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## Commentaries on Mr. Shea's Lecture

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## LEGAL EDUCATION

them, even if it is at the academic level through instruction of and talk with students, is an essential part of any process of development of new ideas and new answers. But I will be a little unhappy if the law schools in this country develop too many institutes for study of particular problems without tying them very closely into the instructional aspect of the law schools' work.

In the end, of course, the heart of the problem of legal education as of all problems of education, is the relationship between the teacher and the student. On committees and in conferences we may discuss legal education as if its problems were unrelated to teachers and to students. But in the end, the answer of education is to be found in the quality of men teaching and, as Mr. Jaffe has said, perhaps even more in the quality of men being taught. The only final assurance that legal education is going to inspire young men and women with a sense of the dignity of their profession is to give them an association with teachers who see things broadly and stimulate the eagerness of students to carry the enterprise of scholarship forward into their professional lives.

### HON. PHILIP HALPERN\*

Dean Hyman, distinguished colleagues, ladies and gentlemen: You may not believe it but it is true that I agree with all the speakers despite their contradictions and I also agree with Dean Hyman who thought there was no contradiction among the speakers. You know the story of Alice in Wonderland—you can believe contradictory things at the same time if you try hard enough. I find myself in agreement with most of what Dean Shea said in his excellent address. I also agree with the comments wittily presented by Dean Jaffe, when I got to the core of their substance, and I agree with Dean Howe, too. So I am going to start out, not by commenting on the paper at all but by commenting on the author. That is not within the privilege of fair comment under the law of libel and slander but since what I am about to say is, I think, not defamatory, I'm not concerned about that.

When Frank Shea came here in 1936, we affectionately called it the Harvard invasion. Dr. Alden and Bill Laidlaw and I were the surviving native population. I once discussed with a colleague of mine at the United Nations, Mr. Krishnaswami of India, the great achievements of India under the leadership of Great Britain, a fact which India has tended to overlook in the last decade or so. I mentioned the fact that the Indians had had no common language, that they couldn't even communicate with each other throughout India until they all acquired facility in English. He said that's true, but after all when the Romans conquered Britain, they built roads for Britain but they were still conquerors. Well, we may say that the conquerors of 1936 built some very fine roads for us. We have been traveling on them ever since. I

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think Frank Shea fulfilled the role of dean in an outstanding way. It seems to me the chief role of dean in modern legal education is to create an intellectual climate which will be congenial to scholars and teachers and will attract good teachers to the law school. To be successful, he must be a man of such intellectual strength as to enjoy the respect of the academic world. In this respect, Frank Shea was an ideal dean; he brought with him such men as Jaffe and Howe, Reisman and Brown; those were great days. Those five men, with Dr. Alden representing the old tradition, and you know he continued actively to teach for many years after he retired as Dean, were the core of the faculty. I was very proud to be admitted to that august company, and I must say that those years were very stimulating and exciting years and provided the kind of intellectual ferment which produces the ideal law school. I may say, although it is not part of my discussion of a conqueror, that we now have a Dean who is emulating Dean Shea in a very fine way and who is bringing to us leading teachers from all over the country. There was little bit of conflict in the days of Dean Shea. These men had all come from the New Deal—I shouldn't say all, but some had come from the New Deal; at any rate, the New Deal was very much in the thinking of all of us in those days. It was a very exciting period, nationally, and everybody wanted to teach Constitutional Law. The rest of the law seemed quite piddling in comparison with that subject. Well, Jaffe taught Administrative Law and of course it was easy to convert that into a course in Constitutional Law dealing with the power to delegate legislative authority to administrative agencies, which produced two wonderful articles by Jaffe in the *Columbia Law Review*. Mark Howe taught Anglo-American Legal Institutions—what is that but Constitutional Law? Since Frank Shea was the Dean, he taught the course in Constitutional Law.

