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TEACHING ABOUT JUSTICE AND SOCIAL CONTRIBUTIONS

TALBOT D'ALEMBERTE¹

It is a special pleasure to honor the memory of Bob McKay, whose passing left us all with a sense of great loss. Bob McKay embodied the ideals of public service for the legal profession. We drew inspiration from his call to us only months before he passed away, when he called on all lawyers to return to basic values and undertake an "earnest quest for the soul of the profession."

He urged that we concentrate on two fundamentals—access to justice and a return to professionalism. And while he spent nearly all of his career as a law professor and dean, he was also fully engaged in the struggle for social justice in America, and he knew that the law schools and the profession would both be stronger if they worked together.

One of his finest hours was his chairmanship of a special commission to investigate the bloody riot and its suppression at Attica Prison in New York twenty years ago. He guided the commission through a thoughtful and exhaustive investigation and issued findings and recommendations which led to much needed reforms of the corrections system.

Year after year, Bob McKay carried out what he believed was necessary work to improve society and to eliminate the social and economic injustices which still plague us. He led the way for us to follow—on a path for all of us in the legal profession to seek that elusive ideal of justice.

Bob was part of the legal profession. His work with the American Bar Association was exceptional—he led reform efforts in legal ethics, torts and dispute resolution. He served on the Board of Governors and as Chair of the Section of Legal Education. Bob McKay was a law professor and was also President of the Association of the Bar of the City of New York. In one of his last public statements, he said; "Without apology, without embarrassment, I freely confess that I am proud to be a member of the legal profession."

As the program for this conference stated, "It is fitting that a conference concerned with the responsibility of law schools to improve the quality of justice in American society be dedicated to a man whose life was spent engaged in such a mission."

* * *

At this conference dedicated to Bob McKay, whom we recognized as a person of many talents, I want to begin by talking about another American lawyer of many talents—Thomas Jefferson. Among the many roles Jefferson played—lawyer, architect, farmer, inventor, statesman, to name a

¹ President, American Bar Association, 1991-92.

few—Jefferson was a visionary leader of higher education. He is remembered for his "academical village"—the University of Virginia. Jefferson was also the father of the American university-based law school, and it was at his suggestion that the first chair of law was established.

It was a dramatic departure from the British tradition of legal training carried out by senior barristers and Inns of Court. Jefferson's unique idea was that training for lawyers should be university based, rather than based in the profession. But it was also intended to teach more than law. Thomas Jefferson envisioned law schools as a means of moral education. His aim was to teach "republican virtue," those traits needed by public leaders to govern justly and democratically.

As we know, Jefferson's vision did not prevail. About a century after Jefferson established the first chair for law, Christopher Columbus Langdell established his method at Harvard Law School. Langdell's notion of the teaching of law as a science, in which, as he said, the library would be to the law student as the laboratory would be to the scientist. It approached law as a science, idealizing detachment and abstract reasoning.

As Professor Calvin Woodard has noted, the Langdell model was well suited for aiding the emergence of the United States as an industrial power and international force.² The law school was also well suited to the development of the American corporate law firm, as envisioned by New York lawyer Walter Carter at the same time. As Professor Woodard puts it, "Carter sensed the strategic importance of the growing pool of young law students graduating annually pre-tested, certified, with *Law Review* credentials, and faculty endorsed—from the case method law schools."³

It is often said that law serves as America's civil religion, "one to which all of the diverse religious and cultural groups can give allegiance." Professor Daniel John Meador, who wrote those words, also observed:

Still today, if motorists leave the interstate highways and drive through the centers of the county seats from coast to coast, they will usually find the courthouse at the heart of the town, the most impressive public building. Churches are usually there also, reflecting the reality that law and religion were central concerns of those who settled and built this country.⁴

Over many generations, Americans have affirmed their faith in this secular religion. Professor Sanford Levinson analyzes this as a religion built around reverence for a special text—the Constitution:

² Calvin Woodard, *Justice Through Law—Historical Dimensions of the American Law School*, 34 J. LEGAL EDUC. 345, 368 (1984) [hereinafter *Justice Through Law*].

³ Calvin Woodard, *Progress and Poverty in American Law and Legal Education*, 37 SYRACUSE L. REV. 795, 817 (1986) [hereinafter *Progress and Poverty*].

⁴ DANIEL JOHN MEADOR, *AMERICAN COURTS* 77 (1991).

