervision.

### *Degree After Two Years' Study*

As Willis Reese indicates, some law teachers believe that students receive sufficient academic training during the first two years of law school and should then be free to begin their practical training (working for a law firm or clerking for a judge). How curious to reflect that thirty years ago a favorite subject of faculty debate was the four year law school program, actually adopted by several schools! Since many members of the bar view with alarm the rapidly increasing number of new law school graduates per year, the proposed two-year program would doubtless meet with intense opposition which the law schools do not want to provoke. Stanford has cautiously approved a degree obtainable after two years of study, carefully labelled NON-PROFESSIONAL (Master of Jurisprudence). Though rarely applied for, it gives a student who has decided to abandon the study of law something to show for his work.

Concerning Canadian law schools at their present stage of development, I can add but little to the observations and insights of Max Cohen and John Willis. However, John Willis' remarks about young Canadian law teachers pursuing graduate studies at famous U.S. law schools will certainly excite some comments; so here is mine. I have always thought that the Canadian practice of encouraging young, aspiring law teachers to study abroad for a year (usually, though not exclusively, in England or the U.S.) was a unique and an admirable device for infusing a cosmopolitan, well-informed outlook into the law schools and their universities. (Most American law teachers have never lived outside the U.S. except as tourists). But now John Willis strongly opposes such

2. 15 *Stanford Lawyer* (1980), at p. 42.

graduate study in the U.S. because “our embryo law teachers who go there find themselves immersed in ways of thinking about law that are quite alien to the Canadian system which they will be expounding to their Canadian students.” He next itemizes three alien and unCanadian “ways of thinking” that strike me as being just as much a part of the Anglo-Canadian historical tradition as of the Anglo-American. The rhetorical conclusion of the paragraph ending with “which God forbid” is apparently intended to make the Beaver thrash his tail.

I have sometimes speculated whether Canadian schools were becoming complacent with their greatly enlarged faculties, splendid new buildings, and hordes of eager entering students. But these speculations were, it appears, quite erroneous. The spirit of competition is very much alive and at least some schools have entertained a laudable aspiration to national standing. Quite apart from the laudable aspirations of Canadian law schools to become a truly “national” school, drawing students from many provinces, Canadian schools can look for stiffer competition from American schools because aliens are now free to practice law or hold government jobs in the U.S. without becoming naturalized U.S. citizens. Highly qualified young Canadians may therefore decide to eschew legal study at home, to graduate instead from a U.S. law school, and, while retaining Canadian citizenship, to try their fortune at practice or government service in any state of the U.S.

Let us return to those “laudable aspirations” to become Canada’s first national law school. It should be much easier for a Canadian law school today to attract students from every part of Canada than it was for Harvard (in 1900) to attract students from every part of the U.S. Attendance at Harvard meant long train rides and long absences from home for many of its students. Today almost everyone resident in Canada can reach the school of his choice in a single day’s travel by air. Moreover, for what it may be worth, there is a much larger body of law in force in all common law provinces; it is possible to speak of Canadian common law in a far broader sense than that in which it is possible to speak of American common law.

Dalhousie, as the most strategically placed and traditionally famous Canadian law school, could well be the first to assume national leadership. First, it is only a short plane ride from the “heartland of Canada” around Lake Ontario. Second, it has a fascinating historical setting in a charming old city by the sea where

fog horns sound and great ships come and go. Third, except for British Columbia, Nova Scotia has the mildest winter climate in Canada. Fourth, despite the constraints of poverty, and until recently, of isolation, Dalhousie has kept the faith in great teaching and scholarship since its foundation in 1883. Its graduates, though not numerous, have spread its reputation throughout Canada and many parts of the U.S.

As John Willis says, it will take much hard work by faculty, deans, university administrators and alumni to make this dream come true. Some very adroit planning, plotting and scheming will be needed to induce the very best scholars (and only those) to join the faculty. Wealthy potential donors must be identified and boldly invited to join the cause by funding scholarships and, if possible, chairs. Alumni must be organized into local clubs, asked to contribute annually to scholarship funds and urged to encourage the brightest and most enthusiastic young men and women they know to "study law at Dal". Faculty publication by senior professors should be warmly encouraged; junior professors should be told that they can expect no advancement without publication. Above all, the entering class should be kept small and exclusive. (Let other schools pick up the low achievers unless, in a personal interview, they show exceptional enthusiasm for "the law".) In the long run, a small, friendly and intellectually keen student body will draw to the school brighter students and more scholarly teachers. Teaching at the Dalhousie Law School was for me, as a young man, a wonderfully challenging and exciting experience. I hope to be able to tell my grandchildren that, once upon a happy time, I was a teacher at Canada's most famous law school.