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From Learned Profession to Learned Business

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to meet the needs of actual practice could not be achieved in law school; they could only be achieved in the apprentice-like setting of the law office after graduation from law school. The other equally distinguished speakers essentially agreed.[2]

Now, twenty five years later, we return to the same theme.

THE EDITORS

From Learned Profession to Learned Business

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I am committed to talk today about changes in the practice of the law and their implications for law schools and legal education. I promise that before I am done I will have circled in upon that topic.

A number of years ago, however, I took a private vow that I would not write or speak in public about a matter of substance unless I could end with "And therefore what we should *do* is. . . ." There is a certain appeal in the little verb "do." To be forced to say publicly what one thinks we should "do" has great power for focusing the mind and for sparking thoughtful debate and dissent. And if a "do" recommendation ultimately should happen to inspire action, so much the better. So, before I am done today I will put before you three practical proposals for action.

As a practitioner facing the daunting task of addressing an audience of professional academicians on an academic topic, allow me to begin by declaring my conviction that one important function of our law schools is forthrightly to perform as ivory towers—overtly proclaimed centers of legal scholarship whose purposes are to expand knowledge and understanding about law. In my own case, I happen to harbor a certain antiquarian curiosity about ancient law as well as an abiding intellectual interest in comparative legal anthropology—in the ways in which different societies go about trying to contain, I will not say resolve, the inevitable disputes of daily human life. I am therefore happy to urge that a place

2. *See* Jaffe, Howe, Halpern, *Commentaries on Mr. Shea's Lecture*, 12 BUFFALO L. REV. 280 (1963).

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for such non-implementational legal topics be saved on the work agenda of our law schools.

But that is not today's topic. So I turn to that other part of a law faculty's activity—training people to enter the legal profession. I offer these remarks against the background of some thirty-eight years of migratory post-LLB life that has included fifteen years professing and deaning in law schools, sixteen years in private law practice and the rest distributed among government service, corporate board room process, legislative activity and international relations. My eyeglasses are ground by that pattern of personal experience, and you should factor my remarks here accordingly.

On the whole, I think our law schools have been remarkably successful. Their success has lain in creating and honing that set of basic analytic skills that we all recognize to be the hallmark of a first class lawyer. These skills are a special combination of intellectual skepticism, linguistic control, orderly reasoning, conceptual perception, a refined sense of relevance, and an awareness of the key role of process and procedure. Development of this analytic legal capacity is our schools' strongest contribution. It has been unique to American law schools. Although that statement is an exaggeration today because, in the latter half of this century, American law schools have strongly influenced legal education in other countries. Our law schools deserve great credit for their analytic training, and for that I give them two rousing cheers.

But I withhold the third cheer. Why? Because our law faculties—and by that I mean not so much our law schools as institutions as our law professors—could, and should, do a great deal more than they now do—not to teach their students how to practice law—but to impart to their students a more useful understanding of the law and legal process. That leads to my three practical proposals.

LEGAL HISTORY AND INSTITUTIONAL CONTEXT

First, some comments about legal history and the institutional context. While I feel strongly that no law student should be allowed to leave law school without doing a substantial amount of reading, or without taking a course in at least Anglo-American legal history, the point I wish to press today about legal history is different and more general.

Our law shool's splintered curricula, our dedication to analytics, our case book teaching materials made up of hundreds of disconnected snippets, our skeptical rejection of grand legal theorems, our open-ended questioning techniques—all are to be applauded and are all indispensable

in my opinion. But they have a cost. Such deconstructionist teaching techniques inevitably produce an impression of disconnectedness in the minds of students. It cannot be otherwise, as in the course of a day or even an hour, the matters under discussion leap every few moments from substance to procedure, from doctrine to fact, from lawyering to judging, from individual equity to public policy, from Henry VII to the Warren Court, from instrumental to aspirational. As mentioned, this is great educational technique, and we should keep it up. But students need an antidote — an antidote that would provide some element of reconstruction and integration to this mass of disassembled atoms.

