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Plus Ça Change

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PLUS CA CHANGE

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Harry Edwards and I both finished law school in 1965, and his article presents an occasion to consider how much the legal academy has changed during the intervening years. Animating Judge Edwards' complaints about the contemporary legal academy is a nostalgia for happier days. His images are of decline — of a growing disjunction between the academy and practice, of law schools' abandoning their proper missions, of their movement toward pure theory.[1] My own view is quite different. Except for some noteworthy demographic transformations and a healthy broadening of the academic agenda, legal education has changed little during these almost thirty years. I find this regrettable, for reasons I will sketch at the end of this comment.

Especially because my impressions diverge from those of Judge Edwards, let me state two premises that I imagine we share. First, legal education is, at its core, professional education. Our primary aim is to prepare students to become skillful and responsible practicing lawyers, policymakers, and judges. (We prepare future law professors as well, but this is a subsidiary mission.) Second, legal scholarship ought to serve both the practical purpose of aiding these various professionals in their work and the intellectual purpose of expanding legal knowledge and thought for their own sake. The two aims are related for, like basic research in other fields, knowledge pursued for its own sake sometimes turns out to have practical implications. With this introduction, let me offer my own thoughts about the legal academy then and now.

INTELLECTUAL AGENDAS

When Judge Edwards and I were law students, the academy was dominated by a single school of legal thought: "legal process" — an amalgam of policy-oriented doctrinalism and concern for the differing competencies of legislatures, administrative agencies, and courts in legal decisionmaking. At Harvard and many other schools, legal pro-

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1. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (the first paragraph describes the disjunction).

cess was the only game in town. To use a term that one would not have encountered in law reviews in those days, but that has been made almost commonplace by critical legal studies (CLS), it was "hegemonic."

Legal process has been remarkably tenacious, and it remains the tacit core of most law teaching and scholarship today. Especially in the scholarly sphere, however, it now competes with a number of other genres. Of these, law and economics is the most influential, having infiltrated the very vocabulary of private law and even some parts of public law. Critical legal studies, a descendent of the legal realist movement, challenged legal process' claims to be nonideological and opposed itself to the ideology of law and economics. I speak in the past tense because CLS — whose size, influence, and threat to the dominant order were in any event exaggerated by the spectacle of Harvard's civil war — has largely been eclipsed by the critical race and feminist scholarship to which it gave rise. These newer genres purport to view the legal system from the perspective of those on "the bottom"[2] and sometimes rely on real or fictitious narratives as much as on more conventional forms of legal analysis. The contemporary law and literature movement has been influenced both by CLS and the postmodernist approaches commonplace in the humanities. Law and society, and especially the empirical study of legal institutions, also has roots in legal realism; it has not flourished to nearly the same degree as scholarship that can be done without ever leaving one's office. While some of the writing in these contemporary genres is quite abstractly theoretical, quite a lot is avowedly policy- and practice-oriented, proposing and arguing for doctrinal and institutional law reform.[3]

THE PROFESSORIATE

With several exceptions, the faculty that has brought about this change looks and acts very much like its predecessors. Then, as now,

2. *See, e.g.*, Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

3. *See, e.g.*, Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990) (CLS); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987) (CLS); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (critical race theory); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) (feminist legal theory); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (critical race theory); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (CLS); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) (CLS); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990) (CLS and feminist legal theory).

the typical law professor has served for a year or two as a law clerk to a judge and spent several years in practice, typically with a corporate firm. Every era has its great teachers — those who deeply challenge and inspire their students — as well as its share of less-than-greats. Today's legal academy does not seem to attract more or fewer inspiring teachers than it did in the past.

The two most significant changes in the professoriate are the presence of women and people of color, who were almost entirely absent among the professors with whom Judge Edwards and I studied. While women and minority law professors are responsible for the new genres of feminist legal theory and critical race theory, most do not write or teach in these genres. Rather, they do the same sort of doctrinal-policy work as their white male counterparts. Another change during these three decades is that more of today's professors — like the students from whom they are drawn — have done advanced work, or even hold graduate degrees, in other disciplines — economics, history, philosophy, and medicine. I am not at all certain, however, that these professors' teaching and scholarship tends to be more theoretically oriented than that of their colleagues who hold only J.D.s.

THE STUDENT BODY

Today's student body is more diverse than Judge Edwards' and my classmates. Nationwide, forty-three percent are women, seventeen percent are members of minority groups,[4] and quite a few have had several years' work experience since college.

Today's students are less sanguine about the likelihood of a fulfilling professional life and a satisfying mix of a professional and personal life than was our generation — perhaps an adjustment to contemporary realities. Nonetheless, they do not seem more, or less, career oriented than did our classmates. Now, as then, most graduates of the elite law schools take jobs in the private sector, in large firms in large cities. As before, relatively few expect to work in government or public interest jobs. Indeed, the rising cost of tuition, larger loan burdens, and the widening gulf between private and public sector salaries make it hard for students to resist the large firms.

