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The Mind in the Major American Law School

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Legal scholarship is significantly, even qualitatively, different from what it was some two or three decades ago. As with any major change in intellectual thought, this one is composed of several strands. The inclusion in the legal academic community of women and minorities has produced, not surprisingly, a distinctive and at times quite critical body of thought and writing. The emergence of the school of thought known as critical legal studies has renewed and extended the legal realist critique of law of the first half of the century. But more than anything else it is the interdisciplinary movement in legal thought, which began in the late 1960s and continues with unabated force to this day, that has transformed the character of modern thinking about law. Virtually every field of human knowledge is being mined for what it can contribute to our understanding of the processes of law and of legal issues.

For Judge Edwards these intellectual developments have adversely affected the modern American law school, especially the "elite" among them. He argues, in strong terms,[1] that within these institutions there is an unfortunate emphasis on pursuing abstract "theory" at the expense of engaging in hard-headed, lawyerly analysis of legal doctrine. The vantage point from which he issues this indictment is primarily that of a judge: judges, he says, are getting less and less help from legal scholarship as they try to decide the cases before them. While Judge Edwards disclaims any desire to rid law schools entirely of "theory," he makes no bones about his view that there is "too much" of it and that a good deal of it is of poor quality as theory. He

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1. Judge Edwards claims that "many law schools — especially the so-called 'elite' ones — have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy." Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992). He says that "the schools are moving toward pure theory," *id.*, and that the "reality" is that "many 'elite' law faculties in the United States now have significant contingents of 'impractical' scholars, who are 'disdainful of the practice of law.' " *Id.* at 35. "The proponents of the various 'law and' movements," Judge Edwards says at one point, "generally disdain doctrinal analysis." *Id.* at 36.

sees an excess of ambition over talent and suggests that law professors would be better off sticking to what they do best — or, in any event, better — which presumably is to analyze cases, organize fields of law, and discover and criticize existing legal principles.

All this is bad enough, Judge Edwards laments, but compounding this excessive theorizing in law schools is an attitude among would-be "theorists" of disdain, even contempt, for those who plow the fields of doctrine. This supposed attitude carries over into the classroom, and with no small consequences. It is said to cause our graduates to feel alienated from their professional lives; this alienation is in turn producing an increasingly unprofessional and unethical bar.

I think this diagnosis of a highly contagious and debilitating disease of "theory" in our major law schools, and of its supposed effects, is seriously overdrawn — even to the point of being a fundamental mischaracterization — and is discouragingly unappreciative of the degree to which law schools have over the years become intellectually invigorated — in a *professional* sense — by the expansion of knowledge and arguments now regarded as relevant to thinking about law. There are several problematic layers in Judge Edwards' critique, but the first is its offer of a basically flawed image of what law schools are really like these days. Reading Judge Edwards' article, one comes away with the impression that a majority of the faculty at these schools has turned its back on its professional identity and given up focusing on basic questions of law. This is simply not the case.

One way to correct this misimpression is to take a quick glance at the monthly summary of publications contained in the *Index To Legal Periodicals*. Just a brief review of the titles listed there provides a sobering antidote to the natural but nonetheless mistaken tendency to fixate on what you do not like or on a few highly publicized incidents or publications, and then to assume that the rest of the world is just like that. The *Index* does not identify publications outside the realm of traditional legal fora, so it does not provide us with a clear picture of the potentially foregone opportunities for work on traditional legal subjects. But it still reveals a rather remarkable array of writing evidently about "law" and doctrine, even by scholars from "elite" schools for the "elite" law reviews.

