

Fellows of the Wisconsin Law Foundation

Remarks by Dean Joseph D. Kearney on the Future of Legal Education

On October 3, 2013, Dean Joseph D. Kearney spoke to the Fellows of the Wisconsin Law Foundation at the group's annual meeting, in Madison, Wis. Together with his law school counterpart from the University of Wisconsin, Dean Kearney was asked to address the future of legal education. The following is Dean Kearney's part of the presentation.

Let me begin by thanking you for tonight's invitation. I spoke to the Wisconsin Law Foundation fellows in the fall of 2003, my first year as dean, and I should like to think that the passage of 10 years between invitations does not reflect some judgment as to the quality of my remarks on that occasion. While my intervening membership in the group suggests that it does not, I am, in any event, glad to speak with you again this evening, a decade after. I am especially pleased to do so with my colleague, Dean Margaret Raymond. We have come to know one another over the past two-plus years. I admire the intelligence and energy that Dean Raymond has brought to leading the University of Wisconsin's law school.

Dean Raymond shared with me a few weeks ago the list of 10 critiques or "reforms" of legal education that she had compiled from her reading (this is not to say that she endorsed them). I was reminded, as a native Chicagoan, of the old phrase that "Chicago ain't ready for reform"—and of what may be an even older phrase, "When someone starts talking about reform, reach to protect your wallet." This is not to be dismissive of the interest in change in legal education. Indeed, my skepticism about much of the current call derives less from any willingness to defend each particular aspect of legal education today and more from my appreciation that these are *systemic* questions. This is where I must begin.

To get at my point of systeminess (perhaps to coin a word), let us consider the most basic requirement for admission to the practice in most places: the prerequisite of formal legal education. Few would doubt that there are some folks who, by reasons of temperament, intelligence, and other native gifts, could practice in some areas of law *without* formal



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legal education (even to leave aside the question of *three* years of school). Yet to acknowledge this is scarcely to agree that the *system* in which even a person such as that must go through formal education is not an appropriate one. For questions about the value of systems depend upon net accountings of costs and benefits.

More could be said along the foregoing lines, but I think this enough to establish my point that we are speaking of the system. This is rather important, as I have mentioned, for one largely defending the current system or form of legal education does not need to defend each aspect or actor in it. To take merely the example of tenure, one defending even just that component of the current system is under no obligation to suggest that there is no downside of tenure. A system with tenure serves many purposes, including the instrumental one of helping attract from practice (and higher salaries) and into law faculties individuals of substantial talent. Would the system of legal education be better if there were no tenured faculty? Well, it is possible that the net costs and benefits might so

indicate, but that is scarcely clear. And as dean of a school whose faculty are considerably more national in their origin and orientation than was the case during most of the school's history, I am not prepared to suggest that a setup in which Marquette Law School did not have substantial ability to recruit to its faculty talented individuals with impressive backgrounds and numerous other options for their future would make for a better legal profession or society.

This is all a bit of a warm-up for the point on Dean Raymond's list that I selected for myself: the 10th point, the *ne plus ultra* of the critiques of legal education today. As Dean Raymond has summarized the critique, it may be stated as "less theory, less scholarship, less 'ivory tower' nonsense." One gets the sense that the concluding noun—*nonsense*—has been toned down, made less earthy.

To find this criticism overbroad—as I generally do—is not to doubt that it is possible to overdo it on the theory front. I recall a conversation—it was more of a monologue for which I was present—in which one of my former employers considered whether to interview for a position a graduate of a certain law school (it may have been in New Haven). The applicant's transcript was pretty well devoid of courses such as evidence, administrative law, jurisdiction and procedure, and the like, and was replete instead with courses rather more resembling what most of us in the legal profession would expect to find in a graduate school of philosophy. The conversation concluded with the prospective employer's saying, "I need a *lawyer*," and putting the transcript and application down, never to pick them up again.

Nor does one defending theory in legal education have to doubt that we are educating—even training, for a word that some might avoid—individuals for the practice of law. I am dean, after all, of *Marquette* Law School, and even the most iconoclastic of my predecessors, the late Howard Eisenberg—who came to the Law School seeking to recruit a more national faculty—even he would not have doubted the importance of ensuring that the Marquette law faculty maintained its longtime interest in ensuring that its graduates were reasonably ready for the practice the day of graduation. After all, Howard had been the state public defender of Wisconsin in the 1970s.

