2011

Keynote Discussion: Just Exactly What Does a Transactional Lawyer Do?

William J. Carney
Emory University School of Law

Ronald J. Gilson
Columbia Law School, rgilson@law.columbia.edu

George W. Dent
Case Western Reserve University School of Law

KEYNOTE DISCUSSION: JUST WHAT EXACTLY DOES A TRANSACTIONAL LAWYER DO?

WILLIAM J. CARNEY[1] **MODERATOR**

RONALD J. GILSON[2] **REFLECTIONS ON *VALUE CREATION***

GEORGE W. DENT, JR.[3] **REFLECTIONS ON *ENTERPRISE ARCHITECTS***

WILLIAM J. CARNEY

Introduction

I'm Bill Carney from Emory, and I want to welcome you to our program. I hope you're enjoying it. My job today is just to serve as moderator for two people who have sort of different views, or have held different views of what lawyers do and what we ought to be training them for. Ron Gilson wrote what I think we have to call the seminal article in this area way back in 1984,[4] and people have been reacting to it ever since. Notwithstanding the fact that we are casebook competitors, I cite his article in my *Mergers* casebook.[5]

Ron graduated from Washington University, got his J.D. from Yale, and practiced in San Francisco as a mergers and acquisitions lawyer before he went to Stanford. And not only has he gone to Stanford, he's gone to Columbia. He holds chairs in both places, so he leads more of a peripatetic life than I could possibly stand, but he's younger and stronger.

And I will introduce George Dent now, and we won't have to go through that later. George Dent has taught at New York University, Cardozo, and New York Law School before he joined the Case Western faculty in 1990. He clerked for Judge Hayes of the Second Circuit Court of Appeals and practiced law with Debevoise. He's the faculty

---

[1] Bill Carney is a Charles Howard Candler Professor of Law at Emory University School of Law, where he teaches Business Associations, Securities Regulation, and Corporate Law. Prior to joining the Emory faculty, Professor Carney was a partner at Holland & Hart in Denver and a professor at the University of Wyoming. He has previously served as chair of the Corporate Code Revision Committee and as a member of the Executive Committee of the Corporate Section of the State Bar of Georgia. He received his B.A. from Yale University in 1969, and his LL.B. from Yale University in 1962. He can be reached at lawwjc@law.emory.edu.

[2] Ronald Gilson is a Charles J. Meyers Professor of Law and Business at Stanford Law School, where he teaches Business and Corporate Law and Securities Regulation. He is also the Marc and Eva Stern Professor of Law and Business at Columbia University School of Law. He is a fellow of the American Academy of the Arts and Sciences and the European Corporate Governance Institute and is board chair for a number of mutual funds that are part of the American Century family of funds. He received his B.A. from Washington University in 1968 and his J.D. from Yale University in 1971. He may be reached at rgilson@law.columbia.edu or rgilson@stanford.edu.

[3] George W. Dent, Jr. is currently a Schott-van den Eynden Professor at Case Western Reserve University School of Law, where he teaches Business Associations, Mergers and Acquisitions, and Business Planning and supervises the Business Organizations Concentration. Prior to teaching, Professor Dent practiced corporate law with Debevoise, Plimpton, Lyons & Gates in New York. He received his B.A. from Columbia College in 1969, his J.D. from Columbia University School of Law in 1973, and his LL.M. from New York University School of Law in 1981. He may be reached at george.dent@case.edu.

[4] Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

[5] WILLIAM J. CARNEY, MERGERS AND ACQUISITIONS: CASES AND MATERIALS (Foundation Press 2001).

supervisor for the Business Organizations Concentration and an Associate Director of the Center for Business Law and Regulation at Case Western Reserve University Law School.

I thought the way we would start this is to give each of the speakers five to ten minutes to talk about the thesis of their original articles. Then to the extent that they want to react to each other at that time, let them have a go at it and follow with some questions, first from me and then from you. So Ron, I think you go first. You've got pride of place because you've got the oldest and most seminal article.

