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Recommended Citation

Steven Lubet, *Closed Minds and American Law Schools*, 75 Cornell L. Rev. 948 (1990)
Available at: <http://scholarship.law.cornell.edu/clr/vol75/iss4/4>

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BOOK REVIEW

CLOSED MINDS AND AMERICAN LAW SCHOOLS?

Steven Lubet†

In a recent issue of the *Cornell Law Review*, Professor Jonathan R. Macey utilizes a book review of Allan Bloom's *The Closing of the American Mind*¹ as a platform from which to launch his own critique of the current state of legal education in the United States.² Macey is critical of Bloom,³ but agrees with his observation that American educational values are in decline.⁴ Otherwise, Macey finds that Bloom is "dead wrong about the cause of this decline,"⁵ and that Bloom's solutions range from dangerous to ridiculous.⁶ From this juncture, Macey proceeds to use Bloom's work as a foil for a description of the 'malaise' gripping American law schools.⁷ While his references to clinical teaching are not detailed, I read Macey to say that this malaise seems at least in part to be the fault of clinical education.

It is remarkable that Macey's agenda allows him, in a single eight-page essay, to take aim at both "absolute" classical education *a la* Allan Bloom and contemporary skills training *a la* the clinical education movement. He could not have considered two more widely disparate views of education. Further, Macey manages to miss each target. He misinterprets Bloom, and in his prescription for legal education fails to consider the profession.

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¹ ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987).

² Jonathan R. Macey, *Allan Bloom and the American Law School* (Book Review), 73 *CORNELL L. REV.* 1038 (1988).

³ See, e.g., *id.* at 1038 ("Allan Bloom is a very frustrated and unhappy fellow."); *id.* at 1039 ("[H]is cure . . . would be far worse than the disease itself."); *id.* at 1040 ("Professor Bloom believes that his way is the only way."); *id.* at 1042 ("It seems to me more likely that Bloom is screaming because modern educational trends are pushing the focal point of American education further and further away from his orbit."); *id.* at 1045 ("Allan Bloom's desperate appeal").

⁴ *Id.* at 1038.

⁵ *Id.*

⁶ *Id.* at 1039.

⁷ *Id.* at 1038.

MACEY AND BLOOM

Allan Bloom achieved both fame and best-sellerdom by arguing that the American university system has fallen upon irredeemably hard times. While his thesis has been subject to considerable elision, if not caricature, in both the popular and the academic press, his general proposition is that the rise of "relativism" as an education norm has led to a corresponding loss of interest in the search for an absolute understanding of knowledge and truth. This development deprives undergraduate education of its structural coherence, since students are now free to pursue a pastiche of value-free curricular offerings, all in the name of an undefinable relevance. In turn, such incoherence deprives the broader society of a truly educated class, since the common frame of reference for education is all but abolished.

Macey and others describe Bloom's work as a call for a "return to the classics."⁸ However, this is only partially correct. Bloom has instead called for the university to rededicate itself to developing shared cultural and intellectual norms, including the identification of non-comparative values. Bloom uses his own experience with "the classics" to illustrate the power and beauty of classical education, but he does not limit his approved reading list to Plato and Aristotle.⁹

Macey concludes that Bloom is "dead wrong" as to the cause of the decline of American education.¹⁰ According to Macey, Bloom attributes this decline both to the rise of relativism and to the corresponding diminution of the classics.¹¹ The real answer, according to Macey, is far more apparent than Bloom's centuries-spanning account of the disintegration of the university curriculum. The true cause of our dilemma is nothing more than cowardice, or as Macey reduces it even further, "simple cowardice."¹² If only we had known.

In dismissing Bloom's observations and reasoning, Macey continually returns to the theme that modern educators have lost their

⁸ Macey exemplifies this mistake, ridiculing what he sees as Bloom's "plea for a return to Platonic dialogue." See Macey, *supra* note 2, at 1039.

⁹ See *id.* at 1043. What Americans lack, according to Bloom, are writers such as Descartes, Pascal, Montaigne, Rabelais, Montesquieu and Rousseau, who are necessary to building our spiritual edifice, and who one must have read to be considered educated. A. BLOOM, *supra* note 1, at 53.

¹⁰ Macey, *supra* note 2, at 1038.

¹¹ Macey refers to this as "Bloom's unsupported assertion," an interesting term to apply to a book of nearly 400 pages. *Id.* *The Closing of the American Mind* is, in fact, a closely reasoned and well supported account of the manner in which Bloom believes relativism to have infected not only education but virtually all civic thought.

