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The Law School as a Center for Policy Analysis: Comment

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COMMENT

BY RAYMOND BOWERS

WELL, I wonder how many people sitting around this table envy me the role of responding to Professor Miller's paper entitled *The Law School as a Center for Policy Analysis*. Unhappily, I do not think his paper reflects what I think are the challenges and the problems. The fact of the matter is, in my opinion, the law schools are facing both problems and opportunities quite comparable to those which were faced by the physical sciences at the end of World War II. Physicists in the universities and elsewhere, proved themselves to be highly opportunistic with regard to the general environment of that time. I think a similar situation exists today with regard to law schools, our subject of discussion, and of course our engineering schools. But, I am going to concentrate on law schools at the present time. There are new opportunities that I think the dynamic law schools will accept and do something about; however, certainly not all are going to take advantage of this opportunity.

Now, it is a difficult task to respond to Mr. Miller, as he makes so many points; it would take me several hours to respond. I will therefore try to restrict myself to his principal points. The paper really is divided into two parts. The first part deals with his perceptions of the problems of science, technology, and society. The second half deals with how law schools should respond to the demands that these problems will make on the law schools. I am going to spend most of my time on the second half, because that is where he makes concrete proposals, but I must say something about the first half.

He has obviously got a pessimistic and even alarming perspective of the problems that face us. For example, he states, "that mankind now lives on the knife-edge of ecological disaster and that unless he mends his ways, and soon, we will soon be in another Dark Age, one from which *homo sapiens* will never emerge." He says that, "as matters now stand, science and technology, for what doubtless are multiple reasons, are ends in themselves, with those ends being aided and abetted by the American legal profession and the political order." He says at the end of that page, "science-technology mean change, rapid and awesome beyond measure. . . ." He says in his paper that he is highly dogmatic. I do not really object to the dogmatism because it does help clarify his viewpoints, but my reaction is that the whole first half of his paper is unscholarly and borders on the hysterical. I would not feel that this was an important point to make, if it were not for the fact that in an emotional climate about technology and

society, the universities are the one place which must remain centers of objective analysis agreeing that one can never be completely objective.

The point I would like to make is that we should not become a political arena, or political soapbox, where any kind of rhetoric is acceptable. He talks about how, "we are still bound by a set of intellectual conceptions that have been smashed beyond repair. . . ." I do not know what he is talking about, and I question whether he does. He refers to John Platt, and he goes on to say "Platt says, '[w]e may . . . have less than an even chance to survive until 1980'. This statement, Platt himself says 'may seem uncertain and excessively dramatic. But is there any scientist who would make a much more optimistic estimate after considering all the different sources of danger and how they are increasing?' " The answer is yes. I do not underestimate the seriousness of the problems that we are facing with regard to technology and society, and I have given a good part of my recent professional career to working on them. But I do react very strongly to overstatement of the problem.

In order to have some perspective, one must know something about the history of technology. It is not true that technology is producing changes so awesomely rapid that society has never faced problems of that magnitude before. If one does not want to look at a complete history of technology in its interaction with society, he should at least look at what the Industrial Revolution did to rural England and how rapidly it did it. And since we are in Denver, I pick out what may seem to you a rather inoffensive invention and ask you to concede with regard to life on the plains states: what the invention of barbed wire did nearly a hundred years ago. It is not a new problem and I do not see any reason at all why we should beat our breasts and say we will all be gone within ten years. But, of course there is hanging over us the danger of a nuclear holocaust. That problem is different than the control of our civilian technology.

Now during the first part of the talk, Mr. Miller comments on law schools, their faculty, the university, and the tenure system, and whenever he sees anything that he recognizes, he flails at it. I am not trying to follow his comments because I do not really see that they are very constructive. Universities, and to be sure their faculties, have a certain conservatism, but it is irresponsible to say that this conservatism is simply a patina with no substance to it. The reasons for tenure are profound, and the problem before us at this conference is how we are going to move these organizations to deal drastically with these problems.

