

Legal Education, Today & Tomorrow

John Sexton

This spring, *Green Bag* Executive Editor David Gossett met with John Sexton, the Dean of NYU's Law School, to discuss legal education. Their conversation touched on topics ranging from school ranking, to whether law schools should fully subsidize students interested in public service careers, to the role our increasingly globalized world plays in legal education.

Let's start by talking about what you think the future of American legal education holds, and how it is going to differ from today. First, though, how do you think it differs from twenty years ago – both here at NYU and more broadly?

Well, the core of American legal education for the last one hundred years has been fundamentally the same. It consists of the model created by Christopher Columbus Langdell at Harvard Law School and then brought elsewhere by others, and is the familiar legal canon of the common law courses – with the addition over the years of statutory, constitutional and procedural courses taught in relatively the same modality.

In the last twenty years, there have been a series of changes but all, I would say, still within that model. The movement to clinical legal education has been important. So has the rise of interdisciplinary approaches. More recently, the recognition of globalization as a phenomenon that would characterize the practice of the graduates of at least the major

law schools (but now, increasingly, of every law school) has been important. But those moves have all been essentially within the existing framework. The magnitude of the change might be a twenty or twenty-five percent move, but no more.

I think that over the next decade, in contrast, change is likely to be cataclysmic. And it will be cataclysmic along a whole set of fault lines. The question of what warrants the expenditure of \$150,000 to \$250,000 for the graduate component of an American legal education will need to be addressed. The short-term answer is the fact that you can't take the bar in any of the fifty American states, at least through the ordinary processes, without being a graduate of an ABA accredited graduate law school. But I think that it's clear that competition is looming, in multidisciplinary practice in investment banks and accounting firms and elsewhere. The question becomes, what justifies this three-year model, and the expenditures associated therewith? There is going to be a tremendous pressure

put on the legal education system to answer that question.

At the same time that American legal education is advancing the answer to that question, I think it's going to have to confront another fault line – the increase in specialization within the profession. And then there's a third fault line that emerges, the breakdown of space and time because of technology. So now we can begin to think about the provision of learning in ways we've never thought about before, that are unbounded by space and time.

You said recently that you thought that the law school of the future wasn't going to charge tuition. Could you explain?

I didn't say that, exactly. What I said was that I hoped to make NYU's J.D. program tuition-free. It is conceivable that in the future, the J.D. program will be like a Ph.D. program. Since I believe its justification is basically Toquevillean and Jeffersonian, however, it would have about it the quality of breadth that we associate with a liberal arts education. The heart of the product has got to be the transmission of the notion of lawyer as a professional, specifically as a professional who acts as a fiduciary for a sacred trust. In other words, the lawyer as priest of and keeper of the law.

What do you mean by law as a profession?

I do not mean what most people mean to evoke with the word profession. I don't want you to see my analogy to the Ph.D. as being about a narrowness of specialization. I think that will probably reside at the LL.M. level. Maybe we will have to rename all these degrees. But if one were to have this view of the J.D. program, like most quality Ph.D. programs it might be tuition free.

But that's not what I meant, in truth. What I meant was the fact that graduating 150 or 200 thousand dollars in debt is bound to

inhibit students' career choices. We should not feel comfortable if that is a position we are placing our students in. In my view, every student should be able to make a career choice free of debt. So in that sense, law school should be free of tuition.

This week they've announced that some law firms are going to start first year associates at \$160,000. If that work is what one prefers, and for many it is, quite apart from compensation – law firm life, law as a chess game if you will, can be exhilarating and pleasing – then you've made a very good capital investment by going to law school, but nobody should give you free tuition. So I would reconfigure my idea along the lines of an experiment we ran with our graduating classes beginning in 1999: For any student who went into a job that paid less than a government job we would pay for part of that student's loans; the extent of the payment would depend on salary and the number of years on the job, and could even amount to our totally repaying the student's law school loans.

