

TEACHER OF MEN

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The great disadvantage of teaching, particularly in the field of the humanities, is that it offers little basis for measuring accomplishment or success. There is agreement neither about the job to be done nor about the way to do it. Reputations grow slowly even in soil painstakingly cultivated, seeming to flourish unduly when nourished from the compost heap of idiosyncrasy. Recognition and advancement come too often from accomplishments outside the classroom, from either the substance or sheer bulk of publications, or even from completely non-academic pursuits. The concept of tenure has been devised as a seemingly necessary protection against unfairly critical judgment where there is little or no concrete basis for either charge or defense.

How, then, realizing these irrationalities, is judgment to be cast regarding the qualities of Wiley Rutledge as a teacher?

There is the temptation to work backward from the fact that he became a justice of the Supreme Court to the conclusion that he must have been a great teacher. Love for him creates concern about magnifying his academic accomplishments solely because of the knowledge that they meant more to him than any others. Yet these dangers are probably much less than that of minimizing his academic stature because of the inapplicability of the common forms of measurement. His attributes as a teacher were different from those of most of his peers.

Rutledge was thirty-two when, in 1924, he came to the law school of the University of Colorado as Associate Professor of Law. He had taught before, in the commercial departments of the high schools at Bloomington and Connersville, Indiana, at Albuquerque, New Mexico, and at Boulder. He had taken his law work at the University while he was teaching in the Boulder High School.

After he had been at the Colorado law school for only two years, Rutledge was taken by Chancellor Herbert S. Hadley, who had also been at Boulder, to Washington University in St. Louis. He became Dean of that law school in 1931, moving then in 1935 to the deanship at the University of Iowa College of Law. He left teaching in 1939, except for his occasional return as a member of a summer school faculty.

Fifteen years broken into four periods, each of which includes inevitable long months of breaking into new circumstances, offers too little time for the kind of building which, in the field of legal education, posterity identifies as

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monumental. No treatise or casebook bears the Rutledge name. His contributions to the law reviews were less than those of most of his colleagues. There are only two "leading articles" and one unusually illuminating book review to bear witness to what his contributions to record scholarship would have been if he had, as teacher, chosen differently. So it was not as a scholar, measured by writings, that Wiley Rutledge achieved his academic stature.

As a law school administrator, Dean Rutledge's record was, again, not distinguished by the kind of achievements which are ordinarily associated with eminence. He introduced no new teaching methods, conducted few curricular experiments, was responsible for little pedagogical innovation. A number of minor changes were made in the course offerings at both the Washington and Iowa law schools while he was in charge of those programs. Introductory courses in Legal Method were added to the curriculum, the law review programs were given special support and assistance, certain courses were shifted from elective to required status, and the public law programs were expanded. The record of accomplishment along these lines was probably greater in both cases than what is normally expected during the first years of a dean's regime. Yet these accomplishments would have to be exaggerated to make them the basis for encomiums. They represent in large measure Dean Rutledge's willingness to let individual faculty enthusiasts try out their pet ideas. He not only permitted, but encouraged, such experimentation. It was characteristic of him that he was never satisfied with the way his job was being done, and so he was always ready and eager to see if something else wouldn't work better. Yet he was no great administrative planner.

What then of his actual teaching, in the specific course, or classroom, sense? Reporting on a teacher's classroom performance presents some of the difficulties which characterize the story of the man who died in the middle of a dream about falling off a bridge. Students, the only witnesses, are not very reliable judges of the real quality of what they get in class. Yet there is, in Rutledge's case, convincing accord that his classes were considered perhaps not scintillating but uniformly enlightening and stimulating. The discussion started from the cases, but was no mere rehash of them. He assumed that they had been read and spent his time probing, in easy, two-way conversation, the avenues they opened up. Those who were there refer repeatedly to his extraordinary thoroughness. These class discussions apparently followed the pattern of his subsequent judicial opinions. Here was a man of extraordinary conscientiousness who doubted both his premises and his own adequacy. The result was an exhaustive exploration of detail, occasionally repetitive, prompted partly by a desire to be absolutely sure himself, partly by concern about his position being understood. It was not enough to establish and prove a point; what was most important was that it be sufficiently developed that there would be a guide for future practice. He often commented on the

dilemma of stimulating the law review men while supplying the minimum essentials to those at the other extreme, the difficulty of broadcasting simultaneously on a dozen different frequencies.

