IN TEN YEARS, ALL NEW LAW SCHOOLS!

*I. Richard Gershon**

100 years from now? All new people.[1]

I. INTRODUCTION

IN June, 2012, I had the pleasure of presenting at the Association of American Law Schools (AALS) New Law Teachers Conference in Washington, D.C. There was great positive energy at this conference, and we should all be excited to welcome this truly wonderful new generation of faculty members. While the panels at the New Law Teacher's Conference dealt with a variety of issues related to teaching, scholarship, and service,[2] every speaker cautioned those attending that they needed to learn the culture of their law schools. We are, after all, diverse institutions with different missions.

I agreed with, and repeated that admonition, but went one step further. I encouraged the new faculty members to work to change the culture at their law schools. In six years, when these new faculty are tenured, they can truly have an impact on the cultures of their institutions, and on legal education.[3]

Deans, on the other hand, do not have to wait to facilitate change at their respective institutions. It is unfortunate, however, that the positive energy of the New Law Teacher's Conference was in sharp contrast with the Workshop for Deans of ABA Approved Law Schools, where there was much less optimism. Many deans in attendance at that meeting expressed concern about the future of legal education, given dire employment[4] and applicant numbers. With those problems in mind, and with the advent of many new law schools since 2000, many deans in attendance asked, "[w]hy are there so many new law schools? Don't we have too many law schools already?"

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1. ANNE LAMOTT, ALL NEW PEOPLE (1989).

2. *See* ASS'N OF AM. LAW SCHOOLS, WORKSHOP FOR NEW LAW SCHOOL TEACHERS (2012), *available at* http://www.aals.org/nlt2012/NLT-booklet2012.pdf.

3. When I first started teaching at Stetson University College of Law, only tenured faculty members were allowed to vote on faculty hiring. The tenured faculty were the Appointments Committee, so those of us who were not tenured called ourselves the Disappointments Committee. We all agreed that we would change the policy when we earned tenure, and we did so.

4. *See Employment Summary Report*, A.B.A., http://employmentsummary.aba questionnaire.org/ (last visited July 30, 2012); Karen Farkas, *Law Schools Reduce Classes as Applications Drop in Wake of Fewer Jobs*, PLAIN DEALER (Cleveland, Ohio), July 23, 2012, at A1, *available at* http://www.cleveland.com/metro/index.ssf/2012/07/law_schools_see_drop_in_ applic.html.

I have heard others add that legal education could be helped tremendously if the ABA would stop accrediting new law schools. My response is that, while it is possible that we have too many law schools, new law schools may not be the problem. The problem might be that existing law schools need to think and act like new law schools if they are to survive, and our accrediting and membership institutions need to encourage that change. In ten years, or possibly even less, we all need to be new law schools!

II. STARTING FROM SCRATCH

My position on the opening of new law schools is admittedly biased. I was privileged to be the founding dean at the Charleston School of Law. Charleston was only the second law school in the State of South Carolina. The state had over four million people, and only one law school, and there was no part-time program available at the existing law school. Based upon an extensive market and demographic survey, the founding board determined that a law school would flourish in Charleston, and the evening program would be a welcome addition to the educational opportunities in South Carolina.

I know some people are skeptical about evening or part-time legal education, but the reality is that many students have to work to be able to afford law school. Because they have work experience, these students bring a perspective to class that is a great asset. One of the evening students at Charleston was Jeff Yungman, the director of Crisis Ministries,[5] a local nonprofit that helped to feed and shelter the homeless in the community. He had been frustrated because it was hard to find affordable legal assistance for the homeless, and lawyers in the community were reluctant to become involved. He came to the Charleston School of Law so that he could be the provider of that legal assistance. He is now the director of the Homeless Justice Project in Charleston.[6] Closing the door on new schools would mean closing the door on people like Jeff Yungman, and all that they bring to the profession.