When I first began to consider tuition-free education a whole set of folks came to me with valid objections. Why should someone who's going to earn \$160,000 not pay tuition? Why should the child of Steve Forbes not pay tuition? That money is the law school's, and could be deployed otherwise. I think the notion of a loan repayment program solves many of these concerns.

Do you think that this program will really send many more people into the types of jobs that they don't currently take because of the money? If so, how does one support this financially – it sounds like it could quickly become very expensive.

My dream plan assumes that, on the high side in a student body like ours, somewhere around 20% of the class would be drawn into low paying jobs. Even if one were free of debt, there's a reason *prima facie* to prefer a high pay-

ing job over a low paying job, and that is you make more money. But once you begin to pack baggage on that high paying job, it might make the low paying job more attractive to some people, whether it be for lifestyle reasons, reasons of social utility, or whatever. The core moral issue for me is one of preserving student choice, and encouraging diversity of student choice. I think that is good for the profession, and for the public.

On the specific question you ask, though, obviously if a single school did this – let's say we succeed in making NYU a school that did – you ought to have, if the market's working, a gravitation of students to that school. On the other hand, we are also one of the relatively few schools who can say to graduates coming in that every one of them will get a job coming out. And when some of those jobs have that \$160,000 starting salary, other kinds of students are attracted here as well. To the extent our experiment here revealed anything, anecdotally it seems to indicate that debt is not as great a factor in student career choice as we had thought.

Let's switch to a topic somewhat related to paying for law school – choosing a law school. You have publicly criticized the U.S. News and World Report rankings of law schools, and in fact at one point gave them a failing grade for accuracy. Would you address the validity and appropriateness of ranking law schools?

Well, first, it's critical to differentiate between rankings on the one hand – which I find objectionable in some forms but not objectionable in others – and information on the other hand, which I don't find objectionable at all. The context in which we are having this discussion is one where a student is choosing among possible law schools, presumably to which the student could be admitted because if the student is not admitted the student doesn't have a choice.

Isn't that circular, because what schools the student can get admitted to might depend on the schools' rankings at the moment?

Well, it may or may not be. It depends on who applies to the school. But the rankings, if they serve a purpose, are designed to guide student choice and inform the consumer as to choosing A over B or C over D. Rankings that purport to provide a single hierarchy of schools – you know one through two hundred – have a fundamental and unavoidable conceptual flaw. They proceed on the assumption that there is only one set of interests or norms that would be used by all students in deciding which law school is best, or better, for the student.

In reality, anybody that does anything to guide students in this choice knows that you start off by asking the student what's important to you? You know, talk to me about what you want to do. And sometimes, for a student who putatively could be admitted to every law school in the country, A is the recommended school. Sometimes it's B. Sometimes it's C. And sometimes it's D.

Now, this is a conceptual flaw only of a ranking that purports to create a kind of consolidated hierarchy – that unites things with some kind of formula or weighting of various factors. I have no objection to a ranking that says here are the fifty top schools, one to fifty, in terms of percentage of X on the faculty, or in terms of student-teacher ratio, or in terms of per capita expenditure per student, or per capita volumes in the library per student, or bar passage rate, or number of associates in the last three years sent to the hundred leading firms in terms of partner's salary, or number of Skadden or other public interest fellows. With these kinds of rankings, the student then can pick or choose based on their interests. Each student could create his or her own normative galaxy, and out of that could emerge an answer that would be very useful. Those kinds of rankings are really no different from informa-

tion provided in tables that are congenial to the reader. I'm all in favor of information, and I think that the American law school deans are in favor of information.

