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2007 Symposium on the Future of Legal Education

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2007 SYMPOSIUM ON THE FUTURE OF LEGAL EDUCATION

Like the proverbial elephant, law school appears different when perceived from different perspectives. During my twenty years as a law professor, I saw law school as a professional training program, a legal research institute, and a wonderful group of academic colleagues. The articles in this Symposium on the Future of Legal Education, based on a conference held at Vanderbilt in spring of 2006, generally view law school from a similar perspective. Now that I'm a Provost, my perspective is different. This raises some new issues, but it also underscores the basic theme of the Symposium.

Law schools, like business schools, public policy schools and undergraduate programs, are largely tuition-supported institutions, although supplemented in essential ways by private donations. This is possible because their students are capable of paying the steadily increasing tuition (often with the help of federal loans, of course), and neither the teaching nor the faculty research relies on the extensive use of technology or large empirical data sets. Medical and engineering schools also have tuition-paying students, but the technological demands of both the teaching and research means that their tuition and donation revenue must be heavily supplemented by grants. In graduate programs, the students generally don't (and often simply can't) pay the tuition, and some fields are subject to technological and empirical demands as well; consequently, these programs must be subsidized by other sources, including grants and related support.

To many Provosts, the fact that law schools are largely tuition-supported means that they do not need to receive funding from central university sources. In fact, they can be regarded as a source of funds for other university programs—to continue the theme of large grazing animals, they are cash cows. More importantly, in my view, the fact that law schools are tuition-driven means that their economic viability depends on factors that are outside their control—in particular, on the gatekeeper degree that they award and on the economic health of the field for which they are training their students.

In granting a gatekeeper degree, law schools are similar to medical schools and engineering schools, but unlike business or public policy schools. Not only is a degree required to practice law, or, more precisely, to take the qualifying exam for legal practice, but that degree must be provided by a university. A few states, most notably California, allow proprietary institutions to offer the required degree, but the vast majority forbid this. As a result, law schools are not in competition with other types of training institutions, nor with employers who are willing to shoulder the training costs themselves. This fortunate situation is determined by political decisions that lie outside the direct control of universities.

But the law schools' monopoly over the training of lawyers will not count for very much unless their students continue to command the handsome salaries that enable them to pay off their loans, or, more generally, that justify the cost of the degree. This depends on the continued economic health of the legal profession. In fact, the profession must not be merely healthy, but robust; it must continue to demand large numbers of entry level practitioners, and must continue offering them salaries far above the national median. Moreover, the viability of research-oriented law schools, including all the schools where this Symposium's authors teach, requires that employers must be willing to pay a substantial premium to the high-achieving students that these schools attract and produce.

Another feature of law schools, when viewed from a Provost's perspective, is that its educational model involves three years of classroom instruction. Business and public policy schools grant their degrees after two years, and sometimes less; medical students spend four year in school, but by the third year the educational program is largely clinical in nature. Until the 1870s, legal training in the United States followed an apprenticeship model, with virtually no classroom instruction at all, and no credentialing. Having adopted an exclusively classroom model for the pre-credential process, law schools have gradually reincorporated the apprenticeship approach through live-client clinics, simulations, and externships. But the process has been less than successful or comprehensive, and these various experiential modes of education have not been fully integrated into the academic curriculum.

It would not be inconceivable to organize a law school the third year of which consisted exclusively of experiential learning, or indeed, of paid apprenticeships. For that matter, the entire educational experience could be reorganized as an apprenticeship program, with the law school running its own law firm, and representing fee-paying as well as public interest clients. Medical schools, after all, sometimes are part of a university medical center which owns and operates its

own hospitals and clinics. They serve fee-paying patients as well as the poor. A law school of this sort might be less expensive to run, and its curriculum might prepare students more effectively for modern legal practice. Several law schools, including a few of the surprisingly large number that have been founded in the past few decades, have made gestures toward experiential approaches of this sort, but none have ventured particularly far from the traditional model.