Being part of a start-up law school was one of the most challenging, and enjoyable, experiences I have ever had. It was like playing a football game, while you are still building the team. We would kick the ball off and think, "oh hell, we need a defense!" At a new school there is no culture of "this is the way we have always done things." The school truly has the opportunity to start from scratch and think about curriculum, the library, scholarship, tenure and promotion, technology, or anything that other law schools often consider to be etched in stone.

One of the most exciting aspects of building a new institution was hiring faculty. Every founding-faculty member is a senior faculty member. In Charleston's first year, the entire faculty served on every committee. Each person was expected to teach a day and an evening section where necessary.

5. *Staff*, CRISIS MINISTRIES, http://www.crisisministries.org/v.php?pg=71 (last visited Sept. 4, 2012).

6. *Homeless Justice Project*, CRISIS MINISTRIES, http://www.crisisministries.org/v.php?pg=69 (last visited Sept. 4, 2012).

They also began working on scholarly agendas, while beginning the process of ABA accreditation. The seven of us, including our law librarian, had to hire as many as seven new faculty members for the second year. We did not have, nor could we afford, any *prima donnas.* Forgive me for saying so, but there are what I would call "hot-house flowers" at the hiring conference every year. These are people who have attended elite schools, clerked one year for a judge, and then want to move right into legal education, avoiding the dirty work of law practice. They want reduced teaching and service loads to begin working on scholarly agendas. These agendas will primarily further their careers. They view the schools that hire them as beneath their talents, and view their students as nothing more than a necessary evil—financial sponsors of the great and impactful work they will be doing. Such potential faculty members would not do well at a start-up law school where there are no reduced loads. My question to law schools would be, do those faculty members do well anywhere, and can any law school afford to hire them in this post-bubble period?

III. IMPEDIMENTS TO INNOVATION

In theory, new schools have the luxury of working from a clean slate. Of course, any new school seeking accreditation has to operate within the constraints of the American Bar Association's Standards, as interpreted by the Council on Legal Education and Admission to the Bar. New schools risk not being approved if they push too hard, or if they try something too far out of the mainstream of legal education. That is not, of course, a generally bad thing. To the extent that the Standards ensure quality in legal education, they are essential. Standards that serve only to protect the vested interests of groups within legal education, on the other hand, can no longer be tolerated if they simply drive up student costs of attendance without providing any actual benefit to the law school or its students.

For example, when we started the Charleston School of Law, the ABA Standards required collection of library resources, including microformats (microfiche, microfilm, etc.). Schools collected in microform only because it was cost-effective and took up very little space compared to hard-copy collections. Law schools often calculated library space needs by looking at the percentage of shelf space they had available. Microform gave them ownership of large quantities of materials without affecting that shelf-space.

When we were building our collection at Charleston, however, it was clear that microform was being replaced by digital databases. Unlike microfiche and microfilm, these databases, while not cheap, were much easier to use and did not require investment in a special reader. Furthermore, if the digital databases were made available through the law school's library website, they could be accessed anywhere there was an internet connection. Our librarian, Gordon Russell, was already on the leading edge of digital law libraries, so I knew he would agree that collection in microform was a terrible waste of resources, even though it was required by the Standards.

With ABA approval at stake, however, we decided to investigate further. In 2004, Gordon and I visited a law school that had recently gone through the approval process. When we went into their library, we noticed cases of

microfiche lined up against the wall in a secluded corner. I asked the librarian of that law school if anyone in his community ever used the microfiche, and he said, "no, we bought it because we were afraid we would not be approved otherwise." He then disclosed that the cost of the microfiche was about $500,000. This cost, of course, was passed on to the students in the form of tuition. It was money that could have been used to enhance their education, but it instead went into boxes of unused materials sitting forlornly on a library floor.

When we got back to Charleston, I told Gordon that I could not, in good conscience, invest in microformat, irrespective of the ABA Standard requiring law schools to do so. We decided to take a trip to Chicago to discuss our concerns with the then-Consultant on Legal Education and Admission to the Bar. I asked what he would think if I told him we were not going to have microform in our library collection, given that the materials were becoming more and more available in digital format. I told him I could not justify spending student dollars on something that would be of no benefit to their educations. His response was, "you'll be the only law school in the country that doesn't have microfiche."

