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On American Legal Education Reform in Japanese Legal Education

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SPECIAL ISSUE:
REFORM IN JAPANESE LEGAL EDUCATION

On American Legal Education*

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I. INTRODUCTION

The one hundredth anniversary of the Kyoto University Faculty of Law is the kind of splendid occasion when, as Justice Oliver Wendell Holmes remarked, a distinguished institution "becomes conscious of itself and its meaning."[1] I can hardly express my pleasure at being invited to join in your celebration; but I must express my fear that I can add little to it. When Dean Tanaka kindly invited me, I should probably have declined, for I, a foreigner, can hardly know enough about an institution so central to the life of its country and its profession to speak of it and its meaning. But you have done me the honor and given me the pleasure of allowing me to teach at Kyoto several times, and I welcomed the opportunity to thank you by addressing you.

A faculty as eminent as this one constantly renews and even reinvents itself. Today, that renewal and reinvention come at a momentous time: Your country's achievements in so many fields have now made it useful to reconsider the kind of legal education that will serve you best. Probably no nation has ever been so deliberate and so cosmopolitan in shaping its institutions. When it decides to reconsider an institution, Japan characteristically surveys similar institutions throughout the world, takes their finest elements, and combines them in the blend that

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** Chauncey Stillman Professor of Law and Professor of Internal Medicine, University of Michigan. I am grateful to Atsushi Kinami, Shigeaki Tanaka, and Mark West for the thoughtful advice they have given me while I have worked on this talk and to Atsushi Kinami for his valiant labors in translating it.

[1] Oliver Wendell Holmes, Address at the Brown University Commencement (1897), *in* COLLECTED LEGAL PAPERS, 1920 at 164.

best suits Japan. No doubt this is how you will reconsider Japanese legal education.

It thus seemed to me that I might best contribute to your festivities by describing and explaining one of the systems of legal education you may wish to scrutinize—my own.[2] My goal is not to convince you to adopt the American scheme of legal education. You will know better than I what you want. However, although Japan may not be an "ordinary" country, in legal education it is America that is unusual. We differ in several crucial respects from most of the world. I want to justify our anomaly.

II. THE GOALS OF AMERICAN LEGAL EDUCATION

American legal education is preeminently shaped by its desire to produce a particular kind of lawyer. Americans see law as a social tool. Law, to us, is not primarily a system of principles; it is a set of rules and powers that can be used to improve society. This leads us particularly to want three things in our lawyers.

First, we want lawyers who can solve their client's problems. We think lawyers vitally help structure commercial relations and make them operate smoothly. This means lawyers must work adeptly in a complex industrialized society which relies extensively on law as an organizing institution. To do so throughout their careers, they must be able to adapt flexibly and acutely to the rapidly changing circumstances of such a society. True in asking lawyers to help clients get what they want, we give up some of the advantages of asking lawyers to help control their clients. However, we are loath to see lawyers become petty bureaucrats whose habitual sentence is, "You can't do that, it isn't covered by the rules."

In short, as Karl Llewellyn once said, the essence of the lawyer's

> craftsmanship lies in skills, and wisdoms: in practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field; and then in skills for *regularizing* the results, for building into controlled large-scale action such doing of things and such moving of men. Our game is essentially the game of planning and organizing management (not of

[2] Indeed, that scrutiny has already begun, and very thoughtfully and astutely. *See, e.g.*, Koji Sato, *Professional Legal Education and Professional School,* IDE—GENDAI NO KOTO KYOIKU [HIGHER EDUCATION TODAY], Nov. 1998, at 23.

> running it), except that we concentrate on the areas of conflict, tension, friction, trouble, doubt—and in those areas we have the skills for working out results.[3]

All this means that, second, we want lawyers who are creative. Lawyers should help invent new forms of commercial endeavor, imagine new ways of structuring deals between commercial enterprises to meet their needs, and devise ingenious ways to help companies work flexibly within a system of governmental regulation that must always threaten to ossify. We also want lawyers to fashion new social and governmental forms. Lawyers representing clients and working for the government do and should often envisage new ways to shape and stir government's authority.

