Whither Legal Education

Michael Meltsner
WHITHER LEGAL EDUCATION*

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I was quite taken with the earlier architectural discussion¹ because during the nine wonderful years that I taught at the Columbia Law School, the only regularly working elevator in the building was restricted to faculty. This was one of the reasons why, when we constructed the new building at Northeastern Law School, we built it all on one level. I am sure the architectural scholars on the earlier panel will divine the political perspective that led to our decision. While we are on the subject of the impact of the built environment on the study of law, let me note that the fascinating experiment at CUNY (Queens) Law School mentioned earlier,² is going to continue in a renovated New York City Junior High School building across the street from a cemetery.

The first panel spoke about architecture. Now in the second panel, the two principal speakers include a practicing clinical psychologist, Dr. Redmount,³ and a practicing family therapist, myself. Is this a covert message from the organizers of the symposium? What are they telling us under the heading, “Legal Education—Needs of the Future?” At any rate, I am grateful for the opportunity to talk a bit about my own legal education in front of Professor Johnstone,⁴ one of my former teachers. I hope no one will conclude that he is responsible for the decidedly critical cast of my remarks.

Let me start with a brief story that illustrates the perspective of many of us who find ourselves often disappointed, sometimes even disgusted, with the quality and character of legal education. A Jewish mother and son lived in Poland as the Nazis drew near in the late 1930’s. Shortly before the actual invasion, a gentile couple offered to

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1. Brook, A Comment on Style: The Elevator as Metaphor, 30 N.Y.L. Sch. L. Rev. 547 (1985). Professor Brook’s article appears in this issue.
2. See Chase, American Legal Education Since 1885: The Case of the Missing Modern, 30 N.Y.L. Sch. L. Rev. 519, 540 & n.68 (1985). Professor Chase’s article appears in this issue.
hid them in an attic room from the advancing Germans. The son refused this invitation because he could not imagine being cooped up with his mother. A few months later the son was given the opportunity to escape alone from Poland to America. Again, he declined the offer. He could not imagine leaving his mother behind. This is the sort of ambivalent devotion that I bring to the subject of this symposium. I feel very much a part of what vexes me; as a result, my search for solutions begins in the past.

What was legal education like in the late 1950's when I went to law school? This was a time when your eminent Dean, James Simon, was in junior high school and probably thought that Douglas was the name of an actor who often co-starred with Burt Lancaster. It was a time when Professor Johnstone was so new to the Yale faculty that he still talked about farmland in his property class.

A 1950's law student was exposed to a first year that was remarkably similar whether one attended a state or private school, or studied in Cambridge or San Diego. Thereafter, a relatively small and predictable list of courses was offered to the student at his option. These electives allowed him (and it was a him) to range about the law but rarely to take more than a course or two on the same subject. The underlying assumption of this arrangement and array of courses was that law school should turn out generalists, that specialization would have to await practice, and that learning practice was best begun after law school. Even upper level classes tended to teach the method—case analysis—more than content. Third and sometimes second year students (especially those who did not enter that alternate law school called the law review) found their attention wandering. Bored and alienated, they marked time until going on a payroll.

The slight to practical legal skills explicit in the organization of the curriculum extended to the lawyer-client relationship, to the manner of dealing with and assembling facts, and to the study of the institutions with which lawyers deal as social entities rather than as objects of legal rules. Any class discussion of the "professional development" of lawyers amounted to nothing more than war stories. Professional development, by which I mean the role of the lawyer as a member of the community and as a human being—someone with feelings, doubts and perhaps a moral vision of his future in the law—was (and is) to be distinguished from "professional responsibility." Professional responsibility, when it was taught (usually by a dean), involved learning the canons, not really dealing with what was good or bad because it was (and still is) said that you cannot teach someone to be good. There was not much attention paid to trial practice either. Trial practice courses, when they were tolerated, were often seen as a means of getting eager teachers from the local bar off the school's back, or as a means of granting some distinction to a local judge; trial practice was not meant to play an integral part in the curriculum.

Perhaps the only exception to this three-year obsession with reading appellate cases (and occasionally statutes), accepting canned facts and cannibalizing judicial reasoning was the periodic discussion of something called "policy." I first heard this term from a student, not a professor. I was not sure what it meant. (I am still uncertain but my best guess is that "policy" serves as a catch-all for those considerations that are not thought to be fully legitimate aspects of rule making.) The tone used when "policy" was discussed suggested that social facts, actual consequences and apprehension of how institutions really behaved had to be bootlegged into the discussion of law the way a parent might sneak some Brewer's yeast into a child's orange juice. Nor was much attention paid during these years to the liberal education of the lawyer. A few institutions popularized the "Law and" course: Law and Psychology, Law and Economics, etc. What passed for conceptual thinking, however, was still mostly legal, by which I mean analytical and critical treatment of doctrine.