Even given his response, we decided not to invest in microformat. To do otherwise would have simply been wrong. Fortunately, the ABA changed the Standards within a year to remove collection by a law school in any particular format, so we were approved without ever investing in microform.

On the other hand, when we appeared before the Council on Legal Education and Admission to the Bar, we were criticized for not having any state code besides the South Carolina Code. The specific question was, "what are your graduates going to do when they get jobs in North Carolina, and they have never seen a North Carolina Code?" My response was that we did have all fifty state codes, even though we only kept the South Carolina Code in hard format. The other codes were available digitally. Since law firms were no longer keeping hard copy codes, but were instead using the state codes available online through their bar associations, it would be unlikely that our graduate in North Carolina would ever see a hard-copy North Carolina Code in her law firm. Finally, I stressed that we should not be accredited if our graduate did not understand how to use state statutory material.

We elected to pay almost $40,000 to buy hard-copy codes for states in our region, as well as New York and California. They sat unused on the shelves of the law library. Even years later, whenever I passed them—in their pristine condition looking like they just came off the printing press—I thought of them as an entry fee that we had to pay. Law libraries can no longer be run as though we are applying the common law Rule Against Perpetuities (what if the fertile octogenarian comes into the law library wishes to hold a copy of the Idaho State Code in his hands?).

The state codes reminded me of my ninth-grade physics teacher (the year was 1972) who made us learn how to use a slide-rule. We protested because Texas Instruments had come out with something called a calculator. Our teacher warned that we had to use the slide-rule because we could not be sure we would have access to a calculator in the future. The truth is, it is almost impossible to find a slide-rule today, and every electronic device I own, including my phone, has a calculator. Law graduates in the future will have a hard time finding a state

code in book form, or a case reporter, or a loose-leaf service, but I guarantee that, barring some type of cataclysmic change in society, they will be able to access all of that information in digital format.

The experience at Charleston made me realize that new schools are at a great disadvantage in terms of innovation, just as untenured faculty members are. Their risk tolerance is small, because the stakes are so big. Failure to achieve ABA approval could mean that the school closes, and the students have no opportunity to take a bar exam. Furthermore, new schools are visited by the ABA every year. Schools receive constant feedback from forces that seem more interested in maintaining the status quo than in fostering meaningful change.

The ABA process is also a very expensive process, and new schools have no option but to bear that cost. Accordingly, their students must bear that cost. Schools are required to host and pay the travel expenses for seven site team members every time they come for a site visit. No meaningful measures are taken to control the expenses of the site team, while they are on site. Accordingly, it is not unusual for schools to pay $500 or more for a dinner for the team. I know that as dean at Charleston I had no plan to tell the site team that it should be reasonable in its expenses. Considering that the team is usually at a site for three nights, the expenses can typically run between ten and fifteen thousand dollars. These visitors would never spend their own students' money so lavishly, but the process allows for such spending of another school's student money. None of this furthers legal education.

Additionally, the ABA Accreditation Committee and Council meetings are invariably held in posh hotels at nice locations. When we came up for approval at Charleston, we met the Committee in San Diego and the Council in Naples, Florida. The meeting with each group lasted only an hour, but we felt it was essential to have our senior administration at each meeting to answer questions. We could not afford to buck the process. Too much was at stake for our students, who would only be able to become members of a bar if we were an approved law school. Requesting a much more cost-effective video conference with the Committee or the Council did not appear to be an option.

Because of the risks for new schools, change in legal education must come from existing schools, just as faculty change must come from deans and tenured faculty members, but new schools can serve as a model for such change.

IV. ESTABLISHED SCHOOLS HAVE THE ADVANTAGE, IF THEY WILL USE IT

Unlike new schools, established law schools face little risk of losing their accreditation for being innovative. For one thing, established schools face ABA site visits only once every seven years, and no school has lost its ABA approval for being innovative.