The concern with public law in the law school has, of course, grown with the years. It did not end with the New Deal. Not only were most of the New Deal measures of social and economic regulation retained but they were added to. The antagonism toward Administrative Law with which Louis Jaffe had had to deal in his early years here, has, to a large extent, been mitigated by the years. Turning from the national to the local government, we find similar inroads upon the domain of private law. Years ago, a developer of a tract of land would try to work out by private contract the restrictive provisions to govern the development—which parts were to be used for residence and which parts were to be used for business. That used to be a very important part of Real Property Law and of Equity, restrictive covenants and conditions subsequent and the like. You don't hear much of that anymore because it has been displaced to a large extent by zoning regulations. The developer relies upon the public authorities in the community to adopt reasonable zoning regulations which will protect the interests of the residential buyers but won't unduly restrict future development. I cite that as an illustration because you will hear more about it this afternoon at luncheon. The local government aspect of the

curriculum in this law school has a great future; it is just entering a period of expansion.

There are whole areas of private law which have been replaced by public law. I mention this particularly because it is the theme of this whole conference. The title has been lost somewhere in the shuffle but the title of the conference is *The Challenge to Private Law* and I take it that Dean Shea digressed to address himself to the theme of the conference when he talked about the private decision-making which had survived the great growth of Administrative Law. I was very much surprised that the great master of Administrative Law didn't challenge him. I thought that Frank Shea understated considerably the impact of government regulation upon the private decision-making process. There is still of course the need for private decision-making but it is of a very different character because of government regulation. That certainly has had an impact upon the content of the law school courses.

I agree there will be a renewed emphasis on private law in the next generation, but for reasons somewhat different from those given by Dean Shea. The interest in private law has increased greatly, not because of the areas of private-decision making which have survived government regulation but because of the strong, almost revolutionary demand for the re-examination of private law. If you look at last year's McKinney's Session Laws, you will find that for the first time in twenty years, the publishers had to break down the year's output into two volumes. This was necessary because so many new statutes were enacted in the past year. The principal one was the Uniform Commercial Code which represents what Dr. Blum referred to yesterday as a drive for uniformity among the states. Apart from that, we have the re-organization of the courts, the Family Court Act, the new Business Corporation Law and even such a settled old field as real property law has undergone drastic revision. Those of you who studied the rule against perpetuities under my tutelage many years ago have to throw your notes away. The whole subject of perpetuities has been rewritten. I mentioned covenants and conditions subsequent; some of them have been eliminated and harshness of others has been mitigated. I happen to be a member of a commission now engaged in rewriting the whole of the Penal Law and the Code of Criminal Procedure. So in 1963, 1964, 1965 and 1966, from the legislative standpoint, vast areas of private law will undergo revolutionary change. That has an impact upon the legal teaching which is self-evident. But the change in private law for this generation is not solely the product of the Legislature. A new attitude on the part of the appellate courts, particularly of the highest court of our state, which has final voice in private law, has manifested itself. In contrast to the statement of Judge Cardozo that the law-making function of the courts is a limited one and that the courts may change the law only in the interstitial space, we have such bold statements as that by our Chief Judge who delivered such a brilliant and penetrating paper last night that it is "the business of the

courts" to change the law to conform to new concepts of justice. The Court of Appeals has gone so far as to undertake changes which had been recommended by the Law Revision Commission to the Legislature and turned down by the Legislature. In effect, it has said: "Well the Legislature hasn't done it. If justice requires it, it is up to us to do it." Now an attitude of that kind toward the development of judge-made law means that for the next generation vast areas of private law will come under re-examination. We have seen it already in the law of Torts in several respects, in the expansion of liability generally and in the extension of warranty so to impose strict liability upon the manufacturer. *MacPherson v. Buick* is rapidly becoming obsolete in this state and is being replaced by a new kind of strict liability. We have seen it even in such a supposedly settled subject as Conflict of Laws. The dogmatic rules laid down by Beale and enshrined in the first *Restatement of Conflict of Laws* are being blown sky high. This has already happened in the chapter of the *Restatement of Conflict of Laws Second*, dealing with Contracts, and the same thing may happen when the American Law Institute gets to the chapter on Torts next spring.

