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LEGAL RESEARCH IN WEST VIRGINIA*

ROBERT M. HUTCHINS**

A glance at the record of the Law School and the Bar of West Virginia leads one to ask why an untutored and unsophisticated foreigner should be invited to tell them what to do. Instead the foreigner should be invited to compliment the Bar and the School on what they have accomplished. I know of no state which can compare with West Virginia in the co-operation of law school and lawyer. You have a remarkable history in working together, and a spirit of mutual interest which promises continued achievement in the future. What you have done must strike envy into the heart of any law school executive. Working together you produced the building in which we are now assembled. Together you have made the educational requirements for the Bar as high as any in the country. Together you have made the Law Quarterly an outstanding publication of importance even outside the state. Together you have made salaries at this School sufficient to gather and retain a distinguished faculty. Together you have secured a dean whose intelligence and energy are already well-known beyond the borders of West Virginia. With his arrival and that of your new president you have begun an even more far-reaching venture, co-operative investigation of the practical problems of the State.

*An address delivered at the College of Law on the occasion of the Formal Inauguration of Dr. John Roscoe Turner as President of West Virginia University, November 28, 1928.

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Both the methods and the content of this investigation seem beyond criticism. You are relieving some professors of the necessity of teaching in the summer so that they may work on matters of pressing importance to West Virginia. In annotating the restatements of the American Law Institute, you have indicated how absurd it is for you to ask the advice of a Yale man. You are here working on both Conflicts and Agency. At New Haven we have been able to undertake only the annotation of Contracts. And in plans for the study of specific topics you are ahead of any law school I know of. You are taking up the whole question of public utilities, the whole question of taxation, the whole question of civil procedure. Whatever your answers to these questions may be, the effort to answer them in a careful and scientific manner will have immeasurable advantages, positive and negative. It will prevent the legislature and the bar from reaching too rapid a decision on these vital matters or any aspect of them. It will educate your students, educate your faculty, lead to action in the light of investigation instead of the intoxication of the moment, and result eventually in a body of law that has had the consistent study of experts instead of the persistent tinkering of amateurs.

If you doubt for a moment the significance of the programme which you have just begun, recall the situation in West Virginia before you began it. A hasty survey leads to the conclusion that in the last five years not less than thirty important and even fundamental proposals for legal or social reform have been discussed by your bar association. They range from the status and function of the justice of the peace to the constitutional amendment on child labor. Most of these questions have been raised not once but many times. Committees have reported and their reports have been referred to other committees. When they reported, the same discussion was repeated that was had of the original report, sometimes led by men who were not present when the original report came in. As is inevitable in large gatherings, everybody had to talk off the top of his head, and occasionally felt called upon to do so with some slight acidity. The total time that could be given to any one proposition at any one meeting was seldom in excess of

half a day. The success of the proposal, then, depended on who proposed it, how well he spoke, who was present or absent, and how emphatic the president was in limiting discussion or getting behind a motion. Some matters which to an outsider seemed obvious and simple were debated year after year without reaching any conclusion. Others of the utmost importance provoked no debate whatever. Others like the resolution in opposition to the child labor amendment were adopted with a speed, unanimity, and enthusiasm which formed a remarkable tribute to the learning, power, and oratorical ability of the persons who urged the action upon you. Whatever action was taken, for whatever cause, it was taken after brief discussion, and after study by only a few of the Bar. And consider the range of study possible to those few. They were busy judges and lawyers engaged either in deciding cases or in a large and I hope lucrative practice. That they were able and willing to take the time to make any study at all is a commentary on their capacity and public spirit. But they would be the first to tell you that they could make no exhaustive investigation and that their conclusions rested in the main on their impressions in practice and what others told them of their impressions. It is absolutely fundamental in the present state of American society that any man who is not giving his whole time to the study of the law is disqualified to do the work upon which any important change should rest. This is not to say that every man who is giving his whole time to the study of the law is qualified. It is simply to say that our law and our society are now so complex, the demands on the practitioner are now so great that he and his associates must turn over to those who are giving their lives to the job the study which is basic to any advance in our legal institutions.

