

Can the Law School Succeed? A Proposal

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The crisis of the university has finally affected the law school. Its symptoms are evident to all: the growing disaffection among students with traditional teaching methods; the increasing ambivalence of younger faculty and students about the value of studying the law; the spreading boredom in law classes; the escalating protests by students over school issues. To comprehend the sources of the problems, it is necessary to view the law school in its societal context.

Law schools have served a definite channeling function in society. Their role has been to train "legal professionals," preparing students for entrance into the corporate law firm and the managerial elite. Nothing better illustrates the bankruptcy of legal education than the pride with which the law school has accepted such an inherently limited role.¹

As a professional school, the law school could, as Ralph Nader has written, have articulated "a theory and practice of the just deployment of legal manpower." With its accumulated resources, available manpower and great prestige, the law school could have attempted to define and protect the public interest in the legal process, or at minimum, those interests which were poorly represented. Instead, those at the bottom of the professional hierarchy, the criminal lawyer and the general practitioner, have been both neglected and disdained. The legal profession has been even more remiss than the medical establishment in its lack of concern over an equitable delivery of services to the poor. The law school, serving the wealthy and the powerful, has ignored these roles.

As an academic institution, the law school might have deemphasized the role of a trade school and adopted that of a graduate center for the study of law. It could have devoted itself both to empirical study of the actual functioning of our legal system and to normative inquiry into the role and nature of law. Instead, the law school has abandoned the basic responsibilities of an academic institution, and accepted its poor part as the training ground for skillful technicians for the corporate elite.

This limited channeling function of the school has had a profound effect on the structure and content of legal education, and has been a primary factor in the increasing student protests in the law school. A description of Yale Law School before the advent of vocal student opposition will illustrate the interrelationship between the channeling function and the institutional arrangements which characterized the law school.

I

Intense competition and the "socratic case method" were the primary determinants of the educational atmosphere. Competition for recognition began upon entrance to the school, intensified by the large impersonal size of first-year classes. Such recognition was imparted by academic success: initially by facility in classroom debate, and later by grades on semester and year-end examinations. The intensity of the competition was heightened, if rendered somewhat absurd, by the virtual absence of papers or independent work as additional bases for academic differentiation. (At Yale each student wrote a first-semester memo, but it was generally not given much weight in the semester grading.) After the first year, competition decreased, as students accepted their roles in the institutional hierarchy.

Mr. Kennedy has adequately described the dynamic of the misnamed "socratic method." What must be emphasized is the autocratic nature of the classroom. The professor determined the parameters of the discussion, called on people to respond and ruled on the relevancy of any student comment. Moreover, all discussion was predicated on the existence of ideological unanimity. The professor's assumptions, undefined and unrevealed, were to be accepted by each of the students. This led to rather amusing results—property taught as if the market system still worked, and antitrust as if the notion of state capitalism had never occurred to anyone.

Competition for grades and classroom success led students to adopt an instrumental conception of knowledge. The emphasis of the teaching was on the "correct," the woodenly logical, the facile, and the suitable qualified answer. Knowledge was a tool for success in the educational hustle.² Intellectual curiosity was subordinated to plodding mastery of course material.

In this competitive atmosphere, fellow students were generally perceived as rivals. Peer group discussions constantly dwelled on the intellectual capability of fellow students, and particularly on whether a given student was "bright." Conversations often mimicked the socratic classroom method, as each student maneuvered to expose the logical inconsistencies of the other with appropriate

acerbic sarcasm. The broadest topics—politics, art, music, literature—were treated like classroom queries: there was presumed to be one logical position and many illogical ones, one rational viewpoint and many irrational ones.

Given the channeling function of the school, the development of these traits served a socializing function. Professional success required a highly competitive life style, and law students, accustomed to long hours of study and competitive peer group relationships, accepted such a life style as natural. Covering one's hand, manipulating colleagues, appearing to be "right" about a variety of subjects were all necessary for success in the educational hustle. The skillful hustler may not become the most judicious advocate or the most just functionary, but he is sure to be numbered among the law school's most "successful" graduates.

The curriculum of the law school was directly related to the school's perceived role. Many of its offerings mirrored the demands of the corporate law firm practice—corporations, tax, securities, secured transactions, commercial transactions. Courses which reflected an equally instrumental view of legal education, but different priorities—courses in environmental planning, consumer protection, tenant's rights—were conspicuously absent. More important, courses in public schools, land development and the like were taught in a curious vacuum. Supported neither by empirical research nor by a searching theoretical analysis, such "policy courses" were taught from a sheltered manager's point of view. Policy discussions consisted of balancing packaged value-considerations against each other, and considered neither the hard concrete questions nor the broadest fundamental issues.

Reinforcing and perpetuating the channeling function and institutional characteristics of the law school was its hierarchical organization. Status in the hierarchy corresponded with the distribution of power and space—both psychological and physical.