Unfortunately, site teams visiting schools to enforce the ABA standards often serve to protect vested interests. If law schools were railroads, the site teams would consist of those who shovel coal, even if all the engines on the railroad were diesel engines. For example, the team visiting the University of Mississippi, in 2012, had three members who were either current or former librarians. It is not surprising that they were concerned that I had been working

with our library and faculty to cut some expenses, like hard-copy state codes. Site teams always have librarians reviewing libraries. How will that ever promote or support needed change? A faculty member's perspective on the library's role is often quite different from the perspective of a library director.

It is time—past time—for established law schools to push back against an evaluation method where the status quo is protected in the face of monumental evolution in the legal profession. The ABA process itself is an incredible drain on institutional time and resources, so it should be focused on quality education and student outcomes, not on protecting vested interests in legal education.

V. *U.S. NEWS* RANKINGS

The law schools in the greatest position to effectuate meaningful and lasting change in legal education are not those in the top 14, the so called T-14, of the *U.S. News* rankings. It is really the rest of us, the other 187 accredited law schools, who must change. The mistake many of the rest of us have made is that we try to be as much like the T-14 as possible. We gauge our success by the same measures they use to gauge their success, when the truth is we are very different institutions. I would go as far to say as we are in different professions.

While law school applicants look at the rankings in considering law schools, a large percentage of the rankings are based upon factors that weigh scholarship, rather than teaching. If we insist on rankings, why do we not come up with rankings that actually further the missions of our law schools and benefit our students? Most of our students will not be working at big law firms for high salaries. That is not a bad thing, as long as the training and education we provide actually benefits them and their careers.

The *U.S. News* rankings have always been suspect, but recent incidents of law schools gaming the system or even being dishonest about their numbers have made matters worse.[7] Schools should strive to serve their own students' best interests, and not try to fit into a mold created by a magazine. Our students pay us to educate them, and that should be our focus.

VI. THE ASSOCIATION OF AMERICAN LAW SCHOOLS

As we explore the necessary and inevitable changes occurring in legal education, we must look at all institutions involved in that process. The Association of American Law Schools sponsors many innovative programs, including the conference for New Law Teachers I mentioned in the first paragraph of this Essay. Yet, as I look at the expense of membership in that organization, I have to ask, what is the benefit of AALS membership? If we want to reduce student debt, we have to find ways to reduce our costs without negatively affecting student education.

For example, the cost of membership includes publication of the *Directory of Law Teachers.* This was a useful tool twenty years ago, because it gave

7. *See* Steven J. Harper, *Worse Than Cheaters, The Belly of the Beast*, WORDPRESS (Feb. 18, 2012, 8:35 AM), http://thebellyofthebeast.wordpress.com/2012/02/08/worse-than-cheaters/.

biographical and contact information for every faculty member. The publication and mailing costs for this book are no longer justified, given the availability of more complete information online. It is time for the AALS to stop publishing the *Directory*. We have enough doorstops already.

In my opinion, another AALS anachronism is the Faculty Recruitment Conference held each October in Washington, D.C. The D.C. location is for the benefit of the AALS staff, and is not convenient for anyone traveling from locations other than the Northeast Corridor. The Marriott Wardman Hotel is a horrible place to hold a conference where interviewees have to navigate two separate wings, and slow, crowded elevators that do not help candidates move from one thirty minute interview to another. Teams have to have their food orders into the hotel months in advance of the conference, but invariably the food arrives in the middle of an interview, and too late to do the team any good. The whole thing is more like some sort of hazing ritual. Is this really the best way for schools to recruit faculty?

The conference is very expensive for schools, and often frustrating for candidates. What if every candidate submitted a video of their answers to standard questions, and those videos were available to recruitment committees through a secure website (I admit this has a "Match.com" sound to it)? I think this would allow schools to screen faculty candidates in a much more consistent setting. The videos could be linked to the Faculty Appointments Register forms. Schools nostalgic for the old days can cram into rooms at the Wardman to watch the videos, and have their team breakfast delivered at 11 a.m.

