LEGAL EDUCATION: PROPOSALS FOR CHANGE

HAL SCOTT*

There have been a number of proposals thrown about for changes in the substance, methods, and institutional structure of legal education in America. Some of the most radical, if not bizarre, have come from the critical legal studies movement. Let me state my own.

First, we must convey more actual knowledge about what the law is and about the problems to which the law responds. Knowledge about legal problems involves mastery of complex transactional systems, whether they be payment systems—a subject close to my heart—or evictions of poor tenants. We also need to develop theories to explain existing legal arrangements and institutions, and to develop criteria for building new systems of law to cope with new legal problems induced by social change and technology.

These theories or prescriptions ultimately must be tested against reality. They must cope with reality, by which I mean something that really exists, and to the extent that theories try to explain something, they must explain reality. Furthermore, and this is a principal tenet of the scientific method that has often been ignored in the theorizing of recent years, theories must contain specifications for their own disproof.

The focus that I am suggesting is different from that of the masters. They sought to explain law, principally case law, with other law, such as precedents and statutes. While this approach certainly should have a continuing and important role in legal education, we must put more emphasis on explaining or prescribing *systems* of law, such as our system of banking regulation, by referring to human behavior, whether it be economic or political in content. The virtue of the masters was that they knew the law. This knowledge was imparted to students who at least knew something—a great deal of something—when they left law school. That aspect of classical legal education remains crucial, regardless of the particular focus.

The focus that I am suggesting is also completely different

* Professor of Law, Harvard Law School.

from that of the devotees of critical legal studies. They are not knowledgeable, in detail, about most areas of law; this is particularly true in economic areas, which constitute a lot of law. Their explanations are often incoherent and tautological ("since law is politics, this law is political"), or extraordinarily simplistic ("corporate law is a tool of capitalistic oppression"). The critical legal studies devotees are also anti-professional: They do not care about the problems of the real world and real professionals, problems with which lawyers must deal. They do not care about these problems because doing so requires detailed knowledge about economic and institutional systems, not just skill in manipulating arguments or in trotting out shibboleths such as equity. Good corporate lawyers do not merely manipulate arguments or engage in elementary and mindless tasks: These lawyers know a great deal about how corporations operate, the products they sell, and the people who run them, as well as the law that controls them. One turns in vain for intelligible prescriptions for new legal arrangements from the critical legal studies movement. They are debunkers and critics, not builders. Why worry about the details of corporate law or corporations, when corporations can be simply dismissed *in toto* as mere tools of capitalism?

Second, we must be more, not less, demanding about getting as teachers people who know something; this fact follows from the first point. Once they arrive, we must encourage them to learn more. Tenure represents a lifetime claim to income; it should be earned through demonstrated ability in scholarship and teaching. Duncan Kennedy, a prominent figure in critical legal studies, thinks that it would be acceptable to give lifetime tenure to those with only initial appointments to our faculty.[1] It is acceptable to Professor Kennedy to grant tenure before there is any demonstrated competence in teaching or scholarship. Moreover, he would have us pay all faculty members—and secretaries and janitors—the same amount of money. Would this contribute to the advancement of knowledge and the training of professionals? Obviously not. Hiring and promotion decisions based on merit, like all personnel decisions that relate to complex jobs, cannot be defended by reference to codified rules of merit. This does not mean, however, that

1. D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 123 (1983).

merit should be abandoned. It means that judgment must be exercised. We can ask some specific questions: Does a person have intellectual ability? Does she have demonstrated knowledge about law or legal institutions? Can she convey this knowledge in a classroom? Do experts believe that her scholarship has made important contributions to a field? The answers involve judgments, but such judgments must be made. If this means hierarchy, we need more of it.

Third, we must do more, not less, to reward and recognize achievement among our students. If grades are an inadequate measure of achievement, we should abolish them—but only if we have something else with which to replace them. Sure, the existence of rewards means that some will not be rewarded, and this situation creates anxiety, competition, distinctions, and hierarchies, but it also permits recognition of achievement. People are graded continually through life on their performance at all kinds of tasks. They are judged by their peers, their spouses, their employers, and often by the public. In my judgment this is part of the human condition, has been for centuries, and is responsible for the advancement of culture and knowledge. There is no reason to assume that a school, particularly a law school, should be any different. People want and should have the opportunity to distinguish themselves.

