UIC Law Review

Volume 2 | Issue 2 Article 4

Spring 1969

The New Dispensation in Legal Education, 2 J. Marshall J. of Prac. & Proc. 288 (1969)

Vernon X. Miller

THE NEW DISPENSATION IN LEGAL EDUCATION

By VERNON X. MILLER*

You are young people, and the year is 1969. Like all law students who have lived in earlier generations, you have a right to be optimistic and to look forward to success in your profession. My emphasizing 1969 points up something special about a man in his sixties. My contemporaries and I have grown up with the twentieth century. We have our fingers crossed in 1969; we are apprehensive about many things.

I am supposing that most of you are close to 25 years of age. I was 25 in 1927. By some measures it was a great year. Babe Ruth hit sixty home runs. Lindbergh crossed the Atlantic in a solo flight. There was prosperity and there was excitement. But in 1927 we young adults did not know that we would have to live through the depression of the thirties, World War II, the cold war and all the events since 1950 that could be conditioning us for a world of robots. Historians can look back to 1927 and discover the things that should have put us on guard. Perhaps always it will be like that. Young people will be optimistic and they will never realize half their dreams. Nevertheless, there is a big difference between your generation and mine. We did not see things as they were in 1927. In 1969 you do see them as they are. Your optimism, if you have it, is calculated.

Six years ago I delivered another commencement address to a class of law school graduates. I told them that they would exemplify the rule of law to their neighbors. I counseled them to be learned, to be humble and to be generous. It seemed simple to me to describe the rule of law as a feeling for the community, a spirit of neighborliness and a willingness to accept decisions of people in authority. I got down to cases: lunch counter sit-ins, picketing, Malcolm X and George Wallace standing in the schoolhouse door. That was only six years ago, and it did not seem unreal to preach about a feeling for the community and accepting the decisions of people in authority, not only in the political community, but in the churches, in the schools and in social groups. Now I must confess I have doubts. I want to challenge the power

*A.B. and LL.B., U. of Minnesota; J.S.D., Yale; admitted Minnesota, Wisconsin, District of Columbia; professor of law at Marquette U., Loyola U. (New Orleans); dean of law school at Loyola (New Orleans), U. of San Francisco and Catholic U. of America, where he retired as dean in 1968 but continues on the faculty. This article comprised the address given by Dean Miller at the 104th Commencement Exercises of The John Marshall Law School, Feb. 15, 1969.

structure in my own church. I want to speak out about overusing firearms in police enforcement. On the other hand, if I were still a dean, I am not so sure I would want to share all decision making with my faculty although that is what faculty members demand. And I do pretend to be able to explain with appreciation all the decisions of the Supreme Court — even those I do not like.

With all my doubts and with my shifting of position, I think you can understand why I do not want to explore with you tonight the meaning of the rule of law. Nineteen sixty-nine is just too difficult. I confess that I do not see how we can live in a political community without a spirit of neighborliness and a willingness to adjust to authority, but my confidence is shaken. We have permitted so many injustices to exist in the community while we have proclaimed our fealty to the rule of law that any worthwhile analysis of it must be more profound than the one I offered six years ago. In all honesty I cannot preach to you about the rule of law except indirectly. I told you in the beginning that I would talk to you about the legal profession and the law schools. We lawyers have so much to do with the rule of law that if I talk about us, I shall talk about the rule also.

I think we lawyers must be honest with ourselves and recognize that some of our neighbors do not believe we deserve all the privileges we claim. Some of them think they know as much about justice and community affairs as we do. Some of them resent us when we tell them they are encroaching on our business. And some of them believe any learned man can be a magistrate. It is not always easy to meet these arguments. The law is so pervasive that it does have something to do with people engaged in every trade, occupation and profession. Many accountants and real estate brokers know more about some business and property transactions than we do. We should be generous enough to recognize it.