One final feature that seems to me worth noting is that both the teaching and research in law school is distinctly different from that of any other university department. The most striking feature of law school teaching is the Socratic Method, a question-and-answer format that to some resembles fraternity hazing more closely than Socrates's subtly subversive inquiries. As law students progress into their second and third years, the lectures courses and seminars begin to resemble classroom teaching in other university departments, but reverberations of the first year Socratic Method continue to the end. Legal research is equally distinctive. To begin with, it is dominated by articles, not books, and those articles tend to be much longer, and much more heavily footnoted, than articles in other disciplines. They are also more normative than scholarship in most other fields, with the possible exception of philosophy; the task of describing legislation, judicial decision making, or private legal behavior is often taken up by other departments, such as political science and sociology. Perhaps most notably, scholarly articles in law are not reviewed and edited by the authors' peers, but by law students, a feature that often leads faculty members in other departments to wonder whether these articles should even count as scholarship.

What sort of institutional behaviors have resulted from these distinctive features? One notable behavior, from the university perspective, is that law schools have been largely self-contained. Because they are economically viable concerns, supported largely by their own endowment, giving, and tuition, they often strive to establish and preserve their autonomy from the rest of the university. The distinctive features of their teaching and research contribute to this desire to function as an independent institution that happens to be in the same location, and have the same name, as the rest of the university. Another behavior of note is law schools' relative isolation from the outside world, a product of their emphasis on classroom teaching, and perhaps the gatekeeper degree that precludes employers or proprietary institutions from placing any competitive pressure on the law schools' educational approach. Finally, the self-contained, isolated character of law schools has allowed them to be resistant to curricular change. Their separation from the general educational currents of the university has left their teaching program

longstanding, not surprising perhaps given the role of tradition and precedent. I know of no other university department that uses the same pedagogic approach that it did 100 years ago, or bases its first year of education on largely the same basic conceptual categories.

What then can be said of about the future of American legal education from the university perspective? Clearly, the ability to continue in anything resembling their present form depends on two factors over which universities lack direct control—their monopoly of legal education, and the continued economic health of the legal profession. It is easy to be pessimistic or even apocalyptic about either of these factors, particularly the second. But the U.S. economy has continued to flourish, despite the relative decline of our manufacturing and extractive sectors, on the basis of our service and knowledge-based activities. Legal services, particularly the highly specialized ones that large- and middle-sized law firms now provide, fall comfortably within these categories. Nonetheless, even small changes in the monopoly of law schools, perhaps as a result of distance learning, or in the economic health of the legal profession, perhaps because of increased foreign competition, may compel law schools to retrench or seek help from their universities.

Even beyond these fiscal concerns, law school efforts to maintain their autonomy from both the university and the outside world are, to many increasingly outmoded and counter-productive. The three years of classroom education have consistently been challenged; third year students, with many securing employment and experiencing practice, may verge on the "bored and restless." The relationship with a pedagogic methodology and a curriculum that is a century old may exacerbate these problems. Patience with the Socratic Method may be wearing thin; the ritualistic "hazing" that it involves has been powerfully challenged as increasingly less appropriate for today's diverse student population. At the same time, the style of legal scholarship that focused on the internal logic of decided cases and on the intricacies of legal doctrine has set astride a growth in a parallel system of research and discovery. Legal research is becoming more empirical and more interdisciplinary, and law schools are increasingly likely to hire entry level faculty with academic training in fields other than law.

As long as their economic viability remains intact, law schools will able to maintain their relative autonomy; in fact, elite law schools at public institutions such as Michigan, Virginia, Berkeley, UCLA, and Texas seem to be moving further in this direction, at least fiscally. But from a Provost's perspective, I agree with many of the articles in this Symposium that continued isolation does not represent the future of legal education. Law schools have a great deal to gain from their

participation in the intellectual discourse of the university. The subject of study in other departments is directly relevant to legal teaching and research, as law becomes more specialized, and more intimately involved with the subjects that it addresses, from either a policy or private practice perspective. The research methodologies of these other departments, particularly those that are empirically based, are increasingly important to the intellectual vitality of legal scholarship. Their pedagogic ideas, and their willingness to update the content of their curriculums in response to changing circumstances, provide a model for change in legal education; law schools can look to these other departments for ideas that would lead them out of their current educational malaise. These efforts, by involving the law school more intimately with so many parts of the university, will require law schools to relinquish some of their fiscal and administrative autonomy. But at any university that is committed to excellence in all fields of instruction and research, the trade-off will be more than worth it.

