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Loyola University Chicago School of Law Annual All-Journal Banquet, April 23, 2008

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LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW
ANNUAL ALL-JOURNAL BANQUET

APRIL 23, 2008

Remarks of Joseph D. Kearney*

Thank you for the invitation to speak with you this evening. While I have never been in Kasbeer Hall before, I have a strong connection to Loyola University. This is not merely because I come from your parent institution. I am a graduate of St. Ignatius, which for the past 138 years has been a few miles from here on what we now call Roosevelt Road but which in our forbears' time was still known as 12th Street. And out of St. Ignatius in the early part of the last century there came Loyola University. I mean this quite literally. In fact, there was a priest at Ignatius in my days there of whom it was said that his job at the time of the move in the early 1920s had been to run along behind the truck moving books from St. Ignatius to the new Loyola University and to pick up the ones that bounced out and toss them back in the truck.

My connections are less incidental than being a graduate of St. Ignatius. My wife, Anne Berleman Kearney, a lawyer herself, taught legal writing for two years at Loyola before we were married in the mid-1990s and (as I am occasionally reminded) I moved her from the bosom of her family in Chicago up to Milwaukee so that I could teach at Marquette. To this day, when Anne teaches as an adjunct at Marquette—a position to which she was appointed before I became dean, although as a Chicagoan I might not have been above nepotism if it had been required—we refer to the modest stipend that she receives as an adjunct as her “Loyola money.”

The reference, though, originates further back, to the days many decades ago that my mother used to teach English at Loyola on Saturdays. Many a Saturday in the early 1970s one of my siblings or I would accompany her on the trek on the C.T.A. from the South Side up to Lewis Towers, as we called the campus then (and some of us still do), where, in addition to spending some time in my mother's

* Dean and Professor of Law, Marquette University. This is an edited version of the dean's remarks.

classroom, we might hang out in the old mailroom with John Cyrwus, the director of the mailroom and clearly the most indispensable person on campus.

And even all this is not to plumb the depths of the connections, for my mother attended Loyola University as an undergraduate and graduate student, receiving her A.B. (not a B.A., she would remind you) and master's degree in the early 1950s, and my father received his Ph.D. in history at Loyola in the same era. Indeed, they met as graduate students while they were doing research at the Newberry Library. I omit here my brother's more recent Ph.D. from Loyola, his wife's undergraduate degree, and several other family connections.

Given all this, as unusual an invitation as it is for a dean of *another* school to speak at a school's annual law review banquet, one might reasonably be tempted to ask concerning the invitation: What took you so long?

But whatever the reason for the delay, I am especially pleased to be here at Loyola. Dean Emerita Nina Appel is a legend, of course, and I am a fan as well of your current dean, David Yellen, whom I saw just last week in Milwaukee and who told me that he has long been scheduled to be in New York tonight (undoubtedly, you should take note, to separate some of your predecessors as Loyola students from some of the contents of their wallets). I take some confidence, of course, from the fact that David reports to one of my former colleagues on the Marquette faculty, my friend Christine Wiseman. Chris, a Marquette lawyer from the Class of 1973, is in her first year as provost of Loyola University. So, between David and Chris, your law school is in good hands.

That is an important matter. Loyola University of Chicago is a significant civic institution. Over the decades you have produced for this city (and beyond) trial lawyers and judges, corporate lawyers, elected officials, and even, I am sure, business folks helping to advance this city. I am sure that in your various publications your marketing folks celebrate the accomplishments of your alumni. They are right to do so, even apart from any transfers of wealth that this might generate to advance the school. We had the great good fortune at Marquette University Law School last year to receive gifts of fifty-one million dollars and thirty million dollars from two alumni who graduated in the 1940s, and there can be no doubt that the feelings of pride and goodwill that both generated these gifts and were generated by them will be long felt in Milwaukee and the region.

Your own work during the course of this past year on the various journals has itself contributed to both your and your school's advancement. The latter, perhaps, is easier to see. You leave behind at the school—and in the library of just about every other law school—your published works. Not every piece will prove to be the modern-day equivalent of Holmes's *The Path of the Law*¹ or Warren and Brandeis's *The Right to Privacy*,² perhaps the most famous law review articles ever. At the same time, I do not hesitate to say that the work of your journals in the aggregate is scholarship in the classic sense: these undertakings contribute to society's collective storehouse of knowledge. In the process, they burnish the reputation of your law school. Changing times have produced new challenges: law reviews, like many other traditional forms of communication, have struggled to be heard within the growing cacophony of media in the electronic information age. But I believe that their reputational importance remains. Without question, this is true on the downside. Shoddy work by its student-edited journals is no happy matter for any law school.

