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REFOCUSING THE TWENTY-FIRST-CENTURY LAW SCHOOL

*Deanell Reece Tacha**

National Conference on Legal Education
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THANK you all for the opportunity to be with you today. I owe a special thanks to Randy Gordon, whose tireless efforts on behalf of academia and the legal community are responsible for my presence here today. Randy, both SMU and the University of Kansas are very fortunate to have your energy and involvement.

It is clearly the height of arrogance for me to talk to this distinguished group about legal education. Regardless, relying on my experience as a legal educator and a judge, I will discuss what I believe are the three central questions facing the contemporary law school. First, what is a law school and what should it be? Second, how should law schools relate to the larger university? Third, what is a law school's duty to society?

Putting first things first, let me posit what I suspect most of your law schools look like. They contain a set of basic required courses, where ethics and professionalism are taught separately from the rest of the curriculum. In the second and third year, law students are offered a proliferation of electives with alluring names that offer the promise of enticing and interesting specializations. The law school itself is largely set apart from the rest of the university with very little interaction except at tenure time and through a smattering of joint degree programs.

If this is what law schools are, what should a law school be? I believe that a law school should first and foremost teach students to think like lawyers. Legal instruction is about integrating and the focusing of knowledge. It is about recognizing the relevant and dispensing with the irrelevant. It is about constructive problem solving. It is about being able to articulate an issue and then draw upon the germane facts and precedent necessary to advance a decision. In short, a law school must teach people to organize, integrate, and focus information.

The historic role of the law school has had far less to do with the information taught than with teaching students to do just that: organize, integrate and focus whatever information a case presents. It has never been more important to reclaim this traditional role of the law school. The body of information about the law and the legal system, as it is in every

* Chief Judge, United States Court of Appeals for the Tenth Circuit.

conceivable topic, is exploding. Society in general, and the legal profession in particular, are threatened by information paralysis. To prevent this from occurring in the law, we must train problem solvers, not data banks. Those that know how to organize, integrate, and focus this vast array of information stand to thrive in tomorrow's legal world.

One need only observe the cacophony that surrounds almost every public policy debate today to recognize the plethora of information on every issue and the dangers that await those who are unprepared to handle it. Tragically, we have all seen the malaise of despair at the individual level as well. Here, choices have become so numerous that many people, some all too young, choose simply to check out in front of the television or, much more devastatingly, through drugs and crime, rather than engage in thoughtful personal decision-making.

Although the results are often not as tragic, a similar professional fate often awaits those lawyers who, unable to "think like a lawyer," fall victim to legal information paralysis. Merely reciting every case ever put on the Internet is not lawyering. As a federal judge, I say to you that there is no good lawyer or judge who cannot analytically and precisely gather the relevant information to serve a client, decide a case, contribute to a thoughtful discussion, and make those all-important personal choices. Taking a theme from last night, this is even more important in a global economic and geopolitical world where we must have problem solvers who can listen, hear, and incorporate legal concepts and assumptions from very different cultures, traditions, and languages.

Law schools have historically been very successful at enabling students from diverse academic backgrounds to "think like lawyers." In fact, I would argue that the historic law school has worked because it has taken this vast array of people, although admittedly not as diverse as it should have been, and made them "think like lawyers." What an accomplishment! We simply cannot afford to lose track of that central mission of the American law school model.

How did we do it? Call me a dinosaur, but I am convinced that the historic law school has provided this critical training through tried and true methods. While we all look back to the "Paper Chase" with a laugh and a grimace, I credit the case method and Socratic teaching with much of this success. The key is taking a set of facts, distilling the law and the precedent from them, and emerging with the resolution of an issue.

In his presentation, Professor Garvin said something that has captured me. Pardon my paraphrasing, but he said in essence that instead of abandoning the case method (our tried and true approach to teaching the law through the analysis of judicial opinions) we need only to adjust it at the margins. He said that we need to appreciate and utilize the differences between what he called "the law school wheel and spoke method," and "the side-by-side case method." To that list, I add a third approach, similar to that used commonly in medical school—the team case method. All

three have positive and negative attributes and all three need to be incorporated together in a legal education.

