On Entering the Path of the Law

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The Annual Lecture for Entering Students, delivered on October 5, 1964.

The conventional way in which to start a talk of this sort is to express the speaker's gratification at the inspiring sight of hopefully bright young men and certainly attractive young women about to begin the study of law. I shall commence somewhat differently—by voicing wonder at your decision to devote yourselves to a subject of whose nature you have not the faintest notion. If in your few days here you have already learned to demand authority for so brash a statement, I will respond, admittedly with less than perfect logic, that since those of us who have been at the law all our lives don't know what it is, there is at least a reasonable doubt whether you do now.

A distinguished English scholar, Professor Herbert L. A. Hart, has noted how in this respect law is “not parallel in any other subject systematically studied as an academic discipline.” “No vast literature,” he writes in his book, The Concept of Law, “is dedicated to answering the question ‘What is chemistry?’ or ‘What is medicine?’ . . . A few lines on the opening pages of an elementary text-book are all that the student of these sciences is asked to consider; and the answers he is given are of a very different kind from those tendered to the student of law.”

Surely, you must be saying to yourselves, this is no end peculiar. Law is scarcely a new-comer on the world scene. The Code of Hammurabi dates from the third millennium B.C., and law existed long before. How then that no one has ever taken the trouble to define it? What a golden opportunity for the University of Chicago Law School Class of 1967!

I must warn you against indulging in so seductive a phantasy. Others have tried to define law; more than that, they were quite sure they had succeeded. “In the very definition of the term ‘law,’” wrote Cicero, some years ago, “there inheres the idea and principle of choosing what is just and true.” St. Augustine put it more crisply, “An unjust law is not a law.” Hegel, in true German fashion, put it more obscurely, “Right and ethics and the actual world of justice and ethical life, are understood through thought; through thoughts they are invested with a rational form. . . This form is law.”

Well, you must now be saying, if this was good enough for Cicero, and St. Augustine, and Hegel, why isn’t it good enough for us? Perhaps you will find it so. But the team of Cicero, St. Augustine, and Hegel, which includes many other players of repute, has by no means had the field to itself. Take this as an example: “These dictates

danger not to be dismissed, for too many unrelated designers, no matter how able, can produce virtual anarchy. Yet given a master plan and ample space, along with the dedicated involvement of discerning faculty representation, the University of Chicago may in time physically parallel the brilliance of its academic achievements.

Welcome

“A welcome addition to the periodical output of the Law School.”

With these words, Dean Phil C. Neal greeted the first issue of the newest Law School publication, a quarterly newspaper called The Reporter. And with the emergence of The Reporter, the Law School has joined the ranks of the many law schools throughout the country which publish their own student newspapers.

Designed, in the words of its first editorial, both to report the news of the School and to serve as a vehicle for the expression of the ideas of its constituents, The Reporter was conceived and brought to life by a group of students led by Kenneth P. Norwick, who served as editor-in-chief of the first issue. The first issue was prepared during the Fall quarter, and published on December 4, 1964.

The eight-page, glossily-printed maiden issue, which featured a unique, blue-tinted view of the Law School building as its nameplate, included comprehensive coverage of such Law School events as the School’s Conference on Judicial Ethics, the Annual Federal Tax Conference, and the success of the School’s National Moot Court team, as well as feature articles on Professor Dallin H. Oaks’ experience as a State prosecutor last summer, Professor Philip B. Kurland’s recent scathing criticism of the Supreme Court, the “Today” program’s visit to the Law School, and the athletic activities of the law students, among many others.

“We tried to provide as complete a review of the events of the School during the Fall quarter as possible,” Norwick said, “while at the same time attempting to bring before the Law School community ideas and experiences that would probably otherwise go unnoticed. And in future issues, while retaining these goals, we also hope to serve as a ‘crusading’ or ‘muckraking’ influence whenever necessary.”