Furthermore, the AALS hiring conference tends to favor candidates who have less, rather than more, practice experience. I think we should strive for greater balance in this respect. Some of the best faculty members I have ever worked with had been partners in law firms. Invariably, they encountered difficulty finding jobs in legal academia, because there was a fear by hiring committees that they had somehow been tainted by their years working at a law firm. These were candidates who had somehow managed to navigate the partnership track of a law firm and had still found time to publish an article or a book. They had proven their interpersonal skills by successfully working within firm politics. When these faculty members found jobs as law teachers, they loved their jobs. They excelled at teaching, scholarship, and service, just as they had excelled in practice. Their perspective in the classroom and their connections within the practice proved to be valuable assets to their students. I will not name names in this Essay, but I assure you that these faculty members do exist just as I have described them. If I was starting another new law school (and we will all be starting new law schools in this new environment), they would be the kind of faculty I would put at the top of my list.

VII. SOME CONCRETE IDEAS AT THE UNIVERSITY OF MISSISSIPPI

I am lucky that my colleagues at the University of Mississippi School of Law understand that legal education has changed, and that law schools have to adapt. We have taken steps to be a new law school. Some of those steps are

unique, and some have been adopted by other law schools. In any event, all of us who are not in the T-14 should have made changes. If not, it might be too late.

At Mississippi, we have reduced our entering class size, as have many other schools.[8] Reducing class size will, in ways reflective of the housing bubble, put some schools "upside down"[9] financially, but we should expect that these smaller classes will be with us for the foreseeable future. These smaller classes will result in smaller revenue, which means that we will have to maximize our use of those revenues. Since the greatest cost of running a law school are its personnel costs, this will mean that law school faculties will have to contract in size, as revenues decrease, and classes get smaller. We will also have to take a long look at the cost-benefit of research grants in a time of declining revenues.

A greater focus on skills is another change many law schools have recognized, and effectuated. At Ole Miss Law, we have added a required professional skills program that each student will take all three years. The program will replace the first two weeks of spring semester each year. During those two weeks, students will have intensive skills training from lawyers, judges, and full time faculty. The courses offered will range from the required 1L class in contract drafting and negotiation, to upper-level electives in advanced trial, taking depositions, and dispute resolution. The lawyers and judges already committed to teaching include members of the Mississippi Supreme Court, NASA lawyers, and lawyers from as far away as Los Angeles. The attorneys and judges will stay in residence during the two weeks, which will further enhance the experience for the students.[10]

The focus on skills in the classroom is complimented by a growing commitment to clinical education and externships. At the University of Mississippi, students have the opportunity to gain experience through several civil clinics: the Mississippi Innocence Project, the Criminal Appeals Clinic,[11] and a robust externship program.[12] We will be adding a Mississippi Justice Clinic, created by funding from the Roderick MacArthur Foundation, in Spring of 2013. This clinic will allow students to participate in impact litigation throughout the state. Funding for this program will also be used to create a loan repayment assistance program for graduates who continue to work in this area.

I mention all of these programs, not just to engage in bragging about my law school, but to emphasize that the future of legal education must track the

8. *See, e.g.*, Joe Palazzolo & Chelsea Phipps, *With Profession Under Stress, Law Schools Cut Admissions*, WALL ST. J. (June 11, 2012, 6:45 AM EDT), http://online.wsj.com/article/SB10001424052702303444204577458411514818378.html.

9. *E.g.*, Elie Mystal, *Law School Over-Promises Financial Aid; Will Have $2.4 Million Shortfall Over Three Years*, ABOVE THE LAW (July 18, 2012, 10:23 AM), http://abovethelaw.com/2012/07/law-school-over-promises-financial-aid-will-have-2-4-million-shortfall-over-three-years/.

