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Preface

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I am flattered to be invited to write this Preface. In the first place, the article by Gordon Gee and Donald Jackson is a model of serious research and perceptive analysis. It uses elegantly the historical, the comparative, and the empirical. It forces one to think, and offers provocative suggestions. All that is remarkable is that this laudable comprehensive study of legal education had not been undertaken before.

I suppose I share many of the assumptions or presumptions and many of the conclusions of the article. Thus, for me, the commentaries in this special issue heighten the value of the Gee-Jackson article and thus make a distinctive contribution to the ongoing debate about the future of the profession and its training and education. The McKay article sets the stage by outlining the role of lawyers in America. The Skousen study provocatively examines the parallel peregrinations of accountancy and the tentative steps being taken towards establishing schools of accountancy. The Levin article aggravates the guilt that is the lot of the legal educator, while the Finesilver article surveys the various structural and intellectual issues facing the profession in terms of education, paying particular attention to skills and the clinical component.

This latter theme reflects the main thrust of this special issue and makes especially interesting the articles that test the reluctance of legal education to change, particularly in the light of the conflict between conventional forms of teaching and the so-called clinical method. Some would see this as the clash between the academic and the practical. I think that this simplistic transposition is wrong; but historically there is little doubt that clinical legal education, however its form is seen, is more related to traditional lawyering skills than to traditional scholarly values.

It is scarcely original to note that in the last hundred years lawyer training has been taken inside the universities and that a considerable element of schizophrenia has developed among that peculiar breed of person, the law professor, as to the direction in which he or she should move. In the late sixties and early seven-

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ties, the march toward clinical legal education seemed almost irresistible; in the last two or three years the tide has turned, or so it would seem. The fascinating thing about these articles is that they tell us a great deal—perhaps sometimes inadvertently—about why the tide has turned. The truth is that the advocates of clinical legal education—and all of us at some level are advocates of clinical legal education—have very different goals. This set of essays not only provokes, but provides various rationalizations of the different trends in clinical legal education. These various rationalizations tell us why the time, as academics are prone to say, may not be ripe for further penetrations—as anthropologists are given to saying—of clinical legal education into the academic realm.

The article by Charles and Jane Kelso says spendidly what many thoughtful academics believe: that change takes place slowly in legal education, but there is room for clinical legal education—especially if the Ford Foundation gives us all a lot more money. Perhaps such implications are somewhat cynical, but at least the Kelso article implicitly asks what would have happened if CLEPR had not come into existence or had given no money. The answer is that very little would have been done and clinical legal education would have gone almost nowhere. In this sense, the academic legal profession shares some of the instincts, one suspects, of the world's oldest profession.

On the other hand, there are other insights in the Kelso article worth highlighting. The authors' view of clinical legal education is remarkably close to the conventional view of legal education. Over the years, many professors have struggled with the so-called problem method. Indeed, which of us has not announced the importance of drafting in contract courses? In this sense, we can all subscribe to the Llewellyn skills thesis. The Kelsos in effect translate clinical legal education into "practice skills education." For them, clinical legal education is, for all practical purposes, simulated legal practice. This example of the Indian rope trick neatly exhibits, to mix an analogy, what might be called the Trojan Horse theory of clinical legal education. "We'll take their money; we'll modify the case method a little; and then we'll go on making ourselves more scholarly. Perhaps we'll go on being professors and being respectable, and invited to sherry with professors of classics, and receive those other marks of respectability in the strange world of academic life."

