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Recommended Citation

Mark, Dean Gregory () "The Perspective of Time: Some Observations on the Relationship of Legal Education and Practice in the Past Century," *Ohio Northern University Law Review*. Vol. 38: Iss. 3, Article 4. Available at: https://digitalcommons.onu.edu/onu_law_review/vol38/iss3/4

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The Perspective of Time: Some Observations on the Relationship of Legal Education and Practice in the Past Century

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Thank you very much to Ohio Northern University for its generosity in bringing us here. I should provide a little background. Before I went to the dark side and became a dean, even before I became a law professor, I was a historian. So, that is the perspective that I will bring here. I hope from that vantage to lend perspective to some of what we have been hearing in the last couple of years about legal education.

Let me begin with a couple of thoughts on the current state of affairs. Right now, the language that we are using to discuss the current troubles we face takes a number of patterns. First, we are talking about unprecedented change in the legal market, fundamental change in the delivery of legal services.¹ We use as examples things like the outsourcing of certain parts of discovery.² We talk about things like contract lawyering. We talk about technology substituting for human activity. These constitute a number of the changes we are concerned about. That language we use to describe the changes, however, is language that has been employed for as long as I have been associated with the law. Let me give you a couple of examples.

When I was in law school, a quarter of a century ago, here is what was really unprecedented: partners were jumping from one firm to another for the first time ever. The compensation structure of large firms was being

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1. See, e.g., Robert E. Lutz, *Reforming Approaches to Educating Transitional Lawyers: Observations from America*, 61 J. LEGAL EDUC. 449, 449 (2012) (discussing how the legal profession will “respond to the paradigmatic changes related to legal practice itself, brought about largely by the revolution in electronic communication and information technologies, the rapid integration and globalization of national economies, recessionary economic times, shifting demographics, and a growing standardization of professional requirements involving legal services.”).

2. See, e.g., Cynthia Cotts & Liane Kufchock, *U.S. firms outsource legal services to India*, N.Y. Times, August 21, 2007, <http://www.nytimes.com/2007/08/21/business/worldbusiness/21iht-law.4.7199252.html> (discussing the pressure placed on law firms to send basic legal tasks to India); *The legal profession is changing . . . Legal Process Outsourcing – Integreon*, LAWYER MONTHLY, July 2012, at 24-26, available at <http://www.lawyer-monthly.com/media/Integreon.pdf> (discussing Integreon, an international legal outsourcing firm that contracts with U.S. law firms to provide services, such as consulting, e-discovery, contract management, due diligence, intellectual property, and legal research and drafting).

completely disrupted.³ I could go on and on. By the way, there were technological innovations even then.⁴ The notion that you could fax things across the country allowed lawyers to indulge their worst bad habits, waiting to the last possible second to fax things to one another. I suppose we are now down from seconds to nanoseconds with electronic filings. My observation is that the language of unprecedented change and fundamental change has been used regularly and often whenever there is a little bump up or down in whatever is going on. So my point is that it is a singularly unhelpful language—the language of fundamental change and crisis—with which to think about the change that we are encountering.

The language is unhelpful for several reasons. First, it suggests a stagnant nature in legal education and the market for legal services. If there is one truism, it is because things have been changing fairly regularly. Secondly, it tends to have a paralytic effect on our capacity to deal with that change because it dramatizes our thoughts rather than catalyzes our thinking. So, what I would like to do, if I could, is discuss ways in which law schools should react, if at all, to the changes in the legal market. That discussion should demonstrate my view on the language we use in the discussing current events.

So, what should we do? Let me first return to what legal education is supposed to be all about before we go too far down the path that brought us here. What is one of the constants in legal education? Everybody always bemoans the first-year curriculum. It has not changed much since the days of Langdell, and truth be told, before that.⁵ But one of the reasons it has not

3. See Robert J. Zeitlinger, *Law Firms with Corporate Clients Facing Changes in Time & Billing Procedures*, 12 No. 2 LEGAL MGMT. 64, 65-69 (1993) (discussing the restructuring of law firm billing practices in the early 1990s).

4. See William T. Braithwaite, *How is Technology Affecting the Practice and Profession of Law?*, 22 TEX. TECH. L. REV. 1113, 1113-15 (1991).

