Journal of Civil Rights and Economic Development

Volume 15
Issue 3 *Volume 15, Spring 2001, Issue 3*

Article 9

March 2001

Judicial Reflections on Today's Legal Education

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JUDICIAL REFLECTIONS

ON TODAY'S LEGAL EDUCATION

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It is a pleasure to be participating in this symposium and 75th anniversary celebration. I think this is one of the panels that has not been put together for conflict. I think you will find the themes reinforcing each other. I certainly resonated to what Judge Starr said at lunch and now what Judge Bellacosa has said.

My own sense is that the situation is pretty good as far as legal education goes, but it of course could be better. I look at it first in terms of the students that come along as candidates for clerkships. I read several hundred applications. I interview about twenty people and I know those twenty people, any one of them could do a first-rate job. I pick three and find that they can do an excellent job year after year. It is one of the most encouraging facts of my life and I see the existence of the highly educated, very able people produced by the system. It gives me confidence in what is being done. I feel - and colleagues have said to me that they feel - it is one of the best parts of the job to see the kind of students the system turns out.

I also see students at moot courts, not as a regular judge. Often, I would say, that as a whole, the average student in a moot court final or semi-final does a better job than the average lawyer going before our court. There is a kind of decline for some reason from the high readiness that the law school encourages and what the lawyers actually do later on.

Another observation that I have made visiting and speaking at law schools is that faculties are better around the country, almost

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without exception. They are considerably better than they were twenty years ago.[1] Very strong people have gone into teaching. The reason they have, I tend to think is, that law practice has become less attractive.[2] It is one of the paradoxes. It is because law practice is less attractive that more people go into law teaching and strengthen the law faculties.

That is the situation. Now I would like to say something about what seems to me open to improvement. One humbling thing when you are on a court is to see pro se briefs.[3] You realize that almost anybody can master the language of law and something of the mechanics. I have seen a great many pro se briefs that were fairly decent. You realize that kind of mechanics is not what law school should be about. Almost anybody can do it. I do not really think that is much of an education. I think the well-prepared law student will have to know some history, will have to have a fair amount of knowledge in American and English literature, and I think today they should have some serious exposure to one of the sciences, in particular I would say the neurosciences.[4] The neurosciences will be to this century what physics were to the last century.[5] The nueroscienses are dealing with how the brain works. They are taking on what we used to take for granted, the mental apparatus with which we analyze the law and legal states of mind. We have to know what the neurosciences have to say. What they are saying has not yet gotten into any brief that I have seen, but it is something that any law student today should be aware of.

To return to a theme that I set out twenty years ago in *Persons and*

[1] *See generally* Afton Dekanal, *Anatomy of Legal Education (Report of the Tunks Committee): The Way We Were and the Way We Are*, 60 WASH. L. REV. 571, 571 (1985) (discussing results of study which indicated that law schools in 1980's had far greater resources those in 1950's); A. Kenneth Pye, *Legal Education in an Era of Change: The Challenge*, 1987 DUKE L.J. 191 (1987) (discussing significant changes in legal education over past 25 years). *But see* John R. Kramer, *Will Legal Education Remain Affordable, by Whom, and How*, 1987 DUKE L.J. 240 (1987) (discussing growing concern over rising cost of legal education).

[2] *See generally* Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1991 (discussing lawyers' dissatisfaction with practice of law and possible increased interest in academic life).

[3] A *pro se* brief is a brief filed in the court by the party to the controversy on their own behalf without the assistance of a lawyer. Speaker is indicating the closing of the gap in legal abilities between lawyers and lay parties writing on their own behalf.

[4] *See generally* David H. Vernon, *The Size and Quality of the Law School Applicant Pool: 1982-1986 and Beyond*, 1987 DUKE L.J. 204 (1987) (discussing decrease in quality of law school applicants).

[5] *See generally* Laurens Walker, *Daubert and the Reference Manual: An Essay on the Future of Science in Law*, 82 VA. L. REV. 837 (1996) (discussing acceptance of scientific techniques as evidence).

Masks of the Law,[6] law students should be encouraged to think more than about rules, because rules can be mastered. That is why law reviews can be so good; they can set out rules quite easily. Not only rules, but persons make up the law and it is important for you, as law students, to know who the lawyer is. It is very important to know who the judge is. To some extent, who the litigants are is important. The only way I know that this exposure to persons could be accomplished in law school is to have a substantial part of a curriculum devoted to a case in depth, so that you could see the interplay of rules with persons and not think that a case consists in the rule finally articulated by an appellate court.[7]

The third point, besides the breadth and the interest in persons, I think law schools have to be resistant to the pressure of the profession. I do think that the firms exploit the young lawyers who come out.[8] I see it time and again in the case of my own law clerks who feel disillusioned as they enter a firm practice. I saw it as a member of an accreditation committee at a major American law school: people out of law school for five years who had been polled were deeply disillusioned; 70 or 80 percent said they wish they had not gone into law.[9] It was an amazing percentage. Why did they feel that way? Because they were exploited by the firms and made to give up their own personal lives to produce a profitable bottom line. I think there should be a lot more resistance in the law schools to the business mentality. There are only three segments of the legal

[6] JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW (Farrar, Strauss & Giroux ed., 1976).

