

1985

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Recommended Citation

New York Law School Law Review, Vol. 30, Issue 3 (1985), pp. 621-628

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LEGAL EDUCATION FOR NON-LITIGATORS: THE ROLE OF THE LAW SCHOOLS AND THE PRACTICING BAR*

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In contemplating the future direction of legal education, we must give attention to the roles of the practicing bar and the law schools in the shaping of law schools' curricula. Clearly the profession controls certification of law schools and attorneys through the American Bar Association and the rules of admission to the bar in our various jurisdictions.¹ My focus, however, is on the less formal activities of legal educators and practitioners in defining the professional development and intellectual growth of law students that takes place—or should take place—in the law school. Rather than discussing this large question in terms of general themes, I will focus on one particular area of legal education—that is, law school education for non-litigators—as a framework for examining the broader questions that I pose and for developing some of the themes raised by Professor Gorman.² In this context I will explore some misunderstandings about legal education on the part of both the bar and law faculties, and suggest concrete proposals for their resolution.

I. THE LITIGATION BIAS OF LAW SCHOOLS

A major premise of this commentary is that law schools today do not do as good a job as they should in training our future lawyers to function as planners on behalf of their clients. Much is taught about how to litigate stillborn and pathological real estate transactions, transmission of wealth structures, and other consensual arrangements. Too little attention is paid, however, to the theoretical underpinnings and skills training necessary to help these future attorneys accomplish sound and creative transactional structures. Although there certainly are some courses at various law schools taught from a planning per-

* A comment on the remarks of Professor Gorman, delivered at the New York Law School Symposium on Legal Education, held on April 12, 1985.

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1. The American Bar Association, through its Section on Legal Education and Admissions to the Bar, sets uniform standards and requirements for law schools and oversees the manner of testing students' qualifications for admission to the bar. See ABA POLICY AND PROCEDURES HANDBOOK 19 (1982-1983).

2. See Gorman, *Assessing and Reforming the Current Law School Curriculum*, 30 N.Y.L. SCH. L. REV. 609 (1985). Professor Gorman's article appears in this issue.

spective,³ there are not enough of them given that much of lawyers' work is devoted to planning.⁴ Additionally, some of the planning courses which are actually offered at law schools are not as effective as they might be since they focus on numerous, unrelated problems rather than taking an intensive view of a limited number of broad transactions.

One of the greatest failings of current legal education is its primary focus on legal issues in the context of disputes and litigation. As we know, the heart of the first year experience, as part of the Langdellian legacy, is the analysis of appellate court decisions.⁵ While I agree with Professor Gorman that case analysis serves as a useful method to develop analytical skills, I also share some of his doubts.⁶ Additionally, I believe that the case system also imparts several negative subliminal messages to our students.

First, students are given the impression that trial and appellate work is the bulk of what attorneys *actually* do and what they *should* be doing. Empirically and experientially we know the former impression does not reflect reality,⁷ and professional responsibility requires the latter misconception not come to pass. I wonder especially about the psychic toll on students whose self-image revolves around the lawyer as spoiler, not facilitator.

Second, the case method, as taught by many, teaches students to analyze and respond primarily in an adversarial context. How many of us have asked questions along the lines of "Ms. Smith, if you represented defendant, what arguments would you make in this case?" Students are left with the view that legal issues are relevant only in the context of a full-fledged dispute and that all legal weapons available to the gladiators are appropriate and desirable. There is little sensitivity to a non-litigation context, where there may be a common goal shared by the parties (such as the development of a parcel of land) and where competent representation requires the forceful advocacy of a client's position without destroying the shared goals of the parties and their long term relationship.

Third, the focus on appellate cases fosters the idea that ultimately

3. See generally L. BROWN & E. DAUER, *PLANNING BY LAWYERS: MATERIALS ON NONADVERSARIAL LEGAL PROCESS* (1978); Cramton, *Rising Expectations in Law Practice and Legal Education*, 7 N. KY. L. REV. 159 (1980); Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654 (1984); Bartke, *Real Estate Transactions and the Law School Curriculum* (Book Review), 26 WAYNE L. REV. 1625 (1980).