The notion of a rampant turn within the legal academy towards theory, or away from scholarly — or professional — engagement with contemporary legal problems is also belied by a close examination of my own faculty, which is generally regarded — and quite properly so — as one of the centers of interdisciplinary legal research. Out of a productive tenured faculty of about forty professors, eight are authors

of major treatises; fifteen are authors of casebooks; at least twenty-five have published works about significant and practical legal issues within the last year or two; six — of whom only two are treatise authors — are engaged in major law reform efforts; and at least eighteen — *not* including the last six — have been involved as consultants, advisors, or active participants in some concrete legal issue in the last year. Yale Kamisar, the one member of the faculty who holds a university professorship, the highest honor bestowed within the school, is the paradigm of the law professor concerned in his teaching and writing with careful analysis of legal issues. Thus, when you consider that the Michigan faculty has the usual complement of legal historians — five, though a couple are part-time — and legal philosophers — two — you realize that the image of the law school as a group of second-rate social theorists trying to imitate Habermas or Foucault is simply wrong. The overwhelming majority of the faculty think of themselves, and appropriately so, as *professional* legal scholars and teachers concerned with understanding major legal problems in their fields.

Part of the problem with Judge Edwards' critique is the limited perspective from which he assays the nature of contemporary legal scholarship and service. If you look, as he does, primarily for law review articles that offer immediate help to judges, you are bound to underestimate the amount of very practical, relevant scholarship being produced today. Not only does a good deal of contemporary legal scholarship appear in forms other than the traditional law review article, but much of it is directed at other decisionmakers besides judges. The propositions that imprisoning fathers who fail to pay child support deters delinquency, that lineups are less protective of defendants' rights than showups, that a Michigan legislative program for citizens to finance their children's higher education tuition costs is based on unsound legal and financial premises — all theses put forth by Michigan faculty and all highly relevant to pressing social issues — may not be particularly helpful to the federal judge but certainly are to other decisionmakers.

I should also say that the "what-helps-a-judge" angle also leads one to ignore or undervalue the degree to which those who advocate major, or radical, reform of law are engaged — professionally engaged — with legal issues. Judges are not revolutionaries, and they rarely go beyond making interstitial changes in the law. And, for that reason, they are not likely as a group to be especially receptive to, or to find especially helpful, scholarship that is sharply critical of existing legal norms. Hence, scholarly writings with a strong feminist, or critical race, or critical legal studies perspective, much of which is highly spe-

cific about legal doctrine, are not likely to be welcomed by the judge laboring over an opinion. Here again, however, other decisionmakers might feel differently.

I see this rather clearly in the First Amendment area. Some feminist and some critical race scholars advocate significant changes in the existing First Amendment doctrine. They argue that the harms of speech are greater than previously supposed, that the slippery slope of new regulation is not as slippery as many think or is a risk worth bearing, and that the interpretation of the Constitution ought to be changed accordingly. I have noticed a tendency to try to discount such attacks on conventional thinking by labelling them as "academic" or "abstract," even when they are quite as specific and concrete as the arguments presented by those who think the status quo is just fine.

Now, to return to where I began, all this is not to say that there have not been significant changes in the intellectual character of law schools. There certainly have been. The greatest has been the interdisciplinary movement — a term I use deliberately. This is an intellectual shift so right, so compelling, as to be properly irreversible. Its origins lie in a simple realization, namely that a number of fields possess knowledge of direct relevance to assumptions underlying law. This is the same idea that led Lord Mansfield to seek the knowledge of merchants in creating contract law. Indeed, it may be said that law *always* speaks the language of other disciplines, and the only issue is whether, as with Monsieur Jourdaiu, that comes as a surprise. To remain ignorant of relevant information about legal principles is to risk not only making the law dumb but also making it an instrument of social harm and injustice.[2] If it works well, and I believe in general it has, the interdisciplinary movement improves the *professional* mission of law schools. It makes scholarship more relevant, not less.