Now what is the impact upon the law schools of all this? The law schools seem to me to have two lessons to learn from this great ferment in the private law field. First, the teaching of law must take cognizance of these great trends; more important than detailed analysis of *MacPherson v. Buick* today, is a study of the trend—the shift from liability based on negligence to strict liability or strict enterprise liability. I can give you other illustrations in other fields but I won't take the time to do it. This brings us to the point which Judge Desmond touched upon last night and to which Mark Howe returned this morning. I'm with Judge Desmond on this. I think that the case system serves its function in the first year as a mental exercise; by the end of the first year, the student should have mastered the technique of detailed analysis of cases and the demands upon the available time in the remaining two years can be better served by adopting other methods of instruction. I sense that Dean Howe agreed with that, when he said that the Socratic method was not the best method for all courses. He recognized that lecture methods, text methods, and discussion methods, using case materials and case books but not using the case system of instruction, are more suitable for many courses.

The second lesson for the law schools from this great ferment in the private law field is that we are living in a period of revolution in private law and therefore the law schools have special responsibility, because the men we train in the law schools are the legislators, the lawyers, the judges, the commissioners of reform of the next generation. They will have the task of completing this work and building a new foundation which will last another generation or two and then undergo a similar period of change.

There are several comments on Dean Shea's paper with regard to pre-legal education and post-legal education with which I heartily agree. I agree

with both Dean Jaffe and Dean Howe that Dean Shea has given us several good ideas about pre-law school education and an excellent idea about post-law school education, namely, to have all our graduates enroll as clerks in the office of Shea and Gardner. These are excellent ideas, but in between there is a gap. What about the law school itself, as Louis Jaffe has said so well? As a matter of fact, the points I want to make in this regard have already been stated by Dean Jaffe but he stated them so wittily and so entertainingly that you may not have realized that he had a core of substance. So you may find my rather prosaic remarks repetitious, if you got past the façade of Dean Jaffe's wit.

I agree that we have to push the teaching of English back. We have been trying in the law school for many years to teach English by requiring the writing of weekly theses, and marking and criticizing them, but the students have to acquire a mastery of English long before their years in the law school. The colleges say it is the duty of the high schools and the high schools push it back to the elementary schools; the only solution that seems to be left is to choose the right grandparents. On the other hand, I want to note a caveat, just a brief caveat. I have talked to Dean Hyman and others about it and perhaps my experience has been unique because I haven't been able to get a sympathetic response, but I think there is a danger in the other direction. I have had an unfortunate experience and our court has had an unfortunate experience, one with a graduate of this school and one with a graduate of an Ivy League school, not Harvard, but one of the other Ivy League schools. The boys wrote so superbly well they may have been hypnotized by their own rhetoric or perhaps they relied upon window dressing to conceal deficiencies in analysis. We found a tendency to turn in memoranda which read beautifully but wouldn't stand up under hard-headed analysis; a tendency to substitute for hard thinking about a problem and for digging into it deeply, a facility in stating their conclusions in very persuasive English. (Fortunately, both boys improved greatly before they left us.) That is the caveat I want to sound. Perhaps it is not needed. I am sure that the other danger, the deficiency in the ability to write good English, is the more serious one, but when we are talking about top students and an emphasis on hard thinking and good solid research, I would rather have a good researcher and a hard thinker whose memoranda may have to be rewritten than a boy who submits bland memoranda which might get a high mark from Professor Silverman in English but would get a very low mark in the courts.

I was somewhat surprised by Frank Shea's suggestion that we use pre-medical education as a model for pre-law education. Dean Howe has already pointed out that pre-medical education has no parallel or counterpart in pre-law school education. One of the chief aims of pre-medical education is to teach the basic natural sciences in order to take part of the load off the medical school. We don't want to do that, we don't want the colleges teaching Constitutional