"Veneration" of the Constitution has become a central, even if sometimes challenged, aspect of the American political tradition. Irving Kristol typifies this strand of our tradition, and its accompanying rhetoric, in his lead article in a special issue of *The Public Interest* devoted to the Constitution. "The Flag, the Declaration, the Constitution—these," according to Kristol, "constitute the holy trinity of what Tocqueville called the American 'civil religion.'" These formal symbols—and the historical experiences that they condense—evoke, for some, what the late Alexander Bickel once termed "the secular religion of the American republic," in which "we find our visions of good and evil."⁵

This veneration has been urged by our national leaders. Again, Sanford Levinson:

Indeed, Washington's Farewell Address, given to coincide with the ninth anniversary of the adoption by the Philadelphia Convention of the constitutional draft, included the plea that "the Constitution be sacredly maintained." And a later president-to-be, Abraham Lincoln, in his own way as much a Founder as Washington, Madison, or Jefferson, would summon the populace to adopt the principle of "reverence for the laws" as the "political religion of the nation." "Every American, every lover of liberty, every well wisher to his posterity," Lincoln asserted, must "swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others." All laws should be "religiously observed."⁶

This religion has its own powerful symbols—principally the flag—and it has a creed known and recited by most Americans—the Pledge of Allegiance. And, to continue the analogy, it has its bishops and priests in the form of judges and lawyers. Does this civil religion have a seminary? I argue that it does and it is the law schools.

But if the law schools are the seminary of the secular religion are they fulfilling their role? What is it about legal education today that supports the traditions of public service, the idea of law as a calling? When is it in the course of our law school curriculum that we talk about each lawyer's "profession?" When do law students think about the oath and the meaning of that oath? When do we decide that we have taught our students enough of tough-minded analytical skills and begin to allow them to think about values, consequences? When do we spell out for our students the special duties of lawyers to society? When do we talk of justice?

This subject is difficult to discuss because so much of the effort of legal education over the last century has been devoted to developing the hardened

⁵ SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 11 (1988) (citations omitted).

⁶ *Id.* at 10.

and dispassionate intellect which distinguishes legal education. Indeed, law schools take pride that they are more rigorous than other graduate programs. But law schools do not often claim to be places where values are taught.

I would like to go back to Jefferson, for it was Jefferson, as Governor of Virginia in 1779, who first envisioned university-based legal education, and he acted on that vision, creating a chair for his teacher, George Wythe, at William and Mary. As Professor Paul Carrington reminds us, Jefferson derived his model from the way ministers were trained and his purpose for legal education was "to teach law as a means of moral education."⁷ His aim, according to Professor Carrington, was "to inculcate republican virtue, those traits needed by public men to evoke public trust in public institutions."⁸

Except for those few who were educated in the George Wythe tradition, early American legal education was much more in line with that of the British tradition where legal education was not university-based. Lawyers might benefit from taking a degree from one of the great universities, but there was no sense that the university played a necessary role in educating lawyers nor an important role in developing the law. As Professor Calvin Woodard reminds us, "a deep-seated tradition was established that English law was not a university subject."⁹ The training of lawyers was done by the senior barristers and the Inns of Court and "was overwhelmingly practical, non-theoretical, and non-philosophical in character, being largely concerned with the technicalities of procedure and pleading."¹⁰

John Mortimer's great character, Horace Rumpole, the English criminal lawyer and self-styled "Old Bailey hack" expresses this in his encounter with Professor Grice, the Oxford law don:

The man to whom I was introduced was the most raven-like of all the dons. He had almost jet-black hair, hardly going grey, which also grew from his ears and on the back of his hands. He had strong yellow teeth.¹¹

"Rumpole of the Old Bailey, eh? How very amusing," said the law tutor Grice. "What do you think of academic lawyers down at the Old Bailey?"

⁷ Paul D. Carrington, *Teaching Law and Virture at Transylvania University: The George Wythe Tradition in the Antebellum Years*, 41 MERCER L. REV. 673 (1990).

⁸ *Id.* at 673-74. See also Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527 (1990) [hereinafter *The Revolutionary Idea*].

⁹ *Progress and Poverty*, *supra* note 3, at 798-99.

¹⁰ *Id.* at 799.

¹¹ From this introduction we may guess that Mortimer, a distinguished barrister before and during much of his literary career, had a score to settle with someone.

"Well to tell you the truth," I had to admit, "we hardly think of them at all."