That which integrates the totality is, of course, history and institutional context. Any legal system is the product of its time, of its past, and of the economics, politics and values of the society which gave rise to it. Every case decided, every statute passed, in some way reflects that sweeping generalization. I believe that no classroom topic should be left without the professor's bringing to the attention of the student—or, better yet, the student's bringing to his own attention—the degree to which the particular chip of law under examination was uniquely a product of the society and the era out of which it was born.

I think no person can have a hint of understanding about the legal process without being a considerable historian. As professionals, we are all engaged every day in hammering out and forging the next link in a chain of legal development while at the same time seeking to predict what tomorrow's link will be. It seems to me that one cannot hope to do that without a sense of what the linkages were that led up to the present. But my experience is that few graduates of our law schools have that sense.

Of course, no professor and no student can "know" all that history. And of course not every hour in the classroom must contain a history lecture. But it is not difficult, and not significantly time consuming, for a law teacher, through patient persistent reminders and questions, to sensitize his students to the pervasive, integrating, rolling cultural historical process—the rich soil out of which the law grows. Holmes's dictum that in the law a page of history is worth more than a book of logic is in fact an understatement. But sadly, it is a dictum that is more often quoted by law professors than followed as a guide in their teaching.

This macro point has a micro equivalent. If a statement of law is not to be ephemeral it must be rooted not only in its general social context and time, but in the particular institutional setting in which it arose. It is no accident that water law in the arid west of the United States is not the

same as in the verdant east, that debtors fare better under the law of agricultural states than under that of urban banking states, or that third party transferees win in commercialized environments while original property claims are more honored in a land-based economy. If a student, or a professor, in examining a particular legal encounter, does not perceive the environment surrounding it, does not locate it in its own institutional setting, he has little chance of understanding what it was about. Further, he will consistently err in his effort to extend or extrapolate the result into other institutional contexts. The outcome reached in one institutional context is in another at most an analogy. The law pertaining to a sale of securities, for example, will have at most a secondary resemblance to the law pertaining to the sale of a cow or of a house.

But most law students and law graduates seem to understand the point hardly at all. In substantial measure because of a legal education that focused mainly on deracinated words, law graduates are all too often mesmerized by what the court or legislature said, to the disregard of what they did. The young lawyer can all too often state what the court held, but remain oblivious to the circumstances and setting in which the facts of the case occurred and those in which the legal statements were made. Certainly case method teaching is less deficient in this regard than hornbook teaching. Yet, in disregard that one of the major potential advantages of the former lies in its fact-basing, that element usually gets edited out by the casebook author and is usually not replaced by the classroom teacher. Further, neither casebook nor hornbook provides any sense of the surrounding social context of the lawmaking body that uttered the statements of law.

Even where a body of law is industry-specific, most law graduates seem not to grasp, or to have been taught, the importance of the institutional setting. I cannot tell you how many young lawyers I have encountered who have taken a course in and know a good bit about SEC regulations, but have not the faintest notion of the operations or economic functions of the stock market, or the role of stock exchanges as institutional instruments for capital aggregation and economic transfer. Or how many students I have seen who, having taken a course in negotiable instruments, can define a holder in due course, but have only the haziest conception of what a bank does and virtually no knowledge of the United States banking system (except that it has somehow been cleft atwain by a legal axe called Glass-Steagall).

Law students are quite capable of learning about institutional settings, or at least being aware of them where they do not have the time to

explore them. Responsibility for their lack of institutional knowledge and curiosity lies squarely at the door of our law faculties. Though I do not know why, our law schools somehow came to the conclusion many years ago that law students are unable to read. Other graduate students lap up three or four books a week; I put forth the radical hypothesis that law students could handle three or four books a course. I have in mind expositional books, assigned as outside reading, relating to the institutional workings and historical context of the subject under study. It is a perverse blindness that even allows us to think of teaching a law course on regulating X without ever talking about X. But in our law schools we do it all the time.

The law graduate's lack of a sense of institutional context is a major contributing reason why young lawyers are so at sea when they leave the law school and begin legal practice. Among the most startling things the young lawyer encounters as he enters practice is the importance of the institutional setting of the matter on which he is working. There is no reason why every law student should not, by the time of his graduation, be sensitive to that reality. Without overburdening their charges, particularly in their third year when, as we all know, most law students are throttled back to half-speed, our law faculties could quite easily impart that awareness. But they do not.

