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The City University of New York Law School: An Insider's Report

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The Law School of the City University of New York ("CUNY") is an experiment in whether it is possible for lawyers to integrate their lives. It is not, primarily, an institution with a somewhat novel, somewhat derivative, approach to legal education (although it is that). It is a place where lawyers try to bridge the gap between love and work, those so often dichotomized constituents of life. At CUNY we are trying simultaneously to equip students for survival in the current legal system and to burden them with a critical perspective on that system; to do and think, to practice and teach, to function and feel.

Already I hear the protests. For any one of us, insider or outsider, to presume to define even a single aspect of this complex institution is of course rather silly. There is nothing I can say that several of my colleagues[1] will not dispute. There is no point, however, in lacing this piece with excessive caveats. Necessarily, what follows is a partial account, partial as distinguished both from complete and from impartial. So long as it is billed "*An Insider's Report*," I feel free to proceed with the intimidating enough task of trying to organize my perceptions and summarize my subjective experience of the past four years.

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1. When I use the word "colleagues" throughout this piece, I mean not only faculty but support staff, administrators, and students. This is not affectation, but the way we in fact describe ourselves and one another in our daily business memoranda, etc. It sounds symbolic, and it is, but it points to one of the truly extraordinary dimensions of CUNY: the genuine attempt to include and honor every member of the community, from the maintenance staff and security guards to the tenured professors. While Duncan Kennedy may talk about paying janitors and deans the same, CUNY is the only law school I know in which the "professionals" have organized and implemented a system for re-allocation of hard cash. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STANFORD L. REV. 413, 413 & n.1. Eighty percent of the faculty and administrators whose annual salaries equal or exceed $40,000 have contributed 1% of their salaries to a fund providing salary supplements to all employees making less than $20,000 per year. I cite this not because it's an adequate response to socio-economic inequality — it is not — but because it is a tangible manifestation of a genuine commitment. It is also one of the things I like best about working here.

Four years: as I find myself describing it to friends, the most tempestuous, demanding, yet literally revivifying four years of my professional life. It has been as unlike the previous eight years of academe or quasi-academe[2] as anything I could imagine. The intensity, and the way in which it has made me test and expand my limits, is reminiscent of the years I spent with the Legal Aid Society Criminal Defense Division as a trial lawyer in New York City's Criminal Court. That was the only other time in my life in which I learned so much, so fast, and so hard. The irony is that a good deal of the time here has been spent unlearning what I learned with Legal Aid, and unlearning even more of what I had learned in my life before Legal Aid.

That may be a good catch-word to pick up as the theme of this piece: CUNY is certainly as much about unlearning as it is about learning. We are trying together, collectively (those are not synonyms, as I have learned) to unlearn fear, hierarchy, racism, gender bias (which to us includes sexism, homophobia, lack of respect for childrearing, etc.), distrust, and despair. In this country, in this society, in this historical moment, that isn't easy. It may also be futile, and worse, dangerous. Most of those habits of thought and feeling have well served most of us at one time or another. At CUNY we are asking each other to give them up and to replace them with something so fragile, so difficult to define, that it may indeed be fools' business to do so.

Yes, that seems right: CUNY is about learning to be a Fool: a Fool like Lear's, a Fool like the one in *Ran*, Kurosawa's adaptation of *Lear*. And at the same time, we are learning to be lawyers?

Perhaps that's not such a stretch after all, when you consider how close the average lawyer's business is to that of a court jester. I spend a lot of time with lawyers. I'm quite active in about twenty different lawyers' groups and bar associations. From the Lawyers Guild to the New York Women's Bar Association, from the Association of the Bar of the City of New York to the Plaintiffs Employment Lawyers Association, I see practicing lawyers who seem not to know why they are doing what they do, except that it will please somebody else who will then reward them for that pleasure. They are very good at figuring out what is needed to produce the pleasure and the reward; they are very sharp and skillful at playing word games and doing elaborate and exotic dances.

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2. Teaching in N.Y.U. Law's civil and criminal clinical programs; a fellowship, followed by staff position, at the Hastings Center Institute of Society, Ethics and the Life Sciences; research and teaching in the College of Physicians and Surgeons, Columbia University.