"But you'll have read my paper on 'The Concept of Constructive Intent and Mens Rea in Murder and Manslaughter' in the *Harvard Law Review*?" Humphrey Grice looked puzzled and not a little hurt.

"Oh rather!" I lied to him. "Your average East End jury finds it absolutely riveting."¹²

It is against this background that Jefferson's idea seems so revolutionary but, despite some early success,¹³ most lawyers did not go to law school until well into the Twentieth Century. The absence of connection between the universities and the law was characteristic of the early experience in the United States and much of the character of American lawyers came from the fact that law was a career available to the bright and ambitious young man on the frontier or in the immigrant populations.

The great waves of immigration at the turn of the century were followed by dramatic increases later of foreign-born lawyers, especially in America's largest cities. In spite of often blatant discrimination at some law schools (Yale Law School limited the admission of Jewish students by quota from 1922 to 1960), the number of American lawyers from Jewish, Irish, Italian and other immigrant backgrounds increased dramatically during the first half of the 20th century.¹⁴ Numerous urban law schools catered to these students, who often expected to establish solo practices serving people with the same ethnic background¹⁵ and the percentage of lawyers in New York City who were first or second generation immigrants increased from 47 percent in 1900 to 69 percent in 1960.¹⁶ Success for these lawyers came from their involvement with their communities in which they lived and made their way as they read the law.

Gradually, under the determined prodding of the American Bar Association, this method of training lawyers was displaced by the law school, and the law schools developed a particular character. The origin of the modern law school is generally credited to the development of a teaching method—the "scientific" case method pioneered at Harvard Law School in the last century.¹⁷ This teaching method spread through the country and came, over time, to be the accepted method at most law schools.

¹² JOHN MORTIMER, *RUMPOLE FOR THE DEFENSE* 53 (1981).

¹³ See Carrington, *supra* notes 7-8.

¹⁴ RICHARD L. ABEL, *AMERICAN LAWYERS* 85 (Oxford Univ. Press 1989).

¹⁵ *Id.* at 86.

¹⁶ *Id.*

¹⁷ ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 38 (1983). Happily, Professor Carrington's work gives us another dimension on the earlier tradition.

Dean Langdell also introduced the prototype of the modern law professor—the law professor without real experience in law practice. He said:

A teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often traveled it before. What qualifies a person, therefore, to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law.¹⁸

This highly dubious assertion was widely accepted. It helped the law schools develop facilities built largely on the recruiting of relatively young and inexperienced lawyers. In any event, law schools claimed more prestige, became recognized as an academic discipline and, finally, came to be the sole method for admission to the bar in most jurisdictions.

The emergence of the law schools came at the same time as the emergence of the United States as an industrial power and an international force. Professor Calvin Woodard places the law schools into their role.

The rise of every great nation state entails the creation of new, or the adaptation of old, institutions to the means by which power is gained. The Prussian Empire rose to eminence through its army and its great civil service, both of which the Hohenzollerns radically reformed for that purpose and to that end. The British Empire rose to power through the strength of its navy and the drastic reformation of its ancient universities, Oxford and Cambridge, and public schools, thereby creating a class of civil servants and colonial administrators capable of governing strange peoples in strange lands around the world.

The rise of the United States to its present eminence has been very largely accomplished by law-trained citizens who worked to implement the ideas of adventurous businessmen and scientists: who helped social critics frame quixotic ideals into realistic reform measures, and who, though professionally committed to law, never forgot that law was not the end in itself.¹⁹

I love Cal Woodard because he paints a beautiful picture, one which makes me proud of lawyers and law schools. Given this view of the profession's great role in society and the achievements of American lawyers and American legal education, we may think it strange that lawyers are the object of jokes and derision and that we have fallen so far in public esteem that Vice President Dan Quayle can draw great public praise by shallow attacks on lawyers.

* * *

¹⁸ *Id.* at 38 (citation omitted).

¹⁹ *Justice Through Law*, *supra* note 2, at 367-68.

I want to offer a brief digression from law to medicine. In May of this year, Dr. George Lundberg, editor of the *AMA Journal*, published an editorial in which he criticized the state of health care in this country and stated that it is no coincidence that the United States and South Africa are the only developed countries that do not have a national health policy that ensures access to basic care for all. Dr. Lundberg attributed inequity in access to health care in the United States in part of "long-standing, systematic, institutionalized racial discrimination."²⁰

In his bold editorial, he was concerned that in this wealthy country, 31 to 37 million Americans do not have any health care insurance and millions more do not have adequate coverage. Dr. Lundberg called for reform, saying:

An aura of inevitability is upon us. It is no longer acceptable morally, ethically or economically for so many of our people to be medically uninsured or seriously underinsured.²¹

There is in Dr. Lundberg's remarks the reminder of the high purpose and goals of the medical profession. But what can we say about our legal system?

