

THE DAWNING OF A NEW ERA? LAW, LAWYERS AND LEGAL EDUCATION*

Peter J. Kalis**

Lawyers have been a continuous thread in American history. From Wythe to Marshall, Lincoln, Holmes, Brandeis, Davis, Marshall and Ginsburg—and many more—lawyers have led the way in American society. They have done so, moreover, along a continuum of legal thought, process, and education that would be generally recognizable to each. Now, however, there is stress in the system that threatens to change it in ways that I believe we would live to regret, and profoundly so.

In this address, I would like to cover a few of these points of stress and suggest ways forward for our profession. In doing so, I am mindful that I am participating in a symposium about the evolution of our profession in Pittsburgh. Although Pittsburgh is the only place I have ever practiced law, my comments will be more broadly cast for two reasons. First, what happens in Pittsburgh doesn't stay in Pittsburgh. Second, what happens in the world doesn't stay out of Pittsburgh. This, as the great Wittgenstein said,¹ is the world as I find it—global, interconnected, highly communicative, and transparent.

* Editor's Note: The following was transcribed from Peter Kalis's lecture delivered at the Steel Bar symposium. It has been selectively footnoted according to the speaker's wishes.

** Chairman and Global Managing Partner, K&L Gates LLP.

¹ LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 151 (Harcourt, Brace & Company Inc., 1922).

I. LEGAL EDUCATION²

Let's start with legal education. Law professors led charmed lives for decades. Hiding behind Professor Kingsfield and various other iconic figures, real and fictional, they labored with light teaching loads, publishing outlets edited by people half their age over whom they exert hegemony in the classroom, and the abject admiration and loyalty of their graduates. Faculty from poorer or more capital-intensive academic disciplines lusted after their rich and generous alumni base. Lucrative consulting relationships beckoned. Law professors had academic swagger.

It's really hard to wake up with fire in your belly when you have things this good. Perhaps, therefore, we should not have expected too much from American legal education. Surely the cascading criticisms of the legal academy suggest a failed or failing enterprise. Even law schools are getting sued these days.

Yet, I would argue that the legal professoriate has been one of the great educational success stories in American history. It has generated hundreds of thousands of lawyer-citizens who populate every level of our society and who are imbued with the substance and spirit of the rule of law. They tend to be leaders in their communities, in the private sector, at all levels of the public sector, and in various other deployments in which sharp analytical minds, verbal skills and a sense of the public interest are prized. At the risk of provoking massive partisan retaliation, the President and Vice President of the United States and nearly half their cabinet are lawyers.

Notwithstanding their evident contributions to American society and, through ubiquitous L.L.M. programs, to foreign societies as well, American law schools and their faculties have lately descended to Rodney Dangerfield status. *The New York Times* has launched a multi-pronged assault. Law students (and their parents) decry the enormous debt overhang that greets them upon graduation. Major consumers of legal services are sharply critical of the unfinished product—lawyers with no practical skills—that law schools are placing into the stream of commerce. Chief legal officers of major corporations are increasingly outspoken on this subject.

² For a related article advancing the same proposal, see my essay in *THE AM. LAW.* (July/Aug. 2012), available at http://www.klgates.com/files/Publication/110eee16-9dd3-40d0-beb8-9b420b766c85/Presentation/PublicationAttachment/eadaa0d2-2afe-473d-8ae5-9cade8561fea/Kalis_AmLaw_No_Lawyer.pdf.

What about law firms—the major customers of law schools? We hide behind clouds of ink and otherwise avoid eye contact so as not to anger our firms’ major clients or the law schools that supply our firms with talent.

In assaying the criticisms, many of which are valid, I see no one on the “buy side” reverting to first principles and connecting proposed reforms to the overarching purpose of American legal education: To graduate into our society people who speak the language of law with confidence and who contribute to a world in which people and enterprises alike benefit from the rule of law. Put another way, it is less important that law school graduates know how to take a deposition than it is that they understand foundational legal concepts and know how to articulate and integrate those concepts clearly and forcefully in spoken and written English.

