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PANEL 4: Knowledge Production in the Legal Academy

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KNOWLEDGE PRODUCTION IN THE LEGAL ACADEMY*

Professor Minow

Thank you. This panel is Kate's idea and I think it is a brilliant idea. A meeting about constitutional law should dig deeply into the subject of how legal education frames the roles of lawyers, the knowledge that is relevant, and actually addresses or fails to address issues of power.

We have a terrific panel, and since the members' biographies are in the booklets, I will not take up time by reading them. We will start with Carrie Menkel-Meadow, who is one of the founders of the Alternative Dispute Resolution Movement, is an astute observer of critical legal studies and feminist theory, and engages in some of the most constructive criticism I know.

Professor Menkel-Meadow

Thank you, Martha. My job is to provide an overview of our topic in eight to twelve minutes. Thus, I will suggest some orienting principles.

To me the question of whether and how legal education has changed and whether there has been a socially appropriate production of knowledge in the legal academy raises some very foundational questions.

First of all, production of knowledge relates to the epistemology of social hierarchies. This means that knowledge in our academy, the legal academy, is produced by at least several sets of people. We tend to think of it as faculty production in scholarship and in

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* Editor's Note: This panel discussion originally included Professors Anthony Farley of Boston College Law School, Susan Sturm of Columbia Law School, and Catherine Krupnick of the Harvard Graduate School of Education. At publication date, they all declined to publish their remarks.

classroom discourse. Students, however, also contribute to the production of knowledge. I will address five different legal reform efforts I have been involved in with respect to legal education, many of which started when I was a student. Part of this is about the notion of empowerment for students, and the way in which what you learn about an institution is based on your position in that institution.

Much of what led me to what I do as a legal academic comes from my experience as a student. As I talk about legal education, consider other institutions in which you may be situated. I was recently a patient in a hospital where I was completely deprofessionalized and dehumanized, and I saw and experienced what you learn about a hospital from a patient's perspective, in a manner you do not usually perceive when you enter as a professional.

I will address five reforms pertaining to legal education.

Legal education is unquestionably more diverse than when I attended law school thirty years ago, although more needs to be done in that direction. The infusion of all kinds of different people, including women, people of color, gays, and disabled persons has affected in many ways what we study and how we study it. One can view this change in a positive, optimistic manner. But one can also be critical of it and ask, for example, why the basic structure has not changed and why this brand new room in which we are currently sitting was constructed in the same way as it was when Langdell came up with his plan for legal education.[1] In other words, one may ask why traditional legal education has strongly resisted many different efforts at advocating all kinds of progressive other ways of learning.

When I was a law student in the early 1970s, clinical education did not exist in the law school I attended, but I started my career as a clinician because I had a wonderful teacher, David Filvaroff,[2]

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[1] The Langdellian case method and its teaching through the Socratic "method" in large amphitheater-like rooms debuted in the 1870s. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 38 (1983).

[2] David Filvaroff, Former Dean, Professor of Law, SUNY, Buffalo; Professor of Law, University of Pennsylvania (1967-72); former Special Assistant, U.S. Attorney General (1965-66).

who taught torts from an experiential perspective. The class was alternatively a legislature, an executive agency, and a court, and that was the manner in which we learned about the new possible tort of "slumlordism."[3]

From learning about new ideas through different methodologies, I decided that if I ever taught, I would teach experientially about law, policy, doctrine, and facts from the perspective of a lawyer playing various roles. I believe clinical education is the most successful form of education, because it engages us at both cognitive and behavioral levels. It is also important to note that most law schools now have clinical education. From a pessimistic perspective, however, clinical education has not really transformed the methods of legal teaching.[4] In most places it is an add-on. Most good students now want to apply the knowledge they have acquired, but there has not been as much integration as I would like there to be between practical application and legal thought in the traditional classroom.[5]

The second movement I believe has changed legal education, and probably the least successful on my list for incorporation into traditional legal scholarship and teaching, is law and society or "socio-legal" studies.[6] I was a sociologist before I went to law school, and, thus, I think of myself as having a sociological

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[3] The tort of "slumlordism" had originally been proposed by Professor Joseph Sax, then of Michigan Law School, now at Boalt. *See* Joseph Sax & Fred J. Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967); *see also* Olin L. Browder, *The Taming of a Duty - The Tort of Liability of Landlords*, 81 MICH. L. REV. 99 (1982).

