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FORUM

Colorizing the Law School Experience

To the editors:

What are my feelings about law teaching? Have I any reflections on this subject? Any thoughts? Now these are interesting questions, and maybe even a little daunting. They are not really difficult to answer, however. They are only difficult to answer with words.

Like a bolt from out of the blue came the suggestion that I should consider law teaching. After a ten-year career as a lawyer, which consisted of learning as much as I could about all of those things which, as it turns out, one really can't learn in college, graduate school or law school, and after many months of worrying about whether it was even possible to find a way to combine my education and experience in some meaningful and enjoyable way, suddenly there it was.

Yes, I have very many feelings about law teaching. All are quite personal and heartfelt, most were well developed long before I attended law school, and they contributed to my decision—no, my compulsion—to do so.

I can recall so well the first time that I ever saw Northwestern University Law School. I was 13 years old and had recently settled on the idea of becoming a lawyer. I was in the car with my father when he drove past a large grass yard which was completely enclosed by a tall black wrought-iron fence which had a large carved gate bearing the name of the school. Next to the grass yard was a four-story stone building, covered in ivy, which I assumed to be the law school building itself.

Seven years later, during my senior year at the University of Illinois, still determined to become a lawyer, I applied to the then seventeen top-rated law schools in the country. When my first letter of acceptance (and loan assistance) came, it was from Northwestern. I realized then that I had never really seriously considered any other school, and I accepted the invitation immediately.

I remember how I poured my deepest feelings about *The Law* into the personal statement which I submitted with all of my applications. For instance, I was unequivocal in my opinion that the study of certain aspects of law was important to everyone's basic education. I also recall expressing my feelings of uncertainty about whether a law school should be the only place where such basics were made available. I thought that law schools should be reserved for the training of serious legal scholars and dedicated practitioners; they were not for lay people who sought little more than a place to learn the proper way to read a lease for their own personal satisfaction, or how to write a will. I admit now that this may

have been a rather narrow view. Although I have grown far less opinionated, in general, than I was then, I have nevertheless, retained some of these same feelings on this particular subject.

But *teaching* law? I had never once entertained such a notion. Once suggested, however, it took me no time at all to embrace the idea.

As a student, I had actually enjoyed the academic atmosphere, so I looked forward to returning to it. Another and very appealing aspect of a career in law teaching soon became apparent. Law professors enjoy an enviably nice life style: four to seven hours per week of teaching; competitive salaries; time to read; time to think; time to muse; time to write; time spent counselling bright adult students; the wonderful luxury of being able to exchange thoughts and ideas with a far-flung set of serious minded colleagues who have had the time to do all of these same things.

There were, of course, many challenges and many questions. Which textbooks should I select? How do you draft a syllabus? Should you require students to stand when responding in class? So, what is the Socratic method, really? How should I draft the final examination questions? What grading curve should be used? Suppose a student asks a question which I cannot answer? Who should I share my teaching concerns with? Doesn't it feel strange to be asked to call your old law school professors by their first names?

Entering law school as a member of the faculty, however, had the one major—and overriding—similarity to coming in as a student. I had to learn *The Law*. Not just in the same way as I had as a student, but extensively enough to profess to be able to teach it! This has been the greatest challenge of a career during which I have purposely sought out many and varied challenges, and one which I have found more professionally and personally rewarding than I had ever imagined possible.

On the subject of classroom teaching, my interactions with my students are influenced by three primary expectations and/or assumptions. For better or for worse I bring them into the classroom as part of my baggage.

First, I assume that all students have a fundamental interest in things legal as well as some natural (not merely apparent) inclination to be a lawyer. I also assume that all law students share an unshakable desire and commitment to learn *The Law* and (especially for first-year students) a willingness to *unlearn* other lessons in order to be able to begin to think like a lawyer and as an advocate. Finally, I expect all law students to have integrity and an intention to bring honor to this, their chosen profession.

As important as it may be to address individual differences among students, these assumptions form my basic threshold for all of them, singly and collectively. I realize, of course, that just as my interactions with students are influenced by my expectations, I also anticipate that they

have made certain assumptions about me. I cannot say for certain that I know what those are.