RONALD J. GILSON

REFLECTIONS ON *VALUE CREATION*

That is a funny kind of pride. As an ordering principle, I'd rather focus on seminal than old, but I'll take what I can get. I'm extremely grateful for Bill's kind invitation to speak at the conference on "Transactional Education: What's Next?," especially in front of so many people. When I started worrying about training business lawyers in the early 1980s, the real truth is that we could have had this meeting in a closet, and there would have been extra room for refreshments. The number of attendees today is a testimonial to what everyone in the room has caused to happen: Education in business lawyering as opposed to litigation has become a central feature of legal education today.

I'm also delighted to share a panel with Bill Carney and George Dent. We've all had to develop personal techniques for dealing with information overload -- the rush of stuff that the Social Science Research Network puts across our computer screens every morning. Let me suggest one easy approach that I use. If you see an article by either Bill or George, just read it. It's an easy screen, it saves time, and you will always learn something.

I will start by talking briefly about where the *Value Creation*[6] article came from, because a little bit of the history helps me frame the areas where I agree with George and the one area where we may part company. In effect, this article was my dissertation from practice. After law school and clerking, I went to work for a small San Francisco boutique firm. I was the fourteenth lawyer, and that was my first experience with, as Bill puts it, pride of place. I held down the very last position on the letterhead. The firm's way of training people was to hand them a deal. I did my first acquisition six weeks after I showed up at the firm. Seven years later, I thought I was doing it reasonably well, and I left practice for teaching because I wanted to figure out what it was, analytically, that I was actually doing. So the seven years of practice was the coursework, and the article we're talking about now was the dissertation. I think it's no coincidence that if you look at Bill's, George's and my backgrounds as described in the biographical document that has been distributed, there is a fair amount of overlap in our career pattern.

I can state the thesis of the *Value Creation* piece in two sentences. Business lawyers have to be able to create value. If the transaction or the organization for whom we are working isn't worth more as a result of our participation, then we're going to lose the work, and we're not going to have very much fun. As an anecdotal piece of evidence, consider the role of lawyers in residential real estate sales in California. In fact, lawyers nor have no role.

---

[6] *See* Gilson, *supra* note 4.

Title companies and real estate agents have completely displaced business lawyers in purchase and sale of people's homes, which I expect has happened everywhere that regulatory restrictions does not protect lawyers' turf. Business lawyers lost the work because we did not offer value in that setting. I thought I could set up the conversation by highlighting a couple of things I've learned over the 25 years and which helpfully expand *Value Creation*'s thesis. These then can set up the places where I entirely agree with George's lovely article,[7] and at least frame one place where perhaps we disagree.

Simultaneity

My first point concerns something that is buried in *Value Creation* but to which I accorded far less attention than I have come to believe that it deserves. I now think of the buried concept as "simultaneity." Clients care a lot about creating value in a transaction, but they also care a lot about how that value is divided. The problem is that creating value, the win-win concept that is both right and incomplete in critical respect, and dividing it, the distributive bargaining element, take place at exactly the same time. At the same time everyone is talking about how to cooperate to make the transaction succeed, they are also anticipating how the success is going to be shared, and all other things equal, each party wants more.

The difficulty caused by the simultaneous creation and division of value is that a lot of the techniques we use to create value – for example, open and honest sharing of what our needs are, what things we value, honest collaboration – can profoundly reduce the ability to engage in distributive bargaining. For example, gains from trade arise from the parties sharing the importance to them of different elements of what is to be contributed or exchanged; identifying differences in valuation provide the opportunity for gains from trade. However, one party can improve its bargaining position if it strategically misrepresents its valuation. In equilibrium, both parties will misrepresent their real preferences, which interferes with value creation. That conflict, and the importance of structuring negotiations to separate value creation and division, is underemphasized in *Value Creation*. More important than my underestimating the point some 25 years ago, I believe the difficulty posed by simultaneity continues to be underestimated. No one, whether it's the law school negotiation teachers or the business school game theorists, does a very good job in addressing how you engineer a transactional structure that generates acoustic separation between creating value and dividing it. The good news is that I think practitioners have figured out some of the problem For example, the standard joint venture between a large pharmaceutical and a small biotech, a collaborative governance structure in a set of formal nested options, does it reasonably well. Nonetheless, developing cooperation in an inherently competitive environment remains a very difficult problem. But better late than never. It is taking up a lot of my time now.[8]

