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The Changing Face of Legal Education: Implications for the Practice of Law and the Courts

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Millennial Angst

This is the last Conference of the Sixth Circuit in the 1900's. Though the Third Millennium technically does not begin until 2001, the turn of the "odometer" from the 1999 to 2000 leads us all to think of this as the end of a century and of a millennium. The pivotal date is yet sixth months away, but the pundits are already issuing their lists, both profound and trivial – the greatest inventions, the best books, the worst natural catastrophes, the trial of the century (of which there are at least a half dozen), the most influential thinkers, and on and on.

Often there is in these lists the implicit question whether, over time, the world is becoming a better plan or is mired, perhaps permanently, in man's inhumanity to man. There is, indeed, a great deal of millennial angst.

For most of us in this room, the sources of that angst range from the general to the professional to the personal.

General Angst

Our dissatisfactions with the world in general include the decline of dignity and civility and excellence. As Cleveland's Jack Liber has aid, we live in a world that is "lewd, rude, and crude." A few months ago, a movie starring Eddie Murphy was released; the movie's title is "Life," and – you're not surprised – it's rated R. Life seems increasingly brutal and coarse. You may have seen the recent cartoon showing a man entering a yogurt shop; the cartoon's caption read: "The closest Earl ever came to getting culture." We seem to be in the midst of a great dumbing down, in danger of entering a new cultural Dark Ages. There is intellectual sclerosis and a failure of prophetic vision.

And with our laudable desire to be tolerant of others, our own society is being balkanized – a term never more fraught with meaning than now. Around the world, and in our own country, ethnic and religious differences create more divisions and less harmony than I can remember in my lifetime. There has been a collapse of a shared value system. As the comedian Bill Maher put it:

> There used to be magazines everyone read, like "Life" and "Time." Now there's "Gay Indian Biker" magazine. You don't just get your coffee; you get your decaf frappucino latte. Everybody has a magazine and channel. There are 500 channels and 500 magazines, and we wonder why we're not united as a country.[1]

We are no longer a melting pot; we're a stew.

We live in the midst also of a loss of faith in long-established institutions. The government, schools, the church, charitable organizations – their flaws have been revealed to us and we feel betrayed and cast adrift. There is even a loss of faith in the traditional concept of family. To what and to whom, then, can we turn?

Professional Angst

Not only are we troubled generally, in common and with our fellow citizens. We are also troubled professionally as we come to the end of the millennium. Not to ruin your stay in this lovely part of Michigan, but let me rehearse a litany of problems – not a comprehensive catalog, but an illustrative list – of concerns and pet peeves that trouble you. (They are, of course, more immediate and more familiar to you, as judges and practitioners, than to me in the academy; and I am sure that my mere mention of them will provoke in each of you an illustrative scenario.)

For example, there are changes – many of them unwelcome – in the *structures of law practice*:

Consider the migration of lawyers, even partners, from firm to firm. Consider the growing use of temporary or contract attorneys – a device borrowed from industrial practice; we even call it by its industrial name: "outsourcing."

Consider that the phrase "mergers and acquisitions" no longer simply describes a law firm's practice specialty; it now describes what firms themselves are doing. New York's Rogers & Wells is holding merger talks with London-based Clifford Chance, to produce a world-wide firm of 2500 lawyers. The American Bar Association contemplates permitting lawyers to be in partnership with accountants and other business and financial professionals. Giant accounting firms have jumped into the law business by hiring thousands of lawyers. It soon may be incorrect to speak of law firms; instead, we'll be talking about "global professional service providers" – or MDPs (multidisciplinary practices). And commercial terminology creeps in: The lead partner's title is not "the senior partner," or even "managing partner," but "president." We may be headed for the practice of law not out of Suite 725 but in ww.reed@lawyer.com (especially dot com, for commerce).

Yesterday we discussed the independence of the judiciary. Perhaps today we ought to mention the independence of the law firm. How about the management of litigation by the budget officers of insurance companies?

There clearly is angst in the office suite.