Another way we have taught people to think like lawyers has been by providing opportunities for students to develop and hone oral and written advocacy skills. As John Sexton stated recently, if you had to search for one word that describes a lawyer in terms of functionality, it would be “communicator.”¹ I agree with John wholeheartedly. At its best, legal writing is about conveying complex legal and factual issues clearly. It is about making your case succinctly so that your garden-variety judge, who in the American tradition is still a generalist, can grasp the intricacies of ERISA or the complex factual scenarios that permeate virtually every case before our court.

One way that law schools have addressed this need, particularly in the last three decades, is through clinical opportunities. Legal clinics enable students to see how their classroom learning translates into practical skills, while helping those who are in desperate need of legal services. Non-clinical writing and oral advocacy opportunities, such as moot court and trial practice events, are also essential.

Unfortunately, success has been far from universal in this area. In my opinion, one of the key failings of modern legal education is in teaching students to convey their ideas clearly in writing. Some blame the primary teachers, and the middle school teachers, and everybody else. To them I respond: I don’t care. It is impossible to produce a good lawyer who can’t write well. I am on the board of a theology school; and we have a writing program for ministers, because you cannot communicate, whether in faith or in the law, unless you can write very clearly. I urge you therefore to give your students a far more intensive writing experience in every semester of law school.

And finally—maligned, criticized, and debated though it may be—we have successfully educated generations of law students through the Socratic method. At its essence, the Socratic method when done well is an analytical interchange that hones a student’s ability to organize, integrate, and focus information. It mirrors what happens in every court in the nation every day. That is so important. Also, by providing on-the-spot questioning and feedback, students learn the underlying legal principles, come to grips very intimately with the process of distilling issues, and, perhaps most importantly, build self-confidence. As all of you know, if you have a confident lawyer, you have a good lawyer. I can attest from my own experience that the give-and-take that law students learn through the Socratic method is without question the best preparation for a hot bench.

I recognize, of course, that the Socratic method is not perfect. Some professors have used it as a tool of sarcasm and rudeness. This behavior is unacceptable. That is not the Socratic method, and it should not en-

1. John Sexton, *Legal Education, Today & Tomorrow*, 3 GREEN BAG 2D 417, 422 (2000).

courage law schools to turn away from what I see as a very effective teaching tool.

Instead, this abuse of the Socratic method should cause law schools to embrace the teaching of professionalism and constructive discourse. Pay attention to tone. Pay attention to the kinds of people that you hire. Are they people who will treat each other, the students, and the law with great respect? If not, keep them out of your faculty. If these kinds of people pervade law school faculties, how can we hope to have legal practitioners who treat each other and the law with respect. Our rule of law is based solely on the respect that we, and the public at large, have for our legal system. If lawyers are not the source of that respect, we cannot expect it from society.

This is not the only way we can teach professionalism. We can also encourage positive, civilized discourse by placing a high value on what in the vernacular is called mentoring. I dislike that word because, as I have learned from dealing with my law clerks as judge, the mentor often learns as much from the process as the mentee. Regardless of our nomenclature, this relationship holds infinite promise for instilling professionalism in the lawyers of tomorrow.

I am on the board of the American Inns of Court, and here's my commercial message: we are doing that, and we are doing it very successfully in about 370 places around the nation. I urge your law schools to get involved in this movement. With your active alumni and faculty, you have the perfect system in which to establish a real tutoring experience. I am convinced that this effort would enrich the lives of both your alumni and your students, without costing you a dime.

All this is to say that legal education must remain focused on thinking like a lawyer, not merely learning information. I worry, as I watch the proliferation of electives of this kind of law and that kind of law, about a curriculum fixated on information content to the detriment of its analysis. I view the increasing instruction in legal specialization as a dangerous trend that neither supports the traditional goals of law schools nor serves to prepare students for their lives as lawyers. I fear that we are promising a wide array of boutique specialties that either fail to materialize or disappear rapidly with the legal problems du jour.