The elite of the hierarchy were, of course, the law school faculty, an almost classic elite—inbred, self-perpetuating, and in possession of all decision-making power. Faculty members met to decide which courses were to be offered and which required. Grading systems, admission standards and credit arrangements were all established by the faculty.

The faculty perpetuated itself, recruiting and selecting the future members of the elite and voting to decide who would receive tenure. The faculty thus consisted of men with remarkably similar experiences. General teaching techniques and mannerisms became institutionalized. Each succeeding generation of professors assumed, more or less consciously, the roles which its predecessors played.

The faculty possessed the greatest space—both physical and psychological—in the school. In regard to physical space, faculty members had their own offices, secretarial service, a separate carpeted lounge, their own rest rooms, and even a separate dining room adjacent to and, appropriately, two steps above the student dining room. The faculty's psychological space was expressed in their claim to extensive "academic freedom." Law professors claimed a contractual entitlement to teach what they wished in the

manner they wished. They considered their non-classroom hours as private time. Although most took part in running committees and attending faculty meetings, many limited their contacts with students, giving their time and attention only to a select few.

The next level of the hierarchy was made up of successful students, primarily law journal editors. These students, victorious in the competition for academic recognition, possessed greater power and space in the law school than their less fortunate colleagues. Their access to the faculty provided them with the opportunity to influence the decisions of the power elite. In terms of physical space, they had access to journal offices and facilities; and editors had their own offices, secretarial services, keys to the library and, most appreciated, telephone charge privileges. In terms of psychological freedom, journal members, as Mr. Kennedy notes, were treated with more respect in class, and were given greater opportunities to design courses or undertake directed study.

The mass of students, of course, had very limited power and space. The decisions on curriculum, grading, and credit arrangements were made without their vote or influence. Their physical space was represented by the austere public areas of the school, with a cramped stall in the library for the studios. In psychological terms, they were expected to show deference to the views of faculty members, and felt the full force of the faculty's disdain for students. Most important, they were faced with the frustration of their own self-doubt for having failed to measure up to the standards of success.

With the faculty acting as the proud guardians of tradition, the hierarchical structure of the law school both perpetuated and reinforced its channeling function. This organization was acceptable as long as students adhered to the basic assumptions of the institution. With ideological unanimity and consensus on the uses of a legal education, it was not unreasonable or particularly noxious that professors should govern the institution. Students in the fifties and early sixties generally accepted their roles. They concerned themselves with the mastery of materials which professors chose to teach, and with the struggle to "learn how to think." There was a jealous mistress, and even for those who found her unattractive and petty, fidelity was mandatory.

At the same time, the late fifties and early sixties marked the beginning of the law school decline. The civil rights struggle was but the beginning of a sustained outcry against the inequities of the American system. In its early years the civil rights movement rejuvenated the law schools. There was a liberal, glamorous President and an active, innovative Supreme Court. Students and professors alike responded to the needs of the civil rights movement (professors, at first, to a far greater degree than students). The law was viewed as a tool for social change. Discriminatory statutes were erased from the books; the Supreme Court found ingenious ways to strike at segregation and to protect the civil rights demonstrators. The political system, it was thought, would respond to the challenges of racism and the "other America." To be trained in the law, for

those with a social conscience, was to be trained to create change. In 1964 we elected a liberal President, pledged to a Great Society and to a peace in the Viet Nam war.

We are now six long years from that election. For the new generation of students, the war and the surfacing of terrible societal inequities have been central formative experiences. The best of a whole generation of Americans have been gassed in the streets. What C. Wright Mills justly termed the "celebration of American politics" has ended. For many the legitimacy of the political system has been called into question. The choice between Humphrey and Nixon travestied the notion of a democratic election. The centralized federal bureaucracies have proven both unresponsive to the public they affected and negligent of a general public interest. This was manifest in the prosecution of the war, dramatized in the urban removal of the inner city, and elaborated by the growing evidence of governmental complicity in actions against the public interest, from the licensing of oil wells off the California coast to the testing of CBW's by the military.

The natural result was that students came to the law school unwilling to accept its limited channeling function. They sought instead answers to larger questions: about the just ordering of a society, about the relation of legal tools to social change, and about the relation of the law to basic concepts of fairness. They wished to address the moral implications of making policy for a government of questionable legitimacy. Many wanted to learn legal skills in order to use the law for the benefit of people at the bottom of the social scale.

The law school which they entered, however, was neither prepared for nor receptive to their queries. Moreover, the law school itself reflected the inequities of the society. Its admissions policy had resulted in *de facto* discrimination against the female, the poor, and the minority group member. Its curricular decisions and resource allocations mirrored and reinforced the inequitable distribution of legal manpower. Its placement office facilitated the interviewing of corporate law firms, and made little or no effort to assist those students interested in other occupations.