My own background was in a large Chicago law firm, doing litigation, mostly of an appellate and regulatory sort, but leaving me with enough general affinity for litigation that I did not hesitate, eight years away from Chicago and two years into my deanship, to represent a high-school classmate in a long-running divorce case in the DuPage County Circuit Court outside Chicago. That activity had the incidental benefit of enabling me to work up a different talk, "10 Things That I Learned During My 28 Days as a Divorce Lawyer," which I have given a few times at Marquette. In short, I am a *lawyer*, licensed in my native Illinois and adoptive Wisconsin, and my own classes over the years, through today, include what one might term "skills courses."

So what, then, is the affirmative case for theory, scholarship, or "ivory tower" thinking in legal education, at least to the general extent that it is present today? To begin, it is that lawyers by and large are not mere scribes or clerks whose duties ▶▶

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“ I am not Matthew Arnold, and neither should you be. One does not need to be a pre-legal-realist or a legal formalist to believe that the law matters and that when we say that one is educated or even trained in the law, it should mean that that has included study of some considerable amount of law.”

consist simply of filling out forms or applying in a semi-mechanical manner established practices to the problems of the next person in the queue outside the door—and the progress of technology and of global markets will probably ensure that even fewer graduates of our law schools are needed for such tasks. Instead, they are largely dealing with a substantial range of human experience and a diverse set of needs, and many of the solutions or approaches that they can offer will require creativity, judgment, research, and good habits of which a legal education including a substantial amount of theory can be especially conducive.

To be sure, I do not defend here a purely theoretical education, and no one familiar with Marquette Law School would think me to be inclined to do so. Most of our students actively engage—as part of their curriculum—in supervised field placements and externships with courts, other government agencies, and nonprofits. Even before this, they take courses that are marked by an emphasis on “skills” to a greater degree than their predecessors even a dozen years ago.

To resume with the affirmative view, part of it simply rests on the amount of law that one encounters in trying to sort through the implications of many clients’ primary conduct—and the recognition that this law is knit together in large part in ways that can only be described as “theory.” In speaking, along with Chief Justice Shirley Abrahamson, at the dedication of Eckstein Hall, Marquette Law School’s new home as of 2010 (that is the modest building next to the Marquette Interchange in Milwaukee), Justice Antonin Scalia said that the “aspect of legal education that the

law schools do best” is “the conveying of a systematic body of knowledge concerning discrete areas of the law.” He used as an example bankruptcy law, which to this day he regrets not having taken in law school. We may acknowledge that a Supreme Court justice has more need of *law* than the average practitioner, but I think the point to be broadly applicable. My own hobbyhorses (and not out of any self-interest, in the sense that this is not among the courses that I teach) include the class that some law schools call “corporations” and that we at Marquette denominate “business associations.” This is scarcely intended just for the transactional lawyer: it seems to me that one practicing in family law, the personal injury field, or employment law simply *must* have an understanding of the corporate form (broadly speaking) whereby so much happens in our society (and wherein or whereby, for my crudest statement tonight, so much money can be found or protected).

Yet it is not just the knowledge of law for its strict relevance to a client’s problem that recommends an education that includes substantial legal *doctrine*, to use a word new in this speech, in order to capture a concept overlapping substantially with *theory*. Perhaps the essence of my view can be captured succinctly in one of my colleagues’ comments a number of years ago, in response to someone advocating still more emphasis on “skills education” and correspondingly less focus on “doctrine” or “theory.” He asked, “When did *ideas* stop being important to one’s work as a practicing lawyer?”

When I spoke 10 years ago, I characterized myself as seeking to be “somewhat provocative”—and I

wish to make another effort here. When one talks about the “ivory tower” and the need for still more practical education, I worry that an anti-intellectual spirit is reflected, which seems jarring in post-graduate education. I wonder whether among some this does not reflect a view that all that really matters in the world nowadays is politics and that every legal issue is political. In such a world, theory and scholarship and all that other high-minded stuff just get in the way, and insisting on them is more than slightly ridiculous, since none of them will ever really matter. Criminal law is primarily about oppression, particularly of minority men; such topics as contract law are just about legitimizing corporate power and holding down the poor. Let me not allude simply to my friends on the left. Those on the right are susceptible of the same cynicism: Chief Justice Roberts could not *really* have believed that the Affordable Care Act’s individual mandate does not amount to a tax for Anti-Injunction Act purposes but *does* for purposes of falling within Congress’s taxing power. Et cetera. I am more naïve, less cynical even while skeptical (or such is my effort to be), more inclined to see gray than black and white, capable of persuading myself that the law matters.