And then, there are changes in *the courts*:

Whatever independence the courts may have in matters of substance, it's clear that their administrative independence is declining, with more and more

congressional control over their actions. Sentencing guidelines for one. End runs around the Rules Enabling Act, for another. Take, for example, the bills mentioned yesterday to federalize litigation concerning Y2K problems. Beyond the doubtful wisdom of saddling the federal courts with Y2K class actions, the bills would require a plaintiff to state with particularity in one complaint matters regarding the nature and amount of damages, material defects, and the defendant's state of mind – all inconsistent with the general notice pleading provisions of the Federal Rules – and would bypass the Rules Enabling Act.

Speaking of congressional forays into rule-making, let me mention my own pet peeve: Rules 413-15 of the Federal Rules of Evidence. In opposition to centuries of contrary thought, Congress has authorized the use of prior misconduct to prove guilt in the immediate cases – her in sexual misconduct and child molestation cases – a clear instance of the triumph of unprincipled pragmatism, and the unwisdom of congressional rule-making.

Through increasing federalization of legal problems, increases in population, and increases in the sources and complexity of controversies, the judiciary labors under increasing workloads; and yet federal judicial salaries are worth $22,000 less today than in 1992, seven years ago.

Perhaps some relief from the pressures of heavy judicial workloads is suggested by the Texas case in which the Court of Criminal Appeals held that "even though the trial judge fell sound asleep during the prosecutor's cross-examination of a defense witness, he didn't miss much anyway, so his nap was harmless error."[2]

Bureaucratization of the courts, with centralized management from a distance and measurement of performance by disposition rates has certainly diminished the pleasures of judicial life.

There is understandable angst in chambers.

And, of course, *civility*:

There is the constant drumbeat of concern about civility and manners in the profession – the tendency to equate zealous advocacy with insolence and arrogance, the type of advocacy someone has called "ice hockey in business suits." This, of course, is the product of a perceived conflict between a trial lawyer's two roles: zealous advocate and officer of the court. Discussions about litigation abuses almost always result in the conclusion that the only solution is for judges to take a more assertive, interventionist role – that lawyers will not, perhaps cannot, rein themselves in; the judges must do it.

Of course tampering with the rules – such as the discovery rules – can help (or, under the law of unintended consequences, make things worse). But rule changes will never be a fully satisfactory answer because the fundamental cause of excesses is that we operate in an adversary system – a system which I ardently believe in, but which, like capitalism, requires monitoring and

regulation. Civility codes arguably are useful as aspirational statements - like the Ten Commandments on the wall - but they seem to mean most to those who need them the least.

Pervading all of these problems is the economic shift. In our professional there is a tension between the practice of law as livelihood and the practice of law as public service. That tension in inevitable; it has always been there, and always will be. But as this century and millennium have waned, the balance has shifted, and the economic model of the profession, the bottom-line mentality, has gained greater and greater ascendancy. You and I know, personally, many lawyers who are profoundly troubled by that shift and who find the practice of law, though lucrative, ultimately unrewarding.

For those who have lost their sense of calling as lawyers - who may have forgotten why they became lawyers - I commend to them (with tongue in cheek) Clifford Mortimer's advice to his son John Mortimer when he heard that the son wished to become a writer:

> Have some consideration for your unfortunate wife. You will be sitting around the house all day wearing a dressing-gown, brewing tea and stumped for words. You will be far better off in the law. That's the great thing about the law, it gets you out of the house.

Is there angst also in *legal education?*

The title assigned for my remarks is "The Changing Face of Legal Education: Implications for the Practice of Law and the Courts." There is in that title an invitation to address the role that legal education can and should play in helping the profession meet the challenges posed by these and other problems which produce what I have called professional angst. I do not deny for a moment that the law schools share with the bench and bar both the responsibility for the status quo, which the country preacher said is Latin for "the mess we is in," and the responsibility for making the legal system more just, more humane, and more accessible. I do suggest, however, that it will not do much good for law schools simply to preach civility and responsibility and altruism to our students.

The face of legal education may be changing, as the title suggests; but the changes in most schools are evolutionary, not revolutionary. And the changes are responsive to a variety of pressures that are not necessarily coherent.

