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AFTERNOON PANEL

JUDICIAL PERSPECTIVES ON LEGAL EDUCATION AT THE THRESHOLD OF THE NEW MILLENNIUM

JUDICIAL ANECDOTAL REFLECTIONS ON THE LAW

HONORABLE JOSEPH W. BELLACOSA*

For those of you who were here this morning, the accreditation process that Professor Yarbrough and I worked in as volunteers for so many years was very fruitful. I appreciate the very great privilege of sharing today's program, particularly with such distinguished colleagues for the panel, but also in judicial service, judges whose careers and works I have admired over the years. One I have known for many years, so it is a real treat to be here with Judge Jack B. Weinstein,¹ and also Judge John T. Noonan². It strikes me that Judge Starr's luncheon speech segue, as well as the subject cues in the program, are fascinating to me.

The last question that you that you heard posed, and this business about the judicial perspective, they ask you to think about for a minute, to wit, does the law school curriculum over-emphasize the role of courts in the development of law is important. That is a rather loaded question with the very significant word, "over-emphasize." It is so fascinating that you should ask three judges

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¹ Senior Judge, United States District Court, Eastern District of New York (appointed Apr. 15, 1967).

² Senior Judge, United States Court of Appeals for the Ninth Circuit.

that question. I was wondering whether it would provide some cause for reflection or perhaps even refusal. But that not being available, it struck me that we Judges should hear things in terms of commentary, and some can call it criticism and we heard some of that this morning. It is a skeptical analysis approach that I suppose that we are all trained for. One of the things about legal education or the judicial system that I think we are accustomed to as human beings as well as professionals is you just cannot complain about it all the time. You have to have something constructive to say, so say something; or even better, do something.

The business of having something to say reminds me of a story that our Chief Judge, Judith Kaye,³ told only last week when we were session in Albany. She thought it made a very good point in a particular case involving procedure and about having the obligation to say something. The little story is about a chap who wants to get a very significant birthday present for his mom on a very significant birthday. The story has him searching and searching and finally finding it at a very great cost, \$10,000, for a talking bird. He thought sending this to his mother at her retirement place in Florida would really be something special. He had it shipped with a special messenger to protect it. The next day he called his mother with great anticipation and glee about how she liked it. When she came on the phone, he said, "well mom, how did you like the gift?" She responded, "it was delicious." The second shoe that drops on that story, the point of Judge Kaye's story is his response, "but mom, it was a talking bird." She replied, "So why didn't it say something?"

I am here to say a little something, not much, so we can have the experience and wisdom and reflections of my wonderful colleagues and also to share some interactive exchange with you. I have heard a number of names mentioned in some of the presentations, and one that caught my fancy was the reference about De Tocqueville's *Democracy in America*.⁴ I think he is still right and I think that bears on our subject, that law and lawyers, indeed our legal process, and I will include our legal educational institutions in that process, are flourishing.⁵ They are flourishing in this dawn of this millennium

³ Chief Judge, New York Court of Appeals (appointed Sept. 1983; Chief Judge since Mar. 23, 1993).

⁴ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (George Lawrence trans., Encyclopaedia Britannica, Inc. 2d ed. 1990).

⁵ See *id.*; see also Jock Yellott, *Tocqueville, Judge Hand, and the American Legal Mind*, 38 S.D. L. REV. 100, 125 (1993) (claiming that despite prevalent lawyer's jokes in American society,

because they have turned out to be a great experiment, so central to our democracy. They are how we have chosen to function as a nation and as a society.⁶ The people who provide poll sample data and grumble about lawyers and about litigation and the process, they know deep down and they have an enormous reservoir of respect for the process as part of the values that hold us together, as people who are committed to this dynamic experiment.⁷

I think part of the perspective that I share is the notion that these values center on access to a higher and relatively respected independent authority of the courts that some of us are privileged to serve on them. We would like to believe that anyone can get to a courthouse or to some other forum with a grievance by way of a chosen or acquired agent and fiduciary. The lawyers we educate in law schools like this wonderful place that I love so much and am coming back to, are trying to prove the point that anyone can sue City Hall. I guess the pause line is, almost anyone. It depends on legal services funding and real access to legal services and the atrophy that has taken over that part of our ideal of access, proving that we have such a long way yet to go.⁸

The critical component in our history is unique to us. We can call it the three "M" principle: Marbury, Madison and Marshall.⁹ That judicial review should be available and how it occurs by lawyers

lawyers are often pillars of government and communities); *But cf.* Malcolm Wallop, *Essay: Tyranny in America: Would Alexis de Tocqueville Recognize This Place?*, 20 J. LEGIS. 37, 56 (1994) (stating that President Clinton should read de Tocqueville and instead of implementing government that seeks to control, American government should serve).

