

## Law at Harvard

Edwin W. Tucker

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Edwin W. Tucker, *Law at Harvard*, 53 Cornell L. Rev. 352 (1968)  
Available at: <http://scholarship.law.cornell.edu/clr/vol53/iss2/7>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## BOOK REVIEW

**The Law at Harvard.** ARTHUR E. SUTHERLAND. Cambridge, Massachusetts: The Belknap Press of Harvard University Press. 1967. Pp. xv, 408. \$9.50.

Publications about the past invariably reflect current standards and aspirations. The historian measures events in terms of his own environment and frequently treats in a niggardly fashion the wants and needs that characterized human cravings during the period he is describing. Denied personal involvement, he suffers from an empathy gap and often ignores factors that, while significant when the events occurred, seem less important in the contemporary setting.

In writing the history of a law school spanning one hundred and fifty years, one must not only avoid the pitfalls that accompany temporal detachment, but also weave together law school events and external occurrences to reveal the full pattern of the environment in which the law school developed. The task is patently a demanding one. The undertaking is rendered even more complex when an author chooses to include in his work an analysis of the post-World War Two period. The last two decades have been especially trying times for law schools and the legal profession. There has been great change, much of it forced; the setting has been volatile. Shedding traditional approaches, abandoning familiar paths, and groping for suitable substitutes for the old are not pleasant endeavors. Compulsion magnifies the unpleasantness, while volatility makes compelled transition even less bearable.

In *The Law at Harvard*, Professor Arthur Sutherland captures the mood of each of the periods he describes. The reader is led along diverse paths from the events that fomented the founding of Harvard Law School through the present, and is given a glance at possible future developments. The journey is marked by the author's comments and appraisals and is vividly illustrated with pertinent materials such as reports of presidents, deans, and faculty members at Harvard, and letters written by students and graduates of the law school.

While the title indicates the main thrust of the work, it is the subtitle that more accurately conveys its actual depth and breadth. Refusing to succumb to the potent mystique of the law school he attended or to embark upon a chauvinistic presentation of the institution with which he has been associated since 1950, Professor Sutherland goes far beyond an examination of the circumstances surrounding the establish-

ment and growth of Harvard. The volume is aptly subtitled *A History of Ideas and Men, 1817-1967*. With Harvard as his focal point, Sutherland delves into the multitude of concepts that have affected the *modus operandi* of most American law schools. A reader who has attended a law school other than Harvard will almost immediately perceive a similarity between Harvard and his alma mater; he is certain to feel an involvement in the issues and patterns probed by the author. Sutherland's approach makes this book a must not only for those who wish to be enlightened about Harvard Law School, but also for anyone who has an interest in American legal education.

Should law schools seek to train men and women to be competent practicing attorneys immediately following the completion of their studies? Sutherland's response is a categorical no. He insists that imparting competence in the handling of specifics of the profession lies outside the concern of the law school, because "the practical application of the law can only be learned by what is actually apprenticeship, no matter how it be described."<sup>1</sup> His rejection of a vocational orientation for law school curricula sets the tone of his presentation. Shunning a "how to" pedagogy, Sutherland sees the formal study of law as a post-baccalaureate experience preparing the student for the next stage of his training. The techniques acquired may serve as the foundation not only for the practice of law but also for a number of other careers. Excessive concern with professionalism would, under such circumstances, be unwise.

With this view of professionalism as his opening theme, Sutherland traces the origin and spread of the idea that the study of the common law properly falls within the purview of the university academic community. Before Sir William Blackstone delivered a series of lectures on the common law at Oxford in 1753, English law was studied in the Inns of Court or in the Chancery Inns. Roman Law, on the other hand, had for centuries been included in university curricula. In his lectures and *Commentaries* Blackstone sought to demonstrate that the common law was predicated on a rational and orderly format, designed to serve and promote social well-being. Blackstone successfully conveyed to his listeners and readers the proposition that the common law is not merely a hodgepodge of unrelated judicial directives, but rather a body of coherent and interrelated principles which warrants study, understanding, and appreciation separate and apart from its actual application by judges and lawyers.

---

<sup>1</sup> P. 26.

Beginning with the colonial period, Sutherland explores the evolution of the current approach to legal education in the United States. He visualizes the modern law school as an association of scholars pursuing the study of the law in a fashion comparable to university treatment of the arts and sciences on an advanced level. He shies away, however, from suggesting that legal education should emulate graduate study in a pristine sense.<sup>2</sup> Acknowledging a line of demarcation between the study of law and other types of graduate endeavor, Sutherland calls for law schools to be graduate-school oriented, but to embellish their programs with a modicum of materials oriented toward the actual practice of law. He refers with approval to the use of moot courts and moot trials and the study of trial techniques.