Paradoxically, law school training is becoming both more practical and more theoretical at one and the same time. Nudged by such studies as the McCrate Report and by law firm demands that graduates hit the ground running, schools have increased their skills training - such as document drafting, negotiation, and especially, clinics, all sorts and kinds of clinics. Although there are pockets of dissatisfaction and resistance, the battle is essentially over, the law school clinics are here to stay for the foreseeable

future. There is scarcely a school without a clinic with real, live clients, and most have several or many. Clinical training is relatively more expensive that the traditional methods of law school instruction, and often the decision whether to have many clinics or few is a financial, not a pedagogical one.

At the same time they were moving toward more hands-on experiences, the schools increasingly pointed out to their students that law is not an isolated, self-contained, local system, but is a part of our larger culture, both national and global, and is interrelated with other disciplines. And so we have the "law and . . ." movement – law and economics, law and sociology, law and psychology, law and philosophy; and we have joint degree programs and dual degree faculty members – even, there and there, some faculty without a law degree. Of course, the movement is sometimes satirized – as in Doogan's law: "For every Ph.D. there is an equal and opposite Ph.D." And scholars in these fields often express themselves in arcane, esoteric terms that diminish the usefulness of their work to the bench and bar. For example, an electronic abstract of an article about presumptions by three faculty members at Southern Cal and UCLA appeared on my computer last week. Let me read you the first two sentences from the abstract:

> This paper develops a theoretical account of presumptions, focusing on their capacity to mediate between costly litigation and ex ante incentives. We augment a standard moral hazard model with a redistributional litigation game in which a legal presumption parameterizes how a court "weighs" evidence offered by the opposing sides.

As I say, it is easy to satirize the excesses, but the "law and" movement and the critical legal studies movement are in some sense a reincarnation of the legal realist movement of a half century or more ago. And the "law and" course courses inevitably affect the views of our students and, ultimately, they will affect the law and the profession.

[Incidently, the late Jerome Michael, of Columbia, used to insist that only the theoretical is practical – that that which is "practical" is merely theoretical. His thinking was that so-called "practical" instruction is simply descriptive; it deals with what *is*, with the present, which immediately becomes the past, where its existence is of only theoretical interest, whereas the theoretical – the study of theory – provides a framework for dealing with the future, which is of highly practical importance.]

Finally, many schools now offer courses in the legal profession, in which students are exposed to the structure and demands of the profession. At Wayne State University Law School, for example, then Dean James Robinson created a course called "Introduction to Lawyering," addressing such issues as professionalism, civility, misconduct, and the role of lawyers in society. Such a course doesn't guarantee a cohort of professionally responsible

admittees to the bar, but it does guarantee a cohort of men and women who have been sensitized to the history and problems and future of the profession.

A major contribution to the decline of professionalism is the decrease in mentoring within law firms. Presumably because of financial pressures, there is vastly less teaching by example than "when you and I were young, Maggie." As a profession, we once understood that the first years of practice within a firm were an integral part of a lawyer's education, both in skills and in professionalism. With much of that now gone, the schools are trying to pick up some of the slack with devices like the Wayne State course. But I say to you, frankly, there is a limit to what we can do to produce caring, honorable, responsible lawyers. What they encounter in their first years in your offices and your courts is a far more powerful influence on what they will become than anything we can do in the classroom.

That said, today's law schools are more professionally responsible than they were in my long-ago days as a student. We have helped open the profession to women and minorities. We help our students understand that law is but one of many forces that shape society. And in many settings, we have abandoned a pseudo-objectivity in favor of a passion for law as a powerful force to bring about an ever more just society, both here and abroad.

We have much yet to do, but I suggest that there is less millennial angst in legal education than there is in the courts and in the practice.

Personal Angst

I do not presume to think that I can know and describe your own personal feelings at the millennium's turn – whether angst or not, whether pessimistic or optimistic. I'm sure that in this accomplished group you take some pleasure in the high degree of your achievements, though I would remind you that it is hard to be sure what is achievement and what is good luck since good luck looks so much like something you've earned. Certainly, though, you are justifiably proud of your accomplishments. But tempering that joy of achievement are elements of anxiety about the uncertain future of the world, of our country, of our storied and noble profession, and, surely, for each of us, anxiety about the future of our families, our loved ones. And, of course, there is stress – the stress of faster communication and overcommitment of our time and strength. Stress, someone has aid, is when your gut says, "No way," and your mouth says, "Sure, no problem." Things have come to a pretty pass when the best part of waking up is nothing more than "Folger's in your cup."