I think anything that posits a single norm universe, however, is very detrimental, because what it does is it creates – as you implied – a kind of circular self-fulfilling prophecy. And I say this fully cognizant of the fact that, as you know, NYU Law School benefits in a way from the rankings because by the most prominent ranking we're clearly one of the eight schools that can claim to be in the top three. But you will never hear me invoke any of those things, since I'm not interested in where we rank *vis a vis* other law schools. I'm interested in this law school getting better with each semester, because one of the consequences of original sin is that none of us achieves perfection in this world, and therefore life should be about getting better with each passing phase of one's life. That is the joy of being human – having the capacity to improve. And that should be the joy of institutional life as well.

Now the sad thing is that students will choose even on micro-differences that they *know* are insanely created. Even the purveyors of the rankings say they shouldn't do this, just as the purveyors of the LSATs say that the difference between a 165 and a 168 doesn't make any difference, but no one listens because Americans love to rank. They love simple answers.

The best example of this that I can remember was the day that the *New York Times*, on a front page story, lower left-hand corner – this had to be fifteen years ago, college football fans will remember it – had a headline that said the three major polls crowned three different national champions. Any real college football fan reading that headline wondered what was the third major poll? We all knew there was the coaches' poll and the sports writers' poll, and we knew they had two different champi-

ons. None of us considered the *New York Times* computer ranking poll to be one of the major polls. But the *Times* a) had embraced ranking, b) had ranked itself, and c) had come out with this absurd result. And that's the story of the American need for rankings.

Don't we use rankings because there are way too many qualified law school graduates? Law firms seem to look at minute differences in grades and between law schools to decide who to hire, because they've got nothing better to look at.

There are all kinds of insane uses of rankings, I agree. A large part of the affirmative action debate is because people take rankings too seriously. The whole notion of admissions into learning institutions is seen as a civil service ladder. The metaphor of the ladder as opposed to the metaphor of circles of competence predetermines the objection, because if you use the metaphor of a ladder you're moving someone up on the ladder over someone who is ahead of that person on the ladder. But you never need to get to that question.

Now the real scandal of the consolidated rankings, in my view, is the way that deans who have excoriated the rankings will invoke them when their school moves up. That's the moral problem for me as an educator, but that's a different subject. No matter what I say to my colleague deans about how they should be careful about invoking them – because the average tenure of a law school dean is only three or four years and they may be quoted against them when they're at a different institution five years later, or because they may go down the next year – nobody listens.

When you described the fault lines affecting legal education today you mentioned the increasing globalization of the legal world, and NYU has been at the forefront of the movement to recognize this increased globalization. How will globalization in law school actually instantiate itself, in the immediate future of

legal education? How is law school, or legal education, going to be different?

As we bring the perspective of a broader spectrum of cultures and legal systems and peoples into the core of legal education, it will create explosive changes in pedagogy and even in the way we teach. It will reveal the foolishness of infallibility and will, I think, encourage a search for different kinds of solutions. Even solutions that seem very fine in a particular context, when tested in other contexts will have to be calibrated. That's a good thing, because then you might learn something through the calibration that feeds back into the initial context as well. So I think that the *experience* of legal education is going to be very different because of the reality of globalization. Not the least because students will be in classes where they're hearing different viewpoints.

I think this is connected deeply, by the way, to the diversity agenda. The educational ground on which the diversity case rests is one of broadening the spectrum of conversation and the voices that are heard, on bringing different viewpoints into the conversation. To the extent that one brings a more global view to each problem one studies at the core, even in the canon, it will have the same impact. We've begun to do this at NYU in the first year classes. This year, in the traditional canon of common law courses, each of our sections had at least one course taught with completely reworked materials that took account of globalization. And next year two courses out of the five canonical courses will be taught from a global perspective. It might be different courses each time – some people are doing it in torts, some in criminal law, some in contracts.

Is this just a fancy way to describe comparative legal education?