More important, the value of its education was called into question. Its most brilliant graduates and professors had become policy-makers, and had directed the prosecution of the war, the urban displacement of the poor, the repression of war dissenters. In honoring its graduates it chose those who had followed the desired channel. In doing so, it inevitably suffered embarrassments—as at Yale, where the last two graduates to be honored with portraits were Abe Fortas and Eugene Rostow.

Disaffection with the law school as an institution antipathetic to meaningful social change was inevitable. The initial response of the disaffected was partial refusal to accept the direction and values of the law school's track to success, a refusal usually manifested in an attempt to create personal and psychological space.

Many had recourse to intellectual flight, characterized by Mr. Kennedy as "compartmentalization." Like intellectuals in Stalin's Russia, students played one role in public and another in private. They went through the motions of acquiring a legal education, but contributed as

little of themselves as possible to the process. Others made vocal demands for space in the law school, expressed in requests for fewer required courses, a "more relevant education," smaller classes, and increased diversity in the curriculum.

As students began to view their personal space as centrally important, interest in traditional classes dropped off, and automatic acceptance of the defined roles of the institution diminished. Denunciations of the "socratic method" and of the hustle which passed for legal education were not merely expressions of discontent but also ritualized declarations of independence from such institutional practices.

The initial faculty response to vocal demands for space was one of accommodation. Since the demands threatened neither faculty space nor the role of the institution, concessions were forthcoming. Students were granted a sprinkling of urban and poverty law courses. At Yale an intensive semester was established in which a student could spend a semester working and /or studying outside the school and receive full credit. Student activities in the surrounding community, if not encouraged, were at least not denounced.

Yet neither the basic function nor the structure of the law school was greatly affected by such changes. Some of the pressure for conforming performance was removed from the individual students, but the law school's role was not altered. No attempt was made to develop a curriculum which could address the broader dilemmas which new students faced. The necessary reassessment of the law in the face of social change was not even hinted at. No professor led his students into a critical evaluation of the American political and legal system. The new courses, held in disdain by many of the faculty, were taught in the old way—from appellate court opinions and by the "socratic method."

For the individual student, the increased freedom facilitated withdrawal; yet withdrawal frequently led only to an enervating anomie. Frustrated and insecure students who had undertaken many activities as undergraduates often spent their free time doing virtually nothing. In the classroom there was mounting indifference to discussion and to the learning process generally. The law school became increasingly dysfunctional for the more sensitive of its constituents.

Creation of individual space also stimulated demands for group space. The result was the creation of semi-autonomous counter-communities, supportive of heretical individual responses to the law school. At Yale and elsewhere, the prime example has been the formation and growth of the Black Law Students Union, an expression of the personal pressures and sense of alienation felt by black law students in a white school. Black students are generally ambivalent about the study of the law; while they realize more than most that legal skills are valuable both personally and for serving those of their race who are colonized in the ghetto communities (which often border law schools), they are at the same time skeptical about the operation of law in society. Furthermore, black students are sensitive to the limitations of the law school itself, and most have little affinity for the channeling goals of the institution. They are

a small minority in a white school, in part because of the institution's admission policies. They directly feel the shortcomings of the curriculum and of the stilted views which pass for reality in the classroom. The personal demands of the law school atmosphere come into direct conflict with black consciousness and style, qualities which black students are loath to surrender.

It is not surprising that the black students have led the demands for group space in the law school. Interestingly, one of the Yale BLSU's first demands was for physical space—a black table in the dining hall, an office-lounge, a bulletin board. The BLSU has also served to create some psychological space for black students in the law school, providing a group of students with which each can be informal and relaxed. The creation of group space has had a political expression also. The Yale BLSU, like others across the nation, has demanded changes in discriminatory institutional practices—new admissions policies, the addition of "black courses" to the curriculum. It has begun to articulate a concept of institutional responsibility in its demand that the institution become involved in the community which it borders.

Another group which has demanded space is the "legal hippies" (or yippies, since law students all tend to be somewhat political).³ The primary expression of the "yippies" in their search for space has been a community based upon a counter life-style. Members of the group adopt the style of the new youth culture in their dress, hair length, music and reading tastes, and, of course, in their experimentation with drugs. The legal yippies' search for space led at Yale to the establishment of a tent village in the quad courtyard. Camping out in the courtyard for most of the fall served both to establish a sanctuary in which students could escape the law school atmosphere, and to demonstrate to other members of the law school a counter-community with new values.

A third group in the law school is represented by the law school's activists,⁴ who are generally more self-assertive and more competitive than the hippies and thus less alienated from the law school. This group's demands for space have taken two major forms. First-year radical students have tended to fulfill their need for group space at the student meeting, where they have been able to unleash their bitterness toward the law school and its institutional arrangements, and to discuss change with a generally sympathetic audience of fellow activists. Thus first-year activism has primarily taken the form of demands for institutional reform. Second- and third-year radicals have tended to abandon the frustrating and aggravating search for group space within the law school. They have generally withdrawn from the law school and attempted to undertake the development of a radical critique alone or by immersing themselves in community activities, from working with welfare rights groups to assisting poverty lawyers.