Although I am not radical in my views (except perhaps under the most liberal use of the word), I am certain that the fact that I am an African-American woman influences the way I teach and counsel my students. I suppose that it is this very influence which the more enlightened law schools anticipate and the others dread when debating the issue of whether to support racial diversity among their faculty and student bodies.

Such debates remind me of those which have arisen over the practice of "colorizing" black and white movies. One detractor quoted by *Gentleman's Quarterly* has called the adding of color (to these movies) "a cultural crime of the first order" that is surely "against the national interest," and insisted that resisting its encroachment may soon turn out to be "the last stand before the entire art form is totally degraded and goes down the drain." Another critic announced that he was "astounded (at) the vulgarity of the whole idea."

Supporters of colorization counterargue that, while it may be true that seeing these movies in color is not seeing them as their makers intended, they also were not originally intended to be seen on tiny television screens, interrupted by commercials and arbitrarily shortened and edited merely to meet a network's time considerations. Furthermore, all indications point to the conclusion that colorization has been a success.

From my personal experience, I would say that the introduction of African-Americans into the law school classroom as teachers has a meaning which is quite different from introducing African-Americans into the law school classroom as students. While my presence in the law school classroom as a student was important to me personally, and perhaps to my few fellow minority classmates, I only rarely felt that it made any impact on the class overall. The fact is, by and large, I felt invisible.

I am well aware that as a law teacher, on the other hand, when I enter a classroom I now have the power to direct the shape of the entire learning process; and I've certainly never felt more visible! My students learn *The Law*, in no small part, as I see it. To the extent that my vision has been influenced by my experiences as an African-American, as a woman, or both, then I suppose, so too is the way I teach it. I can't help but think that the learning process is enriched thereby—*texturized, colorized*.

One of the most important, yet unexpected aspects, of joining a law school faculty is the extent to which many issues and relationships are infused with political overtones. As a junior member of the faculty, I have chosen to avoid becoming entangled in as many of these issues as I can in order to be able to preserve my voice for times when I feel I must speak out. Of course, I find that I must listen very closely in order to

even learn what the real issues are. I have also found that the discussions which elicit my strongest feelings are those which touch and concern students, especially minority students.

In October, 1990, I participated in a joint conference sponsored by the Historically Black Colleges and Universities and the Law School Admissions Council, which brought together a national group of experts to seek out ways to increase the number of African-Americans in law schools and in the legal profession. One of the proposed strategies that received the most attention focused on the need for law schools to be able to provide guarantees of employment opportunities within major law firms and corporations as an enticement to prospective law students to apply to law school rather than to pursue some alternative career choice.

I found myself at odds with this suggestion and, therefore, in a distinct minority among those who voiced an opinion. I certainly agree that more of these opportunities ought to be made available to more minority attorneys. I can also appreciate the nature of certain serious practical considerations which make it difficult, if not impossible, to justify a decision to pay the high monetary and other costs of law school, absent the greater assurances of access to the widest ranges of employment options. I stop short, however, of being able to agree with my colleagues who insist that it is more (or as) important for law schools to meet a burden of promising prestigious law jobs than it is for prospective students to meet a burden of proving their suitability for law school. I feel that this focus, as a primary strategy, is somehow inappropriate.

My opposition is not due to a failure to recognize the merits of the majority view but, rather, to a sense that I simply cannot support it. As an African-American, as a woman, as a former corporate executive at three national corporations, and as a lawyer who has decided to teach—everything I am—leads me to this conclusion. I'll leave that approach to others for whom it may be more reasonable to entice our future lawyers to seek law degrees with the promise of a wonderful life upon landing a position at one of the nation's many fine major law firms and corporations.

I, on the other hand, worry about the level of the quality of advocacy produced by a system which is designed to attract applicants who would not have chosen a career in law but for such assurances. I have reached a point in my own career where I believe that is important for me to deploy my efforts in other ways.

I am far more interested in involving myself in the development of strategies which both attract students who are interested in learning about ways to make substantive contributions to the law and to the legal profession and strategies which discourage those who are not.