It is nonsense to say that drift is the way in which a normal university is operated. The Morrill Act of 1862 was not a piece of drift. The introduction of black studies in more recent years was not just a matter

of drift. There are quiet revolutions, or at least high evolutions, going on in the universities at present, and I see no reason at all why we cannot modify the universities to take into account the problems that we want them to face. I also find it too simplified to say that due to law professors having a tenure, there are too many time-servers in the system. It has been my misfortune to work in industry, government, and in the university, and I have found "time-servers" wherever I have been — with or without the tenure system.

Now let me turn to where he says "[i]f I have not succeeded in turning you off by what has already been said, let us turn our attention to what we in the law schools might do about the crisis of crises." Anybody who lived through the thirties, anybody who had any understanding about what went on in Europe during the thirties and the forties, finds it hard to believe that we are now faced with "the crisis of crises."

Let me turn now to the other points that he makes, and couple some of them together. He says in point number one that the law school curriculum needs thorough revamping. I assume that he means by thorough revamping, substantial revision. Of course they do. Although I am not an expert on the law school curriculum, I am sure the law curricula lags behind the needs today as much as most curricula do. And he is right in saying that we have got to work on them, we have got to change them. But please, we are in a position here to address the question of how and in what direction, but because of the limited time, we probably will not even be able to specify how they should be changed. Nevertheless, do you think we could organize a conference on the need to change law school curriculum? If we achieve nothing else, and decide where it should be held, who are the hosts, who would be an effective agency to do it, we will have achieved a lot. I do not think you can deal with this problem by saying it is just a matter of dropping the amount of time spent on contracts.

Many of the points he makes, in spite of the harshness of my earlier words, are, of course, important ones. He says prelegal education can no longer be ignored. I think he is absolutely correct, but again, I do not really see that we are dealing with insuperable problems. I think the law schools should address the question of whether they need to recruit more of their people from science and technology backgrounds. It may be true that the backgrounds of people entering law has been unduly restricted, considering the problems that they will have to face in the future. I do not think there will be any difficulty in the future attracting people who know something about science and technology into a career in law.

The content, he says, of what is given in courses should be rigorously examined to determine what is relevant and meaningful to the

needs of the era. The word "era" is a fairly strong word. I presume he means the next decade. Of course we have got to do that, but we must also be careful not to overdo it. We need to educate students with some kind of fundamental knowledge that will be relevant to the next decade and the decade after that. I think no school could fall into a worse trap than simply to tip up its whole curricular arrangement simply because we seem to be obsessed with some very special problems of national significance at the present time.

I agree with his first three points completely. We must examine the curriculum and probably deal with our most sacred holy cow, that is the commonly held view that the student is going to learn within the university and stop after that. If you believe that he is going to learn in the future you would not worry so much about the requirements of the curriculum, as we do at present. Also, we have to worry not just about content, but about the motivation of people to go on into the professions.

Another point that he has made, seems to me to be an extremely important one. At least it is important in the universities with which I have been associated. He says that the law schools should become truly a part of the universities. I do not understand how it is that, presently, jurisprudence and the history of legal processes is really not taught to undergraduates by the law school, but it is taught by political science departments. I think, whenever that happened, it was a profound mistake, as law schools cut off a bridge to the undergraduate body. And I think the separation of the law school geographically, while it may have reasons in the urban university, is something for which we have paid a very high price. "Law should be taught," he says, "as a liberal art and no one should get an undergraduate degree without having taken such a course." I wish the law profession would devote much more attention to providing the proper kinds of courses for students of broad background.

Let me go on to his point number six. He wants a new category of professors, one of them being a group of research professors "who would spend their time doing the vastly important task of research now being neglected." My feeling on that point is the following: I do not want to be dogmatic, you cannot really prescribe a principle that will apply to all circumstances, but I would not follow his advice there as the general rule. I think we learned in physics, where research is an integral process of all of our good departments, that you lose something very substantial when you isolate people as research professors. What he should be arguing for is an increased amount of research on the part of law professors, and the integration of this into their teaching and their attitudes towards students.