A Creature of Its Time

The second point that helps frame the extent to which George and I may differ is that we need to be clear about context. I wrote *Value Creation* in 1984. Let me set its context

---

[7] George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279 (2009).

[8] See Ronald J. Gilson, Robert E. Scott & Charles Sabel, *Contracting for Innovation: Vertical Disintegration and Interfirm Cooperation*, 109 COLUM. L. REV. 431 (2009); Ronald J Gilson, Robert E. Scott & Charles Sabel, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice and Doctrine*, 110 COLUM. L. REV. 1377 (2010); Ronald J. Gilson, Robert E. Scott & Charles Sabel, *Contract, Uncertainty and Innovation*, *in* RULES FOR GROWTH (Robert Litan & George Priest eds. 2011).

in a three sentence intellectual history. In 1984 we were still in the process of financial economics turning into serious microeconomics; most of what I think of now as managerial economics barely existed then. George correctly points out in his article that the economic theory of agency, which does not figure prominently in *Value Creation*, is central to understanding the problems that business lawyers address. But William Meckling and Michael Jensen's truly seminal piece that first applied agency analysis to problems that concerned business lawyers appeared only in 1976 in the Journal of Financial Economics, which Jensen had started just a couple of years before.[9] At the same time, Oliver Williamson was still at the early stages of turning Ronald Coase's line drawing into transactional cost economics, which would give us a both a positive and normative handle on how organizations and transactions are shaped.

Since *Value Creation* appeared we have seen an explosion in the range of organizational forms and transactions that are the tools through which business lawyers now create value, and in the range of positive theory that helps us think about how to do it. So the methodology that's reflected in the *Value Creation* piece, and its use of the capital asset pricing model as a heuristic, was a creature of its time. And George properly describes the broader range of theory that is now available to business lawyers. Our tool kit has gotten much, much richer.

The Role of Theory in Training Lawyers

This brings me to my final point, which concerns how much help a currently popular body of theory will turn out to provide. I'm of two minds about the role of the cognitive and social psychology literatures that have been translated by non-psychologists into behavioral economics and behavioral finance. I am of two minds because in the 1985 first edition of my The Law and Finance of Corporate Acquisitions,[10] I included, I believe for the first time in business law teaching materials, a lengthy excerpt from work by Amos Tversky and Daniel Kahneman[11] because I thought there was great promise in understanding the extent to which and how the non-analytic part of people's behavior bears on business practices. Now, after watching the field grow in influence,[12] I think the promise remains relatively empty. We don't have techniques for identifying which cognitive biases are operative in what circumstances and, more important, there is no reason to believe that only one bias can be operating at the same time. We need something like an arbitrage pricing model for biases that we don't yet have, and frankly, I don't think we will ever have. To be sure, it is helpful to know that in some circumstances individuals value losses more than gains – if we believe the party on the other side of a transaction has this bias and our client does not, an opportunity to create value appears. But it remains uncertain when business professionals suffer from such biases and whether individuals can learn to overcome them. For now at least, the payoff to this work for business lawyers remains in the future.

---

[9] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[10] Ronald J. Gilson, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS (Foundation Press 1st ed. 1986).

[11] Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981).

[12] Daniel Kahneman was awarded the Nobel Prize in Economics Science in 1990 for this work. Amos Tversky unfortunately died too early to share in the recognition of the value of psychology to economics.

