New Reasons For Uniformity

By ALLISON DUNHAM
Professor of Law, The University of Chicago Law School
(Remarks delivered by Professor Dunham to the alumni of The University of Chicago Law School during the Annual Meeting of the American Bar Association, Honolulu, August, 1967.)

In the last decade of the Nineteenth Century, the New York legislature invited a number of states to meet at Saratoga, New York to consider uniformity of state law, particularly that of commercial law and divorce. A result of that meeting was the creation of the National Conference of Commissioners on Uniform State Laws. In 1967, more than seventy-five years later, all areas subject to the jurisdiction of the United States except Puerto Rico and Louisiana had adopted the Uniform Commercial Code prepared by the National Conference of Commissioners on Uniform State Laws and the American Law Institute jointly, but in the same year the New York state legislature again memorialized the states to meet in the near future on unifying divorce law. Success has been great in commercial law. This is at least the second time in which the National Conference has substantially unified commercial law. I need only remind you of the Uniform Negotiable Instruments Law promulgated in 1896. The National Conference, however, has had little or no success during its seventy-five years of existence in the field of divorce.

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On Entering The Profession Of The Law

By BENNETT BOSKEY
Volpe, Boskey and Lyons; Washington, D.C.
(There follows Mr. Boskey's remarks to the Law School's entering class, at the customary dinner in their honor, October 3, 1967.)

All good things must have a beginning. You talented men and women, just starting your first year at the University of Chicago Law School, have the enviable advantage of entering into the fellowship of one of the few truly great law schools found in the mainstream of our national life. For each of you, this week marks the beginning of your commitment to the law as a profession. Most of you will never be quite the same again.

Ahead of you lies a broad mixture of experiences—a mixture of accomplishments and, alas, sometimes of disappointments. You will be seeking the paths of learning and of wisdom in a discipline almost as old as civilized man himself. But it is a discipline which every generation—and indeed, every member of this highly-individualized profession—must in some measure rediscover and redefine anew.

Soon—in your classrooms, in your outside reading and in your private discussions—there will be thrust at you what at first will seem to be an over-abundance of legal and other materials. These materials will be aimed at enlightening you concerning the hardy perennials of the law—contracts, property, torts, procedure, corporate and commercial transactions, constitutional developments—as well as concerning some of the more sophisticated-sounding subjects which have become such necessary auxiliaries if law school curricula are to be kept abreast of contemporary life. Here in the law school you will be encouraged to develop your talents for understanding—and not only for understanding, but also for utilizing—methods and techniques of analysis considerably different from those which, as your presence here tonight testifies, you mastered so successfully at college. Likewise you will be encouraged to seek to apply these methods and techniques of analysis in working towards solutions of many of the basic problems of our society.

If past experience is any guide—and one of the part-time axioms of the law is Justice Holmes' observation that a page of history is worth a volume of logic—then by the time the winter winds have started to blow along the Midway this coming December and January, many of you will find yourselves in a state of sore confusion. This is sufficiently normal so that it should not be cause for alarm or despair. You ought not expect that your

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Bennett Boskey introduces Edward W. Saunders, JD'42, to the Honorable Jacob M. Braude, JD'20.

At the reception for entering students, Norval Morris, Julius Kreeger Professor of Law and Criminology, talks with members of the Class of 1970.

Sheldon Tefft, James Parker Hall Professor of Law, introduces Edward W. Saunders, JD'42, to the Honorable Jacob M. Braude, JD'20.

Dean Neal with Joseph I. Bentley, Class of 1968, a senior host, and Joseph H. Groberg, of the entering class.

Mr. Boskey addresses the dinner honoring entering students.
form. The Uniform Federal Tax Lien Registration Act serves this reason for uniformity.

This is not a problem solely involving federal employees; it is also a problem involving private corporations with multi-state operations.