CURRICULUM AND PEDAGOGY

The core curriculum, now as then, is doctrinal. When Judge Edwards and I were in law school, the standard first-year courses were a

4. Ken Myers, *Statistics Show Minorities Have Bigger Share of Lower Enrollment,* NATL. L.J., Mar. 22, 1993, at 4.

year long. Many law schools have since compressed the required curriculum — without compromising the first year's primary mission of teaching legal analysis and without noticeably diminishing students' legal cultural literacy.[5] Today's students take the same advanced doctrinal courses that we did — Corporations, Evidence, Trusts and Estates, Commercial Law, and Tax — along with some newer ones, such as Criminal Procedure and Environmental Law. Students now have a broader choice of electives — many sophisticated advanced professional courses as well as some that look like graduate school courses. On the whole, however, a law student's transcript today would not look much less profession oriented than ours. Indeed, a student from the 1960s would feel quite at home in most classrooms of the 1990s. Though he would be struck by the occasional reference to concepts from law and economics and — less frequently — by ideas from critical legal studies, feminist theory, and critical race theory, he would seldom take a course taught mainly from any but the standard doctrine-policy perspective.[6]

While the dominant form of teaching remains the analysis of cases in a conventional classroom setting, there has been a shift in the style of teaching. The terrorist version of the Socratic method has almost disappeared, and it has been replaced by a mixture of lecture, asking questions of volunteers, and responding to questions from the class at large. In my view, we have moved too far away from the Socratic method, which can be intellectually challenging without being cruel — we have thrown the etching out with the acid — but I may be in the minority on this. The most significant change in pedagogy over these thirty years is the advent of clinical methods, both through simulation and supervised work with actual clients. Clinical methods introduce students to practical lawyering skills — such as counseling, witness examination, and negotiation — that Judge Edwards and I did not acquire in law school thirty years ago; they also can enrich the teaching of doctrine, policy, and legal ethics by situating them in real world contexts.[7]

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5. *Cf.* E.D. HIRSCH, CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW (1987). Of course, as in any discipline, the canon has changed over time. The constitutional law course I took focused on state regulation of interstate commerce and devoted little time to civil rights and civil liberties; the emphasis has flipped in many of today's constitutional law courses.

6. A few of Judge Edwards' law clerks apparently had more required courses taught from critical perspectives — certainly more than they would have wished. This is atypical and, indeed, would be difficult to achieve even by design at the vast majority of law schools, elite or otherwise.

7. Though clinical methods have great value, I am skeptical about law schools' placing too much emphasis on practical lawyering skills, which by and large are better learned when a lawyer is in practice.

SCHOLARSHIP

The most visible change in the intellectual landscape of the legal academy is in the law reviews — both the generic ones and the proliferation of journals dedicated to specialized fields such as law and economics, law and society, feminist legal theory, environmental law, and law and technology. A reader in olden days would not so often have encountered articles with titles such as *Pragmatist and Poststructuralist Critical Legal Practice*[8] or *Deconstructing Los Angeles or a Secret Fax from Magritte Regarding Postliterate Legal Reasoning: A Critique of Legal Education.*[9]

Because the legal academy is not defined by subdisciplines, and because there are so many law reviews — mostly edited by students rather than refereed by professionals — a perseverant professor who can afford the photocopying and postage can eventually get any article published somewhere. There is little question that the level of pretension has increased, but I doubt that the overall proportion of fatuous articles has. While there are some law professors masquerading as philosophers, economists, or anthropologists, who would be laughed out of the university's cognate departments, many are producing first-rate "law-and" scholarship. As in the case of more conventional scholarship, you usually cannot tell just from the title.

Has there been a diminution of useful scholarship over the years? Not surprisingly, given his occupation, Judge Edwards focuses on doctrinal-policy scholarship — the grist for the machinery of appellate courts. The proportion of this sort of work, though perhaps not its absolute quantity, has declined under competition from other genres. Nonetheless, plenty of excellent doctrinal-policy articles continue to be written, treatises continue to be published, and restatements of the law continue to be promulgated. The law reviews undoubtedly contain more abstract legal theory than they did thirty years ago; but they also contain articles that illuminate legal issues from various points of view — race, gender, economic analysis, and empirical social science — and that are designed to affect the ways that lawyers, judges, and other participants in the legal system approach fundamental legal issues. While some of this work is tendentious, it is hardly more so than much doctrinal scholarship.

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8. Margaret J. Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019 (1991).

9. C. Garrison Lepow, *Deconstructing Los Angeles or a Secret Fax from Magritte Regarding Postliterate Legal Reasoning: A Critique of Legal Education*, 26 U. MICH. J.L. REF. 69 (1992).