It is a popular misconception that most lawyers work in larger firms with highly specialized practices. The most recent ABA statistics show that sixty-two percent of all private practitioners work in law firms of five people or less, which tend to have a very broad practice, while only seventeen percent work in firms of over fifty lawyers.² Even for those who work in large firms, it is virtually impossible, and in my opinion undesirable, for them to accurately predict the exact type of law that they will practice during their careers. For instance, I would never have believed when I got out of law school a little over thirty years ago that I would

2. CARSON CLARA N., *THE LAWYER STATISTICAL REPORT: THE LEGAL PROFESSION IN 1995* (The American Bar Foundation 1999).

spend half of my professional life as a federal judge when I didn't see a woman federal judge around me.

For your students, the change will be even more pronounced. How can we predict what tomorrow's specialties will be? I say this not to speak ill of any area of practice but, instead, to point out that we do a disservice to law students, the bar, and the bench, when we encourage the specialization of content over learning the process of lawyering. In these times of tight budgets and probing external scrutiny, I wonder if law schools are keeping their eyes on the prize: training very bright people for effective, instructive, and focused problem-solving and dispute resolution.

A very distinguished jurist, when selecting law students for coveted clerkships, calls me occasionally with a transcript in front of him from one of the prestigious law schools, and this can be many law schools, not just one. After reading from this impressive-sounding document, he asks very succinctly, "But is he or she a lawyer?"

To me, that captures the problem. While many of your electives and add-ons look remarkably like other offerings throughout the university curriculum, it is the methodology, the approach, the organization, the focus, and integration that distinguishes a law school education. Do not lose that focus. The law school's strength has always been, and must continue to be, training students to think like lawyers.

Regardless of our curriculum and teaching philosophy, we cannot create the ideal law school without determining how that institution relates to the university as a whole. Historically, as with other professional schools, it has been a very uneasy relationship. At its worst, the division is about disparate professional salaries. But at its intellectual heart, it represents the age-old question of the practical-professional versus the scholarly-academic.

In my opinion, however, the information age is shrinking the chasm between the academic and the professional. The life of the scholar regardless of the discipline and the life of the professional regardless of the profession share the problems and the riches of having an endless supply of information at our fingertips. The days are numbered, if they have not vanished already, when depth of research is a value of its own. Gone are the dusty old books, the ancient paintings, the forgotten text. Instead, we are confronted with the challenge that has been the hallmark of a good lawyer: assembling vast amounts of information and focusing our analysis on precise points and precise issues. Though we label that "thinking like a lawyer," it applies much more broadly to the entire university.

In my opinion, universities could learn a great deal from law schools. In fact, I argue that it is critical to the modern university—to use a term popular these days—for the law school to "reinvent" itself in the university. More specifically, I mean that law schools need to bring two of their best attributes to the university as a whole: focused decision-making and constructive discourse.

Education at all levels is beleaguered, plagued with a cacophony of unfocused decision-making. Higher education must take the lead in addressing this pervasive problem, and law schools can help. The skills taught in law school are important for students and administrators alike. It is no accident that so many lawyers are university presidents and provosts. In the university, as elsewhere, lawyers are doing what they have always done—transferring their legal skills to a different knowledge set. Law schools must bring to the greater university, to their policies and decision-making, the ability to solve problems and to squarely address issues that are the hallmarks of legal education.

Law schools also have much to offer the broader university in terms of fostering constructive discourse. As Shakespeare said in the *Taming of the Shrew*, adversaries in the law are those who “strive mightily, but eat and drink as friends.”³ This quotation should describe not only adversaries in the law, but those in politics, academia, religion, and all other aspects of university life where administrators, faculty, and students often differ.