Of course, I may be totally misinterpreting what the Kelsos are saying. I note, however, that what they are looking for is "a facility specially designed for practice skills education" which

should provide "housing, specialized equipment, and a trained staff" to "facilitate the precise observing and recording of lawyering activity" and so on. "The teaching environment may have to resemble the real world of practice in many important respects." At the same time, they see another vision. The building, no doubt with suitable federal or foundation funds, should also have

> the facilities and staff for obtaining up-to-date information on the developing factual context in which cases arise and are handled in the courts or otherwise. There should be systematic followup on cases to evaluate the lawyering, the legal processes, and the development of the law. Further, the staff should be collecting and processing political and socioeconomic information about the larger context of local, state, national, and international communities in which the law is but one of many forces. Most importantly, the building should house personnel who would subject that information to the full range of "policy science" processes explicated by Harold Lasswell and Myres McDougal. This policy science is a professional decisionmaking process characterized by clarifying goals, discovering trends and causal conditions, making projections, and choosing and pursuing alternatives in light of what is most likely to produce preferred outcomes with an optimum expenditure of time and other resources.

While I would not regard that passage as the most gracefully phrased paragraph in the English language, it seems to suggest that in the Kelso building there will be simulated clients and a mass of people "processing." I do not regard "processing" as necessarily obscene, and the processing exemplified by Harold Lasswell and Myres McDougal has certainly had an important impact on us all. I, nevertheless, have a sinister feeling at the back of my mind, however, that those professors (I am sure they will be called "resource persons" for the purpose of the proposal to CLEPR)—as they are busy "clarifying goals, discovering trends and causal conditions, making projections, and choosing and pursuing alternatives"—will end up looking and sounding suspiciously like the law professor of old. Indeed, those who are "produc[ing] preferred outcomes with an optimum expenditure of time and other resources," will, I suspect, bear a striking resemblance to Aaron Director and Richard Posner.

Of course, using new types of faculty would help; and of course teaching students computer techniques is vital. The application of the so-called policy science approach might well add intellectual depth to the debate on clinical legal education; but it might well end clinical legal education—at least in the way it

is understood by David Barnhizer, who would undoubtedly reject the Trojan Horse school of clinical legal education.

Professor Barnhizer adopts, under various guises, what I would like to call the "compulsory chapel" approach to clinical legal education. Now, I have always admired those colleges which have maintained the compulsory chapel system. I certainly benefited in prep school by listening (involuntarily) twice a day to the elegant Elizabethan and Carolingian prose of the Book of Common Prayer. (How I detest, from my sceptical perch, those who would translate such resonances to the vulgarity of the vulgate.) Yet on reflection, I find compulsory chapel faintly inconsistent—if I may put it mildly—with the concept of the liberal university. Fortunately, like Lord Esher, Professor Barnhizer has few doubts. His belief is of the revealed variety.

Professor Barnhizer starts from the assumption that an "elitist concentration on the preservation of entrenched property, wealth, and power" characterizes the method and content of legal education. No doubt in any legal system, be it Marxist or capitalist, or under the inevitable shading between the two in which most developed societies, be they in the East or West, in fact live, the legal system represents the established order. In that sense, there is a natural support for those in power. Yet are all the law schools the champions of the propertied and the powerful? I have certainly heard *ad nauseam* arguments to that effect, and can claim no empirical survey that would disprove them; but I wonder if our law schools are really as conventional as the good professor would have us believe. Are there no professors teaching constitutional law who are concerned with civil liberties or the rights of criminals? Are there no professors teaching contracts who are concerned with consumer protection? Are all property teachers solely concerned to espouse unquestioningly the rights of landlords?

Of course, I may not share the same political assumptions as Professor Barnhizer. While a civil libertarian, I am concerned about congestion in the courts and the absence of adequate police protection in all parts of the city, including the ghetto. I am concerned with protecting the tenants against rapacious landlords; but I am equally concerned that in some cities the protection of tenants has gone so far that it is no longer economically feasible for persons to build housing for rental. I would not be shocked by a solution provided by public housing, but I am unable to accept Professor Barnhizer's proposition that "the superstructure of legal education has evolved into a mechanism serving a disturbingly restricted portion of American society, while giving

short shrift to the interests of the numerical majority."

