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# KEYNOTE SPEECH

## INTERACTIONS OF CLASSROOM, LAW OFFICE, AND MARKETPLACE: BEARINGS ON PROFESSIONALISM

VICTOR G. ROSENBLUM\*

President Schnabel, Dean Bodensteiner, Distinguished Guests, Ladies and Gentlemen:

It is a happy privilege to participate in the dedication of the new Wesemann Hall. Valparaiso has had a long and honorable tradition in legal education commencing with its founding of the School of Law in 1879, and enhanced by its approval by the American Bar Association in 1929 and its acceptance for membership in the Association of American Law Schools in 1930.

A fellow educator cannot help but take pride in your dedicated faculty, in the quality of the student body and the curriculum, in the contributions to the profession of your distinguished alumni, and in your placing the new library with its multiple accessible assets at the heart of the building. In addition to the impressiveness of these achievements, you warrant high praise for your insistence in your statements of what you look for in applicants that "law school requires a great deal more than mere academic ability. Law school requires maturity, integrity, dedication, and common sense." From personal visitation, I have seen in action your commitment drawn from religious belief in love of God and love of neighbor to have "a diverse student body whose members represent the wide variety of social, economic, ethnic, and religious backgrounds found in our society." We are at our best as legal educators when we manifest the pluralistic strengths of a society enriched by diversity. Your construction of a superb new facility for legal education for such a diverse student body reaffirms recognition of the primacy of the rule of law and of equal access to it in a democratic society.

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In each passing day's events we find compelling reminders that law is the primary alternative instrument for dispute resolution. It is *the* alternative to violence, blood-feud, and chaos. As the inscriptions on the front and back of the United States Supreme Court building symbolize, "equal justice under law" and "justice the guardian of liberty" make feasible the displacement of individual and collective wars in confronting disputes with utilization of and adherence to legal norms, processes, and institutions — the instruments of democratic governance, accountability, and peace.

Courses, seminars, and clinics are convened here to analyze, advocate, critique, and challenge the legal order's cases, problems, processes, organizations, and actions. You probe and prod, toast, and roast the delineation of doctrines, theories, facts, fables, and foibles in the law's quest for truth and justice.

As regards the case method of instruction, without being a card-carrying Langdellian, I continue to view the case approach as a practicable and essential vehicle for learning about and improving the law. Of course, what are sometimes alleged to be cases and materials on a certain subject can turn out to be disembodied, disemboveled skeletons of human and societal realities, leaving students and professors to conjecture about meretricious and penumbral rather than genuine and core features of cases. Those are occasional defects in implementation rather than of generic defects in conception and potential of the case method.

Last month, in the course of an Association of American Law Schools' conference on clinical legal education in San Antonio, at which Valparaiso was well represented, I enjoyed a musical spoof of the case method of instruction performed by talented clinicians toward the end of an otherwise serious and stimulating program. Entitled *2010: A Clinical Odyssey*, the show dealt with an all clinically operated law school to which a last-surviving adherent to the case method of instruction comes beseeching employment. To the tune of *Those Were the Days*, the lonely case method protagonist bleated:

We liked our reign of terror when  
Classes were Socratic and students were men . . .  
We can show we really rate  
When obscure points we illuminate  
Showing how some footnote errs  
Convincing us that we're great.

Although it should in no sense monopolize the law school curriculum, the case method, with all of its flaws, has yet to be surpassed, in my opinion, when it comes to capacity to demand and evoke critical, analytical thought and moral evaluation in dealing with the nature, complexity, and instrumentation of the command, "Justice, Justice shall ye do." Great cases such

as *Marbury v. Madison*, *Palsgraf v. The Long Island Railroad*, *Sweatt v. Painter*, *Chadha v. The Immigration and Naturalization Service*, *Palmore v. Sidotti*, and many others you and I might include, require us to focus on living relationships among legal norms and human deeds. Facts, motives, actions, confluences, reasonableness, proximateness, foreseeability, relevance, materiality, ethicality, and morality must be examined — not as impersonal propositions or aggregate data but as pertaining to and affecting the lives, capacities, and fortunes of identifiable persons.