Even those for whom religious faith is an anchor sometimes find it difficult to reconcile that faith with the messy world we live in. They smile knowingly when they read E.Y. Harburg's little verse:

No matter how I probe and prod,
I cannot quite believe in God.
But oh! I hope to God that He
Unswervingly believes in me.

I suspect many of us, in our rational selves, look forward to the excitement of the brave new world ahead but also, in our emotional selves, are loath to leave the known of this century for the unknown of the next. And the danger is that in looking back with nostalgia we will, like Lot's wife, turn into useless pillars of salt.

As society changes, institutions must change and the legal system is no exception. It too is changing, apparently faster than every before – everything about it: the courts, the lawyers, the law schools, the law themselves. I would bet that, like me, you somehow have the feeling that we're moving to a new structure of the professional, and that, if we're just patient, the changes will end, the profession will settle down again, and we can adjust to it. But that won't happen, of course. The only constant is change, and you and I simply live during a segment of that change, which will not end in our time, or for that matter, ever after. As Robert Frost said, "In three words I can sum up everything I've learned about life: It goes on."

So, with that frame of mind do we dismiss this millennium and its final century? With what attitudes, what goals, what commitments do we serve as judges, or practice law, or teach in the year 2000 and beyond?

I am not a so-called motivational speaker and I have no handy-dandy list of do's and don't for you – no advice for you, like "don't sweat the petty things, and don't pet sweaty things," or advice like "don't resent change, since resentment is like taking poison and waiting for the other fellow to die." But I do offer thoughts about your professional and personal lives as we move across that divide into the Third Millennium.

Recently, I encountered a poetic phrase in a book by the Englishman George Steiner that caught my attention and has burned itself into my mind. Like those who ask the familiar questions, "How can a good God let bad things happen to good people?", Steiner states that the injustices and unspeakable cruelties that abound in this world justify atheism in so far as they prevent God from what would be even a first coming. "But," he then says profoundly, "I am unable, even at the worst hours, to abdicate form the belief that the two validating wonders of mortal existence and love and the invention of the future tense. Their conjunction, if it will ever come to pass, is the Messianic."[3]

"the two validating wonders of moral existence are love and the invention of the future tense."

The Future Tense

There is in each of us a strong tendency to live in the past and the present, and to pretend that the future will simply be more of the same. We expect to wake up each day and, as in the move "Groundhog Day," find that it is yesterday all over again - day after day after day. Lawyers, as a tribe, believe that to be true more than does the general population, because, beginning in law school, we have been trained to look at precedent - at what courts *have* done -- and to divine from that precedent what courts likely *will* do in the future. As a consequence, we are more backward-looking than most people. We are like passengers in the railroad observation car at the back of the train, watching the low hills recede behind us, unaware of the majestic mountains ahead.

I went to law school in Ithaca, New York. Cornell's campus - far above Cauyga's waters - is on high ground above Ithaca's business district. A main route from campus to town is an uninterrupted six blocks of steep decline known as Buffalo Street. Snow and ice frequently coat Buffalo Street hill, making descent a perilous adventure. It is part of Ithaca lore that in the early days of the century "Mrs. Tichenor," a wealthy, elderly woman of great dignity and reserve, was seen being driven down Buffalo Hill in her two-horse sleigh. Her horses were shod for the ice, but eh rails of the sleigh were smooth; and though the horses continued to go down the hill, due west, the sleight with its human burden swung around sideways, facing south. As the horses moved on down the hill - west - as intended, with the sleigh at almost a right angle, Mrs. Tichenor and her driver looked steadfastly straight ahead - south - refusing to acknowledge that their world was askew.

What a wonderful parable for so many in our profession! The enterprise is moving one way and we are facing another, clinging determinedly to the illusion that nothing is amiss. To the same point is the delightful cartoon of the Thurberesque couple on the dance floor, in which she ways to her partner, "Waltz faster; they're playing a tango."

> [Too many of us] hold certainty dearer than truth. We want to learn only what we already know, [to dance only the steps we learned in Miss Polly's dancing school,] to become only what we already are. And some of us even embrace "The Principle of the Dangerous Precedent," put forth by the British academic who said, "Nothing should ever be done for the first time."