Isn't that a pretty good description of a court jester's job?

The only difference between the other court jesters and Lear's/Ran's Fool was love. The Fool was not ready to forsake his king when he was no longer powerful. The prudent, professional court jester is loyal to the king only while his power lasts. The court jester must be adept at changing his master and relocating his loyalty. The court jester does not have a life of integrity. The Fool does.

At CUNY we hope our students evolve into Fools, which means that they will be able to emulate the song and dance and causerie of the best of the jesters, but will do so only in the service of someone they love. If you will, in the service of human needs.[3] That's what Mark Barnes and Judith Kleinberg, authors of *CUNY Law School: Outside Perspectives and Reflections*[4] (hereinafter "the Outsiders")[5] just didn't get. And it's understandable that they didn't get it. Had they gotten it, what would they have thought of it, is I suppose the next question. Can you do it — can you love and work at the same time? And assuming that it's possible, is it desirable? And if it's possible and desirable, can you teach it?

It is a daunting prospect. God knows we have not figured it out. We think it's important.

I guess the point that seemed most conspicuously missed in the Outsiders' report was that so much of what we do at CUNY is fluid, constantly in motion, always subject to reexamination, revision, change. Because we try to identify the premises of each choice we make; because we try to have a reason for everything we do other than that that is the way it has been done before; because we try consciously to examine the consequences that result in light of the premises we've es-

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3. The motto of CUNY Law School is "Law in the Service of Human Needs."

4. 12 NOVA L. REV. 1 (1987).

5. The title chosen by Kleinberg and Barnes for their piece, together with my diagnosis of what at root limits its utility as an account of CUNY, makes this short-form reference irresistible, as well as the title of mine inevitable. The titles suggest a well-recognized issue of formal social science: the impact of one's status as insider or outsider on the sense one is able to make of the phenomena observed in a particular institution or subculture. This theme is, I'm afraid, most systematically analyzed in the work of someone whose conclusions I do not entirely share. *See* R. K. Merton, *Insiders and Outsiders: A Chapter in the Sociology of Knowledge*, 77 AMERICAN JOURNAL OF SOCIOLOGY 9 (1972), *reprinted in* R. K. MERTON, THE SOCIOLOGY OF SCIENCE (1973) as *The Perspectives of Insiders and Outsiders* at 99. R. K. Merton is critical of the assertion that insider status provides not just privileged access to data but superior understanding of that data and points to counter-examples such as Tocqueville, Flexner and Myrdal.

poused; and because we place a value on integrity which translates sometimes into chaotic individualism and sometimes into a powerful and authentic community, it is virtually impossible to carve out a particular sequence of concrete behavior and ascertain inductively what this place is up to. The basic methodological fallacy of the Outsiders was that they really did try to treat what they saw in a given span of days as somehow typical or definitive or capturing the quintessence of CUNY.[6] That might be possible for a gifted social observer like Joan Didion[7] or Erving Goffman,[8] but for us lawyers it is rather unreliable.

A good though small example is the Outsiders' report that students had been forbidden to engage in original legal research in the course of a simulation. When I read this I was astounded and appalled. I immediately went to find members of the first-year faculty, to whom this had been attributed, to find out whether this was true, and if so why on earth it was. This strikes me as the sort of elementary fact-checking that we try to impart to our students in the second-year curriculum on techniques of fact investigation. However, the Outsiders chose not to do that — or at least not to report on having done it — and so did not provide the explanation that I received: that in an effort to deal with the tendency of some first-year law students to procrastinate, trying to find more and more and more cases without buckling down to analyze and write, some first-year faculty had strongly suggested to these students that they would be more on track in terms of the learning objectives of the exercise if they would focus on synthesizing and applying the authority they already had rather than on trying to find additional material. Wholesale discouragement of all first-year students, including those who could afford to spend the limited time to be devoted to this particular piece of work in that way, was not "the program." The Outsiders certainly left the impression that it was.[9]

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6. *See* J. DIDION, THE WHITE ALBUM (1979).