I am certainly glad to say that at Cornell, for example, in physics, we have no research professors of the kind about which he is talking.

Our most distinguished men all teach graduates and undergraduates, like anybody else, and I believe it is one of our strengths. That is not to say that there will not be special circumstances where a "research professor" makes good sense. But I am not impressed with what happens as a result of the isolation of the professors in an essentially think-tank environment and the incredible loss, as a result, to the teaching process of what are some extremely gifted people.

I, in that sense, for example, do not particularly approve of the Princeton Institute for Advanced Study in terms of it being a full-time occupation. How much better off the world of physics, at least, would be if various people that I could mention on that extremely distinguished staff, had some contact with our graduate students and our undergraduates.

Now I come to his final point, the one he says he wants to hammer home with some force: "The law school should undertake, as one of its principle missions, the task of becoming a center for policy analysis." He hammers it home in the remaining part of his paper. Here again, he says, "I should add that CPAs may well not belong in the university at all, that institution with its incrustation of practices honored only by time and not by rationality, with its narrow-minded, bureaucratic methods of operating . . ." He says it may not belong in the university. He implies that if he had one million dollars for an investment in the pollution problem, he would put it in Arthur D. Little,¹ instead of the university. He clearly does not understand what Arthur D. Little can do. These are complementary institutions, we need the "not-for-profits," we need the universities. The question is how we are going to interact in a kind of compatible fashion. And it is not a question of whether you would put a million into one, or a million into another.

It is nonsense to suggest that the universities have no experience in problem solving. It is true that their experience is in a limited area. There are few organizations more problem-oriented than the College of Agriculture at Cornell University, and many others as started by the Morrill and Hatch Acts. There is no prophet institute that could tackle problem-oriented research in the field of world food production to compare with the Cornell College of Agriculture. However, I do not know the answer to the question of whether we can apply the same techniques to other areas of more pressing social significance today. Obviously, there are a lot of difficulties, but I reject the point that universities have no place in this area, and that the research institutes and national laboratories have such a clear advantage that we should give up before we start.

¹ Arthur D. Little is one of several independent research institutes mentioned by Professor Bowers. He occasionally refers to them as "prophets."

I have just come from the Oak Ridge National Laboratory, and obviously there are some people who feel that that is the kind of place where problem-oriented research should be undertaken. I want to assure you that it does not take a very perceptive person to see that they also have severe problems with undertaking problem-oriented research of the character that we are discussing. They also have organizational boundaries. It is not just a product of the university. Most organizations have a kind of human sociological cell structure, and breaking through the walls of these cells is only slightly easier in the national laboratory than in the university.

Now all I want to say with regard to his point seven regarding centers for policy analysis, is to repeat what I said earlier about the research professors. I cannot prescribe any procedure that is going to apply to all universities. If he would modify his statement to say that some law schools should become centers for policy analysis, then I would be with him completely. However, I think that he has approached it somewhat backwards because I believe it needs to be organized at the university level. At Cornell we are going to do it at the university level, and we hope to include the law school, and if not the law school, at least lawyers, as an integral part.

At Cornell, for example, the idea of starting such a center within the law school, or within the college of arts and sciences, or within the college of agriculture, would have been a profound mistake. I do not say that is so for the University of Denver. In fact, one general prescription I have learned through my participation in the organization of our program on science, technology, and society, is that the program must be custom-fitted to the institution.

At Cornell we have set up a program which reflects very much the strengths and the weaknesses of Cornell University. And that is how you have to start, I mean to get anything done, build on the strengths that you have. Now there may be a few places where a natural focus for this kind of activity is within the law school. I suspect it is not so at the majority of universities, but it may very well be so in one or two places.

At this stage of the game, I simply want to say that we at Cornell have been involved for a year in a formal program on science, technology, and society. I think we have had successes, but we have also had failures. We are faced with many problems to achieve the kind of thing that Mr. Miller is talking about.