The Reporter’s second issue, which will be published late in the Winter quarter, will be under the combined editorship of Judith A. Lonquist, Warren P. Miller, and Les Munson, who all served on the first issue. Among other questions, the editors hope to explore, in this issue, the bases upon which an entering class is selected, and why the members of such a class chose to come to law school and to this School in particular.
of Reason, men used to call by the name of Laws; but improperly, for they are but Conclusions or Theorems concerning what conduceth to the conservation and defense of themselves; whereas Law, properly, is the word of him that by right hath command over others. You ought not need to be told that this cynical voice is that of Thomas Hobbes. Two centuries later came the famous statement that law was the command of the sovereign; "The existence of law is one thing; its merit or demerit another,"—Hobbes' concept in the 19th century dress fashioned by John Austin. By the turn of the century even more sceptical views came on the stage. To John Chipman Gray, one of the quartet of professors who brought fame to the Harvard Law School, statutes—what most people would think the archetype of a command of the sovereign—were only "sources of Law . . . not parts of the Law itself." The "law itself," said a former great teacher at this school, Professor Karl Llewellyn, consists of "What officials do about disputes." The most famous of American judges had gone even further, "The prophecies of what the courts will do . . . are what I mean by the law," Mr. Justice Holmes wrote in 1897. Certainly that is an unhelpful definition for judges, who apparently are obliged to do their work with mirrors; it thus is not strange that they and others have thought there must be some underlying stuff that enables the prophets to prophesy and the judges to proceed from prophecy to decision. Since this prophecy-enabling stuff is more significant than the prophecies, why not call it the law? If you think that fair enough, you must next ask what that stuff is. What can it be other than statutes and decisions and, for the interstices not filled by these, concepts so abhorrent to the realists as justice and morality and social utility? Thus the realist quest devoured itself and ended where it began. Such, at least, was the belief of another greatly admired judge: "A definition of law which in effect denies the possibility of law since it denies the possibility of rules of general operation," Judge Cardozo wrote, in words that make sense to practicing lawyers and judges, however they may seem to jurisprudists, "must contain within itself the seeds of fallacy and error. . . . Law and obedience to law are facts confirmed to us all in our experience of life. If the result of a definition is to make them seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer to realities." And again, men "go from birth to death, their action restrained at every turn by the power of the state, and not once do they turn to judges to mark the boundaries between right and wrong. I am unable to withhold the name of law from rules which exercise this compulsion over the fortunes of mankind."

If at this point you are thinking of a transfer to some other graduate faculty which at least has some idea what it is teaching, resist the temptation! Although none of the statements about the nature of law that I have been quoting may be wholly true, none is wholly false. As Professor Hart has also said, "understood in their context, such statements are both illuminating and puzzling; they are more like great exaggerations of some truths about law unduly neglected, than cool definitions. They throw a light which makes us see much in law that lay hidden; but the light is so bright that it blinds us to the remainder and so leaves us without a clear view of the whole." Moreover, and this is another paradox, you can have a rich and satisfying life in the law without resolving these great issues, although it will be a richer and more satisfying life if you are always aware of them and occasionally take time to ponder over them.

Let us descend to more mundane matters and consider the work you will be doing these next three years, if I have not unduly discouraged you. I remember with horror the first day of our course on Property. We had a case about wild animals, which the court, in an effort to clothe them with proper legal dignity, called feræ naturæ. The opinion detailed the views of various Continental jurists. One, whom I remember after forty years because of his intriguing name, was Pufendorf. Another case set forth the views of a different civilian, whom I recall only because his name resembled that of the famous French chef who killed himself when the fish did not arrive for the royal dinner—Vattel. Try as I would, I could not retain in my memory what were the views of the pompous sounding Pufendorf, and what were those of the culinary reminding Vattel. With this seemingly insurmountable hurdle confronting me on my very first day, what chance was there to complete the course, much less to prosper in the law? It was an enormous relief to find—not, of course, by any direct word from the professors, who were as mysterious then as now, but from older students—that no one expected us to remember the conclusions of these jurists, or even, although this was a bit more desirable, what the New York Supreme Court decided about wild foxes in Pierson v. Post, 3 Caines, 175 (1805). What we were to learn was not the law, but how to "do law"—as today's philosophers say they "do philosophy." If some substance rubbed off on us in the process, so much the better; but that was not the main object of the game.

