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WYOMING LAW SCHOOL BUILDING DEDICATION: WILLIAM N. BRIMMER LEGAL EDUCATION CENTER

Robert H. Henry
Chief Judge of the United States Court of Appeals for the Tenth Circuit

September 24, 2009

“The Barefoot and the Building”¹

Governor Dave Freudenthal and First Lady Nancy Freudenthal; President Tom Buchanan; the Honorable Barton Voigt, Chief Justice of the Wyoming Supreme Court; Judge Wade Brorby; Judge Terrence O’Brien and other distinguished judges; Dean Stephen Easton; Dean Jerry Parkinson (as a recovering dean myself, I always say once a dean always a dean); Marian Rochelle and April Brimmer Kunz; other distinguished donors and *sine qua nons*; political leaders; business leaders; lawyers; would-be lawyers; friends of lawyers; and lovers of lawyers—it is an honor to be here today to participate in the dedication of this marvelous edifice.

Governor, I want to thank you again for recently speaking to the judges of the Tenth Circuit at one of our somewhat rare circuit dinners. My colleagues and I admired your insightful remarks about the future of the energy industry, and we very much enjoyed our conversations with your distinguished and lawyerly First Lady.

It is appropriate that I be here as Chief Judge of the Tenth Circuit, the highest federal appellate court in the land (Denver being at 5,280 feet) because four of my colleagues hail from this state and from this law school: Judges Jim Barrett, Wade Brorby, Michael Murphy, and Terry O’Brien. Wyoming judges are taking over the Tenth Circuit; their number is matched only by a little place back East, called Harvard. (Incidentally, today I understand the Supreme Court of Wyoming sat here today in Laramie, making this the highest court in the land at 7,200 feet.)

This is a great state, with great traditions, and a great bar. And today, we celebrate a new tradition. This remarkable William N. Brimmer Legal Education center is more than an expensive, technologically up-to-date, beautifully landscaped (thank you—Marian Rochelle) learning facility, it is also a commitment to the

¹ This is a slightly edited text of remarks made by Chief Judge Robert Henry at the dedication of the William N. Brimmer Legal Education Center in Laramie, Wyoming, on September 24, 2009.

courts and to the law, and to continuing the tradition of educating the leaders of this state, and the leaders of its laws. “We shape our buildings; thereafter they shape us,” Churchill famously said. I have no doubt that this new education center will shape the generations of lawyers who pass through its doors, who in turn will help shape future legal traditions.

The legal profession is a profession dating back thousands of years. When I spoke with you last spring, at a very nice graduation of an outstanding class from this law school, I used the Torah for my text. It is, after all, appropriate to use old books of the law when one comes to a law school, or even when one comes to the law itself. I notice that Justice Scalia, a person sometimes known for his hostility to citations of foreign law, recently cited the Talmud in an opinion,² and the Talmud assuredly is foreign law. And I shall return to that scriptural mode today, with a beginning reference to the Noahide laws, also contained in the Talmud. Unlike the Decalogue or the other 613 mitzvahs or laws of the Jews, the seven Noahide laws were those that applied across the board to the children of Noah. These laws, the Rabbis taught, were given by God to Noah as a binding set of laws for all mankind.

Now many of you know the story of the flood—conveyed in both the Torah and in perhaps the world’s oldest book, the Epic of Gilgamesh. The point of the Noahide laws, given after the destruction of the world by flood, is that we are all—Jews, Gentiles, everyone—children of Noah, and thus we have certain equalities, and also certain responsibilities. There are certain laws that all civilized peoples must adhere to and follow. Indeed, in the biblical story, lawlessness was the very reason the flood occurred. As Genesis 6:11 tells it, “The earth had become corrupt before God; the earth was filled with lawlessness.”

Now a discussion of all seven laws is beyond the scope of this dedication, but one of those laws is the reason we are having this celebration. It is usually formulated as the seventh and last Noahide law, and it is often stated this way: “You shall have just laws: You shall set up an effective judiciary to enforce these laws.”

² *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2274–75 (2009) (Scalia, J., dissenting) (“A Talmudic maxim instructs with respect to the Scripture: ‘Turn it over, and turn it over, for all is therein.’ The Babylonian Talmud, Tractate Aboth, Ch. V, Mishnah 22 (I. Epstein ed. 1935). Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not. The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed—which is why some wrongs and imperfections have been called nonjusticiable.”).

These sages long ago realized that society must have a body of just laws to prosper, and even to survive. And they recognized that a judicial system is necessary to enforce and interpret these laws. And this is, of course, why we have law schools: To train and educate lawyers and judges (and also legislators, businessmen, and other readers of legal texts) how to access and utilize the law in a society governed and regulated by laws. And maybe through their advocacy they can leave a legacy or make an impact that will make changes for the better on this system. So we are here today in obedience to that universal Noahide law. And to recognize the important role law schools like this can play in the ongoing development of new legal minds.

