The Law School and The Profession:
A Need for Bridges

Address to Students of Center for Study of Law
Nova University
Fort Lauderdale, Florida
January 29, 1987

by

United States Circuit Judge Frank M. Coffin
U.S. Court of Appeals for the First Circuit

It is singularly appropriate that a judge address the twin subjects of the law school and the profession . . . for he is equally remote from both. And, though he might be expected to recuse himself because of lack of expertness in either field, such a defect has never yet prevented the bench from giving its opinion. Moreover, distance from and lack of intimate participation in either academia or the practice of law might at least contribute some objectivity and perspective. In any event I shall follow the example of Winston Churchill who began an address to the French people with perhaps more courage than prudence, saying, "Prenez garde. Je vais parler francais."

I propose that we have a look at both the institution of the law school and the profession of the law, and their relationship to each other, past and present, with the aim of identifying what it ought to be in the future. It seems to me that we are in a time of challenge and flux when the law schools of the nation are seeking a clearer sense of mission and when the profession is in the throes of an unplanned and unpleasant transformation. The great question is whether the law school and the profession have anything to contribute to each other.

We begin with a brief retrospective view of the law school. In the mid-nineteenth century, it was a placid place where quiet inspiration was largely gained from reading and listening. Senator Hoar of Massachusetts describes, late in life, his experience at Harvard Law School at mid-century:

> The youth breathed a legal atmosphere from morning till night all the year round. He had the advantage of most admirable instruction, and the resources of a complete library. He listened to the lectures, he studied the text books, he was drilled in the recitations, he had practice in the moot courts and in the law clubs. He discussed points of law in the boarding-house and on his walks with his companions. He came to know thoroughly the great men who were his instructors, and to understand their mental processes, and the methods by which they had gained their success.[1]

Such a warm appraisal a half century after the fact was not shared by young Oliver Wendell Holmes, Jr., writing in the 1870 American Law Review:

> For a long time the condition of the Harvard Law School has been almost a disgrace to the Commonwealth of Massachusetts. We say "almost a disgrace"

[1] Arthur E. Sutherland, The Law at Harvard 142 (Cambridge: The Belknap Press of Harvard Univ. Press 1967).

> because, undoubtedly, some of its courses of lectures have been good, and no law school of which this can be said is hopelessly bad. Still, a school which undertook to confer degrees without any preliminary examination whatever, was doing something every year to injure the profession throughout the country, and to discourage real students.[2]

Earlier in the very year of this alarum, a man who had attended the Harvard Law School in Senator Hoar's time, and then had practiced law in New York for sixteen years, was made the first Dean of the school. Appropriately named for a discoverer, Christopher Columbus Langdell brought to legal education what Justice Blackmun has recently called "the only really brilliant idea legal education has had in 100 years."[3] This was, of course, the Socratic case method. It was based on the concept of law as a natural science and the phenomena or specimens it studied were appellate opinions. Each student would need his own book of selected opinions for study. But then he would

> still need help in learning to classify the cases, to distinguish like from unlike despite superficial similarity, to reject as useless opinions which were ill reasoned, based on bad logic, and hence were flawed specimens, unsuitable for generalization. Learning this art of analysis and discrimination requires first careful study of the material, then discussion with others, submission to questioning, justification of the student's judgment, or confession of error when error becomes apparent.[4]

This concept of law as a science, with a very specific body of materials, and a dialectic to accompany, is known to all of us and is still a large part of our formal legal education. There is, however, another component of the mission Langdell gave legal education. It is a paradoxical one, when we consider that a major parting of the ways between the civil law and the common law by the end of the thirteenth century was the stewardship over legal education exercised by the Inns of Court in England as opposed to the university. For the fourth component of the Langdell formula was a distancing of the law school from the profession. At the end of Langdell's deanship, when he was succeeded by the brilliant teacher-scholar, but never a practitioner, James Barr Ames, President Eliot proclaimed:

> Professor Langdell early advocated the appointment as teachers of law of young men who had had no experience whatever in the active profession. What a venture was that, gentlemen; what bold advice as that for the head of the School to give!...
>
> And what does it mean? What is to be the ultimate outcome of this courageous venture? In due course, and that in no long term of years, there will be produced in this country a body of men learned in the law, who have never been on the bench or at the bar, but who nevertheless hold positions of great weight and influence as teachers of the law, as expounders, systematizers, and historians. This, I venture to predict, is one of the most far-reaching changes in the