The law school world of today looks remarkably unchanged, at least compared to the enormous changes that have taken place in the doctrines that were then so much the foci of attention. I went to law school at a time when the precursors of Miranda were not dreamed of, much less N.Y. Times v. Sullivan or Roe v. Wade and the like. We did not study no-fault or joint custody or the availability of counsel fees.

There are, of course, a number of significant changes. In the eighties, minorities and women make up a far greater proportion of the law school population. Catalogues bulge with elective courses. There are a greater number of empirical undertakings and theoreticians who are attempting to integrate legal concerns with an understanding of how society and its institutions operate. The number of applicants, graduates and placements have grown dramatically. The greatest change is the arrival of clinical education. An early statement of the goals of

5. Goldner, Feminism and Family Therapy, 24 FAMILY PROCESS 31 (1985).
11. See 1985-86 PSYCHIATRY HANDBOOK 13. Table one lists the number of LSAT's taken, the number of students admitted to law school, and the number of new admissions to the bar for each year from 1965 to 1984. See also Ramsey, Jr., AFFIRMATIVE ACTION AT AMERICAN BAR ASSOCIATION APPROVED LAW SCHOOLS: 1979-80, 30 J. LEGAL EDUC. 377 (1980) (discussing similarly dramatic increases in minority enrollments).
clinical legal education put it as promoting:

1. Understanding that accompanies actual experience with processes and relationships within the legal system;
2. The development of professional responsibility as a result of the felt appreciation of the consequences and implications of choices and decisions; and
3. The development of learning skills, permitting the student to grow professionally and personally as new experiences are encountered.12

On the surface, these goals have been achieved; more than 700 clinicians at virtually all ABA-approved law schools teach clinical courses for credit.13 These courses range from immigration to poverty law to civil commitment to tax law to criminal defense to environmental law.14 Some offer an intensive, practice-related experience; others simulate phases of the lawyering process. These courses are sought after, their instructors are being tenured, and bar associations and judges respect them. They even incur the wrath of those they sue. Increasingly sophisticated teaching methods have been developed employing educational gaming, mock trials, computer exercises, and attention to the critical role of supervision to learning. Trial practice and professional responsibility courses that use experiential techniques are common. Finally, clinicians have begun to develop their scholarly potential by charting the identifiable competencies that make good lawyering, and by developing means of measuring those competencies. To be sure, more needs to be done to protect clinics from budget crunch and to improve the status of clinical law teachers, but to a remarkable extent the faculty opponents of the clinics have quieted. Everyone knows the clinic is here to stay. The problem is no longer making clinical education a legitimate part of the curriculum, but ensuring that instruction is of the highest quality. When one considers that the clinicians teaching in the late sixties could have met in a phone booth, William Pincus of the Council on Legal Education for Professional Responsibility (the organization that pioneered support of the law school clinic) has cause to celebrate.

If clinical legal education is primarily concerned with learning skills, with a more direct experience of professional responsibility, and

13. Association of American Law Schools, Directory of Law Teachers 1984-85, at 785-90. Sixty-six clinicians are listed as having taught for more than ten years, 172 for from six to ten years, and 513 for from one to five years. Id.

with greater first hand knowledge of the legal system, its job would have been done. But it is as well a critique of legal education and of how law is practiced; a challenge to how the norms of the profession are transmitted; a greater willingness to explore value judgments, interpersonal relations, and the lawyer's responsibility for justice. As to these goals, we have less of which to be proud. The job remains; an unkind critic might say that clinical education has been absorbed into the mainstream, declawed and tamed.

Law teachers are still obsessed with content. Courses are organized along narrow content lines. Little attention is given to relating, for example, what a student learns about economic policy in an antitrust course to what he or she learns about economic policy in a public benefits course. Each instructor still determines the approach in his or her own area, with only lip service given to an integrated vision.

The law curriculum is still organized around and controlled by the issue of coverage. The typical law teacher may be pondering the great issues in his or her field but is also sitting at a desk facing a book and wondering if it will get finished in time. The assumption seems to be that if all the leading cases and all the concepts are mentioned in the lectures or cited in the readings, then the job has been done. But if anything characterizes our legal system, it is perpetual change. For example, our system's approach to the death penalty has shifted from unquestioning acceptance to virtual abolition and back to virtually unquestioning acceptance. Why try to cover everything when it is the student's capacity to learn how to learn that will survive—not shopworn precedents, lists of hornbook rules, or vague and overbroad concepts? Perhaps we do it because it is the way it was done to us.

