

HASTINGS COLLEGE OF THE LAW THE FIRST CENTURY

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PROLOGUE

University of California
Hastings College of the Law Press

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Prologue

IN THE history of our civilization, universities have been prominent both for what they have done and for merely being. As for what they have done, a perception of the university depends upon whether one is teacher or the taught. The university has been variously an avenue to place and power in Church and state by the vehicle of a sharp, narrow scholastic curriculum; an institutional structure within which an elite of status and property might be polished in gentility and adorned with letters; an academy for imparting a rigorous Classical learning that fit its votaries to any pursuit; and a school in which by the acquisition of credits in a range of subjects of varying academic merit a career could be forged. This is how those taught have seen it, and with good reason their perception has been primarily vocational and even careerist. To those who teach, the university is the keep in which man's painfully acquired knowledge, even his wisdom is guarded, undiminished, to be handed on through time, the bailey for the defense of free enquiry by which the sum of knowledge is advanced, and the guardroom in which the community of scholars, some of them active, some serving who only stand and wait, follow their science, and contribute to its increase and its diffusion. The imagery of the castle is not strained. Our universities were born in the castellated society of twelfth century Europe, and though the schoolmen were clerics and the collegiate structure, where it developed, closely resembled monasticism, the medieval university in its secular aspect was closer to the castle than

to that other great monument of the age, the cathedral. The university was always under attack, imperilled by the barbarians without the walls, threatened by the urge to orthodoxy of ecclesiastical authority, in danger of subversion by the prince and his feudatories, and subjected to the bloody incursions of townspeople. The university's walls—of privileges and immunities reluctantly accorded by pope and prince, as well as by stone and mortar—were the defenses of a castle. And the university, unlike the cathedral, was not an oratory but a laboratory, a place not of prayer but of work, where neither the things of God nor of Caesar took precedence over the things of the mind, of reason and intellect. This has remained the role of the university—its function—in society from that day to this. No matter how “applied” the sciences taught and researched there, no matter how intimately involved with government, business, the professions, no matter how importunately students demand to be taught something useful, the university stands in a fiduciary responsibility to the corpus of knowledge gained from the past, conveyed in the present, and added to for the future.

The prominence of the university, by virtue of its mere existence, is a product of its venerableness and its uniqueness. Of all the institutions of modern society that survive from the middle ages, the university is the one that in form and function has changed the least. In government, with few exceptions, kings and barons have disappeared in the western world, and even where they have survived, aristocracy has given way to democracy. The Catholic Church of western Europe was halved by schism in the sixteenth century, and halved again by secularist disbelief in the centuries since, its works reduced to things of the spirit, its servants diminished in role and authority. Republicanism proved the victor over monarchy, secularism triumphed over the faith, but no ism has yet managed to destroy or even transform the university. The president and faculty of the poorest state university, harried by legislators and

harassed by a suspicious and even antagonistic populace, still enjoy the privileged position of the rector and faculties of the medieval *studium generale*, still do the same things, maintain the same responsibilities. No western society has found a substitute for the university; indeed, it is a western institution that has become worldwide and has remained more vital than all other western institutions transplanted on the continents in the heyday of western imperialism. Something of the medieval *jus ubi docendi*, the right to teach everywhere, survives, and the university world of the intellect remains a community of scholars profoundly resistant to ideological tests and governmental and societal trammels on free enquiry and free teaching. The university is no less today than it was yesterday the ornament of culture, the factory of knowledge, the nursery of intellect, and the fount of the professions.

The earliest universities were the creation of late eleventh and early twelfth century scholars, of the physician Constantinus Africanus at Salerno, the lawyers Gratian and Irnerius at Bologna, the dialectician Abelard and the theologian Peter Lombard at Paris, and the lesser known masters at Oxford and Montpellier. Such spontaneous generation disappeared with the first creations. Thereafter, new universities were founded by the migration of scholars, civic enterprise, and the act of an individual or corporate founder, prince, prelate, or potentate, or a combination of all of these elements. For the scholars, it was the opportunity to gladly learn and gladly teach in a new and (apparently) more friendly environment. For the city, civic pride dictated the acquisition of a *studium*, and the bourgeoisie reasonably expected that trade would follow where arts, letters, and science had preceded. For the founder, the university manifested his greatness and generosity, attributes highly esteemed by medieval man both to advance his stature in this world and to improve his standing in the next. As one of the last medieval men to found an Oxford college put it in the preamble to the foundation

statutes of Corpus Christi College (1517):

