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SOME BRIEF REFLECTIONS ON JOHNSON AND SCALES, "AN ABSOLUTELY POSITIVELY TRUE STORY: SEVEN REASONS WHY WE SING"

DAVID J. McCARTHY, JR.*

Professors Johnson and Scales offer us "an impressionistic account of the pedagogic transformation" which an Introduction of Law course produced in them. I am tempted to share my own impressionistic responses or first blush reactions: The time devoted to reading the paper is valuably spent if "cute" is your highest accolade, if as a teacher you enjoy watching the "next generation" invent the wheel,[1] if rather amateurish but new "pop psychology" intrigues you, or if you believe that students come to law school devoid of life and educational experiences and of critical talent, unequipped to place a variety of teachers and what may appear to be the scientific certitude of the law in the proper perspective in their lives. I shall resist the temptation, however, or shall at least distinguish the paper from the more informative (though still unsatisfying) appendix.

This paper, like its generational progenitors, uses as a premise the customary legal-education trashing, faculty bashing canards, coupled with a rather one dimensional view of the law and a simply wrongheaded view of (apparently all) lawyers as "hired guns, voyeurs, persons with no noble missions of their own and liars about the missions of others." That some of us must plead guilty does not support their apparently universal conclusion.

Rational dialogue on improvements in legal education is impossible in the world Johnson and Scales describe. Indeed, not surprising for those who reject Descartes and Plato for Woody Guthrie and Tina Turner, "rational" is a dirty word.

> Beyond, critique cannot take us. We can't think our way out of our puzzles because thinking (marking off the rational from the irrational) is the *reason* we can't see beyond where we are. When we try to think up a sane world, we crash into the walls of thinking. To go further, we must break the rules of logic. We must put ourselves at risk. We must dare, we must dream, we must act, We must sing.

What can I offer in response to this prescription from an EST Catalog? Shall I sing? Those who hear me will surely conclude that they may not know a lot about art, but they know non-art when they hear it.

Lest I be guilty of the total disparagement of which I accuse Professors

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1. The authors specifically eschew reinventing the Legal Realists' wheel.

Johnson and Scales, I should pan this stream of consciousness for any gold that may enrich the future of legal education. While congratulations are certainly due to the authors for student enjoyment of the law as a celebration of their creativity, I do not think (there's that word again) that several credits of such exposure coupled with that latest fad in courses which celebrate the realization of "self," the personal journal, are sustainable as a "meaningful" and popular augmentation of the traditional first year. (It seems ironic, speaking of journals, that experiences designed to break the shackles of imprisonment and disempowerment by opening one's self up to the Muses and the creational auras involve the—to me—inordinately high price of waiving the independence of one's personal zone of privacy.)

Unquestionably, legal education can be improved, and the Johnson and Scales experience, stripped of the unnecessary trashing and bashing, can offer some insights. For example, it is important that we do much more than we have done to develop in our students what a lawyer can be and what one educated in the law and its methods can do. It is important to remove the subtle value assessments that make one form of practice, one geographic choice—the traditional treadmill effect—"better" than another. I am not sure that the means of doing so are well modeled by Johnson's and Scales' Introduction to Law.[2] I am reasonably sure that they correctly perceive our participatory role in this formation of ideas, and that our "off the cuff" reactions in the classroom, our chats in the halls, indeed our advice to students play a more significant part in the formation of their choices than we would like to believe. Our advice is often filtered through our mixed perspective of personal likes and dislikes, of the market place, of what we did, etc., a perspective that we may not adequately convey to our listener.

The authors also provide or prompt the following questions: Why can we not convey to our students a more expansive view of the role of the lawyer? Why cannot their heroes include the lawyers who created solutions which enhanced and improved the society in which they lived, which reoriented laws and societal thinking about race and gender, which saved the city financially, which created the concept of landmark preservation, which patented inventions, which extended remedies to large classes of those in need of them? Some have a dream and, sometimes, others help make the dream a reality.