10. *See Skills Training*, THE UNIV. OF MISS. SCH. OF LAW, http://law.olemiss.edu/academics-programs/skills-training/ (last visited Aug. 1, 2012).

11. *Clinics*, THE UNIV. OF MISS. SCH. OF LAW, http://law.olemiss.edu/academics-programs/clinics/ (last visited Aug. 1, 2012).

12. *Externships*, THE UNIV. OF MISS. SCH. OF LAW, http://law.olemiss.edu/academics-programs/externships/ (last visited Aug. 1, 2012).

future of the profession. For most graduates, the job market will be more about service positions than big dollars at large firms. This is not a bad thing, and is a phenomenon that schools of education have always known. Teaching, especially teaching K-12, is a calling. Teachers are frequently trained by teaching in underserved areas.

The legal profession is also a calling, and there is great need for our services. We have to know that we are training the next generation of professionals to deal with our society's legal needs. That is who we should recruit, and that is how we should train them. The concept that law school is a good place to go if you do not know what you want to do does not work when debt loads are high and starting salaries do not match them.

VIII. CONCLUSION: OTHER THINGS TO CONSIDER

In conclusion, as law schools remake themselves, I offer some other things they might consider:

Sharing Faculty

Does every law school need an expert in Natural Resources Law or International Law? My premise is that we all tend to hire for the same teaching and scholarship areas. It seems to me that we could create a greater efficiency by sharing some teaching resources. For example, at Ole Miss we have a strong faculty in Environmental Law, and we host the National Sea Grant Law Center. We have recently lost an expert in International Law. I am certain that there are schools that will be looking to fill Environmental Law slots this year. With the advent of reliable distance options, what would be the harm in sharing these resources with each other? We could benefit from each other's strengths, and even build other partnerships between our schools. This will be especially useful if faculties are getting smaller because of financial constraints.

CALI's Electronic Book Project

CALI, the Center for Computer Assisted Legal Instruction, is a consortium of over 170 law schools that offers over 100 computer-based legal tutorials for use by law students at member institutions. It has been a leading innovator in legal education in the past. This year CALI has envisioned a way for law schools to save their students $150 million by creating and sharing e-books on a free server. The idea is that every law school would donate a fellow who will participate in a team of faculty to write a casebook in a substantive area of law over twelve months. The law school would give the fellow leave from teaching a course or an institutional stipend for writing the book. The details are to be

worked out between the school and the fellow. Because there are 201 accredited law schools, the 201 fellows would have a goal of 100 free casebooks.[13]

Casebooks are another anachronism. They were important when copying was difficult and there was no way for every student in the class to have access to cases in the library at the same time. Now, students can easily find cases and statutes in electronic format, and the class can be tailored to the individual professor's needs. Casebooks are cumbersome, and expensive. The CALI project could help move law schools into the 21st century and could help cut our students' debt loads.

No More One Size Fits All

One more thing law schools must embrace in order to survive is that we can no longer be cookie-cutter law schools. I am reminded of Monty Python's great 1979 movie, *The Life of Brian*.[14] Everyone confuses Brian with Jesus, and Brian says:

> "You don't need to follow me. You don't NEED to follow ME. You don't NEED to follow ANYBODY! You've got to think for yourselves! You're ALL individuals!"
> The crowd: "Yes! We're all individuals!"
> Brian: "You're all different!"
> The crowd: "Yes, we ARE all different!"
> Man in crowd: "I'm not…."[15]

We all claim to be different, but this time we really have to be different. Only the new schools will survive!

13. John Mayer, *How Law Schools Could Save Students $150 Million*, THE CENTER FOR COMPUTER-ASSISTED LEGAL INSTRUCTION (July 7, 2012, 10:05 AM), http://www.cali.org/blog/2012/07/18/how-law-schools-could-save-students-150-million.

14. MONTY PYTHON'S LIFE OF BRIAN (Warner Brothers 1979).

15. *Id.*