Lawyers and legal educators no doubt derive satisfactions and jollies from debates over methodologies of instruction. But the most perplexing problems for our profession today are not tied to *how* we teach. Educational methodologies nationally, as well as at Valparaiso, are better and more effectively oriented than ever toward professional and skills training. To me the core problems are tied to *what* we teach, to the messages we convey via commission and omission to our students.

An essential element of what we teach is a focus on the rule of law, on law's availability to all, and on the accountability of all to the law; this is in essence a focus on a government of laws and not of men, as the framers put it. We are grateful to the framers of our Constitution for their originality, candor, and subtlety in articulating a system of effective and accountable governance. At the core of the system they developed lay distrust of undue power and of individual wielders of that power. Combined with this distrust was the realization that power to govern was as necessary as it was potentially abusive. How were the framers to achieve the necessity yet control the abuse?

Their eloquent prescription was summarized by Alexander Hamilton, James Madison, and John Jay in Number 51 of the *Federalist Papers*:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Aside from its tone of male chauvinism, that prescription is a timeless reminder of both objective and need in conducting the public's business.

The framers were not so naive as to believe that good intentions pro-

duce good deeds. The ability of the government to perform its necessary functions hinges not simply on having sufficient power to control its subjects but is dependent as well on ability and incentive to restrain itself within its proper sphere. Time and again we have learned that controls *over* government are as essential to effective democratic rule as are controls in behalf of the public interest *by* government.

By seeking to separate impulse to take action from the opportunity to carry it out, and by pluralizing initiatives as well as constraints through the separation of powers and checks and balances, the framers endeavored to energize capacity for effective action while controlling potentiality for abuse. One branch's ambition could be countered by the ambitions of the others. In such a system, pride, rather than weakness, attaches to the reigning in of governmental excess; it is when government denies to itself power to abuse power that it meets the acid test of responsibility.

As members of the bar and as educators of future members, we have a special role to play in meeting that acid test. Our professional skills must be available to monitor and constrain the uses of power and to maximize the accessibility of redress. How do we rate in performing this role?

In a speech at the University of Chicago two years ago, Justice Rehnquist criticized lawyers for being more interested in billing than in statecraft. Contrasting today's era with times when the profession gave the country such leaders as Thomas Jefferson and Abraham Lincoln, Justice Rehnquist observed that "[l]aw is surely a more profitable profession for those who practice it now than it was then, but one cannot help doubting whether its contribution to the political life of the nation has not been sadly diminished in the process." He was especially critical of us for "squeezing out" in the course of making law a paying proposition, "like any mass production effort does, the little diversities the profession would better tolerate." He noted with dismay recent transformation, especially in lawyers' roles in political campaigns, of "forensic battles into marketing events."

Legal educators must acknowledge that transformations from forensic battles into marketing events neither began with nor are confined to political campaigns when it comes to diminution of our professional stature. The hiring season for law students by law firms has shifted emphasis in many instances from probes of ability to prescriptions for dressing for success, and for psyching out interviewers to tell them what they want to hear rather than what the job applicant can and wants to do.

Moreover, we faculty members have at times succumbed to or abetted the marketing event syndrome. I noted in a talk in January at the AALS Convention corrosion of educational and professional values by our responses to some recruitment practices. Notwithstanding our insistence that preparation for and performance in courses to the best of one's ability are

as much hallmarks of the professional responsibility of emerging lawyers as are preparation for and performance at trial, we often "excuse" students on myriad "callbacks" for prospective jobs from their course preparation and participation. The fault lies not so much with the existence of the marketplace, which is a vital and functional manifestation of a free society, but with the response by legal educators to it. I would like to reiterate that however indirect the effect may seem to be, law faculty members who condone absences or accept less than students' best in class in order to accommodate to demands of the marketplace, are teaching and practicing the subordination of professional responsibility to fiscal values. Law firms and law schools need to refine and reform approaches and responses to recruitment so as to restore and enhance their confluence with the professional goals, responsibilities, and needs of legal education.

Although it did not address relationships between lawyer recruitment and professionalism directly, the Stanley Commission on Professionalism of the American Bar Association, in an instructive but unencouraging report issued last August, issued caveats regarding subordination of professionals to economic or market values which were entirely compatible with this concern. In the introduction to its report, the Stanley Commission posed the key question: "Has our profession abandoned principal for profit, professionalism for commercialism?" Justin Stanley and his colleagues never quite answer the question frontally, but their admonitions suggest that there is far more than a scintilla of support for a "yes" answer.