Lawyers of this kind need a third quality. They must be masters of legal analysis. They need critical minds, to see the flaws in any argument. They need agile minds, to construct a compelling argument from the myriad sources on which lawyers draw. They need insightful minds, to clothe the bare bones of legal logic with the sinew of social practicality.

This, then, is the lawyer we seek. How do we try to produce him?

III. HOW THE GOALS OF AMERICAN LEGAL EDUCATION SHAPE ITS MEANS

I said that American legal education differs in numerous ways from the legal education of almost every other country. These anomalies, I think, grow out of our vision of the lawyer we want. Let me first sketch the structure of American legal education and then explain how it differs from legal education in other nations.

The young American who wishes to become a lawyer must first attend a university for four years. There he may study any topic except law, which is not an undergraduate subject. He then takes an examination (called the Law School Admission Test) which measures his aptitude for learning law. He then applies to law schools, which base their decision on that aptitude, on his college grades, and on whether his qualities and experience promise to make him a rewarding student and a capable lawyer.

He then studies law for three years. In his first year, he takes required courses on the building blocks of the common law—property, torts, criminal law, and contracts—and on civil procedure and constitutional law. In his second and third years, he may choose his own courses, although he usually takes courses in corporate law, commercial

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[3] K. N. Llewellyn, *The Crafts of Law Re-Valued,* 15 ROCKY MOUNT. L. REV. 1, 3 (1942).

law, tax, evidence, and constitutional law. In the summer after his second year, he ordinarily works for a law firm, both for the high salary and the experience. In the summer after he graduates, he spends a few weeks taking a commercial course which prepares him for the bar examination of the state in which he hopes to practice.

This sketch conceals the first difference between America's and most other countries' legal education. It lies in what American schools try to teach. Prospective lawyers need to learn three things: (1) legal doctrine, or what the law says, (2) legal analysis, or how to reason about a legal issue, and (3) legal practice, or how to apply legal doctrine and legal reasoning to the lawyers' tasks. In no country with which I am familiar do the law schools attempt to teach the practice of law. Rather, that task is primarily left—expressly or tacitly—to some other institution: in England, to apprenticeship combined with instruction provided by the two parts of the organized profession (barristers and solicitors); in Germany, to the *Referendariat*, a series of apprenticeships in different practice settings; in Japan, to classes at the Legal Training and Research Institute and to apprenticeships.

The American system is perhaps the least formalized. Essentially, American law schools expect preparation for legal practice to come from informal apprenticeships in law firms. American schools do generally have some "clinical" courses in which students represent clients (usually poor people who cannot afford to pay a lawyer) under supervision. However, the specialization of American lawyers means that clinical training cannot equip students for all the kinds of practice they will undertake. In particular, the more prestigious the law school, the likelier its students are to go to large firms that represent corporate clients and the likelier the school is to rely on those firms to give their graduates the specialized apprenticeships they need.

This worldwide division of labor seems to me entirely sensible. Much about the practice of law is best learned while working in company with experienced lawyers. It is inefficient to try to teach it in law school. No law school should hope to turn out finished lawyers.

Legal education around the world agrees, then, in leaving practical training to practical people in practical settings. Where America stands almost alone is in its view of the other two components of legal training. American law schools do not primarily seek to inculcate a thorough command of "the law." Rather they principally seek to teach students to "think like a lawyer." Of course American law schools teach a good deal of doctrine, and of course schools around the world expect their students to learn something of how lawyers think. But in my experience American law schools are so much less ambitious to teach doctrine and so much more determined to teach reasoning that American legal education differs notably from its foreign counterparts.

Our approach works partly because it is impossible—at least in the United States—to teach students all the law they will need. The difficulty of teaching everything is particularly acute in a federal system with more than fifty jurisdictions and in a country as law-rich as the United States. What is more, the practice of law is ever more specialized. We do not know what specialty any given student will pursue. And neither does he, since specialties change over time, as new fields open up and clients' needs change. To teach the student everything is to teach him much he will not use and much that will soon be outdated. In sum, as my distinguished American predecessor in Japan, Walter Gellhorn, wrote,