There are about 130,000 lawyers in the 200 largest law firms in the United States. They increasingly operate across a global economy because their clients do. And they are not the only U.S. lawyers who do so. Because they and their clients operate in markets around the world in which there may be no rule-of-law tradition, they are missionaries for an objective, predictable, and fair approach to legal process and substance. Their success in this mission will be critical to the creation of a world fifty years hence that is hospitable to the values embedded in free, capitalist societies. American law schools prepare them for this mission when, and only when, they teach their students how to speak the language of law with confidence.

How wonderful it is that this aspect of the global economy harmonizes so nicely with the realities of Main Street. American law schools can serve all points on the market spectrum by attending to fundamentals because it is assuredly the case that the language of law is as important on Main Street as on Wall Street or, for that matter, in the City of London or Hong Kong’s Central District.

So let’s ask: What systemic reform would honor the core purpose of the American law school as I’ve defined it, dramatically cut the legal educational expense for American law students, meet the vocational critiques of major consumers of legal services, take advantage of existing infrastructures and strengths, and get managing partners like me off the hook so that we can make eye contact again with legal educators and clients?

Meet Ralph and Alice, who will enter law school as 1Ls in September of Year One and graduate in May of Year Three. In the intervening 33 months, their law school will have Ralph and Alice for 27 months, and I will have them for 6. Of course, by “I,” I don’t mean me. I mean any summer job in a legal setting in which the purpose of employment is to support the provision of legal services in an age- and education-appropriate way. In other words, lifeguarding at the Jersey Shore won’t do.

After my 1L year, I worked at a small firm in Wheeling, West Virginia, called Schrader Miller Stamp & Recht. It would count. After my 2L year, I worked at Jones Day in Cleveland. It would count. Friends worked as clerks within governmental or corporate legal functions. They would count. Others worked at public interest law firms and legal services organizations. They would count. Hanging out with Snooki all summer would not count.

We should view Ralph and Alice's 33 months holistically and as an educational continuum. Law schools should set a goal of graduating their students in December of their third year, after five semesters instead of six, and focus almost exclusively on traditional course offerings for those five semesters. Instead of increasing their expenses by hiring adjunct and tenured faculty to teach "practical" skills, they should certify the experiences that students will receive in their summer jobs and outsource (at no expense to the law school or student) the practical side of the curriculum. If students get enough practical exposure and mentoring in one or both of their summers, they would be able to saw off their final semester or one-sixth of their time in law school. If not, they will have to suffer the expense of a sixth semester by being immersed in practical education.

Are there issues with this proposal that require resolution? I should think. The certification process requires a treaty between employers and law schools. Law firms and other employers would have to step up to the plate with elevated summer experiences. Law school faculties would have to be reshaped and right-sized. Leading professors would have to get back into the classroom.

So far I have not addressed the key issue: what should happen in those five semesters ending in December of Year Three. Or, put another way, what is the language of law over which a young lawyer should have command and speak with confidence?

At a rarified level, the rule of law is a wonderfully textured fabric that is structurally woven into modern, capitalist society. It's a magical, load-bearing fabric, and it had better be, because in a world of globalized commerce and transnational integration the Rule of Law will occasionally have to carry the weight of the world.³

At a less rarified level, the roots of the Rule of Law are sunk deep in the traditional teachings of American law schools. Think of contracts and torts and their intersection; the foundational principles of property and security; the

³ For its path-breaking work on the global condition of the Rule of Law, see The World Justice Project's Rule of Law Index 2011 at <http://www.worldjusticeproject.org>.

permutations of causation; the values embedded in objective and fair procedure, civil and criminal; the rules governing commercial transactions and their adaptations to advances in technology; the subtle history of the criminal law understood against the evolving disciplines of human behavior; the beauty of constitutionalism and the vile and ugly threat presented by its enemies; law's role in vindicating the values enshrined in our Bill of Rights, in mediating the societal tension between consumption and investment, and in encouraging innovation; the roles of courts, legislatures and other public institutions in modern society including transnational institutions; the sometimes troubled boundary between law and markets; and so much more.