4. See Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264, 270-72 (1978).

5. See Chase, *American Legal Education Since 1885: The Case of the Missing Modern*, 30 N.Y.L. SCH. L. REV. 519, 521 (1985). Professor Chase's article appears in this issue.

6. Gorman, *supra* note 2, at 610.

7. See Baird, *supra* note 4, at 270-72.

a third party, weighing arguments of precedent and policy, will resolve most, if not all, legal disputes. We know, instead, that lawyers must operate in a world of grey when advising clients on transactions and helping them to plan their affairs.

Finally, I believe some professors communicate a perspective that an attorney can make an impact by making new law only as a litigator, ignoring the important role of the lawyer as reformer through the legislative and law reform commission routes.

The litigation orientation of legal education extends beyond first year curriculum. Even clinical education, an important, relatively recent addition to law schools, is mostly arranged around a dispute. To be sure, in the context of these disputes clinical education explores alternatives to litigation, such as negotiation, mediation, and settlement, and there are some clinics focusing on non-litigational legal problems.⁸ Still, the dominant clinical scenario involves litigation, rather than transactional planning. Similarly, the current interest among legal educators, the bar, and the judiciary in alternative dispute resolution presupposes the existence of a dispute that requires attention through traditional or non-traditional means.

Somewhat surprisingly, even many of the criticisms of current legal education coming from outside of the law schools also seem to assume that legal education should focus on litigation.⁹ While these doubts about the adequacy of preparation of law students for trial and appellate work deserve attention, they should not obscure the need for reevaluation of legal education in non-litigation disciplines.

II. IMPEDIMENTS TO PLANNING COURSES

I leave for another occasion discussion whether the negative implications of the case method outlined above balanced against its substantial benefits require a major reworking of the law school curriculum.¹⁰ Instead, I will focus on a more limited, but to my mind significant, reform—the development of courses and materials for the teaching of some substantive areas of the law from a planning perspective and the recognition of these courses as an important and respected part of the curriculum.

8. *E.g.*, the Small Business Clinic at the University of Pennsylvania Law School.

9. See Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227, 232-33 (1973). According to Chief Justice Burger, inadequate advocacy can be traced to law schools that "fail to inculcate sufficiently the necessity of high standards of professional ethics, manners and etiquette." *Id.* at 232. The Chief Justice proposes a two year basic legal education, after which a more specialized education would be offered. *Id.*

10. See generally Chase, *supra* note 5.

A. *Faculties and Planning Courses*

Let me first address some of the factors relating to law faculties that have been impediments to instituting a greater number of planning courses.

First, there is a stigma attached to planning courses by some legal educators. One criticism of planning courses is that they are simply "how to" courses, lacking intellectual rigor.¹¹ However, this need not be the case. Challenging planning courses can be developed requiring students not to be scribes but to be creative craftsmen, able to analyze difficult areas of the law, advise on courses of action in light of uncertainty and develop legal structures to meet the needs of hypothetical clients and transactions. Moreover, policy analysis should be an integral part of such courses, with students formulating and analyzing legislative proposals and model codes to address inadequacies of the current law. This may be an especially appropriate area for interdisciplinary analysis of the kind that Professor Gorman finds currently lacking in much of legal education and a means of focusing needed attention on the legislative and political processes. Additionally, planning courses can examine ethical problems outside of the litigation context, meeting the need for the increased and diverse ethical exploration which Professor Gorman suggests.¹² High quality planning courses can rebut current claims that legal education is both inadequately theoretical and insufficiently practical. Those of us who believe that legal doctrines should be developed not in the abstract but in light of the actual actors and events that they will control should welcome planning courses since they give exposure and sensitivity to actual transactions and relationships between parties.