That brings me to the one point where George and I may have a difference. It relates to how we train lawyers, and the role of theory in teaching how transaction cost engineering, or architecture as George would put it, creates value. In my view, the starting point is that law as a discipline simply does not have a methodology that addresses the relationship between transaction or organization structure and value. The absence of that link is underscored by the fact that Oliver Williamson and Elinor Ostrom received the Nobel Prize in Economic Science last year for their exploration of just that gap. The absence of a methodology in law that explains the sources of value may explain why, in the end, Steve Schwartz seems to think that we end up being regulatory technicians.

The point is that law professors have to go elsewhere in the university to find the underlying theory that identifies how we can teach the skills for creating value. Without that underlying theory, we end up teaching a series of anecdotes, with little analytic rigor, and without the students having the means to test in their own minds the cohesiveness or coherence of what we teach. To put it differently, what distinguishes a professional school from, on the one hand, a graduate department, and on the other, a trade school, is the obligation to take cutting edge theory that's largely been developed elsewhere in the university and bring it to bear on the real world in which our students will and our alumni are practicing. At one level it's only arbitrage, but on another, when the theory comes out of the law school tied to things that happen in the real world, the theory is better for it as well.

So, I agree with George that the structures that we now create and the techniques that we now use are dramatically broader than those that we were addressing in 1984. Where I will dig my heels in, and here I'm not sure George disagrees, but we will find out, is what the task is in the end. In my view the task remains helping our clients create value.

GEORGE W. DENT, JR.

REFLECTIONS ON *ENTERPRISE ARCHITECTS*

Taxonomy

First, just a little point of taxonomy which might seem too trivial to mention, except that I think the problems of taxonomy are very common here. I noticed that the subject of this session is: Just exactly what does a transactional lawyer do? My article and Ron's were about what "business" lawyers do. And, of course, there is some difference. A lot of what business lawyers do does not involve transactions. A lot of lawyers do a lot of work that is involved in transactions and also do a lot of work that is not involved in transactions. Then there is the question of what is business law. There are an awful lot of areas that are closely related that might or might not be included. So, one of the big problems here is just to decide what it is we're talking about before we can describe and understand it.

The Role of Business Lawyers

My remarks will probably be quite brief because, as Ron suggested, we agree on most things. When I come to his last point, I'm not sure there is a disagreement there either. Ron's article captured a lot of truth and of course, as he said, it was written before anyone else had even addressed this issue. So it's quite remarkable. I didn't think he had captured the whole truth, and furthermore, I thought that the profession had changed and was continuing to change with the emergence of venture capital, leveraged buyouts, and new

forms of entity, like the limited liability company and the virtual corporation. And, in a more general way, there is a difference between distinct, one shot transactions, on one hand, and on the other hand, repeated transactions between the same parties and relational contracts, like a joint venture.

And then the next task was to describe the wide variety of functions that business lawyers perform and, again, it's a long list. Although transaction cost engineering is an important part of it, there are a number of other tasks involved, like gathering and verifying material information, and negotiating and drafting agreements. Each of these categories comprises innumerable specific tasks that vary according to the nature of the matter at hand.

Then, coming closer to what we teach our students, is describing the skills needed for these tasks. One such skill is helping to decide if a deal should be done at all. If so, the lawyers help to choose the entity, the scope of the enterprise, the division of control, profits, and risks, and the issues that Tina Stark has told us that we always have to run through, including provisions for resolving disputes and provisions for parties to exit or to terminate the undertaking. Ron also mentioned the problem of identifying agency costs, or opportunism.

We often mention negotiating skills, but tend not to talk as much as we should about discussing matters with our own clients. In litigation, it is usually pretty easy to know what the client wants. If he's the plaintiff, he wants more money. With a business client, it's not always clear what exactly the important issues are. How important is it that certain representations and warranties be true? How important is it that there is a veto or complete control for one party or another?

Another thing that was mentioned in a couple of the sessions yesterday is that all of this has to be done with attention to costs. With clients becoming more and more cost conscious, we need to discuss with students how to be cost effective; how to determine when it is really worth it to take an additional step.