¹² *Id.* at 1039.

nerve: we lack “commitment to excellence in teaching and scholarship;”¹³ we invariably choose to “follow the path of least resistance.”¹⁴ Bloom no doubt would agree with Macey’s description of an educational system that has lost its will to succeed.¹⁵ Bloom, however, goes on to search for the cause, or at least an explanation, of this phenomenon. The antinomian Macey, in contrast, criticizes the cowardly sinners’ loss of faith, without exploring the reasons for their rejection of salvation.

But how could cowardice be so simple? The United States possesses the largest and broadest system of higher education in the world.¹⁶ According to both Macey and Bloom, the system’s hundreds of independent components have undergone a nearly simultaneous abandonment of “the values and principles that made them great.”¹⁷ Cowardice might account for a few lapses here and there, but it hardly explains the imminent demise of our entire university structure. The events and decisions decried by both Macey and Bloom have recurred from coast to coast over at least a decade. As an explanation for such complex phenomena, “simple cowardice” is an oxymoron.

Macey’s proof of Bloom’s misdiagnosis is taken from a single illustration. As an example of the harm occasioned by the abandonment of rights in favors of openness, Bloom cites an incident that occurred at Cornell University during the 1960s.¹⁸ According to Bloom, a black student’s “life had been threatened by a black faculty member when the student refused to participate in a demonstration,” and the university provost refused to take any action to protect the student.¹⁹ Macey agrees that the professor should have been fired, but he goes on to criticize: “[1]t seems a bit ridiculous to insinuate, as Professor Bloom does, that somehow, a different cur-

¹³ *Id.*

¹⁴ *Id.*

¹⁵ In fact, Bloom repeatedly makes just that point, although one would hardly know that based only on a reading of Macey’s review. For example: “The democratization of the university helped dismantle its structure and caused it to lose its focus.” A. BLOOM, *supra* note 1, at 65. “The provost had a mixture of cowardice and moralism not uncommon at the time.” *Id.* at 316. “The universities never performed [their] function very well. Now they have practically ceased trying.” *Id.* at 256.

¹⁶ In 1970 there were 1639 four-year educational institutions in the United States, employing over one-half million faculty at the rank of instructor or above. By 1986 the number of institutions had increased to 1915, with a corresponding increase in faculty. UNITED STATES DEP’T OF EDUC., NATIONAL CENTER FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS (1988).

¹⁷ Macey, *supra* note 2, at 1039.

¹⁸ A. BLOOM, *supra* note 1, at 316.

¹⁹ *Id.* Bloom’s description of the incident is open to question. Was the student’s life seriously threatened, or was the professor merely guilty of a rhetorical excess? Certainly there is no documented case of a student, in the 1960s or at any other time, having been harmed by a professor for refusal to attend a demonstration.

riculum would have given the provost the moral courage to carry out the responsibilities of his office. Simple cowardice is to blame."²⁰

Bloom, however, insinuates nothing of the sort. Rather, he describes the manner in which he believes the steady erosion of a commitment to absolute rights and rational discourse led to an ultimate inability to stand up for principle. The suggestion that a different curriculum would not have given the provost additional moral courage is tautological. Bloom's point is slightly more subtle than Macey allows. Having given in to the forces that led to abandonment of the classical curriculum, the universities became incapable of resisting other forces as well. Bloom certainly observes a lack of conviction among university administrators, but he recognizes this deficiency as the reflection—not the cause—of a deeper problem. Macey, on the other hand, seems to confuse the shadow for the thing itself.

In any event, it is at least "a bit ridiculous" for Macey to attribute the campus events of the 1960s, and their contemporary repercussions, to insufficient bravery on the part of professors and administrators. During the 60s, there were campus rebellions from San Francisco State to Columbia. Students died from gunshots at Berkeley and at Kent State. At the same time, urban riots broke out in Watts and Detroit, a general strike took place in Paris, and tanks rolled through the streets of Chicago and Prague. The universities were only one theater in what then was perceived as a transcendent struggle, if not an outright war. The university curriculum was only one front, but for Bloom, an important front.

Macey's condemnation of "simple cowardice" calls nothing more to mind than some grade-B movie, loosely based on Kipling, in which a frustrated British officer shakes his swagger stick at the troops: "Courage lads, have courage!" The imagery is stirring, but it doesn't explain the decay of the British Empire.

Much can be said for courage in academics, but it also has its downside. Those who are both fearless and certain run the risk of an overstated case. Macey overstates his critique of both Bloom and law school as the result of his certainty that a professional education makes the identical demands as does undergraduate school.