The first two articles in the Symposium discuss the history of legal education and the forces that have acted on it. Robert Gordon describes the way the modern legal education, with its characteristic case law method, originated at Harvard Law School in the 1870s, the way it became dominant, and the way it preserved itself by resisting changes that were occurring in society at large. As he notes: "In law schools policy studies by 1920 were even more peripheral than they had been in 1870, driven out by the Langdellian private-law case-method curriculum. For as the Harvard model proliferated, it exiled or marginalized both the traditional and the newer (Progressive) alternative curricula, sending them off to separate departments or confining them to the law schools' graduate programs." Changes have occurred however. Professor Gordon traces the development of elective courses in the second and third years, and the gradual evolution of the basic Constitutional Law and Torts courses, as reflected in the changing casebooks that these courses use. While he sees some evidence that new intellectual approaches, particularly interdisciplinary scholarship, have influenced the way these courses are taught, he concludes that "[i]nterdisciplinary approaches have, however, affected scholarship more than teaching, because traditional teaching materials, and especially the case method, continue to act as a brake on innovation."

John Henry Schlegel traces the common law origins of the Langdellian curriculum, and attributes the difficulty in reforming it to our inherited conceptual categories. He notes that there is no standard first year course that is based on statutory law, although the modern legal system is predominantly statute-based, nor has contracts moved

beyond its common law origins to incorporate modern commercial law. Another factor discouraging change is that the common law focus makes legal scholarship an easy and convenient task for law professors—no "messy social science fieldwork," no need to know much about what lawyers actually do. Professor Schlegel then offers a vision of a law school whose curriculum reflected modern legal practice. Today's lawyers, he says, rarely go to court or conduct legal research; rather, they engage in a complex process of advising, negotiating and planning that mediates between legal doctrine and pragmatic action. Thus, a modern law school should devote its first year to teaching doctrinal structures and methods, legal practices, and legal writing, together with the administrative, economic, and social background of the legal system. In the second year, students would explore two practice areas in detail, and then they would be done; the third year, Professor Schlegel suggests, is a waste of time.

In the next section of the Symposium, which offers varying perspectives on legal education, Wayne Hyatt, a practitioner and part-time academic, underscores several of the concerns raised by Professor Schlegel. Legal education, he points out, fails to reflect the needs of its consumers—specifically, the firms and departments that hire law school graduates. He argues that legal educators must abandon their disdain for the practice and practitioners of law in order to better prepare their students to contribute to the legal profession and experience rewarding careers. They should not only teach their students to "think like a lawyer," but to be a "professional." That is, students must enter the profession with a sense of integrity, the ability to read and to understand people; the ability to solve—not just spot—problems, and an understanding of the multidisciplinary nature of most transactions.

Lloyd Weinrib's jurisprudentially oriented article dissents from the two preceding articles in its premise, but interestingly, agrees with them in its conclusion. The purpose of law school, according to Professor Weinrib, is not to serve the legal profession, but to serve the university in its primary mission of caring for and developing the "intellectual inheritance of civilization." But this does not mean that law schools should ignore the realities of modern legal practice: "The university study of law can . . . be nothing other than the study of the practice of law." Focusing on private law, Professor Weinrib finds that this essential mission has been sidetracked by the instrumentalist approach to law, as typified by the law and economics movement, because it "effaces the very concepts that are constitutive of the [legal] reasoning process" and "negates rather than explains the concepts supposedly being analysed." In addition, instrumentalism ignores the direct relationship between the parties that is central to private law,

and substitutes a public law approach directed to the general public good. Private law, Professor Weinrib argues, is a normative structure based on a series of coherent concepts, and legal education, at least for private law, must focus on these essentially legal concepts. Although he sees the law school's primary service to the university in the communication of these concepts, Professor Weinrib is not opposed to interdisciplinary study. But such study should not involve the colonization of law by other disciplines and the displacement of the concepts central to legal practice; rather it should be a genuine interchange, a means of "creating an academic conversation with different disciplinary voices."