Rutledge once wrote of Hadley, who had been his teacher, that "his instruction was outstanding for two things, incisive analysis of cases and piercing through the formulations of legal language to the real social and economic issues they so often conceal." His own students say much the same thing of Rutledge. They go on to note the difficulties inherent in trying to satisfy his dual standard. "Never an hour passed," one writes, "but that the dean would glance at least two or three times at the clock and then shake his head." It takes so long, if you stick to the procedure of matching students' questions with your own, to first comb the historical and conceptual details of a proposition, and then to consider carefully its social and economic implications. Most teachers meet the time strictures by deliberately or subconsciously selecting their emphasis. Few try both to dig deep around the roots of a doctrine and then to explore the shade or shadow cast by its branches upon the economy or society in which it grows. Few are suited temperamentally or by interest to do both. Rutledge was, or at least he forced himself to the double task. It was an unusual semester when the class in Corporations got past page 200, and it is part of the folklore at Iowa that when, just before the term ended, Rutledge was called to the bench, his successor instituted 100-page-a-day assignments to insure the students' having what he deemed an adequate exposure to the subject.

It is probably true that Rutledge's attention to the history and evolution of the concepts with which he dealt reflected more than anything else a sense of what he considered academic duty. The two papers he contributed to the law reviews are heavily weighted with historical tracing and conceptual analysis. They are recognized, one of them particularly, as outstanding papers. But they lack the spark which characterized the man, and as you read them you think of some of your friends whose letters make them seem not closer but farther away. There is confirmation of this impression in a colleague's recollection that "Wiley struggled with the article, until I finally grabbed the first part for the law review, somewhat over his protest; he never finished the concluding part." Rutledge had few of the historian's impulses, and unquestionably chafed under what he considered part of his obligation. His comment, made after he had left the teaching profession, about the essays contributed in 1942 by Pound, McIlwain, and Nichols to the Rutgers Forum, seemed to bespeak his real feelings about this aspect of scholarly endeavor, or habit:

One turns from [these essays] with a sense almost of futility in scholarship. History has its uses. They are not altogether antiquarian. Why we are, in some part, as we now are always is interesting, if only for reminiscence. But this [November, 1942] is no time for easy recollection.

The time spent on the "social relevancies" represented, on the other hand, the bent of Rutledge's real personal interests. He talked often, particularly after the outbreak of the war, about the importance of stressing in education the present and the future. Thus, to the Chicago Bar Association in 1943:

No campus character is quite so pitiful as the one who becomes engrossed in seeking the old and the obtruse, so that he loses sight of the new and the living, the obvious and the simple things. For at the end of the past are the present and the future, and beyond the most intricate technique lie the simplest, and therefore, the greatest things.

One of Rutledge's last addresses was entitled, "Looking Forward in Law." He relied, on another occasion, upon the implications he found in Lowell's line,

And glad Truth's yet mightier man-child leaps beneath the Future's heart.

There is something almost anomalous in the fact that this man, almost a reformer by nature, more interested in civil liberties than in authority, more concerned about the future than the past, nevertheless embraced much of what would have been considered the orthodox and even conservative pedagogy of his period. It is hard to believe that the review of Professor James' casebook on Business Associations, appearing in the *Georgetown Law Journal* in 1938, could have been written by one of the few proponents, in the legal profession, of the Roosevelt court-packing proposal. What you think of as typical of Rutledge emerges in his suggested testing of course content in terms of its value for the *average* student, in his statement of desire to teach his students about the "organization, conduct and winding up of the corner grocery store," and in his references to the advantages of small, local law schools. But in the course of that review he aligns himself rather definitely on the "conservative" side of such issues as that of "casebooks versus 'collections of materials'" and that of "bringing more social science into the law schools." He almost goes out of his way to defend "conceptualism" as against "functionalism," perhaps proving only the emptiness, or at least the slipperiness, of such terms.

