

Introduction

John Garvey

Editors' Note: The following five papers are part of a set of panels presented at the 2009 AALS meeting exploring the role of institutional pluralism in the context of legal education. As then-AALS President John Garvey noted in his presidential address, there are forty-eight religiously-affiliated law schools whose missions are defined or influenced by particular faiths. The papers below explore the value and limits of religion in legal education. The *Journal of Legal Education* may publish additional papers from this symposium in future issues.

During my term as President of the Association of American Law Schools, I proposed that we focus our attention on the idea of institutional pluralism. This idea occurred to me in the first instance because of my attachment to Catholic higher education. My wife and I have sent our children to Catholic colleges because we want them to be able to integrate their faith with their understanding of art, literature, philosophy, politics, and science. I think there is a place for this kind of comprehensive wisdom in legal education too. Let me offer a few examples.

Catholics believe in the sanctity of human life. This is connected to some theological ideas about creation and the incarnation. This belief has obvious implications for how we think about criminal punishment. It is difficult, for example, to accept the idea of general deterrence as a justification for punishment. It is also hard to accept the idea of capital punishment. Modesty compels me to admit that Catholics have been slower to come to this conclusion than some other Christian (and non-Christian) churches. But that doesn't undercut my point that there is a connection between law and theology.

Catholics believe we should have a special concern for the poor. The Beatitudes (Matthew 5:1-6) and the parable of the Last Judgment (Matthew 25:35-40) teach that the poor are especially blessed, and that God will judge us according to how we care for them. The U.S. Catholic Bishops' pastoral letter *Economic Justice for All* (1986)¹ argues that these ideas have a bearing on how

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1. U.S. Catholic Bishops, *Economic Justice for All*, Pastoral Letter on Catholic Social Teaching and the U.S. Economy (1986), available at http://www.osjspm.org/economic_justice_for_all.aspx.

we think about unemployment, welfare policy, agricultural programs, and our attitude toward developing nations.

I could offer further examples, but you get the idea: a law school where these kinds of ideas are in wide circulation is going to have a different intellectual climate than the University of Kentucky.

This is, you might say, a fairly parochial point of view. So it is, though as my predecessor Bob Drinan, SJ, was fond of saying, there are fourteen Jesuit law schools in America, and they educate ten percent of the profession. And there are twenty-five Catholic law schools in all. And if you look at the mission statements of other religiously affiliated law schools—Baylor, Brigham Young University, Cardozo, Pepperdine—you will find echoes of what I have said in all forty-eight of the AALS's member and fee-paid schools.²

The class of religiously affiliated law schools is a subset of an even larger idea. Consider another class of schools—those at historically black colleges and universities like Howard University, North Carolina Central University, and Texas Southern University. In 1935, Charles Hamilton Houston wrote an article about the special mission of Howard Law School.³ He pointed out how few black lawyers there were in states like Alabama (4), Mississippi (6), and Louisiana (8). There were a lot of white lawyers in those states but, he said,

[E]xperience has proved that the average white lawyer, especially in the South, cannot be relied upon to wage an uncompromising fight for equal rights for Negroes. He has too many conflicting interests, and usually himself profits as an individual by that very exploitation...which, as a lawyer, he would be called upon to attack and destroy.⁴

Houston conceived for Howard a special mission to serve this underserved population. This would mean a different academic emphasis. The law of business associations might focus on small business rather than multinational corporations; the law of carriers on the passenger or shipper rather than the management. Life and fire insurance would draw more attention than marine insurance. The historically black colleges and universities are like religiously affiliated schools in several respects: (1) they have a distinctive mission and point of view that influences the intellectual culture; (2) that mission may influence the subject matter of the curriculum; and (3) they hold a special appeal for some groups of faculty and (4) students. There is, in the universe of law schools, a kind of institutional pluralism. Boston College and Howard are different from other schools, in different ways.

But they are not alone in being different. Consider a third class of schools—ones with a unique point of view, like George Mason. Henry Manne, the

2. Out of a total of 195.

3. Charles Hamilton Houston, *The Need for Negro Lawyers*, 4 *J. Negro Educ.* 49 (1935).

4. *Id.* at 49.

godfather of that law school, wrote about his vision for it in 1993.⁵ The original plan called for students to “major” in one of several academic fields—economics, political science, technology, or behavioral science. That was too expensive, so George Mason decided to concentrate on economics. A lot of fields in law made use of economics. There were enough academics trained in Law and Economics to build a faculty. Students would be introduced to the culture through a six-hour course in Quantitative Methods. And nearly every course would have a Law and Economics flavor.