Enterprise Architect

Ron used the metaphor of the transaction cost engineer. I thought a more accurate title is enterprise architect. My colleague David Porter, a former corporate partner at Jones Day, suggested changing this to enterprise engineer because lawyers also implement designs of their own or of others; they actually build the entities' ramparts and the castle walls as well as its plumbing.

Distinguishing Business Lawyering from Litigation

What are the pedagogical implications of all this for business lawyering? First, a general observation. It is based on the sessions that I heard yesterday, so it will hardly come as a surprise to you in this room. It is how remarkably different the activities of a business lawyer are from those of a litigator, and how little attention is paid to business lawyering as opposed to litigation in the law school curriculum, generally, and in the first year of study in particular.

Now, I teach the basic Business Associations course, as well as a couple of the advanced courses. A constant problem in the basic Business Association's course is that students, by habit, think in terms of litigation, not in terms of planning and contracting. They aren't accustomed to thinking about what may go wrong down the road, including how someone may behave opportunistically in a business relationship, and they are not used to thinking about how to prevent or resolve future problems.

They are also not used to thinking about negotiating outside of litigation. Unlike litigation, in transactional negotiations the other party can just walk away. And even if the other party does not walk away, in many cases again the parties are looking to a relational contract, a joint venture, a venture capital investment, so they are looking to continued relations down the road. Even if the behavior of the lawyer is not so atrocious as to destroy the deal, it may be bad enough to sour the relations between the parties.

There was some mention yesterday, consistent with things I have heard before, that very often business people view lawyers not as deal-makers, but as deal-breakers. When the parties are getting along just fine, the lawyers come in and start to stir up trouble. That may be an unjust accusation against business lawyers. It is also claimed by business lawyers that, in some cases, the parties have agreed at a level of glittering generalities; they are getting along just fine because they haven't paid any attention to the tough issues. Then, when the lawyers come along and point out some tough issues, the parties start to have a falling out and they blame it on the lawyers. But it is nonetheless true, I think, that the kinds of attitudes one brings into litigation are often inappropriate for the business context, and part of the job of the business lawyer is not to destroy, but rather to foster, a friendly relationship between the parties.

Theory Between Structure and Value

That brings me to Ron's last point, and I think it's an interesting one. I don't know to what extent I agree or disagree with him, in part because I'm not sure exactly what he is saying, and in part because I am not sure exactly what I think about it myself. But when we talk about a theory of relationship between structure and value, first of all, I don't know how much there is available in fields outside of the law to draw from. I know that there is a fair amount, for example, about the choice of form of strategic alliances. But that's just one part of what business lawyers do.

Perhaps a more basic problem is that application of theory here may be extremely difficult because of the infinite variety of business matters. To have a theory that in this situation you do A, and in that situation you do B works fine if you've got just two choices and two basic situations. Business lawyers will tell you that every deal varies a little bit from every other deal and that you have to adjust to those specifics.

At some level of course there is theory. You wouldn't try to organize Microsoft as a general partnership but that's obvious. When you get to the most difficult situations that people really do deal with, I wonder if that is the point at which theory no longer works.

But, I know Bill has a number of questions he wants to discuss with us so I will stop with that.

WILLIAM J. CARNEY

Development of Delaware Law

Just for reference, I'll put up a slide of some of the leading – at least my view – some of the leading articles in addition to Ron's and George's that contributed, I think, in many ways, to the debate. And one of them is Steve Schwartz's article,[13] where he speaks generally of the lawyer as somebody who reduces regulatory costs in transactions. Ron wrote his piece in 1984, when the Delaware courts were about to roll up their sleeves and

[13] Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J. L. BUS. & FIN. 486 (2007).

really dig into corporate law, particularly mergers and acquisitions law, and the duties of directors, and looked rather carefully at contract provisions, all with a very suspicious eye, I think. And at the end of the day, it's been my observation that not just in M&A deals involving Delaware corporations, but also in deals involving all corporations, Delaware laws have had an enormous impact on what the acquisition agreements look like. And the sort of background law that we all think we have to deal with, even in states where there isn't really much law, the worst case will probably be Delaware.