Can we agree that there is no system in Western civilization, excepting only South Africa, which is so delinquent in providing access to justice to its poor and middle class?

* * *

How should we assess the American law school today? In one sense, we must grade ourselves as an outstanding success. Lawyers and law schools have never known such material success. We are prosperous, we have power. When I look at legal education from the perspective of a large corporate law firm lawyer, I feel great comfort—there is the high quality student who is recruited to the law school and socialized by the law school for practice in a corporate setting. I feel particular gratitude for the excellent job of "sorting"—that's Professor Richard Abel's term—that the law schools are doing. It simplifies the law firm recruitment process to be able to narrow our efforts only to the law review members and those with high grades.

But when I think about legal education from the standpoint of law students I say to myself as a law professor: "I ought to be ashamed of myself." I am not a great believer in conspiracy theories, but I believe I could construct a fairly decent case that legal education has been in league with large law firms for some time and that the cartel this represents has not had justice as its primary goal.

Let me make the conspiracy case in the following way: By screening law students and sorting them out, we legal educators ease the burden of selection for law firms. By socializing law students to think that they should go where

²⁰Dr. George D. Lundberg, *National Health Care Reform: An Aura of Inevitability is Upon Us*, 265 *J. AM. MED. ASSOC.* 2566 (May 15, 1991).

²¹*Id.*

the "interesting work" is, we precondition them to accept this employment. By telling them that they will only learn to "think like lawyers" in law school and they must go elsewhere to learn to practice law, we offer them no real career alternative. And, by extending their education and inhibiting their earning capacity, we force them into debt and push them towards the highest paying jobs.

If that is a conspiracy, what do we law professors receive from the arrangement? We get the large class teaching method and a system which burdens us least. A system of great prestige, decent pay and enough leisure time to pursue our interests other than teaching. Our teaching is largely of subjects we personally want to teach and our students are among the very best in our society.²²

THE JUSTICE MISSION

I have tried to state, in very brief outline, my case that the law schools and the large law firms have thrived on the "Paper Chase" model and that they are not fulfilling the mission which I will, without apology, call the seminary mission. They are not teaching us about justice.

Each of us is at this conference because we are concerned with the way legal education operates today and most of us believe that it can be improved. Before this is over, I hope you design a grand agenda for change and I feel privileged to help begin that agenda.

SOME ELEMENTS OF AN ACENDA FOR ESTABLISHING THE JUSTICE MISSION AT LAW SCHOOLS

Admission to Law Schools

During my five years as a law school dean, I read all the personal statements of the students we accepted and was struck with the powerful statement of interest in public service contained in those statements. Virtually all these statements conveyed the desire of the applicants to contribute to their communities and to seek justice. I know that there is a reason for this. These applicants were all very smart and many wrote these things because they thought we wanted to hear them. But I'll even settle for that: at least they thought we in the law schools were about the business of public service, they thought we had a justice mission.

After doing this for several years, I began to reflect on the one-sidedness of this conversation. They were writing their thoughts but the conversation ended there. We didn't respond with any conversation about justice and when we brought them into our classrooms, we immediately set out to "teach them to think like lawyers"—to be detached and analytical.

²² There are many nice things I would like to say about legal education, but they are, after all, known to all of us, because we read our catalogs.

Honestly, I never quite figured out what we ought to do to keep the conversation going. I did try something that I enjoyed, even if it did not have a great deal of impact—I photocopied each third year student's personal statement and sent it back with a letter from me reminding them of their aspirations. This did bring some of the better students to my door and led to some very good discussions, but I realized that even this modest step was taken too late. Most students had already determined their job choices by that time.

I still think that we could use the admissions process better to initiate a dialogue with our students. We might begin by developing some idea of what the justice mission of law school should be and putting that concept into our catalogs. We might even develop an admissions process which truly values public service.

We could give a preference for admission to those students who have demonstrated a history of commitment to public interest. William Buckley's book, *Gratitude*, makes that proposal for universities and it seems to me that it merits special consideration by law schools.²³ Particularly in this era of numerous law school applications, law schools could help shape the way students look at the law if we would give preference to the students who are motivated to contribute to society.

