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“GREAT AND TRULY PUBLIC”: CAROLINA LAW’S TWENTY-FIRST CENTURY CHALLENGE*

MARTIN H. BRINKLEY**

The author of this article, a Tar Heel born and bred, was a member of the Review’s staff while a student, has, since that regrettably remote time, contributed moderately to its pages, and served on the Law School’s faculty for more than thirty-two years. His sentiments about the Review are undeniably colored by personal considerations and by institutional and provincial loyalties Hence, any reader who is seeking an unbiased appraisal, academically worthy of the Review’s normal standards, should stop here and allot his limited reading time to something more congenial.

—DEAN HENRY BRANDIS, JR.¹

My ties to the *North Carolina Law Review* have been a source of deep satisfaction ever since I joined the staff as a second-year student in the late summer of 1990. My memories of fellow laborers in the vineyards of Volumes 69 and 70—many of whom remain close friends and admired colleagues today—are among the best of my law school years. The last quarter century has given me the privilege of contributing to these pages from time to time, and even of reflecting on the history of the *Review* and its role in the life of the University of North Carolina School of Law.²

Like Dean Brandis, I am a Tar Heel born and bred and am unable to be wholly dispassionate where the *Review* and the institution it represents are concerned. Unlike him, I am not a faculty

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1. Henry Brandis, Jr., *The North Carolina Law Review: 1922–1972*, 50 N.C. L. REV. 965, 965 (1972).

2. See generally Martin H. Brinkley, *The North Carolina Law Review at Threescore and Ten*, 73 N.C. L. REV. 773 (1995) (discussing the history of the *Review* as part of a special issue marking Carolina Law’s 150th year).

member of decades' standing. Until recently, I lived my professional life in the trenches of practice, never dreaming it would fall to me to introduce a volume of the *Review* as dean of Carolina Law. So I take as a high honor the invitation of the board of editors to offer, at the inception of my service, some reflections in these opening leaves of Volume 94. My feelings on placing this essay ahead of the scholarly productions that follow are illustrated by the story of the farmer who insisted on entering his mule in the Kentucky Derby. A friend protested: "Joe, that mule can't possibly win—the thoroughbreds will leave him in the dust." The farmer replied: "I know that; I know he can't win. I just thought he might benefit from the association."³

For readers interested in a new dean's thoughts on the state of Carolina Law, I offer the following reflections.

The opening sentence of our mission statement says we are "dedicated to being a great and truly public law school." The conjunction is "and," not "or." The adverb "truly" elevates the adjective "public" to the same level of importance as the adjective "great." The phrase is not a duality. It is a unity. We cannot choose to be great at the expense of being truly public. We likewise cannot choose to be public by sacrificing greatness. What does it mean for Carolina Law to be both great *and* truly public?

Ebbs Chapel is a tiny community in Madison County, North Carolina, almost in Tennessee. There, in a senior citizens' center, a friend of mine—Tom Lambeth, former Executive Director of the Z. Smith Reynolds Foundation and a loyal son of this university—once met a man wearing a UNC cap. Tom asked if he was a Carolina graduate. Tom soon realized that the man had attended no college and had never gone far from western North Carolina. The man answered very clearly: "No, but I do own it."⁴

That sense of ownership, of direct stake, of pride in Chapel Hill—cherished by millions of North Carolinians who pay taxes to support us but will never study here or send a child here—is at the heart of what it means for Carolina Law to be great and truly public. The stakeholders we never see are our living taproot, linchpins of every hope we have, now and in the aftertime. Every excellence we

3. I owe this anecdote to famed North Carolina trial lawyer Wade Smith, a 1963 graduate of Carolina Law.

4. Thomas W. Lambeth, Exec. Dir. Emeritus, Z. Smith Reynolds Found., Speech Delivered to the North Caroliniana Society: A Love Affair with an Entire State (Apr. 25, 2013), in THOMAS W. LAMBETH, A LOVE AFFAIR WITH AN ENTIRE STATE 11, 16 (N. Caroliniana Soc'y, Imprint No. 52, 2013).

achieve—in teaching, in penetrating scholarship, in public service, in the pursuit of justice—is won in their interest.