5. Christopher Columbus Langdell, Harvard Law Dean, is famous for his contribution in the development of the “case system” of legal education. William Schofield, *Christopher Columbus Langdell*, 55 THE AMERICAN LAW REGISTER 273 (1907), available at <http://www.jstor.org/stable/3307175>. His system changed the face of legal education by substituting lecturers and text books for the study of cases in schools of law. *Id.*

Langdell’s new law school embraced the emphasis on formal knowledge by presenting law as a science in the making. Judicial decisions were analyzed in a scientific spirit as specimens from which general principles and doctrines could be abstracted. Once formulated, these doctrines would be used to classify the fast-expanding mass of American legal decisions, forming the body of law into fields such as contract law, tort law, and criminal law. Students taught from Langdell’s case books were being introduced . . . to grasp the principles organizing the particular domain. Once discovered, these principles were to be “applied” to existing law, to make legal practice a more rational pursuit. Through this new procedure, Langdell updated a central tradition of classical jurisprudence: American law was not to be analyzed by academic specialists and criticized in the light of general ideas and principles.

been changed much is that most of what we do in the first year, sometimes even what one sees in the second year, deals with the problems the law confronts.⁶ What is the law of contracts? It is about what it means for people to agree and what types of agreements the law recognizes. What is a tort? Fortunately enough, that is easily shown when people interact with one another or with property and, deliberately or otherwise, cause harm. What about criminal law? That is when you do something so bad that society decides to slap you around a little bit. Right? What else do you do in first year? Property, that is how humans interact and control the physical world and the world we create. So those are the core courses, except of course for civil procedure and constitutional law, and those are for learning the language lawyers use to talk to each other and the structure of government. Those fundamentally have not changed; they have been retitled, mixed, and matched. But those have not changed over the course of time. What has changed over the course of legal education? The upper class curriculum has changed a great deal. Now remember we are not just dealing with the twentieth century—I bring a little perspective to the subject of change that is a bit more than a century, or so, old.

The upper-class curriculum has changed.⁷ It mixes and matches stuff that we all know from the first-year curriculum.⁸ But even there, there is a lot of constancy; there is a large, long pattern that changes not particularly dramatically. It involves important questions of a complicated and segmented society, for example, how one organizes the activity of the polity productively for economic well-being? That is called the corporations course, or now business organizations, because we used to have partnerships and corporations, and now we also have other intermediate organizations. But the fundamental questions about people who are in charge of other peoples' money for productive activity have not really changed. Similarly, there are courses examining the organization of government to deal with our society. That is administrative law. The content of administrative law has changed over time, but it is a core course, and the shifts in the course have not considerably changed it. What is true

WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 5-6 (2007) [hereinafter CARNEGIE REPORT].

6. See *id.* at 3 (quoting U.S. Bureau of Labor Statistics, 2006) (discussing the typical first-year law school curriculum); Judith Welch Wegner, *The Curriculum: Patterns and Possibilities*, 51 J. LEGAL EDUC. 431, 431-32 (2001) (discussing the structure of the first-year curriculum).

7. See Welch Wegner, *supra* note 6, at 432-33 (discussing the variation between the first-year and upper-level curricula).

8. See CARNEGIE REPORT, *supra* note 5, at 3 (indicating that “[d]uring the second two years, most schools continue to teach, by the same method, a number of elective courses in legal doctrine.”).

of corporations and administrative law is also true of the other core doctrinal courses. All the core courses are the same; they change slowly.

That leads us back to the question of what actually can be accomplished in the classroom. Thinking about what a bad legal education might be is helpful as the alternative to what we do now. What do we really do in the classroom, upper class or first year? The most we do, in reality, is introduce future lawyers to important questions in the field that we happen to be teaching.⁹ What are the foundational questions? In contracts, for example, what does it mean to have an agreement, why do we value exchange in an agreement, why are agreements that do not embody an exchange considered less important? These are some of the key questions. And these questions are conceptual. Among those important conceptual questions is the question of boundaries and categories. Why is one human problem classified as a contract breach rather than a tort, for example? Why is one category broader than another? What is the plasticity of the boundaries among categories? What are the techniques and skills that we expect of people who become lawyers? What does it mean to engage in the style and argument of litigation? What does it mean to counsel? What does it mean to help set up deals and transactions in the corporate world? Thus, there are certain constants in legal education—the questions and issues—which remain unchanged, and that affect the legal market over the course of time. Those questions ultimately speak to the utility of our profession. We ask those questions because they are important to society. What, then, is the utility of legal education and has that changed over time?

I think we must look at this from two perspectives. First, what good is the law the way it is taught here, for society overall? Then, what good is it to those who are graduating from law school these days and for those who are in the legal world? Finally, what are some of the relations between those two questions? The societal utility is, at first, obvious—lawyers help facilitate what we all do in society. I have put aside the sometimes overwhelmingly self-justificatory claim that we are responsible for justice in society or that we are responsible for at least some of the justice in society. But overall, our work has been, while stable conceptually, adaptive in practice.¹⁰ And law schools have adapted to changes in the market.¹¹ I do

9. See Judith Welch Wegner, *A Legal Education Prospectus: Law Schools & Emerging Frontiers: Reframing Legal Education's "Wicked Problems"*, 61 RUTGERS L. REV. 867, 890 (2009).