7. *See* E. GOFFMAN, ASYLUMS (1962). *See generally* H. GARFINKEL, STUDIES IN ETHNOMETHODOLOGY 1967 on the significance of sociological inquiry for "common understandings."

8. I should add that I have serious concerns about the way CUNY teaches basic legal research. We have tried two different approaches already and are currently considering yet another variation. I believe that the planning, execution and evaluation of legal research should be an integral component of all the simulations and courses in the first three semesters, and whenever I get back into the first-year or second-year curriculum and am in a position to influence that choice directly, I will seek to implement such a system.

9. Kleinberg and Barnes, *supra* note 3, at 19 n.42. What, I wonder, is the *correct*

This is just one small example, though, of the confusion the Outsiders apparently labored under. They label much that is ephemeral and epiphenomenal, the product of who happened to be assigned to a given piece of the program this year, as central. They seem to be collapsing, in what I dimly recall as Thomistic categories, the accidental and the essential. It is as if generalizations about the Langdellian model were to be based on the antics of my first-year contracts professor at NYU, a petty tyrant who tried to terrorize students and did degrade women and who, when challenged on the ground that his conduct interfered with our learning, laughingly dismissed that as irrelevant to his job.

A prime example of the Outsiders' failure to get what is going on here is their discussion of the operation of the Houses. Among the faculty at CUNY we have had many conversations about what the House is and what being a House Counselor means. In the letters I write explaining our program to prospective employers of our students, I usually describe the House as the basic work-group unit. In most American workplaces there is no equivalent. In House, the discussion of work is viewed as a component *of* work; the planning collectively and reflecting collectively on how one has done the work one set out to do, is a form of labor we take seriously at CUNY. There is more; the House is also where we experience the interrelationship of the personal and the political, the so-called private and public spheres. In the Houses all of us — students, faculty and support staff — witness directly the ways in which our norms of interaction affect both the substance of what we do and the way we feel about what we do. In the House we try to live by explicitly alternative norms, to observe the effects of that effort, and to incorporate those observations into our critical appraisal of the institutions of American law and society.

For example, CUNY generally uses a consensus model of decision-making rather than an electing and voting model. Too many of us have spent too long as oppressed minorities in ostensibly democratic institutions ruled by majoritarian power to have much faith in that model. One basic difference is that when you vote, you don't have to explain

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meaning of the term that the Outsiders were looking for? Whatever it is, I suspect that, for example, Justices Rehnquist and Brennan would not both accept it — although each would probably agree that the other had not "really understood the meaning or applicability of [the] principle." *Id.* I wonder, too, what sophisticated articulation of the concept and, more important, understanding of the principle *in action* the average Columbia Law student would display.

your position to anyone; when you block consensus (which does not occur each time you are in disagreement with what most of the collectivity thinks is best) you must explain, or else defeat yourself. The whole point of withholding consensus is to create more time and space to explain your position, so that the rest of the group can strive to meet the concerns you've expressed and hopefully bring you into the consensus. There is also a qualitative difference between the way it feels to lose under a voting system and the way it feels to participate reluctantly in a consensus after the rest of the group has gone as far as it can to honor your divergent views.

In the Outsiders' view, the House they observed demonstrably failed because "the students did not engage in 'rule' making" but merely in "airing of issues" and "extensive and lengthy discussions." What are the premises implicit in that assessment? Some that seem apparent are: 1) the process of sharing conflicting views openly is worthless; 2) meaningful and lasting resolution of a conflict in a way that preserves rather than fragments community can be achieved by voting; 3) in sum, that only product, not process, matters. How ironic a set of premises for lawyers, of all professions supposedly the most cognizant of the value of process, in particular for lawyers who are highly critical of the students they observed for their inadequate articulation of the meaning of "due process."[10]

The House is an incredible laboratory for experimenting with all sorts of forms and models of rule-making and decision-making, but that is not its primary function. The committee system of the governance structure is designed for that. Very often, the point of what happens in House is that conflict is expressed and acknowledged, not resolved. We try consciously to use techniques of facilitation that will make the conflict productive albeit perhaps still painful and frustrating. It is important, we believe, for all of us to *experience*, not just talk about, the phenomenon that people we work with closely and need to depend upon do not share our views and values on fundamental issues, and to explore the consequences of that divergence for successful collaboration. It is important to know whether you can deeply disagree with someone in one area and yet cherish that person's contribution on another front,