---

[2] Id. at 140.
[3] National Law Journal, Sept. 22, 1986, at 2
[4] Sutherland, op. cit., at 176-177.

organization of the profession that has ever been made in our country.[5]

This step had not been universally acclaimed. In 1876 (three years after Ames started teaching), Louis D. Brandeis, who was enthusiastic about the case method of teaching, wrote:

> Last year, it seemed to be Ames's great aim and object to convince us that nine-tenths of the Judges who have sat on the English Bench and about ninety-nine-hundreths of the American Judges did not know what they were talking about.[6]

He contrasted Ames with another recent addition to the faculty, ex-Chief Justice Bradley of Rhode Island. Bradley, wrote Brandeis,

> rejoices over the gradual growth of Equality doctrines in our law and the ultimate rule of real justice and right .... He desires that there should be no distinction between what is "legally right" and what is "morally right." Ames is like the inflexible professor of the deductive method, who being timidly informed that his principles, if carried out, would split the world to pieces, answered carelessly: "let it split; there are enough more planets."[7]

A few years later, in 1883, the first Dean of the Faculty, Ephraim Gurney, deeply concerned about "the contemptuous way which both Langdell and Ames have of speaking of Courts and Judges," had written President Eliot these ominous forebodings about Langdell:

> He is as intrangiseant as a French Socialist, and his ideal is to breed professors of Law, not practitioners; erring, as it seems to me, on the other side from the other schools, which would make only practitioners. Now to my mind it will be a dark day for the School when either of these views is able to dominate the other . . . .[8]

Now we have been talking about a basic philosophy and format of legal education that began 117 years ago. To large extent these remain our major premises, articulated or inarticulated. But criticisms have been voiced. One is that the Langdellian tilt toward the exclusive importance of intellectual analysis misses an important ingredient of actual practice. Dean Redlich of New York University School of Law has this criticism:

> The case method, with its emphasis on principles of law rather than facts, leads to a teaching environment in which theoretical constructs are considered far more important than facts. Cases are selected for casebooks because they illustrate new legal principles, and rarely because they demonstrate how changing facts will affect the application of those principles. In such an environment, law teachers will inevitably project themselves as being far more concerned with legal principles rather than operative facts. It is then but a short, and devastating, step to

---

[5] Id. at 184.
[6] Alpheus Thomas Mason, Brandeis A Free Man's Life at 37 (N.Y. The Viking Press, 1946).
[7] Id. at 37.
[8] Sutherland, op. cit., at 188.

the conclusion that sharp thinking is far more important than careful preparation.[9]

A related criticism is that, while medical education reform has moved toward greater clinical and laboratory instruction, legal education reform, until very recently, was unconcerned. Circuit Judge and former Dean Dorothy Nelson points to a 1978 study of 1600 practicing lawyers who have seen no help from their law schools in drafting, in negotiation or in counseling clients.[10]

A third is that "thinking like a lawyer" -- the target of Langdellianism -- pays too little attention to the fact, as an American Bar Foundation study observes, "that the end of a court case is often only one step in a continuing conflict rather than a final settlement" and that clients often fear "that lawyers will translate a good working business relationship into a fight over a narrow legal point."[11]

Finally, former Yale Dean Harry Wellington has been concerned with what he has discerned among law professors as a "scorn" for the practicing lawyer's work, which he feels contributes to the extensive and intense unhappiness of law students."[12]

Over the past twenty-five years there has been considerable response to these criticisms -- an infusion of clinical programs and of courses such as philosophy, history, and economics. And, most recently, courses in negotiation, alternative dispute resolution, and counseling. Indeed, the situation in legal education -- if we really considered it a science, as Langdell did -- has the earmarks of a scientific revolution as defined by Thomas Kuhn. In his book, The Structure of Scientific Revolutions, he defines such revolutions as "those non-cumulative developmental episodes in which an older paradigm is replaced in whole or in part by an incompatible new one." They are, he continues, "inaugurated by a growing sense . . . that an existing paradigm has ceased to function adequately in the exploration of an aspect of nature to which that paradigm itself had previously led the way."[13]

