The Law School and the Profession: A Need for Bridges

Judge Frank M. Coffin*
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Abstract

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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 expertise 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 français."

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 with his companions in the boarding-house and

* Judge, United States Court of Appeals for the First Circuit, 1965-present. L.L.B., Harvard, 1947; A.B., Bates College, 1940. This article was originally presented in a speech on January 28, 1987, to the students of Nova Law Center.
on his walks. 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.  

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” 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.  

Earlier in the year of this alarm, 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.” 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.  

This concept of law as a science, with a very specific body of

2. Id. at 140.
4. A. SUTHERLAND, supra note 1, at 176-77.
5. Id. at 184.
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.”

A few years later, in 1883, the first Dean of the Faculty, Ephriam
Gurney, deeply concerned about “the contemptuous way which both
Langdell and Ames have of speaking of Courts and Judges,” had writ-
ten President Elliot these ominous forebodings about Langdell:

He is as intransigent 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 prac-
titioners. Now to my mind it will be a dark day for the School
when either of these views is able to dominate the other . . . .

Now we have been talking about a basic philosophy and format of
legal education that began 117 years ago. To a large extent these re-
main 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 con-
cerned with legal principles rather than operative facts. It is then
but a short, and devastating, step to the conclusion that sharp
thinking is far more important than careful preparation.

A related criticism is that, while medical education reform has
moved toward greater clinical and laboratory instruction, legal educa-
tion 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. 16

A third is that “thinking like a lawyer”— the target of Langdel-
lianism — pays too little attention to the fact that, as an American Bar
Foundation study observes, “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 a considerable re-
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 counselling.
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 de-
velopmental episodes in which an older paradigm is replaced in whole
or in part by an incompatible new one.” 13 They are, he continues, “in-
augurated 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.” 14

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
Mediaw, big law and middle to little law. The first is the world of the
high tech, fast track giant firms, serving corporate and institutional cli-
ents, 250 of the largest now averaging 194 lawyers, the largest now
having over 800 lawyers, the top seven having over 500 each. One

826 (1985).
11. F. ZEMANS & V. ROSENBLUM, supra note 9, at 204.
14. Id.
quarter of all these lawyers work in branch offices. 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 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 discarders, 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 five to ten lawyer firm; and 70.2 percent work in firms of fewer than twenty lawyers.

As for life in Megalawopolis, 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 — either 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.

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. Yet here, too, all is not completely serene. The same ABA, in 1984, reported that only a third of the nation's lawyers under the age of thirty were "totally happy" in their work; even at age fifty less than half were "totally happy." At the same time, Mary Ann Altman of the well-known management consulting firm, Altman & Weil, Inc., filed this somber report of 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.

The reasons? The increasing dominance of computerized technology, the displacement of the private secretary, the disappearance of quality judgments in determining compensation, the 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 Megalawopolis the die is cast, the trend to giantrism irreversible; in Medilawopolis, 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 education revolution in Kuhn's sense, for I visualize no excision of much of the
quarter of all these lawyers work in branch offices. 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 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 discarders, 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 firm of ten or fewer lawyers; 70.2 percent work in firms of fewer than twenty lawyers.

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17. Reidinger, It’s 46.5 Hours a Week in Law, A.B.A. J. Sept. 1, 1986, at 44.

19. Id.
20. Reidinger, supra note 17, at 47.
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. 23 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.44

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 the 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 more 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 relation— 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 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 gratefulings of teachers whose major background has been practice rather than teaching and publication. And there can be special lectureships for lawyers on sabbatical — 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 counselor 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. 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. 26 Much of what we call litigation is

25. F. ZEEMANS & V. ROSENBLUM, supra note 9, at 203.
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writing out questions and answers. Far more central to the lawyer in Meditapolis 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 analytical 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.27

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 Dorothy Nelson, “much of the instruction is mechanical.” Here is an area where thoughtful practitioners can make a profound difference in the sensitizing of young lawyers to the ethical dimension 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 helplessly at 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 counseling — 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 Megalapolis, Meditapolis 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 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:

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\(^{28}\) Nelson, supra note 10, at 816.

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The Five-Year Residence Requirement for Naturalization: Its Operation and Employment-Related Exceptions and Ameliorations

Judge Juan M. Bracete*

I. Introduction

Congress, since the first naturalization statute,1 has insisted that aliens pass through a trial period of residence in the United States before they are admitted to citizenship pursuant to article one, section eight, clause four, of the Constitution. Until 1929, the courts generally construed the residence requirement favorably to the alien, thus making any need for the amelioration or waiver of the required residence largely unnecessary. With the institution in 1929 of more stringent requirements as to the continuity of this residence, the need for exceptions and ameliorations for reasons purely in the national interest became apparent. Presently, if an alien desiring naturalization has to be absent from the United States for reasons relating to his or his spouse's employment, the likelihood of his qualifying for a waiver or amelioration of the five-year residence requirement is present. This article analyzes the present state of the law in this area.2


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1. The Act of March 26, 1790, 1 Stat. 103, was the first naturalization statute. This statute imposed a two-year residence requirement as a condition to naturalization. The Act of January 29, 1795, 1 Stat. 414, first imposed the five-year period as a condition for naturalization. Residence is only one of the requirements imposed by the statute as a condition to acquire United States citizenship. A discussion of the other requirements is outside the scope of this article.

2. Citizenship confers upon the former alien the right to integrate himself fully into American society, allowing him to vote, hold public office, transmit the citizenship to his offspring, and travel abroad with the protection of our Government, as well as allow him to engage in certain types of employment reserved for citizens (notably employment with the United States Government). See Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978).