There is of course nothing new in this position. It is the position taken by the Commissioners on Uniform State Laws and by the American Law Institute. The problems to be studied are determined by lawyers. The work is done by law professors. When done it is criticized by lawyers. This is essentially the scheme that you have adopted. I venture the prediction, without disrespect to what has been accomplished, that the work will be better done than you

have dreamed it possible to do it, and that you are beginning a period of achievement which will surpass any you have known. In the past when the Bar Association has agreed that something ought to be done, it has transmitted its feeling to the Legislature. Members of the Association have sacrificed their time and money to press bills through that body. In general, they have failed. The experience has usually been that reported in 1925, when all three measures favored by the Association failed of passage. The committee on legislation then used words which appear in substance over and over again in their annual reports. "The average member of the legislature," the committee said, "who is not a lawyer views with suspicion measures proposed by this Association and by lawyers as a class. Apparently such measures are viewed as class legislation and at least some of the members suspect that the lawyers have some improper motive in presenting measures." The committee has often had occasion to remark too that the lawyers in the legislature have frequently been as bitter against the Association's proposals as the laymen. All of which led an eminent and restrained member of the bench in 1926 to make an announcement in open meeting which has filled me with awe, wonder, and surprise. Judge McClintic in a furious argument about the fate of measures backed by the Bar used these horrendous words: "After some years of experience, I would say that when the name of this Bar Association is used in connection with a bill that kills it in the legislature every time, you might as well understand that you are a joke." Now I have all the veneration for a judicial opinion of one who has never practiced law. Consequently I am bound to accept as a fact what Judge McClintic said, that to the legislature of West Virginia the Bar of West Virginia was a joke. Judge Robinson was not so easily abashed. He replied, "I would like to pursue that a little further and ask you what that means. Does it show wisdom in the legislature to so condemn this great representative body? To my mind it condemns the legislature." To which Judge McClintic quite properly responded, "What are you going to do about it?" In the joint research programme which you have now adopted you are answering Judge McClintic's question,

and answering it, I believe, in the only rational and successful way. If the legislature has in the past disregarded the recommendations of the Bar, it has probably not acted solely from petty motives, such as a disbelief in the integrity of lawyers as a class. Is it not possible that it may have felt that the recommendations made were not based on impartial investigation and painstaking consideration? I cannot feel that the legislature of West Virginia is as bad as some West Virginians seem to think. But suppose it is. Suppose it does not recognize the nobility of spirit and purity of aim which characterizes all lawyers. What are you going to do about it? You cannot hope to beat them into a belief in our great qualities. A flank attack will produce better results. If the measures which you favor are presented backed by the scientific researches of the University in which your legislature has repeatedly manifested its confidence, are you not going to have a different attitude toward those measures from that which you have experienced in the past? At any rate, if Judge McClintic was right, and I am not permitted to doubt that he was, the attitude of the legislature cannot be worse, and any change will be an improvement.

To the untutored and unsophisticated foreigner, therefore, the methods of advancing the law of West Virginia which the Law School and the Bar have adopted appear thoroughly sound and eminently promising. They are methods which every law school will admire and wish to imitate. I have nothing to contribute here except certain minor suggestions as to the details of the content, and technique of your studies, and the added machinery that may be desirable to make them most effective. In advancing them, I ask you to remember that wherever I mention my own school I do so solely because it is the only one I know anything about, not because it is the only one that is doing things of interest to you. Nor do I mention it because I think the Yale Law School is a model to be copied by other institutions. It may prove to be a horrible example.

In the first place, then I think that in your studies of West Virginia problems you will wish to work on two things, the rules of law and the operation and effect of those rules. The first of these tasks is generally conceded

to be the task of a law school. The discovery of what the law is has indeed up till very recently been supposed to be the sole job of a professor of law. All the great legal treatises are statements and criticisms of what the courts have held. The statements are made after years spent in reading the cases. The criticisms are made in the light of logic, and an arm-chair determination of the practical results to which the cases seem likely to lead. In such work as annotating the restatements of the American Law Institute nothing more is needed. There the object is to set forth what the law of West Virginia is. But when you go into some of the projects which you have decided to undertake, you may find yourselves requiring additional information. Admitting that your law on such and such a point is so and so, what of it? Suppose it is illogical, suppose it is different from that of other states, if it produces nothing but beneficial results, why change it?