There can be no question that the depth of intellectual sophistication in law schools today is significantly greater than it was just a couple of decades ago. There is a greater self-consciousness about law as a human activity. Concepts and ideas, that were unknown then, have been added to the standard working tools of legal scholarship and teaching. By comparison, scholarship from earlier eras now often seems formalistic, simplistic and even shallow. The audience about

2. To pay tribute to Professor Edwards, this was the basis for his very compelling arguments about fashioning employment discrimination law in *Race Discrimination in Employment: What Price Equality?*, 1976 U. ILL. L.F. 572. Only by understanding the historical and sociological realities of racial discrimination in employment, he argued, can we then "fairly appraise some of the current legal debates over appropriate remedies for job bias." *Id.* at 573.

law has also greatly expanded. Serious bookstores now have sections devoted to serious books about law. The special character of law — its blending of theory and practice — together with the new openness within the legal community to outside knowledge — has widened the number and the types of participants in debates about legal issues. It has also attracted some of the best people from other fields into the legal community — yielding valuable contributions even to analysis of doctrine. (The legal philosopher Don Regan on my faculty has published both a leading book of philosophy and a two-hundred page, definitive law review article on the Dormant Commerce Clause.) Students are also better educated. Principles of economics, theories of government and of finance, ideas about the nature of the human psychology, and so on, are part of their vocabulary and within their conceptual grasp.

To be sure, there are problems or potential problems with the interdisciplinary movement in legal thought. First, there are certainly failures. Some of the scholarship born of the interdisciplinary or other movements is naive, even on occasion silly. Second, the question is, and must constantly be raised, whether law is merely absorbing wooden or simplistic versions of knowledge from the other disciplines. Third is a risk that the sense of law as a discrete human enterprise, having its own special character and definition as a discipline, will be diminished or lost. We should worry about law merely becoming applied economics or philosophy. Fourth, with the increase in interdisciplinary knowledge, there also come the problems of internal specialization within the legal community, producing the kind of babel of incomprehensible languages that so troublingly besets the modern university. Fifth, and finally, there is the basic question of the identity assumed by law professors: are we in our intellectual and emotional hearts historians, philosophers, psychologists, literary critics first, or are we intellectual participants in the profession of law?

All these risks I see as serious and worthy of attention, but I have to say I do not see them as presently so serious as to undermine the integrity of law schools as educational or research centers for the profession. As for the scholarly flotsam that accompanies the new intellectual movements, my own view is that this has to be kept in perspective. Almost any shift in thought of the dimensions we are talking about here is a collective affair, involving many people exploring the same general territory. The less talented will always wish to follow in the footsteps of the gifted. There will always be intellectual hangers-on. They like and benefit from the association with those who have achieved great things, even if that association exists only in their

own minds. We possess, however, few effective means of separating the weak from the strong at the outset. More to the point, though, is the fact that exactly the same thing happens, now as well as in the past, with doctrinal scholarship. There have always been mediocre or poor doctrinal analysis and subjects that became disproportionately fashionable for awhile, and for precisely the same reasons that there is now a degree of poor "theory" scholarship.

It also remains to be seen what contributions to general knowledge these movements will amass. On that the jury is still out. And it probably should be out for some time. One must be careful not to judge an intellectual shift of these dimensions too quickly. We are not talking about trends that display their full effects in a year or two, or perhaps even in a generation. And the general character of legal scholarship is not static, but rather evolving. It is my sense, for example, that newer scholars are putting somewhat greater emphasis in thinking about current legal issues than has been true of the middle-aged scholars, who really ushered in the interdisciplinary movement.

Overall, though, my own firm belief is that law schools today are institutions of high integrity. By that I do not mean only that law professors, and students, work hard. Nor do I mean to say that law schools as they are presently composed are necessary to an intelligent and humane system of law. Indeed, they seem to me singular social institutions. Society surely could train lawyers far more efficiently than the law schools do. But we do something quite special. We take virtually all of the potential entrants into the profession, before they have done anything in law, before they have built up the kind of local knowledge — what this judge is likely to do with that case, and so forth — that tends to inhibit broad and idealistic thinking, and at the very outset of their careers, when everything seems to have a kind of magical aura, we introduce them to a wide body of knowledge about law, resisting specialization; provide them with a base in the structures of thought central to law; have them participate with very talented and broad-minded people in approaching problem after problem after problem in an special, independent atmosphere of critical inquiry; and do all this in a setting suffused with a profound respect for the human achievement of law. It is a rich, and I also think wise, culture that operates in this fashion. It may make, or contribute, to making law as central as it is to life in this society; but, given that law is that central, it is certainly wise social policy to educate our lawyers in this way.