Finally, there is a new or at least an increasing reason for uniformity in areas where custom, convention and habitual course of conduct are tending to establish a common expectation throughout the United States. This commonality of expectation is increasing at a faster rate than I suspect many lawyers realize. I will use a “non-law” illustration to make this point. A friend of mine has been with a national waterworks company since his graduation from engineering school in 1939. When I saw him for the first time in many years in 1964, twenty-five years after his graduation, I asked him what were the major changes in his business in the twenty-five years he had been with it. His answer was, the development of a common taste or tolerance (perhaps it would be better to say lack of tolerance) of brackish or poor-tasting water. The demand in his business for insertion of chemicals into municipal water supplies designed to eliminate various bad qualities of water has been the fastest growing element of his business and the demand, he asserted, was tending to make water quality substantially uniform nationwide. I asked whether he had an explanation for this phenomenon and he replied that he did. He said that it was the result of the tendency of the large multi-state corporations to transfer their junior executives from plant to plant throughout the country and the equally strong tendency of the wives of these executives to become members of the League of Women Voters or other similar organizations in the community in which they reside. He reported that as soon as the junior executive’s wife tasted the water in her new location she mounted a campaign to have chemicals inserted in the water to make it equivalent in taste to the water of the community from which she had come.

In the law side of this problem, the strongest illustration is perhaps in the field of probate law. There is developing a common expectation that on death the rules concerning transmission of wealth, particularly the rules concerning the administration or activities of the personal representative, should be substantially uniform throughout the United States. Thus, the commonality of expectation is becoming an increasing reason for uniformity.

I should not close without referring to another reason for uniformity and that is the elimination of various kinds of economic discrimination. Here the divorce of Governor Rockefeller dramatizes the point. As we are developing an increased consciousness of discrimination against the poor, we are becoming more aware that the middle class and the higher income groups can shop for their law in such matters as divorce and abortion but the poorer elements of the community can not. In order to eliminate this kind of economic discrimination, increasing pressure is developing for unifying the law so that there is no advantage to the rich by their ability to leave temporarily the jurisdiction which has a bad law. One of the legislative sponsors of the recent Colorado abortion law, it is said, was induced to be a sponsor by his shock and embarrassment, when a client asked him about abortion, to find that his client (who fortunately had sufficient money) could best obtain an abortion by going to Japan. He was embarrassed that he could not give similar advice to his other clients because they did not have the price of the airline ticket.

It is likely that these newer reasons for uniformity will spread, so that the Commissioners and, indeed, the Congress, will be operating in areas of law which seventy-five years ago it was thought could be left to the “experimentation” of the individual communities.

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course at the law school will resemble in any way the breezy saturation courses which now enable one to speak fluent French or Italian or Spanish with the tongue of a native after only a few weeks of vigorous effort. The law does not permit herself to be taken so readily. But she nevertheless is amenable to seasonal blandishments. As spring rolls round, many of you will find that at least some of the confusion has started to be dispelled—assuming, of course, that you yourselves have cooperated by hard work, perseverance and a reasonable amount of self-generated initiative.

Before this mysterious process of confusion followed by de-confusion has even begun to set in, it may be helpful to explore just a little the nature of the commitment which you are making to the law. Just what is it that you have committed yourself to, and what should you expect from that commitment?

You will find it is a familiar exercise in the law, when we are trying to identify and to zero in on what some principle or some concept really is, that we look closely at some of the things which it is not. To use a rather antique illustration, if you examine enough situations involving simple bailments which are not gifts or trusts, it will slowly dawn on you that you have acquired a degree of understanding as to what gifts and trusts actually are. Or if you scrutinize enough situations which involve mere exercises of free speech which are protected by the First Amendment, then you may develop an instinct for recognizing conduct which because of accompanying violence or other special circumstances has stepped over the line into the area where the Constitution permits the police power to operate. Or to take a
more dreary but a highly practical question, if you read enough cases in which the Government defeated claims by taxpayers that their transactions had produced capital gains rather than ordinary income, then you may be able to furnish to the next taxpayer some profitable advice on how to avoid the pitfalls and work out his salvation so as to be taxed only at the lower capital gains rate.