Think of it all, moreover, expressed with confidence in powerful English, the medium of its greatest practitioners, and the undisputed legal language of choice of the 21st Century.

To the professors of American law schools, we continue to entrust you with the most sacred of ongoing obligations: To perpetuate a tradition of lawyer-citizens who are missionaries for the rule of law, here and abroad. Don't blow it!

II. LAW AND LAWYERS IN THE GLOBALIZED WORLD OF THE 21ST CENTURY⁴

The marketplace for legal services is multi-layered, complex and interactive. It stretches from Main Street to Wall Street, from the private sector to the public sector, from for-profit enterprises to not-for-profit enterprises and beyond. There undoubtedly are many people who are expert in all facets of this marketplace. I am not one. For the last three decades, however, I have spent my life in a single law firm that has grown in that time from the fifth largest law office in Pittsburgh to one of the largest law firms in the world, with 2,000 lawyers in 48 offices on five continents. This is what some commentators refer to as "BigLaw." And, while the blogs report daily that I am not very expert on this subject either, it is the only one that I feel comfortable addressing today. And if you have problems with that, address those problems with the folks who invited me to give this talk. It wasn't my idea!

For the 130,000 lawyers who work at the 200 largest law firms in the United States, for their counterparts in London-based firms, and for many smaller and more specialized firms as well, the traditional focus on excellent client service must

⁴ For a version of this analysis that challenges the stereotypical characterization of law firms as denizens of the "old," as opposed to "new" economy, see my contribution within the Symposium at 8 ISJLP 1 (2012).

be supplemented by an eye toward strategic positioning. In the 21st Century, the strategic position of choice is at the intersection of globalization, regulation, and innovation. Let me explain.

First as to globalization: Law firms take their positioning cues from clients, and these days even modestly sized clients compete in global markets and face threats in their home markets from foreign competitors. More specifically, there is a continuous movement of people, products, services, capital, ideas, and commodities across national borders. Sovereignty matters. Foreign legal systems matter. National borders matter. Clients need advice on this side of the border. They need advice on the other side of the border. And they need advice on how to cross national borders legally and efficiently. This Law School has been a leader in providing an international dimension to its educational offering.

At the same time, there is an inexorable penetration by governments around the world into private markets. This phenomenon is not so much born of partisan impulse—although that obviously plays a role—as it is public mission. As the universe of knowledge grounding public policy initiatives grows—what makes people sick, what drives climate change, how global financial markets relate and are interdependent—those regulators and legislators with public missions believe they must act. And they do—sometimes wisely and sometimes not. In either case, clients need solutions to questions posed by such interventions into private markets.

Finally, from the technology sector to various smokestack industries, clients innovate to survive. Much of the value of their enterprises is housed in intellectual property. The creation and protection of intellectual property is central to their experience. And lawyers are indispensable to both the creation and protection of intellectual property. For those who think that this is exclusively the province of the technology sector, consider this: In 1980, it took ten person-hours to fashion a ton of steel. Now it takes two. Steelworkers are not now five times as strong. Even smokestack industries achieve their goals through innovation.

Globalization, regulation and innovation form the critical cross-roads of the 21st Century. When a law firm reflects upon its strategic positioning, it is hard to escape the conclusion that it should reside at or near this intersection.

One final word on strategic positioning: The attack by some on our profession as insulated from forces of competition and as surrounded by barriers to entry is so misplaced as to be silly and naive. My law firm and countless others compete against other global firms, Wall Street firms, Magic Circle firms, national firms in the U.S. and elsewhere, regional firms, super-regional firms, boutique law firms, accounting firms, legal process outsourcers, consultants of various stripes, contract lawyer organizations, electronic discovery companies, document vendors and others. We even compete with our own clients for the same work, as many clients

wish to bring that work in-house to their own lawyers. And, of course, law partners leave law firms every day to reinvent themselves and compete with their former partners.