And speaking of universal laws, the brilliant scientist and mystic Isaac Newton famously said, “If I have seen further it is only by standing on the shoulders of giants.”³ And today as we think about the task at hand, to educate about the law, we clearly share Newton’s vantage point. We stand on the shoulders of several giants who occupy the historic stage of this law school. They have built this institution and made this possible. Perhaps the first giant that should be mentioned is William N. Brimmer.

William Brimmer was a man of great integrity, vision, and civility. He loved his family, his country, and the University of Wyoming. He attended the University for seven years. His undergraduate degree was in political science. In a time-honored tradition (and one that I share by the way) he took his political science degree to law school, specifically, to the University of Wyoming College of Law, where he earned his J.D.—much to the chagrin of his father who had wanted him to attend the University of Michigan Law School. But, paternal chagrin aside, he certainly turned out well: Upon his graduation in 1941, Brimmer started his practice in Rawlins. Later he moved to Cheyenne where he earned a reputation as a premier attorney, specializing in businesses and oil and gas law. Other accolades included the Bronze Star for his service in World War II and the City of Rawlins Distinguished Service Award. He also found time to teach political science here. This legal education center is a fitting tribute to him.

How fortunate we are to have his legacy and how fortunate we are that his wife Marian continues his largesse: this center, its landscaping and—perhaps my favorite of all of her contributions—the beautiful statue of Socrates the “Barefoot of Athens”⁴ that you see here before you. How appropriate to have a larger-than-heroic-sized Socrates at the very entrance to a law school! (More on him in a moment.) And Brimmer’s legacy includes April, his remarkable daughter who, recovering from an early misstep in attending University of Southern California,

³ Letter from Sir Isaac Newton to Robert Hooke (Feb. 5, 1676).

⁴ Jerry Palen, the noted artist who sculpted our Socrates, sent me a note that appears at the end of this article.

graduated from this law school, and had a brilliant career in business and politics, including being the first woman elected President of the Wyoming State Senate.

Bill Brimmer's life itself teaches. He valued integrity and lived his life accordingly, even when it cost him in other endeavors. During his tenure as the Carbon County Attorney he closed the houses of ill repute and shut down gambling in the city of Rawlins. But Rawlins was a pretty tough place then—I suppose it still is—and he lost the next election and the vices flourished again. But he was true to himself, and things seemed to work out. He established a brilliant and successful career, and ennobled the already brilliant star of the Brimmer clan in Wyoming.

Other giants deserve mention, albeit briefly as my time is short. Chief Justice Michael Golden nominated his own Magnificent Seven in a law review article on the history of this institution.⁵ He mentioned the brothers Arnold—Thurman and Carl; also Robert R. Hamilton, Dean Frank J. Trelease, E. George Rudolph, Peter C. Maxfield, and Arthur Gaudio. These and many others have allowed us to stand upon their shoulders and hopefully see a bit farther.

But what is it that this College of Law will do with this building as it tries to comply with its task? What does a legal education do? How does a law school shape lawyers who will shape future changes in the law? Well, in a typical judicial mode, I decided to look at two competing views in postulating my own answer.

The first postulate was provided to me by my wonderful colleague, Judge O'Brien, and it came from Dean Trelease. Judge O'Brien said,

When I was in law school (in the years when student activism was at its zenith) Dean Trelease gave a speech to students . . . that was not well received because it was an affront to their sophomoric yearnings. His message was that the duty of law students is to learn the law, not to inflict their nascent understanding of it on others through passionate but unrefined activism. Learning the law also means learning restraint. The law is a profession because it requires an understanding of its evolution, respect for its purposes and reflection upon its principles, as well as obedience to its commands—some would say its commands cannot be understood or obeyed without such understanding, reflection and respect. Informed and tempered judgment makes for an attorney and counselor at law. The law is not a bludgeon to be used upon others to force them to yield to a client's (or

⁵ Justice Michael Golden, *History of the University of Wyoming College of Law: The First Seventy-Five Years*, 31 LAND & WATER L. REV. 1 (1996).

lawyer's) purposes and it is not a foil to excuse intemperate acts. So treated it would be a tool of oppression. It is a lawyer's duty to zealously advocate for a client, but within the limits of the law. That requires lawyers to obey and counsel others to obey the law. But a lawyer should also seek to aid in the evolution of law through reasoned discourse. It does not serve the higher calling of our profession when advocacy fails to advance the ultimate goal, an ability to live together in harmony.

