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Professors Gee and Jackson have given us a comprehensive overview of the major issues confronting legal education today. In addition, they have provided historical and comparative perspectives, impressive arrays of information in many areas, and unique insights and analyses throughout.

It is hard to dissent from their judgment that legal educators, like lawyers generally, tend to accept change with something less than marked alacrity and wild enthusiasm. Instead, legal educators customarily view proposals for change with a firm conviction that the burden of proof rests with those who would alter the status quo. Despite the apparent resistance to change, the perspective of history may reveal that legal education has undergone greater change during the past two decades than those who would move more rapidly appreciate. Clinical education has been accepted as a major force in most law schools, thanks in large measure to the thinking and funding of the Council on Legal Education for Professional Responsibility (CLEPR). Local rules permitting student practice have been adopted in both state and federal courts. Law school class electives and alternative educational programs have proliferated, even though no one program has gained acceptance on a national scale. Indeed, the vast increase in the number of young men and women seeking a legal education is itself a significant external change having a marked impact on the quality of legal education obtained in law school classrooms and corridors. The fact that external stimuli rather than decisions made within the law schools are primarily responsible for change does not alter the event nor diminish its significance.

Although past years have seen changes, many issues, which distinguished observers expected to have been resolved by now, remain yet undetermined.[1] That so many questions remain unanswered may indicate that, however great the need for improvement with regard to specifics, legal education is still fulfilling its

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1. *E.g.*, Gorman, *Proposals for Reform of Legal Education*, 119 U. PA. L. REV. 845, 847-48 (1971) (discussing the issue of interdisciplinary study).

basic mission in a fashion acceptable to the great majority of lawyers, judges, and law teachers. It is therefore unlikely that any single, uniform proposal for reform will be embraced by the legal profession as a whole. Legal education will probably continue to develop much like the common law. Developments will remain interstitial and incremental, the significance of each step being appreciated only as one surveys the cumulative effect of a large number of small steps. Concerns of faculty members, strictures on financial resources, and other factors noted by Professors Gee and Jackson will inevitably continue to play important roles.

To continue the common law analogy, we should recognize that legal educators, like common law judges, must necessarily determine long-range goals in charting a course of the future. Professors Gee and Jackson report that today the "magic elixir" is competence. Holmes, almost a century ago, addressed the question of what was the proper "business of law schools," and his emphasis was rather different than the prevailing view reported by Gee and Jackson. In an "oration" delivered in 1886, Holmes said:

> Education, other than self-education, lies mainly in the shaping of men's interests and aims. If you convince a man that another way of looking at things is more profound, another form of pleasure more subtile than that to which he has been accustomed—if you make him really see it—the very nature of man is such that he will desire the profounder thought and the subtiler joy. So I say the business of a law school is not sufficiently described when you merely say that it is to teach law, or to make lawyers. It is to teach law in the grand manner, and to make great lawyers.[2]

Education in the "grand manner" must certainly include competence, and—I should like to suggest—competence properly understood may well be best achieved by education that at least approaches the grand manner.

Gee and Jackson's figure of speech, referring to competence as the "magic elixir," is apt. Like other forms of magic, however, competence is a term difficult to define. Indeed, as the authors themselves readily acknowledge, competence is not always easy to recognize even when observed. Difficulties of definition and recognition aside, it is nevertheless important not to aim for too low a level of competence. The legal profession should not be

2. O.W. HOLMES, *The Use of Law Schools*, in COLLECTED LEGAL PAPERS 35, 37 (1920) (oration before the Harvard Law School Association (Nov. 5, 1886)).

satisfied with minimum competence as a goal, particularly if greater competence is attainable without excessive incremental costs. Moreover, society is entitled to expect more of its lawyers than a rudimentary ability to manipulate doctrines, interpret precedents, and draft enforceable agreements. It is not wise to assume that we should expect less of lawyers choosing to practice in small towns instead of urban centers, or in neighborhood settings rather than financial districts.