We need not reduce the intellectual quality of our student body to accomplish this. We could still set standards but since we all know that the LSAT is, at best, a rather crude instrument, we could begin with the idea that we would add points to the index for public service. We could tell our applicants that we will consider three factors: undergraduate grade point average, LSAT scores and a public service index to be graded by a group of law professors and lawyers who have demonstrated that they care about public service.

Before leaving this topic, let's look at another possible way for us to use that same group of lawyers. Even if you do not accept the idea of giving a score to public service activities as part of the admissions process, how about considering an interview, an actual person to person interview. I don't even propose that this be done by law professors who would be spread too thin, but I see no reason that we cannot ask public interest lawyers to conduct these interviews with all students who meet the minimum standards for LSAT and grade point average. If we care about the justice mission of law school, we ought to begin with law school applicants and any one of these ideas would be worth examination.

Faculty Recruitment

We do not recruit faculty members today on the basis of public service experience. Indeed, most of our emphasis is on past grades, class standing and scholarly potential. I spent five years as dean and seldom heard a faculty candidate asked about their public service experience and never heard it as a

²³William F. Buckley, Jr., *GRATITUDE* (1990).

leading argument for recruiting a faculty member. Faculty members who have known public service should greatly help law schools to teach about justice. Hiring faculty who have demonstrated such service is a pretty good indication of how we value that service.

Mandatory Pro Bono

I hope our efforts lead to mandatory pro bono requirements for students at all law schools. There is no better way to underscore the profession's commitment to pro bono work throughout a career than by starting this as a student. I was very pleased to see the formation last summer of Law Students for Pro Bono and its progress in enlisting students at most law schools. Six law schools now have mandatory pro bono requirements, and a growing number of others are actively considering it.

Derek Bok, in his book, *Higher Learning*, noted that sending students into the community had the desired effect of exposing law students to the real issues of law. I quote:

The act of representing real clients from poor neighborhoods probably did more to raise student consciousness about the adequacy of legal services and the moral dilemmas of practice than did most of the existing courses on the subject.²⁴

The Pro Bono Coordinator for the University of Pennsylvania said something very similar at a meeting of the Society of American Law Teachers: "It's a course in Urban Life 101, teaching students about their community."

There's also no good reason why pro bono service cannot become a commitment which law professors take on as well. Outstanding pro bono service by a faculty member should become just as important for promotion and tenure as other factors.

Placement

We need to revamp our ideas about placement. We do not prepare our students for interviews with law firms and we do not tell them what we know about the growing dissatisfaction among practicing lawyers. All too often we point them to the largest firms and the largest salaries.

There is a great deal we could do to prepare students for their interviews, prepare them to learn from their clerkships and help them critically evaluate their experience. There is a story about the law student who dies and appears before St. Peter, who asks the student to elect heaven or hell. The student elects hell and when he arrives, he finds himself in an extremely disagreeable place—oppressive heat and humidity, noxious fumes, poor food, backbreaking work for long hours, disagreeable and tyrannical overseers.

But even hell has due process and he took his complaint to the devil. "Last year," he protested, "I was here and it was a lovely place. Congenial colleagues,

²⁴DEREK BOK, *HIGHER LEARNING* 100 (1986).

interesting work, long lunch hours, frequent social functions, and that is how I pictured this place when I was asked to make an election."

"Oh," said the Devil, "you were here on our program for summer associates."

It is easy to understand why that story is so popular among law students. Several years ago, I served on an ABA accreditation site inspection to Harvard Law School. One of my tasks was to assess the placement office and, after reviewing the material and talking to the staff, I interviewed the faculty member who headed the faculty committee responsible for placement. After getting several specifics settled, I asked, "What should be done to improve the placement function at Harvard Law School?" His answer: "Abolish the placement office!"

We have long talked of getting our placement offices to help guide students to look at careers beyond the large law firms and I agree to that, but we must live with the fact that the large law firm is here to stay and we must accommodate it.

The justice mission of legal education can be furthered if we engage our placement offices in being something more than fawning servants of the large firm interests. Law firms should be asked the hard questions about the quality of life and the nature of their commitment to pro bono. We can teach our students to ask these questions and we can even teach them to evaluate job offers on their true economic terms.