The formation of group space in the law school has had some beneficial results. The groups have provided support and reinforcement for students who reject the law school's channeling function and role definitions. Their formation

has demonstrated that the channeling function is generally discredited among students in the law school. The personal cost of alienation from the school has been diminished by the existence of group support. The political demands of the groups and their partial fulfillment have increased the diversity of the law school in course offerings and in credit arrangements. Competition has somewhat diminished, in part because many students have simply refused to compete in traditional ways, and in part because of some grade reform, pass-fail courses, and a major de-emphasis of the law journal's status.

On the whole, however, the formation of group space has had inimical effects on the law school. The process of forming groups—the making of demands, the challenging of normal standards—has increased the isolation of the group members from the rest of the community. The law school population is now polarized. The faculty disdain for students, as Professor Edward Sparer has noted, has increasingly been met with student disdain for professors, as intellectually arrogant professors come into contact with politically arrogant students. The student body itself is divided and inter-group communication is infrequent. Due to the increased polarization and the large number of students withdrawn into individual or group space, indifference and vapidly continue to characterize law classes. The intellectual excitement which should result from the clash of differing perceptions and opinions is absent from the law school.

Most important, the beneficial changes resulting from the creation of space for students have had no significant effect on either the perceived channeling function of the law school or upon the institutional arrangements which uphold it. The faculty has granted only those demands for space which did not infringe upon their own. At Yale, the faculty agreed to admit more minority group members, but refused to permit students to review applications. They agreed grudgingly to a small grade reform, but ignored requests for greater individual evaluation. After much furor, they permitted a few students to attend faculty meetings, but refused to give them voting representation.

Neither a reassessment of the role of law nor a new analysis of the responsibilities and functions of the law school has taken place. The faculty has refused to reappraise legal education. In spite of the valiant efforts of a few individual professors, most courses still entail excursions through appellate court opinions; students are still expected to accept gratefully the role of diligent, attentive, and respectful acolytes perched beneath the lectern altar.

Increased demands by disaffected students and continued faculty intransigence result in a very heated situation. It is important to delineate the various aspects of the crisis. First, there is a growing disagreement between faculty and students over the content, means and ends of legal education. Many black students and some activists have demanded that legal education include more clinical experiences, experiences in the community combined with related class work. Inherent in this demand is a concept of institutional commitment to the problems and desires of

the surrounding community. At the same time, many students have demanded that the law school offer more academic approaches to the law, that it provide opportunities for those who wish to develop an analysis of the operation of law and the legal system. Both groups reject the traditional channeling function of the law school. Second, and of course related to the former, is the fact that an increasing number of students now feel that the institutional arrangements of the law school are illegitimate. They find the hierarchical structure of the law school both personally detrimental and institutionally divisive. As the student search for space has gone beyond an unsatisfactory retreat into individual space to an active demand for space within the institution, their demands have increasingly come into conflict with the present structure of the law school. The result of these two interrelated conflicts is a growing polarization of the law school.

Group demands are likely to escalate as sympathetic involvement with the school lessens. The combination portends a future of increased disruption. Such challenges can only be detrimental to the students involved and to the institution itself. Yet the pressing need for reform remains; the demands for change will not cease. A means must be found to effect change in the law school.

II

Effecting radical change in an institution, particularly an educational institution, is a difficult task. Excluding revolutionary take-over; two possible alternatives come to mind.

The first is one suggested by Paul Goodman in the "Community of Scholars," and one with which the majority of the law school faculty would certainly be in agreement. In a sense, it is the logical extension of the efforts to create group space; it is, simply, that the disaffected students locate some disaffected professors, secede and form a counter-law school dedicated to a radical reassessment of the law and committed to some degree of activity in the surrounding community. In a sense, this may be the only practical means of reforming the law school, but I have many difficulties with it. First, assuming that the revolution doesn't come tomorrow, the traditional law schools will continue to produce what they define as a legal professional. Many of these people will become our governors. Their exposure to a radical critique of the legal system and of the state seems both desirable and necessary. Secession only isolates radical opinion, and would therefore be detrimental to the development of a viable radical alternative for the country. Secondly, secession is not a viable alternative for those of the disaffected who would want to be licensed by the bar. More important, many of the disaffected are not prepared to drop out and proceed independently. Genuinely convinced that drastic reform of American institutions is necessary, many students are still at a stage of asking questions, of seeking to develop new analyses of the law and the political system. For those of us seeking answers to such broad queries, the clash of opinion and perspective which might be achieved if the present law

school were reformed would be both stimulating and rewarding. Finally, there is a basic problem with resources. The present disaffection of students creates demands for more faculty time, and for more opportunities and alternatives to be made available. These resources can be found only in existing institutions.