Thirty years ago, at Washington University School of Law in St. Louis, Dean Erwin Griswold gave a lecture that has outlived its time and stands as the forerunner of much modern criticism of legal education.15 Griswold, having been a tax lawyer, knew of what he spoke:

[T]he case method is essentially analytical. It leads to intensive dissection of problems. This is, of course, one of its great merits. But, as the problems are dissected, they proliferate. The fields of the law continually increase. The problems within each field divide and subdivide. Every time it is shown that a slight change of the facts of a case introduces new considerations, another problem is presented which the teacher is likely to feel obligated to cover. This was well enough in the early days of case teaching, for the law then was still in need of or-

organizing and systematization. Now it presents special burdens which merit our attention.\textsuperscript{16}

The condition that Griswold so clearly exposed remains with us.

The law curriculum also continues to have no discernible structure and coherence, as Roger Cranton has eloquently pointed out.\textsuperscript{17} Law school continues to be dominated by randomness of student experience, inattention to identifying basic competencies, and little evidence of structuring an educational program to teach and evaluate either. Law students are surprisingly uncertain about the principles to use in selecting elective courses. This state of affairs results in reinforcing the values of those large and powerful employers whose idea of legal education begins and ends with certain traditional analytical skills, as well as the values of those who believe law school exists primarily not to educate in the discipline of law but to provide an entry point on a career path.\textsuperscript{18} (A cynic might say that the single most important set of events in a legal education is the relationship of employer interviews to class schedules. A school that has given up its control over when students interview has also given up its power to present a vision of what should be learned and how.)

As critics have put it, the curriculum is neither sufficiently practical nor sufficiently theoretical. Skill courses will change the way lawyers learn only if they are sufficiently illuminating about how lawyers behave and how they should behave. They must transcend "how to do it." Legal theory will change the way law is learned only when the theory is no longer trivialized as doctrine or as a smattering of materials from an allied discipline.

Given the tide of criticism that has washed through the journals in recent years, even a first year student busily cramming for exams can put together a much longer list of items that call for attention. Choice of the object of change is subjective. Here are a few matters that interest me.

Little has been done to teach lawyers about the overriding human issues they must confront, a factor that contributes to the profession's lamentable reputation among the general public. Nothing has been done to correct what we might call the hidden costs of practicing law—the burnout in humanity and the damage done to intimate relationships that seem to go along with playing the lawyer's role.

Some years ago a survey of Michigan law students revealed that one in seven was so alienated as to drop out of school emotionally and intellectually, if not physically.\textsuperscript{19} Another large group was angry and dissatisfied with their legal education.\textsuperscript{20} Things don't get much better in practice. The profession's prestige in the community is so low that it is not surprising that there are also signs of low self-esteem among lawyers. The hidden costs of law practice include extreme anxiety or depression, alcohol and drug abuse, feelings of powerlessness about one's career choices, attempts to over-control personal relationships, and excessive hostility to others—all arising as a kind of carry-over from the "adversariness" with which lawyers must live.

Everyone recognizes these symptoms in members of the bar. They are not less important because a few non-lawyers also suffer from them. Nor do I suggest, in calling attention to them, that the rigor and standards of professional conduct should be replaced with a sort of pollyannaish view of the world or by utopian conflict avoidance. What produces these symptoms? More precisely, what professional norms, combined with personality factors and family circumstances, produce them? One cause seems to lie in those aspects of the profession that encourage us to suppress our real feelings and then reward us for doing so.\textsuperscript{21} This suppression of feeling, i.e., when we find ourselves coming to identify with our client's point of view, has important social value. Putting one's own feelings aside may serve to enhance our capacity to provide impartial professional judgment. How much of the professional is appropriately present in any particular encounter is a tricky business, not dealt with by "either-or" thinking. But suppressed feelings go somewhere, often to our private lives, where they arrive with unexpected and unpleasant consequences. Who has not had or heard of a marital fight where a spouse retorted, "Don't lawyer with me!" or "Stop cross-examining me!"?

I am suggesting that there are lawyering styles that are likely to get us in trouble with ourselves, or in our intimate relationships, or in some other aspect of our professional life, or all three.\textsuperscript{22} Those aspects of lawyering associated with the trouble are not mysterious. For exam-

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\textsuperscript{16} Id. at 220.