No – the global law school initiative is not a comparative law program. It's the notion of

viewing kaleidoscopically the process with which you deal. Let me give you an example: One terrific course that we have around here, the kind of whole new pedagogy that's developed inside NYU's Global Law School initiative, is taught by my colleague Frank Upham. He is one of our country's leading experts on Japan, and teaches a course that requires the students to be bilingual in Japanese and English. But it's a course in property law, not a language course. He gets, say, twenty students in that class and he divides them into five groups of four students each. He gives the students a complex document – all five groups get the same document – dealing with some property notion. Their task, consulting within the group but not across groups, is to translate it from one language to another. And what happens is that when the five groups, each working separately, develop their consensus translations, they come to class. And among the five there are wild variations.

And thus begins to surface the lacuna in the languages, the assumptions, the absence of words, the absence even of concepts as you move from one cultural motif to another, even within the narrow discipline of law. So, it's a whole different pedagogy that comes with this approach, because you're able to reveal to people, in ways they don't see very often, their basic assumptions.

To give you another example, even the simple fact of integrating students from different countries into a traditional course can produce a different pedagogy. In teaching constitutional law to a group of about fifty students from thirty different countries a couple of years ago, I was startled when after the first assignment – to read the Constitution – the first question I was asked in class, by a South American student, was where in the Constitution was the provision for suspending the Constitution? Now, that is not the sort of thought that comes unbidden to the average American student, and gets you right away

into a different perspective about what constitutional governance means.

Does the increased standardization of international law undercut the development of a globalized legal education? To the extent that we live in a society where in the last three months there have been multi-billion dollar mergers between a British company and a German company, and a British company and an American company, aren't we tending towards more homogenization?

There are many, many levels at which globalization and legal education intersect. The most obvious is that if our students are going to practice in a globalized world, they have to know how the simple fact of globalization affects the way rules operate, and they have to develop a set of techniques for mediating within a much more complex sovereign system than even the relatively complex one in the United States. This will remain true, no matter how law develops.

More fundamentally, one should not fool oneself into thinking that standardization is going to dominate. Even under *Swift v. Tyson* there was no grand homogenization in the relatively narrow band of pluralism that American law represents. In my view, when one dramatically increases that band the chances of harmonization coming to dominate the legal landscape are not very high.

The fact that capital markets are becoming standardized and homogenized is one part of the landscape, but I think we're a long way yet from discerning how these larger and larger multi-nationals are going to operate within the pluralistic legal systems in which they find themselves. You're dealing now at the level of sovereignty, bold case. You're not dealing merely at the level of sovereignty and the commerce clause.

What does a more globalized perspective to legal education expose at this broader level, then?

I think the impact of globalization on the enterprise of legal education can be captured in the word humility. To be tossed on one's rear end intellectually by the revelation of a premise that you never knew drove your thinking is quite dramatic intellectually, and should instill humility and a reluctance to assume that there is a single right answer.

There is a dramatic pedagogical move that becomes available here, in a much more poignant way than in traditional materials. A related dimension is being able to focus on starting *tabula rasa*. We have societies that are literally inventing the concept of property today. How would one do that, if one were starting to create a free-market economy? This is a very different question from the rule against perpetuities or covenants that run with the land. And it gets to very deep notions. So you're putting before the student, through all these devices in a way not as dramatically possible before, the fundamental questions of the ought of the law. The very best law schools have always said they're trying to teach that – "We're not teaching you the is of the law, we're trying to teach you the ought of the law," because in the old aphorism we are creating judges, not lawyers. But it is much easier through a globalized perspective.

Will lawyers operate differently in a more globalized legal environment?

If you had to search for one word that describes a lawyer, in terms of functionality, it would be communicator. In a whole set of different contexts it is the lawyer's task to communicate – whether it be writing a contract, or making an oral argument to a panel, it's about words and meaning and communication. Even rule interpretation is about words and communication and understanding.

When one begins to deal not in a relatively narrow cultural band, which for all its pluralism the United States is, but to inter-

sect the kind of cultural differences that occur in a globalized environment and which are going to remain diverse even with a heavy overlay of whatever the globalized culture becomes, the first thing that the lawyer has to do is to get the people together. I'm not even talking at the level of law yet – I'm talking at the level of people dealing with people. There'll be an overlay of Coca-Cola and McDonald's and whatever, no matter how the French try to resist it. But there'll be an underlay which will be much more profound, where communication can be turned on its head by misunderstanding.

