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The Metamorphosis of Legal Education Symposium on Legal Education

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THE METAMORPHOSIS OF LEGAL EDUCATION*

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Professor Brook's remarks this morning provide a context for my own. I mean to say a word or two for the classical era. One of the characteristics of legal education over the past half century or so, one that we ought not give up, has been its passion for order in a chaotic world. Striking as it is to say that "a passion for order ill suits a chaotic world,"[1] the world has ever been chaotic—and that passion, our principal defense. The question is, with what principles of order do we exercise that passion, to subdue unruly fact. Do we look to doctrine, to the characteristic tools of the legal profession, to understandings economic or semiological? Recent years have seen a shift in focus concerning what constitutes order, at least from a pedagogic perspective. We have turned our attention to the instrumental or vocational side of the legal profession, as distinct from concern for the content of law and the public order aspirations to which law may relate. That shift seems to me reflected in Professor Gorman's comments.[2]

Professor Gorman's concerns about legal education are concerns that I share, and that are widely shared. The problem is always how to respond. What strikes me is that the three reforms he chose to discuss in his paper sound rather more on what might be described as the vocational or instrumental side of one's approach to the problem of finding order in a chaotic world than on the intellectual or disciplinary side. One can hear them as moving towards the bar and, at least in the hearing, towards a view of the lawyer as rhetorician rather than as person of learning. These reforms include: more instruction about the legal profession, greater use of the practicing bar to sharpen professional skills, a third-year program of concentration intended to develop progression—an end on which all of us might agree, but which is illustrated largely by its prospect for developing a wide range of lawyerly skills. Evidently this last reform has room for law and economics, interdisciplinary perspectives, planning, counseling, drafting, and other

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1. Meltsner, *Whither Legal Education,* 30 N.Y.L. SCH. L. REV. 579, 589 (1985). Professor Meltsner's article appears in this issue.

2. Gorman, *Assessing and Reforming the Current Law School Curriculum,* 30 N.Y.L. SCH. L. REV. 609 (1985). Professor Gorman's article appears in this issue.

matters of that character. What I want to do, if only by way of creating a contrast that may sharpen later discussion, is to call attention to the risk that the knowledge to be sought will be defined vocationally and instrumentally rather than in the context of a search for critical understanding. While I doubt that it could be said of Columbia, as it recently was of Yale, that appreciation of the legal profession is a scarce commodity, our discussions do tend to look more often in the latter direction.

None of us doubt that changes are coming—whatever our view of their speed and direction. One could start with Professor Chase's reminder to us that even dramatic change may come gradually to those involved in it.[3] The case method did not sweep Harvard, much less the rest of us, overnight. Indeed, as Dean Simon reminded us,[4] New York Law School owes its very existence to resistance to the case method, and its initial success to the soundness and attractiveness of Professor Dwight's alternative teaching techniques. That the case method ultimately did prevail owes a bit to Harvard's special position, but mostly to its effectiveness in producing engagement among students and, as important, professional success among alumni, at an acceptable cost. As what we have heard today will confirm, those three measures—student engagement, professional success, and acceptable cost—remain common reference points in thinking about curricular change.

Note how different we are from other graduate faculties in talking about these subjects and measuring our impact in these terms—indeed, in planning for curricular and pedagogic reform at all. Our professional association's journal is the *Journal of Legal Education,* in contrast to the substantive orientation of professional journals in such fields as economics or comparative literature. Columbia and other schools offer seminars on legal education. That our faculties concern themselves as deeply as this conference suggests with issues of effective pedagogy equally distinguishes us from other university faculties, who rarely convene on these subjects or rank teaching with scholarship in considering advancement. The very fact of that professional orientation is a symptom of what Thomas Bergin once characterized as our peculiar schizophrenia—our indecision between the profession and the academy.[5]

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3. Chase, *American Legal Education Since 1885: The Case of the Missing Modern,* 30 N.Y.L. SCH. L. REV. 519, 519 (1985). Professor Chase's article appears in this issue.

4. Simon, *Introduction,* 30 N.Y.L. SCH. L. REV. 517, 518 (1985). Dean Simon's introduction appears in this issue.

5. Bergin, *The Law Teacher: A Man Divided Against Himself,* 54 VA. L. REV. 637, 638 (1968).

> The hard center of this insight is that the modern law teacher has been suffering from a kind of intellectual schizophrenia for the past twenty-five years—a schizophrenia which has him devoutly believing that he can be, at one and the same

Let me begin with the subject of "student engagement." Save perhaps for the first few months of legal education, or for the advanced elective in which professor and student share the search for knowledge, "student engagement" today generally signals the clinic or its close relatives rather than the Socratic class. None of us really doubt that; we have given up on Socrates. Twenty or thirty years hence, Northeastern's cooperative program or the extraordinary and innovative program at CUNY-Queens may well prove to have been this generation's Langdellian case method. The effectiveness of such programs—of clinical teaching generally—in engaging student effort across a broad range of professional skills appears to be enormous. They need only prove competitive in cost (which is going to be difficult) and succeed in the placement wars to shift all of us in that direction.