BLOOM AND LAW SCHOOL

What does Bloom's analysis say about the American law school? The short answer is "virtually nothing." Bloom is concerned first and all but exclusively with undergraduate education.²¹ He does

²⁰ Macey, *supra* note 2, at 1039.

²¹ A. BLOOM, *supra* note 1, at 244, 380.

not devote a page to discussing either legal education or professional school, and nothing in his book suggests that he expects his methods to be applied outside of liberal, undergraduate programs. His Index of Proper Names does not contain a single reference to Langdell, Llewellyn or any other primarily “legal” scholar.²² He does not count law among the “small number of disciplines that treat the first principles of all things.”²³ Rather, he regards law as an “applied science” that, while beneficial, is “lower in dignity and derivative in knowledge.”²⁴

Of course, Bloom does not approve of relativism in the law (since it elevates openness above natural rights),²⁵ but he does not begin to suggest that the methods of scholarly inquiry—in law or in any other field—ought to be limited by absolute values.

Macey fails to appreciate Bloom’s implicit distinctions between undergraduate and professional education, and between curriculum and scholarship. Bloom obviously seeks to impose no limitation on the manner in which law students are taught. One can only wonder, then, why Macey framed his strenuous defense of the Critical Legal Studies Movement—which occupies a central position in his essay—as a response to Bloom-inspired ideas.²⁶ Bloom does refer to deconstructionism as a fad,²⁷ but this hardly seems provocative of Macey’s conclusion that *Bloomthought* is a threat to free inquiry in law schools.²⁸

Macey does not bite down on the hard issues: What is the relationship between law school and undergraduate school? What is the role of professional school in university education? Indeed, he uses a debater’s trick to avoid this very question. First, Macey assumes that the mission of law school and the mission of the larger university are identical.²⁹ Then he demonstrates that Bloom’s model for undergraduate education just won’t do for law school. Finally, he asserts this failing as a refutation not only of Bloom, but also of those whom he associates by fiat with Bloom. This allows Macey first to raise and then to shrug off, the attacks on Critical Legal Studies that Carrington, Van Alstyne and others have leveled.³⁰

Carrington’s concern, however, is not about Critical Legal

22 There is one reference to Oliver Wendell Holmes and another to Hugo Black, neither in the context of legal education. *Id.* at 28, 62.

23 *Id.* at 261.

24 *Id.* The other beneficial applied sciences are medicine and engineering.

25 *Id.* at 29.

26 Macey, *supra* note 2, at 1041, 1042.

27 A. BLOOM, *supra* note 1, at 379.

28 Macey, *supra* note 2, at 1040-43.

29 *Id.* at 1042.

30 *Id.* at 1041, 1042.

Studies as an academic discipline; he does not suggest that Crits would be out of place in a philosophy, political science or literature department.³¹ Rather, Carrington's concern is the potential effect of Critical Legal Studies on the practice of law: "Faced with such impediments to belief in law, who can fail to have doubts about the validity of their professionalism as lawyers?"³² Only a few law students ever embark upon academic careers. The vast majority become employed at large law firms and other private institutions. Carrington's worry is that a value-free approach to the study of law may lead, even if unintentionally, to a value-free approach to the practice of law. Contrary to Macey's assertion that it may be "Pollyannaish [to teach] that law inevitably plays a civilizing and constraining role in society,"³³ clear-headed realism recognizes that the health of our legal system depends upon the individual lawyer's respect for the rule of law.³⁴

One need not agree with Carrington (and I don't) to recognize that he poses a very different question from the one raised by Bloom, not to mention the one ignored by Macey. To assess the "malaise" gripping American law schools we must consider the nature and meaning of professional education.

MACEY AND LAW SCHOOL

Macey identifies three major topics in the current debate about the direction of legal education: "the place of Critical Legal Studies in the law school curriculum, the merits of clinical education and the role of interdisciplinary work, particularly law and economics."³⁵ The choice of words tells a story—we must consider the "place" of Critical Legal Studies and the "role" of law and economics. In other words, these movements are assumed to belong in the law school world, and only their relative importance or emphasis is subject to debate. Concerning clinical education, however, Macey implies that the discussion is on its "merits." Its position in the curriculum still seems in doubt. Macey's response indicates his understanding that clinical teaching is marginal at many law schools, but he disclaims the possibility that his own words might reflect that same intolerance.³⁶ In fact, he concludes with the suggestion that clinicians' own "defensiveness" is the problem.³⁷ Students of Femi-

³¹ See, e.g., Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

³² *Id.* at 227.