The Dean's view, as I understand it, was that the law should be understood before it is changed. And as a judge, I can appreciate that, as I have never seen an advocate succeed who had not first mastered the law. Socrates advanced the position even further and argued that the law should not only be understood, but always be followed—or else it should be changed. Sometimes this is called “obey or persuade.” But this somewhat positivist view is not the only view. Some natural law followers might even urge civil disobedience—Martin Luther King for example—in the case of an unjust law. But I think that the Dean's first point remains: it might be good to understand the law before concluding it is wrong or seeking to change it.

One of my law clerks provided me with another view, perhaps a bit more cynical. It comes from Professor Duncan Kennedy of Harvard, a critical legal studies scholar. Professor Kennedy complained about the law school experience, calling it:

The trade-school mentality, the endless attention to trees at the expense of forests, the alternating grimness and chumminess of focus on the limited task at hand—all these are only a part of what is going on. The other part is the ideological training for willing service in the hierarchies of the corporate welfare state.⁶

Prof. Kennedy continues:

Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world. . . . Students act affirmatively within the channels cut for them, cutting them deeper, giving the whole a patina of consent, and weaving complicity into everyone's life story.⁷

⁶ Duncan Kennedy, *Legal Education as a Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 54, 54 (David Kairys ed., 3d ed. 1998).

⁷ *Id.*

It gets worse. Prof. Kennedy prophesies what judges may add to the formula:

In the classroom and out of it, students learn a particular style of deference. They learn to suffer with positive cheerfulness interruption in mid-sentence, mockery, ad hominem assault, inconsequent asides, questions that are so vague as to be unanswerable but can somehow be answered wrong all the same, abrupt dismissal, and stinginess of praise (even if these things are not always and everywhere the norm). They learn, if they have talent, that submission is most effective flavored with a pinch of rebellion, to bridle a little before they bend. They learn to savor crumbs, while picking from the air the indications of the master's mood that can mean the difference between a good day and misery. They learn to take it all in good sort, that there is often shyness, good intentions, some real commitment to your learning something behind the authoritarian façade. So it will be with many a robed curmudgeon in years to come.⁸

Now even though I am, I suppose, a robed curmudgeon, I don't mean to set Professor Kennedy up as a straw man.⁹ But I don't think law schools are or need to be the stifling environments that Professor Kennedy describes. Certainly this one is not.

I think legal education can be stultifying, and can be conforming, but it can also be different. And I might say that state law schools, and perhaps especially state law schools in smaller states, often have a different take. When Thurman Arnold sought support for this law school in 1921, he urged that a school be created that would be especially relevant to Wyoming. He told the Bar,

The new generation of lawyers . . . will either have to be born in this state, or they will have to come here from beyond our borders, where they will not be versed in the traditions and in the peculiar conditions which surround the practice of law

⁸ *Id.* at 68.

⁹ Nor do I mean to criticize him for his Leftist philosophical leanings. Like my late-friend Professor Bernard Schwartz, I would note that Marxism is alive and well in only one place—the elite law schools of the United States. But also, like Prof. Schwartz, I think all sincere schools of legal thought have something to say—sometimes not for use in the real world, but still for consideration, discussion, and thought. Parenthetically, I might pause to remind you of what the President of the University of Chicago said to a woman who was irate that the Great Books curriculum of the University included Marx. She said, “So, Dr. Hutchens, are you still teaching communism at the University of Chicago?” “Yes,” he replied, “and cancer at the Medical School.”).

in this state. That is a condition which is of great interest to this bar, and that is a condition which fortunately has now been changed by the introduction of our new law school.¹⁰

Prof. Kennedy might say, “I told you so. He wanted to create a conforming tradition.” But not so. He wanted to create the opportunity to develop a community of lawyers within Wyoming, and he wanted citizens of Wyoming to have the opportunity to enter that powerful profession of lawyer. Some would no doubt turn that education into successful corporate practices. Certainly Thurman Arnold did himself. Yet along the way he and his firm struck some blows for liberty, including their work on the great case of *Gideon v. Wainwright*, which established the fundamental right to the assistance of counsel in criminal proceedings.¹¹ He also willingly took on Senator Joseph McCarthy during the peak of McCarthyism.¹² His career as mayor of Laramie, representative in the Wyoming Legislature, law professor, Federal Court of Appeals judge, assistant attorney general, and law firm partner, showed the diverse range of possibilities open to such a lawyer.¹³

¹⁰ Golden, *supra* note 5, at 2 (quoting T.W. Arnold, *The Law School of the University of Wyoming*, in WYOMING STATE BAR ASSOCIATION—PROCEEDINGS OF THE EIGHTH ANNUAL MEETING 49, 49 (1921)).