Before we jump to any conclusions about legal education, let us take a look at the state of the profession. That profession, viewed as a universe, is divided into two spheres. We can call them Megalaw and Medilaw, big law and middle to little law. The first is the world of the high tech, fast track giant firms, serving corporate and institutional clients, 250 of the largest now averaging 194 lawyers, the largest now having over 800 lawyers, the top seven having over 500 each. One quarter of all these lawyers work in branch offices.[14] Some 50,000 lawyers! Growth of the largest, 16 percent a year. Starting salaries now well over $65,000. Fees over $525 an hour for some. Billable hours -- 2000 and up; some boasting of 4000 billables a year -- a 50-week year of 80 billable hour weeks. A world of specialization, complex litigation, rainmakers, hustling, computerization, the subcontracting out of recruiting and training, out placement services for the discards, and the rise of the law office managerial class. In the other sphere, 21.3 percent of all lawyers are in solo practice; 22 percent work in a 5 to 10 lawyer firm; and 70.2 percent work in firms of fewer than 20 lawyers.[15]

---

[9] Frances Kahn Zemans and Victor G. Rosenblum, The Making of a Public Profession at 201 (Chicago: American Bar Foundation 1981).

[10] Dorothy W. Nelson, "Justice -- A Universal Responsibility," XIX Suffolk Univ. L. Rev. 815, 826.

[11] Zemans and Rosenblum, op. cit., at 204.

[12] National Law Journal, Sept. 22, 1986, at 2.

[13] Thomas S. Kuhn, The Structure of Scientific Revolutions at 92 (2d ed. Chicago: The Univ. of Chicago Press 1970).

[14] National Law Journal, Sept. 22, 1986, at S-2-24.

[15] Amercian Bar Association Journal, Sept. 1, 1986, at 44, 47, 50

As for life in Megalawpolis, there are those who are thrilled with the excitement of being in on the big cases, the great takeovers, the stunning mergers. But listen to one witness, Ruth Hochberger, a publisher of newsletters for lawyers. She finds the reason for the $65,000-plus starting salaries is one stark fact: "The life of a large firm associate is awful." She documents with detail:

> The hours are oppressively long, sometimes around the clock for days on end. The work is often boring, and involves proofreading or basic legal research in solitude in the library, frequently with no indication of what the end product is or what use will be made of it. Training and supervision have, in many places, become close to nonexistent as firms get busier and busier, the tenure of associates gets shorter and shorter, and the number of bodies required to staff enormous corporate matters becomes so large that partners frequently do not know the names of all the associates to whom they are paying these exorbitant salaries.
>
> The positive reinforcement -- with joy in a job well done or a deserved pat on the back -- is routinely missing; substituted is an end-of-the-year bonus when the firm has a good year.
>
> And the final payoff -- the coveted partnership -- is so remote, sometimes nine or 10 years away, with so little chance of occurring (often entering classes of 50 first-year associates are whittled down to one or two partners) that it often seems about as random as winning the state lottery.[16]

On the other hand, an American Bar Association study, published at the same time, records the typical practicing lawyer as enjoying his practice, as being active in civic activities, wishing only that there was more time to spend with spouse and children. A healthy 59.4 percent said they would choose a legal career again.[17] Yet here, too, all is not completely serene. The same ABA, in 1984, reported that only a third of the nation's lawyers under age 30 were "totally happy" in their work; even at age 50 less than half were "totally happy."[18] At the same time, Mary Ann Altman of the well known management consulting firm, Altman & Weil, Inc., filed this somber report on the profession as a whole:

> Lawyers today are leaving the practice for new careers outside the law as never before. A lifetime commitment to a group of partners is a thing of the past. Increasing numbers of lawyers are admitting that they find the practice of law neither interesting nor challenging.
>
> Others complain that the practice atmosphere has become tense, pressures have increased and the practice is no longer a caring human occupation.[19]

The reasons? The increasing dominance of computerized technology, the displacement of the private secretary, the disappearance of quality judgments in determining compensation, the

---

[16] The National Law Journal, Sept. 1, 1986, at 13.

[17] ABA Journal, Sept. 1, 1986, at 44, 47.

[18] ABA Journal, February 1984, at 50, 54.

[19] Mary Ann Altman, "Fostering Firm Culture Can Stop Dehumanization of a Practice," National Law Journal, Jan. 12, 1987, at 15.

boredom inherent in much specialization, the decreasing amount of long-term client-counselor relationships, an increasing lack of trust coupled with fierce competition within the profession, and increasing disrespect from outside the profession. But there is this difference: in Megalawpolis the die is cast, the trend to giantism irreversible; in Medilawpolis, the future may be more open to human experimentation, leadership, and humane resolution.