10. See, e.g., Stephen J. Curley, *Adapt or Die*, 29 GP SOLO (Sept./Oct. 2012), available at http://www.americanbar.org/publications/gp_solo/2012/september_october/adapt_or_die.html; LAWYERS' IDEAS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 6 (Robert L. Nelson et al., eds., 1992) (discussing the American lawyer's "adaptive, expansionist approach to practice.").

not think law schools have been given as much credit as they should be for that. So, where would we be if we looked to find some evidence of my claim? Well, let me suggest the easiest place to look: our course catalogs. What have we done? How has that changed what we are talking about? The basic courses, as I have said, have largely remained the same in substance. As I have also said, the second-year and third-year curricula have changed; some courses gradually, while others more dramatically, as they have had to rise to meet the challenges of the modern political economy.¹² One example I gave you at the outset was the rise of administrative law. This was unheard of, and indeed rejected in theory, in some law schools at the end of the nineteenth century. It became a core course in every law school by the end of the twentieth century. Other interests have declined over the course of time, largely because they have become less important to what lawyers do. There is a notable decline, for example, in courses dealing with trusts and estates. You see courses in tax proliferate as the tax system gets more and more complicated and as tax becomes a consideration, not just domestically, but internationally.¹³ In my own field, historically, you see a huge decline in courses dealing with partnerships, a rise in courses dealing with corporations, and the addition of courses, or partial addition of courses, dealing with things like limited-liability partnerships and such. These are all adaptations of the legal education base. It changes the knowledge base of lawyers. This is not like art history, where you go in and decide to study something over the course of time—it does not really matter if there is a demand for those kinds of paintings or that kind of sculpture. Law is adaptive; it is an adaptive science so to speak.¹⁴

We adapt also in different ways as society demands different things and different skills.¹⁵ This we do not do as well as perhaps, for example, dental

11. See Ann Carns, *Law Schools Adapt to Big Shifts at 'Biglaw'*, U.S. NEWS & WORLD REP. (Mar. 15, 2011), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2011/03/15/law-schools-adapt-to-big-shifts-at-biglaw>; *Law School Curriculum Changes Aimed at Developing Marketable Graduates*, LEXIS HUB (Aug. 5, 2012, 12:20 PM), http://www.lexisnexis.com.precise.petronas.com.my/community/lexishub/blogs/law_school/archive/2012/08/05/law-school-curriculum-changes-aimed-at-developing-marketable-graduates.aspx.

12. See Carns, *supra* note 11.

13. See, e.g., Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 350 (2007) (noting that “[a]fter the New Deal, some of the statutory courses, such as Taxation, were promoted to the second-year and achieved the status of semi-required subjects.”).

14. See ARTHUR T. VON MEHREN & PETER L. MURRAY, *LAW IN THE UNITED STATES* 253 (2d ed. 2007) (commenting on the “adaptive capacity of law.”). See also CARNEGIE REPORT, *supra* note 5, at 5 (discussing how Christopher Langdell “present[ed] law as a science in the making.”).

15. For example, as we adapt now to changes in the economy and new technology. See Niki Black, *The Legal Profession is at a Crossroads—Law Schools Must Change*, LAWYERIST (July 6, 2012), <http://lawyerist.com/the-legal-profession-is-at-a-crossroads-law-schools-must-change/>.

schools, but we do adapt in the teaching of skills and the teaching of hands-on requirements that are necessary to go out and actually practice. One of the areas, and Stanford actually leads in this area, is the teaching of transactional training in law school.¹⁶ We have been better at litigation training than we have been at transactional training. I will leave you with one other thought from the course catalog. If you do not believe me that we have adapted by looking at what is in the catalog now, and how it has changed, go back and look at the course catalog from the twenties, or the thirties, and look at the courses that have completely disappeared. For example, there were not just one, but several courses on railroad law in the teens the twenties and the thirties.¹⁷ If there is a school in the country that has a course on railroad law today, I would be surprised. They have, however, been supplanted by courses focused on cyber law, internet law, and a multitude of other topics.¹⁸ But again, these are second-year and third-year courses and they combine the basics taught in core courses to bring focus to specific manifestations of our changing world.