Your efforts thus will be primarily directed not at learning "law" but at acquiring a "legal mind"—more accurately, since even twentieth century medicine has not learned how to slip a new mind into the brain case, at making your minds legal. What, you may ask, is a legal mind? This is something easier to spot than to define. Obviously Dean Neal has one—if he didn't, he wouldn't be dean. I can testify on the basis of a year's happy association with him as my law clerk that Professor Currie has one—although there were times when I was not altogether sure he would return the compliment.
Indeed, I would be willing to stipulate that all the members of this faculty have legal minds, even if some of them might think I was being unduly generous as regards others. An official communication next summer will give each of you a notion of the extent to which he is acquiring one. Still it seems fair for you now to seek more enlightenment as to what a legal mind is.

An easy out would be for me to take as an example the standard charge to the jury in a criminal case that reasonable doubt is a doubt based on reason, and to tell you that a legal mind is a mind capable of handling legal matters. But I can do a little better than that, and give you some characteristics, if not a comprehensive definition. The legal mind is an inquiring mind. It does not accept; it asks. Its favorite word is “why.” Charles M. Hough, one of the great judges of the Second Circuit, wrote that “the legal mind must assign some reason in order to decide anything with spiritual quiet.” It is analytical; it picks a problem apart so that the components can be seen and judged. It is selective; it rejects characteristics that are not significant and focuses on those that are. The legal mind learns to know that it does not matter whether an accident takes place on a Monday or a Tuesday, although some old cases indicated it might be as well never to be injured on Sunday, but that it may matter whether the cause of the accident is an automobile, an airplane, or an atomic explosion. It is a classifying mind; it finds significant differences between cases that superficially seem similar and significant similarities between cases that at first seem different. It is a discriminating mind; it has a profound disbelief in what Professor Frankfurter used to call “the democracy of ideas.” Beyond this, Dean Levi’s little book will tell you as much as anything I know.

As you pursue this primary aim of making your minds legal, you will be exposed to various branches of the law, and they to you. Here again your adventure will be quite different from your counterparts in other graduate schools. No medical school turns out a doctor whose studies have included only the head, the throat and the chest cavity but have wholly omitted the abdomen and the bone structure—even though he will later have to spend several more years in learning every cell of his chosen organ. But the variety and complexity of mid-twentieth century law, ranging through the alphabet from Administrative Law, Admiralty and Agency to Taxation and Torts, and Wills and Workmen’s Compensation, prohibit anything approaching coverage, even in the most superficial sense. If we classify the subjects of legal study in a more functional way, the variety still is dazzling. One branch deals with the demands of organized society on the individual, in such diverse forms as taxation on the one hand and criminal law on the other. Another branch concerns the claims on and protection of the individual against organized society; the social security system is an example of the former, and many aspects of constitutional law concern themselves with the latter. Another covers the claims of one member of society against another not otherwise known to him. Here the great and always fascinating subject is the law of torts; much of property law can also be fitted under this rubric. Then there is the law governing various relations, most of these voluntarily assumed, husband and wife, employer and employee, stockholder and corporation, another never voluntary on one side and sometimes not wholly so on the other, parent and child. Bordering these are instances where the law enables people to enter into transactions having legal significance although indifferent whether they do or not—the immense variety of contracts, ranging from some of the relations I have already mentioned through the great field of commercial law to intercorporate transactions of almost unimaginable complexity, and wills and trusts. Then come the newer areas where government has imposed restrictions on the freedom of transactions—antitrust law, public utility and securities regulation, many facets of labor law. Other subjects are concerned with the distribution of power among organs of the same government or of different governments, a topic peculiarly important in our federal system; these include portions of constitutional law, administrative law, federal jurisdiction, foreign relations law, perhaps the conflict of laws. Finally there are the branches which concern themselves with the manner in which rights are invoked or duties imposed—civil and criminal procedure and other portions of administrative law. You will require, and receive, good guidance through this wood, whose size and luxuriance I have only begun to describe. When you complete your three years here, many parts of the forest will necessarily remain untraveled; but by that time you will have learned to find the paths for yourselves.