All this is related to what is known as definition by the gradual process of inclusion and exclusion—a process which is part of the great strength of the common law, provided the particular problem is not so explosive that society is unable to hold itself together while waiting breathlessly for the emergence of the applicable general principles. In this tradition, let me mention an event from my early experience which may provide a meaningful contrast to your own situation this evening.

Nearly a quarter of a century ago, in the summer of 1943—having completed my service as law clerk to Chief Justice Stone and having spent the intervening two months in the Department of Justice—I entered the Army as a private and was assigned for basic training to the combat engineers replacement training center at Fort Belvoir, Virginia. In those days the Army was dealing with manpower on a rather vast scale, and its classification methods often seemed to have little rhyme or reason. Fort Belvoir was reputed to be a tough and rigorous training ground, which probably few men would have selected voluntarily if given any choice as to their initial destination in the Army. On our second day there, the captain in command of the company convened a meeting to deliver his welcoming address. The captain asked that every man in the company who felt that being assigned to Fort Belvoir must have been the result of some mistake should raise his hand. Good-naturedly the captain himself raised his own hand first, and most of the men then quickly did the same. The captain closed this out by saying that, mistake or not, there was no way of transferring out of Fort Belvoir until the basic training was completed, and therefore everyone should just get on with the job.

That is one way, of course, for a professional career to begin. How different it is from the circumstances which bring all of you into this first-year class at the University of Chicago Law School. Each of you is here not by mistake, and not because you were sent or assigned, but because you want so very much to come. Each of you who stays will stay not because you are required to, but because, on the basis of those periodic reassessments which nearly all thoughtful people engage in, you will make a deliberate decision that you want to remain.

I urge, however, that you never regard this matter as closed or settled. If in good time you discover that you do not have a temperament for the law, or if you find that the law is not sufficiently activist for your tastes, or if you feel a strong urge to move into another branch of learning or into another profession or occupation, then by all means take a hard look at whether the change should be made. This does not mean you should be unduly hasty in arriving at such a decision. But certainly it is no dishonor and no discredit to become a law school drop-out—provided of course that the reasons are sound and do not merely reflect laziness or other weakness of character. Being one who came to the law only after having done a year of graduate work in economics at this University, I feel a special affinity with those of you who may find yourselves, particularly within the next year or two, reconsidering your choice of a profession.

Having (I hope) disarmed you a little by this plea for career open-mindedness, let me turn now to some of the factors which are likely to influence the great majority of you to stay steadfastly on the course you now have chosen.

A basic consideration is the extraordinary variety and diversity of callings which the law will offer. People grumble about lawyers from time to time—Shakespeare set the tone for this—and it is right and proper that they do so, for complacency in a profession can lead only to weakness and deterioration. But despite such grumblings, ours is a Nation in which lawyers have always played a notable and a creative role both in public affairs and in private matters. With the increasing complexity of our society, the diversity of these opportunities has multiplied—and multiplied almost unbelievably.

In politics and in Government, the lawyers—some of them in legal positions, but many of them not—are at least as prominent today as they ever have been. Whatever may be the seasonal or even the cyclical ebb and flow, it seems unlikely that this role will be substantially diminished during your professional lifetime.

In private matters, the American lawyer—and in this respect, he is very much unlike lawyers in many other countries—tends to serve as counsel in the broadest sense, whether he is advising business and industrial organizations or foundations and other non-profit groups. Thus it is commonplace today to find the lawyer participating regularly in the formulation of policy, and not merely in the determination of the often-narrower strictly legal questions.

In the universities, a lively reception awaits the law graduates whose interests run to teaching, scholarship or applied research. As the law schools, with foundation and government assistance, have been seeking to meet their enlarged responsibilities to society, the opportunities for law teaching and for wide-ranging legal research have increased vastly. While generalization is risky, it is evident that legal scholarship has broadened out—and in certain respects its quality has been altered—partly
under the stimulus of interdisciplinary activities involving the collaboration of lawyers, economists, some scientists, and indeed scholars and men of affairs from many other disciplines. This interdisciplinary thrust is a movement in which your law school has been one of the innovators, though I think such approaches will require far more attention during the next decade, particularly if urban life is to be reconstructed on a tenable basis. Moreover, the welcome announcement recently made by this University concerning its next president shows that a distinguished legal career is not an insuperable obstacle even to becoming the head of an outstanding institution of learning.