The Introduction to Law course, itself, was intended to do more, and the appendix, therefore, has more of value in it. The course appears to

2. Indeed, the authors do not profess to have done more than illustrate possible directions for change. "Critique by itself can never show conclusively what to do next. To impose a requirement that it must (that we can't 'tear down' anything until we *know* what to put in its place) is self-denying nihilism that leaves us eternally thinking and never doing."

have prompted its participants to go beyond traditional premises, to search for new solutions, to challenge popular theories, to accept the ethical burden of personal responsibility, to strike out on uncharted waters. Perhaps the real gold lies not in the impressions captured in the paper, but in the objectives of the course. We do too little of this in the classroom and thus may signal that it is not the thing to do.

There's the rub, the dilemma that the Johnson-Scales experience highlights. It is one thing to have an experimental course. It is another to have to meld these objectives with those of a traditional first year course, for it would ill serve our students to enjoy the exploration of what can be but to ignore the need to master what has been and what is. Moreover, we are professional schools. Our work product is, while not absolutely predetermined, nevertheless somewhat encompassed by professional, societal and client expectations—not of hired guns, but of the capabilities and knowledge of those whose expertise is sought. More of us have struggled to solve this dilemma, with varying degrees of success, than our critics will admit.

I am much less troubled by the directions for change which the authors proffer than I am with the methods, some of the readings, the deconstructionist underpinnings of the theory of the course, and, as stated earlier, the incorporation of pop psychology.[3] Too much dross surrounds the gold. It is unnecessary and Johnson, Scales and McCarthy are not alchemists.

Professors Johnson and Scales have set forth their impressions and ideas for critics to snipe at. It behooves those of us who have sniped to explain what we do and why we do it—and even why we like it. I shall limit my explanation to the relevant year, the first year, and to the pertinent size of class, large. What I am about to demonstrate is that, probably like most veteran teachers, I prefer my brand of "pop psychology." I do.

I believe that the communicative strengths and weaknesses, personality, "presence," quickness, organizational capacity, memory, and sense of humor of a law teacher should play a determinative role in the teacher's design, choice of course objectives and methodology. In short, after honest self-appraisal, each teacher should play to his or her strengths. Where such choice is possible, reinforced by another Stone, Alan,[4] I believe that in a large class, it is important for the teacher to maintain

3. The authors apparently feel that the deconstructionist technique is justified by the unbending resistance to such ideas. "It's not only that there are remarkable parallels between the intensity of emotions that swirled about the Realists in their day and the equally visceral reactions that today's 'radical' professors provoke. . . . It's also that the debate is the *same*." Dare I suggest that the generational resurgence may not be the result of entrenched power's recalcitrance. Rather, the fact that the same ideas come and go with unsatisfying numbers of converts and levels of acceptance may say something about the questionable value of those ideas.

4. A. Stone, *Legal Education On the Couch*, 85 HARV. L. REV. 392 (1971).

control, to channel the students' competitiveness, anger, anxiety and aggression by allowing it to vent, by drawing it upon himself or herself (the teacher).

The classroom is an opportunity to stretch minds, to challenge, to permit challenge, and to serve such ancillary objectives as improved oral communication by students. The learning ambience, the vicarious participation by the students not actually involved in the give and take of the moment, and the application of the most senses and learning and development skills, are all enhanced by formality, coupled with the dominance of the teacher, the "discomfort" of the unexpected, a frisson of fear or anxiety. Thus, for example, in first year, I retain the requirement of random, formal "recitation." (What, stand? Egad! Woody Guthrie meets Alley Oop!) Such pressure, if unrelieved, would be intolerable and counterproductive, however. It must be—and is—relieved by a silly and unpredictable sense of humor, out-of-class informality, unremitting efforts to be sure to know each of the students by name as soon as possible, and periods of "relaxed" volunteerism in the class. Perhaps the most effective antidote to incipient "Paper Chase," other than the humor, is my effort to explain to the students what I do, why I do it, and what benefits I believe they may expect from the method.

Substantive objectives are important, of course, whether they be framed in terms of the various traditional coverage-depth, skills-substance or consumer-expectations-teacher-preference dichotomies. For me, it is important to introduce the students to sufficient coverage to relate well to the other first year courses and to the upperclass curriculum. It is equally important to allocate some time to policy, value and ethical considerations and to do so in flexible ways that allow some responsiveness to the differing chemistries of particular classes, and some exposure of my opinion to student criticism.