I hope that you are as well. Most practicing lawyers in my experience are not cynics, at least not most of the time, and wish, if anything, that they had picked up more legal theory before they got thrown into the struggle of helping people solve their problems. Unless we are just going to throw out law, it turns out that one still has to persuade judges to rule in his client’s favor, and understanding the theoretical background of a body of law usually helps in that endeavor.

I do not know whether this is the speech that you envisioned either when the invitation was made or even when Dean Raymond yielded the podium. I believe that I have kept faith with the invitation, as fairly construed my remarks have touched upon, at least implicitly, not only no. 10 on Dean Raymond’s list summarizing current proposals but also nos. 1 (the two-year degree), 2 (no more tenured faculty), 3 (more skills training), 7 (two kinds of law schools),

perhaps even 8 (the lawyer “residency”), and 9 (“more externships!”). And I acknowledge that mine is more of an apology for the status quo and a *hope* for the future than it is a *prediction* of the future. The American Bar Association will have a good deal more to do than Marquette Law School in determining the future direction of legal education.

Yet this seemed a suitable occasion, after a decade on the job and even as the dean who has broadened Marquette Law School’s mission on both the public service and public policy fronts, to say a few words in favor of the status quo. And when I am back at the podium next week in my Federal Courts class, talking about Judge Henry Friendly’s statement in *T.B. Harms* that Justice Oliver Wendell Holmes’s characterization in *American Well Works* of the well-pleaded complaint rule for determining “arising under” federal-question jurisdiction “is more useful for inclusion than for the exclusion for which it was intended,” I will do so not because I like talking about Justice Holmes and Judge Friendly and reading the cases (although all this is true). Rather, I will do this because I expect that some of those students may want to get a case into or out of federal court some day, and I think that ensuring that one’s complaint satisfies the jurisdictional requirements of the federal courts actually requires not only knowledge of the sections of a complaint required under Rule 8 but understanding the law.

My Federal Courts class is a place to end. Our class reading for this past week (I teach the course with ▶▶



Tom Shriner) included then-Justice William Rehnquist's concurrence in *Northern Pipeline v. Marathon Pipe Line*, the 1982 case striking down aspects of the bankruptcy system as violating Article III (presumably because some bankruptcy practitioner had made the argument). The concurrence characterized Justice Byron White's dissent as treating certain precedents as "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night." The allusion (indeed, the quotation) comes, of course, from Matthew Arnold's 19th-century poem, "Dover Beach." My own mind tonight ranges a few lines earlier in the poem,

where Arnold refers to "[t]he Sea of Faith" as having been "once, too, at the full," but now he only hears "[i]ts melancholy, long, withdrawing roar." I am not Matthew Arnold, and neither should you be. One does not need to be a pre-legal-realist or a legal formalist to believe that the law matters and that when we say that one is educated or even trained in the law, it should mean that that has included study of some considerable amount of law.

Thank you for your kind attention. Dean Raymond and I would be pleased to respond to any questions or comments. ■

Professor Alan R. Madry

Remarks at Midyear Graduation

On December 15, 2013, Marquette University Law School celebrated its midyear graduates with a hooding ceremony and luncheon. The tradition over the past decade is for a faculty member to deliver remarks. This year, Professor Alan R. Madry spoke.

What a wonderful day. Congratulations to all of you—to our graduates in particular, but also to your family and friends who have supported you these past few years and share in your success. It's a privilege for the faculty who have shared so much with you in and out of the classroom to be able to celebrate this enormous achievement with you. Having been through it ourselves, we know well what an achievement this is. Parents, significant others, children—you are part of our extended family. The Law School is much more than just a school; it is also a center of public policy discussion for the entire community, and you are always welcome to visit and join in those presentations and discussions.

Let me begin with a deeply insightful minor country hit from the mid-1970s, written and recorded by



Alan R. Madry

England Dan and John Ford Coley. This song reflects one among the common themes of country music. There are no freight trains; no one goes to prison. The song is a lament for what the singer gave up as a young man to follow his muse. Among the things that he gave up was the love of a young woman. The song, titled "Lady," is addressed to this woman, and in its three or four verses, the singer reminisces about their time together.

But it is in the refrain where he addresses her most directly, in the present, and he asks her, pointedly: "Do you still seek the mysteries of life? Or have you become some businessman's wife?" I heard this song the first time some 30 years ago on a cross-country drive with my wife. It came on the radio somewhere in a snow-covered valley outside of Telluride, Colorado. That refrain buried itself deep in my imagination: "Do you