In this regard, you should consider, if you have not already done so, this extraordinary fact. Loyola Law School has given you its most precious commodity: its name. You, who are not yet lawyers, may put forth work that will be available for decades bearing the name "Loyola University of Chicago." You or I would not permit someone to publish under our name, and yet Loyola has such confidence in you that it permits you to do so. In exchange for that confidence, you have owed it your diligence in the pursuit of your duties.

I allowed that your work has contributed to your own development in the law. At some level, you must know this, but at the same time you cannot know it as well as do those of us already on the other side of the bar. More than anything else, I hope, your experiences—whether on the *Annals of Health Law*, the *Children's Legal Rights Journal*, the *Loyola Consumer Law Review*, the *International Law Review*, the *Public Interest Law Reporter*, or the *Loyola Law Journal*—have helped you to fashion in yourselves a demand for excellence in written legal work. If this is so, perhaps it is only a nascent matter, not yet a habit, and you must attend to its growth in future years, lest it die young. But, oh, the advantages that you and your clients will reap if you make it a habit!

When I refer to excellence in written legal work, I refer only in part to the clarity and felicity of your words. To be sure, I would hope that your legal writing professors—the successors to my wife, if you will,

1. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

2. Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

whom the *Loyola Law Journal* now has the generosity to include in its masthead with other faculty—impressed upon you the importance of topic sentences, one of the two most important attributes of good legal writing, and one to which many of us did not give much thought between sixth grade and entering the legal profession. (The limits of time mean that you will have to invite me back a different time if you want the other most important rule in legal writing.) Yet it is not simply the well-crafted sentence, paragraph, or document to which I refer. Excellent legal writing also requires adequate and appropriate *support*—for that is the basic purpose of the footnotes and citations that they contain. They are your *proof*: they are your evidence whereby any reader can verify what you are saying. They are especially a challenge to the disbelieving reader, for the signal *See* in front of a case is surely just shorthand for telling the reader to go and look it up if he or she does not believe you.

Let me demonstrate my point about the importance of a habit of seeking excellence in your writing, in the specific sense of ensuring that you adequately confirm the truth of what you are saying—in the specific sense, that is, of cite-checking your work. There are many lawyers who believe that cite-checking is merely a matter of making sure that the case name, date, and page numbers are correct (and some other lawyers, my sense is, who are not even that interested). But cite-checking is not simply this: it rather is your last chance to engage in quality control, to ensure nothing less than that what you are saying *is true*. When I was an associate at Sidley & Austin, I worked on cases for AT&T involving regulation of the telecommunications industry. These were cases said to be worth six to nine billion dollars a year to AT&T, for they concerned the extent to which its divested progeny, the Bell Companies, could enter into the long-distance market in competition with the former Ma Bell. One particular appeal to the D.C. Circuit involved a request by Bell Companies for a waiver of a court order that the Department of Justice supported but that AT&T, the other party to the court order from a decade earlier, opposed. The Bell Companies and DOJ argued that AT&T's opposition was irrelevant and the motion should be treated as uncontested, meaning that it would almost certainly be granted. In the final days as we prepared our brief in the D.C. Circuit, I was cite-checking the brief—the task that in my estimation entails confirming that cited cases say what they are said to say, that there is not other good material in the cases that should be worked in, etc. I noticed that some years earlier, in a document that we had cited for another purpose (and at which I therefore had occasion to look), the Department of Justice had relied, in defending its own inaction in

policing the Bell Companies under the decree, on AT&T's own ability to complain to the court about the Bells. It seemed to me an intriguing fact, and so I added something along the lines of a *see also* citation with a parenthetical quoting the document. I did this about two o'clock in the morning. Upon reading the revised draft brief the next morning, the partner in charge of the case, David Carpenter (a brilliant former law clerk for the late Justice William Brennan), noticed this and recognized it to be a more significant fact than I had appreciated. He decided to elevate and highlight this fact and to recast an essential part of the brief around it. We won the case in the D.C. Circuit—by a 2-1 vote, in part on this theory.³ (If an appellate victory stands, how much more satisfying sometimes to win by a single vote than by a unanimous court.) To this day, David regards my middle-of-the-night *see also* addition—my effort to improve the brief ever so slightly—as the most important thing that I did in my six years of full-time law practice. I do not know that I disagree.