Ron, would you think that what's happened in Delaware since you wrote provides a larger role for the lawyers as a regulatory cost saver?

RONALD J. GILSON

It certainly plays a role; it makes the landscape more complicated in no small measure because of the fact that Delaware, in my view, has two laws. It has a law that the Delaware Supreme Court occasionally states, typically in tongues, and then it has the deal-lawyers' working law that reflects a continual dialogue with the Chancery Court, grounded in transactional patterns and market realities that the lawyers and members of the Chancery Court confront every day. So teaching takeover law doctrine because has become both dramatically more interesting and more complicated; it reflects the effect of changing market realities and the sometimes tense interaction between the Supreme Court and the Chancery Court. But beyond doctrine, the changes in Delaware law have pushed lawyers to be creative about deal structure. Here is an example. The worst thing that can happen to a Chancery Court judge is that he or she actually has to make a decision about value. Thus, recent Chancery Court decisions can be understood as the court pushing the deal lawyers to design a transaction structure that the court is confident operates to fairly price a deal. If the deals lawyers ca do so, then the court gets out of having to independently determine value. Of course, that pushes us back to what Bill, George and I, and I think everyone in the room too, thinks is most important – that is, the lawyer's ability to be architect or engineer a structure that works. In the particular case of Delaware, the audience is somewhat different. It's not just the client and the party on the other side, but also persuading a bunch of sophisticated Chancery Court judges that the structure you've created is sufficiently reliable that the court is relieved of directly reviewing the substance, as opposed to the process, of the transaction.

WILLIAM J. CARNEY

George, your article (and it seems to me that you and Ron are much closer together than the two articles suggest separately) suggested the broader role for the lawyer, advisor, counselor, and planner, absent transactions. I think that's a very valuable addition to the literature. But essentially, we see a spectrum of activities for the lawyer from counseling where there is no action or activity taking place, all the way to the one shot deal, and acquisition agreements as being that kind of representation. Does that make it difficult, or perhaps impossible, to sort of have a general model of what it is lawyers do? I'll add one more piece to that and that is the lawyer as a foil. In one of my last roles as a lawyer, I had a favorite client. He was a free spirited entrepreneur, and sometimes we would go to negotiations. It would be my job to take the hard line in the opening argument and as soon as I had done that, Ed would back off and say, "wait a minute, Bill has made it a little unreasonable here," and would offer something a little more generous, and the other side would often leap to take it because the appearance was that he was giving up a lot more than he really was. I realized that I had become a violin that he played in whatever way he chose

to play me. I didn't mind being a violin; it was a fun role to play. George, can we generalize in any meaningful way of how lawyers add value?

GEORGE W. DENT, JR.

Well, your first question – does the wide variety of matters handled by business lawyers make it difficult or impossible generalize? That's easy. Yes, it does. Can we generalize? I think we certainly need to. How else do we decide what it is our students need to learn? There is no point in teaching them some narrow set of skills for a particular very narrow area of practice that they probably will not enter, and even if they do, that will probably change over time so that what they have learned will not be of much use to them. So we do have to generalize, but just how we go about it is, I think, a very difficult question. Can we describe a set of general skills?

Talking to Clients

One thing I mentioned that doesn't come up often in the literature is talking to clients because that certainly is something that cuts across the practice of all business lawyers and is something that doesn't come up much in litigation. You don't have to ask your client in a products liability case, what would you like: more money or less? But in business transactions, such discussions are very common.

Just to take one small example, with students and young lawyers there is a reluctance to say to the business people: "It would help me to understand how your business operates and what it is you're trying to do here in order to help to design the entity and negotiate a deal that will work for you." Young lawyers are afraid of sounding stupid if they ask, "Would you explain your business to me?" And yet when you talk to people who practice in the area, they will say that asking such questions is absolutely essential. Business clients often list the fact that lawyers don't understand their businesses at the top of their complaints.