A year ago in New Haven we began to feel very keenly the weaknesses of the introspective method of determining the practical results of legal decisions. We concluded that we had been teaching the virtues and defects of various rules without knowing anything about them. We decided to make an attempt to find out what happened as a result of one holding or another; and decided to make a start on procedure. Because Connecticut lay closest to hand, we made our start there. We are now in the second year of an investigation of the practical operation of procedural devices. We put men in the offices of the clerks of the superior and common pleas courts of the state and set them to work on the records. From their figures we have obtained some idea of the consequences of procedural regulation and some basis in fact for suggesting reforms if any appear desirable. Rather extraordinary facts have appeared, for instance, as to the efficacy of the Connecticut requirement on waiver of trial by jury, on foreclosures, on the operation of the attachment statute, and on the part played by traffic cases in increasing the delays and swelling the cost of administering justice. In theory Connecticut is not an easy state in which to get a judge to grant a divorce. But our figures show that out of 1904 cases, of which 1554 were uncontested, the divorce was granted in

1792 cases, or 94 per cent. In the next five years we shall spend \$55,000 in carrying the study into other jurisdictions to determine among other things whether companionate marriage exists in them also. Our research assistants are now working in Connecticut, Massachusetts, and New York. We have branched into criminal as well as civil procedure. And a study which began as a purely procedural venture is throwing light too on problems of substantive law. Indeed we propose to use this investigation as the basis for further investigations of such diverse matters as business failures, the family and the law, judicial organization, and crime. If the West Virginia College of Law would care to cooperate with the Yale Law School by making a similar procedural study in this state, we should be delighted to work with you. Your material would illuminate ours; ours might be of some interest to you. As a basis for your proposed study of civil pleading in West Virginia such work would prove of some importance. You might even establish here a permanent fact finding body for the information of the public authorities. Whether you take this step or not, you will certainly wish in carrying out the research programme you have in mind to direct your attention to the operation and effect of legal rules as well as the rules themselves.

In considering the manner of accomplishing your aims you will first of all wish to relieve your teachers to a greater extent than is now possible of the burden of teaching. The summer plan is excellent; but more than that is required. The summer months are about long enough to enable a man to decide what he wants to do. If he wants to do anything important, and none of your professors wishes to do anything else, they are not long enough for him to do it. You must have research chairs for that. There are now such chairs in at least three law schools, and others are planning their establishment. The one that we have pays a professor's full salary, gives him a research assistant, and some stenographic help. He is not permitted to teach, and need not be in residence. My guess is that from the standpoint of production one year on such a chair is worth ten summers. The opportunity is one for continuous endeavor which successive summers cannot provide.

You may wish, too, to make it possible for your better students to participate in your programme, by taking them out of the class room and putting them to work with your instructors on the problems of West Virginia. All our work for the Connecticut Judicial Council has been done by such men. The rules on summary judgments adopted ten days ago by the judges of the superior court of Connecticut followed an exhaustive study of the possibilities made by a second year student at the Yale Law School, who has received the public thanks of the judges. Other students in the second and third year have supplied the council with memoranda on the failure of the accused to testify, the control of expert testimony in criminal cases, special defenses in those cases, the use of a jury less than twelve, majority verdicts, and six documents covering various phases of appellate procedure. All the work was done under the direction of faculty members. All of it was excellent for the students; almost all of it was material for the Yale Law Journal. And all of it was work that the council did not have time to do itself. In this way our men made a direct contribution to the advance of Connecticut jurisprudence; for it they were given, beside the glory, credit toward their degrees. We believe that this kind of work is better for the student than an equivalent number of hours in the class room.