Rutledge had, nevertheless, a well-developed concept of what he considered the broad purpose of education. His was, in general, the philosophy of Horace Mann and John Dewey.

Central to his thinking, and illustrated by his emphasis on the present and the future, as distinguished from the past, was an insistence upon the integration of education with the rest of the social experience as men actually live it. He conceived of the law school as a place where young men are already taking part in life, not just preparing for it. He took advantage of every opportunity to weave the classroom discussion into the fabric of contemporary events, not just to illumine a concept but to make that discussion part of the students' participation in what was going on around them. As dean, he encouraged a

variety of programs devised to work the men in the law school into campus, community, bar, and national affairs. He spoke repeatedly against emphasis upon educational components lacking in other than academic significance, against "the accumulation of academic honors for their own sakes," insisting that "credits, grades, and degrees have only the interest of rusty medals in museums, if the only achievement in attaining them is the attainment." His conception of teachers and students alike was a conception of men pursuing together a function of citizenship.

It was as part of this conception that he himself participated broadly in the affairs of the community, some related only remotely, if at all, to school matters. He became a leader in the programs of the St. Louis and Missouri Bar Associations, was active among the Commissioners on Uniform State Laws, became president of the Iowa City Rotary Club, organized evening discussion groups in both cities, was always running from class to a meeting of this campus committee or that one, even taught Sunday School for a while. Irving Brant has described the many ways in which Rutledge was a citizen first, and a teacher only as part of his fulfillment of the broader role.

There was kinship with Dewey, too, in Rutledge's attempt to identify and develop the special significance which education has in a society based on democratic ideals. He spoke frequently on this subject, perhaps most notably at the Indiana University Commencement in 1946. He expressed there, as on two other public occasions, his concern about the fact that it was in the country where literacy was perhaps the highest that the forces which precipitated the second World War were mobilized. Taking his text from Jefferson's concept of "education on a general plan," he took issue with the proposition that "education in the greatest quantity, at all levels either creates or protects [democratic] institutions." He excoriated "the blind idolator who worships at the shrine of education for education's sake alone." The trouble is, too frequently, that

Our schooling has not taught us as a people to put aside our cherished, outworn wishes. . . . We cling to policies time and events have buried. We succumb to vast and sudden swings of emotion. We delay and debate, until the time for talk has long gone by. We are swayed by labels, name-calling and wise-cracks, whether or not the facts contradict them.

Rutledge's answer was that the universities "must be great independent agencies for full information and enlightenment," not "subservient to men in political power" or under the "domination of any private, selfish interest or group or institution." Grouping schools with the press and radio, he noted the necessity of their giving voice to "special interests of all sorts," the even greater essentiality of their being

. . . great instrumentalities of impartial information and disinterested opinion and judgment, governed alone by that sincere regard for truth which requires all available facts before judgment and renders it with an eye single to the general welfare, not that of some special interest.

It may well be that these sentiments are so unexceptionable, as the stuff of commencement speeches, that it would be a mistake to make too much of them. Perhaps the real significance of this address was that a good many who heard it knew that the speaker was not just talking easy generalities. His discussion of the history and ideals of democracy in society and of freedom in universities bore closely upon a particular situation that had developed at the time on the campus where he was standing, an issue which had not then been resolved. It is often enough that academic freedom has been publicly memorialized as a fine ideal in the absence of any concrete challenge to it. It is something else for a Justice of the Supreme Court to state publicly what, under the circumstances, could only have been interpreted as an enunciation of the principles applicable to a specific issue, which, although it omitted a judgment upon the issue itself, most public figures would have considered it impolitic to utter.