I think most of us in the legal profession are conceding all that. We are learning how to get along with accountants, bankers, medical men and realtors. I think also most of us admit to ourselves that we are too generous to some of our fellow lawyers who do not measure up to our standards. It is ironic that we claim too much and overlook too much. It proves that we are human like all the other people in the community. We are so like our neighbors, but we are different. We know that we are a brotherhood and that all the rest of the people in the world, even the members of our families, are laymen. We are the analyzers, the organizers and the synthesizers. We add other men's learning to ours. We have special skills for working with

people. We work hard on our books, we give time to our clients, and we know what our colleagues mean by due process. We exhort one another, we criticize ourselves, and are objective about people and events. Not everyone of us reaches the summit in our profession, but all of us strive for it. With our occasional pettiness, our halfhearted self-policing and our carrying some of our colleagues on two cylinders of learning, we have been good for the community, and our neighbors know it. They can make fun of us and they can resent us, but they know we have protected them against rascals and ignoramuses, and they know we have structured their political communities.

Most of you, perhaps, agree with much of that appraisal. Some older lawyers may think I have not done right by us. They could be right and I could be exaggerating, but I ask your forbearance when I am generous to law schools. I would not be worthy of my status if I did not think that legal education is the cornerstone of the profession. It has to be good. The years you graduates have spent in law school are the most important in your career. You are not lawyers yet, although you are graduates. To be lawyers you need the experiences you will put under your belt in the next few years, but you do have the philosopher's stone, and we have given that to you in law school.

Because legal education is so vital to the profession, lawyers owe it to the brotherhood to bring every law school into the stream of professional activity. If law teachers do not join professional associations, they should be drafted. I have been at the bar for forty-four years, and most of that time I have been in legal education. The most fruitful years of my life were those I spent in Louisiana, and I believe it was because of the Louisiana State Law Institute. The Institute could suggest a pattern for lawyers in every state. Judges, teachers and lawyers worked together in it to re-appraise the jurisprudence of the state, to devise new ground rules for the community and to draft experts from outside the profession to give lawmen new insights about the law. Every law teacher needs that kind of opportunity.

It is important to catalogue what law schools can do and what they cannot do. We have to assume that our students bring something with them to the profession. We cannot help them to make up for what they have missed. If our students are literate and if they do read, we can help them learn how to communicate ideas, how to analyze concepts and how to organize arguments. Your law teachers have not taught you how to win cases nor how to get business. We never can brief students on the rituals they will have to observe when they appear before certain trial judges (and those judges are likely to be our severest

critics). But we do bring judges and lawyers to our classrooms to counsel you and to give you a feeling for professional standards. And we create the atmosphere in which you can discover the philosopher's stone.

I try to resist the temptation to classify anything I discuss into limited categories because I remember a character in one of Booth Tarkington's plays who classified all the men in the world in two categories, those who carry wicker suitcases and those who do not. Nevertheless I want to talk about two kinds of schools, the professionally-oriented and the university-oriented. Right in the beginning I confess a fuzziness in the two categories. The "oriented" part is the give away. It can suggest just a dominant influence, and American law schools today cannot escape from the university influence. Even an independent school like John Marshall is staffed by administrators and teachers trained in university oriented law schools. Law training in England is professionally oriented. Law study at Osgoode Hall in Ontario was professionally oriented until the nineteen-fifties. A hundred years ago in the United States training for the bar was professionally oriented. Today all law schools in the United States bear the university stamp.

I want to digress for a moment to comment on the profession in England. Most barristers and many solicitors are university graduates, but they are not graduates of university law schools. Certainly all of the barristers are trained in the Inns of Court. Solicitors can get some of their training in university law schools, but their final supervision is professional. How many barristers and solicitors are there! The division is lopsided, ten to one, thirty thousand solicitors to three thousand barristers. If there is any crossing over, most of it is from barrister to solicitor. That should give us some second thoughts about any such division in the United States. Many lawyers talk as if all their colleagues should be trial lawyers. Forgive me if I labor a point. There is not enough trial work to keep all lawyers busy, and there are not enough courtrooms. Perhaps it would be good for every lawyer if he could argue one case a year or one every five years before an appellate court. If we tried to plan it that way, there would not be any experts; too many lawyers would argue too few cases. I think we must be realistic. We do not want to divide lawyers into trial lawyers and the other kind. The reasons for the division in England are historical. We cannot create those reasons in the United States. We expect every lawyer to be litigation-minded. We try to do that for you in law school. We expect every lawyer to be an advocate. Advocacy includes more than trying cases and arguing on appeal. It includes negotiating and lobbying. We know that house counsel and government

lawyers carry their share of advocacy. English lawyers have missed a lot of lawyering. Not until the present decade have solicitors been able to work as payroll employees, and barristers never.