Practical Proposal Number One, requiring no funding, no institutional reform, no faculty meetings and no overload of student or teacher. By reading assignment, classroom exposition, and lectures by visitors, law teachers should supplement their students' training in legal analytics by greater emphasis on fact, institutional setting, and history.

The Institutions of American Law

It has long been a second mystery to me why our law schools pay so little attention to, and are so profoundly uninterested in, the institutions of American law. By and large, our law students are provided only the most rudimentary knowledge of the institutions of our legal process and the legal profession. And except for an occasional empiric study on a specific subject like sentencing, law professors devote very little research effort to such matters.

We have immense court systems, federal, state, and municipal; the attention of our law schools is riveted on the words these judges say, but little or no time is devoted to how these courts run, their pathology, or how they might be improved. This despite the common knowledge that our court systems are quite literally in a state of operational crisis.

The average law graduate's knowledge of the operation of Congress, state legislatures and local governments, if existent at all, has been learned in undergraduate school or by personal work experience.

In the United States we have hundreds of thousands of lawyers doing all kinds of different things, but our law schools and students know almost nothing of the sociology of the profession. The case is no different with respect to our bar associations. National, state and local bar associations are engaged in countless activities, many of them contributory to solving problems, some of them contributory to creating problems. But so far as most of our law schools are concerned, these associations and their activities might as well be on Uranus.

Prisons, in-house corporate law departments, small claims procedures, alternate dispute resolution tribunals, local police and FBI, grand juries, law schools themselves, and dozens of other institutional components make up the skeletal structure of our vast legal process, but graduating law students typically know virtually nothing of these matters because they are seldom mentioned in our law schools.

I have no doubt that this institutional ignorance on the part of our law graduates contributes to the turnover that young lawyers experience in their professional careers. The rate at which young law graduates change their jobs after two or three years is astonishing. While some of that turnover is healthy and normal, much of it is painful and expensive to all concerned. And some of it is attributable to the new lawyer's discovery for the first time of what the working world of the legal process is really all about.

It is not inevitable that that learning process be quite so haphazard. There is no reason why our law schools could not through exposition, visiting lecture and reading, provide much more information to students about such subjects. Surely some such matters should appropriately be perceived as promising fields for research.

May I name one that is ready at hand at this rostrum? While I am flattered to be asked to address you today, it should not be a practitioner who stands here talking about how the world of law practice is changing. As I see it, I should be in the audience. You, as scholars, academics and observers are the ones who have the perspective to discern what is happening in the larger currents of the profession, and to teach those of us who are caught up in the daily frenzy of the practice. I can assure you that out there in the trenches there is very little time available, and little incentive, to observe, compare, reflect and deduce.

But we all know it to be a truth that there has been very little inter-

est in such matters on the part of our law faculties. I believe that that disinterest is a source of consequent loss to young lawyers, the bar, and the law schools themselves.

Practical Proposal Number Two, requiring no funding, no institutional reform, no faculty meetings and no overload of student or teacher. By reading assignment, classroom exposition, and lectures by visitors, law teachers should supplement their students' training in legal analytics by acquainting them with the structures and operations of our principal public and private legal institutions.

WHAT DO LAWYERS DO?

I have mentioned the extraordinary turnover of new lawyers entering practice. Over the years I have paid some attention, albeit anecdotal, to inquire into the causes of that turnover. Some young lawyers, of course, simply do not perform well. But by far the largest number of those who leave the profession do so because of some sense of non-congruence between their own personality, their expectations and the work they are doing. They discover a personal non-fit between themselves and the lawyer's job.[1]

Many young lawyers leave their employment in the law because they are surprised by the work life they find, and discover that they do not like it. Why did they not know that before? Some such incidents are bound to occur, but why so many? The answer is that young lawyers who come into a law firm typically have only the dimmest idea of what a lawyer actually does. Their law school had taught them almost nothing about that.

It is easy to say what lawyers do. They serve their clients.

It is also easy to say what clients want from their lawyer— particularly since all clients want the same thing.