[4] Clinical education is very successful on its own terms, see Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555 (1980), but has not altered more conventional instruction. *See* STEVENS, *supra* note 1, at 212-14.

[5] *See* Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14 (1999).

[6] *See, e.g.*, Carrie Menkel-Meadow, *Durkheimian Epiphanies:The Importance of Engaged Social Science in Legal Studies*, 18 FLA. ST. U. L. REV. 91 (1990); David M. Trubek, *Back to the Future: The Short Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4 (1990); David M. Trubek, *The Place of Law and Social Science in the Structure of Legal Education*, 35 J. OF LEGAL EDUC. 483 (1985).

perspective when I talk about the epistemology of social hierarchies in institutions. I think one's position, class, or gender affects everything that one does.

Social theory is most often simulated as policy in law school classes. But adaptation and use of social science methods and social theory have not been rigorous, except if law and economics is added to that category, which I would not do, despite recent attempts to add "behavioral science" to law and economics.[7]

The third movement I wish to address briefly is critical legal studies ("CLS").[8] I attended the first CLS meeting in 1977, and I have been "involved" with the movement since its inception (though it seems quiescent at the moment). What we have learned from this movement is both a traditional Marxist class examination of law and legal doctrine, and the important principle of indeterminacy and manipulability of the law and legal doctrines.[9]

I think even non-critics have assimilated the heritage of the CLS movement into their teaching. In fact, a critique of legal studies would be the idea that exploring the indeterminacy of texts and "deconstructing" doctrine, which is what most CLS law review articles do, is actually quite congruent with very traditional legal scholars and has not added to the possible diversity of legal method (such as more use of empirical study of the law).[10]

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[7] *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

[8] *See* generally Mark Kelman, A Guide to Critical Legal Studies (1987); Mark Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986).

[9] *See* Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

[10] *See, e.g.*, Frank Munger & Carroll Seron, *Critical Legal Studies versus Critical Legal Theory: A Comment on Method*, 6 LAW AND POL'Y 257 (1984); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

The fourth movement I want to discuss is legal feminism.[11] Again I would say this has had a positive impact on legal education. I view both feminism and critical race studies as innovations in legal education originating from students.

Women holding seminars in legal education introduced the idea that the law did not speak to our experience. With few exceptions originating from great thinkers, topics such as reproduction, the reconstitution of rape doctrine, employment discrimination, criminal law, and family law really came from students attending seminars and wishing to reconstruct seminars using the methodology of consciousness-raising groups. Those students have changed the methods and subject matter of legal teaching.[12]

I would even go further in saying that these students had the most profound effect on the law itself via the exploration of different methodologies, the re-framing of legal issues and the innovations of new legal theories. Students like Catherine MacKinnon[13] have made a difference by taking new legal theories constructed in the classroom out into the world.

The fifth movement I will address today is law and literature.[14] I think the importance of law and literature, critical race theory, and similar movements has been to bring story telling and narrative back into the law school. Once again, there is a pessimistic view of the import of these movements, which is that we are

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[11] *See* Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493 (1992); Carrie Menkel-Meadow, *Women's Ways of "Knowing" Law: Feminist Legal Epistemology, Pedagogy and Jurisprudence*, *in* BILENKY ET AL., KNOWLEDGE, DIFFERENCE AND POWER (1996).

[12] *See* Cynthia G. Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249 (1998).

[13] While still a law student, Catherine MacKinnon began her path breaking work on sexual harassment and new legal theories. *See, e.g.*, CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

[14] *See, e.g.*, JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW AND POLITICS 9 (1994); ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW 89 (1993).

telling other kinds of stories. They are not the stories that appellate courts necessarily tell, or recognize. The overall impact of these movements on legal education, however, has been very profound.

When I was a student, to talk anecdotally about one's own experience was absolutely taboo. That is no longer true. When one attends a meeting now and hears another's story of injustice, one is inevitably moved by it.