⁶ See John P. Heinz, *The Power of Lawyers*, 17 GA. L. REV. 891, 892 (1983) (discussing role of lawyers as captains of industry).

⁷ See *id.* at 908-9 (discussing varying backgrounds and values of lawyers in our society). See generally Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical Evidence*, 27 J. LEGAL STUD. 503, 515-16 (1998) (explaining poll data which indicates that legal advertising has impact on public's opinion of lawyers); Ronald D. Rotunda, *The Legal Profession and the Public Image of Lawyers*, 23 J. LEGAL PROF. 51, 53-6 (1998/1999) (explaining mixed views and opinions about lawyers in our society).

⁸ See generally Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 608-13 (1994) (discussing problems currently in access to legal services and suggestions for improvements); Angela McCaffrey, *Pro Bono in Minnesota: A History of Volunteerism in the Delivery of Legal Services to Low Income Clients*, 13 LAW & INEQ. J. 77, 77-81 (1994) (discussing delivery of legal services to those in poverty); Laurence E. Norton, II, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601, 612-618 (1997) (discussing issues involved with representation of poor and what should be done to promote equal justice).

⁹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See generally Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1113 (2000) (exploring myth that judicial review necessarily results in judicial supremacy). *But see* James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 259 (1992) (discussing Marshall's decision in *Marbury* as one borne of defeat).

getting into courthouses to review other branches of government and their actions are remarkable.¹⁰ It is a breathtaking and revolutionary concept still, that I do not think is given sufficient appreciation and understanding in the day and age that we live, further away from the extraordinary proclamation and decision of that case in the early 1800's.¹¹ It is so admired around the world.

My dual perspective as a judge and soon-to-be restored academic here, is that the entry gate to the legal profession and to the courts is doing a reasonably good job in preparing a large and diverse cadre of lawyers. As with all human institutions and endeavors, the system has plenty of room for improvement and a long way to go on many different levels. There has to be better and more realistic training of the clinical, hands-on trial and error variety, the human client or bureaucrat interactive model that go hand-in-glove with the traditional, analytical, doctrinal educational standards and models that we have been so accustomed to.¹² There has to be a healthier relationship and continuum the MacCrate report key word with the practicing Bench and Bar.¹³

Judge Weinstein has cued us so we can talk about them, the skills and ultimately the values that came out of that extraordinary examination of what we try to do or aspire to do in legal education. The resources allocation and the enhancements that are necessary to deal with the albatross of debt that is incurred to garner a legal education is something that is also very important.¹⁴ I do not even

¹⁰ McGreal, *supra* note 9, at 1175-76 (discussing role of lawyers in constitutional interpretation).

¹¹ See *Marbury*, 5 U.S. (1 Cranch) 137 (1803).

¹² See Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 OHIO ST. L. REV. 1965, 1969-70 (1999) (discussing need for change from theoretically-based law school education to more practically-based model); Linda F. Smith, *Pedagogy: Designing an Extern Clinical Program: Or As You Reap, So Shall You Sow*, 5 CLINICAL L. REV. 527, 528 (1999) (discussing need for clinical externships within framework of traditional legal education); Sara B. Lewis, Comment, *Rite of Professional Passage: A Case for the Liberalization of Student Practice Rules*, 82 MARQ. L. REV. 205, 212 (1998) (discussing how state relaxation of student practice rules can enhance legal education).

¹³ See American Bar Association Section of Legal Education and Admissions to the Bar, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Robert MacCrate ed., 1992). See generally Stephen R. Alton, *Mandatory Prelicensure Legal Internship: A Renewed Plea for Its Implementation in Light of the MacCrate Report*, 2 TEX. WESLEYAN L. REV. 115, 119 (1995) (discussing need for law school and profession as whole to impart on students skills and ethical values necessary to sustain life in practice of law); Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 GONZ. L. REV. 1, 6 (1997) (proposing ways in which law schools and practitioners can ensure professional competence of law school graduates).