We who have the privilege of serving this law school and this ancient university will only continue to deserve our silent stakeholders' faith if we seize and cultivate five core values.

1. *Accessibility*. Legal education at Carolina must remain open and available to the most qualified applicants, regardless of ability to pay. Faced with preserving excellence in the teeth of draconian budget cuts, we nearly doubled tuition over the last seven years for North Carolina residents and raised it by a third for nonresidents. That was a hard choice, driven by the swiftness and depth of the cuts and the need for immediate bandaging. We are still, relative to many of our peer schools, affordable. But we cannot responsibly bankroll *our* future by piling more debt on the backs of fledgling graduates who face uncertain employment prospects.

2. *Intellectual Fire*. Our faculty must continue to teach and write at levels of excellence comparable to those of their peers at the most celebrated law schools. It is the business of the Carolina Law faculty to gaze into dark places where people would rather not look and tell the truth about what they see there. Our duty to be truly public cannot be met with compromises that undermine our academic quality and quench our intellectual fire. We must invest in bringing the best minds and hearts to our faculty, and give them the tools to produce scholarship of transcendent value.

3. *Engagement in the Economy*. We must be directly engaged in work that sustains and improves our stakeholders' lives. The economy of the United States and of North Carolina thrives or languishes under a system of regulated capitalism. Within that system, our fellow citizens earn bread for their families and pay the taxes that sustain this university. It is natural and appropriate for them to ask: "What are you doing for me?"⁵

Carolina Law has a role to play in fostering a healthy, fair economy for North Carolina and the nation. The Research Triangle region, one of the world's half-dozen leading idea-generation centers, is an ideal habitat for a great public law school. North Carolina is home to the largest public utility in the country⁶ and is a leading

5. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 664 (2d ed. 1985) ("The legal system is taken as a tool, an instrument. For any proposed law or legal act, individuals ask, what is in it for me, or my family or my group?").

6. News Release, Duke Energy, Duke Energy's 2013 Adjusted EPS Results Meet Expectations; Company Announces 2014 Adjusted EPS Guidance Range 8 (Feb. 18, 2014), <http://www.duke-energy.com/pdfs/2014021801f.pdf> [<http://perma.cc/KLW8-NVYD>].

developer of renewable energy sources, particularly solar energy.⁷ Financial institutions based in the Tar Heel State supply capital that fuels economic transformations at home and around the globe. Destination healthcare institutions are among our largest employers. If the capitalist regime under which these enterprises operate is to seem fair, it must do so under the rule of law—a human enterprise consisting of people who have been trained to think, to persuade, to communicate, and to bring wisdom and judgment to bear on hard problems. Those are the people Carolina Law is well positioned to nurture.

4. *Diversity.* We must welcome to Van Hecke-Wettach Hall people who embody the endless list of variables that form our individuality as human beings. If all our foresters look and think alike, we will never penetrate every thicket that separates us from the truth. The institutions of the law—and the rule of law itself—depend for their public legitimacy and acceptance on law schools that foster a diverse bench and bar.

5. *Devotion to the Public Good.* To be great and truly public means we at Carolina Law have to take some things more seriously than our peers at other law schools. When the framers of the Constitution finished their work in Philadelphia that sweltering summer of 1787, someone asked Ben Franklin just what the Constitutional Convention had produced. He answered: “A republic.”⁸ But then he added a kicker: “[I]f you can keep it.”⁹ Our law school has a high burden of producing republic-keepers, the kind of people my greatest teacher, Judge Sam J. Ervin, III, called “dues-paying members of humanity.” Whatever our graduates do with their lives, Carolina Law will always be the place where they first saw our profession put its defining values and exemplars on display. Preparing lawyers for lives of public service has been one of Carolina Law’s proudest traditions. Any uniqueness of ours within the firmament of American law schools exists by virtue of that tradition. We cannot brook any diminution in that distinctive ethical engagement with the world.