What Rutledge did at Indiana was what he had done time and time again in his classes. He was a "liberal," by any of the decent usages of that term. The precise meaning of liberalism, as he exemplified it, is developed in detail in the other papers in this symposium. The important thing here is that his point of view was one that law school students need very much to be exposed to as they enter a profession where financial reward is likely to flow most generously from a defense of the status quo. He did more than express that point of view. He did it in a way that offered potential architects of democracy an example of how, if they so choose, they may, without personal prejudice, assume leadership in sponsoring any changes which may from time to time seem necessary.

In one of his letters, written in 1940, Rutledge referred to some of the experiences he had in connection with the perhaps classic example of advocacy of the unpopular point of view, his defending the court-packing bill in Republican Iowa. He noted that his position had "put [him] on the spot" because the incident developed "during the second year I was in Iowa City and before I had time to firmly establish a great number of personal confidences." He admitted that he had, as a consequence, felt compelled to speak sometimes guardedly. And then he concluded:

I think it is not a compromise of principle to adapt the expression of your views to what the group can take without strongly unfavorable reaction. This does not mean of course that when an issue arises where your own integrity requires a frank expression you should not make it; but there won't be many such situations, other than of your

own making. . . . And when they arise one can by objective manner and carefully qualified statement of reasons . . . at least give . . . some better appreciation of the other point of view. . . .

It was one of Rutledge's great qualities as a teacher that he could develop, in a way that commanded respect, a point of view covering many areas, which too often, by the manner of its presentation, only evokes sneers and confirms reaction.

It seems then a fair summary that Rutledge gave his students a thorough grounding, a broad basis for understanding, a basis too for healthy doubt, and an appreciation of the place a rule of law has in a democratic system. This describes quite a job, measures a substantial accomplishment. Yet to find in this much alone a basis for special distinction would be less to do Wiley Rutledge credit than to do injustice to a good many of his colleagues. This is, so far, only the story of one of a score, or perhaps several scores, of men who today lead this branch of the legal profession.

There remains to be noted, however, the quality for which Rutledge will, as a teacher, be longest and best remembered. He was a teacher of law, but beyond that, and foremost, he was a teacher of men, drawing upon his own being and humanity for the precepts "students" never get from books. He was, using the phrase he applied once to his own dean, John D. Fleming, "both teacher and father to his 'boys.'"

There are today in this country some 1500 men, all who ever studied with Rutledge, who have in their being a substantial piece of this man. This is the story of one who, as teacher and as dean, eagerly let students take from him the time and energy which most of his colleagues reserve for themselves. It is the story of the pedagogical effect of students' feeling themselves admitted to intimacy where all they expected was exposition or at most an audience. What is involved is the basic issue of whether law school students need most a store of book learning or living examples of how high grade, decent, tolerant and intelligent men conduct themselves in thought and in action having to do with the law. If this seems to suggest a false dichotomy, the fact remains that there is a problem inherent in assembly-line graduate education which we are today far from solving.

A good many of these 1500 students, those with enough stuff in them that they test their own reactions before they act, carry their personal juries around with them. When there are briefs to be written or when questions of conscience or of intellectual honesty present themselves, there are swift, perhaps unconscious, pollings of these juries; impulses are tested against what would be the reactions of these other people—a father, a mother, a wife, a professor at college, a friend. Part of Wiley Rutledge's immortality lies in the jury duty which he will continue, for half a century, to do.

Two instances may be selected from many to illustrate how much more than the law of Corporations this man taught.

Student morale was low at Washington University as the fall term opened in 1926. When the new professor imported from Colorado made it plain that both attendance at class and preparation of the day's lesson were considered minimum essentials, there was at first a strong reaction. An alarm clock went off behind the rostrum just after the class had started. It was turned off. There were violent hiccoughs up in the first row, sudden malaise here and there requiring precipitate and grotesque exit. It was all ignored. Clark Clifford has special information about a moaning that came for several days from someone's unmoving lips. An undertone of shuffling feet frequently developed behind an epidemic of out-of-season coughing. This went on for most of a month. There was never the slightest recognition of it on the part of the newcomer.