³³ Macey, *supra* note 2, at 1041.

³⁴ See, e.g., DAVID LUBAN, *THE GOOD LAWYER* (1983); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

³⁵ Macey, *supra* note 2, at 1038.

³⁶ Jonathon R. Macey, *Macey Responds to Lubet*, 75 CORNELL L. REV. 959, 959 (1990).

³⁷ *Id.* at 961.

nist Legal Theory (among others) will have no difficulty recognizing this rhetorical device as a benign variation on "blaming the victim."

Although Macey never explicitly discusses the content of clinical legal education, his articulated conception of excellence seems to leave little, if any, room for clinical teaching. We need more Critical Legal Studies and more law and economics, but the inclusion of clinical courses in the curriculum only panders to the mob. Law students, apparently the enemies of excellence, will cry loudly "if they are unable to dilute their work-load by indulging in the luxury of adding a skills course to their schedule as they while away the spring semester of the third year."³⁸

First let us try to understand this position in purely descriptive terms. In the spring semester of the third year, law students are only a few months away from entering practice. By the next fall they will be performing lawyers' tasks and charging fees to clients; they will be exposed to malpractice liability. Macey, however, refers to skills training as an unnecessary luxury, undertaken only to avoid real work. Could he make this argument with a straight face concerning any other professional school? Would Macey entrust his own well-being and health to an engineer, architect or physician who had not been trained in professional competencies such as information gathering, fact evaluation, theory choice, and ethical reflection?³⁹ Does he think that senior medical students while away their time with clinical rotations?

Macey's characterization of clinical courses as diluting the curriculum is neither fair nor accurate. Does he have any basis on which to rest this charge? Has he analyzed the comparative work loads involved in traditional versus clinical courses? Is he even aware of the demands of contemporary clinical education?⁴⁰ Perhaps Macey's law students never ignore their reading, skip the lectures, or merely cram for exams at the end of the semester, but plenty of other students do. The skills courses, however, permit no such luxury. When well taught they require daily preparation and

³⁸ Macey, *supra* note 2, at 1043. In his response, Macey asserts that I misread his original Review, which was nothing more than a "plea for tolerance" for all voices, including clinical education. It is good to learn now that Macey is an enthusiastic supporter of clinical teaching. See Macey, *supra* note 36, at 959. Unfortunately, he described skills teaching in such sharply negative terms throughout his Review as to convey the exact opposite position.

³⁹ See DAVID A. BINDER & PAUL BERGMAN, *FACT INVESTIGATION 2* (1984); Edward J. Imwinkelried, *The Educational Philosophy of the Trial Practice Course: Reweaving the Seamless Web*, 23 *GEORGIA L. REV.* 663, 675 (1989).

⁴⁰ See Steven Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 *J. LEGAL EDUC.* 123 (1987). Macey continues this theme in his response, attributing the need for closer monitoring of clinical courses to the fact that "students rarely complain about undemanding courses." Macey, *supra* note 36, at 960.

allow no unexcused absences. Unlike standard exam courses, and even seminars, last-minute cramming and paper writing isn't possible in clinical courses. The work either has been done throughout the semester or it hasn't.

It may be that certain clinical courses are poorly taught, or that certain teachers demand less than rigorous analysis from their students.⁴¹ The same shortcomings are no doubt present in grand rounds at certain teaching hospitals, and, unfortunately beyond argument, law schools contain a good share of lousy Socratic-method teachers. In every field, however, the failings of a few individuals hardly illegitimate the entire endeavor.

Macey not only denigrates clinical education, he worries that the law schools are falling under "the increasing tyranny of skills courses."⁴² Tyranny is an unlikely concept to apply to a course of study that has struggled for its place, and exists at best as a step-child at many institutions. Are there really law schools where clinicians crack the academic whip, and where traditionalists have fallen into helotry? The 1988-89 Catalog of the Cornell Law School, for example, lists only six courses that appear to employ the clinical method, from a total of sixty-nine.⁴³ None of those courses is required, and none is included among the "core courses" that every second year student is urged to take. If this is even nascent tyranny, then Cornell's business law curriculum (at least sixteen courses) must hold the school in abject thralldom.

Macey's position implies a distrust of law students. He suggests that if they seem attached to clinical teaching, this must be due to their own slack vigilance. The popularity of skills classes—as corrupt and seductive as they are—could never be the product of students' rational choice. The faculty, therefore, should "care enough to fight for high standards and commitment to excellence against the onslaught of mediocrity."⁴⁴ Is Macey saying that law students,

⁴¹ See *id.*; Imwinkelried, *supra* note 39.