> American legal scholars . . . believe with Alfred North Whitehead that information decays as quickly as fish. Students may learn a lot of details their professor has laid before them, but the details are likely to be forgotten very soon after they have been disgorged during the examination. . . . [I]f anything at all is to be left, it will have to be some heightened capacity, some ability to deal with new experience, rather than merely to recount an old experience. That is why the case system of instruction places such heavy emphasis upon method instead of content.[4]

Our discussion of what law school should teach leads us to the second distinctive feature of American legal education – how professors teach. Put briefly, Americans prefer Socratic discussions to lectures. I believe this is as crucial a feature of American legal education as any other, and perhaps the feature best suited for export. But what does "teaching Socratically" mean? Today, the Socratic method is used in many ways, but at its core is the idea that the professor best spends class time by leading a probing discussion, not by lecturing.[5]

In its purest form, the Socratic method means teaching students the law through class discussions of a series of cases. The professor proposes questions that force students to think hard about a case and the court's treatment of it. What were the facts of the case? What legal issues did the court actually resolve? What was the structure of the court's reasoning? What were the flaws of that reasoning? How could the legal issues be analyzed better? As the discussion develops, the professor challenges

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[4] Walter Gellhorn, *Impressions of Japanese Legal Training,* 58 COLUM. L. REV. 1239, 1241 (1958).

[5] I have described and defended the Socratic method in Carl E. Schneider, *The Socratic Method and the Goals of Legal Education: With Some Thoughts Inspired by Travel,* HOGAKU KYOSHITSU, Sept. 1995, at 34.

students to see the connections between the case's technical, doctrinal arguments and the broader social and philosophical principles that undergird them. He also tries to show students the recurring features of legal reasoning, to get them to see what makes a good argument and what makes a bad one.

I believe that teaching Socratically in some form is necessary for accomplishing the goals of our system of legal education and perhaps the goals of *any* system of legal education. I have two reasons. The first is crude but vital: students need immediate and not just long-term incentives to work hard. As one of my own law teachers wrote, "to acquire discipline in any area of human endeavor is, in some degree, against nature."[6] The universal problem of motivation is perhaps intensified in German and Japanese legal education, because students see so little reason to work for the university—German students because they rely on a *Repetitur* (a commercial tutor) to prepare them for examinations and Japanese students because they know they can get a job without stellar work in the university.

To be sure, the best way of motivating students is to make education irresistibly stimulating. This is one reason the American law school seeks to broaden and deepen legal education by going beyond legal doctrine, by examining social policy writ large, and by recruiting the insights of many disciplines. But we also favor the Socratic method exactly because it makes class more stimulating. Socratic teaching makes the study of law demanding; it sets high standards of analytic effort and acuity. That which is easy is often boring; that which is rigorous is at least challenging. In addition, Socratic teaching asks students to awaken from their torpor, to speak and to help shape the discussion, to hear from their colleagues as well as their professor.

Still, stimulation alone is rarely enough to inspire students to unremitting diligence. Socratic teaching gives students the incentive to prepare every day—the gratification of success, the embarrassment of failure.

The second reason the Socratic method is vital to American legal education is that it is the best way of teaching a student to think like a lawyer. And not just like a lawyer, but like the kind of lawyer we think we want—analytically keen, problem-solving, creative. Let me try to explain why.

Socratic teaching produces analytically keen lawyers because it makes students practice reasoning. You can no more teach someone to think by telling him how than you can teach him to play baseball by telling him how: both activities are too complex. Neither can you teach him to

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[6] FRANCIS A. ALLEN, LAW, INTELLECT, AND EDUCATION 4-5 (1979).

reason by showing him how, since he will not appreciate what is difficult about the demonstration or detect how the argument was developed. Indeed, studies of how professionals reason suggest that they are so accustomed to using shortcuts in reasoning that mere demonstrations and even explanations of their thinking only confuse novices. "[C]ompetent practitioners usually know more than they can say. They exhibit a kind of knowing-in-practice, most of which is tacit."[7]

In short, the only way people learn to reason well is by practicing assiduously. Socratic teaching gives students that practice—day after day for three years—by making them think like a lawyer under the guidance of an experienced legal analyst. Each class is an exercise in building and criticizing legal arguments by grappling with the hardest questions the legal system presents. The professor shows students what a good question is by requiring them to answer one and shows them what a good answer is by asking more questions about it. Gradually, students acquire a feel for what kinds of arguments work and a distaste for arguments that do not.