Then, on various pretexts, the students began dropping by Rutledge's office. A question about the next day's assignment frequently branched out into an hour's conversation. The talk was neither personal nor profound. Preparation for tomorrow's lecture on *ultra vires* was set aside while teacher and student hashed and rehashed the Teapot Dome incident, the Mitchell Palmer raids, the Child Labor Amendment controversy, and the problems faced by the St. Louis Bar Association. Here was an unusual combination of warmth and candour, a blunt, frank statement of position on every issue of public moment, but an ingenuous charity toward the individuals involved. The visits often ended with student and teacher going down the street for coffee. The foot shuffling was a little less next day, and the catarrh improved. One participant in this series of episodes says today, "I've forgotten the rules about the rights of minority stock-holders in Missouri, but I have never in 25 years joined another gang-up or gotten sore when someone picked on me."

Then, at Iowa, there was the problem of the intellectual apathy which always threatens at a law school where a good many of the students come from traditionally conservative families and expect to return to a casual (but by no means unsatisfying) small town practice. It was hard, for example, to interest even the potentially good students in working on the law review. Among the early callers at the Dean's office were a boy just registered from Sioux City, another from a little town with a population of three or four hundred. One had a problem of waiving a technical deficiency in his college record. The other needed some financial assistance. Both recall today their embarrassment upon their realization that they had, before their talks with "the dean" were over, taken at least an hour of his time. Perhaps it was only coincidence that two years later one of these boys was Note Editor of the *Iowa Law Review*, the other, Editor-in-Chief. It has to be assumed that other hours went to students who subsequently dropped off. Yet it is equally reasonable to

wonder how much more those two boys put into their law school work because they had learned that the dean was interested in them as individuals.

These stories could be repeated in 1500 different forms. They would explain, if explanation is necessary, the paucity of Rutledge law review articles, the absence of Rutledge texts and treatises, the fact that the Corporation blue-books never seemed to get graded until just before the next examination period. (They lampooned the dean in the Iowa Law Day skit one year by wheeling in an old codger who inquired of the laboring pedagogue, through his whiskers, if he could find out yet whether "my Pappy passed 'B. O.'") It may even be that these stories explain in part why Rutledge, a crusader and reformer by instinct, never evidenced more than moderate interest in the curricular and methodological reforms which a number of deans were instituting during the late thirties. He may well have felt that the formal aspects of pedagogy didn't matter enough to make them the subject of strenuous attention. To one who felt that "the greatness of a university is found in its spirit" or, again, that "the soul of an institution marks it with distinction or lack of it," it wouldn't have been a matter of first importance whether the procedural courses were taught in the first year or the third.

There would, at the same time, be justification for finding in Rutledge's recognition of the individual personality of each of his students, at least the seeds of what may someday become the "progressive school" of legal education. The phrase is borrowed from its usage in the literature which describes developments during the past twenty-five years in the primary and elementary schools. When Rutledge spoke out, as he frequently did, against the "law school factories" and "mass production teaching methods," his thoughts found a common denominator with those of Carlton Washburne and the others who have now made the grade schools in many parts of the country places where individual children grow as their particular natures justify instead of in molds which are as likely to stunt growth as to aid it. There are those law teachers today who cry out against a system of graduate education which runs its course in the case of an individual student without any faculty member ever even learning his name. There are a good many who reflect with shame upon the action of the Association of American Law Schools at its 1948 meeting when it was decided that one faculty man to 100 students is a satisfactory ratio. There are even some of these teachers who wonder whether the callousness that characterizes too much of the legal profession traces to the cold impersonalness of so many law schools. This goes, perhaps, beyond the Rutledge story. It is the essence of that story, though, that he gave to legal education an extraordinary example of what a teacher can accomplish by treating students not as sponges but as people. The figure is really his own. He said once of Chancellor Hadley, "Students were not intellectual absorbents to him. They were also men."