Another partial dissent comes from Mark West's comparative study of legal education in Japan. He describes the shift from European-style legal education, where law is an undergraduate major, to three-year graduate level law schools of the sort that Langdell initiated at Harvard and now prevails throughout the United States. (Interestingly, a Japanese student who majors in law as an undergraduate can complete law school in two years.) The shift to the American structure for law schools has been accompanied by an increased interest in American pedagogic techniques, such as the Socratic Method and clinical education. This sea change in Japanese legal education was motivated by the perceived need to increase the number of people who pass the bar examination and become practicing lawyers. But even with this reform, the number of practicing lawyers will remain relatively small, and lawyers will continue to focus on high-end, corporate litigation. The low end disputes involving individuals that are handled by lawyers in the United States, such as landlord-tenant cases, consumer bankruptcy, and debt collection, are addressed by gangsters (*yakuza*) in Japan. Unlike Japanese lawyers, the *yakuza* are "innovative, diverse, entrepreneurial, and proactive." Professor West thus paints a picture of American legal education, at least when seen from overseas, as both an inspirational model and a pragmatic response to our nation's legal needs.

The next three articles focus on the culture and atmosphere of law school, and particularly the classroom experience. Two of these articles describe empirical studies that provide much more detailed insights into the classroom experience and related matters than the previous anecdotal accounts. Bonita London, Geraldine Downey, and Shauna Mace, all psychologists, begin by identifying the influences on students' sense of engagement. These include institutional factors such as the method of evaluation, situational factors such as pedagogic practices, and individual factors, such as each student's sense of his or her own competence. Standard methods of assessing these factors, and student engagement in general, involve general surveys that suffer

from limitations on the students' memories of their actual experiences. Instead, the authors designed a longitudinal that of students entering an urban, elite law school that required student volunteers to record their immediate experiences at the end of each day during their first three weeks of law school. They find that a number of students reported feelings of alienation based on social factors such as their gender, race, or socioeconomic status. Many students also found the Socratic Method alienating, and observed that the discomfort it induced interfered with their ability to learn. Experiences that increased students' sense of engagement included peer support, the acknowledgement of their concerns by faculty members, and their growing mastery of the subject matter. The authors conclude that law schools would benefit from greater diversity, and the introduction of more collaborative and cooperative pedagogic practices.

Elizabeth Mertz's article describes a study of the linguistic interactions between professors and students in the first year classes of eight different law schools. In each school, the entire first semester of classes was tape-recorded, transcribed, and coded while in-class observers also coded aspects of the classroom interactions. As a result, the researchers were able to determine the length of each in-class interaction between professor and student, the gender and race of the speakers, whether the student had been called on or had volunteered, and numerous other features of the classroom process. Professor Mertz finds that law professors use the Socratic Method to re-focus student attention from questions of content to questions of authority. In discussing cases, professors insist on precise identification authority issues, sometimes to the point of demanding an exact repetition of the opinion's language, but encourage a highly speculative reconstruction of the litigants' underlying interaction that converts it into legal discourse. The result is to create a "closed linguistic system which is capable of in essence gobbling up all manner of social detail without budging its core assumptions." Professor Mertz also found that women and minority students participate less frequently in classroom discussions unless the faculty member is also a woman or minority group member—still another way that the classroom experience narrows the range of possible discourses about law.

Taking a less empirical and more interpretive approach to the same topic, Susan Sturm and Lani Guinier argue that the classroom experience is part of law school's "culture of competition and conformity." It emphasizes conflict in both its content and its pedagogic methodology. Presenting law to students through the medium of decided cases, and under-emphasizing statutes, treaties, contracts, and informal agreements creates an image of law as

essentially adversarial. "The conventional law school classroom mirrors adjudication's adversarial, formal idea of conflict" by its use of the Socratic Method, which resembles either a trial lawyer's cross examination of a witness or an appellate judge's pointed interrogation of a lawyer. In addition, the law school's emphasis on classroom instruction conveys the message that legal expertise is abstract and formal, to be gained by passively absorbing information from a hierarchical superior, rather contextual and interpersonal, to be mastered by self-motivated learning under experienced guidance. This instruction tends to be sharply separated from the students' efforts to define their professional identity and determine their career objectives. Professors Sturm and Guinier find that this competitive, adversarial culture breeds a narrow concept of law and legal education that undermines efforts to reform the curriculum. Students want to conform to the dominant norms in order to get ahead, and shun innovative programs or unique experiences. The only way out, in the authors' view, is to make "law school culture an integral part of the conversation about law school reform."