Furthermore, this process teaches students to teach themselves. Students quickly learn to ask themselves the same questions they are asked in class. And because the professor provides no definitive answers to most of his questions, students are left to wonder and to ponder.

Socratic teaching not only teaches reasoning; it also inculcates the habit of solving problems by constantly presenting students with problems to address and asking the entire class to demonstrate how many good solutions can be discovered. In like manner, the Socratic method teaches creativity. Students must find an argument even when that seems desperately difficult. They are insistently encouraged to ask why things are as they are and whether they might not be better arranged.

The third distinctive feature of American legal education is that it is graduate education. This too helps produce the kind of keen and creative lawyers we seek. This is partly because law schools need not give students a broad education. That was the responsibility of their undergraduate training. Law schools are free to train lawyers.

In addition, more can be demanded of graduate than undergraduate students. As an English observer remarks, "American law schools are blessed, in comparison with those in England or on the continent of Europe, in having a graduate student body that enables them to teach with a rigor and sophistication that might be unproductive with undergraduates."[8] First, our students are older than undergraduates and

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[7] DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION viii (1983). To like effect is GARY KLEIN, SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS (1998).

[8] Graham Hughes, *The Great American Legal Scholarship Bazaar,* 33 J. OF LEGAL ED. 424, 424-25 (1983).

thus tend to be more serious about their work. Second, they are more widely educated and are often trained in fields crucial to law, like economics and business. Third, they often have some experience with the world, since many of them have had a job between college and law school, or even during college. Law is about how the world works; the more students understand of that, the better.

In sum, then, American legal education attempts to train lawyers who are skilled legal analysts, who are practiced problem-solvers, and who are habitually creative. We seek to do so through a program of graduate legal education that makes thinking like a lawyer its over-riding goal and that uses the Socratic method to achieve it.

IV. CAN AMERICAN LEGAL EDUCATION BE ADAPTED TO JAPAN?

You will of course decide for yourselves whether there is anything in American legal education worth adapting. You may wonder, for example, whether Japan has the same goals for lawyers as the United States. You may believe teaching the substance of the law is a more useful enterprise in Japan than in America. You may think the Socratic method produces lawyers too aggressive for life in a harmonious society. These are substantial questions I can hardly address, except perhaps to note that in a global world, Japanese lawyers will probably find it useful to be able to deal with lawyers trained in this way. But these are questions I leave to your good judgment. Here, I want to ask whether the practices I described can be imported into Japan.

Making legal education graduate education is in one sense easy, since it can be done by fiat. On the other hand, such restructuring would raise political perplexities, including questions about whether you want your bar to remain small and elite. In any event, I believe the crucial issue is not when lawyers are trained, but how. For the core strength of American legal education is that it uses the Socratic method to teach students to become lawyers who think rigorously, constructively, and creatively.

So, can law be taught Socratically in Japan? I see some reasons for concern, but more reasons for hope. First, there are surely cultural barriers. Not least of these are your culture's inhibitions against some manifestations of disagreement. Professor Gellhorn commented on this some years ago:

> The non-argumentativeness of Japanese young people—and, indeed, many older people—is very noticeable to a foreign teacher, perhaps especially to a law teacher. The law, it has been said, is a disputatious profession. Even

> neophytes in that profession, in American law schools, find that argument comes naturally—not rancorous debate, but the thrust and counterthrust of contesting opinions. They sharpen not merely their tongues but their wits by constant exchange of views, disagreement, reconciliation of seemingly inconsistent ideas. In Japan, on the contrary, it seems to me that differences are often kept under tight constraint instead of being brought out into the open.[9]

The challenge is not only to get Japanese students to argue with each other; it is also to persuade them to discourse with the professor. In good Socratic teaching, the professor confronts the students with arguments and ideas and expects them to scrutinize his own arguments and ideas critically.[10] In Japan (and Germany), however, respect for age and rank operate so imperatively that, in my observation, students shrink from this kind of interchange.