In a 1964 resolution the Section of Legal Education and Admissions to the Bar of the American Bar Association described the course of study at an approved law school as "professional" training. The LL.B. and J.D. degrees were referred to as "normally" signifying "a first professional degree in law."<sup>3</sup> Though this approach may appear to be the antithesis of that advocated by Sutherland, further reflection indicates that the two views are not necessarily inconsistent. The graduate school approach may hold the greatest promise for the effective preparation of men and women who plan to practice law.

Critical observers of the contemporary scene have asserted that "future historians will probably describe our time as an age of conscious social change."<sup>4</sup> Writing in this milieu, Sutherland carefully explores the impact of environmental change upon the form and substance of legal education during the past 150 years. As society discards previous modes of conduct and guidelines of propriety, new demands are imposed upon the legal profession and in turn on legal education. Sutherland the historian deals with a number of major storms, twists, and turns that have substantially affected the development of Harvard Law School. New technology, depressions, wars, the expanding nature

---

<sup>2</sup> On April 26, 1967, the American Law Student Association announced that, of the nation's 135 accredited law schools, more than 40% would confer on their graduates the J.D. rather than the LL.B. degree at their June 1967 commencement exercises. *STUDENT LAWYER J. OF THE AM. L. STUDENT ASS'N*, May 1967 at 24. In 1961 only 16 law schools awarded the J.D. degree. *American Law Student Ass'n Newsletter*, April 26, 1967, at 2. As of April 12, 1967, more than half of the non-J.D. law schools indicated that they were "giving serious consideration to the adoption of the J.D. degree as the first professional law degree." *Id.* at 3.

<sup>3</sup> SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASSOCIATION, *REVIEW OF LEGAL EDUCATION* 21 (1966).

<sup>4</sup> REPORT OF THE NATIONAL COMMISSION ON TECHNOLOGY, AUTOMATION, AND ECONOMIC PROGRESS xi (1966).

of civil liberties, the broadening of the electoral base, the new stress on equally-populated legislative districts, and the greater involvement of nations with one another all have profoundly affected our society. Sutherland considers these changes in terms of the demands they have placed on the legal profession and their resulting effect on the content of legal education. Although his attention is focused on the administrators, faculty members, and students at Harvard Law School, Sutherland's analysis of their responses to change is generic, reflecting ideas and actions that had an impact far beyond the confines of Cambridge.

Areas of human activity that only recently were viewed as falling outside the law schools' province of concern now constitute a substantial part of their curricula. Courses and seminars devoted to the study of urban problems, civil rights, the administration of criminal law, and international business transactions are illustrative.<sup>5</sup> Cautioning that a plethora of basic changes in the fabric of American life will continue to occur in the decades ahead, Sutherland insists that those involved in legal education must remain alert by constantly engaging in critical self-examination. They cannot rest on past accomplishments or current achievements, but rather must seek out and respond actively to new demands in order to fulfill the role ascribed to them by society.

Reported enrollment in law schools in the fall of 1947 was 51,015; by the fall of 1966 this number had risen to 68,121.<sup>6</sup> With an increasing population, a more involved and interdependent socio-economic community, and an expanding interest in graduate study, the number of men and women desiring entrance to law school is certain to climb in the years ahead. Sutherland sees this demand as affording an opportunity for expansion to a number of the nation's smaller law schools. He further insists that expansion need not bring about a concomitant increase in the size of law school faculties. Instead, Sutherland envisions fewer contact hours and greater reliance on self-education. He writes: "Education occurs only when the student labors to educate himself . . . [A] student explores and acquires learning for himself."<sup>7</sup> Suth-

---

<sup>5</sup> Included in the list of course offerings of the Cornell Law School for the 1967-68 school year are Law and Society, International Organizations, and Problems of Public Employment.

<sup>6</sup> SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *supra* note 3, at 20.

<sup>7</sup> Pp. 53, 73. Sutherland's predilection brings to the surface the conflict between the Sophistic and Platonic approaches to education. The Sophists viewed education as essentially a teacher-based, teacher-directed, and teacher-motivated process, with the instructor serving as the student's taskmaster. The student's obligation was to memorize and retain information for later pragmatic application. Plato lauded self-learning and the development of the individual as an entity—a total being—-independent of the possible pragmatic

erland finds support for self-education in his belief that law schools are now preparing men and women to utilize their training over a period of several decades. These persons will exert their greatest influence on society many years after they have completed their formal education. Thus, simple ingestion of subject matter in a classroom is ultimately less valuable than developing an ability to see and research problems. Subordinating knowledge of specifics, Sutherland suggests abandoning annual examinations in each subject and substituting the general examinations employed by faculties that offer the Ph.D. degree.<sup>8</sup> Under such an arrangement, a law student would be obliged to pass an examination only after completing three years of legal study.