Moreover, I simply don't see myself as needed in the role of one who promotes careers in the major law firms and corporations. As a practical matter, I subscribe to the view that there will be fewer and fewer

of these positions for all lawyers in the 21st century as major law firms and corporations make business-related decisions to consolidate and constrict. Now, more than ever, law schools must prepare students to become entrepreneurs, not employees. I know that this is a controversial stance in some circles, but I seek only to add another voice, not to dominate the debate.

Moreover, it seems clear to me that insofar as minorities and women have secured relatively few of the most lucrative and prestigious jobs when they are plentiful, it seems ill-advised to expect that more of these positions will be filled by minorities when they are becoming ever more scarce. Without a strong desire to contribute to the development of *The Law*, how will our young lawyers cope when they learn that the careers that were promised cannot be delivered? How will they react when they learn that our failure to deliver on said promises was not only foreseeable, but predictable? But, I digress.

While members of ethnic minorities are still only a small percentage of all law teachers, we certainly are not alone in our ability to colorize the law school experience. In fact, I would attribute this ability to any teacher who cares enough about facilitating the learning process to develop a presence and/or teaching style which naturally makes a lasting impression on her/his students. I can recall that all of my favorite professors in college, law school, and business school were those who either had strong opinions or some passion that fueled the subject they taught with a life it would not otherwise have had. Though only one among that number was a minority or female, I submit that they each colorized my educational experience.

One thing certainly has not changed in the law school environment—students still respond most favorably to professors who manage to bring something extra to their teaching. It's a sign of involvement and of the kind of commitment that we expect from them. At least, that's what I think.

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The Philosophical Origins of Modern Contract Doctrine

An Open Letter to Professor James Gordley

Dear Professor Gordley:

I have just finished reading your new book *The Philosophical Origins of Modern Contract Doctrine*.¹ The book raises a fundamental question about the relationship between contract doctrine and philosophy that few have ventured to proffer, let alone answer. As I see it, your question is this: "Can contract doctrine be coherent in the absence of a philosophical explanation of why promises bind?" You argue that in the absence of a philosophical explanation, modern contract doctrine cannot account for itself. As proof of this you point to what you perceive as internal contradictions and lacunae that pervade modern contract doctrine.

Can we get ourselves out of this mess? From your perspective, "it is hard to see how we could resolve these problems or resurrect the older concepts on which contract law was built without returning to an Aristotelian philosophical world in which it makes sense to speak of an ultimate end of man." (p. 245) In this letter, I want to suggest that things may not be as bad as they seem. I want to persuade you that the problems you see in modern contract doctrine lie not in the doctrine but in your conception of what philosophy can provide by way of justification for our legal practices. I will offer a solution to the problems you see with the philosophical ground of contract doctrine; but before I do, let me be sure I understand the main points of your argument.

You begin with the question "What is the origin of modern contract doctrine?" The answer you provide is a rich, textured account of the intellectual history of contract doctrine: one that starts in the present and goes back to Aristotle. In the beginning, there was Aristotelian metaphysics. Aristotle asked "How do we know what anything is?" His answer was that "[t]o know what a thing is, one must know its substantial form." (p. 18) And how, one is inclined to ask, does one go about doing that? "[B]y forming a concept of the thing in one's mind. This concept in the mind that corresponds to the 'substantial form' is the 'essence' of the thing." (Id.) An example of this comes from Aristotle's greatest commentator, Thomas Aquinas, who said "relying on Aristotle, that marriage has two ends: a principal end, which is the good of offspring, and a secondary end, which is an association of a man and woman in which each sex makes a different contribution." (pp. 15-16) Given that these are the ends of marriage (marriage's Aristotelian essence), the essence of the contract of marriage is clear: "a 'joining' by which 'certain

1. JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991) (references are to page numbers in the text).

persons are directed to one begetting and upbringing of children, and again to one family life’ This ‘joining together’ is the ‘essence’ of matrimony.” (p. 16, quoting Thomas).

The second key element in your story is Roman law. Unlike Aristotle and Thomas Aquinas, the Roman lawyers cared little for the sweep of general principle. Theirs was a nominalist world of particulars, principally particular types of transactions (e.g., sale, lease, pledge, etc.) The Romans eschewed any effort at system or wide-ranging organizational principle. This left them at something of a loss when questions arose as to why certain rules had the content they did. Little in Roman law was explained by reference to something more abstract, something “underlying” the play of the rules. The only response was “That is the way we do things.”

