

TWO VISIONARY DEANS OF GEORGE MASON LAW SCHOOL

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I. GEORGE MASON UNIVERSITY SCHOOL OF LAW

IN 1972, Dean John W. Brabner-Smith and four other prominent attorneys founded the International School of Law in a church basement in the District of Columbia. In 1979, this law school merged with George Mason University, the state university in Northern Virginia. Brabner-Smith possessed a highly distinctive vision of legal education that to this day influences us and other law schools, notably some that are religiously affiliated. After Brabner-Smith laid the cornerstone, two other deans succeeded him: Ralph Norvell and Henry Manne. Each of these deans also possessed a highly distinctive vision of legal education, especially Henry Manne who is one of the four acknowledged founders of law and economics.

As a young law school, we have sought to remain faithful to the ideals and visions of our founders. In this short essay, I would like to explain what our founders' visions have been and how we have sought to develop our program in light of them.

II. JOHN W. BRABNER-SMITH'S VISION OF LEGAL EDUCATION

Before he founded the International School of Law (our former name), John Brabner-Smith had already had a remarkable career. He was born to missionary parents in 1900 in Northern Minnesota. Throughout his school and college years, John worked to support himself. At the age of twelve, he had become the county correspondent for the Minneapolis daily paper. When his family moved to Evanston, Illinois, where his father became the Methodist minister, he did typical jobs at the surrounding country clubs and at Northwestern University.

In 1925, John Brabner-Smith graduated from Yale University, where he received a full tuition scholarship and worked his way through school by starting the for-profit pictorial section of the *Yale College Daily* and promoting social events for the college, in addition to working at the college library. In 1927, he received a J.D. from Yale Law School, one of the last students to earn a two-year law degree from Yale.

Brabner-Smith began his legal career in Hartford, Connecticut, and then quickly moved to the prestigious Wall Street firm of Root, Clark, Howland, and Ballentyne in New York. There he practiced corporate and bankruptcy law as the Great Depression gathered force.

In late 1930, he moved to Chicago to study and to teach at Northwestern Law School. He earned a J.S.D. in 1931 and taught Real Property, Receivership, Constitutional Law, and Equity. Each of these areas of law became a lifelong

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interest, and he published distinguished law review articles about all of them. While still at Northwestern, he co-authored an influential article on mortgage foreclosures.¹

At this point, the Illinois state's attorney hired Brabner-Smith to help prosecute the Al Capone Gang. The state had been unsuccessful in its attempt to persuade anyone to testify against Al Capone. Upon determining that a case could be made against the renowned gangster at the federal level on charges of tax evasion, John moved to Washington, D.C., in 1932 to become special assistant to the Attorney General, Joe Keenan, who was in charge of kidnapping and racketeering, which until then had been governed by state law. During this time, he published one of the first law review articles on gun control² and other New Deal crime legislation.³ Later, after observing Hitler's swift rise to power, Brabner-Smith repudiated the legal work he had done to help the U.S. government assume greater power over formerly state-controlled affairs.

In 1934, the Chairman of the House Judiciary Committee, Hatton Sumners, asked Brabner-Smith to help draft the Philippine Constitution. Upon returning from the Philippines at the height of the depression, he was enlisted to help draft the regulations for the newly created FHA, and demonstrated how individuals could avail themselves of FHA loans to build or remodel houses. While working at the FHA, he continued to publish on housing law and policy⁴ and the legality of other New Deal programs.⁵

In 1938, he went into private practice in Washington, D.C. At this time he also began to pursue what would become a lifelong interest in farming, buying four farms in Northern Virginia and using them in experiments to make cheap animal feed, with the intention of encouraging lesser developed countries to lower their food production costs. The Washington Chamber of Commerce elected him "Man of the Year" in 1939. That same year, with Myres McDougall, he published in the *Yale Law Journal* an article about land title transfer that is still read, more than sixty years later, by first-year Property students.⁶

1. See Homer F. Carey & John W. Brabner-Smith, *Studies in Realty Mortgage Foreclosures: v. Reorganization*, 28 ILL. L. REV. 1 (1933).

2. See John Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROBS. 400 (1934).

3. See John W. Brabner-Smith, *The Commerce Clause and the New Federal "Extradition" Statute*, 29 ILL. L. REV. 355 (1935).