Our profession desperately needs the imaginative ministrations of its most creative practitioners, men and women such as yourselves - and also our academics, who, by definition, have the most time to ponder these things. The profession is being reshaped, and the question is whether you and I are role players in that reshaping, or mere observers going along for the ride. As Yogi

Berra said, "Predictions are hard to make, especially about the future." But the future will be more predictable if you and I address it, if we lift our heads out of the sand, out of our own daily concerns, and participate in shaping the changes that are taking place.

The unknowns of the future tense create stress, of course. I jokingly referred to stress a few moments ago, but I submit that a degree of stress, obviously within limits, is not a negative but a good. We do much of our most creative work under stress. The oyster produces the valuable Mikimoto pearl when it is irritated by a grain of sand. Left in its own contented state, the oyster produces nothing greater than an hors d'oeuvre on the half shell.

Pearls of great price are the products of stress. Each of us surely would like less stress, but never doubt the relationship between a degree of stress and creativity. And facing the future tense provides plenty of stress. I ask you to welcome that future creatively. The characteristics and abilities that, by definition, qualify you to be here in this distinguished company, qualify you to take lead roles in determining the future. They not only qualify you, they charge you with that responsibility, because each of us in accountable for the faithful stewardship of his or her talents. And you are an extraordinarily talented people.

Love

But talent is not enough; and here is where we come to the other part of Steiner's aphorism: The validating wonder of our mortal existence is not only the fact that there is a future - what he calls the invention of the future tense - but also love. Is it illegitimate to speak of love in a professional setting like this? It is simply sappy? Merely maudlin?

I want us to think about love as being part of one's professional qualities, part of the essential equipment of a lawyer, of a judge. It may seem strange for those of us who are trained in the craft of careful thought and rational discourse to talk about love as a professional qualification. How is it relevant, to use the lawyer's term? Is love part of a lawyer's answer to the uncertainty of the Third Millennium?

I suggest that love *is* a part, an essential part, of being a true professional in the law. I use the term "love," of course, in the sense of charity - what the theologians call *agape*, what Noah Webster calls "unselfish and benevolent concern for the good of another" - love in the sense of affection for and commitment to another. Love in the sense of caring is not only relevant, it is central to being a good person and being a good lawyer, a good judge. A different world cannot be built by indifferent people. Love animates; it gives purpose and leads to dedication. It is not mere tolerance of others. I think it was Garrison Keillor who said of one of the citizens of Lake Woebegon, "Olaf

learned to behave without making people mad at him, which is not the same as being a good person."

Every one of us knows that the state of mind with which a person does something is critical to its meaning. Intent, purpose, motive – these make a difference in the legal effect of the thing done. Not only the legal effect, but the personal and social effects as well depend on intent, purpose, and motive. Referring to Don Quixote, Oliver Wendell Holmes said, "If a man has the soul of Sancho Panza, the world to him will be Sancho Panza's world; but if he has the sole of an idealist, he will make . . . his world ideal." If our daily work is the mere performing of professional tasks – research, depositions, trials, negotiations, opinions, even personal counseling of clients – then that work, no matter how skillfully done, is Sancho Panza's work; and we are likely to feel unfulfilled. But if despite the corrosive effect of our years in the trenches we can do that work with the soul of an idealist – that is, with generosity and helpfulness and caring – that is to say, with love – then we will make our profession more nearly ideal, and our personal lives as well.

Mentioning Mr. Justice Holmes reminds me of another Holmes – Sherlock Holmes – who well knew that one's purpose affects meaning. Holmes and Dr. Watson went on a camping trip. After a good meal and a bottle of wine, they lay down for the night and went to sleep. Some hours later Holmes work up, nudged his faithful friend, and said, "Watson, look up at the sky and tell me what you see."

Watson replied, "I see millions of stars."

"What does that tell you?" said Holmes.

Watson thought a moment and replied, "Astronomically, it tells me that there are millions of galaxies and potentially billions of planets. Astrologically, I observe that Saturn is in Leo. Horologically, I deduce that the time is approximately a quarter past three. Theologically, I can see that God is all powerful and that we are small and insignificant. Meteorologically, I suspect that we will have a beautiful day tomorrow. What does it tell you?