Education in the "grand manner" should do more than enrich the lawyer's life with appreciation of subtleties and dimensions otherwise ignored. Education in the grand manner serves its purpose fully if it enriches the lawyer's capacity to serve his clients, improve his profession, and elevate the life of the law. There may be something to be gained from considering for a moment the goal of law teaching and the methods by which we strive to meet it. On that basis, we can explore—by way of example—legal education's potential for enabling lawyers (1) to see ethical problems in litigation that they might otherwise not see; (2) to see ethical problems in the legal system that they have an obligation to help weed out; and (3) to comprehend the body of the law as a living thing rather than a static set of doctrine. Finally, we can examine how education in the grand manner may be furthered by developing the capacity in the system to blend the rich perspectives of the academician, the practitioner, and the judge in an effective teaching setting.

We begin by considering ethical problems in litigation that law students might otherwise ignore. Gee and Jackson underscore the importance of professional responsibility when they state that lawyers should be "profoundly aware of ethical questions and standards."[3] To be profound, knowledge or awareness must reflect a personal understanding that affects one's professional judgment and actions in a continuous and powerful way. Teaching this awareness is an exceedingly difficult task. Perhaps even more difficult is measuring whether we have been successful in our efforts. Serious practical and theoretical problems are encountered in the attempt to evaluate how and to what extent legal education teaches this profound awareness of ethical questions and standards. A consideration of how law schools approach the teaching and examination of legal rules and doctrines may reveal the fact that where legal education has been deficient in teaching

3. Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U.L. REV. 963.

profound ethical awareness, the students of that education may be among those least able to sense the deficiencies.

Probably no single major premise of legal education is more familiar to law students and their professors than the proposition that rules of law have not been "learned," let alone mastered, until they can be applied to concrete fact situations. Indeed, we typically test for mastery of doctrine, not by asking about the doctrine directly, but rather by posing a fact situation in which the doctrine is relevant. In legal education we stress issue identification because we consider it relatively useless to know a rule without being able to recognize situations where the rule is relevant. If a lawyer cannot recognize an issue, it will do him no good to know the governing rule. On the other hand, if he can see the question, it is usually possible, with a little time and effort, to discover the state of the authorities that may or may not provide an "answer." Thus it is not unusual to see the weak student emerge from an examination rather less troubled than his more knowledgeable classmate, simply because the latter has grappled hard with problems of which the former was oblivious.

This phenomenon can be analogized to the pitfalls of relying too heavily on data forms or questionnaires addressed to lawyers, asking whether and in what ways they were or were not equipped by their legal education for the practice of law. To the extent that lawyers report perceived deficiencies in their education, the data are valuable. However, to the extent respondents report no perceived deficiencies in their education, the data may tell us relatively little. To put the matter another way, one who is totally unaware of the role of vitamins in a well-balanced diet can hardly be expected to report a vitamin deficiency regardless of the state of his diet or health. Therefore, because of the great possibility that attorneys will not perceive a lack of those qualities or skills—some related to ethics and others not—of which they are in greatest need, it is important to avoid placing undue reliance on surveys of attorneys[4] who report no perceived deficiencies.

While it is uncertain whether these various deficiencies are best remedied by undergraduate legal education or by some other means, it is apparent that legal education should do more to sensitize future lawyers to problems and issues of which they might otherwise remain oblivious. Indeed, if legal education should fail to meet this challenge, law school graduates, not perceiving the educational failure, will be unable to identify deficien-

4. Primarily that survey data cited in *id.* at 927-63 (Section VII).

cies when responding to questions concerning the success or failure of the law school in giving them the tools with which to successfully practice law. A vicious cycle is thus identified: The deficiency that is never recognized as such will likely remain unremedied. Whereas a lack of substantive knowledge or inadequate skill in draftsmanship hopefully will be perceived and corrected, what remedial action can be expected when the deficiency itself is failure to perceive the need for remedial action?

In the area of ethics, for example, legal education has a vital role to play in breaking this vicious cycle. It was, at least until recently, common for legal educators to ignore ethical problems, finding it fashionable to assert that fundamental traits of character are unlikely to be changed by anything the law schools can do with respect to ethics or professional responsibility. Perhaps this is partially true. But there remains a clear role for legal education at least to identify situations involving issues of ethics and professional responsibility that require character judgments.