Indeed, wherever one turns in American life, those who have come through the law schools have made and are making their mark. One need hardly be a prophet to know that this situation will continue. Once again the opportunities and the need for lawyers to bring to bear their creative talents and their wisdom will grow substantially, as the country really comes to grips with its serious problems of poverty and slums and inequality. These squalid areas have been miserably neglected by the organized bar in the past, but there are stirrings now which suggest that an effort is under way to make up for some of the lost time.

Because of the exceptional multiplicity of opportunities available to law school graduates, going to law school has been looked upon by some as being, in substance, a means of preserving one's opinion. In a sense, of course, it is. The law school teaches the methods of analysis—and the methods will be useful outside the law as well as within it. The law school imparts at least a certain minimum of substantive information concerning legal matters and the institutional environment in which they arise. It helps to instill in the students a spirit of inquiry and a willingness to tackle new problems no matter how difficult and insoluble those problems may at first appear. The students, however, having once decided to enter the law school, are then enabled to put off for three years, and possibly longer, any concrete decisions as to whether to go into public service, or into private practice, or into teaching, or into some law-related activity outside the main branches of the profession—or whether, instead, to leave the law behind for a career in business or in the arts or in some other field where the law's role will be very much in the background.

Moreover, even when the emerging law graduate has made his or her choice of a place to start in the profession, he or she is fortified by the knowledge that this choice is neither permanent nor irrevocable. One of the high attractions of the law is that it permits so much mobility from one branch of the profession to another, and that, at least within limits, a sort of lifetime guarantee attaches to this condition of mobility; the ability to move, and to do so in a dignified manner, is almost always there if needed or badly wanted. No other single factor is better calculated to preserve the independence of mind and action which makes a lawyer worth his salt.

Now, as each of you is happily reflecting on all the options which you have so astutely preserved, let me go on to mention several other matters you may find of importance regardless of which one, or more, of these many options you ultimately exercise.

Lawyers occupy a key role in improving effective communication between different groups of people. We see this vividly in Washington law practice. In case after case, we are confronted with situations which start out with a chasm of misunderstanding between a Government agency and the industry which it regulates or the company or individual with whom it is dealing. The skillful lawyer, by a combination of interpretive translation and diligent ingenuity, frequently can find some mutually acceptable accommodation which gives proper recognition both to the legitimate desires of the Government and to the significant interests of the industry. I should add that in the search for such accommodations, it usually helps materially if the ingenuity and the goodwill come from the lawyers on both sides—those who represent the Government as well as those who represent the industry.

And it is not only in the affairs of Government that lawyers are the catalysts for effective communication. In a large business enterprise, for example, it is often the lawyer who, by well-placed questions or comments, enables the management and the technical staff each to understand what the other is driving at and how to proceed toward a common goal. Accordingly, as you move ahead through law school, it is well to remember that the book learning, for all its apparent significance, will become primarily a basis for assisting living human beings to deal with concrete problems.

Let me mention also the high value of developing habits of mind and habits of work which will enable you to move comfortably, and fairly rapidly, from one type of problem to another. Whether you are in public life or in private practice, whether you are an office lawyer or a trial lawyer or both, whether you are in a university or in a law firm or in the legal department of a private corporation, you will find that such agility is intellectually stimulating and provocative. It strengthens your judgment—and wise judgment is the ultimate hallmark of the fine lawyer—by providing a wider basis in experience. It increases your capacity for handling whatever may be the range of problems that actually arise—problems which often will come upon you suddenly, without warning, and take you by surprise. Justice Frankfurter occasionally used to say that a lawyer is an expert in relevance. By this he was paying tribute not
only to the ardor with which lawyers are willing to grapple with every aspect of human affairs, but also to the special abilities of a good lawyer in sorting out a brand new problem into manageable form. Indeed, if any of you were to leave the law and embark upon cattle breeding, or producing motion pictures, this is a capability you might wish to take along.