A hundred years ago training for the bar in the United States was professionally oriented. There were some university schools but not enough of them. The profession let the young law students down, and they did not do right by the budding law schools. A hundred years ago, fifty years before that and twenty-five years after, the legal profession in this country was not a learned one. A hundred years ago most lawyers were not equipped to train anyone but their own office clerks. The profession left a vacuum which the universities filled. Since the early nineteen hundreds the university schools have set the standards for the profession. By and large their influence has been good. Lawyers are more learned today than they were a hundred years ago, more learned academically and professionally. Nor is much of this the result of Langdell and the socratic method. Jurisprudence in the United States is case-law structured. It always will be. We will never stop using cases in the schools or at the bar, but there can be many ways of using them. The socratic method has been out of style since the nineteen-twenties. I am amused somewhat bitterly when critics set up Langdell and the socratic method as strawmen. Those critics know little about Cooke, Llewellyn, Hohfeld and Corbin, to name just a few. Perhaps you have never heard of them, but you have been under their influence. Adjusting to the New Deal and the crises of the depression affected all kinds of law school techniques. That was when more university schools began to bring more lawyers and judges to the classroom.

University law teachers have been good for the profession. They have brought academic insight, lawyer skills and objective criticisms to the law schools and the legal profession. Not everything has been good even in the best university schools. Too many law teachers have been isolated from their brethren. Some of them have not been members of the bar. Not enough lawyers and judges have served as faculty members. But there is one popular criticism of the university schools I do not buy. I do not fault the schools for not thrusting more legwork and client-caretaking onto student apprentices. It is a waste of time for beginning law students to spend much time in court. I could be giving myself away, but I think law students need a time for the cloister as long as their teachers are men of the world.

I am making much of the good things in the university oriented law schools because I think we have deserved them. I

am a product of that kind of training. So are you and your teachers. Every respectable law school conforms to that pattern. Is it always going to be like that? Are all law schools at a crossroad? The universities are changing, and the changes are affecting the law schools. This could be the time for the rest of the brotherhood, the men in practice and the men on the bench, to move closer to the law schools not in a spirit of hostility but with appreciation and understanding for the problems some schools are facing especially in matters of budget and curriculum and getting along with university administrators.

The changes in the universities have been developing over the last fifteen years. In that sense they are not revolutionary. We have had a chance to see them coming. So far the student revolutions have not affected the process. In fact the changes could explain something about the student revolts. Universities are getting bigger and richer. They are committed to Parkinson's Law. Institutional development has become a dominant theme. Foundation grants breed more administrators at an accelerated pace. Research is effected for the sake of research, and not all of it is on the applied or pure research level. Lobbying for grants has become an end in itself. Many of the state universities are on the bandwagon as well as a number of the private schools. Foundations have helped to accelerate the process. Since law schools began to tap the foundations in the middle 1950s, they are reflecting the university picture.

It is easy to overdraw the picture. Not all of the big spending is bad. University administrators in the law schools and the other departments can justify most of their projects, but I give you an example of what the new dispensation can do to the law schools. All law schools have more money to spend than they needed fifteen years ago. Money comes from tuition, taxes, foundations and private gifts. In the law schools most of it is spent on physical plant, salaries and libraries. Law librarians are enjoying a field day. There is a kind of competition among them to see who can buy the most books and build the biggest staff. That kind of competition can be good for many schools, but it is not good for all of us. Nor would the rest of us worry much about it, were it not that the competitors want all of us to engage in the competition. The library-busters have persuaded many people in legal education that money spending on libraries is the vital measure of a school's respectability.

During the new dispensation some good things are happening in legal education. We are restructuring our curricula as we should have done many years ago. We have scheduled time for clinics, seminars and studies in depth with paper writing.