Let us turn to specific examples. Litigation tactics have long been a fertile source of difficult and frequently subtle problems of ethics and professional responsibility. Some behavior is clearly unethical and thus, by definition, removed from the arena of tactics and neatly labelled as unprofessional conduct, unworthy of any self-respecting advocate. Further along the spectrum are any number of situations in which attorneys must draw that fine line between a legitimate tactic and unethical behavior.

The tactical use and abuse of discovery provide a prime example. It has long been suggested that some attorneys use the taking of depositions as an opportunity to multiply the expenses of an opposing party, hoping thereby to obtain a more favorable posture for settlement. In fact, there is evidence that the cost of litigation has become so oppressive that many would-be litigants are denied effective access to the courts. As a result, the entire process of discovery is currently being reexamined with a view toward significant improvement.[5] Yet, regardless of future definitional and structural changes, it is of critical importance that attorneys who unscrupulously exploit the discovery process should have been taught to recognize the ethical problems presented by resort to such tactics.

5. *E.g.*, American Bar Association, *Report of Pound Conference Follow-up Task Force*, 74 F.R.D. 159, 191-92 (1976). Chief Judge Irving R. Kaufman of the U.S. Court of Appeals for the Second Circuit recently announced appointment of a special circuit commission to study reducing litigation costs. *Federal Courts Act to Improve Accessibility*, N.Y. Times, Oct. 30, 1977, § 1, at 61, col. 7.

I am confident that if the problems are identified as ethical issues, the bar will generally rise to the perceived need and will identify the circumstances under which burdens of discovery imposed on the opponent cross the line from the permissible to the forbidden. If the problem is never identified as such, it is difficult to feel any measure of confidence that solutions will be proposed, let alone accepted. Although this problem has been ignored for too many years, it is an area where legal education definitely has a role to play in sensitizing our future lawyers.

Let us next turn to a distinct but related problem, that of the attorney's obligation not only to avoid impropriety himself but also to contribute, as a member of a learned profession, to the improvement of the system as a whole. The problem of the so-called "sewer service" of process provides an example. A little over a decade ago it became obvious that in a number of urban centers the rights of certain minorities, and of poor people generally, were being violated in massive numbers by the filing of false returns of service. To borrow a figure of speech, process servers were dumping legal papers into the sewers of the cities, filing false returns, and relying on execution process, usually by way of garnishment, to inform the named defendants that default judgments had already been entered against them.

Though remedial action was ultimately taken on a number of levels, including prosecution for violation of federal laws, the primary question was and is whether the organized bar had then and continues now to have responsibility for cleaning out what may be termed little cesspools on the periphery of the profession. Is it the obligation of a member of the bar, or of the organized bar, to assume the initiative for eliminating such abuses? To its credit, the Association of the Bar of the City of New York did indeed feel such an obligation and consequently focused on the difficulties through special committee reports and other organized activities.

This type of situation should be grist for the law school mill. In typical Socratic fashion, a series of hypothetical probings could be conducted. For example, what is the propriety of using process servers engaged in such odious practices if, at the request of a particular attorney, they would give the attorney or his law firm involved in the litigation every assurance of properly serving each and every summons? Moreover, what is the obligation of an attorney who is not involved in litigation at all? Does such an attorney, as a member of the bar, owe any particular obligation to improve the level of the profession?

Even though Canon 8 of the Code of Professional Responsi-

bility mandates that "[a] lawyer should assist in improving the legal system," these precatory words hardly provide a definitive answer. While the Canon is relevant to the inquiry, it says too little or proves too much. This is an area with which education in the grand manner should deal, if only to sensitize future members of the bar to the potential obligations inherent in membership in a learned profession. Once again, if the law schools do not accomplish this much, is there not the risk that the very problem will go unnoticed?

We next turn to yet another instance where, without sacrifice of basics, legal education should attempt to develop a law student's potential to its fullest. The truly competent lawyer should be able to comprehend the body of the law as a living thing rather than a static set of doctrine. Knowledge of existing substantive law is always valuable; yet, proper legal training should include the ability also to contribute to the development of the law. Therefore, a sensitivity to the weaknesses and infirmities of long-established doctrines may be more important than a knowledge of the substance of such doctrines. This is aptly illustrated by a recent United States Supreme Court decision in *Shaffer v. Heitner,*[6] rendering obsolete a vast amount of received learning in the area of quasi in rem jurisdiction. The decision was not the *coup de grace* administered to a doctrine already riddled with exceptions by lower courts. On the contrary, although there were a few lower court opinions inviting reconsideration of the major premises of quasi in rem jurisdiction, there was no clear foreshadowing of what may properly be termed a basic change.