You wonder what it was that prompted this man to make, from his time and energies, so much more of a contribution to his students than the rest of us do. Those who knew him at all know that it was not personal ambition, at least in any ordinary sense. Perhaps the answer lies in philosophical or psychological mysteries where exploration is futile. Part of the explanation is probably offered, though, in one of his last public addresses, given on December 7, 1948, at McCain, North Carolina. The occasion was the dedication of a new building at the tuberculosis sanitarium where Dr. Paul McCain had served so long before his death. Justice Rutledge spoke of McCain's relationship with his patients:

Each received his personal attention, and on a personal basis. None was merely 'a case.' His aid was never given coldly, with mere efficiency. Without apparent effort, though it cost him much in time and energy, he created in each person a sense of understanding and courage.

These were not just the fine words of a dignitary imported for this occasion. Rutledge had come back to "the San," as he called it. He had gone there first thirty-two years earlier, when he was twenty-two. He said more about that experience on this later public occasion than some of his most intimate friends had ever heard him say before. Most of them knew that he had once been a very sick man, or boy, but few had realized how he credited Paul McCain with having saved both his life and his spirit. When he spoke as he did of McCain, in words which describe so well his own life pattern, that pattern became much clearer. Perhaps the only mystery remaining is in the fact that an experience which centers so many peoples' thoughts upon themselves led this extraordinary man to emphasize instead the personalities of those with whom he worked.

There is another part of the probable explanation of this quality of Rutledge's which can, with propriety, be neither omitted nor more than noted here. Those who feel that warmth is a pedagogical attribute will agree that in all except the occasional case such warmth requires nourishment in the evenings and renewal over the weekends and during the vacations. Perhaps the heart of the story of Wiley Rutledge as a teacher is the story of the Rutledge family. Here, some day, his biographer will find relief from the monotonous pattern of the biographies of "great men," a pattern characterized so much by the apparent necessity of choosing between public success and family satisfactions.

This then is the record of how one man wrote out in his own tears and sweat, and probably his blood, what Mr. Justice Holmes meant when he said, at Harvard's 250th Anniversary ceremonies: "nearly all the education which men can get from others is moral, not intellectual." Perhaps this isn't so, or

perhaps it is only partly true. It was, in any event, in this realm of moral education that Wiley Rutledge accomplished what few others ever have.

* Recognition of the subjective basis upon which this tribute is built has made it seem some way wrong to use footnotes as flying buttresses. They have therefore been omitted. It is probably appropriate, however, to list the Rutledge addresses from which the quotations have been drawn. They include the following: Address at a Meeting of the St. Louis Bar Association, April 27, 1943; *Two Heroes of the Law*, an address before the Chicago Bar Association, June 29, 1943; *Was Thomas Jefferson Wrong?*, the Commencement Address at Indiana University, June 16, 1946; *Eighty-Six: Forty-Six*, an address before the Michigan Bar Association, September 13, 1946; *Looking Forward in Law*, Federal Bar Association Dinner, September 26, 1947; *Women's Rights—Barometer of Democracy*, an address at Bryn Mawr College, March 11, 1948; *Tribute to Paul McCain*, an address at McCain, North Carolina, December 7, 1948. The "unfinished article" is *Legal Personality—Legislative or Judicial Prerogative*, 14 ST. LOUIS L. REV. 343 (1929); the other one is *Significant Trends in Modern Incorporation Statutes*, 22 WASH. U. L. Q. 305 (1937), 3 U. PITT. L. REV. 273 (1937).

I have also relied to a substantial degree upon letters contributed by these men who knew Wiley Rutledge either as colleague or as teacher: Albert S. Abel, Ralph F. Fuchs, Mason Ladd, Philip Mechem, Clarence Morris, Edward S. Stimson, Matthew J. Heartney, Jr., Lowell C. Kindig, Elmer Hilpert and Margaret Warner. Needless to say, some of these correspondents would disagree on some of the details which have been covered.

Finally I should like to express particular gratitude and indebtedness to Edna Lingreen, who worked with "The Dean" and "The Justice" from 1938 to 1949, and who has been so helpful in the preparation of this account that only her insistence explains her not being listed here, as she might have been so many times in the past, as co-author.