[7] *See* Karen Knight, *To Prosecute is Human*, 75 NEB. L. REV. 847, 848 (1996) (acknowledging value of traditional analysis approach to legal issues while recognizing imperative to educate students on client counseling, interviewing, and trial advocacy); Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107, 118 (1999) (describing active learning method requiring students to develop issues from readings as well as simulated interviews with "guest" clients); *see also* Patrick Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 532 (1994) (proposing that law schools should augment case method of teaching with training in counseling and decision-making).

[8] *See* Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 924-26 (1996) (describing how practice in law firms in dominated by number of billable hours); Johnson, *supra* note 2, at 1232-33 (attributing disillusionment of young lawyers to commercialization of legal profession).

[9] *See* Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 881-82 (1999)(citing students in North Carolina and California reporting that, if given choice, up to fifty percent of attorneys surveyed would not have become attorneys). *But see* John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 749 (1999) (reporting that eighty-four percent of Chicago area lawyers were "satisfied" or "very satisfied" with their jobs).

profession that are not focused on the bottom line. They are the judges, the government lawyers and the law school faculties. All three segments should be working together to keep the profession from turning into just a business in which maximum profit is the object.[10]

One word on curriculum reform. I do think that there should be more interest in courses that are directed toward the reform of our society. I have looked at the old law books before our Civil War.[11] They took it for granted that slavery was part of the legal profession. You would be educated in how the slave law worked.[12] They did not attempt to reform it.

The same thing happens today. We take it for granted that the law is the way it is and we do not do much to inculcate in students that there are major changes that should be made. Let me name some of them.

Immigration law. Immigration law is a labyrinth and about as complex as the Internal Revenue Code.[13] In it fairly helpless people are pushed around, exploited by non-lawyers and sometimes by poor attorneys.[14] It is dominated by a bureaucracy.[15] It is an immense area where people in the law schools should be passionate

10 See Johnson, *supra* note 2, at 1248 (arguing that law schools have duty to infuse into profession notion that legal issues affect society in more meaningful ways than are reflected in bottom line); Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 274-75 (1999) (stating that government lawyers recognize their obligations extend beyond agency they represent to all of society). *See generally* Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decision-Making*, 1991 WIS. L. REV. 837, 864-65 (discussing relationship between judiciary and legal profession).

11 *See* THOMAS R.R. COBB, *An Inquiry into the Law of Negro Slavery 1858*, AMERICAN LEGAL HISTORY, CASES AND MATERIALS 190 (Negro Univs. Press 1968); *see also Code of Alabama, 1852*, THE CIVIL RIGHTS RECORD, BLACK AMERICANS AND THE LAW, 1849-1970 6-7 (Richard Bardolph, ed.).

12 *See* Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 ROGER WILLIAMS U. L. REV. 75, 92-96 (1999) (stating that students could expect to learn day-to-day legal aspects of slavery through study of Cobbs' pro-slavery theory); see also Cobb, *supra* note 11, at 190.

13 *See* Daniel Gordon, *California Retreats to the Past: The Paradox of Unenforceable Immigration Law and Edwards v. California, The Depression, and Earl Warren*, 24 S.W. U. L. REV. 319, 338-40 (1995) (pointing out conflicts between federal and state immigration laws of California).

14 *See* Kelley Kaiser, *A Lawyer's Guide: How to Avoid Pitfalls When Dealing with Alien Clients*, 86 KY. L.J. 1183, 1194-98 (1997/1998) (describing difficulty in determining standards of ineffective counseling and affirmative misrepresentation in immigration law cases).

15 *See* Gerald L. Neuman, *Admissions and Denials: A Dialogic Introduction to the Immigration Law Symposium*, 29 CONN. L. REV. 1395, 1402-03 (1997) (referring to increasing caseloads involving immigration as "forcing bureaucratization"); *see also* Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Immigrants*, 102 YALE L.J. 1401, 1423 (1993) (describing battered immigrants' fear of bureaucratic entanglements).

about reform.[16] You could go on to other areas of poverty law, where there is still need for improvement.

Then there is the whole area of criminal law—sentencing. The sentencing guidelines have now become an enormous, complex labyrinth of their own.[17] I think most judges who have experience with the old, non-guideline system regret the guidelines.[18] We have accepted the most mechanical way of approaching what should be done person-to-person, and we are unwilling to fight against it.[19] The political leadership is unwilling because apparently the public likes politicians who are hard on crime.[20] They do not think about what that means, and they do not seem to realize that there are human beings being affected by these harsh rules.[21] The sentencing guidelines should be criticized as part of the criminal law program.[22] You can move from that to the prison conditions where we now operate under a draconian habeas corpus statute that was

16 *See* Kevin R. Johnson, *Clinical Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423, 1453-56 (1998) (supporting clinical education within law schools as indirectly promoting political and social reform in immigration law).