These cultural factors surely inhibit Socratic teaching in Japan, but I am not convinced that they prohibit it. The classes I observed at the Legal Training and Research Institute were taught Socratically in ways both students and professor seemed to enjoy. I myself have taught Socratically in Japan a number of times. I hesitate to draw strong conclusions from this, since my students chose to take courses from an American. On the other hand, my teaching faced an unusual obstacle—I taught in English. In any event, my Japanese students respond to Socratic teaching much as my German students do. They are diffident at first but soon enter gaily into the spirit of the enterprise. By the end of our time together, they express warm-hearted appreciation for a method of teaching which they find lively, engaging, and invigorating and which they think expresses the professor's solicitude for their learning.

You might also object to the idea of teaching Socratically in Japan because Americans use it primarily to teach how to think like a lawyer, while Japanese might wish to emphasize the substance of the law. It is true that Socratic teachers do not try to cover all of a course's subject in class. Rather, they emphasize its most challenging aspects and rely on students to learn the easy parts on their own. As one American professor

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[9] Walter Gellhorn, *Impressions of Japanese Legal Training,* 58 COLUM. L. REV. 1239, 1250 (1958).

[10] One distinguished American sociologist who was trained as a lawyer even believed that "the law student is encouraged, in part of course by forensic tradition, to talk back to his professors, even in huge classes, with a verve and lack of fear of what might happen to him that one seldom finds in graduate school." David Riesman, *Law and Sociology: Recruitment, Training and Colleagueship,* 9 STAN. L. REV. 643, 648 (1957).

writes, our method "places the student on a narrow, knife-edge ridge of conflicting doctrine, enabling a ready survey of the doctrinal landscape on either side below."[11] What is more, the Socratic method spurs students to work hard at the sometimes wearisome task of learning the substance of the law, and it reveals to the professor what progress they are making and where they need help.

Another reason to be skeptical about teaching Socratically in Japan is that Socratic teaching is easiest when there is a case to discuss. Civil law systems, of course, rely less centrally than ours on cases. However, even civil law jurisdictions have cases, and statutes can readily be taught by inventing cases that pose illuminating problems about interpreting a statute. The most efficient solution to this problem lies in publishing teaching materials that reprint judicial opinions, devise hypothetical cases, and set problems for students to work out and questions to reflect on. Such materials are already being developed in Japan. For example, one of the leading works on commercial law is a casebook by Professors Tatsuta and Takeuchi.

There are also practical barriers to teaching Socratically in Japan. Japanese classes can be large (although not as large as many German classes). However, you can teach Socratically in classes of even two hundred students in a room with good acoustics. It is preferable to have classes small enough that each student is called on frequently. But even a student who is not speaking can learn much from a Socratic dialog by listening and trying to answer each question in his mind. And large classes have the advantage of offering many well-prepared students with differing opinions.

Japanese professors might also reasonably say that they already bear heavy teaching loads and that Socratic teaching requires more labor than lectures. This is true. As long as the law does not change, you need only write a lecture once. But to lead a discussion, you need to be prepared to ask pertinent and probing questions no matter where the conversation may go. On the other hand, it is easier to teach well Socratically than by lecturing. As I once wrote,

> A good lecture is a thing of beauty and a joy forever, but it is painfully hard to craft. Leading a good discussion certainly requires considerable preparation beforehand, considerable attention at the time, and considerable evaluation afterward. But because it asks students to learn by doing, because it corrects errors and rewards insights,

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[11] George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929, 1936 (1993).

> because it challenges students to react and reflect, because it more deeply engages the minds of the students, and because it draws them into the work of learning and thus induces them to learn more richly and deeply, it commonly repays—and thus invites—pedagogical effort better than lecturing.[12]

Socratic teaching offers the professor another recompense. It is boring to lecture year after year on the same topic. But Socratic discussions can be actively interesting, since the professor never knows just what his students will say and thus where the discussion might lead.

