Eighteen or Thirty, But Not Twenty-Two

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Most law students love the law but eventually come to hate law school. I suppose that this has always been true. Surely apprentices were not entranced with the task of copying forms. Complaints abound about boring teachers in early law schools. Langdell's Socratic antidote to boring lectures brought equally well-documented complaints. Curiously, in the twentieth century, widespread discontent first appeared in the 1930s at Harvard, peaked in the late 1960s and early 1970s with agitation for a more relevant legal education, but subsided thereafter, apparently as the required curriculum declined in scope, electives multiplied, and clinics and internships proliferated.

Explanations for the generalized discontent of law students are numerous and anything but consistent. I believe that much of this discontent has its roots in the content of the law school curriculum. A significant amount of the rest is the result of a mismatch between the age of the typical student and the mode of instruction. Remedying this mismatch should mitigate much of the law student discontent with legal education. In the words of the title of this little *billet doux*, if one wishes to reduce student complaints about legal education, then one should enter law school at the age of eighteen or thirty but not at twenty-two. To understand how this might be so, it is necessary to examine the relationship of the culture of law school to that institution's pedagogy.

The culture of the contemporary law school is much like the culture of the American middle school. Where but a year earlier individuals who are now law students traveled in mixed gender packs, upon encountering the law they re-segregate by gender. Budding romances—defined as being seen alone together twice—are instant "news" in the small goldfish bowl of daily class interaction. The middle schooler's sense that this stuff we are supposed to be learning is all very new is duplicated in law school and made even more threatening because the law school student body's collection of aggressive, high achieving individuals is proportionately far larger than that of any middle school. Still, quite quickly the law school separates into the nerdy gunners, the diligent and modestly interested core, the ostentatiously uninvolved, the furtively scared, and the openly hostile—groups that can be found in any middle school. A method of instruction that always ends discussion with "it depends" only makes the situation worse for individuals who thought that they were through with this "baby stuff" when they gradu-

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ated from high school. In such circumstances, unhappiness with legal education should hardly be a surprise.

When trying to figure out how to diminish student unhappiness at finding themselves in middle school again, one should remember the circumstances under which the modern law school developed. Langdell's law school was part of a university where the average age of entering undergraduates had only recently risen above eighteen,[1] where earning a "C" was not an embarrassment, and where the method of instruction had only recently begun to shift from the reading of a text and recitation to that new German import—the lecture. In this university, a student did not need a college degree to matriculate in law and almost anyone with modest academic credentials was free to enroll, knowing that the likelihood of success in completing the program was no better than two out of three.[2]

It is hardly surprising that it was during the Depression that serious complaints emerged about an education designed for Langdell's students. It was a time in which most students were college graduates, most colleges had gone to a primarily elective curriculum, and pervasive unemployment made most students highly conscious of the cost of education and so of the necessity that value be delivered in each and every year. In our world where the ubiquitous LSAT and the pressure of law school rankings guarantee that a class will consist of individuals possessing almost homogenous qualifications, who have had freedom in college in selecting their courses, and have seldom, if ever, had a semester's grade turn on one roll of the dice in a closed book exam, significant discontent is all but guaranteed, if only because the grading system is designed to convert almost homogeneous ability into neatly stratified ranks.[3]

What, therefore, is to be done with the contemporary mismatch between the pedagogy of legal education and the expectations of the students enrolled? One thing that is unlikely to work is a proposal to reduce class sizes radically to those typical of junior and senior undergraduate courses with the appropriate accompanying alteration of pedagogy. The cost of such

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[1] Charles W. Eliot, *Annual Report of the President of Harvard College, 1871-72 in* HARVARD UNIVERSITY, ANNUAL REPORTS OF THE PRESIDENT AND TREASURER, HARVARD UNIVERSITY TO THE OVERSEERS ON THE STATE OF THE UNIVERSITY FOR THE ACADEMIC YEAR 1871-72, 13 (Cambridge, University Press 1873).