The interesting and optimistic part of these movements is to see what the future holds, in particular, regarding the continuing scholarly debate about whether stories and narrative are verifiable and statistically significant in the old law and society ways.[15] But I think that these movements, at least, have placed a different kind of discourse in the law school classroom and, when used properly, empower students to criticize the discourse that is otherwise controlled by us, the teachers.

Finally, I would like to address the Alternative Dispute Resolution ("ADR") movement.[16] I have been associated with this movement, labeled as the new approach to legal problem solving, for fifteen years. The ADR movement relates to broad conceptions of problems solved in legal environments, legal institutions, law schools, court houses, and other places. The ADR movement also addresses whether processes other than litigation would produce better results. Further, the problem with traditional legal epistemology is the mismatch of the courtroom's narrow, binary solutions to complex, real world problems with multi-party, multi-issue, competing world views, and competing groups.

At least four foundations are now funding efforts to address how problem solving and dispute resolution can be integrated and incorporated into the classroom in law schools to broaden the different expertise that we bring to bear on solving a legal or social

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[15] Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991). *Cf.* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

[16] *See, e.g.*, Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997); Carrie Menkel-Meadow, *Dispute Resolution: The Periphery Becomes the Core: A Review*, 69 JUDICATURE 300 (1986) (reviewing STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1985)).

problem. Optimistically, studying the different movements I have addressed is very exciting and is challenging to traditional legal education. From a pessimist's standpoint, however, it must be pointed out that change has happened only because every single movement has had some foundation funding in supporting the change of legal education.

The only movements that I think have had any real influence have been those that have had not only the foundation funding, but also student and faculty bodies committed to them. Some of them were more successful than others, but the truth is that virtually all of the movements I have discussed have operated solely on the periphery. They are still marginal add-ons to legal education, which is why I am sad to report that much of the core remains the same.

I would like to ask those of you in the room who are students to think about the extent you might have a broader, better, deeper, more complex legal education than some of us have had, and what difference that has made. Do you think of new legal theories, do you think of new ways to practice law? Do you think of new questions with which to interrogate each other and your teachers or do we all have the same diet, carved up slightly differently?

Professor Minow

Well, several questions have been put to you and I am sure you have questions and comments. But if anyone wants to put on a play or paint a picture, that is also appropriate. Does anyone want to come to a mike, or does anyone sitting here in front want to speak?

Audience Member

I teach constitutional law at Suffolk Law School. I have been convinced for many, many years that many of the problems in law schools, power relationships, the over-focus on rules, the Socratic method, would be minimized and more of this interdisciplinary and self-actualizing learning would take place if we broke up the first-year classes into small sections, small class sizes.

In other words, it is really a financial issue. The large class method of instruction is a cheap method of instruction and allows the universities to drain off a huge chunk of law school tuitions,

anywhere from ten to forty percent to the university. It has really been a financial decision that has been made for a hundred years, that has created so many of the problems we face today. We should all push our law schools to have smaller units of instruction, particularly in the basic classes.

A lot of these classroom dynamics may really diminish or disappear in a seminar. People are much less apt to beat each other up on the basis of categories or to stereotype when they are in a room with twenty people. It becomes a much more human experience. I am just wondering what the panelists' reactions are to what is really a very simple idea.

Professor Menkel-Meadow

A couple of things.

I agree with you, and I have two comments. First, what you are describing absolutely can be done. Of course it would be ideal if it were formally structured in the law school. But to the extent that law schools cannot afford to have that structure implemented, many law schools have at least some smaller classes. For example, students at my law school have at least two of their first-year courses in small groups. That is the compromise on the financial front.

I teach one hundred and thirty civil procedure students, and I do it partially in small groups and I have them introduce themselves to each other. Although not every day, I do break the larger class into smaller groups. The students write complaints together in groups of four or five. They have to construct a non-adjudicative solution to some legal problem that I give them in groups of three or four. I have them speak in groups of three, four, five, six or seven in a large classroom. I take valuable class time to have them talk to each other.