At the same time, we live in a world where in the same complex transaction the same multinational may be represented by very fine lawyers from Wachtell Lipton in New York – who are the products of a three-year graduate-school model of legal education, four years of college followed by three years in law school – and by lawyers from Freshfields in the United Kingdom – who are the products of the much more typical university legal education, consisting of five years with no discernible “graduate” component. The multinationals experience the lawyers from Wachtell Lipton and from Freshfields as equivalent.

That is a perfect link back to our discussion of how the practicalities of legal education are changing. How do you think law school will be structured in the future? Do you think that any sort of fundamental change – a restructuring of American education towards a European model of an undergraduate law degree, or a real specialization requirement in the third year, or the like – is actually going to happen in America?

Well, remember that you're dealing with a comparative religionist. My answer, therefore, is that these changes are going to happen – there is going to be a multiplication of forms, and the real result is going to be diver-

sity. Some people will be taking five-year university programs which graduate them with an LL.B. What will they be qualified to do – are they employable? Well, hello I'm Ernst & Young, and we have a legal department. Hello, I'm Goldman Sachs, and we have a legal department. Or maybe all these students need do is add on to that undergraduate degree a masters degree in intellectual property, if the corporation they work for is Sony or the equivalent.

Then there are going to be other people who, having graduated from that program, or having done a four-year university education in engineering or biology – we don't require any specific undergraduate curriculum, right? – will show up at our doorstep and say, “I'm here, and I want the good old American three-year graduate law degree.” And meanwhile, you will have other people, who are high school or even college graduates, who will be down the street taking a one-year certification in probate law or some other specialty. Then there are surely going to be a bunch of folks in cyberspace, who are just interested in law and want to be in a law chat room – a kind of C-SPAN of the law.

This diversity is going to provide a lot of legal access, spread across a broader spectrum of the population. The question will be how much of it do we want to bring within the ambit of what we call legal education? It's *all* legal education in some form or another, but what kind of model do we want to pursue in regulating it? Do we want the SEC model, a disclosure model? Or there is the make-sure-there-aren't-any-rats-in-the-kitchen regulatory model of restaurants – minimum standards, but that is it. Then there is the best-hotels-of-the-world model, where if you're in the book you know you're going to get a bathrobe in the closet that you'd like to be able to take home but know you can't afford to. I don't know where it's going to go.

One final question. What do you think makes a law school great?

There is no one thing that makes a law school great. What makes a great institution is reflection on purpose, and actuation based on that reflection. Before I came here to meet with you I was down the hall with a dozen pre-law advisors, and I said to them this is *not* about persuading you to send us your best students. This is *not* about convincing you NYU is the finest law school in the world. This is about *explaining* ourselves to you. By doing so, we'll thereby arm you with the knowledge about us such that after we admit your students you can advise them on whether we're right or wrong for them.

My wife and I attended not only the same law school but were in the same section with the same professors. After our first year of law school, I found myself utterly and absolutely in love with virtually everything that went on,

and she made a decision never to set foot on that campus again because she found it ideologically objectionable. Now we are two people in love. We are in a spectacularly successful marriage in which most of the things in our lives are common joys. And here these two people found themselves in the same school, one in the perfect place and the other in hell.

What that tells me is not so much that that institution was heaven or hell, but that it's important to get the right students to each institution. That requires institutional reflection on self, and articulation of self. So when you ask me what makes a great law school, it's a variation of saying what makes a great institution. I think the answer is a sense of purpose that's thought out. In the concept of education, the Jesuits call this the *ratio studiorum*. If you're running a school you should be able to explain why you're running it. You should then work at making your community of people the kind of people that want to embrace that vision. 