Like most teachers, I certainly engage in occasional "legal realist," "judge-breakfast" analysis, and sometimes focus on result-oriented argument construction. I strongly believe, however, in the law as a reflection of fundamental principles, rights and order. I believe further in the communicative, policy, stability, flexibility, desired ambiguity, and sometime clarity of the law's Esperanto, the terminology with which we talk with one another. I suppose that, on the whole, one of the great "Esperantists," Justice Cardozo, has said it most completely:

> The law has its formulas, and its methods of judging, appropriate to conservation, and its methods and formulas appropriate to change. If we figure stability and progress as opposite poles, then at one pole we have the maxim of stare decisis and the method of decision by the tool of a deductive logic; at the other we have the method which subordinates origins to ends. The one emphasizes considerations of uniformity and symmetry, and follows fundamental conceptions to

> ultimate conclusions. The other gives freer play to considerations of equity and justice, and the value to society of the interest affected. The one searches for the analogy that is nearest in point of similarity, and adheres to it inflexibly. The other, in its choice of the analogy that shall govern finds community of spirit more significant than resemblance in externals. "Much of the administration of justice," says Pound, "is a compromise between the tendency to treat each case as one of a generalized type of case, and the tendency to treat each case as unique." Each method has its value, and for each in the change of litigation there will come the hour for use.[5]

Among additional important goals is that of creating in the students the substantive instincts that will never leave them, even after they "have forgotten what they learned," the intellectual "electric eye" that will trigger its alarms when combinations of facts suggest to litigator and counselor the necessity or wisdom of further research, the presence of an issue or consideration important to the resolution of a problem. In my opinion, this goal is well served by the classic examination process. These instincts are "branded," Professor McCormick's piecrust is formed, by the pressurized mastery of a whole course in expectation of examination on any part thereof, with the results to be of galvanizing consequence.

While I can describe in more detail and be introspective in more depth, I suppose that I have said enough to be recognizable to colleague and critic. Professors Johnson and Scales and my students would write a different set of impressions in my class from those formed in the professors' Introduction to Law, and all of us would strongly defend our conclusions drawn from our experiences. On one thing we might agree: What I have described is not to be discarded as "the past," and what they have proffered is not a vision of "the future."

What then is the future? It has been my experience that curriculum changes that have intentionally introduced into the first year courses designedly different from the classic formula, both in objective and in method, have failed in their purpose, have been poorly received by participants, and have consequently been short lived. Such experience prompts the conclusion that the success of the Johnson-Scales experiment may be due more to them and the unique chemistry they were able to achieve with their students than to any methodological breakthrough signalling a sea change in legal education. Indeed the temptation for us troglodytes is to reject out of hand the application of literary method (e.g., deconstructionism), the "law is in the eye of the beholder" premises of critical legal studies adherents and fellow travelers.[6]

It must be remembered, however, that the ideas of the Legal Realists

5. Benjamin N. Cardozo, *The Paradoxes of Legal Science*, 8 (Columbia University Press 1928).

6. *See, e.g.*, Frug, *Henry James, Lee Marvin and the Law*, The New York Times Book Review, Feb. 16, at 1 (1986).

and the "Sixties Suggestions" of Savoy[7] and Kennedy[8] in fact synthesized in varying degrees with their targets to produce subtle, yet unmistakable, changes in analytical and classroom methodology—some good, some bad. It is more realistic than "pollyannish" to predict that if respective proponents meet one another with respect and humor[9] a similar (lower case) dialectic synthesis will occur between this generational resurgence of ideas and the thus modified classical techniques and objectives of legal education to produce changes—some good[10] and some bad.[11]

7. Savoy, *Toward A New Politics of Legal Education*, 79 YALE L.J. 444 (1970).

8. Kennedy, *How A Law School Fails: A Polemic*, 1 YALE REV. L. & SOCIAL ACTION 71 (Spring, 1970).

9. Applying thus the asserted openness of the classroom to the faculty exchanges.

10. For example, motivation of students to expand their analytical and professional horizons.

11. For example, removal of rigor from the classroom: the "no-hassle pass."