Most teachers in this room know about all of this. There are things that one can do even within the existing structures. I am a little resistant to those who say the civil procedure environment may not be the place to do this. Any environment can be used if one is brave enough and has at least some support through students. I am also resistant to those who opine that clinicians are not sharing these different teaching methods. Clinical teachers have

shared methodologies for thirty years now.[17] There is a great variety of teaching technologies, methodologies, and approaches, although I also want to say that there is a form of clinical education that has become just as encrusted and not subject to change as traditional education has, as I see it, even in some of the best clinics where students are taught to be trial lawyers in some very traditional, old fashioned adversary ways.

Thus, to the teachers in the room, I say, push the envelopes of your own forms; to the students in the room I say, think about what works for you and what does not. The other thing I was thinking about were the terms of art used to teach. Using art as a method of teaching is a method that has been employed by the Esalen retreat for over thirty years.[18] Esalen has shifted from one modality of learning to another for years as a way of expanding how one thinks in the mode one is in. One must shift out of it, draw a picture of something, then see what the picture teaches and return to more conceptual mores.

What does one learn from the attempt to draw something and then to put oneself back into the modality that one thinks one is working in?

Those of you who are students, think about a time of your life when you really learned something or came to understand something new. As you had high moments, think about what made you feel that way, and consider what you could do to bring some of that into the law school. We are only as stuck as we think we are in accepting the forms that we are in.

I just have one other observation. One of my heroines is a wonderful judge in Canada, Rosa Abella.[19] She said that we

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[17] *See* Menkel-Meadow, *supra* note 4; *see also* Alan M. Lerner, *Law and Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107 (1999).

[18] Esalen, California is an experimental gestalt psychology based retreat center. *See* http://www.esalen.org (last visited Mar. 11, 2001).

[19] Rosalie Silberman Abella was Justice of the Canadian Supreme Court. She was a leader in advancing the human rights movement, particularly women's rights and the rights of the disabled. Justice Abella also held several public service positions such as the director of the Institute for Research on Public Policy, the Canadian Institute for the Administration of Justice, and the Canadian

should consider all the institutions we are involved in, education, medical care, hospitals, law, and now policing as one of them. If you compare any picture of those institutions a hundred years ago with a modern snapshot, every one of them looks very different in the year 2000 than it did in 1900, except for law.

I am just struck by the fact that courtrooms, law schools, and the physical spaces of law still look similar. I may be wrong, and you may have some counter examples in the 'new' architecture, but even new law schools build old forms.

As the panel was describing some innovations, I was thinking about some meetings at the Justice Department where police departments talked about their work on spousal and domestic violence issues.[20] I was struck by how many creative exercises were going on in many different places. This was not the case in all of them, and there is still a long way to go, but many of the police departments were quite flexible. Now I am about to say something totally blasphemous: the police departments were more flexible than some of my feminist friends, and I was involved with the domestic violence movement as a feminist twenty-five years ago. In the recent DOJ-Vera meeting, some of the police officers were more creative and sensitive than and more conscious about whom they were approaching and how they were thinking about what they were doing, than some of my activist friends who have been making the same arguments for thirty years about arrest and

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section of the International Commission of Jurist. *See* http:\\www.library.ubc.-ca/spcoll/ubc_arch/hdcities9.html#abella (last visited Mar. 5, 2001).

[20] *See* Vera Institute - DOJ Programs, Focus Group on Mediation and Domestic Violence, Jan. 1999, *at* http://www.vera.org/main.html. The Vera Institute of Justice was founded in 1961 by Loiis Schweitzer, a philanthropist, to help alleviate the overcrowding in jail by helping poor persons with strong community ties post bail. *Id.* The Vera Institute, working with the United States Government, now designs and implements new programs to "encourage just practices in public services and improve the quality of urban life." *Id.* As a response to domestic violence, Vera and the Department of Justice have implemented a new program by creating a forum where police officers, district attorneys, judges, and victims' advocates brainstorm in generating and testing new practices to address the issue. *Id.*

incarceration of abusive partners, rather than trying to do what is best for women *and* their relationships.[21]

At that moment I was thinking about what Rosa Abella said, that lawyers were using the same tropes, the same arguments, the same expressions, the same physical environments as in the nineteenth century. And virtually every other institution in our society has changed. Business has changed more than we have. Why is that?

Professor Minow

We are grateful for this presentation, and the others made orally at the conference.

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[21] *See* Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEG. F. 23 (1989).