A. The client wants, as an objective, to avoid or prevent something that would be painful to him, or to contain something that will be painful to him but is unavoidable, or to get something from somebody who does not want to give it to him.

B. The client wants his lawyer to do something and/or advise him on how to achieve the optimal trade-off between (i) full or partial

1. The reported story of Archibald McLeish is illustrative, if a bit extreme. He practiced law as an associate in a Boston law firm until the day he was offered partnership, at which point he is reputed to have said, "Great. That's what I've been waiting for. I quit. I want to be a poet."

achievement of A and related cost, and (ii) risk of downside consequences.

C. The client wants the lawyer to do B now—or sooner.

It is always the same. There are infinite variations—as playwrights write variations on a few basic themes—but that is what clients want, and what they pay us for. If we do not or cannot meet those demands, clients will consider that they got poor service, and that we did not do our job. They will be right.

Some of what the lawyer does in these regards is essentially the straightforward "writing up" of a legal document recording or documenting a transaction. I believe there is little law schools can do to teach students how to do that task well. Nor can law schools teach students how to advise their clients, or what advice to give. A lawyer's capacity to advise a client on what to do is a function of legal knowledge, experience, exposure, being banged around a lot, acquaintance with others who have experienced trouble before, a native talent for tactics and psychology, knowing what and whom to ask, a smell for public relations, a feel for the trade-off of short-term and long range goals, a sense of evolutionary trends that grounds an ability to forecast, and— very high on the list—an acute professional sensitivity that enables him to steer through the sudden, recurrent, wrenching moral dilemmas that beset the lawyer's daily work. Such kaleidoscopic experience and insight cannot come from law school. It comes to the working lawyer, if it comes at all, from going around the track many times.

But what could be done in the law schools—and I cannot think why it is not done, since it is easy and costs nothing—is to provide the student an accurate picture of the lawyer's real life work with its daily operational crises and moral pressures. At the end of every case read, at the end of every block of material discussed, one can see, if he will but look, much of what the lawyer actually did or did not do. The student, or, if not, the professor, should ask: "As an operational matter, what have I learned from this? How could I have helped these people avoid this mess? What should these people have done instead of what they did? What could (should) the lawyer have done? Did some, or all, or none of them (or their lawyers) behave in a morally reprehensible manner? How might I have constructed the transaction so that there would not have been any dispute in the first place? What motivated these people to do what they did? Were their motivations normal or aberrational, et cetera?"

Is my point clear? I am not pressing for more so-called "clinical

legal education". I am most certainly not arguing that the law school can or should teach the student "how to lawyer"—how to make lawyerly judgments or what to advise. But the law student *could* learn what it is that good lawyers do, what the mission assignment is, and what will be expected of him in the role of practitioner. And he can learn what it is that is worthy to be learned from what he reads in law school.

The transition from the law school's focus on analytics to the law firm's emphasis on, "what do I do with my legal knowledge to help my client" is very difficult for many young law entrants to make. Throughout law school, no one ever asked them to make that translation. With dismaying frequency, the new lawyer will respond to a work assignment with a memo to a partner or client saying: "There are these arguments here, and those arguments there, and on some occasions it is done this way; on other occasions it is done that way, and it all depends on the facts and the people involved, etcetra, etcetra." And there the memo ends—totally blank in the respect that matters most. The partner or client then says, "Okay. That's very interesting. But what do you propose that we—or the client—do now?" The new arrival either blurts out an unconsidered impractical recommendation, or simply stands dumb.

It is as though meteorology students were to come out of school having learned something about the forces that determine weather, but having never been squarely confronted with an awareness that they will, as practicing meteorologist, have to put themselves on the line with real weather predictions. But even that analogy is tenuous. The meteorologist merely forecasts, the lawyer is usually expected not only to forecast but to act and advise on how to act.