At several points in the body of the report, the commission called upon the profession to "resist the temptation to make the acquisition of wealth a primary goal of law practice." Toward the end of the report, the commission stressed that "[a]ctivities directed primarily to the pursuit of wealth will ultimately prove both self-destructive and destructive of the fabric of trust between clients and lawyers generally."

My good friend and fellow law teacher, Professor Harold Levinson of Vanderbilt University, recently commented in somewhat negative fashion on the commission's admonitions against acquisition of wealth as a primary goal of law practice. In a carefully crafted statement last month to the ABA's Special Coordinating Committee on Professionalism, which was established to follow up and facilitate implementation of the Stanley Commission's Report, Professor Levinson stated:

The Commission urges lawyers to "resist the temptation to make the acquisition of wealth the primary goal of law practice." I find this proposal unconvincing for a number of reasons. First, I have no interest in the goals — whether primary or not — of lawyers. I care about their conduct — specifically, the manner in which their conduct fulfills their duties to client, to profession, and to society. Second, any attempt to inhibit the

ambition of lawyers to acquire wealth is naive and, arguably, incompatible with some basic assumptions of our free enterprise system. Third, I have no interest in the income level of lawyers, either when expressed in terms of statistical averages or when revealed in connection with specific law firms or individuals. Thus the statistics about the income levels of lawyers (Report, pp. 8-9), even if factually reliable, seem irrelevant. In order to take a realistic approach, we should acknowledge that today's law firm is a business, and that its owners are entitled to maximize their income from it, provided they remain within the bounds of professionalism.

I do not disagree often with Professor Levinson's finely-honed insights and comments, but I dissent on this occasion. The hallmark of the legal profession is not that it is a business. In my view the Stanley Commission was impeccably correct in its concerns and recommendations about the bearing on professionalism of the generation of wealth as the primary drive or goal. The fiduciary and officer-of-the-court dimensions of lawyers' roles are subordinated if not abandoned by conceptualizing law practice as a business. There is nothing wrong with earning a decent and substantial living as an accompaniment or collateral phenomenon to membership in the legal profession; but the professed goal of "equal justice under law" suffers, withers, or is Ramboed away when the generation of wealth assumes dominance over lawyers' choices and actions.

Carried to the logical economic extreme, lawyers' preoccupation with the generation of wealth leads to leaving the law for places like Wall Street investment banking houses, as Tamar Lewin's depressing article in the New York Times Magazine in August, 1986, made clear. Among many of "the best and the brightest" she interviewed for *The Faster Track*, the law was seen increasingly "as technicians' work, neither entrepreneurial enough nor remunerative enough to satisfy ambitious young professionals." As one lawyer who abandoned law offices and courthouses for investment banking put it: "Your lawyer is your safety valve and that is still an important function, but it's not where the action is."

If serving the legal needs of the people and seeking to improve the fairness and efficiency of our system of justice is not "where the action is," something is rotten in the state of legal education, or at least in its inputs and outputs.

Attitudes and practices that denigrate the core functions of the legal professional fuel our critics. I am still smarting from charges by Doug Bandow of the Cato Institute, who in a column on the New York Times' op-ed page on March 15 of this year described the American Bar Association as "the prime guardian of lawyers' economic interests for a century"

and charged the legal profession with having “consistently worked to make it as difficult as possible for people to become lawyers” as part of the “brazenness with which the organized bar uses the system to enrich itself.”

Professor Levinson calls appropriately on the legal profession to “recognize and refine our special duties to society”; yet he does not quite see that those “special duties” may be bypassed, if not purged, by dominance of the wealth motif over our profession.