We have no abiding city here (as saith the apostle) but we seek one to come in heaven, at which we hope to arrive with the greater ease and despatch, if while we travel in this life, wretched and death-doomed as it is, we rear a ladder whereby we may gain a readier ascent. We give the name of virtue to the right side of the ladder, and that of knowledge to the left, and between these two sides lie steps; for either side hath rounds of its own, by which we may either soar on high, or sink into the lowest depths.¹

Richard Fox, Bishop of Winchester and Lord Privy Seal to Henry VII and Henry VIII, expressed a time-honored sentiment in the motives for his beneficence. And to the initial generosity of the founder would be added over the years the munificence of others. Munificent patronage also set the university apart from most other institutions, the church excepted, and that is still true today, in the support that individuals—sons and daughters and friends of alma mater—foundations, and latterly the state accord it.

Whatever the range of motives that led to the foundation of universities and their continuing endowment through benefaction, behind each university that established itself and survived was a need. The sentiment of an age and of the society evoked the university. The degree of practicality of the need varied—some institutions have had a more “pure” and others a more “applied” function in the vision of their founders and benefactors. But behind all was need.

The two institutions which are the concern of this work, the university and the law, came to this culture on this continent at almost the same moment. In 1636 in Massachusetts, a college was established at Newtown, shortly to be renamed Cambridge in honor of the university from which most of those in the colony who had a university connection had come. It was not an afterthought, but a step taken because of a perceived need a short time after the edifying of Faith and the frame of government and law had been raised:

After God had carried us safe to *New England*, and wee had builded our houses, provided necessaries for our liveli-hood, rear'd convenient places for Gods worship, and setled the Civill Government: One of the next things we longed for, and looked after was to advance *Learning* and perpetuate it to Posterity; . . .²

It can be argued that Harvard College came into existence before the full elaboration of the rule-of-law came to Massachusetts. In 1641, an attempt was made to establish a fundamental law for the colony in the “Body of Liberties,” but not until the gathering of the legislation of the colony in *The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusets* (1648), was the “Civill Government” fully settled insofar as it demands certainty in the law.³

It was a long time before the law found a place in the American university. The reasons were many and complex, but the more salient ones deserve mention. First of all, the law which was taught in European universities, including Oxford and Cambridge, was the highly academic law which had spawned Bologna: Roman Law, in its two facets, the Civil Law and Canon Law. By the thirteenth century, the Civil and Canon Laws had come to dominate all the universities, threatening the primacy of the Queen of Sciences, Theology. The Reformation in England expelled Canon Law from the two universities, but Civil Law remained, and served in one major secular court, Admiralty, and in the ecclesiastical courts. Not until the eighteenth century would the English common law receive any attention in the English universities, and it was not taught consistently until the mid-nineteenth century. The Vinerian professorship at Oxford, established in 1758, was the first chair in the common law in the English-speaking world. It is noteworthy that the second oldest American institution of higher learning, William and Mary in Virginia, established such a chair in 1779, and that the Royall professorship in common law was bequeathed by Isaac Royall to Harvard on his death in 1781, although it was