4. See generally John W. Brabner-Smith, *Economic Aspects of the Deficiency Judgment*, 20 VA. L. REV. 719 (1934); J.W. Brabner-Smith, *The Banking Act of 1935*, 21 A.B.A. J. 610 (1935); John W. Brabner-Smith & V. Joyce Brabner-Smith, *The National Housing Program*, 30 ILL. L. REV. 557 (1936); John W. Brabner-Smith, *The Government's Housing Program to Date*, 22 A.B.A. J. 631 (1936); John W. Brabner-Smith, *Congress vs. Supreme Court—A Constitutional Amendment?*, 22 VA. L. REV. 665 (1936); John W. Brabner-Smith, *The Hoosac Mills Case and Our Founding Fathers*, 25 GEO. L.J. 48 (1936); John W. Brabner-Smith, *The Wagner Act: A Definite Housing Program*, 23 A.B.A. J. 681 (1937); John W. Brabner-Smith, *The National Housing Act Amendments of 1938*, 24 A.B.A. J. 302 (1938).

5. See generally John W. Brabner-Smith, *Federal Incorporation of Business*, 24 VA. L. REV. 159 (1938); John W. Brabner-Smith, *Incorporation by Reference and Delegation of Power—Validity of "Reference" Legislation*, 5 GEO. WASH. L. REV. 198 (1936).

6. See Myres S. McDougall & John W. Brabner-Smith, *Land Title Transfer: A Regression*, 48 YALE L.J. 1125 (1939) (still read by first-year law students in Krier-Dukeminier Property casebook).

In the early 1940s, Brabner-Smith published two leading articles on the federal government's war powers.⁷ Because of this work, he was asked to become Chief of the Legal Division of the Provost Marshall General's office. This office was created in anticipation of the United States' entry into and victory in World War II, and was in charge of POWs, military police, internal security, and military occupation. While working for the Army, he also privately co-founded the Latin American Institute and later, its social adjunct El Circulo Interamericano in 1943-44. The former was an academic institution that taught languages in Washington, D.C., while the latter was a social club that promoted better understanding among countries of the Western Hemisphere.

At the close of the war, he participated in the German Allied Control Council and drafted the charter for the Tokyo War Crimes trials, but refused to take part in the Nuremberg trials due to disagreement with fundamentals of procedure. Later, he lectured extensively throughout Germany on constitutional forms of government to many future leaders of Germany who participated in drafting the German constitution. It was here that he met his life partner, the future Daniela Brabner-Smith. They were married in October of 1948. Taking up residence once again in Washington, D.C., with his new bride, John became Principal Attorney for the FHA and oversaw the building of housing and remodeling of homes in the D.C. area. With the aid of Daniela's mother in Berlin, who worked for Church World Services, John and Daniela began sponsoring to the U.S. displaced persons, primarily from the Baltic States, and guaranteeing them employment in construction ventures.

In 1954, he began work as an attorney at the Department of the Interior's Bureau of Indian Affairs. His duties included acting as counsel for Indian tribes, representing their claims against the government, and drafting tribal constitutions. John retired from his work at the Department of the Interior in 1967.

In 1972, John and Daniela Brabner-Smith, with several others, founded the International School of Law taking responsibility for its financing, as well as generously funding its operational budget. The vision for the new law school grew out of Dean Brabner-Smith's conviction that the study of law had drifted too far from its theological and moral roots. By this time, Brabner-Smith had become an expert on natural law. In the required course in jurisprudence that he taught himself, he emphasized the classical distinction between "jus" and "lex," in other words, the difference between natural principles of justice and mere positive law.

As he explained, Brabner-Smith believed that the study of law was becoming a technical trade. He argued that nineteenth-century law schools were better than the existing law schools, because they were better integrated into the universities of which they were a part and their curricula thus were enriched by "the basic tools of finance and economics, as well as those of politics, jurisprudence, and finance." Brabner-Smith especially lamented that at leading universities, jurisprudence was no longer taught by presidents or deans who were also theologians, such as Princeton's John Witherspoon, Yale's Timothy Dwight, or Georgetown's Father Carroll.

⁷ See J.W. Brabner-Smith, *Martial Law and the Writ of Habeas Corpus*, 30 GEO. L.J. 697 (1942); J.W. Brabner-Smith, *Subversive Propaganda, The Past and the Present*, 29 GEO. L.J. 809 (1941).