If you want my views whether all this effort will be worthwhile, I would answer with a resounding “Yes”—and I say that as one who has been powerfully attracted to another subject in his student days. My first, and best, reason I shall borrow from a master of that discipline, the historian Samuel E. Morison. “For my part,” he wrote, “I freely confess myself a historical hedonist; one in whom the pursuit of pleasure overlaps the pleasure of pursuit.” So it is with the law—you will find the sharpening of your mind, the learning and use of legal analysis, the effort to put your thoughts into clear and persuasive English, the exploration of the panorama of legal subjects, as pleasurable as any such endeavor that I know. A second reason is that the law is all encompassing; nothing human is alien to it. There are so many related subjects about which you ought to know something if you are truly to understand the law—subjects which make law more meaningful and are made more meaningful by it.
First of all, history. Which of the wealth of apposite quotations shall I use to make the point? I will pluck from Holmes, not the familiar sentences from the opening paragraph of "The Common Law" which you must already know, or the epigram from his opinion in New York Trust Co. v. Eisner, which you will learn, but a combination of two others. "The rational study of law is still to a large extent the study of history"; for "historic continuity with the past is not a duty, it is only a necessity." Belief of that sort underlay Judge Learned Hand's modest proposal that a judge called upon to pass on a question of constitutional law should "have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant . . ." Next, as Judge Hand's list itself indicated, I would put philosophy, not so much for its forever changing content as for its method. A Harvard graduate student asked me last year, quite seriously and perhaps not without basis, how anyone could become a lawyer, much less a judge, without understanding modern analytical philosophy, particularly Wittgenstein; I have never so deeply valued the privilege of silence conferred by the Fifth Amendment. Many fields of law—trade regulation, labor law, taxation, commercial law—can scarcely be comprehended without some knowledge of economics, an interdisciplinary development in which this School has pioneered. Psychology has a role to play in evidence and in criminal and family law. Other social sciences contribute to our understanding of torts, of criminal law, and of land use—and in the last we must work also with the artists and the architects. We link arms with the political scientists in exploring administrative and constitutional law. And I am certain that the lawyer of the 1970's would do well to know a good deal about the theory and practice of computers, and the mathematics that underlies this.

When you begin the practice of law, you will become an interdisciplinarian in a different way. The office lawyer who lacks knowledge of his client's business is a poor adviser; the litigator who tries a case or argues an appeal without adequate information as to the relevant technologies is perpetrating a fraud on his client and is failing in his duty to the court. The lawyer who tries personal injury suits must have at least a "bowing acquaintance" with medicine and with machines; one specialist in airplane accident cases included a year as an airline mechanic in his preparation. The patent lawyer must know chemistry and engineering; the copyright lawyer must be familiar with literature and music. Counsel who appear before the Federal Communications Commission must understand frequencies, and contours, and coverage. Although the advocate before the Civil Aeronautics Board need not be able to fly an airplane, I found it did no harm to know what makes them fly, and a thorough understanding of airline economics was essential. So, too, with the practitioners before the Interstate Commerce Commission, the Federal Power Commission, the Atomic Energy Commission—ton-miles and train-miles, kilowatts and B.T.U.'s, neutrons and megatons, are their daily grist. Indeed, there is always the risk that the lawyer will become so adept in his client's affairs that financial and other inducements may lead him to forsake his proper mistress. No wonder that when, during World War II, it was found that the airmen engaged in bombing and the scientists analyzing its results could not communicate, the Air Force recruited lawyers as interpreters, and that the colonel chosen to command the first such group was a trial lawyer, now better known as Mr. Justice Harlan. No wonder also that so large a proportion of the lay leadership in such endeavors as hospitals, education, and the care of the young and the old, not to speak of politics, is furnished by lawyers. I know that the extent of lawyers' participation in these efforts is often attributed to motivations not completely altruistic. I neither deny this nor believe it requires defense, so long as the lawyer gives honestly of his time and brains. Few courses of conduct are wholly unselfish, and if a lawyer thinks he may get business by helping put a social agency on its feet rather than by lingering at the nineteenth hole, the community is the gainer. The ability, resulting from legal training, to come into an unfamiliar area, quickly to grasp the essentials, then to organize a solution, and finally to translate all this to others, is what makes the lawyer so immensely valuable in all these efforts; and his abhorrence of the vacuum presented by an unsolved problem relentlessly sucks him in.