Now that may seem like a long walk for a short drink of water, but it is not. It is an example of how the painstaking things that we do in the practice of law can make the difference between winning and losing, and how, more specifically, the *habit* of seeking excellence in your writing—not just the words, but the entire matter—can be dispositive. It is your habits—I cannot emphasize this strongly enough—that especially will determine your success. And your work on these journals has given you the foundation for taking the practices in which you have engaged and making them habitual. To do so will be your choice.

There is one other aspect of your work on the journals upon which I wish to touch. It is the sense in which you have helped to perpetuate the traditions of your school. There have been some important articles published in your various journals over the years. Your faculty advisor and my friend, Professor John M. Breen, wrote one a few years ago that seemed to suggest—no, it did suggest—that the fourteen law schools operating today at Jesuit universities and thus branding themselves as Jesuit law schools did not warrant the appellation. More specifically, it asserts that the failure of these schools to ensure that their students engage the Catholic intellectual tradition means that they should either revise their curricula or “cease to go by the name ‘Jesuit’ or ‘Catholic.’”⁴ I must admit that I have not yet found the criticism at

3. United States v. Elec. Co., 969 F.2d 1231, 1239 (D.C. Cir. 1992).

4. John M. Breen, *Justice and Jesuit Legal Education: A Critique*, 36 LOY. U. CHI. L. J. 383, 417 (2005).

bottom to be persuasive: it seems to rest on a false premise that these schools have “lost [their] sense of mission,”⁵ which I take necessarily to mean that they no longer do something that they once did. To the best of my knowledge, this requires an ahistorical view of Jesuit law schools, a number of which—including Marquette—emerged out of secular institutions and which did not upon their reception into their universities find some directive to proceed substantially differently from their course of conduct when they had been, say, Milwaukee Law School, as we were for most of the years from 1892 to 1908. This is not to suggest that there are or should be no differences between Jesuit or Catholic law schools and other law schools. But this is not the occasion to engage Professor Breen, and certainly none of this is to suggest that his article is not significant. Quite the contrary on the latter point: It is a learned and thoughtful article that has occasioned substantial attention at a number of Jesuit law schools and reflects how your work as editors of law journals can affect the public debate, in the tradition of your predecessors.

This matter of tradition is important otherwise as well. In preparing for tonight, I briefly looked at every issue of your various journals, both for this year and past years. I was most impressed by their contents, at least to infer from the topics addressed and the authors engaged to address them. At the same time, having accepted your invitation to take your time this evening, I would feel myself remiss if I did not offer a constructive suggestion for your journals going forward. There is a salutary aspect of law reviews that I respectfully suggest is largely missing from Loyola’s. Law reviews are capable of serving as a sort of institutional memory for their schools; indeed, in my remarks last year at the end-of-year dinner for the *Marquette Law Review*, I observed that for us they are our most permanent and accessible institutional memory. My review of your journals, from both this year and years past, suggests to me that they do not especially play this role. To some extent this may be a phenomenon of the ages in which they were born: whereas the *Marquette Law Review* has been published since 1916, the oldest of your journals dates to 1970. But I was nonetheless surprised by the paucity—the almost entire absence, really, in recent decades—of occasional pieces marking some important event in Loyola Law School’s history. This could be the remarks commemorating the construction of a new law school, a memorial essay recalling a notable

5. Leonard J. Nelson, III, *God and Man in the Catholic Law School*, 26 CATH. LAW. 127, 144 (1981), quoted in Breen, *supra* note 4, at 417 n.134. See also John M. Breen, *The Air in the Balloon: Further Notes on Catholic and Jesuit Identity in Legal Education*, 43 GONZ. L. REV. 41, 46–47 (2008) (discussing whether Professor Breen’s model is historically grounded).

judge or professor, a dean's remarks at a law review dinner—after all, *The Path of the Law*, which I mentioned earlier, had been a speech, and while I make no comparison to Holmes, I liked my own remarks last year sufficiently well that you can find them in the closing pages of last summer's Volume 90 of the *Marquette Law Review*.⁶ The *Loyola Law Journal* makes a brief feint in this regard, on the opening page of its first volume in 1970, where it is recorded that the issue is dedicated to Dean William Lamey, who had helped to create the journal and was stepping down from the deanship. But it is not a matter that is carried through, with a couple of notable exceptions in the first dozen years of the Journal, including some memorials of Justice and Dean John Hayes⁷ which I noted with particular interest because many years before he had given my mother an important assist in her career.⁸ The occasional—

6. Joseph D. Kearney, Dean of Marquette University Law School, Remarks at the Marquette Law Review Annual Banquet (Apr. 13, 2007), in 90 MARQ. L. REV. 1069 (2007).