Around 1100, scholars began to look at Roman law through the lens of Aristotelian ideas (but not directly through Aristotelian philosophy—that would come later). By reading Roman law texts in the light of Aristotelian ideas, the medievalists (especially Bartolus and Baldus) began to see that law, in particular contract law, was not a disconnected congeries of rules but a system displaying an order that made sense from the perspective of overarching principles, which brought a sense of organization to an otherwise disconnected panoply of rules. Despite their best efforts, “Bartolus and Baldus did not reorganize Roman law around Aristotelian principles. Their use of Aristotle was limited and, one might almost say, conservative.” (p. 67) It was not until the late scholastics came on the scene that the real synthesis took place.

Around the time of transition from the sixteenth to the seventeenth century, there was a renaissance of interest in Thomistic moral philosophy, which culminated in a synthesis of Roman law and Aristotelian philosophy. That effort, which was due largely to the work of Luis de Molina, Leonard Lessius, and Francisco Suarez, united “[t]he traditions of Roman law and Greek philosophy . . . more closely than they had ever been before or were to be again.” (p. 71) In the hands of seventeenth century popularizers such as Grotius, Pufendorf, and Pothier, this synthesis would be lost. What they and subsequent theorists did was to retain the vocabulary of contract doctrine but separate it from its roots in Aristotelian metaphysical philosophy. It was this separation that caused the undoing of contract doctrine.

Before we get to some comments about the nature of your argument, I must recount one additional part of the story you tell. The seventeenth century ushers in the era of modern philosophy. Like many new modes of thought, modern philosophy was born in criticism, that is, criticism of metaphysical or “essentialist” philosophy. For instance, as we have mentioned, Aristotle made sense of things in the world (including persons) by asking after their “essence.” Once that essence was identified, the form or nature of a thing or person was known. In light

of that form or nature, all questions could be answered (e.g., the question "What makes a contract binding?"). Modern philosophers such as Descartes, Hobbes, and Locke demonstrated that Aristotle's metaphysical philosophy had some insurmountable problems. For example, the moderns pointed out that the way we know what something is by the thing's appearances (e.g., color or shape). We organize the world on the basis of sensory impressions not essences (which we can never see). Even worse for Aristotle, "one cannot logically demonstrate that the substance exists from the fact that the accidents are perceived." (p. 114) So Aristotelian metaphysics just did not work, and the moderns abandoned it. What did they replace it with?

This is the point at which I became very interested in your argument. Having demonstrated how contract doctrine and Aristotelian metaphysical philosophy had been first joined and then torn apart, I was anxious to see what you made of this. One thing you do is make a convincing case for the proposition that English and American lawyers (e.g., Blackstone and Holmes) have a hard time explaining contract law without resort to Aristotelian philosophy. In one passage, you make this point in a rather convincing way:

[T]he nineteenth-century jurists defined an acceptance to be necessary without any discussion of any purpose that such a requirement would serve. For Thomas and the late scholastics, since the essence of a human action had to be defined in terms of its end, reasoning from a definition and reasoning in terms of purpose went together. As we have seen, however, the nineteenth-century jurists had formulated their definitions of contract without regard to why a contract should be binding. Once they had done so, it was difficult for them to take purposes into account. Consequently it was hard for them to explain why contract should be defined to require an acceptance. (p. 177)

Your story ends with discussions of contemporary approaches to the problem of a lack of any foundation for current contract doctrine. Your principal focus is on various versions of the Will theory of contract. For example, you agree with Charles Fried that there is no coherent reason why contract law requires consideration (p. 237). But whereas Fried appeals to internal contradictions in the argument for consideration, you point out that a late scholastic, following Aristotle's lead, would ground enforceability of promises in liberality and commutative justice, not simply bald appeal to doctrine. You argue that this ground (liberality and commutative justice) is preferable because the late scholastic can then explain why some promises should not be enforced (e.g., promises to make extravagant gifts). The Kantian, here in the person of Professor

Fried, cannot make this move. Again, it seems to be the case that doctrine without (Aristotelian) metaphysics is not possible.