Brabner-Smith's basic idea was that a country's natural law was determined, not by that country's statutes, but by that country's religion:

Have we forgotten that the Babylonian Code of Hammurabi placed the chief of the gods, Marduk, at its center? What about Moses and the Hebrew Decalogue? Or Demosthenes: "Every law is a discovery and gift of God"? Or Aristotle: "He who bids the law rule may be deemed to bid God and reason rule, but he who bids man rule adds an element of the beast"? Or Cicero, in *De Legibus*: "I agree with you, brother, that what is right and true is also eternal, and does not begin or end with written statutes Law began ... with the mind of God"? Or Paul's assertion in Romans 13 that all law and government is a product of God's will? And so on and on, through Augustine and Calvin, Suarez and Grotius, on down to Blackstone, the teacher of John Marshall's age.⁸

This was obviously a radical concept for a new law school in the early 1970s, a period of growing anti-clericalism. Nevertheless, Brabner-Smith, though a Christian himself, did not want the new law school to focus exclusively on Christian conceptions of jurisprudence. His view was that students could learn profitably from all of the world's great systems of jurisprudence determined, as they were from different religions. The original faculty of the International School of Law included Jews as well as Christians and at least one Muslim. In fact, between 1989 and 1992, Brabner-Smith undertook an intensive study of Islam, with a view toward better understanding its theology and jurisprudence. Alumni of different faiths who studied at the International School of Law have told me that they did not feel any sense of a need to conform to any religious orthodoxy or that they were being overborne in any other way

III. HENRY G. MANNE'S VISION OF LEGAL EDUCATION

Henry G. Manne received a B.A. in Economics, cum laude, in 1950 from Vanderbilt University, in Nashville, Tennessee.⁹ Like Dean Brabner-Smith, he took only two years to earn his J.D., but Manne studied at the University of Chicago, not Yale. Nevertheless, Yale and Chicago were in many ways similar institutions and routinely traded faculty. Robert Hutchins profoundly influenced both law schools, as dean of Yale law school and then as president of the University of Chicago. Dean Manne's vision of legal education, which he was later to apply to George Mason Law School, first developed in a rigorous fashion at the University of Rochester where from 1968 to 1974 he was Kenan Professor of Law and Political Science. He was also director of planning for a new law school at the University of Rochester. Indeed, Manne approached this project with his characteristic thoughtfulness and brilliance. Manne's vision was, similarly to an important branch of Brabner-Smith's own contemporary thinking, that a law school should be more like a university and

8. John Brabner-Smith, *Who Will Study Justice?* reprinted in CHRISTIAN LAW, 5 (George B. Newitt ed., 1975).

9. See HENRY G. MANNE, AN INTELLECTUAL HISTORY OF THE SCHOOL OF LAW [OF] GEORGE MASON UNIVERSITY 27 (1993).

somehow reconnect itself with the wider rivers of knowledge of which law is a tributary. At Manne's proposed University of Rochester law school, each law student would specialize either in behavioral science, economics, political science, or science and technology. The courses, as well as the particular orientation of individual classes, would be determined by the interdisciplinary specialty chosen by the student. Unfortunately, the university was not able to raise enough money to make Manne's vision a reality, so by 1973 Professor Manne was seeking other opportunities.

Two years earlier, in 1971, Manne had already started the summer Economics Institute for Law Professors, which by 1974 was quite well known and successful. In fact, most of the pioneers of law economics learned their craft at Manne's programs, which were commonly called "Pareto in the Pines." Manne's students included such illustrious academics as Professors Robert Ellickson (Yale), Ernest Gellhorn (George Mason), Thomas Morgan (George Washington), Warren Schwartz (Georgetown), Dean Robert Scott (Virginia), and Judge and Professor Ralph Winter (Yale), to name but a few¹⁰. In this same year, Professor Manne moved to the University of Miami, then under the deanship of Soia Mentschikoff, who had been a law professor at the University of Chicago. Manne moved his Law & Economics Center to Emory in 1980 and then to George Mason in 1986 when he became Dean of the George Mason Law School.