If this picture of the current state and direction of the practice of law is basically accurate, then it seems to me that there are serious implications for legal education. I am not talking of any educational revolution in Kuhn's sense, for I visualize no excision of much of the Langdellian mode. I see no new paradigm which is incompatible with the old. As Professor Arthur Miller has urged, there is still a justification for striving to make the classroom experience "an intense experience," just as the courtroom is often intense.[20] Dean Redlich of N.Y.U. states the case in this way:

> The case method and Socratic dialogue may no longer make up the exclusive law school fare, but enough remains (particularly in the first year) to create an intellectual skepticism that sparks an inquiring mind to question underlying policies and values. Traditional classroom teaching has been criticized for thriving on the students' classroom mistakes, but the method also thrives on bad policy judgment, arbitrary actions of administrators, foolish legislative choices and the erroneous reasoning of judges. All of this provides a strong antidote to the inherent conservatism of the legal profession.[21]

No, I am not suggesting any substitution of techniques. There is room for the Socratic case method, as there is room for lectures, for independent reading, research, and writing, for work with computers and videotapes, for problem solving, for moot court, for clinical experience, for role playing. What seems to me to be indicated by our overview of the profession is a recognition by the law schools of the country that they and the profession are indissolubly linked. Since the law school has its reason for being in the education of lawyers, it has an obligation to do what it can to assure the survival of a noble and humane profession whose demands and rewards will continue to attract bright, hard-working, and socially concerned young men and women. The school also has an obligation to infuse into its three-year stewardship of its students whatever it can effectively teach of values, attitudes and disciplines that will be demanded by that profession.

This may suggest a mere restatement of the ancient dispute between academic teaching and clinical experience, between intellectualism and vocationalism. This is not my intent. It is a more fundamental suggestion that the law schools adopt Dean Gurney's advice to President Eliot and abandon any sub silentio policy, intended or not, of maintaining distance from the legal profession. It is not that I want the school and the profession to assimilate each other's characteristics, but rather that I see the need for a much more creatively symbiotic relationship -- for the survival of the profession as we know it and for the relevance of the law school as we wish it.

What is implied in such a relationship?

The first implication is that the practicing profession be more of a presence in the law

---

[20] Interview, Vol. 18, No. 11, The Third Branch, Nov. 1986 at 10.

[21] Norman Redlich, "Why Must Law Schools Blur Students' Vision?" The National Law Journal, August 18, 1986, at S-18.

schools. I do not mean that the faculties need do anything that does not come naturally; the superlative intellects, prodigious research and coruscating teaching abilities of the Langdellian faculty type are priceless resources. But there can occasionally be hirings of teachers whose major background has been practice rather than teaching and publication. And there can be special lectureships for lawyers on sabattical -- an increasingly frequent practice, as well as places for judges and lawyers-in-residence. There can also be awards for distinguished practitioners and speakers invited to campus.

As Dean Redlich has intimated, the role model function of teacher is perhaps something we have underestimated. To the extent that the role model available to students is confined to the razor-sharp analytical intellect, they miss the opportunity to experience other minds who have coped successfully in solving problems across the vast spectrum of human affairs.

I think, for example, of the role-model someone like Brandeis would be -- a person who combines a first rate mind with broad business, civic, and legal experience and a concept of his mission as a counsellor at law to serve as "lawyer to the situation," enhancing the long-run interests of all parties.

Another implication for legal education of its responsibility to the profession lies in the subject matter of the curriculum. I suggest that law schools can safely forget the demands of Megalawpolis. Perhaps whatever schools want to consider themselves in the top ten or twelve may, for fundraising reasons, want to conduct a course or two in mergers and acquisitions. But the large firms themselves are the primary source of education in what the large firms do.[22] Most law schools would do well to prepare their students for the real world they will enter and serve. That world is one where litigation is vastly overrated. Not that it is unimportant. It is both important and exhilarating to try a case before a judge, and especially before a jury. But trials are relatively few and far between. Ninety percent of federal court cases, for example, terminate without trial.[23] Much of what we call litigation is writing out questions and answers. Far more central to the lawyer in Medilawpolis are counseling, negotiating, and settlement. And preventive law as opposed to reactive law. Yet these are the skills which studies have shown have seldom been the focus of any effort in law school. An American Bar Foundation study has noted:

> Neglected by law schools are the interpersonal skills so important to the client-oriented problem solving that is the task of the legal professional. The more analytic skills may constitute the ideal symbolic work of the legal profession, but very often they are not deemed to be as useful as interpersonal competencies in the actual practice of law.[24]

In short, to the grounding in Socratic dialectic, which prepares for an adversarial, competitive style, schools should consciously strive to add the imparting in small groups of the outlook and skills fostering collaboration and problem solving.