\textsuperscript{17} Cranton, The Current State of the Law Curriculum, 32 J. LEGAL EDUC. 321, 327 (1982). Except for the fact that one fundamental cognitive skill—case analysis—and one fundamental applied skill—legal research—come early in the law-school experience, the law curriculum has no perceptible structure, sequence, or organization. Id.

\textsuperscript{18} The virtues of the recruiting process at the University of Michigan Law School are subjected to somewhat differing evaluations by a dean, a professor, and a director of placement in To market, to market, 29 LAW QUADRANGLE NOTES, Winter 1985, at 7, 9.


\textsuperscript{20} Id. at 892-96.

\textsuperscript{21} The damage is a common by-product of professional life. See Kantor, Facing the Hidden Effects of Doing Therapy, in 2 QUESTIONS AND ANSWERS IN THE PRACTICE OF FAMILY THERAPY 279 (A. Furman ed. 1982). "Valuable as it is assumed to be for clients, the distance of the professional bystander takes its toll, for professional burn-out has two major sources—too much objectivity and too much empathy." Id. at 281.

\textsuperscript{22} Shafer, Preface to M. SWIGERT & F. BAY, MAXIMIZING THE LAW SCHOOL EXPERIENCE III, vi (1983) (discussing the "ambivalent discomfort of being a lawyer").
ple, to do our problem-solving work we control communication, we label and categorize, we become experts at analytic evisceration, we regard emotions as irrelevant and immaterial, we assume we know more than the people who are paying us and therefore get in the habit of making decisions on their behalf. Of course, we sugarcoat these pills. We act in the service of our clients’ interests and we know the value of appearing sweet and reasonable and prudent. But somehow the role doesn’t work for a good number of us and the results are destructive, not only for family life and intimate relationships, but for those clients or adversaries who get in our way when we have to let loose.

I think the law schools have a responsibility to make sure that this side of professional life is not permitted to remain invisible. Group therapy is not the aim here; but awareness and understanding of the personal burdens of representing others in an adversary system is the best hope we have of preventing the burnout, paranoia, free-floating hostility, and emotional undernourishment that much of legal practice promotes.

Modern legal work is complex not only because of the density of so much doctrine and the multiple sources of law and legal materials. Lawyers must also deal with the internal workings of organizations and institutions as well as the external influences impinging on them. The modern corporation, for example, has as its universe management, stockholders, directors, suppliers, consumers, lenders, investors, government regulators, accountants, foreign governments, employees, unions, and the factions of each group. Small wonder that the law firm as corporation has grown up to deal with the legal work of the corporate entity and that the business corporation is represented by teams of lawyers, no member of which has all the information, much less all the competence, to deal with the needs of the organizational client.

Lawyers have an enormous fund of information about the institutions of our society which comes directly from their work experience. But often that information depends on the particular case a lawyer has handled. A young lawyer who has been thrown into an acquisition fight will have a lot to say about corporate life—from the perspective of a person who entered it by looking at an acquisition. A broader and more useful perspective could be formed in school if we studied institutions as seriously as we study cases. In a field of mine, criminal procedure, I am amazed at how little the readings contained in most casebooks tell the students about the interdependent workings of various pieces of the criminal justice system. We still teach as if the most important perspective were that of the lawyer or judge dealing with a particular case or class of cases. In our curriculum, we still underrepresent the role of other decision makers and how the interrelationship of players in institutional settings affects what it is that lawyers do.

Law schools proceed as if individual lawyers, rather than large law firms, still represent the complex corporate client. Is the manner in which complex organizations operate so obvious that we can leave the learning of it to ad hoc opportunities? Are the business schools totally missing the point when they commonly offer training in organizational behavior and group dynamics? I doubt it. More likely, the law schools are doing what they are comfortable doing and have not yet been forced to offer a curriculum that features training not only in the behavior of the organization but also in the collaborative skills that are necessary for group legal work.

The reputation of the profession is foul and getting worse. I realize that much of the lawyers’ poor press has to do with hostility to the messenger—hostility to the consequences of society’s arrangements. When four young men threaten a fifth on the subway and gunfire results, public attention is not directed toward the social arrangements that led to the violence but to the action of the grand jury, the prosecutors and the judges. Because the public resists actually changing the bleak facts of rich and poor, white and black, educated and ignorant, it instead focuses on the reaction of lawyers and legal institutions. However, the profession has a responsibility for the way lawyers are perceived. For example, the source of much dismay with the profession has to do with the way clients are treated by the bar.