That is one small example of how to talk to clients and of the importance of understanding the business, but then, going beyond that and coming up with a list of general skills that would be really useful would be a very difficult project.

WILLIAM J. CARNEY

The Future of Business Education

I think I'd like to shift very briefly to my last topic, which is the future of business law education. I want to talk about some models of business law education that we now have in law schools and not surprisingly, I begin with Emory's model, which I can also describe as "Tina Stark's," to give credit where credit is due. We have a fairly elaborate certificate program, which has a schedule of required courses which takes up almost a year of students' time after their first year. And they run from the basics of rudimentary accounting knowledge, a course which can be waived if a student has sufficient experience elsewhere, through the basic corporate course, and contract drafting, which is something that most of our students who are in the program will take the first semester of their second year because it is a prerequisite to deal skills. The other courses along the way are followed at the end by a capstone course which is either a workshop, a simulation, or we have a series of field placements with largely corporate clients and a couple of government agencies that fulfill that requirement.

So they get a progression of experience, and it is pretty rigid. It is not so rigid that we haven't had a large demand for it. Tina has a requirement that the 2Ls have an interview with her and figure out what it is they really want, and I think this year she had 110, which is 50 percent of the rising 2Ls sign up for the interviews, and I think about 75 students were admitted into the certificate program. So, you know, it is a significant number. It seems to be playing well in the marketplace.

The next thing is a series of elective courses. Many of those are taught by adjuncts, and it's a pretty rich array for those who want to add to that set. But we have consumed almost one year of their total law program if they go that route. The elective courses continue with workshops that are the capstone classes, and the field placements are with corporations and with the SEC and the IRS and the Federal Reserve Bank. So that's the group that we have. It is a fairly structured program and requires a commitment to a lot of hours.

Case Western's program is a bit different. I think it is 8 hours of required courses and then an additional 7 credits, so that makes about 15 hours, which is considerably less and considerably more flexible for the students, to Stanford's, which represents kind of the ultimate flexibility. It is just a grouping, I think, as best I can tell in the catalog, and I assume some advising along the way about what students might want to take.

In contrast, the other end of the spectrum is the Northwestern model of a three-year JD/MBA program with a full year in the business school. The number of credit hours required in the law school is 72 hours (I think ours is 90 here), and the others are in the business school, and that's somewhat reduced, too, I'm sure for the MBA over there. So that represents the range of models that I am aware of. I would like to know if either of you gentlemen have any comments on the success or your desires for the future in your own schools, or what we ought to be doing.

GEORGE W. DENT, JR.

First, it's a great question. Actually, let me back up and even broaden the question if I may, Bill. Note that in most countries, including most industrialized countries, law is an undergraduate program, and so some people might well ask if we even need law schools. Why don't we just get rid of them altogether and stick legal education into the undergraduate program? And, of course, the other side of that coin is that following the undergraduate law program, students in other countries serve what is basically a lengthy apprenticeship. So what is the best way to train young people who want to be business lawyers? A relatively brief period of general education, followed by long apprenticeship, or a very detailed program of study carefully prescribed that will turn them out ready to hit the ground running? It's a good general question.

Of course, we are hardly disinterested. We want more legal education. When people start talking about a three year JD/MBA in which students would spend only two years in law school and one year in a business school, law deans immediately start to ask, what's that going to do to our income? So those are good questions. There is also a question of what students want, and what they reasonably want. On one hand, they want to come out of law school able to get a job. On the other hand, they don't like to be too restricted, especially early in their law school careers. Now that's not an answer to your question. That is just more questions, I realize, but I guess that's the best I can offer.

RONALD J. GILSON

I started out my teaching career thinking that coupling the MBA degree with a law degree was a great idea (and one I should have taken advantage of). I am less convinced of that now. One other thing I learned over a lot of years is that you can't really get someone else to paint your fence. What law students need to know about business and what MBAs need to be taught, although they overlap some, are different in focus. The MBA program doesn't bring to the table the range or theory or set of skills that are not traditionally law but which a good business lawyer does. Law Schools have to design that curriculum themselves.