I hope to be forgiven the thought that for all of this, disciplined attention to the law's intellectual structures had best not disappear. In this respect I suppose I am guilty of preferring Andrew Wyeth to Jackson Pollack. That we have become disillusioned with law, that the impossibility of encompassing doctrine has spurred our instrumentalism, that our present curricula are too given to private law and judicial action; I suppose all of this is commonplace.[6] Consider, if you will, the recent flood of pabulum produced by reasonably accomplished members of our profession in the form of outlines, nutshells, and black letter student trots written for no other purpose than fostering a superficial grasp of doctrine for examination-takers. What are their implications? For our students, these may be welcome shortcuts through the thickets of cases and literature; for us, surely, they constitute an admission that this stuff no longer has importance, that sophistication in the management of doctrine or development of lawyers' critical sense is not to be demanded. Yet it is hard to imagine a more enthusiastic embrace of the demeaning view of lawyer as mere rhetorician, than a curriculum that abandons law for the techniques of using it. For students to achieve the capacity to learn how to learn law, alone, is not enough. Even from a professional point of view, one wants to know what the law is, as well as how to relate and work within it. I imagine few of us would be interested in being operated on by a surgeon whose education had been limited to the instrumental aspect of modern medicine. What those structures are, and how one achieves coherence, remain important questions indeed; acknowledging their importance is the crucial step.

Professor Gorman has referred to the real-world problems that

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time, an authentic academic and a trainer of Hessians.

Id.

6. Woodard, *The Limits of Legal Realism*, 54 VA. L. REV. 689 (1968) is an early assessment that still rewards reading.

necessarily influence and constrain the direction of change.[7] We ought not to think about the coming years as if all else will be held equal. The search for engagement among students and success among alumni is going to occur in a declining market and in a changing environment. It bears importantly on the possibilities for reform if the coming years will not be ones of abundant resources, or if the teaching context will be changing in ways that require response.

The resource problems are probably the best known. Paul Samuelson once remarked to my faculty that the number of lawyers is not written in heaven and that the hog/corn cycle has its lessons for those who run law schools. We have been through a period of abundance and we are going to have to adjust to less. Law school applications are dropping sharply and applications from the students law schools would most like to have are dropping the most sharply of all.[8] Bruce Zimmer, the head of the Law School Admissions Council, remarked recently that he would not be surprised to find fifty schools using open admissions standards within three years. Does that mean a return to planned attrition in first year classes? What implications would that have for us? Even without the student risks that would revive, the economic attractiveness of a legal education is also open to question. Today's graduates will all spend their professional careers under the bulge created by the baby boom and the past ten years of law school growth. At the current median entry salary for law graduates, Mr. Zimmer said, a cost/benefit analysis of legal education will suggest doing something else. The increasing vocationalism of American college students—the number of business majors has doubled in a period that saw literature, English, and classics majors halved—suggests that many students will be making that calculation. It may speak as well to the intellectual equipment and expectations with which our students reach us. It certainly promises significant competitive and cost pressures. And we ought not forget how much Langdell's success owed to its competitive and cost advantages. We may also have reason for concern that the heavy debt with which so many students leave us will not only constrain their choice of professional paths today but also, in the repaying, make it less likely we will have their support in the successful years of tomorrow.

We also face changes in the teaching context important to consider in figuring the next decade. We do a lot of talking about pedagogy but, as I think Professor Feinman may also be saying,[9] not enough about

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7. Gorman, *supra* note 2, at 613-15.

8. For a general discussion on student demographics and the effect of declining enrollments on law schools, see Vernon & Zimmer, *The Demand for Legal Education: 1984 and the Future*, 35 J. LEGAL EDUC. 261 (1985).

9. *See* Feinman, *Reforming and Transforming*, 30 N.Y.L. SCH. L. REV. 629, 634-35

considering how learning occurs. Today's students, and especially tomorrow's, come to us from a different learning environment than characterized early schooling even to the middle of this century. Has there *never* been a time when vicarious participation in socratic education was a fact, as Professor Shreve asserts?[10] I can recall little speculation about the impact of television on what we do and how well we succeed, yet I wonder what Marshall McLuhan would have to say about the impact of growing up with television on the possibilities of vicarious participation on which the Socratic method is premised. What are the implications of the day, not far distant, when our students will have lived through their intellectual growth with a computer, not just as a tool for learning (for which it offers some promise in the area of acquiring knowledge of law), but as a teacher of logic or structured thinking? At the same time as others stress the techniques of policy analysis and literary criticism, we may find ourselves with students trained in forms of logic to an extent we have not previously experienced and do not know.