The second alternative is the one which I would like to explore. That is that the members of the law school community undertake the reconstruction of the law school. Before listing the benefits of such an activity, I will suggest one means by which that reconstruction can take place.

The reconstruction of the law school should take the form of the development of a new institutional constitution. Although it might be preferable for this to be done by oral agreement, it is probable that it could only occur by the drafting and adoption of a written document. The reconstruction process should take place at a convention of all the members of the law school, held at the beginning of the school year over a period of two weeks.⁵

The constituents would consider three major topics. First, the form and content of legal education would be discussed at a series of meetings. Students and faculty members would elaborate their conceptions of the purpose of legal education. The demands which students would make on resources, the curriculum, and faculty time would be articulated. Substantive educational reform would finally be discussed by the community in open forum and with the prospect that proposed changes would ultimately be implemented.

This series of meetings would consider two major areas. First, the issues on which the faculty and deans have traditionally made decisions—course offerings, grading system, credit arrangements, resource allocations—would be discussed. Secondly, the constituent convention could consider questions which the faculty has either slighted or not considered germane in the past—questions of major educational reform, teaching techniques, and issues like the responsibility of the institution to the surrounding community. The convention would not make final decisions on either educational policy or institutional responsibility. The discussion would outline areas of agreement and disagreement for the school governing bodies to investigate.

The second topic for consideration would be the establishment of the governing bodies of the law school and the elaboration of rules for their composition and operation. Included, presumably, would be a legislative council (made up of faculty, student and employee representatives), an executive of elected and/or appointed administrative personnel, and a committee system.

In constituting these bodies, individuals and groups would undoubtedly demand certain guaranteed space and rights. In part, these would be protected by limitations on the powers of the governing bodies. Additionally, a bill of rights would undoubtedly be detailed, listing those rights deemed inviolate by the constituents, and providing protection for individual and group space for students and faculty.

A third group of meetings would be directed toward establishing guidelines for the working conditions, house arrangements and physical operation of the law school. The school schedule, the working, living and lounging conditions for staff, students and faculty would be discussed. The hired staff (secretaries, librarians, food service and janitorial employees) would explain their needs and suggestions for reform. Such suggestions might include greater recognition for their labors, increased involvement in law school activities, and new forms of cooperation (free legal and investment advice, opportunities to work with law students on community projects, etc.) The allocation of physical space would also be considered.⁶

What is the importance of such “tinkering with the structure,” as Mr. Kennedy would call it (citing the Beatles in support)? First, reconstitution is desirable if the law school is to remain a viable educational institution. As noted above, continued creation of group space can only weaken the institution. Escalating struggles over student rights can only consume time better spent in discussions of educational reform, and in study of the law. By legitimizing the governing structure, reconstitution would remove many of the petty issues which are constantly blown out of proportion in student-faculty confrontations. Ideally, it would bring about a new consensus on the roles and responsibilities of the law school. Minimally it would result in more distributive justice. The governing structures would be more representative of all members of the community; the curriculum more balanced, with programs available for students with differing interests. The institution would direct its students to a variety of careers, from public interest law to the State Department to radical politics, and its placement office, faculty, curriculum, and teaching methods would reflect that diversity.

Second, if the channeling function of the law school is to be changed, or at least broadened, structural change is necessary. The status hierarchy of the law school perpetuates its limited function. Faculty members, who now determine institutional direction are committed by education and experience to the maintenance of that function. If the role of the school is to be changed, the institution must be made more responsive to the objectives of its students.

Third, the process of reconstitution takes faculty and students out of their role positions, and places them in the position of equals attempting to reconcile necessarily differing interests, fears and goals. The very communication of such concerns by the participants would increase sensitivity and comprehension on all sides. The first meetings of the constituent convention would reveal to both professors and students the underlying consensus which I believe exists among virtually all members of the law school. Numerous faculty members have now popularized the line that the problems of the law school are due to the fact that legal hippies, activists and many of the black students should not be in the school at all, that they do not want “to be professionals,” and thus “do not want a legal education.” Numerous students have loudly suggested that, if the law school is ever to be minimally acceptable,

mass resignations of the faculty are necessary.⁷ Yet, there is a general student commitment to a stimulating education and environment and to the acquisition of at least minimal legal tools. There is manifest student respect for the intellectual acuity of their professors. There is increasing faculty concern about the “relevance” of legal education, and the methods of teaching the law.

The recognition of a consensus would be the basis for a minimal trust and confidence which presently does not exist. All groups in the law school could diminish their self-imposed isolation, and their members reduce their paranoia. The commitment to change represented by the reconstitution process, the exchange of ideas and concerns, and the mutual confidence engendered would lead to a lowering of voices. Proposals for reform could be discussed and analyzed, rather than shouted and sloganized. The members of the institution would finally benefit from the clash of ideas and diversity of opinions of the school’s disparate constituency.⁸

Finally, educational institutions have always provided the place for experimentation relevant to the problems of society. It is desirable that the law school direct its attention to the problem of institutional restructuring. There is little question that a reordering of American institutions must occur. Many members of the school, both faculty and students, will be involved in the restructuring of other institutions. With its small size and unexcelled intellectual resources, the law school is the ideal place for experimentation with institutional restructuring to take place. The process of restructuring would be an educational and intellectual experience of great value.