Public Interest Lectures

In addition to the curriculum ideas which others have advanced, law schools can consider a special course on public interest or civil rights law. At Florida State University Law School, we established a chair which was funded for that purpose and it has brought some very distinguished lawyers and law professors to spend several weeks teaching a class, lecturing on special subjects and counselling students on public talk about public service and civil rights. A list of those who have been at the school includes Deborah Rhode of Stanford University Law School, Ken Greenawalt of Columbia, Mike Tigar of the University of Texas Law School, Jack Greenberg, also from Columbia, Elizabeth Schneider of the Brooklyn College Law School, Jack Boger, who was with the NAACP Legal Defense Fund and is now at the University of North Carolina Law School, Derrick Bell of Harvard, Randy Kennedy, also at Harvard Law School, Sylvia Law, of New York University, and Steve Bright, the director of the Southern Center for Human Rights. Additionally, we made a practice of having the lawyers in Florida who were recognized for their pro bono efforts spend time with students to share their experiences.

Those are some ideas; there are many others you should consider, but I want to ask another question before my time expires.

DO WE BELIEVE THAT LEGAL EDUCATION CAN EVER CHANGE?

If I am asked this question, I would respond in much the same way as the Alabama farmer did when he was asked if he believed in baptism by total immersion. "Believe in it," he replied, "certainly I believe in it. I've seen it with my own eyes."

In our lifetime, what have we seen to make us believe in improvements in legal education? While we are on this catalog, what forces can we say served to bring about those changes?

As I look over legal education and changes in my lifetime as a lawyer, I believe that there have been significant changes which I regard as constructive:

- * Clinical education;
- * NITA - role playing courses;
- * Diversity of student body, even of some faculties;
- * Improvements in admission process;
- * Improvements in placement services;
- * Improvements in student-faculty ratios;
- * Increase in legal research and writing courses;
- * Development of legal ethics courses;
- * Development of ADR courses;
- * Steps to harness technology;
- * Development of lawyering courses.

As we search for an agenda for reform of legal education, we should keep in mind the forces which have been brought to bear to bring about changes. These include:

- * Social and economic forces;
- * Innovation by Bar Committees and Conferences: (NITA came from initiatives of the ABA's Judicial Administration Division and the ABA's 1976 "Pound Conference Revisited" led to the formation of the ABA Dispute Resolution Committee);
- * Innovation through academic conferences and committees;
- * Pressure from state legislatures.

Most important for our purposes are:

- * New resources tied to new programs (the Ford Foundation funding for CLEPR led to many clinical programs);
- * Accreditation standards;
- * Accreditation process (student-faculty ratios have been reduced drastically through this method).

Of these last three methods, I most prefer the first, but I do not know of anyone who proposes to give resources for innovation at law schools. I do not think that it is practical to take on real curricular changes through the accreditation standards and I doubt that the accreditation process is the appropriate instrument to be used to urge change. I turn, then, with trepidation, to the bar exam.

THE BAR EXAM

Practicing lawyers largely control one of the important gatekeeping functions of our profession—the bar exam. I want to talk about the bar exam even though I recognize I am in dangerous territory. The bar exam is largely despised by legal educators and I believe there is justification for this. We should acknowledge, however, that much of what is despised by law professors about the bar exam—the relatively superficial questions, the emphasis on compartmentalized doctrine—is the product of law professors who have drafted the questions.

I am in deep water and I want to keep swimming. Tell me: Is there anyone who can justify the way we conduct the bar exam today? Is there any reason to give the bar exam (which is based largely on subjects taken in the first year) so long after the courses are taught? Given the other screening mechanisms, is there any reason to give the bar exam at all?

Dean B.G. Garth makes a real point when he observes that some of the innovation found at the University of Wisconsin College of Law derives from the bar exam waiver for Wisconsin graduates. I could be persuaded to abolish the bar exam but I have not been persuaded that it is likely that it will be abolished. As it stands today, it is the worst possible influence on legal education and a terrible drain on the psychic energy and financial resources of law students. Particularly with the growth of bar review courses, it is expensive and time-consuming.

I regard the bar exam as the most useless and conservative institution in the array of institutions which guard the gates of the profession. Perhaps the bar exam can be abolished but I doubt that it will be, and it is a useful exercise to think about how we might make it serve a constructive role.

At a meeting of the Society of American Law Schools this year, I first threw out a suggestion that the bar exam be offered at the end of two years of law school. Dean Steve Smith immediately told me he thought it was a terrible idea and that gave me pause.