We confront changes in ourselves as well as in our students and in the prior educations from which they come to us. Where previously we have been individuals divided against ourselves, in Bergin's characterization,[11] increasingly we seem to be divided faculties. Clinical faculties are rapidly gaining a status equivalent to traditional law academics, and yet a distinct one, with questions about cost and what constitutes an appropriate contribution to the academic enterprise not fully answered. Whether, for example, a faculty teaching with the commitments entailed by the CUNY approach will find the time or have the inclination for scholarship remains to be seen; that has been for many of us a large issue on the clinical side. Tony Chase suggested that the answer to the problem was that faculty members could put in twice the hours for the same pay. That puts extraordinary weight on faculty altruism, unless one believes the market for teachers will become so crowded as to permit such a lowering of compensation. What can be said with more confidence is that the focus of clinical teachers' attention is almost entirely instrumental, and on the vocational side. One need not deny that problem solving has intellectual rigor and variety—it plainly does—to observe that it is quite a different activity from the study of legal norms.

Those of us on the academic side sometimes seem to be looking away from the profession and towards the academy. I have made no survey, but the impression is strong that we academicians are writing

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(1985). Professor Feinman's article appears in this issue.

10. Shreve, *Two Cheers for the Case Method,* 30 N.Y.L. SCH. L. REV. 601, 602 (1985). Professor Shreve's article appears in this issue.

11. Bergin, *supra* note 5, at 638.

for each other and our colleagues in other disciplines more often; for lawyers and judges, less. We do not so much expect to be read there, and we are not. In class, and in our writings, we build theoretical models and investigate the languages and analytical techniques of other disciplines, where once we sought to understand law on its own terms and to convey its own terms of analysis. Within our faculties we seem to wish to reconstruct the great diversity of discipline and perspective that surrounds us in the university as a whole. For academicians, as for clinicians, law appears to be becoming the subject of our attention, more than it is the center of our being.

In observing this, I do not mean to convey that it is wrong—only that it is happening and that, in its way, it constitutes as radical a movement within our tension between profession and academy as does the move to embrace the profession suggested by Professor Gorman and others we have heard today. From the perspective that the university is a place to seek out knowledge and understanding, indeed, this movement is ideal; as is the other movement from the warring perspective, now ascendant among students, that the university is where you go to prepare for a job.

Do I owe a proposal from all this? There is no reason all of us must take the same path, perhaps every reason not to. The coming competition for this shrinking, changing student body will be eclectic. It would be good to see some schools respond by seeking out the fading liberal arts core. One of the unique aspects of American legal education in the world view is that we so radically separate undergraduate from professional education. Do we need to do so? The time may be upon us for at least some law schools to go back to the model suggested by Professor Kirchwey in the remarks that Professor Brook read earlier this morning,[12] the model in which the law student not only wanders by the rooms where political science and philosophy are taught, but actually goes in.

Would there be a place for a program thoroughly integrating legal with undergraduate education? Imagine a course of education from high school to legal degree that is still seven years long, yet begins to incorporate law in its third year. Imagine a student who nonetheless also pursues an undergraduate major and writes an honors thesis. The university might find cost and learning advantages in using a full economics department, rather than having its law school duplicate existing resources by employing its own economist—a teacher who, to some degree, must always feel herself out of her element. Genuine cross-fertilization may occur if students learning law and learning sociology at the same time produce for themselves, and for their more

12. Brook, *A Comment on Style: The Elevator as Metaphor*, 30 N.Y.L. SCH. L. REV. 547, 553 (1985). Professor Brook's article appears in this issue.

compartmentalized professors, continuing insights denied when learning occurs in serial fashion. A thesis written in the final years of legal as well as undergraduate education would provide the intensive learning Bob Gorman seeks, and also foster integration of liberal arts and legal perspectives. It may be that, by mixing the two, one could achieve a richness of education at the same time as one maintains a parsimony of resources.

In a world increasingly oriented to vocation, a few backfires might be lit. The *New York Times* recently reported the announcement by the heads of several multi-national corporations of a new program to support the liberal arts; middle management may come from business training, they remarked, but at the top a broader vision is required.[13] In law, as well, the turn to vocationalism warrants some resistance.

13. Gutis, *Executive Education's Unconventional Side,* N.Y. Times, Mar. 24, 1985, § 3, at 17, col. 1.