How much attention do the law schools focus on the lawyer-client relationship? Lawyers are still trained to take a narrow slice of the client’s life and are still paid to be loyal to it. But a greater loyalty resides in the subtle interplay between people; the stuff of professional life. When efforts are made to focus on the way lawyers experience their work, or on the way clients experience lawyers, the efforts are degraded as soft, or poaching on the domain of psychologists, or as bringing up matters that do not pay. When law firms hire, they are more likely to look at good grades than good judgment. One reason for this is that we do not attempt to teach, much less measure, the qualities of maturity and balance that make good judgment. Yet technical skill is of slight value without these qualities.

Here, in the eloquent words of my friend and former colleague, George Cooper,23 is an example of what I mean. Professor Cooper was supervising a law student in a South African legal clinic catering to black workers.

A client came in to complain that he had suddenly been fired from his job as spray painter in an auto body shop. When asked why it had happened, he said that his boss had seen him come back from the bathroom at 4:30 one day and had accused

him of ‘washing up’ early. ‘Wash up’ time was not until 4:45. The client said he had not been washing up but rather had gone to the bathroom to urinate. Further questions developed this story and brought out that the man had worked for this employer for five years. The student also asked questions like:

S. “Is your work good?”
C. “Oh, yes.”
S. “Any problems with your performance on the job?”
C. “Oh, no.”
S. “You’re sure you didn’t do something else wrong.”
C. “Oh, no, nothing else.”

We then asked the client to wait outside for a moment and the student and I discussed the case. He correctly concluded that the legal issue presented was whether the man had any statutory or contract rights against summary discharge on these grounds. In addition there might be cushioning rights—such as unemployment compensation—of which the man had to be advised. The student knew the likely course of all these rights, and where to find them. He thought he understood the case and the issues, and he proposed to schedule a follow-up interview with the client a few days later, after time for some legal research. I suggested however that he immediately call the client back to ask again whether there was anything more going on, since the story seemed so fishy. The student protested that he had already pursued that line of inquiry, which he had. I then proposed that he try a different approach. Not “What else did you do wrong?”, but “What else might your employer say that you did wrong?”, enabling the client to criticize himself by accusing another. We tried it, and the results were spectacular. An entirely different story came out, involving a dispute between the client’s immediate supervisor and the boss related to the client’s health problems from inhalation of paint fumes. This recast the entire discharge problem, making it much more intricate, and it also added a worker’s compensation issue which turned out to be even more important. What is more, it reoriented the student’s thinking about the relationship between facts and law. It demonstrated to him, as no lecture could, how thinking about one without the other masks the true complexity of a problem. A trivial case, you say, and I agree. An isolated case of a bumbling student, you say, and I disagree. This is an absolutely typical example of student behavior, in America as well as South Africa, when they are first exposed to reality. In part, the problem was a lack of skill in phrasing questions, but underlying that, the root causes of the problem, were (1) the absence of an instinct for the facts, for the critical importance of probing and digging to make certain you have the real story, and (2) a failure to appreciate that a person cannot be relied upon like a card catalogue to yield the desired information just because the right topic is pursued. Even if these problems were merely evidence of a gap in legal education we should be concerned and want to fill it. But it derives from more than a gap. It is actively caused by law school. Why? Because law students are trained, in course after course and year after year, with a system that puts facts in neat little packages—a hypothetical, a statement of the facts, possibly contrasting statements of the facts in different judges’ decisions—while leaving the law as the great uncertainty to be learned. Students are told to pay attention to the facts, but it is not all that hard to dig them out and certainly you don’t have to deal with those terrible nuisances, real people. The challenge is always the “law,” understanding how to find and analyze legal doctrine, and law students, expectantly, want to rush on to that, to the thing they think they know how to do. This “law” bias of law school of course turns reality on its head, as any practicing lawyer or legislator or even judge knows. In the world outside it is the facts and their sources that are the more unruly element. Finding them, presenting them, manipulating them, dealing with all the vagaries of the world has been, in my experience, always more of a problem than determining the law which, intricate though it may be, is at least packaged up in books neatly kept on shelves in a central location. But law school, in all good faith as an almost unbelievable byproduct of performing its traditional function, makes you think otherwise, and in so doing it makes the little incident I described almost inevitable.24

Yes, the problems clients bring us are unruly. So are we and so is the legal system in which we work. Bringing some order to facts and to clients’ lives, to the system of dispute resolution and to rule guidance that the law represents, is valuable work. In the world we live in, its importance to our very survival cannot be underestimated. But a passion for order ill suits a chaotic world. It threatens to widen the gap between our assumptions and what goes on outside this building—ironically, reducing our capacity to guide others toward justice.

24. Id.