Still another implication lies in the field of inculcating a sophisticated sense of professional responsibility, a subject where, according to Judge and former Dean Dorothy

---

[22] Zemans and Rosenblum, op. cit., at 203.

[23] Alan J. Tomkins, "Civil Dispute Processing" (Book Review), 69 Judicature, No. 6, April-May 1986 at 370, 373.

[24] Zeamans and Rosenblum, op. cit., at 163.

Nelson, "much of the instruction is mechanical."[25] Here is an area where thoughtful practitioners can make a profound difference in the sensitizing of young lawyers to the ethical dimensions of their complex work.

In addition to encouraging more of a role model presence of the profession on campus, more attention to developing the "interpersonal competencies," and a more sensitized effort to inculcate a sophisticated sense of professional responsibility, the law school can do more to prepare its students for their career decisions. At the present the schools look on helplessly as the phalanxes of big firm recruiters descend and as students shuttle across the country for weeks of interviews. Before all this is deemed inevitable, schools should try to be in a position to give their students the best and most up-to-date information on all options. The presence on campus of some who know what the practice of law is in firms big, middle and small, in government, and in the public interest sector could measurably improve the quality of counselling -- not only as the student prepares to choose his first job but also later on as the former student considers a change.

Finally, perhaps the most important contribution that the law school can make to the profession is to catalyze, lead, and coordinate efforts to look ahead to the future prospects and problems of the practice of law. I have said that, unlike Megalawpolis, Medilawpolis is still malleable. Directions can be changed, new forms can be molded. But forethought and planning are essential. The key questions are: how can solo practice survive? How can legal services be made more available to the poor and the middle class? What kinds of economies and cooperative groupings may be available for the person who wishes to practice alone or in a small group? What new forms of practice should be encouraged, such as clinics, prepaid insurance plans, institutional provision of legal services for church members, retirement home occupants, tenants, one-stop "package services" providing legal advice with other professional services? How can law schools assist? How can general practitioners have the services of experts? How can large firms best fulfill their pro bono obligation?

Bar associations and law schools in a number of states -- Maine, California, Colorado, Connecticut, Minnesota, and at least seven others -- have undertaken efforts, ranging from day-long conferences to professional surveys, workshops, interviews, and substantial reports, all aimed at planning for a future profession that will retain as much of its attractiveness as possible. In my own state of Maine, a Consortium on a Study of the Future of the Maine Legal Profession has been formed, in which the University of Maine Law School is a key participant.

A final role in which the law school may strengthen the profession is that of continuing education. Of course one area is education in legal specialties -- an area where today so much time is perfunctorily spent in order to accumulate required credits. As a result, the term "continuing legal education" is held in bad odor by some. But wholly apart from traditional subjects, law schools could carve out a new area of education in the broad and liberal tradition of a humane profession -- holding themselves out to help resolve for judges and lawyers alike tension and pressure by lifting their sights and broadening their horizons. Law schools could serve as honest brokers between the bench and bar for which they educate and the arts and sciences faculties of the universities with which they are affiliated.

All of this is leagues away from Langdell's and Ames's inarticulate premise that the

[25] Dorothy W. Nelson, "Justice -- A Universal Responsibility," XIX Suffolk Univ. L. Rev. at 814, 815.

profession and the school have nothing to do with each other. On bridging the gap in creative ways consistent with the independence and genius of each depends the possibility of becoming an old fashioned lawyer in a new fashioned world, to wit:

-- in a world of increasing specialties, retaining something of the generalist;

-- in a world stressing technical competence, retaining something of the broad view that once justified the law in being included among the humanistic professions;

-- in an era of exaltation of adversarial combat and increasing delays and costs of litigation, finding ways of serving clients by seeing the common interests of all concerned, by being, as Brandeis was, lawyer to the situation, by creatively probing the possibilities of collaboration over combat, by making a specialty of preventive law rather than of the law of salvage, and in the process, having the time of one's life;

-- in a legal community often marked by highly paid but subservient employees, maintaining independence and making the lawyer population one knows best a real fraternity;

-- And, notwithstanding the escalating demands of the profession, making time for community and, not least, oneself as a broad-gauged, vital and integrated individual.