Just this week I received a letter from the Dean of a major eastern law school urging law teachers to address “the over-commercialization of the profession” and its consequences. There are major changes in values and structures of the profession, he insisted, that warrant serious immediate discussion. “Despite the growth of the skills training movement in law schools, legal education may be further removed from the issues facing the profession than at any other time in history,” he continued. Among the ongoing changes compelling attention that he cited were:

the spectacular growth of the mega-firms, the internationalization of law practice, the overt basing of fees on the size and success of the transaction, a money-driven system of law firm management whereby the best and the brightest of our law school graduates seem inevitably drawn into a structure that places the highest premium on a total commitment of time and effort to serve the interests of a very narrow slice of our society, the pressures of this structure on family life, particularly as it affects women, the widening gulf that many persons see between the research interests of faculties and the concerns of the practicing bar, [and] the effect of high law firm starting salaries on the teaching profession and legal education generally.

The legal education community must address earnestly and urgently such issues relating to the changing structure of the profession, a subject which at present “is not even an orphan, it is a homeless waif.”

What this distinguished Dean urges compellingly in 1987, Frances Zemans and I touched upon several years ago in *The Making of a Public Profession* — the need for legal education to focus not only on the technical skills of the profession but also upon the societal and moral roles and impacts of the law and the lawyer in practice. We concluded that “the notion that the law is a purely technical enterprise is simply inconsistent with the complex intertwining of law and social norms in any society, and most assuredly in a democratic one.” We maintained that moral and ethical issues can and should be integrated into traditional courses and not confined to the “Professional Responsibility” class. Beyond that, I would like to see implemented further a proposal to correlate pre- and post-enrollment plans and attitudes of our students.

Students applying to virtually any law school are required to write a short essay on "why you are seeking a legal education, including information on your career plans" (the quote is from Northwestern's application, which is typical), but I am not aware of systematic efforts by schools to confront students before graduation with relationships between their stated reasons for becoming lawyers and actual career choices being made. Of course, market factors can furnish dramatic explanations at times for dichotomies between intention and action, but we should not assume or justify market sovereignty over every choice. Nor am I suggesting that a student does not have the right to change his or her mind between enrollment and graduation. My prime point is that intellectual confrontation over and explanation of relationships between declared aspirations and career decisions would provide informative data on the realities of legal education's impact on lawyers' values, pressures, and choices and on the availability to the general public of the services of competent professionals at a reasonable cost in the future.

Although it would not alone cure any of the ailments of the legal profession, and although there are other Supreme Court decisions that I would urge be reversed ahead of this one, I would like to see the Burger Court's ruling in *Gertz v. Welch* reconsidered and revised. The Court ruled thirteen years ago that we are merely "private figures" when we practice law. That decision allows us to recover in defamation cases more easily than media or sports celebrities or public officials. We neither needed that ruling nor gained in esteem from it, for I believe we are and should be recognized as public figures with public obligations as we practice and teach law. While there is nothing wrong with our sharing in rewards of the marketplace, there is very much wrong, as Justice Rehnquist stressed in his critique, with our transmuting legal events into marketing events. Such transmutation is facilitated by labeling as "private" figures the members of a public profession.

The problems and concerns I have discussed are receiving attention and have key places on the agendas of the American Bar Association, the Association of American Law Schools, and other leading legal entities. There are no immediate panaceas in sight, but incremental improvements, at least, are on line. A soon to be issued report and recommendations of the Joint AALS/NALP (National Association of Law Placement) Committee on Placement will propose approaches and programs that can alleviate placement crunch. Additionally, the ABA's Special Coordinating Committee on Professionalism is working steadily toward implementation of the Stanley Commission Report. I am hopeful that the forthcoming AALS Convention will consider these and other proposals for enhancing our professionalism and the public's perceptions of us.

For contextual support in endeavors to bring our profession closer to

achieving nationwide reality for “equal justice under law,” I would recommend a recent article by my colleague, Professor Robert P. Burns, entitled *A Lawyer’s Truth: Notes for a Moral Philosophy of Litigation Practice* in the *Journal of Law and Religion*. Arguing that a disposition toward factual truth lies at the very core of moral personhood, Professor Burns concludes that legal ethics must inquire into “what kind of a person am I to be and what kind of person I make myself by engaging in the practice of law.” I know that the Valparaiso faculty and curriculum pose and probe such issues with sensitivity and rigor, while at the same time developing the skills essential to responsible and successful law practice. In this beautiful and imposing new Wesemann Hall, the probes, debates, and relentless quests for truth and justice will surely flourish in an ambiance of professional skills and caring.