¹⁴ See generally Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and the Entry*

know if this is a word, and William Safire¹⁵ can tell us some Sunday I suppose in his *New York Times* language column,¹⁶ “moneyfication.” The moneyfication of the profession¹⁷ is a real feeding frenzy, whether it is at the legal education standpoint or at the practicing bar standpoint or in the expectations of the people who hire lawyers. These are fundamental features that do affect and distort the availability of legal services throughout society or a given community.¹⁸ They affect, I think, the concerns that we share from the judicial perspective, so harkening back to the posed questions for our part of the program, and to the judicial perspective that was asked of me and my colleagues, I will give you a few examples of some of what I have observed as a judge. This is anecdotal, and anecdotally without an empirical base, necessarily.

I must tell you that even in our court of last resort, the highest court of the State of New York, I occasionally have quality concerns. Thus, I can only cringe at what the quality is sometimes in the lower courts and the administrative agencies. The worsening writing and rhetorical skills are scary. They are still going, as I see it, in the wrong direction. I see sloppy and careless work, perhaps driven by some of the unrealistic time demands and constraints of the

Into the Legal Profession: The Role of Race, Gender, and Educational Debt, 70 N.Y.U. L. REV. 829 (1995) (discussing role of debt, race and gender in post-graduate professional choices); Luize E. Zubrow, *Is Loan Forgiveness Divine? Another View*, 59 GEO. WASH. L. REV. 451 (1991) (proposing ways in which debt forgiveness can affect number of lawyers seeking to work in public-interest sector); Rocco Cammarere, *Winds of Change at Law Schools?* N.J. LAW., Aug. 16, 1999, at 1 (discussing possible ways law schools can control increasingly high debt of graduates).

¹⁵ William Safire is a political columnist for the *New York Times*. He also writes a language column on English grammar and etymology entitled “On Language.” He won a Pulitzer Prize for distinguished commentary in 1978. Prior to joining *The Times*, Safire was a speechwriter for President Richard M. Nixon.

¹⁶ See William Safire, *On Language: Baldfaced*, N.Y. TIMES SUNDAY MAG., Nov. 5, 2000, at 28 (discussing origin of term “baldfaced”); William Safire, *On Language: Rollout*, N.Y. TIMES SUNDAY MAG., Nov. 12, 2000, at 42 (discussing etymology of term “rollout”); William Safire, *On Language: Slurvian*, N.Y. TIMES SUNDAY MAG., Sept. 17, 2000, at 37 (discussing unique language of New Yorkers as evidenced in such terms as “fuhgeddaboudit”).

¹⁷ See generally Catherine Aman, *Corporate Counsel Tied to the Stakes*, N.J. L.J. Nov. 17, 2000, at 1; Johnathan Glater, *New Lawyers at a Big Firm Get Bonuses of \$35,000*, N.Y. TIMES, Oct. 27, 2000, at B3; Robert Tuke, *Legal Aid, Pro Bono Lawyers Struggle to See That There is Justice for All*, TENNESSEAN, July 26, 2000, at A17.

¹⁸ See Susan Daicoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1361 (1997) (discussing decline of public’s perception of lawyers and correlation to rise in salaries); Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 740 (1994) (discussing how quest for fees perverts public perception of lawyers). See generally Lawrence J. Fox, *A Nation Under Lawyers: The Legal Profession at the Close of the Twentieth Century*, 100 DICK. L. REV. 531 (1996) (discussing ways acceptance of pro bono work can improve legal profession’s public image).

marketplace because we heard so much this morning of the economies of scale and the fiscal competition, all that kind of stuff. As soon as you start using those words, we can take a walk over to the school of business building and operate in marketplace mode because we would have lost some of what Cardozo¹⁹ and so many others rich in our tradition reminded us about what this learned, fiduciary profession.²⁰ We are not the marketplace and the fiduciaries with that distinctive responsibility are not merchants in business, as wonderful as they are in what they do, and as important as they are in our booming society and economy. So I worry about that part of the professional training which produces more contentious conduct and more highly competitive-driven attitudes and less professional civility. I do not mean these in some nostalgic, old-fashioned sense, though I wish we could go back decades for some of the sensibilities. I mean this in human respect sense for one another, in terms of the responsibilities that lawyers bear for others.