Some new graduates quickly shift into lawyering gear as they enter the law practice environment and come to perceive what is expected of the working lawyer. But many do not. For some, the prospect of on-line responsibility is terrifying. For others, on the other hand, the prospect of the advisory or implementational role of the practitioner seems pale and unexciting—a species of staff function far removed from the grander vision of the lawyer as statesman and doer so often implied in law school. These young people leave the practice, declaring that they would rather be a client and hire lawyers. And finally, it is no secret that many a young lawyer leaves the practice because he discovers in real life that for him it is unacceptably uncomfortable to apply the profession's traditional separation between the lawyer's personal values and those of his client when the two value systems clash—unacceptably uncomfortable to live

by the profession's proud canon that lawyers can, should, must, work diligently in the interest of even the vilest of clients.

Can our law faculties do anything to head off these jarring and expensive surprises encountered by the new lawyer? I believe so.

Practical proposal number three, requiring no funding, no institutional reform, no faculty meetings and no overload of student or teacher. By recurrent classroom attention, and lectures by visitors, law teachers could do more to inform students of what the practicing lawyer really does, what the service of clients is all about, and how to translate abstract legal material into implementational form. The student can be taught to ask habitually, "In the light of what I have just read, what would I have done, and how would I have advised the parties and lawyer to behave?" It would take no more than a shift of focus for law teachers to instill in their students an awareness and the habits of operational thought. That would be a great boon to students, to law firms and to clients. But it is not much done in our law schools today.

PRACTICING LAW TODAY—AND TOMORROW

Now some more general observations about today's legal profession. Page one of the financial pages of the September 11, 1987 issue of *The New York Times* carries an unusually interesting article.[2] It is addressed to the "family farm" and what has become of that solid building block of the American historical experience. It appears that three things have happened to American family farms. Some have become parts of large scale agricultural corporations. Other family farms are still family owned but have been transformed into capital-intensive, skill-intensive, specialty-focused, high-technology businesses. Family farms in those two patterns are prospering. The rest? They have either been driven to the wall and disappeared, or they are economically marginal and moving in that direction.

Most retailing and merchandising in the United States has undergone essentially that same evolution. In heavy industry, it is plain now for all to see that industrial America—even the bastions of big steel and big auto—has been forced in this generation to accommodate to the forces of new technology, increasing capital requirements, competition, marketing sophistication and specialization. Transportation? The experience is the same. Communications? Ditto. And everyone knows how rad-

2. Stevenson, *Farming in a Corporate Age*, N.Y. Times, Sept. 11, 1987, at D1, col. 3.

ically the formerly stable worlds of commercial and investment banking have had to restructure themselves in the past ten years.

Is it likely that the practice of law will escape these surging currents that dominate the waning years of the Twentieth Century? All the evidence is to the contrary. In the legal world, the same kinds of changes are not only happening—they have happened. Competition, advertising, heavy capital requirements, sophisticated marketing, talent raiding, deskilling, chain franchising — they have all suddenly become real in the practice, and they are not going to go away.

We are clearly on the way to the creation of immense full-service, multinational law firms. Whether they will achieve the scale of the Big Eight accounting firms is not clear, but certainly, all of us have been forced to raise again and again our earlier held conviction as to the maximum number of lawyers that can be orchestrated into a single law firm. And a parallel development is obviously occurring all around us in the growth of large, powerful legal capacities within corporations, governmental units and other large institutions. It is no longer unusual to find a corporation with an in-house staff of 300 lawyers.

Does that mean that everyone who graduates from law school tomorrow will work in some giant organization? No. As in other areas of services, a promising alternative strategy for a law firm today is intense specialization—the boutique practice.

The twin phenomena of gigantism and specialization are not the only measure of the change in the profession. A few months ago I gave a talk before some 250 lawyers who make up the legal staff of one of our larger corporations. My own remarks probably were not memorable, but the conference itself was an eye-opener for me. Every aspect of the two days of meetings was dominated by and expressed in the conceptual vocabulary of our business schools. All discussion was addressed to operating tactics for the legal function, enhancing legal produce, cost-benefit analysis, personnel allocations, quality control techniques, deskilling, networking electronic capabilities, product unit cost, packaging, retrieval and rerun. The seminar was an exercise exclusively devoted to how to perform the legal function more efficiently, faster and cheaper. The planners of this corporate department conference in these respects were out ahead of most independent law firms today—but only marginally so. Throughout the conference one could see clearly the manifest direction of current trend lines for legal services, whether provided in-house or by outside firm.