Holmes was silent for a second, then spoke. "Watson, you idiot. It tells me that someone has stolen our tent."

It *is* essential to know what the real question is. And that's a lawyer's skill.

In a few minutes, you are going to gather by districts to discuss your concerns. Some of those concerns will be common to all of you; others will be idiosyncratic to particular districts. You have free rein to talk about whatever is calculated to improve the administration of justice and the practice of law in your individual areas. You may well begin by talking about what the chairman has called your "pet peeves"; for example:

- never ending rule changes
- variations in local rules - the balkanization of federal procedure

- judges who force settlements
- lawyers who equate belligerence and stubbornness with excellence in advocacy, and seem to get away with it because judges won't rein them in
- how ADR methods are working in your district
- can the law schools do a better job of preparing skilled and responsible graduates
- the continuing domination of the profession by Caucasian males, as witnessed in this room

And that unhappy list can go on and on. You will find plenty to talk about.

But I hope you will place an affirmative cast on your discussions, seeking understanding of one another and (in O.W. Holmes phrase) seeking, with the soul of an idealist, to make our profession ideal.

Let me conclude by stating a favorite theme, about which I have spoken to you in other years. That theme is the importance and the responsibility of the individual, especially the talented individual. In the late 4th Century, St. John Chrysostom, a church father and the patriarch of Constantinople, stated a theory of ethics in which one learns how to behave by imitating or copying exemplary models. Although that self-evident truth is at least 1600 years old, too many believe that ethics and civility and responsibility can be taught by lecturing - by preaching; that lawyers can be hectored into behaving professionally. "Do as I say," not "Do as I do." But as a teacher, if I am shallow in my thinking, shoddy in my preparation, uncaring about the issues of our day, disrespectful of my students, too busy to deal with them personally, what good will it do to lecture them on the qualities of a responsible, caring lawyer? And so I have an obligation to offer them, in Chrysostom's terms, something to imitate, to copy.

And so does each of you. Each as the obligation to be a model, an exemplar. As a judge, you are being observed by counsel, by litigants, by your staff and your peers, by the press. As a lawyer, you are being watched by young associates, by colleagues, by clients, by judges and juries, by the public. You are only one, but you *are* one. You must serve our profession as a leaven, a leaven made up of those validating wonders of mortal existence: love and the invention of the future tense.

Is there cause to be hopeful? Does optimism depend on memory loss? The legal profession and the justice system face daunting problems, and there is much pessimism among us. But Israel's Abba Eban once said, "we do the right thing only after exhausting all the alternatives." Like Eban, I am a short-term pessimist, but a long term optimist. We *will* to the right thing in the end.

The good news is that we live in a moral universe, and the point is to love, to hope, and to have courage. Welcome to the Third Millennium!

[Endnotes]

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1. Mother Jones, Jan./Feb. 1998.
2. Uelmen, *The Care and Feeding of TV Court Critics*, 17 NOVA L. REV. 825, 833 (1993), citing Jackson v. State, 634 S.W. 2d 727 (1982). The New York Times account was as follows:

> The Texas Court of Criminal Appeals refused today to overturn a jury conviction even though the trial judge fell asleep on the bench.
>
> On Dec. 13, 1978, State District Judge J.E. Winters, fresh from the Dallas Bar Association's Christmas lunch, had warned jurors that he might doze. He told them:
>
> "Ladies and gentlemen, I have just been to dinner and I believe I've eaten more than I have eaten in my life and if I go to sleep up here, you whistle at me. Will you?"
>
> The trial ended with the conviction of Joseph Jackson, who was sentenced to one year in jail for resisting arrest in a scuffle with a policeman.
>
> Mr. Jackson's appeal said the trial was unfair because Judge Winters fell asleep. But the appeals court affirmed the conviction, saying it was clear that the judge did fall asleep, but adding that there was no proof as to when his nap began. [May 20, 1982, p. A22]

3. G. Steiner, Errata: An Examined Life, (1997) pp. 171-72.
4. William Sloan Coffin, *Diversity and Inclusion*, Mt. Holyoke Alumnae Quarterly, Winter 1999, p. 23.