By integrity, then, I mean to say that the people involved — the faculties — are personally committed to the kind of enterprise I have just described. They work hard at achieving the aims of the institution

as it is defined. Faculty prepare for classes, and their fatigue afterwards bespeaks their engagement. Faculty grade their students' examinations.[3] Faculty do research and writing, and do it themselves. They are there at the birth of their articles and books. And, most significantly, virtually all faculty, even the few who can be fairly described as purely "theoretical" — indeed, especially those faculty — have a profound identification with the institution of law in the society.

I think our most serious problem in modern legal education — and here I am referring to the teaching and not the research function — is, ironically, that it is not "theoretical" enough. The source of the problem is the continued dominance of the casebook as the primary form of educational material in law schools. For all of the efforts to draw upon the knowledge of related disciplines, legal scholarship has benefited from these efforts substantially more than legal education has been enhanced. I do not mean to say that the interdisciplinary movement has left the classroom experience untouched. There are many courses in today's law school curriculum that introduce the students to other fields of knowledge. The number of courses entitled "law and . . ." testifies convincingly to that. Nevertheless, the basic courses within the first year of law school and the so-called core courses of the second and third years continue, in my judgment, still to be organized around the casebook method, which relies on the appellate court opinion as the principal focus of instruction. It is as if law schools are stuck between the Langdellian revolution of the late nineteenth century and the interdisciplinary revolution of the late twentieth century.

Every law school struggles in one way or another with this fundamental problem. Deans set up special task forces on curriculum reform, which produce extensive reports the gist of which is that we do not sufficiently integrate the knowledge we have about law into the appellate-court-opinion-dominated curriculum, and the reports are followed by many meetings and much debate, at the conclusion of which very little is done. It is a curious feature of contemporary legal education that the first year of law school is still so heavily organized around doctrinal analysis of classic cases in the basic areas of contracts, property, torts, criminal law, and civil procedure. There is too often an implicit, if not an explicit, message conveyed to most students that what they bring with them from their earlier education, which is usually the stuff of the interdisciplinary work in law, is not fully relevant to the study and practice of law. The cases contain little direct

3. I refer to this practice not for its intrinsic value but as an example of the intimate engagement of faculty in the teaching enterprise.

reference to other fields. Though the notes after the cases do frequently try to draw upon interdisciplinary knowledge, as do many teachers during class time, the primary focus, day after day, is the next set of legal doctrines and the development of the skill of critical analysis and effective advocacy.

Students learn quickly that any effort to develop a sophisticated grasp of related fields will not be rewarded on the examination, where spotting issues in a hypothetical case and writing a memorandum of law outlining the issues and stating the conclusion or advice remains the primary method by which we grade students. The standard upper-class courses on the whole do not vary significantly from this model. Coverage of doctrine and fields of law is the predominant classroom activity.

The fundamental problem facing modern law schools, therefore, is precisely how to combine the coverage of doctrine and the development of skills of critical and careful reasoning, with the integration of the extensive and growing knowledge of related fields that have come to inform so much of the scholarship emanating from the academy, and the role law plays beyond the appellate court. Despite the somewhat popular view, represented in Judge Edwards' article, about the nondoctrinal character of the average law school class, the situation is actually quite the reverse.