We should also demand that students fulfill their potential to learn and achieve; this affirms the importance we place on those values. How are we to encourage students to fulfill their potential to learn and achieve? Obviously we must impart knowledge. The basic hierarchy between professors and students is natural. Professors know more about their subjects than students. If they do not, then they should not be professors. Not only should professors know more about their subjects, but also they should know how effectively to conduct a class to impart that knowledge, whether this be done by lecture, guided discussion, or criticized student presentations.

Does respect for students require us to credit all student statements? Clearly not. When a student tells me that the Comptroller of the Currency is the primary regulator of state-chartered banks, that is an incorrect statement and I have the obligation to point it out. When the student says that fairness demands that plaintiffs recover in all tort cases, I should not simply say that that is one point of view, but press the student

on what he means by fairness, and on what he thinks the effect of such a rule would be. If a statement reflects no attention to the reading or class discussion, I should be free to say so, and strongly, to affirm the importance I attach to reading and listening. Is this being tough and demanding? Yes. Is it some perverse exercise in the imposition of professorial will? No. It is the way in which we inculcate professional values, such as attention to detail and the ability to analyze actions in terms of their consequences. If this means hierarchy, we need more of it.

These are prescriptions for change and not a defense of the existing system. The law school needs to be more committed to knowledge, achievement, and the training of professionals than it is today. Far more committed. We must refuse to credit legal scholarship or teaching on genre grounds when we believe the scholarship contributes little or nothing to our understanding. Rhetoric and fairy tales should not pass for analysis or truth. My proposals seek to combine the best of the past with our potential for the future. We should not be content with what we have now, at least at the Harvard Law School.

Finally, we must come to grips with the attempted politicization of law schools and law students by the critical legal studies movement, which wants a leftist nonhierarchical law school and society, and which is totally against the existing open and pluralistic system. The movement's teachers seek to bring about leftist institutions by indoctrinating students to the "correct" perspective through advocacy in whatever course they happen to be teaching—to the exclusion of other points of view. Since they know that law and society are corrupt, why not say it and do their bit to hasten the revolution? They want leftist professors who share their views and, by the way, if a conservative woman or black comes along, the movement's teachers suddenly abandon their firm commitment to affirmative action. Their actions demonstrate that they do not want an open classroom or an open law school or an open society. They have no idea, however, what they do want.

The critical legal studies movement cannot ultimately succeed because society cannot tolerate its victory. Society will only respect and support institutions that meet its needs. The movement should pay *more* attention to Marx on that score. Institutions must respond to the diverse demands or constraints

placed on them. In law schools, these constraints are many: the desire of students to get jobs, and good jobs at that, the satisfaction of which depends in part on how employers, whether public or private, value the education dispensed by a school; the imposition of standards by the bar or other professional associations, such as those for course hours and quality of instruction; the need of a professional school to compete with the private or public sectors for competent instructors and staff by paying adequately in money and in soft currency, which consists of such tasks as maintaining a good reputation, creating a pleasant work environment, and offering adequate freedom to pursue ideas; the demand of the university administration that schools within the university effectively transmit and create knowledge; and the need to finance programs through a combination of tuition and alumni giving. Henry Manne's thesis that educational nonprofit institutions can act with impunity is, in my judgment, simply wrong.[2] The institution is ultimately held accountable to these demands.

Many of Professor Kennedy's proposals can be ruled out simply on the ground that they would seriously erode the financial stability of the school. Where would the money come from for his nonhierarchical leftist law school? Certainly not from a private sector that is not about to fund its own destruction, at least knowingly. His "cell" approach to reform—to revolutionize the workplace[3]—won't work because the cells in our society are highly interconnected financially, socially, and politically.

Perhaps we should allow the Harvard Law School to become an empty leftist nonhierarchical cell or shell, devoid of influence and respect, financial resources, and, eventually, students. This may happen, and schools like the University of Chicago and Yale would gladly assume the mantle of respect and influence, if any remains. What would be achieved other than to demonstrate that madness can destroy without replacing what it destroys with anything valued by our society? It would be a tragic waste of educational capital. It is we who should cry for resistance.

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2. Address by Henry Manne, Federalist Society for Law & Public Policy Studies Annual Symposium (Feb. 24, 1984).

3. *See* D. KENNEDY, *supra* note 1, at 98. *See also* Kennedy, *Rebels from Principle: Changing the Corporate Law Firm from Within*, HARV. L. SCH. BULL., Fall 1981, at 36.