The final three articles in the Symposium present global critiques of legal education and offer programs for change that have been planned or implemented in leading law schools. Carrie Menkel-Meadow notes that legal education has remained relatively unchanged in the past few decades, unlike professional schools for medicine and business, which have "reinvented" themselves during this period. She suggests that the path to educational renewal in law involves the recognition that "the study of law itself [is] necessarily a multi-disciplinary enterprise, borrowing from or using the insights, methods and canons of other fields to tell us about how we govern ourselves." After reviewing the history of legal education since Langdell, and the various efforts that movements such as legal realism, legal process, law and economics, socio-legal studies, critical legal studies, law and literature, feminism, critical race theory and clinical education have undertaken to bring a broader, more interdisciplinary approach to law school teaching, Professor Menkel-Meadow proposes a new method of legal study, "organized around a 'holy trinity' of temporal approaches to law—before, during, and after 'the law.' " To that end, she proposes that law students should take not only traditional courses, but also classes which inform them how and why law is made, such as anthropology, political science, and sociology. In their second and third years, students could specialize in particular areas of the law and participate in clinical programs. She proposes that students should also receive training in basic legal skills such as counseling, negotiation, and fact investigation.

Professor Menkel-Meadow provides concrete examples of interdisciplinary programs currently in practice that represent both modest and expansive reforms to traditional legal education: two at Georgetown University Law Center and one at Centro de Investigacion y Docencia Economicas in Mexico City. The first and more modest of the Georgetown programs is "Week One: Law in a Global Context." In the first week of their second semester, students engage in an intensive investigation of the three international law problems that draw on a number of different disciplinary areas. The second program is Curriculum B, a specially designed set of courses offered to one quarter of Georgetown's daytime students. Featuring courses such as Legal Process and Society, Democracy and Coercion, and Government Processes, its declared goal is to "1) reconceive separate subject matters in terms of common problems such as incentives, distribution and social control; 2) fully take into account the emergence of the regulatory state and pervasive legislation in most common law areas; 3) invoke other academic disciplines as they bear on law and 4) teach theory, as well as doctrinal analysis of law." These two efforts clearly represent one of the most dramatic innovations in legal education that has occurred in the post-War era, certain one of the most dramatic innovations that remains in operation.

In the next article, Todd Rakoff and Martha Minow second Professor Menkel-Meadow's assessment: "The plain fact is that American legal education, and especially its formative first year, remains remarkably similar to the curriculum invented at the Harvard Law School by Christopher Columbus Langdell over a century and a quarter ago." Its staying power, Professors Rakoff and Minow suggest, lies in the multiple purposes that Langdell's case law method serves; it teaches students how to reason from particular legal materials to general principles, it connects to a recognizable aspect of legal practice, it is easy to use, and the necessary materials are easy to acquire. But the method has serious limitations. It treats "too many dimensions as already fixed." In an appellate case, the facts have already been determined, the issues already defined, and range of possible responses constrained by the institutional setting. This does not reflect the experience of practicing lawyers, who must analyze problems from various perspectives, devise alternative approaches, and remain open to a variety of solutions.