I have also been concerned with the diminishing resource of usable academic research and writing that is reasonably relevant and time efficient for me or my court or my colleagues to use with the busy docket that we have.²¹ We do not use a lot of published materials, as was one of the questions that was asked, as much of the tremendous pool of publication materials. Frankly, from an efficiency standpoint, we too have to be efficient in terms of what we do and how we move our docket and decide our cases within a

¹⁹ See Geoffrey C. Hazard, *Under Shelter of Confidentiality*, 50 CASE W. RES. L. REV. 1, 9 n.34 (1999) (arguing that Cardozo defined standard of fiduciary duty owed by lawyers to clients); W. Bradley Wendell, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 58-59 (1999) (crediting Judge Cardozo with authorship of lawyers' duty of loyalty); see also Jason Lacey, Note, *Iolita Programs and Professional Responsibility: Dealing With the Aftermath of Phillips v. Washington Legal Foundation*, 47 U. KAN. L. REV. 911, 930 n.156 (1999) (stating that Cardozo's definition of fiduciary duty is guide for lawyers' conduct).

²⁰ See *Cox v. Delas*, 33 P. 836, 839 (Cal. 1893) (defining client-attorney relation "as fiduciary relation of the very highest character, [which] binds the attorney to most conscientious fidelity."); see also *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 384 n.11 (Cal. Ct. App. 1983) (stating that "[a]ttorney-client relationship as a fiduciary relationship, one of trust. The nature of that fiduciary relationship tends to make the client intellectually and, in many cases, emotionally dependent upon the attorney."); in re *Hansen*, 586 P.2d 413, 416 (Utah 1978) (stating that "[t]he practice of law is a profession whose members are granted a special privilege of holding themselves out as having the education, the skills and the integrity to give help and guidance to others in their affairs and particularly when they are in trouble").

²¹ See Michael A. Riccardi, *Battle over Appeal Sanction Against Allstate*, 223 N.Y. L.J. 55 (2000) (addressing issue of docket congestion in New York). *But see* Paul Shechtman, *Docket Shrinking, Dissents Are Few*, 224 N.Y. L.J. 64 (2000) (stating that Court's criminal law docket has been decreasing since 1995).

reasonable time because low and behold, you bang the gavel and the next case is in line and another one or more are in line or are coming in. I do not know where that takes us, but there is less time for esoteric published material.

Some of the things to do, without a crystal ball to help me, is to urge teachers and leaders in the profession to provide a better and finer example of what we more ideally wish for and want to be perceived as by the public. Some will be incorrigible or uneducateable about those kinds of things because what some clients want is a hired gun. They want their lawyer representatives to use any means that justify their ends. This is a concern. The elitism in the competitive, almost sniffiness - a disconnect of sorts - between academe and the private Bench and Bar is also a matter of great concern.

On the other hand, you have things that inspire us like a letter from Holmes to Cardozo that the latter described as one of the great treasures of his library.²² In it, Holmes dares to define for Cardozo with a magnificent exchange, "the measure of success" of them as judges,²³ or I suppose it could be transposed into anything we do as human beings. Holmes first says the measure of success is not power or prestige or place.²⁴ It is not any of those things, but it is the daily "trembling" effort and hope to stretch out for the ideals you most firmly believe in; this, from the ultimate realist, Holmes.²⁵ It seems to me that we ought to pay attention to those inspirational words, lessons and lives lived and committed to action in the way that they fulfilled those ideals.

It seems to me that I want to leave you with one other thought. I read a book not too long ago, and I will not quote from any of it, but it is magnificent for what it says about legal education. The way it

²² See HOLMES AND FRANKFURTER 235 (Robert M. Mennel & Christine L. Compston eds., 1996) (reproducing words of Cardozo calling Holmes "greatest judge that ever lived."); see also Paul Brickner, *Kaufman's Cardozo: Judicial Biography as Legal History*, 88 GEO. L.J. 1895, 1908 (2000) (discussing Cardozo's letter to Justice Holmes); Joseph L. Rauh, *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 CARDOZO L. REV. 5, 10 (1979) (quoting letter from Justice Holmes to Cardozo).