What of the second question: utility of the law for those who come to law school. This is an important question and it is an important question because we live in the present, not in historic times. Your capacity for employment is not governed by whether or not the classes of the 1940s and the 1950s had equivalent placement problems. But we must think about this in two different ways. What are the aspirations of the people who come to law school for two different programs: full-time programs and part-time programs?

The language used to address these two approaches to legal education is typically incorrect when one talks about how difficult the job market is. The job market, if one goes back to placement statistics as early as the 1960s, looks radically different from the last quarter century. Graduates, even from the most elite schools, were doing things in the 1950s and 1960s that one would not expect—most were going to small firms, many to small towns. Perhaps we are returning to that historical norm.

The part-time programs that are characterized today as a huge portion of legal education were essentially, and primarily, vehicles for people who were already working to be able to enhance their careers, and to do so in one of two ways: as a credential to move up within their governmental

16. See e.g., *Organizations and Transactions Clinic*, STANFORD, <http://www.law.stanford.edu/organizations/clinics/organizations-and-transactions-clinic> (last visited Oct. 5, 2012).

17. See generally Gordon, *supra* note 13, at 350 (noting that Railroad Law was an example of a public-law course that had been banished from the standard law school curriculum).

18. See, e.g., *Teaching*, BERKMAN CENTER FOR INTERNET & SOCIETY, <http://cyber.law.harvard.edu/teaching> (last visited Oct. 5, 2012).

office or their business, or to move laterally within their own, usually urban, area. The part-time programs are where, I think, we actually have seen the biggest transformation over the course of time because the credentialing aspect has largely gone away, as companies and governments insist on education that is relevant to things that are absolutely going on at the moment in their businesses or agency. And that has put a crimp in that aspect of what legal education is.

But full-time program placement is different. What has changed in those programs is the rise of the large law firm.¹⁹ Those firms absorbed lawyers at terrific rates. The change in expectations of graduates in the last thirty years parallels the rise of those firms.²⁰

So, where does that leave us? I would suggest that there are two problems that we need to focus on that are not the subject of dramatic language that I have proffered. First, Bob Gordon, a well-known legal historian, made an observation about the change in demographics of the law school population, especially the elite law school populations, up until about two years ago. He observed that law schools have become the place where a lot of upper-middle-class kids end up. And where we have questions about what social mobility in this country means, and law school's role in making society more open, then I think that our role is an important question we have to face. And it is not one that is on the table right now.

Second is the crisis of expectations for people coming into the law profession these days.²¹ At my own law school, when I was a dean candidate, I met with students who were concerned about a number of things, but they were mainly concerned about placement. One young woman turned red in the face talking to me about what it was that she wanted. She could not get a job. The placement office was terrible. Nothing was going her way. I asked her, "What do you want to do?" She responded, "Patent Law." I responded, "Well that is an area that is doing quite well." I said, "There is Silicon Valley, there are the pharmaceutical companies, and health services." She got even redder in the face and said,

19. See Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1825 (2008) (noting that "the rise of large law firms in the late nineteenth and early twentieth centuries was a response to the demand of big corporate clients.").

20. See Jennifer Smith, *The Coveted Summer Job*, WALL STREET J., Sep. 9, 2012, <http://online.wsj.com/article/SB10000872396390443779404577641611988518878.html> (showing that the amount of law students in traditional 'Biglaw' firms has been slashed over the past few years).

21. See Amanda Becker, *Critics say law schools don't give students realistic career expectations*, WASH. POST, Feb. 24, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/18/AR2011021805894.html>; Aaron N. Taylor, *Managing Law Student Expectations is a Joint Endeavor*, LAWYERIST (Feb. 1, 2012), <http://lawyerist.com/managing-law-student-expectations-is-a-joint-endeavor/>; Brian Dalton, *ATL Survey Update: Great Unmet Expectations*, ABOVE THE LAW (Feb. 29, 2012, 2:10 PM), <http://abovethelaw.com/2012/02/atl-survey-update-great-unmet-expectations/>.

“But I only want to practice in the ‘Loop.’” For those of you who do not know Chicago, the “Loop” is a small area of the downtown that is surrounded by elevated trains.

The hallmark of legal education is flexibility of mind. One of the things that we need to do as educators is inculcate a certain amount of flexibility into the expectations of students. The happiest lawyers that I have known over the course of time are the ones who have approached their careers with an expectation that things are going to change, and that they should take opportunistic advantage of those kinds of changes. Those people end up being very, very happy. I think what we need to do in legal education is not talk endlessly about the crisis of the day, but face issues of social mobility and our profession, and of expectations about what it is lawyers can and ought to do in society today.