Finally, let me say a word about what may be broadly referred to as the fiduciary principle. It applies to many relationships in our society, but has its greatest impact on the ethic of the lawyer himself. I am sure all of you already realize—and in time you will come to know about this in far greater detail—that a lawyer is first and foremost in a position of trust and confidence. His clients—whether they be private clients or governmental agencies or something in between—are entitled to his best independent judgment as to what is the most appropriate course of action for the client to pursue. In making this judgment the lawyer must strive carefully to eliminate all consideration of what would be personally advantageous for himself, as distinct from the legitimate interests of his client. This perhaps is another way of saying that a lawyer works in a representative capacity, not for his own glorification but for the softer satisfactions that come from a professional task well done.

All around you, as you enter this law school, you hear the sounds of conflict and of challenge, both at home and abroad. Of one thing you may be certain. Your course of studies here will in no way isolate you from the major present-day controversies which all of us find so troublesome. And if you are not too impatient, you should emerge from this law school far better equipped to play your part in dealing not only with these present controversies but also with whatever new problems are to follow them in this computer-oriented world. Like other institutions in our society, the law is on the threshold of immense changes. By the time you are ready, it will need your help.

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Our Committee has not adopted a statement of reasons, but I shall exercise the Chairman's prerogative of stating some of them: Grant Gilmore's work exhibits the singular power of the single human mind, not likely to be matched by any team or committee or task force, to impose a kind of order on unruly and recalcitrant facts, to see a piece of reality in a new way. His field has been traditionally obscure, technical, particularistic, rule-ridden. Through his labors and those of others, especially the late Karl Llewellyn, a statutory tour de force has illuminated the field. And now, by a superb act of critical detachment, Professor Gilmore has reappraised that re appraisal, set it in its historic perspective, analyzed its central problems and unapologetically criticized its deficiencies. He is no builder of closed systems; he substitutes no new dogmas for the old ones. If his treatise is "definitive"—and it is—that quality inheres in its recognition that soundly conceived legal doctrine is simply a starting point for thinking about a problem in its context. Finally, Grant Gilmore exhibits a lucidity and grace in this, as in his other works, that stands as a reproach to those who think that style is somehow separate from substance. The mind at work in these pages is fastidious, ironic, aristocratic. These are not qualities that are much in vogue today; they are qualities that are worth celebrating when brought, as here, to the solution of significant legal and intellectual problems.

Response by Professor Gilmore

I have often thought that the distinguishing mark of our particular profession is its essential loneliness. There are many honorable ways of making a living—indeed of coping with life—in which you know to start with what it is that you are supposed to be doing and will in due course be told whether or not you have succeeded in doing it. We are like spies in an alien land, cut off from any contact with headquarters, with no way of ever finding out whether the intelligence which we diligently collect and relay is what is required of us or is even relevant to our vague and ambiguously stated mission.

We do something called teaching. But we all know from bitter personal experience that nothing is, or can be, taught once we get beyond the communication to small children of the basic mysteries on which civilization depends—how to read, how to write, how to count. We can of course pump students full of facts or even brainwash them—but pumping facts is a waste of everybody's time and washing brains in public is, as Justice Holmes might have told us, dirty business. Learning is what the students are there for and all we know about learning is that, on any level of complexity, it is every man for himself and by himself, imposing a perhaps delusive formal pattern on the swirling chaos by a prodigious effort of the individual will. It may be that we can stimulate, or irritate, an occasional student into undertaking this arduous task—but, if we do so, it will be much more by accident than by our own design. Karl Llewellyn once observed that the function of the law teacher is not to let the true light shine: he was wise to content himself with that negative formulation.

We also engage in something called research and scholarship. We write learned articles and books, we draft Codes and Restatements, we publish or we perish—sometimes we do both. In our articles and books and Codes and Restatements we are indeed concerned to let the true light shine. We aim at a hammerlock on certainty, a stranglehold on truth. In the ecstasy of struggle