Let me try again. We are here to talk about the Justice Mission of Law Schools. As I read the thoughtful advocates of such a mission for law school from Jerome Frank to Bob McKay to the many people who are here today, I hear it said that the traditional approach to large classroom format, doctrinal teaching of supposedly detailed scientific method has a firm hold on legal education. Dean Richard Julin has referred to "Fortress Langdell" and my question is how are we going to assault Fortress Langdell? How long will we wait for Jerome Frank's ideas to be absorbed? How do we promote incentives for change?

I believe that the bar exam can be used to help change legal education. If we were to allow a bar exam on basic subjects to be offered after the first or even the second year of law school, we would begin to draw a bright line between the type of courses which would be offered in law school after students get that behind them.

Professor Gerald Lopez's description of law students and their method of study strikes me as entirely accurate. If the bar exam were out of the way, students would not accept a curriculum built entirely on the continued study of appellate cases—they would demand more. I believe that clinical programs

and advanced interdisciplinary courses would blossom as soon as students got doctrine behind them.

In making this suggestion, I do not deny a place for the Langdellian method or teaching "thinking like a lawyer" or even doctrine. I merely say that the place should not be as large as it is today. We have very bright law students today. We need not take three years of their lives and many thousands of their dollars to teach them to think like lawyers. That task is largely done at the end of their first year, and if we do not know that, they do. I do not propose that law students be admitted after they pass this bar exam. I would require that law students finish three years of law school before being admitted to the full practice of law.

One way to think about this is to consider what would happen if we were to offer a second exam at the end of law school. I would see this as in the nature of a comprehensive examination on the full three years of law school. It might even be partially an oral examination, a demonstration of ability to function as a lawyer. It could be an exam to determine if the law student were prepared to profess, prepared to serve clients. It might inquire into the student's abilities to analyze a client's problems without doctrinal category labels, it might test ability in client counselling and inquire into knowledge about alternative dispute resolution. It might ask questions about poverty law. Indeed, if we are preparing law students for a profession which takes seriously its commitment to serve the poor, we might do well to think about qualifying and certifying students for that service.

Let's put out a model for discussion. First, a basic exam on elementary doctrine, an exam of the type now administered in most jurisdictions to be offered after the first or second year of law school for those who elect to take it then.

This exam would be in the nature of the multi-state bar exam and it would parallel the practice in medical education of requiring that a basic science exam be passed early in the study of medicine. The decision to take the exam would, in this model, rest with the law student.

This exam would, I concede, have the potential of intruding on law schools and it is possible that those who are innovative might be deterred by the forces which would be set loose through an early bar exam. It is possible, but since I do not believe that many of the innovative faculties are also timid, I do not fear any real intrusion. There could be a real disruption in the cycle of law firm recruiting in the law schools and for that we can only be grateful.

If we were to convince the bar examiners to allow the test to be taken early and still require three years of law school, there is the very real chance that law students and faculty alike would see that a different use could be made of the third year and maybe even the second year.

Where there is so called skills testing, as in California and Alaska, that portion of the exam would logically be given after all three years. Where that is not required by a state agency, perhaps law schools could develop their own form of review to assure that students are prepared to serve the public—including the poor.

CONCLUSION

That is my analysis of where we have come from, where we are and where we ought to go, all of it largely taken from the ideas of others. We should spend more time in thinking about how this change can be brought about. I hope we can think more about ways that we can create healthy incentives for change.

In their classic 1985 analysis of American society, *Habits of the Heart*, Robert Bellah and others wrote that American professions in general are losing their connection to their communities. As Bellah wrote:

"Profession" is an old word, but it took on new meanings when it was disconnected from the idea of a "calling" and came to express the new conception of a career. In the context of a calling, to enter a profession meant to take up a definite function in a community and to operate within the civic and civil order of that community.²⁵

Bellah continued,

The profession as career was no longer oriented to any face-to-face community, but to impersonal standards of excellence, operating in the context of a national occupational system. Rather than embedding one in a community, following a profession came to mean, quite literally, "to move up and away."²⁶

American legal education deserves high praise for its accomplishments in promoting professional excellence. Those accomplishments need not be abandoned in order for us to now reconnect lawyers to their communities and to revive the Jeffersonian ideal of legal education as a moral education—an education which encourages lawyers in their own justice mission.

²⁵ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 119-20 (1985).

²⁶*Id.*