17 *See* Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755, 1761-62 (1992)(describing intricacies within sentencing guidelines as causing new problems); Kevin R. Reitz, Book Review, *Michael Tonry and the Structure of Sentencing Laws*, 86 J. CRIM. L. & CRIMINOLOGY 1585, 1585 (1996) ("[t]he laws and legal institutions that govern sentencing have been changing more rapidly over the past two decades than any other part of the legal landscape of American criminal justice").

18 *See* Albert Alschuler, *The Failure of Sentencing Guidelines*, 58 U. CHI. L. REV. 901, 912-13 (1991) (discussing "troubled consciences" of judges when imposing severe sentences demanded by guidelines); Plato Cacheris, *Responsibilities of the Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 33, 34 (1996) (stating judges no longer have discretion to account for human factors in sentencing defendants); Michael T. Cimino & William J. Powell, *Prosecutorial Discretion under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?*, 97 W. VA. L. REV. 373, 382 (1995) (describing frustrations of federal judges in having their power taken away by sentencing guidelines).

19 *See* Cacheris, *supra* note 13, at 33 (describing role of judges as performing "ministerial act of imposing a sentence within a prescribed grid"); Kristin L. Timm, *"The Judge Would Then be the Legislator": Dismantling Separation of Powers in the Name of Sentencing Reform – Mistretta v. United States, 109 S. Ct. 647 (1989)*, 65 WASH. L. REV. 249, 260 (1990) (describing sentencing guidelines as setting out particular sentences to entire class of defendants).

20 *See* Alschuler, *supra* note 18, at 916-18 (discussing politics surrounding sentencing guidelines and politicians fear of appearing "soft on crime"); Lay, *supra* note 17, at 1765 (explaining Congress' reluctance to reform by fears of appearing "soft on crime").

21 *See* Cacheris, *supra* note 18, at 35-36 (noting impact sentencing guidelines have on defendants' decision to go to trial); Alschuler, *supra* note 18, at 916-18 (stating sentences imposed under guidelines may be more severe than those imposed by judges); Timm, *supra* note 19, at 261 (discussing substantive significance of guidelines to defendants).

22 *See* Cacheris, *supra* note 18, at 33 (calling for efforts to change sentencing guidelines); Cimino & Powell, *supra* note 18, at 393 (criticizing prosecutorial discretion under sentencing guidelines); Lay, *supra* note 17, at 1762 (stating guidelines have negative impact on societal problem).

recently passed.[23] Conditions can become far worse than they have been.[24]

Finally, I will say something where, in particular, I would suppose a Catholic law school would take a particular interest: the life issues.[25] The life issues are vital. I would suppose that there would be courses where, again, a certain amount of passion went

[23] *See* 28 U.S.C. § 2254 (1996) (denying defendants' ability to bring habeas corpus proceeding where there has been "full and fair" proceeding on same claim in state court).

[24] *See* John W. Bristow, *In Quaker View, All Criminals Capable of Reform Prison's Goal Should Not Be Punishment*, RECORD, Feb. 4, 1999, at H16 (noting that harsh and degrading conditions of prisons are getting worse). *See generally*, Jason E. Pepe, *Challenging Congress's Latest Attempt to Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLINE L. REV. 58, 79 (1999) (stating prison conditions are worsening, which may lead to more suits challenging such conditions); HUMAN RIGHTS WATCH, PRISON CONDITIONS IN THE U.S., *available at* http://www.hrw.org/ advocacy/prisons/u.s.htm (stating that in many prisons inmates suffer from physical mistreatment and that many local jails are dirty, unsafe and venom infested and due to increase in population violence).

[25] *See* John T. Noonan, Jr., *Keller Hall Dedicatory Speeches: The Heart of a Catholic Law School*, 23 DAYTON L. REV. 7, 8 (1997) (discussing how Catholic law schools educate lawyers to be kind to each other and to their spouses and children so families are not neglected as result of focus on billable hours). *See generally* John T. Noonan, Jr., *A Catholic Law School*, 67 NOTRE DAME L. REV. 1037, 1040 (1992)(discussing that "the person" is most fundamental of legal concepts and should be integrated into law school curricula); James W. Perkins, *Virtues and the Lawyer*, 38 CATH. LAW. 185, 193 (noting that because lawyers are preoccupied with monetary gain they are working longer hours and enjoying work less, in turn their family life suffers).

towards reform in those areas.[26] I will leave it at that and I know Judge Weinstein will carry on from there.

[26] *See Keller Hall Dedicatory Speeches*, *supra* note 25, at 8-9 (discussing three issues Catholic law schools should engage in including: freedom of corruption from government, freedom of religion, and human life); *see also* Perkins, *supra* note 25, at 207 (stating opinion that legal education should include exposure to virtue ethics and how these relate to becoming better lawyers). *See generally* Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. TOL. L. REV. 1 (1992) (noting law schools have been reforming their curricula in effort to integrate "theoretical insights from other disciplines" into legal education).