Second, as we know, during the late 1960's and 1970's law school enrollments boomed.¹³ Included in those ranks were many of the most intellectual of America's college graduates who chose to attend law school rather than seeking advanced degrees in the social sciences and the humanities because of the lack of opportunities in those disciplines and the political consciousness of the times. After a stint in practice, some of these law school graduates have gone into law teaching, seeking an outlet for their intellectual inquiries unavailable with the demands of legal practice. This may help to explain some of the antipathy among some of the newer generation of law professors towards

11. See H. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 43 (1972); A. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 219-20 (1976).

12. Gorman, *supra* note 2, at 616.

13. The average annual enrollment in the years 1966 to 1969 and 1970 to 1979, inclusive, was 69,762 and 114,602, respectively. In the years 1956 to 1965, inclusive, the average annual enrollment was only 48,698. See *A Review of Legal Education in the United States—1981-82*, 1982 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR 53.

planning courses as being insufficiently theoretical and too practice oriented. If we are aware of the sociological and personal issues that I suggest may be involved, we may be better able to address and resolve the concerns raised about planning courses.

Third, the use in planning courses of model transactions based on the law of a particular jurisdiction may pose a threat to a law school's self-image and image among other schools as a "national" law school. This is an issue of importance, for example, in the teaching of real estate law, which varies widely from jurisdiction to jurisdiction. To be sure, a course focusing on insignificant, local transactions might have the feared negative effect. I believe, however, that an approach requiring students to closely analyze non-routine transactions under the microscope of the law of a single jurisdiction may provide an especially rigorous and comprehensive educational experience, since students and professors would be forced to confront difficult issues in a limited universe, without being able to escape by resorting to the vagueness of "national trends." Concentrating on the law of a single state in this way can serve as a model for problem solving in any jurisdiction.

Fourth, while faculty members can stay current for litigation oriented courses by reading newly decided cases, it is more difficult to follow new trends important for planning courses because they are often not the subject of case decisions or new legislation,¹⁴ and secondary sources have their limitations. Although it is hard for law teachers to stay current with the state of the art in planning courses, it is critical that they do so. I am reminded of a story about students in a vocational high school in my old home town who were trained in automotive repair by working with instructors on cars that had been donated to the school. Upon graduation, however, these students were unable to function successfully as mechanics because, as it turned out, the automobile engines with which they had practiced in school were so old as to be obsolete.

Finally, we should remember Professor Gorman's statement that "new directions [in legal education] require extraordinary self-awareness, humility, courage, hard work and re-training" on the part of faculties.¹⁵

B. The Bar and Planning Courses

Let me now describe some misconceptions held by some practicing attorneys about the goals of legal education that are especially relevant to the teaching of planning in law schools.

14. Consider, for example, the recent evolution of alternative mortgage structures, which are essentially a function of private agreements, not case decisions.

15. Gorman, *supra* note 2, at 613.

First, the bar should be realistic in its expectations about what law schools can impart to students given the schools' limited resources and amount of time with their students. Like other professionals, the young lawyer gains proficiency in his or her work over the course of years, through the learning and growth derived from the experience of practicing law. Indeed, it would be a sorry commentary on the legal profession, and also on the human condition of attorneys, if three years of study could produce a graduate who has learned all that he or she ever needs to know to practice law effectively for a lifetime.

Second, practicing lawyers must recognize that the legal education goals of some attorneys and the interests of law students may be divergent. The increasing economic competitiveness of law practice making the attorney-employer prefer an attorney-employee who can immediately produce a return for his or her salary, the decreasing number of partnership opportunities reducing the long term commitment by partners to associates, and the rise in an assembly-line type of practice by some attorneys may lead some members of the bar to favor the development of law school graduates who are fully trained to perform only a few discrete, and relatively routine, tasks (such as standard real estate closings) at the expense of a broad and theoretical legal education. Law schools, however, have an obligation to meet the long term goals of their students, the far sighted members of the bar, and society, by providing students with theoretical and analytical tools that will serve as a foundation for a fulfilling professional lifetime of service to clients and the larger community. This tension between short and long term goals may be especially great in the case of planning courses because they can be taught with varying emphasis on the practical and the theoretical.