As a political expression, reconstitution would demonstrate the profession’s commitment to make legal education, the profession and the law itself relevant to the problems which presently plague American society. At a time when the moral legitimacy of the law and the authority of legal institutions has been deeply discredited, the restructuring of the law school would demonstrate the possibility of change without violence, of reconstruction without revolution.

Since this proposal calls for radical reconstruction of the law school by democratic means, it has faced indictment by both the left and the right.

First, some of my radical friends who have established a meaningful existence in work and communities outside of the law school accuse me of parochialism, of failing to realize that the law school is, in Vonnegut’s memorable phrase, a “grand falloon,” not a true community, and that political reform of the law school is a waste of time. This argument, however, ignores the effect of the law school as an institution in society. Abdication of responsibility by students in the law school has led to the structural inequities, the destructive institutional practices and the distorted channeling function which characterize the law school. The members of the school must now direct their attention to these problems.

Second, other acquaintances excoriate my utopianism. My refusal to analyze the faculty’s class interests, they claim, has led me to underestimate their resistance to such a proposal. They note that the difference between the beloved older professors at Yale (Kessler, James, Moore) and the younger generation is due to the development of class mentality among the younger. The older professors, they argue, are dedicated to teaching, respect and love their students, and evoke sympathetic responses in return. The younger professors are more concerned with their professional prerogatives and stature; teaching is strictly secondary. They are intellectual picaros, seeking greater fame and fortune. Thus they will react viciously to any suggestions which impinge upon their privileges.

This argument is a potent one. The ill will which exists between professors and students seems to increase each semester. It is not likely that the faculty would readily accept reconstitution without further embittering disruption. They may, however, find it necessary to do just that. As has been noted above, until a commitment to reform is articulated and the governance of the law school gains some minimal legitimacy, time which should be spent in academic discussion will be consumed by recurrent crises. I believe that in the end, most professors at the law school want to teach, to enter into the stimulating intellectual relationships implied by that word. While I admit it is unlikely that the faculty would willingly undertake the radical step of reconstitution, I find it still harder to believe that they would steadfastly resist if they thought reconstitution a practical solution to the law school’s difficulties.

A third criticism is implied in the Kennedy article: since the problem in the law school is a matter of faculty-student relationships and substantive educational reform, structural reforms are irrelevant. I must disagree. The rigid role structure of the law school and the governing arrangements which define it are the chief factors in perpetuating the practices about which Mr. Kennedy complains. What is needed in the law school is a new conception of the roles of students and professors in the learning process. Students must be encouraged to take more responsibility for their own education; professors must be taught to work with students and not at them, to guide but not to limit. Students and professors must begin to relate as peers, learning from the subject matter and from one another. The law professor must learn to admit that for many of the legal problems which must now be faced, he possesses neither adequate empirical data, nor sophisticated conceptual frameworks, nor imaginative practical solutions. In such cases, the learning process must become a mutual exploration by the professor and his students. The breakdown in institutionalized role patterns inherent in the restructuring process would provide the necessary basis for better relationships between professors and students.

The most impassioned arguments against radical restructuring of the law school have been made by many faculty members and some of the more conservative

students. *Ad hominem* attacks on students suggesting reform and statements predicting imminent destruction of the institution abound, but more reasoned criticisms have also been forwarded. Five major themes can be discerned.

The first is that the law school's responsibility to other constituencies—the profession, the councils of state, alumni, the university, the law firms—equals that which it owes to students. The faculty, it is claimed, is the body best suited to represent all of the constituencies of the school. If students were to share in the decision-making process, then all of these constituents would have the right to claim an equal share. Since this is impossible, the faculty must retain the role of guiding the institution in the best interests of all.

No one suggests that the law school has no other constituencies than students in the sense the term is meant in the argument. Indeed, much of the turmoil in the law school concerns the question of who the school's constituents are and who they should be. The groups mentioned above are consumers of the graduates of the institution. By definition, the poor, who are in desperate need of legal assistance, are equally constituents of the school. If the faculty can claim to represent the interests of the profession and the alumni, surely the student body, which includes minority group members and students who have come from or worked with impoverished communities, can claim to represent the other "constituents." In any case, the learning process is a matter between the student and the teacher. It is based upon their communication, and the role of other "constituents" can only be secondary.