²³ See BENJAMIN N. CARDOZO, MR. JUSTICE HOLMES, IN *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE* 77, 86 (Margaret E. Hall ed., 1967); see also Benjamin Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 691 (1931) (quoting letter from Holmes to Cardozo).

²⁴ See CARDOZO, *supra* note 23, at 77, 86.

²⁵ See Michael P. Ambrosio, *Legal Realism*, 205 N.J. LAW. 30, 31 (2000) (stating that American legal realism was inspired by Holmes); see also Gary J. Aichele, *Oliver Wendell Holmes, Jr* 162 (Twayne Publishers, 1989) (addressing Holmes' realist views); Michael E. Tigar, *Litigator's Ethics*, 67 TENN. L. REV. 409, 416 (2000) (referring to Holmes as "great legal realist").

says it is beautifully written. It has great concepts. It is by Professor James Boyd White from Michigan.²⁶ It is titled simply *From Expectation to Experience, Essays on Law and Legal Education*.²⁷ One of the things that he does in describing legal education lawyers, training lawyers, writing, and writing by professors by judges is that he talks about the rhythms. The first chapter is entitled, "Rhythms of Hope and Disappointment."²⁸ It is a very inspiring book as well as a very instructive book. It refers to the Judge Harry Edwards exposition and many of the things that we are familiar with in the debates about legal education.²⁹ It is done in a way that is so open and it is a slim book. One of the things that he talks about in terms of the rhythms of hope and disappointment is coming to class every semester in the beginning and having these grand, wonderful hopes as a teacher and seeing the rhythms go somewhat awry into what he calls disappointment.³⁰ He asks then, how does one keep coming back every semester?³¹ His answer: because the rhythms of hope return and you realize how much you have accomplished and you realize in self-evaluation how much you have not been able to accomplish from your end or from the receptive audience of pupils and students.³² It is a book of hope. It is a book of optimism. It is a book of commitment to what we teachers do in trying to train fledgling lawyers to know the analytical skills, to know the practice skills, to know the values and the contribution each one of them will make to the people that they ultimately serve in this exclusive profession. It is a very worthwhile

²⁶ See Robert P. Burns, *Book Review*, 50 J. LEGAL EDUC. 147, 147 (2000) (reviewing "From Expectation To Experience: Essays On Law And Legal Education" by James Boyd White); Thomas Holbrook, *Book Review*, 47 FED. LAW. 70, 70 (2000) (reviewing White's book).

²⁷ See generally JAMES BOYD WHITE, *FROM EDUCATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION* (Univ. of Mich. Press 1999).

²⁸ *Id.*; see also Harry T. Edwards, *The Growing Disjunction Between Legal Education And The Legal Profession*, 91 MICH. L. REV. 34, 1992 (discussing disjunction between study of law and practice of law).

²⁹ See Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications* 50 U. MIAMI L. REV. 707 (1996) (discussing "war" over legal education and different views on importance of theoretical versus practical instruction); William R. Rakes, *Conclaves on Legal Education: Catalyst for Improvement of the Profession*, 72 NOTRE DAME L. REV. 1119 (1997) (discussing widening gap between academia and practicing bar noting failure of practitioners to educate new lawyers effectively).

³⁰ See generally Harry T. Edwards, *A Lawyer's Duty To Serve the Public Good*, 65 N.Y.U. L. REV. 1148 (1990) (expressing concern over lack of students pursuing public interest).

³¹ See generally Robert W. Gordon, *The Independence of Lawyers* 68 B.U. L. REV. 1 (1988) (discussing lawyers desire to be independent from traditional confines of client control).

³² See generally Derrick Bell, *Students as Teachers, Teachers as Learners* 91 MICH. L. REV. 2025 (1993) (responding to article by Judge Harry Edwards).

enterprise.

With that, I am going to leave the rest of the answers and commentaries to my colleagues. I wish I had said less because then I could have stood up later and it would have been very brief. I could have said as I do back at the courthouse, I concur. Unfortunately, they asked me to go first since the name Bellacosa starts with a "B" and I was very pleased to do so, alphabetically.

Thank you very much.