We have added more faculty men to cut down the size of classes and to allow for more give and take in class discussions. We are correlating materials from social science areas with the more conventional materials of the standard legal subjects. But we must keep our perspectives. The good things in the new dispensation just could be outweighed by the risks I have described. Administrators with money to spend can develop programs for the sake of development, faculty men can go after foundation grants to prove that they can get results, and librarians can become intrigued by size. We could all live with this if the developers did not want to believe that all schools must be cut to their mold.

There ought to be in legal education as many slots as there are schools and communities. The profession has a right to demand that every school in every slot measure up to standards of decency in equipment, personnel and achievement. For many years we have been living in that kind of environment. We have big schools and small schools, night schools and day divisions, church schools and state schools, local schools and multi-state schools. We are approved by the American Bar Association, and we belong to the brotherhood. We people in the schools with modest resources do not want to stop progress. We hope for the bigger schools that they can build their libraries to include everything any lawyer wants to read. We can share with them the satisfactions that come from research projects grounded in social science techniques. We profit with them because we can work the results of this research into our own programs. We want the bigger schools to develop graduate training programs because our teachers can go there for training.

We can appreciate what the richer schools are doing, but we want them to appreciate us. It takes special skills from our people to organize and develop good working libraries to serve the young lawyers who are going to practice in our communities. Almost anyone can go out onto the market and buy every book in print. Our librarians must be good because they have to pick and choose. It is absurd to suppose that every law school must buy every book. We are happy we can supplement our collections with access to community resources. We want our colleagues in the bigger schools to appreciate what we do to bring our students close to the profession with our clinics, and panel discussions, our moot courts, our special lectures and our supervised visits to courtrooms and lawyers' offices.

Five years ago I made a speech to a group of law teachers and I said that we people in the smaller budget schools were producing a majority of the lawyers. I think I have to speak in the

past tense now. We are not turning out most of the graduates, but we are turning out a big enough percentage that the bar needs us. That is why I am making my plea to the profession to come to our aid. It is not that people are trying to persecute us. They are not looking down their noses at us as some of them used to do. Nor is it like the parable in Edward Bellamy's "Looking Backward" where a few favored people were riding on the coach and a lot of other people were trailing behind and trying to get on. Nowadays a lot of law school people are riding the big coach. Surprisingly perhaps they want all of us to be up there with them or to be up on other coaches just as big. But we have carts of our own, and we are getting there just as fast.

I have labored a number of themes tonight, and I can believe that you are wondering how I or anyone else can tie all of them together. I began on a note of pessimism which I cannot change. The community is facing crises. Few of us have had the imagination to penetrate them. Some of us oldsters are frustrated. We could be the James Buchanans of the twentieth century. I dodged the crucial issues about the rule of law, and I began to talk about the legal profession. Certainly lawyers are going to have to guide our country through these crises. It will demand more from us than routine professional skills. We will have to draw the philosopher's stone with all the wisdom of the brotherhood. I concentrated mostly on law schools as the cornerstone of the profession, and finally I described a kind of crisis in legal education which points to a division among the brethren at the cornerstone level.

I am not sure that I have tied all of this together. Our crisis in legal education is trivial compared with the crises in urban life and foreign affairs. Perhaps our crisis is not big enough to be called one, but it is big enough to demand consideration from all the brethren in the profession. In the United States the profession has not been tight. That is what has saved us from monopoly. A lot of people live in its house, a lot of different kinds of people, and most of us want it to be that way. We want it to be that we can be driving all kinds of carts in school, at the bar and on the bench. Consensus may be a word that is out of date, but that is what the brotherhood needs.

Legal education is the third house in the parliament of the legal profession. It can serve its true function only when it can work in harness with the practicing bar and the bench. We do not have to lose our autonomy when we ask the profession to let us serve with them in bar associations and law institutes, nor do we lose our autonomy when we ask practitioners to join the American Bar Association's Section of Legal Education to help

us draft standards for law school achievement. We do not lose our autonomy when we ask you to serve on our boards of trustees, our boards of visitors and in our classrooms. We have a right to expect that lawyers and judges will do this as a public service. In the meantime and immediately we people in the schools with smaller resources need the profession's good will as a kind of public relations interest so we can buy time while we are trying to persuade our teaching colleagues in the bigger schools that the profession needs us as we are.

The John Marshall Journal Of Practice and Procedure

Volume 2 | Spring Term, 1969 | Number 2