⁴² Macey, *supra* note 2, at 1043. Macey's response asserts that he was merely calling upon law faculties to "think carefully" about how much emphasis to put on skills courses. Macey, *supra* note 36, at 959. Readers can draw their own conclusions as to whether comments such as the above qualify simply as a call for increased attention, much less a statement of enthusiastic support. In fact, Macey's Review contained not a single positive word about skills teaching.

⁴³ The six are Negotiation for Lawyers, Trial Advocacy, Handicapped Persons Law Clinic, Legal Aid I & II, and Family Law Clinic. There is also a course sequence entitled Practice Training I & II, but from its description it seems to encompass what most law schools call Legal Writing. I assume that Macey would not categorize the teaching of legal writing as tyranny. Additionally, "a limited number of students" are allowed to take a full clinical semester; students must apply for this program during the preceding academic year and the externships must be approved by a vote of the law school's administrative committee. 1988-89 CORNELL LAW SCHOOL CATALOG 17-21.

⁴⁴ Macey, *supra* note 2, at 1043.

in their self-indulgent sloth, should not be allowed to choose clinical courses ahead of subjects like finance and philosophy?⁴⁵

This paternalism is uncharacteristic of Macey. Elsewhere in his essay he offers market economics as the cure for our suffering primary and secondary schools:

We can lay part of the blame at the feet of public primary and secondary schools, where parents are unable to affect the quality of the education their children receive, because no market forces exist to constrain the shirking of public school officials. For one thing, parents of public school students cannot shop among alternative teachers or rival schools.⁴⁶

But Macey seeks to squelch this very competition within the law school curriculum.

These conflicting positions suggest a rich irony. Upper-class law students must surely be among the most sophisticated and informed consumers of education in the world. Increasingly they have come to law school after having already pursued other careers. By the third year most have been "summer associates," and many have already accepted jobs to follow graduation. Still, according to Macey, we should not trust them to shop among alternative teachers, lest they dilute their work load and while away the semester.

Macey distinguishes primary schools, on the other hand, claiming they only can benefit from the application of market forces. In the large cities primary education is in the worst repair. In these same cities many parents of young children are themselves poorly educated, some are even illiterate, and many are not fluent in English. A good number of these parents are no older than the typical law student. Macey assumes that these parents will be able to shop intelligently for schools and teachers and will never opt for easy or trendy alternatives. Their efficient choices will reward good educators and weed out bad ones. Perhaps he is correct that we need to establish a "market for education," but it is impossible to fathom how the application of the market could spell relief for primary schools and doom for legal education. Macey compares his position to that of a physician providing medical advice, but the analogy is

⁴⁵ Clinicians, on the other hand, do not discount the value of courses in philosophy, finance, economics and other fields. Neither Critical Legal Studies nor Law and Economics is in danger of a clinical kulturkampf. Clinicians recognize the essential role that both traditional doctrine and nouvelle analysis play in legal education. Clinical teaching's additional contribution emphasizes the discovery, organization, manipulation, verification, construction and imagination of facts. The so-called "skills courses" are typically the only place in the law school curriculum where facts are treated as something other than the opening paragraph of an appellate opinion. See FRANCIS KAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981).

⁴⁶ Macey, *supra* note 2, at 1044.

inapt.⁴⁷ His Review called for the enforcement of standards against the “onslaught of mediocrity,”⁴⁸ and that surely must mean something more than merely providing guidance. In any event, my point is not that student choice should control the law school curriculum, but rather to note that if markets can help elementary schools, they have their place in law school as well. Finally, I must note that it does not minimize paternalism to compare oneself to a doctor. Perhaps Macey, like Bloom, simply doesn’t like the competition.

CONCLUSION

Macey’s penultimate words on Bloom: “[T]he answer . . . is not to stifle dissenting voices, but to answer reasoned argument with reasoned argument, and to balance opposing views in a way that Bloom would abhor.”⁴⁹ Just so. Of course, I am on thin ice here. Jonathon Macey uses his response to identify himself as a friend of clinical teaching, and it is hardly my goal to persuade him that he is not. Open discussion of issues should, when we do our jobs well, always lead to greater clarity. Thus, I am satisfied to have given Macey the opportunity to explain.

I hope that he is no longer depressed,⁵⁰ although I still think that he got Allan Bloom all wrong.

47 Macey, *supra* note 36, at 961.

48 Macey, *supra* note 2, at 1043.

49 *Id.* at 1045.

50 See Macey, *supra* note 36, at 959.