The market for legal services has never been more competitive than it is today, and indeed I believe it to be one of the most competitive of all business marketplaces because of the lack of concentration within the industry. Because many such irresponsible attacks on our profession come from the academy, I am bound to say that the only inviolable border in the legal profession of which I am aware is the one surrounding tenured law professors who lodge such bogus and irresponsible charges.

III. LAW FIRM STRUCTURE⁵

There is a movement in Big Law to exalt brand over structure. By that I mean that some large law firms are willing to affiliate on the flimsiest of bases in order to fly a common flag without any of the historical indicia of integration characteristic of law partnerships. I believe that this is commercially driven, backward-thinking, and short-sighted. It is, therefore, inimical to our profession.

Before I throw some paint at this canvas, allow me to step back and address a related question. There are many, inside and outside the academy, who get irritated in the most unseemly way when law is referred to as an “industry” instead of a “profession.” By way of admission, I should point out that I refer to it as both. Let me explain.

The legal industry is a series of concentric circles, the innermost of which is the traditional profession. As you move outward from this innermost circle, you encounter a variety of enterprises that collectively, along with the profession, constitute the industry. Law schools, professional associations, legal consultants, bankers to law firms, legal publications and support services to law firms are just some examples of the greater industry. Make no mistake about it, however, that the entire industry is leveraged off that innermost concentric circle: the profession of law.

Purported reforms that undercut the profession threaten the entire structure of the industry and undermine the contribution that law and lawyers make to society every day. In the long term, they will undermine the rule of law. What about outside investments in law firms from, say, public shareholders or private equity

⁵ See Peter Kalis, *Grand Illusion*, THE AM. LAW., May 2011, at 49. Compare Chris Johnson, *Taking on the World*, THE AM. LAW., Mar. 2011, at 70.

houses?⁶ Now there's a thought; perhaps this is a way that lawyers can make more money. But how would those lawyers reconcile client duties such as the attorney-client privilege with their fiduciary duties to outside investors, including the public? For a few dollars more, we would disable our profession to society's detriment.

I would place the "verein" movement on the same plane. A *verein* is a Swiss legal structure that some large law firms employ to retain their independence under a common brand. *Vereins* make it possible to say in nations around the world that I practice at a firm called Smith & Jones when, in fact, there are two or more independent firms operating under the Smith & Jones umbrella. The Pittsburgh legal community has within its offices some of the largest law firms in the world—Jones Day, Morgan Lewis & Bockius, Reed Smith, K&L Gates—and I am proud to say that none to my knowledge has taken a single sip of this Kool-Aid.

Clients should be able to depend upon the notion that there is a single law partnership under every legal brand. Law partners should be joined at the hip culturally and financially to provide seamless service around the corner or around the world. Why does this matter? It matters because our profession and our law firms exist to serve clients, not themselves. Clients—first, last and always—are the *conditio sine qua non* of our existence, and we either reaffirm that tradition across the ages or we embark upon a dangerous new direction.

CONCLUSION

For the past hour or so, you have endured a highly idiosyncratic walk through one corner of our wonderful profession. There has been a largely unspoken premise to the entire trip: Pittsburgh is connected to the world as it has never been before. Its lawyers, its law firms and its law schools are a point of enormous pride and a source of great strength as Pittsburgh carves out its role in the 21st Century. What will that role be? I think you will answer that question. I know what I would like to see: a legal community hard at work in its traditional role of vindicating the rule of law in large and small ways, at home and abroad. But for that to be true, we have to resist the forces of vocationalism in legal education and the mindless movement toward marginalization of the profession by those who, frankly, ought to know better.

⁶ The ABA Commission on Ethics 20/20 is currently considering if it will make a recommendation on whether nonlawyers should be allowed to have some form of limited ownership interest in U.S. law firms. See James Podgers, *Nonlawyer Ownership Interests in Law Firms Remains an Unsettled Issue for Ethics 20/20 Commission*, ABA J. (Feb. 3, 2012), http://www.abajournal.com/news/article/nonlawyer_ownership_interests_in_law_firms_remains_an_unsettled_issue/.