The antonym of George Mason might be a school like Antioch (which eventually merged into the University of the District of Columbia).⁶ Antioch was started by Edgar and Jean Cahn in 1972 to train public interest lawyers through a comprehensive clinical method. During their first two weeks in school students would live with families in poor areas of Washington. Before the first year was out students and their teachers would work at providing free legal services to these clients.

Then there are schools that have a special subject matter focus rather than a point of view—environmental law (Vermont Law School, Lewis & Clark Law School), intellectual property (The Franklin Pierce Law Center).

Finally (maybe I should have started here) there are the state law schools—more than 50. State schools often have a well defined mission to a particular population. The University of Kentucky used to negotiate with the legislature about how many out-of-state students it could take. They are a distinct minority, and of course they pay more tuition. Kentucky has a well developed specialty in Equine Law. Its environmental program and one of its journals pay special attention to coal mining. The Law School and some of its faculty also perform research functions for the Kentucky General Assembly.

The Advantages of Institutional Pluralism

The examples of institutional pluralism are so familiar and so numerous that we might miss the point about how counter-cultural it is to celebrate the idea. In our everyday thinking about law schools we tend to measure them by the same yardstick. The ABA has its standards. The AALS has its four core values. The *U.S. News & World Report* lines schools up on one axis and ranks them from 1-200.

On the whole I think that cultivating differences is a better thing for legal education. It may be good for consumers of legal education in the way varieties of mustard are good for consumers of picnic food. Prospective law students have different tastes. Charles Hamilton Houston’s ideal of a school that taught its graduates to undertake a career of service and fight for equality might appeal to a young African American from Alabama. BYU’s offer of an

5. Henry G. Manne, *An Intellectual History of the George Mason University School of Law* (1993), available at <http://www.law.gmu.edu/about/history>.

6. The Council of the District of Columbia created the District of Columbia School of Law in 1986 to take over Antioch. In 1996 the School of Law merged with UDC.

opportunity to integrate the study of law with service and spiritual growth might appeal to a young Mormon just back from a mission in Argentina. A young woman who wants some day to be governor of Kentucky would have reason to prefer UK over Duke.

Institutional pluralism might also be good for the progress of legal thought. We are not as comfortable talking about truth as John Stuart Mill was when he wrote *On Liberty*. But most of us acknowledge the idea of forward progress in intellectual life. Einstein's theory of general relativity explains better how gravity works than Newton's system does. Let me mention five ways institutional pluralism might contribute to this effort.

One obvious advantage of having a group of people using the same tools or thinking about the same problem is that more people know more. On weekends my wife and I do the crossword puzzles together, and we go more than twice as fast as either of us can working alone. She knows a lot of words I don't. This is hardly surprising. We read entirely different kinds of books and magazines and have for years. Let us call this advantage more data.

A second advantage of having several people interested in the same problem might be parallel processing. Think of my wife and me doing the daily Jumbles rather than the crossword puzzle. These are five anagrams that answer a riddle. The first clue might be ENAKO, which you can unscramble to spell OAKEN. The second might be DROVEN (VENDOR), and so on. Here we go faster not because we have more data but because we can run through two sets of permutations at once.

A third advantage to collective intellectual effort is the one we usually have in mind when we talk about mentoring. I read Walter Isaacson's biography of Einstein⁷ this summer. You often hear it said that Einstein was a better physicist than a mathematician. The point is exaggerated, but there is some truth in it. When Einstein moved from Prague to Zurich in 1912 he asked his friend Marcel Grossmann for help with non-Euclidean geometry. It was the introduction to Riemann's metric tensors that allowed Einstein to capture the general theory of relativity—the idea that gravity could be defined as the curvature of space-time.

A fourth feature of institutional pluralism—I'm not sure whether to call it an advantage or an aspect—is what we might call the institutional aesthetic, or style, or culture. Consider the Venetian school of painting in the 15th and 16th century—Bellini, Giorgione, Titian, Tintoretto, Veronese, Lotto. There were things these painters shared and collectively developed. One was an interest in light and color that anticipates the impressionists by four hundred years. (Think about *Venus and the Lute Player* at the Metropolitan Museum.) A second was a distinctive style of brushwork that gave their paintings a smooth appearance. A third was the use of oils, a development born of necessity; the Venetians needed a medium that would stand up to the damp air of a city laced with canals.