A work dealing with education would be incomplete without some reference to two of the controversial problems currently being discussed on university campuses: publication by faculty members, and the extent of student involvement in the educational process. On the issue of publication, Sutherland unequivocally jumps into the fracas, contending that one has not arrived in the field of higher education until he has published a hard-covered work. He echoes the traditional argument that one cannot draw neat lines between research, publication, and teaching. The fruits of one's research and writing are necessarily reflected in the classroom, regardless of the form of instruction. His well-illustrated argument is both sound and convincing.

The role of the student in higher education, according to Sutherland, should be more than that of a passive recipient of information dispensed by a lecturer. He maintains that one of the indicia of a successful law school is a vibrant, inquisitive, ambitious, hard-working, involved, and concerned student body. The core of a successful legal education is the vigorous mental interaction of professors with students, students with students. Sutherland pictures the educational process as a continuous bombardment of ideas upon each participant in the law school, an endless flow of interpersonal contacts and clashes of ideas, followed by acceptance, accommodation, or rejection. Conflict, struggle, and disputation breathe life into a law school. Once mental combat ceases and serenity pervades the atmosphere, the educational process comes to a halt.

---

aspects of his formal education. The Sophists worshipped at the altar of the specific; Plato abhorred the idea that knowledge was nothing more than a conglomeration of bits of information which, if combined properly with rhetoric, could be invoked to elevate one's station in the community. For a reprint of A. N. Whitehead's remarks on this problem, see R. BRUMBAUGH & N. LAWRENCE, *PHILOSOPHERS ON EDUCATION* 10-48 (1963).

<sup>8</sup> P. 365.

Aspiring law school administrators, newcomers to the craft, and those interested in the pragmatic aspects of administration will find this work an excellent primer. Eight of the eleven chapters of the book bear the names of persons charged with overseeing Harvard Law School. Among the quandaries explored by Sutherland are several that face nearly every administration: meeting expenses, expanding the physical plant, staffing and equipping a library, attracting and keeping competent teachers and scholars. Sutherland's numerous examples of administrative accomplishments and failures support his premise that an administrator must constantly perform necessary tasks, even if they are personally distasteful or unpopular.

Law students are bound to reflect upon Sutherland's comparison of Harvard's present admission standards with the old "spartan" approach, which consisted of easy entry into the law school, with only two out of three members of an entering class surviving the rigors of the first year. Sutherland endorses the present emphasis on selectivity in admissions rather than the old open door policy. He describes as "merciful" the present use of the Law School Admission Test and reliance on undergraduate academic achievement as admission criteria.<sup>9</sup> Although Sutherland does not probe the question, one may quite properly ask whether emphasis on these criteria precludes admission to some students who, given the opportunity to pursue the study of law, would become accomplished members of the bar. The query will probably remain unanswered, at least for the immediate future.

This work is certain to make those who staff our nation's law schools take a hard look at the status quo. Sutherland challenges his readers to act. He commends awareness and lauds creative response, disparaging blind adherence to the tenets of the establishment and satisfaction with the existing order. Burgeoning student bodies will permit professors to experiment, to innovate, to pursue new horizons. The

---

<sup>9</sup> The following is an excerpt from a letter to a young man, sent by the Acting Dean of the Harvard Law School on September 23, 1921, long before the use of the "merciful" standard. "If a man fails to be entitled to enter the second year class at the close of his first year's work, except by special vote of the Faculty, it is certainly then for him to understand that he must do or die in the second year. And you have died." HARV. L. RECORD, Sept. 22, 1967, at 22.

The attrition rate for medical students during the post-World War II period has been put in the following terms: "Of the 75,453 students entering medical school from 1949 through 1958, 4,596 failed to graduate on time and an additional 6,556 failed to graduate at all." SATURDAY REVIEW, Sept. 16, 1967, at 88. For a critical examination of the duty of medical schools in an age of an acute shortage of physicians in certain sections of the country, see D. JOHNSON & E. HUTCHINS, DOCTOR OR DROPOUT? A STUDY OF MEDICAL ATTRITION (1967).

faculty will have the opportunity to explore the relationship between law and sectors of human involvement as yet untouched by law professors and students. A dearth of students places serious obstacles in the path of empirical undertakings. Work beyond the first degree in law will probably attract an increasing number of students as specialization in the practice of law becomes more commonplace. Proliferation of areas of concern to lawyers will prevent the growth of specialization on the LL.B. or J.D. level. An orderly retreat from the case method can already be detected by comparing the texts now in use in law schools with those employed in the late 1940's. Unanticipated innovations are certain to make their appearance in the near future.

Professor Arthur Sutherland has ably served as a chronicler of Harvard Law School's first 150 years. He has set an exemplary precedent for future historians, and the product of his efforts will be difficult to equal, probably impossible to surpass.

*Edwin W. Tucker\**

---

\* Professor of Business Law, University of Connecticut. B.A. 1948, New York University; LL.B. 1951, Harvard Law School; LL.M. 1963, S.J.D. 1964, New York Law School; M.A. 1967, Trinity College.