If a school asks its professors to teach Socratically, it needs to reward the effort that method exacts. The school could make teaching a criterion for hiring, promotion, and setting salaries. But this might be awkward in the Japanese system. Indeed, it is awkward in the American system. Fortunately, it is not necessary. In the United States, an informal culture (and excellent support services for professors) crucially sustains teaching. To invoke yet again my eminent predecessor, Professor Gellhorn,

> American law professors think of themselves, very seriously, as teachers. Obviously, every professor everywhere, is a teacher. But those who have studied in Europe (from which so much Japanese academic tradition has been derived) will, I think, agree that the continental professors do not concentrate very much on their students. They study, they write, they lecture—and thus they teach. The professor functions in a professor-oriented rather than a student-oriented atmosphere, and he has few direct obligations to the learners who sit at his feet.[13]

Because Socratic teaching is so central to an American lawyer's education, American law professors inherit a tradition which commands them to labor at their teaching and which leads them to evaluate their colleagues and themselves partly on that basis.

There is a final barrier not just to adopting the Socratic method, but to most reforms of legal education throughout most of the world. Japanese law professors, like legal academics in all the countries I have visited, lack authority over their schools which American professors have

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[12] Carl Schneider, *The Frail Old Age of the Socratic Method*, 37 LAW QUADRANGLE NOTES 40 (1994).

[13] Gellhorn, *supra* note 9, at 1240.

found vital.[14] In particular, American professors—unlike professors in civil law systems—have two kinds of power.

First, they can decide who will be admitted to their school. They exercise this power to select students with an aptitude for the study of law. Most law faculties around the world cannot do this. The *Kyodai* and *Todai* entrance exams, as I understand them, measure what the student learned in high school, not what he can learn of law. As Gellhorn puts it, "The better universities' tests . . . afford an accurate insight into a student's capacity to absorb and retain information. They do not explore his ability to use the information he has. He is not pressed to exhibit his powers of analysis so much as his powers of recollection."[15]

Second, American professors have the power to motivate. American law firms evaluate a prospective employee by examining the grades his professors gave him. Professors may give students who perform badly in class a bad grade. Students with bad grades will not get good jobs. This gives American students an incentive to prepare for class and to join in discussion. In contrast, Japanese students who have been admitted to an institution as eminent as yours have already taken the most important step toward getting good jobs. The few students who wish to become *bengoshi* rely principally on a commercial course to prepare them for the entrance examination for the Legal Training and Research Institute. How then, can professors induce them to do the burdensome work of preparing for and participating in class?

I suspect that if Japanese and European law schools are to acquire authority over their own houses they will need to cabin the power of the state. American governments are ordinarily indifferent to what happens in law schools. Even public law schools rarely find public bodies meddling in their operations. In Japan and Europe, however, the ministries of education and justice generally not only set educational policy, but also insinuate themselves into the daily working of law schools in ways which must hobble law professors in the work of building great universities.[16]

V. CONCLUSION

Today, I have sought to explain the world's most anomalous system of legal education—my own. My defense has been that our system

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[14] I have explored this point in some detail in Schneider, *supra* note 5.

[15] Gellhorn, *supra* note 9, at 1249.

[16] In Europe, this intrusion can go as far as bureaucratic participation in the selection of faculty. *See* Ugo Mattei & P. G. Monateri, *Foreword: The Faces of Academia,* 41 AM. J. OF COMP. L. 351, 351-52 (1993); Bernard Rudden, *Selecting Minds: An Afterword,* 41 AM. J. OF COMP. L. 481 (1993).

works well to train the kind of lawyers we think we want: lawyers who are analytically able, who are adept at solving their clients' problems, who are creative. We try to produce them by teaching our students to think like lawyers. We do so first by making legal education graduate education. But more importantly, we do so by teaching Socratically, by making each class an opportunity for students to practice the language of the law until they become gifted speakers. I have acknowledged the barriers to implementing our system in your country, but I have argued that those barriers are not insuperable.

You will, of course, be the soundest judges of whether any part of my system might interest you as you re-examine yours. You already have high reason to be satisfied with your system: After all, it has produced scholars and lawyers as distinguished as the ones before me now. Altering a successful system is always a perilous enterprise that demands persuasive reasons. But let me close by suggesting one: I believe that we American law professors and our students have more fun than our counterparts around the world. For us, every class is an adventure on which we embark together into a disciplined, rigorous, and inspiriting inquiry into some of the worthiest questions human beings can ask themselves. What more could we want?