So what are we moderns to do? One direction we could take leads back to Aristotle. For instance, you assert that "we need the very concepts that the nineteenth-century jurists threw out. If we consider our diagnosis carefully, we can see that this is the direction in which a cure must lie." (p. 222) When I read sentences like these, I read you as recommending a return to Aristotle. But then you follow up such sentences with these:

I know that we could not resurrect these concepts without major changes in the way we understand the world. I am also aware that it would take a great deal of hard thought to see how these concepts should be applied. Although we can learn from the late scholastics, we cannot simply copy them. There were issues that they did not resolve successfully. There are modern concerns and techniques of analysis that are valuable and should be integrated into a larger approach to contract. (p. 222)

These sentences exhibit the quality of nostalgia. You seem to regret the fact that contemporary contract theorists have failed to generate a metaphysical theory like Aristotle's; one that will provide an answer to the philosopher's demand for "a new and correct theory of contracts." (p. 222) If nostalgia is indeed the sentiment, then the nostalgia is problematic, if not misplaced. Aristotle was wrong about essences: you do not deny that. But if Aristotle was wrong about essences, then he never had a correct theory of contract. If he never had a correct theory of contract, then our nostalgia is for an illusory object. If the object (a metaphysically correct theory of contract) of our nostalgia is illusory, that suggests our nostalgia itself might be equally devoid of content.

Let me broaden the analysis to what I hope will be an issue about which I think there needs to be much discussion. Throughout your book you refer to the need "to explain why contracts are binding." You think that in order to answer this question, we need a "theory" of contract. The theory of contract that provides an answer to your question will be the "correct" theory. As you know, there are many answers to the question "Why do promises bind?" To take just one group with several answers, economists believe that promises are binding because, among other reasons, it is in the interest of all concerned that they be so viewed (rule-utilitarianism). You are unsatisfied with the answers to your question given by modern theorists. But should we go back to Aristotle? You claim not to be able to see how a theory of the normative foundations of contract could be possible "without using these older [Aristotelian] concepts." (p.222) And why is that? Because "[t]hese difficulties cannot be resolved by a Kantian or a utilitarian approach. They seem to

be inherent in any theory that seeks the ultimate source of law or morality in human choice." (p. 222) As you make clear, Kant gets hoisted on the petard of his own universalizations when he simultaneously urges us to see contracts as binding because to will otherwise would be to will violation of promises as universal law, yet he insists that not all promises (e.g., promises to make a gift) should be treated the same way (pp. 236-37).

I have a solution to the problem of the unsatisfactory quality of the answers you are getting to your question "What is the correct theory of contract?": *Stop asking the question*. The reason I urge you to stop asking the question is that the question asks for something that is quite unintelligible. Time and again you demand that theorists "explain" why contracts are binding, but you never tell the reader what it is you mean by "explanation." I take it the answer has something to do with a "correct theory of contracts" (p. 232) but I am uncertain. What I am most unclear about is what a "correct" theory of contract would look like. In fact, it is entirely unclear to me what a "correct" theory of anything would look like.

It seems to me that the most one can mean by a "correct" theory is that, for whatever reason, it commands the assent of the relevant practitioners of the enterprise who use it to carry on their day-to-day activities (e.g., advancing claims to truth, knowledge, correct judgment). "Correct" is nothing more than a synonym for a complex and coordinated set of intersubjective practices, which practices are the concrete expression of the self-understanding of those who partake of the practice in question (in this case contract law). I suppose I would want to put it this way: the mistake you make is to think of contract as a "thing" about which we can have "right" or "wrong" theories. Perhaps it is better to think of contract law not as a thing but more akin to an ongoing, self-transforming cultural activity. Two thousand years of philosophy has failed to yield anything like a plausible account of what it would mean to provide a "correct" account of the "thing" called contract. Instead of continuing to ask for such an account, we might be better off dropping the question.

What do you think?

Sincerely,

Dennis M. Patterson

Mr. Patterson is a Professor of Law at Rutgers Law School (Camden).