Law so that we won't have to teach it. As a matter of fact, there is an apocryphal story that, at an Ivy League school, which I won't identify, there is a rule that if a student has taken Constitutional Law in college he has to take the elementary course in Constitutional Law in the law school, but if he hasn't taken it, he is admitted to the advanced course. We certainly don't want the colleges to relieve us of any of the burden of what we think is the proper subject matter of the law school. The prescribing of pre-legal subjects, which Dean Shea in one sentence seemed to advocate although I think it was qualified by other sentences, is a venture upon which legal educators turned their backs many years ago. Here I agree entirely with Dean Howe that the purpose of pre-legal education is to broaden the vision and to develop the interest of the student in human affairs. As Dean Acheson said in a recent magazine article, quoting Edmund Burke: "The law sharpens the mind by narrowing it." The students will have enough of that narrowing in the law school years and then in the practice of law for a great many more years. The pre-law school days should be spent in broadening the mind, in developing the interests of the student in any field which engages his interest, no matter how remote it may be from the subject matter of law. In that regard, perhaps I am in slight disagreement with the paper but I am in hearty agreement with the two commentators.

I must agree with all who have spoken and I can't put it any better than they have, that a good law school depends primarily on the professors. I have a caveat to note there, however. There seems to be an assumption that if a man is a great scholar, a productive scholar, he will necessarily be a good law teacher. I would be the last in the world to denigrate scholarship, but there is no necessary correlation between teaching ability and creative scholarly ability. There are certain qualities of a good teacher which we ought to look for—not only the ability to organize material and to present it in a logical and attractive fashion but the ability to communicate his enthusiasm, to infect the student with his own dedication to the law, to fill them with what has been described here so eloquently by Dean Jaffe and Dean Howe as a sense of being part of a great tradition. That is the sort of thing we enjoyed in my day in the law school under Dr. Alden. As I said on the occasion of the celebration of his fiftieth year of association with the law school, all those who studied under him came away with a touch of "Alden's disease." That is what the great teacher does and therefore I urge that in appointments to the faculty in the law school in the coming generation, greater weight be given to teaching ability. Coupled with that, of course, there must be a place in the law school for research scholars, for men who will have very light teaching loads, if any teaching loads, but who will be available for conferences with the students. I like the analogy to poets in residence or novelists in residence in the colleges and graduate schools. A poet in residence who is available to the student body is a great addition to the college but of course the basic English courses in the colleges are not turned over to the poet in residence. In the same way

the basic courses in the law school should be in the hands of good teachers, but research scholars should also be available, because their presence, their thinking, their conversations with the students will be of immense importance in the development of the students. In every generation there are a few who have exceptional qualifications, who combine happily teaching ability and creative research ability and I am very happy to say that we were blessed temporarily in this law school by three Deans and one assistant Dean who represented a combination of the kind I have just described. I am glad to say that we have some men on the present faculty who have that very happy combination. More power to them and I hope that they grow more numerous.

Finally, I turn to the other essential of a great law school and that is a good student body. Here we face up to a fact that is infrequently discussed. The law school cannot be a great law school if good teachers, of the kind I have just described, are held back by a mediocre class. Even if there are one or two outstanding men in the class, the teacher cannot do a good job because he has to gear his instruction to the level of the class. In fact, it is more difficult to teach a mixed class than to teach a wholly mediocre class. The problem of getting a better student body which in turn will stimulate the teachers and produce better teaching is a great problem. Louis Jaffe has spoken very frankly about the Harvard Law School as an institution of legal self-education. But to make that system work, the raw material must be there. Perhaps we are in a vicious circle. We will get better students here when we get better teachers. Good teachers cannot function properly unless we get a better student body. Perhaps we can break through that circle by more generous fellowships and grants in aid to students and by the enlargement and improvement of our faculty; so as to induce the brilliant young men in the city of Buffalo and Western New York who might otherwise go to the Ivy League law schools, to stay here and to go to our own law school.

And finally I want to second what Frank has said in conclusion and here I am very happy to sound a note of complete and enthusiastic agreement, to stand up and shout, hear! hear! when he says, after all, the old virtues are still the ones that count. We want to turn out lawyers who have the qualities of thoroughness, zealousness, industry, vision and resourcefulness—lawyers who have both intellect and moral strength. Those are the old virtues and they are still the important ones. If we turn out lawyers who possess those qualities, we will be turning out good lawyers and so I come to a conclusion as paradoxical as my opening statement that I agreed with all the speakers even though they seemed to contradict each other, that in a changing world, the fundamental aims of legal education remain unchanged.