In developing a technique for the investigation of West Virginia problems you will certainly wish to bring to bear on them all the intellectual resources you can command. Co-operation with other law schools, if it is possible, is very fruitful. In two of our modest projects we are working with the Columbia Law School. Our study of the psychology of evidence and of the family and the law have been greatly expedited by this arrangement. By dividing the field we are able to cover it in half the time. But if such a treaty with say the University of Pittsburgh or the University of Virginia is not wise because of the local character of your problems, or for any other reason, you can at least profit by employing the total brain power of this university. You are going to study, for example, co-operative marketing, taxation, public utilities, and oil and gas. Co-operative marketing is of the greatest importance to the

school of agriculture and the department of economics. Public utilities are important to students of political science and business. Taxation affects these gentlemen as much as the student of law. Oil and gas bring you up against the geologist and the economist. The chances are that you will find these non-legal scholars already working on the non-legal aspects of these questions and handicapped for lack of your assistance. On some of them unless the legal scholar has their assistance he is pretty certain to run at last into a stone wall. If you will forgive me for adding another stanza to the paean of praise I am singing about the Yale Law School, I shall illustrate from our experience. First we have selected the job we thought needed to be done. We have then combed the University for people in other departments who had any interest in it. If there were such people we then formed a committee of them all to make a study, not a legal study, or an economic study, or a sociological study, but a university study. If no non-legal scholars appeared interested and we felt that the project required non-legal participation, we appointed such men to our own staff. For example, our investigation of the family and the law is in charge of a group consisting of a psychologist, a sociologist, an anthropologist, a psychiatrist, and two lawyers. By pooling the resources of the University each discipline receives the benefit of whatever intelligence is represented by every other. On the other hand, when we decided that we should like to do something about psychology in evidence we found there was nobody outside the Law School prepared to devote attention to the subject. We therefore appointed a psychologist to our own staff. In the same way we have added a political scientist and an economist to our faculty. Such a process contributes to the the education of professors, and thus to that of their students, tends to break down the barriers between departments and schools, and to focus all the intelligence of the University on something that needs to be done.

When you have determined what you will study and how you will study it there yet remains the question of how you shall make your results most effective. You have at hand a way of making them available. Whatever may be said about the volume of useless writing now being pub-

lished in the law reviews, no such criticism can apply to the journals of the state law schools when they are concerned with their own jurisdictions. Mr. Justice Brandeis once told me that the best thing for the American law would be a strong law school in every state each with a journal of its own which respectfully but steadily scrutinized the acts of the courts and legislature of the jurisdiction. You have that situation in West Virginia now. There is no better state law school and no better state law journal than those which you possess. You have already found the Quarterly worth supporting. It will seem more and more so as your research programme develops.

In addition to the Quarterly you will have sooner or later a judicial council. Such a body, consisting of judges and lawyers, having power to make or advise rules of court, to transfer judges so that the state may have the constant service of all its judicial force, to direct the collection of statistics, and to make recommendations to the judges, legislature, and governor has proved of inestimable value in Massachusetts, California, and Connecticut. Eleven states now have such councils; the most recently created one is that of Virginia. Your bar association some years ago suggested a plan for convening judges, which was a step in this direction. It is to be hoped that the measure which then died in the legislature can be resurrected and revived. A law school can help a judicial council, a judicial council can help make a law school's researches immediately effective. Indeed a strong bar association, a strong law school, and a strong judicial council can in co-operation remake the legal map of almost any jurisdiction. The bar association can suggest what needs to be investigated, the law school can do the investigating, and the judicial council can put it over.

Of course it can put it over a good deal more easily if it has the rule making power. But it is not absolutely necessary that that power should reside in the council. Perhaps it is not necessary that it should reside anywhere. But it would seem on the whole that there is nothing that can be said against it and everything that can be said for it. In view of Judge Marvel's exposition of it before the West Virginia Bar Association last year there is no need for

me to go to its defense. Let me give an example of how it works when joined with the suggestion of a bar association, the research of a law school, and the recommendation of a judicial council. In Connecticut very broad rule making powers are vested in the judges of the superior court, which includes the judges of the Supreme Court of Errors. The New Haven bar suggested that a rule making summary judgments possible would be desirable. The judicial council asked the Yale Law School to study the matter. We had the study made to which I have referred. It was an examination of the results in every jurisdiction where the device is employed. A full report went forward to the Council. The Council recommended the most extensive summary judgment rule in existence. Ten days ago the judges met and adopted the recommendation of the council. All this, from the suggestion to the promulgation, took about a year. Imagine the time and the expense to the state in trying to get a much tamer measure through the legislature. Without the rule making power, we may be sure we should not have summary judgments in Connecticut today. A state that has that power, a judicial council, a good law school, and an active bar has almost everything it needs for progress in the law.