¹¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹² As Mr. Arnold’s firm still proudly describes on its website:

[Arnold & Porter] was the only major law firm in the United States willing to represent the victims of McCarthyism. In 1950, Senator McCarthy made a false charge that an Asian affairs expert named Owen Lattimore was the “top Communist espionage agent” in the country, instantaneously making Lattimore the most reviled man in America. Within hours, future Supreme Court Justice Abe Fortas (soon joined by Thurman Arnold) signed on for a bitterly protracted legal battle, including the longest ever grilling of a single person by a congressional committee, as well as an indictment for perjury because Lattimore denied being a Communist “sympathizer.”

The firm ultimately defeated all of these charges, and its courage in taking Lattimore’s case brought numerous other victims of McCarthyism to our door.

Arnold & Porter, *Our Pro Bono Program, Then and Now*, http://www.arnoldporter.com/about_the_firm_pro_bono_our_program.cfm (last visited Nov. 15, 2009).

¹³ One legendary story about Mr. Arnold concerns a letter to a Yale University chemistry professor which Arnold wrote answering the professor’s complaints about Arnold & Porter representing the tobacco industry. After making the point that in America all are entitled to be represented, and further pointing out that his firm had, pro bono, represented some unpopular people (including Yale law professors in tenure battles), he then recounted his firm’s defense of those attacked by Senator McCarthy for being communists. He told the story of a person approaching his colleague, Paul Porter, and asking, “Is it true that Arnold & Porter primarily represents communists and deviants?” “Yes,” Mr. Porter replied, “what can we do for you?”

Likewise lawyers educated here have advanced many causes and built many great legacies and traditions. Certainly corporations and industry, especially that of oil and gas, have benefitted greatly from what goes on here. (And making and distributing wealth is not necessarily a bad thing!) But also graduates here have fought racism and sexism, defended those unjustly accused, and worked internationally for human rights.

In the end, although I am closer to Dean Trelease's view than those of the Professor, I do conclude that both have something to say. Perhaps we should rethink some of the old ways of legal education, and open the doors to new ideas. But the law is a tradition, and must be studied. I am always amazed by its ancient realizations that are sometimes controversial today: that it is better for ten guilty people to go free than one innocent person to be punished (Blackstone's famous ratio), that people charged with crimes have rights to be heard, defended, and confront their adversaries, and that even the government must follow the law.

And as this law school continues its vital mission to train lawyers for Wyoming and beyond, the faculty and students can remember Professor Kennedy's challenges: to not be complicit where complicity is unjust, to not miss the forests for the trees, to be willing to challenge ideas.

And for some reason, I don't think we have to worry about students challenging ideas. For one thing, a College of Law that enshrines Socrates in bronze (thank you again, Ms. Rochelle, for that gift) is creating a great "statutory" example. Socrates not only popularized the Socratic (or maieutic) method. He taught the youth of his day to challenge thinking that needed to be challenged. Someone said that the best you could say about the Athens that convicted him was that at least it thought that the education of its youth was worth killing for. But of course the Barefoot of Athens again trumps: he demonstrated that the education of youth was worth dying for. This remarkable statue of Socrates, contemplatively leaning back as he propounds yet another question, will inspire and challenge all who enter here.

Graduates of this school have been Ambassadors, Governors, United States Senators, law professors, and judges. They have also been school board members, city council members, and pro bono defenders of people with no money and difficult cases. We shape our buildings; thereafter they shape us. Students, faculty, and citizens will hear lectures in this marvelous hall that will challenge them. They can then go on to challenge and shape the law.

Litigants will have their actual cases handled, so that students can learn from them. And arguments will be honed in this moot court room that will someday shape the justice in this state and nation. It is indeed an honor to stand on the shoulders of the giants who have made this possible, and to envision a more just and law abiding world, shaped by this building we dedicate here today.

APPENDIX A

September 24, 2009

Dear Judge Henry,

Thanks to Mrs. Rochelle, the University of Wyoming Law School will be able to enjoy the father of the “Socratic Method” right in its midst. Socrates, the ancient Greek thinker, laid the early foundations for western philosophical thought. His method involved asking probing questions in a give-and-take manner, which eventually led to the truth. This method of learning the truth is used daily in the law school as a way of discussing complex topics to discover the underlying issues of the subject and speaker.

Socrates (469–399 BC), as I learned after reading and evaluating different sculptures of him, was a short, homely man whose trademark was his bare feet and his unkempt appearance. Although he professed no extraordinary wisdom, established no school and founded no sects, his influence on the course of philosophy through his most famous pupil, Plato, is incalculable.

I was very honored to be asked to create this work. It gave me the opportunity to work in my style and be sensitive to two artists I admire, Rodin and Degas. As I’ve always said, art is there to show us where we’ve been.

Sincerely,

/s/ Jerry Palen