Finally, practicing lawyers should also take to heart Professor Gorman's advice to faculties for self-awareness and courage when considering legal education reform.¹⁶

III. SOME SUGGESTIONS

I would like to offer some specific suggestions for cooperation between the law schools and the practicing bar that can help meet some of their respective concerns and lead to the teaching in law schools of rigorous and creative planning courses. First, as President Stevens has described,¹⁷ historically, American law schools and attorneys have been unclear as to whether the mission of law schools is to teach law with a

16. *Id.*

17. R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850's TO THE 1980's* 24-25 (1983) (discussing the historical tension between practical apprentice-type education and academic legal education).

practice oriented, professional school approach or as an abstract, intellectual discipline. While some may view this as a sure sign of schizophrenia and others may see this as an identity crisis, I see this as a beneficial, ongoing dialectic, reflecting the fact that graduates of law schools perform a wide variety of tasks in our society. I think that maintaining a dialogue about these issues is vital. Professor Gorman has suggested that law schools and law firms should exchange information about the pedagogical process that goes on in both institutions.¹⁸ As a means to implement this idea, I would propose that this exchange be formalized to some extent and not left to random contacts between individuals. There are a variety of possible structures. One possible arrangement would be for the law school to sponsor a series of seminars each year to which a group of practitioners would be invited to discuss specific pedagogic issues. One of the first topics on my list would be the teaching of planning courses in law school, and how to address the barriers to those courses. These seminars could, I hope, transcend finger-pointing, bitterness, and complacency on the part of practitioners and professors and lead to a dialogue helpful to both the lofty and prosaic goals of the profession and educators.

Second, the practicing bar can help in several ways in keeping faculty members who teach planning courses informed about new trends. Professor Gorman's suggestion that law schools should invite "attorneys in residence" to co-teach courses and participate in the development of teaching materials¹⁹ would be especially valuable for planning courses where the best information about new problems and trends is likely to come from lawyers actually confronting them. The perspective of the attorney in residence in combination with a theoretical viewpoint of the law professor could make for a rigorous and responsive learning experience. As an alternative or a complement to an "attorneys in residence" program, traditional co-teaching between a full-time faculty member and a practitioner could also produce a valuable union of theoretical analysis and current problem solving.

Third, practicing attorneys could take the lead in the effort to inform law professors on current trends in two other ways. Law firm departments that hold regular in-house educational programs addressing new developments in their practice specialties could invite law professors to attend these sessions; the faculty member, having the benefit of a neutral perspective, could likely make important contributions to these discussions.

Additionally, law firms could establish "professors in residence" programs during the summer months. The professor would be employed full time (for a salary) at the firm and would work on transac-

18. Gorman, *supra* note 2, at 617.

19. *Id.* at 616.

tions, observe practitioners, and participate in new developments; this experience could be incorporated by the professor into his or her teaching. The law firm could benefit from the legal work performed by the professor, especially from the professor's broad outlook on legal problems the firm faces, his or her insights on projects, and his or her assistance in the education of young lawyers at the firm. A professor in residence program would differ from traditional consulting work by law professors since it would include junior faculty (who usually do not do consulting) and because the goal would be to expose the faculty member to new issues and not necessarily ones in which he or she already has great expertise. *Occasional* service as a professor in residence could enhance, rather than harm, the professor's productivity as a scholar and teacher.

Finally, members of the bar could provide funding and grants to encourage the development of teaching materials for planning courses. These financial incentives would also be a tangible demonstration of the bar's concern for this issue.

* * *

I believe that increased communication and cooperation between the law schools and the practicing bar can help alleviate misconceptions and provide a legal education that better serves the needs of law students, the bar, and society. This collaboration, moreover, can encourage increased non-traditional approaches, such as planning courses, in legal education.