In general, educated people in our society need a lesson in constructive discourse. A terrible rancor persists in the larger public. I believe this bitter dialogue derives in part from a failure to focus our discussions, bring all of the relevant information to bear, and analyze it properly. That is what lawyers can do and do very well. I know that lawyers are not always the poster children of collegiality and civil discourse; but, as vibrant efforts such as the American Inns of Court have shown, we are making gallant strides forward. Who better than lawyers then to begin the process of training society, and the broader university, to espouse different points of view in spirited debate with respect and collegiality?

Although it marks an important step forward, thoughtful discourse alone is not enough. Law schools must also help the broader university, and society in general, understand the importance of listening, of truly listening, to different points of view. Lawyers, and certainly judges, know that unless you listen very carefully, hear, and incorporate all pieces of the argument, you will not make a good decision or represent your clients effectively. In short, unless you listen intently, you will not be a good lawyer or judge. This lesson is a very important one for our society.

While law schools have these things to give to the university, it is clear that the universities have a great deal to give back to us. Considerable evidence shows that there are many dispirited and unhappy lawyers. The most recent statistics from the American Bar Foundation in 1986 estimate that forty percent of second-year law students suffered from depression compared with nine percent of the general population.⁴ The *Journal of Law and Health* found in 1996 that depression plagues one out of every

3. WILLIAM SHAKESPEARE, *THE TAMING OF THE SHREW* act 1, sc. 2.

4. C. Andrew H. Benjamin, Alfred Kaszniak, Bruce Sales & Stephen B. Sanfield, *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225 (1986).

four practicing lawyers, while over thirty percent suffer from chronic anxiety and over twenty percent from drug and alcohol abuse.⁵

I know that many causes exist for these problems. My personal theory is that these ills plague the legal profession because people who entered the profession with a single-dimensional goal failed to account for their multidimensional personalities. In law school, we must remove the blinders from students, faculty, and the profession, eliminating the professional insularism that is both arrogant and narrows personal interest. The best and happiest lawyers I know—like most of you—have a healthy array of interests: literature, music, sports, science, computers—the list goes on. By integrating law schools into the social, cultural, academic, and athletic life of the university, we teach our new lawyers to be well-rounded individuals as well as good lawyers. Therefore, just as lawyers can bring legal method to the university, the university can ignite intellectual curiosity in the lawyer.

Finally, and most important, I urge you to look outside the confines of the university and ask yourselves: what is the duty of the law school to the greater society? Law schools function as more than professional training grounds for future attorneys. From the beginning of American legal education, the law school has stood as the pillar of our democratic way of life. As stated by Paul Carrington, “Early law teachers were . . . prophets of democracy. . . . [I]t is still an important if seldom stated aim of the American university law teaching to train students for public responsibilities in a democracy.”⁶ In my opinion, law schools are called to promote democracy in two ways: through civic education and by preparing their students for service. With all due respect to you and our colleagues around the nation, we have failed in both endeavors.

American society suffers from a plague of civic ignorance. It has been the central, animating premise of our democracy that every citizen would be informed and would take an active part in governing the nation. However, a recent survey conducted by the National Constitution Center reveals that:⁷

- More than half of Americans do not know how many U.S. Senators there are.
- More than 75% do not know the number of voting members of the House of Representatives.

5. Connie J.A. Beck, Bruce D. Sales & C. Andrew H. Benjamin, *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1 (1996).

6. Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741 (1992)

7. NATIONAL CONSTITUTION CENTER, CONSTITUTIONAL KNOWLEDGE SURVEY (1997), available at <http://constitutioncenter.org/civilaction/civiresearchresults/nccnationalpoll/index.shtml>; NATIONAL CONSTITUTION CENTER, *Teen's Knowledge of the United States Constitution Survey* (1998), available at http://constitutioncenter.org/PressRoom/PressReleases/1998_09_02_1265.shtml.

- About one in three do not know the number of branches of the federal government; 62% cannot name even one of the branches.
- Almost a quarter cannot name a single right guaranteed by the First Amendment, and only 6% can name all four of those rights.
- Fewer than half of Americans know that the first ten Amendments to the Constitution are known as “The Bill of Rights.”
- Only about 2% of young people know that William Rehnquist is the Chief Justice of the United States Supreme Court.