You will thus, I am quite certain, find yourselves absorbed, both in your years of study and later, by the fascinating game of the law. But you must resist the temptation to think of it only as a game. To fall into that trap is all too easy even—perhaps particularly—for an appellate judge. The higher reaches of such subjects as federal jurisdiction, the conflict of laws, and income taxation have somewhat the quality of a chess tournament, and unless lawyers and judges and law-teachers are constantly on the alert, the solutions may have about as much relation to reality. Sometimes one has an impulse to sweep the chessmen off the board and attempt a fresh start. Often in dealing with such subjects, I am reminded of Hermann Hesse's great novel, Das Glasper­ lenspiel, the "bead-game," translated under the rather less descriptive title, "Magister Ludi." It tells how, after a catastrophe that destroyed most of civilization, the remnants were picked up in a central European country, Castalia. There the elite of the youth were trained to master the bead game, never described in detail but combining the highest elements of music, art, mathematics and drama—a sort of double acrostic raised to the
nth power. To become a member of the order which protected and performed the game was a high reward for a young man; to become the master was the highest of all. Yet the youth who reached this pinnacle came ultimately to disillusionment and disaster. Such is the fate of the lawyer who becomes unduly fascinated with techniques and acrobatics.

Practitioners thus must always be on guard that they do not become too completely absorbed in contests for the benefit of clients, and judges must be wary of the risks in the overarduous performance of bead games for the applause of the law reviews. We are engaged not only in administering but in developing rules for the conduct of society. If you do not like German symbolic novels, even in excellent translation, the occasional reading of a book about some foreign legal system or on jurisprudence, even if you do not fully understand it, will help keep your eye on the goal. When John W. Davis said that lawyers “supply the lubrication” that makes it possible for society to run, he was speaking the truth but not the whole truth; you are not here simply to become better welders of oil cans. Dean Pound had it better when he wrote that “Civilization involves the subjection of force to reason, and the agency of this subjection is law.” Law is a process, not a result that has ever been achieved for all time.

Professor Fuller has recently added another to the many definitions of law. He says that it “is the enterprise of subjecting human conduct to the government of rules.” Some may find, as I do, that this alone does not take us far. But it is a start, and we can supplement it with an analysis of the important differences in the nature of legal rules—some of which I have already suggested. There are the rules whose violation brings retribution, whether criminal, “Thou shalt not kill,” or civil, “Thou shalt not slander.” There are other rules the violation of which will have unpleasant consequences, but only if one has previously so agreed, “Thou shalt not breach a contract.” There are the rules that enable men, by following certain procedures, to impose their desires on others perhaps yet unborn—wills, trusts, restrictive covenants. There are what Professor Hart calls “rules of recognition”—rules determining who can make rules and how. There are rules that can be and are looked up in law books before taking action—how many witnesses are needed for a valid will, how to make an instrument negotiable, how to have a profit taxed at the lower rates established for capital gains. There are other situations where the rule is so vaguely stated that people often cannot know whether particular conduct is within or beyond it until a jury or a judge or an administrative agency tells them—examples are the requirements that an autoist drive with due care or that an employer bargain in good faith. There are the rules made by the legislature or its delegate, and those, decreasing in number, still left for the courts to evolve. And there are the cases not governed by any rule yet ascertainable, where the actors must simply guess, whether before or after acting, what answer a court will provide, and the judges, within some limits, can indulge in “the sovereign prerogative of choice.” Another contrast is between rules that rarely change and those that constantly do—not by the swift revolution that makes what was black today white tomorrow but by the gradual evolution wherein rules no longer suiting the demands of our society are eroded until after a half century they are entirely gone and new ones have taken their place. Products liability is a sufficient example in our time. Then there is the fascinating interaction wherein society having moulded the law is then moulded by it—men today do not have to be constantly reminded that they must not drive carelessly, fail to perform bargained promises, or neglect to file an income tax return; indeed, without this knowledge of the general nature of the rules and broad acquiescence in them, the legal machinery would break down.

The task you have set yourselves thus is not a small one; it is nothing less than to learn, in the moving words in which the degrees in law have long been conferred at the Harvard commencement, to be “ready to aid in the shaping and application of those wise restraints that make men free.” All of you can have some part in the shaping, as well as in the application, if you will. Many of you will become judges, legislators, law teachers and writers. But for those who do not, there is still useful law-shaping work to be done—as members of bar associations or of political parties, or just as informed and responsible citizens. You will have a responsibility for what Professor Fuller calls the internal morality of law—that it be clearly expressed, that it be applicable generally and without discrimination, that usually it be prospective, and that it be known or at least be readily knowable to the citizen. You will have a further responsibility that the law should help to achieve the good society. Fashion no longer requires that you look condescendingly on the utilitarian concept of the greatest good for the greatest number or, despite Mr. Justice Holmes’ oft quoted cynical remark, that you take a contemptuous view of the age old idea of justice—a notion that is still meaningful even if no one can define it with precision.