not filled until 1815. Both American institutions followed the lead of Oxford under the influence of the first Vinerian professor, Sir William Blackstone. Secondly, there was from the outset in the American colonies considerable mistrust of lawyers, more marked in the puritan colonies than in those to the south. As the early colleges did not seek to educate young men in the law, neither did any of the colonies encourage the creation of that peculiar institution which gave England its bar, the Inns of Court. The early evolution of the colonial bars grew out of the autodidacticism of self-styled "attorneys" (few of them with any formal legal training in England) and the apprentice method of law-office study that very soon came into existence. The first "law school," that of Judge Tapping Reeve in Litchfield, Connecticut, in the 1780s, began as an extension of his law office, but it grew rapidly, and between 1784 and 1833 trained over a thousand lawyers from all over the new country. Thirdly, the pattern of westward expansion in this country, beginning in colonial times but reaching the proportions of a general cultural phenomenon in the early national period, created a demand for lawyers that could not readily be met by available formal instructional means, and which in the opportunity society of the frontier no young man was really inclined to tarry for. Finally, in the first flowering of higher education in the national period, the new colleges springing up all over the United States right to the edge of the frontier, many of them sectarian institutions, adopted a heavily Classical curriculum. This Classicism emphasized the traditional liberal arts of humanistic learning, and by its apparent completeness and holistic adequacy persuaded one trained in it that he had all of the learning that was necessary, and that academe might impart, to undertake any profession. Classicism was not, as some of its critics have urged, antithetical to professionalism. In fact, Classicism assumed that all knowledge was part of an organic whole, was governed by the same natural rules, and that a rigorous grounding in the

humanistic disciplines allowed the learned man to unlock any subject, follow any vocation, with no more to add than command of the formal peculiarities of the professional activity. In this view Classicism was the highest level of professional preparation obtainable. It would require a kind of enlightenment from a foreign source—the German universities—in the late nineteenth century to cast professionalism and therefore professional education in a new light.

In 1849 the frontier made a big jump, a thousand miles from the Missouri River to the foothills of the Sierra Nevada mountains, the land between abandoned to the Indians, to the trappers and traders still left, and to such hardy eccentrics as the Mormons. The piecemeal creeping tide of westward migration became a single great wave that left the flotsam of many cultures on the edge of the Pacific, the small indigenous Spanish-speaking culture being submerged under the wave. The new metropolis was San Francisco, the “instant city” of the first great transcontinental lunge. The new urbanites of the instant city:

lived in a culture so totally different from the ones they had left that often the transition was almost unbearable. Almost everything they created was made to serve the moment and most of their early work disappeared or fell into disuse when the moment passed.⁴

Massachusetts, two centuries later, was reborn again three thousand miles further west, without the homogeneity of the puritan forefathers of Boston. But like the old colony, the new sought in both the university and the law to cultivate the unifying power of the intellect, to bring order out of chaos, and to build something that would serve not only the moment but all time.

What had taken Massachusetts a bare six years took California twenty, but the University of California came into existence in 1868 full of promise, ambition, problems, and inadequacies. It would be another decade before California would have its first law school—and that would be the first west of the Missouri River. One man,

who had played a distinctive, even determinative role in the coming of "the law" to California, also gave California its first academy for the formal training of lawyers and the University of California one of its earliest higher faculties and professional schools. Serranus Clinton Hastings stood in the tradition of the medieval founders of colleges and universities. The comparison to Bishop Fox is striking: a man of affairs, not an academic, in the service of the state, seeking to erect a ladder to heaven, with two sides, "virtue" and "knowledge." The need to be met was evident. The hope of encouraging other benefaction was high. Civic pride was appealed to—the new college would be sited in the instant city, a point of distinction for the new metropolis. It would be part of a great state university, but would enjoy a marked autonomy by virtue of having its own trustees, presided over by the highest servant of the law, the Chief Justice of California, a secular archbishop or the lord high chancellor, if you will. The new college was not for profit, its objectives were unsullied by base motives. Characteristically, from its conception, Hastings College of the Law was unlike any other American law school; indeed, not quite like any other institution of higher learning.

This is a history of that law school during its first century. Though it was the idea of a single man, it has been the work of many. It has reflected the greater influences washing against it from society outside it. Yet like the university throughout western civilization, Hastings marched to a different drumbeat than society's, that of the *scientia* which was its responsibility to preserve and to which it was to introduce Justitia's votaries. Through all its trials and tribulations, for all its changes, despite all its failures and its successes, Hastings never shut its ear to the drummer. In that it has fulfilled the vision of its Founder, the hopes of its professors, and the desires of its students. In the process, it has woven itself into the fabric of California, and contributed to

California's phenomenal growth over the course of a century. As with every university that responds to a true need in its origins and continues to respond to changing needs, the history of Hastings College of the Law will know no end, only many beginnings.