The successful practitioner, like the prevailing attorney in *Shaffer,* is one who has been educated to question accepted doctrines and to be sensitive to the vulnerability of received learning. Legal education can contribute significantly to the development of these qualities of mind if we do not either dilute the definition of competence or aim so low in defining the goals of legal education that we ignore such training. Indeed, this dimension of legal education can and should be emphasized in both practice- and theory-oriented law school classes.

It bears repetition that sensitivity to questions of ethics and professional responsibility and to the weaknesses and infirmities of substantive law should be of concern to solo practitioners as well as to partners in large firms, to lawyers in small towns and rural communities as well as to lawyers in urban centers. Indeed,

6. 433 U.S. 186 (1977).

optimum legal reform cannot be achieved without considering the different and valuable perspectives of small-town practitioners.

Professor Walter Gellhorn has put it even more broadly in an observation applicable not only to the development of the substantive law, but to the entire range of professional practice. "A law student," he wrote, "needs curiosity, not simply about the immediately relevant, but about the seemingly 'impractical' as well. A law student is training, after all, not to meet the demands of the moment at hand or already in sight, but for work whose contours can only be guessed at."[7]

Typically it is easier to define goals than to prescribe how to achieve them. What sufficed for education in the grand manner when Holmes wrote can hardly suffice today. Fortunately, our processes are changing. The burgeoning of clinical education has been widely noted. Perhaps less widely noted is the fact that these programs frequently serve to forge a partnership in education between practitioner and academician. This union is a healthy development. There is advantage to bringing together those whose focus is on theory and those whose focus is on the needs of clients. The sitting judge also has much to offer. He is uniquely qualified to lend a sense of reality to proceedings in a classroom intended to simulate proceedings in a court. If he rules as he would rule in his court, if he acts as he would act in his court, the relevant question is not whether he has ruled correctly, but rather whether the student has been given a taste of reality and can learn to cope, not with a textbook answer, but with what he might well expect in real life.

The potential, however, does not end with role playing or with the development of the skills of the practicing lawyer in the educational context. Thoughtful judges, trial and appellate, can provide a fresh and enriching perspective to traditional discussions of theory. Whether the subject is the desirability of compulsory psychiatric examination of certain witnesses, the wisdom of pretrial settlement procedures, or the advisability of proposed changes in the substantive law, one who spends his professional life on the bench or in representing clients with particular needs and interests has much to offer. It would be good to see a greater willingness on the part of academicians to reach out and to involve both judges and practicing lawyers in strictly academic aspects of legal education, thus enriching the experience for all concerned. No doubt a seminar setting is more conducive to such

7. Gellhorn, *Preaching That Old Time Religion*, 63 VA. L. REV. 175, 183-84 (1977).

efforts than is the traditional classroom. The point, however, remains.

By the same token, professors have a great deal to offer the organized bar as it deals with topics as diverse as the operation of small claims courts, alternative mechanisms for dispute resolution, reform of grand jury procedures, or the refinement of no-fault statutes. Perhaps it has always been that way, although many would deny it. It is beyond cavil, however, that today there is a genuine contribution which professors are making and which should be encouraged, and, indeed, expanded. Happily, there is strong evidence that the organized bar is receptive to that contribution. Continued interchange between these complementary divisions of the legal profession will inevitably have a beneficent effect on legal education.

It is appropriate to conclude by recording yet another contribution of Professors Gee and Jackson. They have focused our attention on the process of change. Their valuable work invites reexamination of the status quo and thoughtful consideration of alternatives. While change is not rapid, and should not be, there is a sense of motion in legal education. The multiplicity and diversity of radical change currently on the agenda serves as a denial of complacency and an affirmation of a willingness to reexamine. Given that much, one can expect improvements in the decade ahead.