Let me frame the issue in a setting. Suppose I want to teach my students how to choose an exit option for a close corporation. One option is to require arbitration to set value if the parties cannot agree. A standard pattern is that one selects an arbitrator, the other side selects an arbitrator, and then the two arbitrator picks a third arbitrator. This is an expensive process, but probably results in reasonably accurate, non-strategic valuation. But what about a different process that is really cheap and quick: one person makes an offer, and the other person gets to buy or sell. Under what circumstances is each technique the best?

There is a game theory literature that talks about how to divide a pie[14] I want the students to walk away from my class with some rules that grow out of theory and help them identify the circumstances when one of these techniques is likely to be preferable to the other. They won't get that in the MBA program. They may get some game theory, but it won't be put in the context that I want them to have it, and that turns out to run pretty much through the curriculum.

In the end, I think that theory is critical to giving students the ability to select among options, but I don't find any place else in the university that's likely to apply that theory in a way that is most effective in training lawyers. A high end professional school is doing something that nobody else in the university can do for us so, unfortunately, I can't pawn it off on the business school or on the economics department or the psychology department to do the interrogative work of taking theory and making it applicable to what our students are going to be doing in the real world. Nobody else is going to do that hard work for us.

WILLIAM J. CARNEY

We are pretty much out of time if we are going to stay on schedule. I see Tina nodding, so yes, boss. We will close with this and invite anybody else who has questions. Sorry we ran out of time for questions. One of the authors in one of the articles I listed, Jeff Lipshaw, sitting here with his hand ready to go up. Five minutes, okay. I will cut the coffee break by five minutes.

RONALD J. GILSON

That was a beautiful negotiation.

WILLIAM J. CARNEY

Go on, Jeff. Do you have a question?

---

[14] Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994).

QUESTION FROM JEFFREY LIPSHAW[15]

Yes, I do. [Question regarding the role of theory in teaching transactional law.]

RONALD J. GILSON

My idea of the role that theory plays can be illustrated by the little routine that used to be done at the beginning of Sesame Street and that I used to watch when my children were small. There was a board with a picture of nine things and a song was then sung that one of these things is not like the other. The children were being taught to reason by analogy, and the technique is quite similar to that reflected in Edward Levi´s classic An Introduction to Legal Reasoning. In every class I teach, there are students who □get□ it, who have sense. I expect they got it when were twelve years old, that is, they understood intuitively into which box each thing went. What I'm deriving from theory, from economics, from psychology, from finance and the like, is in fact a set of shorthand algorithms that let the smart kids in the class who just weren't born necessary intuitions, perform the same sorts of roles, and very effectively.

So where am I going to look? I'm going to take pieces of it from everywhere. So, for example, it is not in my mind a surprise that the best policy work done with cognitive psychology and biases was in large part the work of a lawyer although sometimes with an economist as a co-author. The notion that I can switch default rules, and as a result can help with individual decision-making is an example of taking an idea that was developed elsewhere, and bringing it to bear on complex problems that we address in a law school. It may not extend into a transactional setting, but it doesn't mean it is short theory.

What doesn't happen in the other disciplines, and what makes it, frankly, so much more fun to be a legal academic, is that our world doesn't fall into little disciplinary boxes. We deal with real people doing real things; lots of them are rational, lots of them have a little bit of irrationality, and sometimes we are trying to impose rationality on what is often an emotional problem, like busting up a two family closed corporation. Law schools may be the only place in the university where academics truly get rewarded for doing interdisciplinary work. And that's allowed because we don't have much of a discipline ourselves, so nobody cares that we are grabbing stuff from elsewhere.

WILLIAM J. CARNEY

And with that, I think I will repeat myself. We have run out of time, and if you have any questions, come on up.

[15] Jeffrey Lipshaw is an Associate Professor at Suffolk University Law School, where he teaches Agency, Partnership & The LLC and Securities Regulation.