PROFESSIONALISM

The underlying tone of law schools, now, as thirty years ago, is quasi-professional. I use the modifier, because legal education has always focused on the relatively academic side of law practice — the analysis of doctrine and policy — rather than on practical lawyering skills.

Has there nonetheless been a decline in reverence for the law and for its guardians in the profession and on the bench? Most likely, yes: there is less grand talk about the law, and perhaps less belief in the possibility of law that rises above interest-group politics. This is hardly surprising given the widespread perception by lawyers, judges, and the public at large that the profession has devolved into a business — and one with sharp practices at that. Reverence for the law may also have suffered from the sorry state of the administration of justice, and also from the disappointed expectations that the judiciary would work major social transformations in racial justice and other social issues.[10] I doubt that the new scholarly genres contribute to cynicism about the law so much as manifest a wider societal discontent with the legal system and profession. Indeed, their writings tend to be idealistic and reform-minded at the same time as they criticize existing practices. What I hear mostly from law professors is not disdain, but some sadness in preparing students for a professional life that many will find unsatisfying even while its demands frustrate the enjoyment of a fulfilling personal and family life.

In sum, the legal academy has not changed all that much in the thirty years since Judge Edwards and I graduated. (Nor had it changed much in the thirty years preceding our admission to law school.) Taking everything into account, a law student who fell asleep in 1963 and awoke in 1993 would not be astonished by his new surrounds. If he had fallen asleep holding a law review — the soporific power was no weaker in those days — the nature and language of some of the articles would bewilder him, but he would find much that was familiar.

WHENCE

None of this is cause for self-congratulation. While the legal academy muddles along pretty much as it did thirty years ago, one might hope for more than muddling in a time when the work of lawyers is becoming increasingly complex; when lawyers are perceived, not with-

10. For a deeply skeptical view of the judiciary's transformative powers, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

out some justification, as problem-makers rather than problem-solvers; when the administration of justice often seems an oxymoron; when the bench and bar are wanting in courtesy and civility; and when there is widespread skepticism about the very possibility of a legal "profession."

This is not the place to set out a detailed agenda for the reform of the legal academy, but let me conclude by mentioning several areas in which we could do better. First, while the case method is an excellent vehicle for teaching the basic skills of legal analysis in the first year, there is little justification for the continuing obsession with appellate decisions in the second and third years. The conventional mode of pedagogy is poorly suited to teaching students most of the problem-solving skills and bodies of knowledge necessary to become competent and sophisticated lawyers and policymakers. We have not been thoughtful about what these skills and bodies of knowledge are and therefore have not systematically considered how to go about teaching them.[11] Second, the writing abilities of our entering students have, at very least, not increased over the years. Yet we do little to improve their writing skills during law school; as a result, significant numbers of bright young lawyers are not able to express themselves well, whether in memoranda to clients or formal legal documents. Third — *pace* Judge Edwards — law reviews contain a surfeit of doctrinal writing as well as high theory, to the exclusion of scholarship that connects doctrine and theory with the way law actually operates. The legal academy seems especially uninterested in empirically based research designed to improve the systems for administering civil and criminal justice.

My final point is a good news, bad news story. Judge Edwards and I were not required to take courses in legal ethics or professional responsibility. Like most of my classmates, I did not. If only because of a mandate from the ABA — inspired by Watergate — law schools now purport to teach legal ethics to all students. "Purport" gets it about right, for most faculties have, at best, approached the task half-heartedly. The reasons vary from the assumption that the subject has no intellectual content, to the belief that courses in ethics will not

11. Actually, the so-called MacCrate Task Force has made a partial effort in this direction. *See* THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM (1992). (Robert MacCrate of Sullivan & Cromwell chaired the Task Force.) The centerpiece of the document, *The Statement of Fundamental Lawyering Skills and Professional Values, in id.* at 135, is an exhaustive taxonomy of lawyering skills. Unfortunately, it is likely to be tarred with its surrounding recommendations about the time, place, and manner of teaching these skills, which, for good reason, are generating opposition from the legal academy.

change anyone's behavior, to simple laziness and inertia.[12] In fact, during the past several decades, legal ethics has been transformed from an academic backwater to the subject of much excellent scholarship, showing it to be a field every bit as intellectually challenging as most others in the curriculum. Though the study of ethics will not turn bad people into good ones, it can prepare well-intentioned lawyers to think reflectively about critical issues involving their responsibilities to clients, other parties, and the public at large. At a time when collegial relations within the bar and public confidence in the profession are disturbingly low, it is not asking too much of law schools to take this task more seriously.

12. On the other hand, many professors respond to the "pervasive method" — teaching ethical issues in standard courses in the substantive and procedural contexts in which they arise — as if someone were trying to build a toxic waste incinerator in their backyard.