We should not be surprised. We have already seen a close counter-

part development in the world of investment banking. In an earlier day the company and its financial adviser, the investment banker, enjoyed a congenial partner-like relationship that typically continued over decades of mutually informed cooperation. Over the past 10 years that world has evaporated, giving way to an intensely competitive deal-by-deal scramble of comparison shopping. Relationship banking is out and transactional banking is in. A chief financial officer of a company will dump any long-standing bank relationship for 20 basis points. The results? Our financial markets are economically more efficient and cheaper. Obsolete structures have been swept away. And we are experiencing an unparalleled surge of creativity—a literal explosion of new financial ideas and products (some of which will prove wonderfully fruitful and others disastrous). But the by-product of this new atmosphere is clear; it has depersonalized, de-individualized, boiled-away, the close advisor-client relationships of an earlier day.

The past decade's experience of the banking world, the evolution of the family farm, the change in industrial America, the seminar just described, all foreshadow tomorrow's world of law practice. I will not pretend that I personally welcome the encroaching atmosphere of bottom-line driven managerialism in law practice. But neither do I waste my energy decrying it because it seems to me a quite inevitable product of our era. Our work may not be becoming less learned, but what was a learned profession is becoming a learned business.

What do these profound developments mean for our law schools? I have not sensed that our law faculties have begun to think much about that. Here are two observations that seem to me relevant.

First, with the sociological structure of legal practice in the United States in a period of fundamental change, it is all the more important that those changes become recognized in our law schools as legitimate subjects for scholarship, research, observation, analysis and teaching. It is simply poor scholarship to do otherwise. And it is inexcusable to allow students to carry away from law school a vision of a career setting that is vanishing, or has vanished. For the emerging law student, that is a recipe for career disappointment, high turnover and professional frustration.

Second, much more serious—ultimately vital—is the brooding question. Can lawyers, in pursuit of a learned business preserve the ideals, the values, and the service standards that were the crowning achievement of law as a learned profession? It is never an easy job to instill high ideals in human beings. It is harder still to build institutional structures that will over long periods of time foster those ideals, and by example, incentive

and sanction, see to it that the ideals are not only acknowledged but are acted upon. In the case of the American legal profession, a loose alliance of courts, bar associations, and law firms voluntarily undertook that mission in the law practice world of yesterday, and to an acceptable if not exactly laudable degree, performed it. But how will that job be done tomorrow, and by whom? A shift from law as a learned profession to law as a learned business does not inherently bode well for nurturing a sense of the lawyer's work as something more than another market transaction.

Most, perhaps all law schools include in their curriculum some block of material dealing with what are usually called "legal ethics" and the traditional canons of professional responsibility. In the main, the scholarly attention devoted to such matters has been cursory, *pro forma* or less. But now, as the profession changes, it has become quite evident that the simply expressed canons of the simply designed institutional structures of the 19th Century must be rethought. They must be reshaped and reexpressed to achieve their original purposes in a new environment populated not by sole practitioners, individual proprietors, and family farms, but by large scale, sophisticated, modern institutions made up of long chain molecules, endlessly interlinked and interconnected. In today's environment—as every corporation and government lawyer discovers—it has become increasingly difficult to even identify and isolate who is "the client"—the lodestar concept of the profession's traditional ethical compass.

Such rethinking and reconstruction is an intellectual task. It is one in which our law schools can play a major role. Further, as these seismic changes occur in the profession, it is predictable that commercialization will take its toll. Something like a moral reawareness of the profession will come to be needed. Our law schools should be the intellectual vanguard of that development. Dedicated not only to teaching, but to inspiring tomorrow's lawyers to understand, to nourish, to redefine and to exemplify in new settings the nonmaterial service traditions of our profession.

But our law schools will never be able to make those vital contributions unless they change their ways. They will not be able to do so unless they commence to devote serious attention to institutional settings, to our legal institutions present and past, and to the law as a practicing profession. Not wholly by accident, those were the three practical proposals made earlier in these remarks.