7. 8 LOY. U. CHI. L.J. 673–80 (1977).

8. Here is how my mother recalled John Hayes:

After teaching for three years at Longwood and acquiring my master's degree, I was ready for a change. Endless papers from my students and for my professors seemed to be a permanent part of my life. I was sure that other people went to work at nine and left at five or six without thereafter ever giving their daytime work a thought. I spoke to my friend, Father Joe Hogan, about it. "Let me talk to John Hayes," he offered; John Hayes was the president of the Archdiocesan Council of Catholic Men and [future] dean of Loyola's Law School. I had seen him in the lobby at Lewis Towers and possibly even shared an elevator with him as he had ascended to his office on the ninth floor, one floor above that of Father Doyle whom I still stopped in to see almost every week.

John Hayes and Joe Hogan had gone to St. Ignatius Grade School together and then on to Loyola Academy. When John continued on to college at Loyola, Joe Hogan entered the Jesuit seminary, but they had remained fast friends and saw each other often. When Major Joe Hogan came back to Loyola from his army chaplaincy, Hayes and Hogan were often seen with their heads together.

Thanks to Father Hogan's intercession when I went to Hayes's office, at Father Hogan's direction, I met not only John Hayes, but two men whom I was to see frequently in the next year while I temporarily switched careers from teacher to youth worker: Matt Gobreski, office manager at the Catholic Youth Organization and a prince of a man, and Gene Kent, editor of the publications of the Mission of Our Lady of Mercy.

Mercy was known to many Chicagoans as the Working Boys' Home. Msgr. Kelly, with the assistance of Kent, mounted eloquent appeals for help for these boys, providing a good-sized envelope for donations. In the 1950s, many people did not have checking accounts and they stuffed change and dollar bills into these envelopes, sending them off to the Home or the office of the CYO. Once those were received at the CYO office, it was the job each morning of retired Sears Executive Joe Gladstone to slit open these envelopes and total the money. Sometimes there were poignant messages down with the pennies and nickels about someone's childhood on the street or heart-rending requests for prayers which he duly noted and reported. After a long and successful career at Sears, Joe thought he would be giving something back by this contributed service. He became a good friend.

and I do not even mean every year or even every other year—publication of a significant address would be, I suggest, a salutary development for your journals. While I offer the *Loyola Law Journal* these remarks as a beginning corrective, my point has nothing to do with me but with those who will come after you, administrators, faculty, and students, at Loyola. I have spent a good deal of time within the past several years contemplating and addressing the future of my law school, and it is striking how often I have gone to the annals of the *Marquette Law Review* for either inspiration or, in some instances, support for specific propositions—and found it.

This matter of memory is probably as good a note as any on which to conclude. You will remember your days on these various law journals, and the mist of time will enable most of you to remember especially their happier aspects. Others will remember your work, for it will stand in the libraries and reside as well just a few mouse-clicks away on computers across the country. And I will remember the opportunity that I had to come to my hometown and to recall, among other things, the Saturdays, some four decades ago, when I would find myself in a Loyola classroom with the greatest Loyolan I have known, my mother. I admit, though, to remembering especially from those days the mailroom, and if there is a professor here who remembers John Cyrwus, perhaps he or she will come up and tell me before I leave for my train at Union Station, and we can reminisce. Thank you for the invitation to be with you this evening, and, as a Loyolan once-removed myself, I wish you much luck and success in both your remaining classes and your coming lives in the law.

Anyway, John Hayes, along with Gobreski and Kent, told me of a new plan to be launched by the CYO which sounded to me like a network of discussion groups through the parishes for which I would be directly responsible. I was excited and they offered me the job of Supervisor of Girls Activities on the spot. With the recommendation from Father's childhood friend and head of all the Holy Name Societies in the archdiocese, the "fix" was in.

MARY JANE KEARNEY, MY LIFE: A CONVERSATIONAL MEMOIR 77-78 (2001).