The actual basis for the argument is that the faculty are better qualified to direct the affairs of the school than students. To an extent this is true. Few would deny that many faculty members have a broader understanding of legal education than students. To deduce from that fact the need for absolute faculty control over the school is rather absurd. The views of the faculty would surely be treated with great respect in any governing council. Their better qualifications would give them greater influence, but would hardly justify a monopoly of power.

The second faculty criticism is that periodic restructuring would destroy continuity in the law school and make serious scholarship impossible. Students, it is argued, would force other students to adhere to the present fads in education, and constant flux would result.

Continuity is a legitimate concern in the law school and in legal education. But periodic reconstitution of the governing arrangements does not threaten educational continuity. The process of reconstitution, by demanding consensus and insuring compromise, would inherently protect the continuity of the institution. Faculty members would find that students have a deep respect for their educational views, a respect which extends even to matters of school governance; continuity would have influential and concerned spokesmen in the reconstituting process.

This is not to say that reconstitution will not lead to significant reforms in the structure of the law school and in legal education. The alternative to such reforms is stagnation and the consequent threat of destructive upheaval. Continuity is only one value, and must be

balanced against this danger, and against the increased flexibility, diversity, and experimentation which are the goals of the reconstitution process.

The third objection of the faculty to reform in the law school is that it threatens "academic freedom." This claim has been made repeatedly in response to anything from grading reform to curricular changes. But reconstitution would not endanger the principle that professors may think, speak, and teach what they deem appropriate. Students have not called for the dismissal of a professor because he writes for the *National Review* (and there are no professors who write for the *Daily Worker*). Students have not suggested that anyone who believes in strict construction of the Constitution must leave the school.

The faculty, however, has tended to equate academic freedom with the space and status which they possess in the law school. Professors claim that they must be free to teach whatever courses they want, however they want, and that they must have total freedom in how they spend their time.

In at least one respect, this is just nonsense. The freedom of the faculty has always been limited by institutional responsibilities. Faculty members may feel free to teach what they wish, but someone always offers each of the basic courses, and professors do not teach Evidence out of love. Nor can such a claim be reconciled with tenure standards, which, by demanding published work, discriminate against professors who prefer to practice in their spare time, or prefer clinical education to the teaching of appellate opinions gathered for a future book.

There is no question that reconstitution would lead to a change in the conception of faculty responsibility. In demanding greater space, students have suggested that their involvement in the educational process requires that they as well as the faculty be given some degree of academic freedom. They, too, must have the opportunity to pursue questions that interest them. Such freedom is expressed not by giving students the right to leave the institution, nor by giving them freedom in course selection when courses offer no real alternatives in teaching techniques, subject matter and political perspectives; but rather by steps which will lead to the creation of a true diversity in the law school. These steps could include the employment of new professors and the encouragement of experimentation by present faculty members. Reconstitution of the law school and the addition of a student voice in the making of curricular decisions will place a greater strain on the resources of the institution; it will not necessarily impose new restraints upon the freedom of the faculty.

The question of faculty time, as outlined by Mr. Kennedy, would be discussed by the whole community. The reconstituting convention would consider the balance to be struck between personal freedom and institutional responsibility. No doubt the faculty would demand protection against coercion as part of a bill of rights. The vast majority of students would surely accede to this demand, and the discussion itself would provide a better understanding between students and faculty about the concerns of each.

The fourth argument favored by the faculty is that, with structural reform, the law school would become factionalized, forcing faculty members to spend their time in political maneuvering. There are several basic responses to such criticism. The law school is already faction-ridden and politicized, and will remain so until its institutional arrangements gain some modicum of legitimacy. It is certainly preferable for the members of the law school to discuss reform in an appropriate forum than to spend hours responding to recurrent and continually escalating crises. Further, faculty views would be better represented in open discussion than in hostile confrontations. Finally, the process of reconstitution is predicated upon a willingness to experiment; given such willingness, continual nose-counting should not be necessary.

The final argument used against restructuring is that it would undermine the quality of the institution. Good professors and good students, content with traditional approaches, would go elsewhere. At Yale, this is known as the "for God, for country, and for Yale" argument. But it is those law schools which are unwilling to accept the need for reform which face certain decline. Student discontent can only increase. To await the revival of the political quiescence which characterized the fifties is foolhardy, and will only hasten the deterioration of the law school. To eliminate dissident students either by a quiet purge or through the admissions process is theoretically possible, but can be done only at great cost—the sacrifice of intellectual honesty and excitement.

If reconstitution succeeds, it will preserve the institution. A widespread exodus of faculty would be averted by the protections which emerged from the constituting process. To many professors, the experiment would be a stimulating response to this "time of troubles" for the law school. The renewed classroom interest and increased intellectual excitement caused by the clash of differing ideas and perceptions would reward both students and faculty. If reconstitution fails, it will be because the law school as a viable institution has failed.