7. Walter Isaacson, *Einstein: His Life and Universe* (Simon & Schuster, New York, NY, 2007).

Finally there is what I might call the coffeehouse effect—the communication of similar ideas across different fields. I’m not sure I can describe how this works. Carl Schorske’s interesting book *Fin-de-Siècle Vienna*⁸ explains how revolutionary changes communicated themselves across different fields in the coffeehouses of turn-of-the-century Vienna: how the Expressionist painter Oskar Kokoschka and the atonal musician Arnold Schoenberg shared the idea that everything is in flux; and how Freud in psychology and Gustav Klimt in art both began to explore the world of instinct, self, and the interior life.

Some Questions

I have sketched a picture of institutional pluralism in legal education, and suggested some ways in which schools with distinct cultures might both serve students better and advance the cause of legal theory. I would now like to mention some doubts I entertain about my own idea.

The first is big: institutional pluralism may be impossible. David Riesman once gave some lectures at the University of Nebraska⁹ in which he talked about his failed effort to build a distinctive law school at the University of Buffalo. His idea was to “develop a curriculum that was not merely a minor league version of the Eastern Seaboard schools but rather one which was designed with reference to the particular problems of Western New York.” The effort failed because of three homogenizing influences. First, at least half the faculty, and all but one of the younger people, had gone to law school at Harvard. They wanted to teach the courses that were held in high esteem at Harvard. Second, good students tended to have their eyes on the Supreme Court and the SEC, not the Buffalo City Planning Commission. Third, the faculty and the administration were interested in building an institution that would succeed according to the established norms of ranking. I might add a fourth such influence: large firms find a simple ranking system like that used by the *U.S. News & World Report* attractive for the same reason law schools like LSAT scores: both are ways of reducing information costs and simplifying the process of choosing among many applicants.

Some of Riesman’s objections have less force today than they did seventy years ago when he taught at Buffalo. There are more good law schools competing with Harvard. I don’t just mean Yale, Chicago, and Stanford. There is a more vibrant intellectual life in the American legal academy today than there was in Riesman’s time. Young faculty must write before they can get hired. They have more and different role models, and a more sophisticated understanding of the *U.S. News* rankings. It may be that we are better able, at half a century’s remove, to resist the temptation to all be like Harvard.

8. Carl E. Schorske, *Fin-De-Siècle Vienna: Politics and Culture* (Albert A. Knopf, New York, NY, 1980).

9. Published as *Constraint and Variety in American Education* (Doubleday, Garden City, NY, 1958).

I could say more along this line, but let me turn to a second kind of objection: even if we could make institutional pluralism work it might be a bad idea. Maybe what we want is diversity *within* institutions, not pluralism among institutions. Maybe the best way to discover truth is “out of a multitude of tongues”¹⁰ rather than through a collective effort. John Stuart Mill says it’s good to have dissent—not everybody walking in the same direction—because (1) an unpopular opinion might be true; and even if it is not, (2) we will understand the truth better if we have to defend it.¹¹

This objection is something of a red herring. Even if institutional pluralism meant that private schools could limit unorthodox expression,¹² we would still have disagreement between institutions. It’s not clear that Mill’s argument entails protection for dissent at every level. More importantly, though, the idea of a distinctive institutional culture is not inconsistent with individual freedom of inquiry. None of the advantages to collective effort which I described entails or depends on censorship. My wife and I would do crossword puzzles and Jumbles less effectively if either of us tried to control what the other thought. A mentor is a bad teacher if she forbids her student to put her insights to new uses. The Venetian school of painting taught and nourished a distinctive style of art through collaborative effort. It did not depend for its success on the suppression of competing styles. You see the point: collaboration is not control.

Conclusion

You may detect a note of uncertainty about the suggestion I am making. Institutional pluralism is a familiar phenomenon (most of us work for such places), but one we have not embraced in the legal academy. I think it would be a very healthy thing both for our students and for the intellectual life if we paid more attention to it. Schools don’t need to compete on the same track to succeed.

10. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

11. John Stuart Mill, *On Liberty* (1869), ch. 2, available at <http://www.bartleby.com/130/>.

12. As Wheaton College attempted to do when it fired Joshua Hochschild in 2006 for converting to Catholicism. The First Amendment would of course prevent a public school from doing this.