I hope that, in thus telling you of all that lies ahead, I have not overburdened you with a sense of enormous difficulty. Sursum corda! The prescription is really quite simple. “What is wanted for success at the Bar,” wrote Lord Lyndhurst, “is a clear head, a good memory, strong common sense, and an aptitude for analysis and arrangement. Before these combined qualities, the difficulties of the law vanish like the morning mist before the sun.” As you puzzle over the seeming contradictions carefully planted in your case-books and the Delphic deliverances
of your inscrutable instructors, perhaps it will cheer you to recall those encouraging words of the Lord Chancellor, to reflect on your own sterling qualities, and, if I may slightly alter the title of a novel popular in my youth, to remember that “the sun always rises.”

A group of Law School alumni in Metropolitan Los Angeles, who gathered to hear Dean Neal report on the state of the Law School.

Iolani to Capitol Hill

The Record is pleased to note that Mrs. John Mink, whom members of the Class of 1951 will remember as Patsy Takemoto, has been elected to the United States House of Representatives from the State of Hawaii. Mrs. Mink had served for several years as a member of the State Legislature.

Graduates of the Law School are occasionally beautiful and frequently distinguished; we are seldom privileged to point to one who is both.

The Appellate Court

The program of cooperation among the Courts, the Bar and the School, described in detail in Professor Oaks’ article in the last issue of the Record, continued in the Autumn Quarter of 1964. The Illinois Appellate Court, the Honorable Robert English, ’33, presiding, the Honorable John V. McCormick, JD’16, and the Honorable Joseph J. Drucker, heard two cases from its regular calendar argued in the Kirkland Courtroom. Students in the first year Tutorial Program were given research and writing problems based on the cases being argued, then studied the briefs, which were provided in advance, then heard the oral arguments. Following the Court session, counsel were kind enough to meet with the students at some length, discuss their conceptions of the cases, and answer student questions regarding their handling of the issues.

The Court—1964

The Supreme Court Review for 1964, edited by Professor Philip B. Kurland, was published in mid-December. The Review is dedicated to responsible criticism of the work of the United States Supreme Court. Contents of the current issue are:

“The Reapportionment Cases: One Person, One Vote—One Vote, One Value”
by Carl A. Auerbach, Professor of Law, University of Minnesota

“Full Faith and Credit, Chiefly to Judgments: A Role for Congress”
by Brainerd Currie, Professor of Law, Duke University

by Sheldon Tefft, James Parker Hall Professor of Law, The University of Chicago Law School

“The Sit-in Cases of 1964: ‘But Answer Came There None’”
by Monrad Paulsen, JD’42, Professor of Law, Columbia University

“Potential Competition under Section 7: The Supreme Court’s Crystal Ball”
by George E. Hale, JSD’40, and Rosemary D. Hale, Lecturer in Economics, Lake Forest College

by Harry Kalven, Jr., Professor of Law, The University of Chicago Law School

“Act-of-State Doctrine Refined: The Sabbatino Case”
by Stanley D. Metzger, Professor of Law, Georgetown University

“Flood Tide: Some Irrelevant History of the Admiralty”
by Jo Desha Lucas, Professor of Law, The University of Chicago Law School

A Goal Surpassed

The Eleventh Annual Fund Campaign set new records, both as to the total amount contributed and as to the number of alumni giving. The Campaign goal of $125,000 was exceeded by more than 6 per cent, with total gifts aggregating $133,600. General Chairman J. Gordon Henry, JD’41, and Special Gifts Chairman Arnold I. Shure, JD’28, led more than 200 Fund workers in this remarkable effort. It is interesting to note that some 79 gifts totalling more than $20,000 came from non-alumni friends of the School.

Richard H. Levin, JD’37, has accepted the General Chairmanship of the Twelfth Annual Fund; organization for the Campaign is under way.