In the end, the difficulties and risks attendant upon reconstitution are of lesser importance than the answer to the normative question: how should institutions be ordered? A proposal for periodic reconstitution represents the belief that institutions must be democratically organized. Institutional arrangements must be representative and fluid, responsible to and agreeable to all members of the institution. To exist as a stimulating center of learning, the law school must redefine and legitimate its goals and its structure. When institutional arrangements exist for too long without review, they become their own *raison d'être*. The law school has reached that point. Its members should now dedicate themselves to the task of its restructuring.

1. Different conceptions of the role of the law school have been discussed in the past. At Yale Law School, in the thirties, for example, the legal realists attempted to change the law school in form to a graduate school, and in function to a center of study on governmental regulation (i.e. of public interest law). It is not unenlightening that it was during the depression that conceptions of institutional responsibility to the public interest were articulated. Like many of the bold thoughts of the early depression, the reform movement died during the war.

2. I do not mean to suggest that the educational hustle was unique to the law school, and that the traits engendered were functional only to legal occupations. I do maintain that the view of education as a hustle acquired particularly strong prevalence in the law school, and that the personal traits were there developed in their extreme form.

3. If one shares Mr. Kennedy's penchant for musing about psychology, one might speculate that the hippies come to the law school for reasons which make their alienation inevitable: to avoid the draft, to fulfill parental ambitions, to hedge for future security, because of ambivalence towards "success." The faculty tends to dismiss them as unfit for the law school, because they do not wish to be "professionals." That is undeniable if the faculty definition of that term is accepted. As for their motivation for entering law school, one might suggest that all of the above factors would have been equally served by going to graduate school.

4. The distinction between "radicals" and "hippies" is rather tenuous, because the membership of the two groups is intermixed; the "hippies" tend to be quite political, and the "radicals" tend to adopt the youth culture life style. However, members of the hippie group tend to be much more alienated and isolated from the institution than radicals.

Since radicals tend to be less bearded or disheveled than hippies, they seem to be more acceptable to the faculty and straighter students. Indeed radicals in the school (which by faculty definition includes anyone to the left of HHH) tend to be lionized by professors and straighter students. Both groups frequently listen to the viewpoints of such students, both for titillation and, presumably (kudos to Mr. Kennedy) to assuage their feelings of insecurity and guilt. The "house radical" has replaced the "token negro" in liberal parties and discussions, perhaps because black students will generally not serve that role any longer.

Legal hippies tend to avoid such situations. This may be due not only to the life style, but also to the fact that hippies may be the only white radicals in the school. I would accept, without any way to question it, an argument that the hippies are generally further to the "left" on any scale of political ranking than the putative radicals.

5. The reconstitution would probably become a yearly activity of the school. Since much of the activity of the constituting convention would be discussion, yearly meetings would be a good means of allowing the community to evaluate its efforts, direction, etc. The reconstitution of structures would probably have to occur at regular intervals once a year, or every two or three years. Since the law school will undoubtedly remain in flux as it undergoes change, it is best the institutions be approved by the community at frequent intervals. In times of flux, no doubt, any institutional arrangement agreeable to all will be somewhat unsatisfactory to all. A periodic reconstitution will make compromise easier, as it will not require commitment for three generations.

6. I must emphasize exactly what I am suggesting. The convention of all the members of the law school would *decide* what would be and who would be on the governing arrangements of the law school. It would decide the rules under which the institution would be governed. It would *discuss* educational reform, working conditions etc. I am not suggesting that educational planning take place in community meetings. I am suggesting that discussion of major ideas for courses, programs and changes in legal education must take place, and that, perhaps, the convention would provide guidelines for immediate reforms. The decision-making would still be done in committees and school council meetings.

The decisions which the convention made would require consensus approval for adoption. That is, vocal opposition from any one group in the school (faculty, black students, female students, radicals, hippies, moderates, etc.) would defeat a proposal. Majority voting would not safeguard the interests of any one group; unanimity would be impossible. A strong consensus vote is the only alternative.

7. This type of talk is incredibly dangerous and always counter-productive. For students to threaten the faculty with talk of the inevitability of mass resignations does not help bring about reform in the law school. The language of the faculty is even more reprehensible. As a classic elite which controls the law school, they must comprehend the responsibilities which such power imparts. For professors to convince themselves that the problems of the law school would vanish if "these people" were kicked out is not only illusory, it is incredibly licentious behavior for men who possess power. By popularizing that line among other faculty and students, professors have created a situation which is ripe for purge of the students who "shouldn't be here." Such students cannot help perceiving this threat, and responding to it. Paranoia thus increases in the law school, and behavior becomes more and more manic.

8. I do not mean to suggest that the convention meetings would always be rational and calm. I have no doubt that many participants would merely rap and that tempers would be lost more than once. At first, such conventions would undoubtedly be very difficult. The commitment to change, however, would take the edge off the anger and frustration. In any case, such communication must take place. The law school cannot continue to function with isolated groups and minimal communication. The convention takes faculty and students out of their roles and makes them talk *with* each other.