[2] For information on the history of American higher education, see generally LAURENCE R. VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY (1965); *see also* HELEN LEFKOWITZ HOROWITZ, CAMPUS LIFE: UNDERGRADUATE CULTURES FROM THE END OF THE EIGHTEENTH CENTURY TO THE PRESENT (1987). For information on the Harvard Law School in the nineteenth century, see generally BRUCE KIMBALL, C.C. LANGDELL, 1826-1906: THE TRIUMPH AND BETRAYAL OF MODERN PROFESSIONAL EDUCATION (forthcoming 2009) (manuscript on file with author).

[3] For a history of American legal education, see generally ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983). For the Harvard Law School's history in the twentieth century, see generally ARTHUR E. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967 (1967), at least until Dan Coquillette's forthcoming work on the school's history is completed.

a reform in terms of faculty salaries would be prohibitive, at least unless a school decided to flood its curriculum with adjunct instructors from the world of practice. Law professors are far too insecure in their role to agree to such an alteration of their ranks. There are, however, two other alternatives.

First, one might simply start admitting eighteen year olds. After all, almost everywhere in the world, law is an undergraduate discipline. The continuity in terms of a heavily required curriculum would be consistent with student experience in high school and the ability to take courses in other departments would leaven the loaf of the average law student, as well as provide an alternative to the daily diet of large classes that most law students endure today. Law school pedagogy could quite easily continue relatively unchanged. Having known nothing of the intellectual richness of the education available at any good college or university, law students would be less likely to feel infantilized by being called on in class and finding the material unintelligible at first and then numbingly repetitive after a while. There would, of course, be the problem of status anxiety among faculty who could no longer claim to be delivering a graduate education, but some might be able to overcome their anxiety when they find that teaching eager eighteen year olds is significantly more fun then teaching sullen twenty-two year olds.

The other alternative would be to limit admission to individuals thirty or older. By such an age, all but the most indulged of trust fund babies will have had to earn a living for half a dozen years. Being out in the world for a while changes students enormously. They do not come to law school because law seems to be glamorous or because they imagine they have no better alternatives. Instead, they come because law practice seems to be a better idea than some reality that they have already experienced. Since they would be ripping apart a settled family life to come to law school, they know what they want out of their education and would be unlikely to put up with a program that does not deliver the desired product. If they find that they have made a mistake, they are not likely to hang around for want of something better.

Most importantly, as real, not supposed adults, older students are unlikely to put up with an education that treats them as if they were back in middle school. Pedagogy will have to change whether the law professors like it or not. These students are unlikely to put up with learning law as students do now: the way a bad owner trains a dog—by rapping it on the nose when it does something wrong. So, instruction would likely be more didactic, as well as focused less on doctrine and more on the practices, in both senses—routine activities and specialty areas, of lawyers. Concomitantly, there would be less discussion of cases and more of legal documents, such as agreements, pleadings and regulations, fewer exams but significantly more written assignments related to such documents. Overall, law school would become more descriptively, as opposed to normatively, theoretical with respect to both rule systems and practices and so more concretely

anchored. It is possible that current law professors would prefer such teaching to the present system, since their students would not need to be disabused of so many of their notions about how law works and could contribute to every class the background of social, economic, and political life that makes law come alive. Alternatively, a new species of law professor might emerge.

Of course, these proposals are utopian. That is the point. The way that law is taught is unconscionable, as is made clear by the middle school atmosphere that results. If pedagogy is going to infantilize students, then at the least law schools ought to focus teaching on students who are closer to being infants. However, present pedagogy makes life too easy for faculty to be dislodged without changing the law school's current market. Big classes are cheap. The current classroom style of questioning that hides a rudimentary lecture avoids the heavy lifting that real lecture would require. It also limits what would have to be known by faculty about the details of the practices of law. Because faculty think that no one needs to see a credit agreement before practicing corporate law, and because twenty-two year old students will not demand such an experience, faculty currently will not bore themselves with such unimportant details. Similarly, because such students do not push for large doses of descriptive theory, faculty can spend excessive time doing normative theory, moving feathers from one side of the balance to the other, all the while talking about how to solve social problems optimally, as if, after hard political infighting for uncertain stakes in uncertain circumstances, most solutions are anything but "least-worst." Killing this pedagogical stasis is unlikely without a significantly older student body and so I put my chit on that square.