As educators, you have more than a duty to ensure that your law students know the job title held by William Rehnquist. As Justice Breyer has noted, “The lawyer’s role as teacher is his [or her] most important role in public service, for it encompasses all the others.”⁸ Lawyers, students, and faculty have to step forward en masse throughout the nation to help educate the public on civic affairs. You have a duty to help the general public learn the basics about the law and government to which we have devoted so much of our professional lives. As Alexis de Tocqueville so eloquently stated, “What makes the people capable of governing themselves? It can only be that the people are sufficiently knowledgeable to be active participants in the affairs of the day.” The promotion of civic knowledge this vital foundation of our democracy is, to some extent, in your hands and those of the blossoming young lawyers that you teach.

You also have a duty to promote civic involvement by your law students. As you know, lawyers played a vital role in founding our democracy. Lawyers conceived this Republic, lawyers created the Republic, lawyers sustained the Republic, and lawyers have forced the Republic to confront its errors and redress its wrongs. This year, with the fiftieth anniversary of *Brown v. Board of Education*,⁹ we are reminded so poignantly of the great civic power and duty of the legal profession. As the great 19th century lawyer, Rufus Choate, said:

To vindicate the true interpretation of the charters of the colonies, to advise what forms of polity, what systems of jurisprudence, what degree and what mode of liberty these charters permitted, to detect and expose that long succession of infringement which grew at last to the Stamp Act and Tea Tax, this was the work of our first generation of lawyers. To construct the American Constitutions, the higher praise of the second generation. . . . To interpret these constitutions, to administer and maintain them, this is the office of our age of the profession.¹⁰

Lawyers of that period were not the cloistered recluses that we are in danger of becoming—billing hours in high-rise towers, or deciding cases at arm’s length from the public and even from the courts. Far from it. In

8. Stephen Breyer, *The Legal Profession and Public Service*, 57 N.Y.U. ANN. SURV. AM. L. 403, 415 (2000).

9. *Brown v. Bd. of Educ.*, 345 U.S. 483 (1954).

10. The Position and Functions of the American Bar, as an Element of Conservation in the State (1845), in *ADDRESSES AND ORATIONS OF RUFUS CHOATE*, at 154 (3d ed. 1879).

those days, lawyers dominated not only the courtroom but the literary, philosophical, educational, and political life of the nation.

That has gone from the American scene. The number of lawyers in public office has dropped, and dropped dramatically. We are in danger today of training a profession adept at serving well-paying clients, but lacking the skill and desire to ensure the system of government that gave them that opportunity continues to thrive. Please do not misunderstand me. Law is a noble profession. Universities are doing a great service by training aspiring lawyers to practice law and practice it well. I call on you, however, to rise to an even greater challenge—the one on which American legal education was founded. Help us train the next generation of lawyer-citizens to serve and promote the democratic values upon which this nation was founded.

So I close with the question, “what is the law school”? The answer again for me is clear: it is an institution that forms professionals with integrity, channeling the talent, energy, and range of experience that characterizes law students so that they see themselves as stewards of the law. They must bring from their law school experience not just the quest for a particular job, but the far more rewarding and vastly more valuable aspiration of professional purpose—a sense of their link to and role in a society committed to ordered liberty and the rule of law. It is fashioning the law school experience with a broader sense of who the twenty-first century lawyer is called to be: an age-old model in a new context.

I did not go to law school to master the billable hours model of lawyering. No one in this room did. We stand here as living proof that the law school model somehow needs to capture the idealism and the sense of common purpose that John Sexton describes as “the lawyer as a fiduciary for a sacred trust; the lawyer as priest and keeper of the law.”¹¹ What a lofty and challenging opportunity it is, and it is yours. Good luck!

11. John Sexton, *Legal Education, Today & Tomorrow*, 3 GREEN BAG 2D 417 (2000).

Comments