To resolve some of these problems with legal education, Professors Rakoff and Minow propose a shift from the case law method used in law schools to the case method used in business schools and other types of professional education. "Students ought to be presented with relatively dense materials that lay out a situation, experienced as

a problem for a person or group of people, for legal treatment." In these materials, a decided case, if it appeared at all, would be just one event in an extended interaction between the parties and a variety of other actors. Professors Rakoff and Minow identify themselves as members of a committee that proposed this approach to the Harvard faculty. Rather than adopting the case method in all its existing classes, the faculty, by unanimous vote, added three courses to the first year curriculum—Legislation and Regulation, a set of three alternative courses on globalization, and an intensive course on Problems and Theories. Although different from the approach proposed by Professors Rakoff and Minow, this reform shares the same underlying aspiration of exposing first-year law students to a broader array of methodologies and issues than the Langdellian curriculum provides.

The final article in the Symposium, by Edward Rubin, also centers on the lack of change in legal education. The Langdellian curriculum, Dean Rubin argues, and particularly its mandatory first year, was up-to-date at the time it was developed, but became obsolete a mere thirty or forty years later due to dramatic legal and conceptual changes in the 1890s. To begin with, there was no administrative state at the federal level when Langdell developed his curriculum. In the immediately following decades, however, the Progressive Movement spawned a host of federal agencies that rendered this curriculum's exclusive focus on the common law outdated. Second, there was no knowledge of the common law's real history, but instead the myth that it embodied unarticulated principles that had existed since time immemorial. In the 1890s, Pollack and Maitland demonstrated that the common law was the specific creation of the Angevin monarchy to extend its power, thus undermining the rationale for Langdell's idea that students should read cases to discern such underlying principles. Third, there was no social science in the United States when Langdell developed his curriculum, and he thus relied on natural science as a model for his approach. Rapid intellectual advances in the following decades provided the more appropriate model of social science, and offered methodologies for studying law as a social practice, rather than merely a body of doctrine. Finally, the prevailing belief in Langdell's day was that education was a process of training the rational mind. Shortly thereafter, theories of learner-centered education, particularly those of John Dewey, suggested that learning is a developmental process where the students' capacities and interest change as their mastery increases.

Recognition of these conceptual developments, which have now been established for 100 years, would produce dramatic changes in the

law school curriculum. First-year students should be introduced to the realities of the administrative state as well as to the common law and learn to read statutes and regulations as well as cases. Law should be viewed as social policy, rather than embodied principles, and studied by social science methodology; thus, the upper class curriculum should enable students to focus on a particular area of legal practice in depth, and study it from an interdisciplinary perspective. The curriculum as a whole should progress from the first year to the third. First-year students should receive foundational training in all basic areas of law, rather than studying selected common law subjects at the same level of detail as the statutory subjects they will study in subsequent years, and third-year students should be able to pursue individual projects, with professorial guidance of a more sophisticated and collegial nature.

Rubin is the dean of our Law School at Vanderbilt. There are few legal scholars who have given greater thought to rethinking and modernizing legal education. Of course, as is clear to all deans, faculty, students, and alumni, this is a collective and political enterprise of the entire law school and university community, and will ultimately be based on the ideas of many faculty members, students, and alumni. Indeed, while from the Provost's "seat" any effort at curriculum reform can often be a quagmire, Vanderbilt is on the path of exciting and bold steps in curriculum innovation. Thus the underlying goal, which Rubin's article and so many of the other articles in this Symposium have urged, is to scrutinize and modernize the Langdellian curriculum and develop a new mode of legal education that is more consistent with modern thinking about law, more interdisciplinary, and more relevant to the twenty-first century practice of law.

Significantly, doing so will allow great law schools to take full advantage of being part of a great university. It requires top university administrators to abandon *their* set ways of thinking about law schools in the university setting. That is, we cannot look avariciously at the tuition margins and use law schools as net exporters of cash to buttress the university's bottom line. We cannot be uninformed critics of the modes, methods, and outlets for legal scholarship. And we cannot be the source and repository of anti-lawyer rhetoric. All ordered and free societies depend upon law and upon lawyers trained in fundamental principles of adjudication, fairness, equality, and compensation. By isolating, overtaxing, or being the source of jejune ramblings about our law schools and lawyers, we turn our backs on that agreed to by all of our commentators—conceptualist, realist, or pragmatist. Law and the study of legal institutions is essential to our most basic human values

and aspirations. Viewed against this backdrop, rethinking curriculum is a critical part of the mission of a university that seeks to be called great.

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