Nor can I accept unquestioningly Professor Barnhizer's notion of the essential homogeneity of the elite corporate bar and the traditional law school faculty—institutions whose members apparently adhere to the same antimajoritarian value system. In Professor Barnhizer's eyes, working for the Supreme Court or for a prestigious law firm is counterproductive to producing a good teacher. The only hope of producing a good teacher apparently is to hire some good soul from the local bar or, better still, from the local legal services office. Yet Professor Barnhizer's law professor has a challenging role. Not only is he the scholar or intellectual hoping to force students to think, but a teacher that must structure the "legal experiences the student undergoes" so that "the instructor and student can produce the desired learning." Apparently the training obtained by those fortunate enough not to be contaminated by the Supreme Court or prestigious law firms is of the behavioristic mode—which enables him or her to assimilate the clinical student to the rat in clinical psychology. Tomorrow's law student may have cause to remember the complaint of James I's yeoman: "*New Presbyter* is but *Old Priest* writ Large."[1]

In this context, it comes as no surprise that Professor Barnhizer himself is an admirer of the "strict" model of clinical legal education—the law office in the law school. It is "the best available method by which an affirmative, coherent, and personalized system of professional values and responsibility can be created." Here we come to the heart of the matter, for it is apparent that the kind of professional responsibility that Professor Barnhizer is concerned with is responsibility to the poor. He sees law school today as reflecting an "antidemocratic, antisocial, and anti-intellectual" elitism which seeks the preservation of "power, prestige, wealth, and influence." Only the clinical law professor stands against the tide. As conceived by Professor Barnhizer, this paragon is not unnaturally concerned solely with the poor, for it has been revealed to the good professor that "it is in the representation of these clients that the deepest insights into the nature of society and of one's relationship to it can be found."

Quite which prophet revealed this intelligence to Professor Barnhizer is unclear. He is, however, apparently convinced that only poor clients suffer from "abuse of power, bias, and discrimination" and experience afflictions arising out of interactions with

1. J. MILTON, *On the New Forcers of Conscience Under the Long PARLIAMENT*, in MILTON'S COMPLETE POEMS 38 (rev. ed. F. Patterson 1933) (emphasis in original).

"adverse parties and attorneys, judges, police, and court personnel." I am somewhat reluctant to take issue with Professor Barnhizer. At the risk, however, of questioning his higher source of wisdom, is it not just conceivable that middle-class clients also have trouble with, and suffer frustration caused by, "adverse parties and attorneys, judges, police, and court personnel?" Was it not possible that even the *New York Times* and the *Washington Post* suffered by the abuses of power during the Nixon administration?

Of course I understand what Professor Barnhizer is trying to say. Empirical studies have shown that law students, whether radicals or conservatives, go to law school because they are interested in power. What Barnhizer assumes is that if they work in legal services offices, they will show less interest in power. Is that, however, borne out by the facts? What about the contempt by many of those legal services for Band-Aid responses? Why the obsession to bring test cases? Power hunger exists among those who practice poverty law in much the same way as it does among those who practice corporate law. Professor Barnhizer's argument is that too many of our law students go into corporate practice and they ought to be psychologically readjusted in order to appreciate that the poor have problems as well as the rich; perhaps in this way they will become more professionally conscious. Whiffs of such dogmaticism—be they from right or left—may spell the end of the liberal university as we know it. It is a high price to pay for undoing Langdell's work.

Professor Barnhizer seems to represent the "activist" style of law professor described in the Gee-Jackson study: the political activist basically contemptuous of traditional scholarship; convinced that all laws favor the rich, and none the poor; convinced that lawyers need to be radicalized to change this deplorable social situation; and so on. Such assumptions make it irrelevant that lawyering skills could be learned as a lackey of corporate clients, for this argument in favor of clinical legal education is essentially a political one. I would not wish, however, to end on a sour note, for in terms of the historical thrust in favor of clinical legal education, Barnhizer's is the most significant contribution, and, as in the case of all these comments on the excellent Gee-Jackson study, a vital contribution to the ongoing discussion of legal education.