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A LONG OVERDUE RENDEZVOUS FOR AMERICAN LEGAL EDUCATION

DANIEL J. MORRISSEY*

We finished our classes last week. As had been my custom for the last several years, I closed the term by extending my best wishes to the students. I told them that I hoped their legal education would stand them in good stead, and I wished them professional careers providing not only material prosperity but also moral satisfaction.

When I mention this desire that our students find moral satisfaction in their work I get some interesting responses from my colleagues. One asked rhetorically, "Why should we be concerned if our students are happy or fulfilled in any larger sense? Isn't our job just to train them to be good lawyers?" Another remarked matter-of-factly, "Of course the practice of law isn't spiritually uplifting; that's why lawyers get paid so much." And a third colleague bantered back affably, "Morrissey, why don't you go teach in the religion department."

I bear great affection for almost all of my fellow faculty members at the University of Tulsa but their comments are typical of the narrow positivism that has dominated American legal education. It seems normative matters just aren't our business.

A colleague at the University of Denver where I visited this fall manifested this prevalent attitude when I asked her how her torts class was going. She answered with some gratification that the class was finally talking about values. I asked how she conducted those discussions and she candidly replied, "Well, we identify the values and move on."

It appears we believe there is nothing to measure the worth of competing ideas except taste or preference. Values are arbitrary, ultimately matters of personal subjectivity. As Michael Perry puts it in his new book *Law, Religion and Morality*: "If one wants to find moral skeptics, one

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would do well to look in American law schools where some provincial lawyer-academics continue to subscribe to the morally skeptical views of an earlier generation of legal philosophers.”

Process jurisprudence is another aspect of this barren ethical climate. It was explained to me by Dean Ed Dauer from Denver in this fashion: “How can we ever establish that one idea is better than another? The job of lawyers is rather to devise a method where every person is to be affected by a decision gets some input. That way most people are more or less content with the result.” Take that approach, however, to its logical conclusion in a group with no accepted standards and what do you get—inconstant procedural wrangling. That should sound familiar to anyone who has recently attended a law school faculty meeting.

What I have described, of course, is the modern, liberal world and for it we have Martin Luther, Rene Descartes, Immanuel Kant, and John Stuart Mill. The Reformation, the Enlightenment, and the utilitarian movement have given us a society where each individual occupies unchallengeable ethical ground. Every moral decision is rooted in autonomy. In recent times, John Rawls has built his expansive vision of a just society on those very premises.

Individualism of course has always been a strong theme in America. After all, we are the premier Protestant country with a government invented by men of the Enlightenment. De Tocqueville noted this persuasive personal sense of independence when he visited America in 1830 and wrote of his fear that we'd become a land where “Each man is shut up in the loneliness of his own heart.”

With the breakdown of social responsibility that was a part of our early Protestant heritage, I'm afraid we have come close to fulfilling De Tocqueville's sad prediction. Individualism, in any event, has never been very satisfying to those who believe that sharing makes for the common good. The result for law practice is the hired gun syndrome—a view of lawyering that only Ayn Rand could love. Society becomes the Hobbesian jungle—every man at war with every other—best described today by Tom Wolfe in his contemporary novel, *The Bonfire of the Vanities*.

But there is a competing vision of what it means to be human that holds great promise as an alternative to the isolation and sterility of individualism. In the best legal and philosophical scholarship of this decade, a communitarian alternative has arisen out of the despair of contemporary liberalism.

Communitarianism means, in the current words of Kent Greenwalt, that “some of the most fulfilling aspects of human existence involve organic social units that have a kind of priority over the individuals within them.” The project at root is about a return to the pre-modern view of the human condition first articulated in ancient religious writings and epic poetry. Communitarians have much respect for tradition. As Michael

Perry eloquently puts it: "Tradition is nothing more than the dialogue we maintain with all humans who have lived before us."

A central piece of this legacy which our generation has almost forgotten is the "moral tradition," revived philosophically by Alisdair MacIntyre in his influential 1981 book, *After Virtue*. MacIntyre looked back to Aristotle, who defined a way of life that had its antecedents in the pre-Homeric world. To achieve their proper end of happiness, said Aristotle, humans must practice virtue.

Lead by Cicero and St. Thomas Aquinas, the West developed a legal philosophy that built on this sense of morality—the natural law tradition. St. Thomas pointed out 750 years ago that there are certain self-evident, common principles essential to promote human flourishing. His wisdom was echoed last year by Lloyd Weinreb in his comprehensive work *Natural Law and Justice*. Said Professor Weinreb:

Natural law suggests ways of thinking about purposive human activity that helps recognize how much agreement there is about human ends and how properly to achieve them. Hard cases of moral uncertainty and conflict understandably attract our attention, but they are so troubling partly because more often the moral cause is unproblematic.

Communitarian themes are now sounding in our popular intellectual culture. Bill Moyers achieved phenomenal success last year in his PBS interviews with anthropologist Joseph Campbell on the role of myth in society. There is also the poignant search for community that you find in diverse works such as Robert Bellah's much-acclaimed sociological treatise *Habits of the Heart* and Stephen Sondheim's award-winning musical "Into the Woods."

This new/old thinking can be a welcome antidote to the ethical malaise now besieging legal practice and education. There are all kinds of fresh, humanizing perspectives that a communitarian or moral outlook can bring to the work we do. Last fall I wrote an article reviewing the debate on corporate social responsibility using the communitarian and natural law frameworks.

When I was asked to testify this February before a Congressional panel investigating leveraged buyouts I put forth a proposal to regulate mergers and justified it as promoting a just and humane society. Testifying with me was a Law and Economics oriented professor from the Harvard Business School who went bananas when I started talking about justice and humanity. Are those concepts vague, meaningless abstractions? No! I think almost all of us know them when we see them.

On the teaching front, I'd prefer that all law students take a course in moral philosophy. Maybe some would turn out to be Kantian individualists, but at least they would know the alternatives. But I would gladly settle for a required first year course along the lines that we are proposing

at Tulsa. It is called "Legal Thought" and introduces students to various jurisprudential approaches as part of problem solving exercises. The class also invites insights from the social sciences as well as discussion of the relationship of philosophy and religion to the law.

May I apologize if in arguing my thesis today I have overstated the case against the Reformation and the Enlightenment. Perhaps Luther, the first individualist, had no choice but to stand against the entire European community. The Enlightenment certainly delivered us from superstition and intolerance.

Pope John XXIII conceded those points when he called the Second Vatican Council in 1960: "The Catholic Church," he said, "has a long overdue rendezvous with the modern world." It would be similarly impressive if we lawyer/academics could finally acknowledge our responsibility to fashion a just and loving society. American legal education will then be having its own long overdue rendezvous.