Although in 1986 Manne had been the director of his Law & Economics Center for many years, at George Mason he became, for the first time in his career, a law school dean. At this point, he naturally thought of his earlier plan for the University of Rochester law school with its four possible academic specializations for students. Nevertheless, as Manne himself later said, this original plan proved impractical at George Mason law school for two reasons: first, the fifteen mile separation between the law school and other academic departments and, second, a lack of resources at the new law school to duplicate whole departments in behavioral science, economics, political science, and science and technology. Dean Manne therefore thought that he needed to select one of these academic specializations, and the one he selected was economics. Here in his words was his reasoning:

First, ... economics has proved to be the most powerful and applicable cross-disciplinary tool to use in collaboration with law. There simply are more fields of law that can use economics profitably than is true of any other discipline. Second, it is more likely that an entire law school can be staffed by law professors with some meaningful background in economics than with those of any other discipline. There has been vastly more serious training of Law and Economics-oriented law professors than is true of any other cross-disciplinary field. Third (and this factor cannot be denied or minimized), Law and Economics was the one field that I was qualified by my own experience to develop, staff and evaluate.¹¹

10. *See id.* at 11.

11. *See id.* at 21-22.

IV COMPARING THE TWO VISIONS

Although each dean had a different law vision for our law school, some similarities exist between them. Both deans were influenced to some extent by the thinking of Robert Hutchins. Hutchins was a Yale law school classmate of Dean Brabner-Smith, and the long-time president of the University of Chicago when Henry Manne arrived as a first-year law student. Brabner-Smith began an article explaining his own educational philosophy by embracing Hutchins' criticism that the legal profession was becoming a mere "technical trade" and that law schools were partly responsible.¹² Hutchins' thinking is also evident in Dean Manne's plan for the University of Rochester law school and George Mason law school. Hutchins had stressed that law schools must cooperate with other disciplines and borrow theories from them. He wrote, "The law schools have been too often and too far separated from the rest of their universities." Then, attacking Langdell, who had stressed that case results were like scientific facts, Hutchins continued:

[C]o-operation with other disciplines requires that the co-operating discipline each have a theoretical structure which makes the facts and ideas of the one intelligible to the other. Facts about business are not useful to economics in the absence of economic theory. Facts about law are not useful to the legal scholar in the absence of legal theory. The facts of each are not interchangeable to the other unless the theory of each can be grasped by the other."¹³

Both visionary deans of our law school accepted Hutchins' idea. Nevertheless, Hutchins went further. He argued that interdisciplinary work and the sharing of theories between law and the social sciences "could be effective only if a vital core of jurisprudence were at the center of the law school."¹⁴ This was also the core of Dean Brabner-Smith's program, and it went beyond even what Hutchins was able to achieve at the University of Chicago.

Dean Manne's influence on the law school continues through our law-and-economics focus, which still pervades our curriculum and strongly influences our faculty's research. Nevertheless, Brabner-Smith's program for the law school remains appealing and enduring. Brabner-Smith stressed that law classes should involve economics, political science, and finance, but that this knowledge would be empty for a lawyer not grounded in the great classical sources of jurisprudence, which sprang ultimately from theology. As the George Mason law school has evolved since Dean Manne's era, we have included a more diverse set of scholars within the faculty. Besides economists, we now have political theorists, philosophers, psychologists, behavioral scientists, and biologists. In addition, although all first-year students take a course in economics, they can now also elect to take a course in jurisprudence, and many of them do so. Recently we have added

12. Brabner-Smith, *supra* note 8, at 1. The work to which Dean Brabner-Smith referred was almost certainly Robert Maynard Hutchins, *Legal Education*, 4 U. CHI. L. REV. 357 (1937).

13. Hutchins, *supra* note 12, at 362-63.

14. *Id.* at 364.

two distinguished experts in jurisprudence to our faculty,¹⁵ and their courses are extremely popular.

Another way in which we have tried to continue Dean Brabner-Smith's work has been through our Rule-of-Law Initiative, which seeks to train Latin American judges in economics and in turn expose U.S. judges to the classical jurisprudence with which Latin American judges are more familiar than their North American counterparts. Perhaps both of our visionary deans would approve of this work. Dean Brabner-Smith invested much of his time in creating relationships with lawyers and judges in that region of the world, and Dean Manne would certainly approve of extending economics training to judges beyond our borders.

15. Peter Berkowitz and Michael Green.