7. See Taylor Knopf, *State House Lawmakers Argue for Keeping Renewable Energy Policies and Tax Credits*, NEWS & OBSERVER: UNDER THE DOME (Sept. 10, 2015), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article34728777.html> [<http://perma.cc/TP28-KYG9>].

8. Document, *Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 AM. HIST. REV. 595, 618 (1906).

9. *Id.*

To remain accessible, intellectually on fire, economically engaged, diverse, and devoted to the public good, Carolina Law must have new resources and have them soon. We are passing through a time of segmentation in the legal profession and in legal education. Today the dozen or so best law schools in America live in splendid isolation, largely immune from outside forces and lapped in endowments grown large over decades of prosperity. If Carolina Law is to flourish, it must have significant new philanthropic support, and it must have it soon. We must ask our alumni and other stakeholders to invest in us in new ways.

We will ask ourselves hard questions over the next few years. What is the right size for Carolina Law? Will the world five, ten, or twenty years from now need fewer lawyers than it has in the past? Even if the answer is yes, does that mean that the world will need fewer *Carolina* lawyers, trained with excellence at comparatively modest cost? Is there a hunger for legal knowledge on the part of people who don't want to become lawyers but need to understand some part of the law for themselves? Does the law school of a state's flagship university have an obligation to feed that hunger? Do we have an obligation to make legal knowledge available to other parts of the university? Is our curriculum adequately stocking our graduates' practice toolbelts?

Even more critical is this question: At the end of the twenty-first century, will any American law school deserve to be called both great *and* truly public? In these uncertain days, the greatest risk may not be reaching the wrong answer, but avoiding the question altogether. This is the risk of fearing too much "[t]he undiscovered country from whose bourn / No traveller returns, [which] puzzles the will, / And makes us rather bear those ills we have, / Than fly to others that we know not of[.]"¹⁰ Our silent stakeholders, whatever they may say about us in public, are worried lest the desire for safety cow us into lukewarm expedients and soothing drift. They fear that Carolina Law will not dare to be different, and that the rule of law itself will suffer as a result. We cannot disappoint them. Better to be mocked by the failure of our hopes than never to dare at all.

Churchill warned the House of Commons in the fall of 1936: "The era of procrastination, of half-measures, of soothing and baffling expedients, of delays, is coming to its close. In its place we are

10. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

entering a period of consequences.”¹¹ The Great Recession has given back to Carolina Law the world of the possible. We did not ask for the responsibilities of this time, lined as they are on every side with confusion and seeming impossibility. But engaging these crosscurrents is a privilege not given to every generation. It is precisely the kind of first-rate, affordable legal education Carolina Law is so well equipped to provide—an education that cultivates habits of mind, a spirit of rigorous analysis, and the capacity to look ceaselessly for answers despite an abiding conviction that there are no permanent ones—that suits the season of reinvention through which our profession is living.

Some will say my tenure as dean does not begin in bright and favorable weather. The times are difficult. The need is great. But the beating of Carolina Law’s generous heart—faculty, students, alumni, and our silent stakeholders—thrown into the conflict will surely prevail. The laconic and trenchant Tacitus, describing Subrius Flavus’s passing thought of assassinating Nero while the emperor sang on stage, observed: “*nisi impunitatis cupido retinisset, magnis semper conatibus adversa*”¹²—“The desire for safety stands against every great and noble enterprise.”¹³ If we in this university and this law school toil with every scrap of our strength, we will surely set the world on fire, and a Golden Age will open up before us.

11. Winston Churchill, The Locust Years, Address Before the House of Commons (Nov. 12, 1936), in *BLOOD, TOIL, TEARS AND SWEAT: THE SPEECHES OF WINSTON CHURCHILL* 114, 127 (David Cannadine ed., 1989).

12. PUBLIUS CORNELIUS TACITUS, *ANNALS* XV.50 (c. 102 C.E.).

13. An alternative translation might be: “[I]t was only the desire of escape, that foe to all great enterprises, which held him back.” PUBLIUS CORNELIUS TACITUS, *ANNALS* XV.50 (Alfred John Church & William Jackson Brodribb trans., London, MacMillan & Co. 1st ed. 1888) (c. 102 C.E.).