But, that said, I remain convinced that law schools are institutions of integrity, as I have defined that standard. Perhaps the best test of this would be to ask those practitioners who have recently visited and taught in major law schools what they think about the state of our institutions. Over the years I have invited several leading practicing lawyers to teach at Michigan. I believe that every one of them would say, even in private, that the present health of law schools is very high, that students are being well-served, that in all that is done there is a seriousness of purpose and a public spiritedness that is highly admirable.

I want to conclude with both an acknowledgment and some difficult observations, which are not offered and I hope are not taken in the spirit of retaliation. I would agree with Judge Edwards that there is less in today's legal scholarship offering help to judges disposing of cases on their dockets than in earlier generations. I have cautioned against overstating this decline and have disagreed with a number of conclusions Judge Edwards draws from it about the character of law schools. I also think that probably much of what he might call "theory" I would say can, in fact, be helpful to judges. Holmes was right, in my view, when he said there is nothing more practical than a good

theory. But the lessening of dialogue between the legal academic world and the judiciary is nonetheless a reality, and, at least in part, an unfortunate one. One cause, no doubt, is the shift in legal scholarship to which Judge Edwards points.

But, to my mind, a greater part is due to another change, and that concerns the nature of judging in this society. The fact, in other words, that legal scholarship is directed less to judges and more to other audiences is the result not only of changes in the composition of legal scholars and of new and important intellectual commitments, as I have suggested, but also of changes within the judiciary that make it a less appealing audience.

In recent years the judiciary has been a beleaguered institution. The decline in judicial salaries relative to those in the academy and the practicing bar; the increase in the politicization of the appointments process during the 1980s — especially by the effort to pack the judiciary with young judges of a particular ideological bent; the enormous increase in the workload of judges and the increase in the amount of tedious issues; the reported decline of collegiality among judges on the same court; the lessening of personal engagement of judges with the creative side of the office, manifested primarily in the growing reliance on law clerks to write opinions — or first drafts of opinions — and other similar forms of bureaucratization; and, finally, the trend within the judiciary away from the judicial activism of the Warren Court era. These changes in all candor make the judiciary a less interesting subject for legal scholarship; all the changes have weakened the interest of those in the academy in thinking about what judges are doing and in engaging judges in dialogue.

Part of the growing gap between the judges and the professors, in other words, is the product of a perceived decline in the intellectual interest of judging and of a declining sense of identification with the position of judge within the society. Law professors used to identify more closely with the life of a judge, especially a federal judge. When I began teaching in the early 1970s, the aspiration of many law professors was to be a judge on a federal court of appeals. Indeed, the salary of a senior law professor was pegged to that of a court of appeals judge, symbolically indicating the sense of shared identity and mission within the life of the law. Today the feelings within law schools are considerably different. While few faculty would turn down a judicial position if offered, very few would accept without ambivalence, without a sense of loss over how this once would have felt like a crowning professional achievement but does no more.

From a scholarly point of view, this means that there is less inter-

est in following and responding to the writings coming out of the courts. More accurately, scholarly engagement with judicial work is more likely to take the perspective of detached and strong criticism, instead of reflecting a sense of shared mission with judges. Judges seem less reachable, as well as less interesting. There are, of course, and everyone knows this, exceptions among judges (notably Judge Edwards). But it is the general sense of what judges and the judicial process are like that determines the general character of legal scholarship.

What this means, then, is that at the very same time that there has been an intellectual explosion about what is truly relevant to thinking about law, there has been a decline, or perceived decline, of intellectual interest in what judges do. While in law schools law seems richer and more complex, in the courts law has become more mundane, more quotidian, more like the dull products of the administrative agency system. Judges themselves bear some of the responsibility for this state of affairs, though surely not all of it. I sense that, especially with the tendency exhibited over the past decades to give a high priority to prior judicial experience in making appointments to the bench, that we are heading towards a professionalized judiciary, similar in character to the bench in the civil law systems. That, I must say, does not bode well for the wish to reestablish closer intellectual ties between the academy and the judiciary. Nor does it bode well for society.