West Virginia now has most of these things, and all the more important ones. But even with all of them two propositions must be faced. The working out of such a programme as you have in mind will be slow, and it will be costly. No real advance can be made without deep study; and deep study takes time. If your experience is anything like ours you will need money to add to your faculty, money to employ assistants for them, and money to expand your library. Although our student body is now smaller than it has been for fifteen years and is declining at the rate of fifty a year, our faculty has tripled in that period. We now have a total teaching and investigating force of thirty-two. Our library has doubled in ten years, and we are spending on books and binding \$25,000 a year. We are making plans to double our present 100,000 volumes in the immediate future. All this means that instead of making a profit, as we used to, we are now running an annual deficit of \$47,000. But everybody knows that a research institution

cannot be maintained like a trade school. Legal education is one of the few branches of education that can be made to pay and still be kept respectable. None of the elaborate apparatus of the medical school, for instance, is required. Not even a library is an essential; some schools which have satisfactory reputations continue to retain them in spite of the fact that they have no libraries of their own. They use the Court House collection. Many such institutions seek to increase their profits by running day and night; the more men the more money. But many law schools that are not night schools definitely take the view that their sole object is to turn out technicians, and that the way to turn out technicians is to train men to commit to memory vast quantities of legal material. From this attitude it naturally follows that the faculty need not be full time teachers, because they are employed simply to lay before the students in the shortest possible time the rules of law prevailing in the state. The students in turn need not possess any particular background or capacity. Anybody may come, if the state law gives him any chance of being admitted to the bar, and try his hand at taking notes and getting them by heart. The number of students is likewise immaterial, because 300 auditors can listen to a lecture almost as well as 30. The course of study, too, will contain nothing which is not absolutely necessary to get men by the bar examinations. The object is to produce as large a number of men who can do that as possible.

I do not say that this is not a legitimate object. Certainly it is a profitable one. And as I contemplate our impressive deficit, I am inclined to see merit in the arrangement which one dean of a northern law school has made with his institution. He gets a percentage on the tuition of his students, and his income is said to be \$100,000 a year. Not only is this a legitimate and profitable object, it is also a popular one. It is safe to say that more than 50 per cent of American law schools, teaching more than 60 per cent of American law students, aim to manufacture technicians and to manufacture them by giving them information, which if remembered will put them through the tests administered by the guardians of the bar.

But however legitimate, profitable, and popular this ob-

ject may be, it is a different object from that which you envisage here. You are a university law school. You will train practicing lawyers. But you will train men who understand the true university spirit and what it teaches, breadth of outlook, habits of work, high mindedness, and independence. In addition, through the investigations of these men and of your faculty you will continue to make West Virginia, if it is possible, an even better place to live in. To do it is worth all it costs. In medicine our people understand the worth of such an institution as you propose your law school shall be. One medical school I know of has a student body of 200, a faculty of 170, an endowment of \$8,000,000, and an annual deficit of \$150,000, all without arousing the slightest criticism or surprise. Our people can be brought to understand that it is just as important to bring justice to the poor and oppressed as it is to bring them freedom from rickets and small-pox. In no section of the country can a cry be heard or even a faint whisper calling for more lawyers. When the community understands that our object is not merely to grind out more practitioners but to train men to work and think in ways beneficial to it, to advance the social welfare of the state, we shall receive the support that such a programme deserves. Especially is this true in West Virginia, where a splendid law school has already its capacity for public service, where it has the active and intelligent co-operation of bench and bar, and where under the joint leadership of President Turner and Dean Arnold it will assuredly go on to greater usefulness.