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10. A CUNY Insider has to smile whenever using this term since it has acquired an overlay here that underscores its ambiguity; when trying to explain some facet of the program to new faculty, students or staff, those of us who've been here a while often find ourselves saying "traditionally . . ." meaning "in the first two years . . . ."

and still want that person to participate in your community despite your differences. Paradoxically the experience has been that not infrequently, the clash of views leads to greater understanding and movement from positions to the point at which conflict can be resolved in a consensus fashion, but the absence of such resolution is no failure by our lights.

To an Insider, the description of the House meeting, untextured as it necessarily was by a lack of awareness of the ongoing dynamics of the interaction among particular House members, sounded not as if "very little was accomplished" but like a reasonably good House meeting. Had outsiders not been present, it is possible that a "feedback," "criticism and self-criticism," review of "good points and bad points," or some other such brief period of commentary on the meeting *qua* meeting would have occurred. During that period there may have been some discussion of the facilitator's choice (not "failure" or "mistake," but *choice*) to allow the group to depart substantially from the agenda. It might have been discussed in light of one of the more prosaic purposes of the House: to provide an experiential opportunity for learning about group facilitation, a skill valued by any lawyer who tries to work with professional committees, boards and community organizations.

There are a dozen other instances in this piece of failing to grasp what it is we are trying to do at CUNY, and thus misapprehending what has worked and what has not. They range from the false premise, presented on the second page and reiterated on the thirty-fourth, that CUNY began with a wholesale rejection of every component of "traditional"[11] legal education to the equally inaccurate assumption that the performance of our first graduating class on the New York bar exam that generated a sudden impulse to re-examine that rejection. Even from the Outsiders' own description, it is evident that CUNY incorporates a myriad aspects of the standard-issue law school. Some of that is deliberate, some unconscious. For us the question is hardly framed, however, as the Outsiders define it: "whether to *begin* to adopt the ways of more traditional schools, or continue its present course of rejecting traditional legal education." Similarly, as I have already said, we have been reexamining our curriculum and every other choice we have made in a serious and systematic way since CUNY's inception. Another example is the statement that "Faculty evaluation of students' work is deemphasized."[12] At this I can only laugh as I think about the

11. Kleinberg and Barnes, supra note 3, at 2 (emphasis added).
12. *Id.* at 6.

literally hundreds of hours I and other CUNY faculty spend on painstaking evaluation of student work, culminating in detailed end-of-semester evaluations which often run to five pages for a single student, and compare that with the total absence of evaluation in my law school experience outside first-year moot court and third-year clinic. (I was graded, all right, but my work was not evaluated).

It is impossible, and would be fruitless, to enumerate every instance of mis-apprehension on the part of the Outsiders, but one last observation invites a specific response. The Outsiders wonder whether CUNY students should not "at least be acquainted with the traditional mode of organization"[13] of the law and note that traditional doctrinal categories may be "more realistic and helpful to students because they are used widely in American legal culture."[14] It is simply not the case that our students leave law school[15] innocent of the classic divisions between, to pick examples, tort and contract.[16] What CUNY students learn is both that such categories are used in the legal culture and that they are limited and limiting. In the process of trying to trace the boundaries and connections among them, our students come to realize that the effort to translate a given human problem into its appropriate pigeon-hole may deflect lawyers and the legal system from more important dimensions of the problem, and that the judicial choice of a particular doctrinal framework is as often the function of societal forces as it is of pure legal analysis.[17] There is a qualitative difference, one that seemed to elude the Outsiders, between unawareness of a model and a skeptical approach to that model which sets it in the context of other competing models in order to demonstrate the inherent artificiality of

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13. *Id.* at 33.

14. *Id.* at 24 n.50.

15. The Outsiders apparently saw virtually nothing of our second and third-year programs and did not talk with third-year students, who are loaded down with highly "traditional" courses such as Wills, Real Property, and U.C.C.

16. Of course the indivisibility of those two categories in particular is increasingly questioned. *See* G. GILMORE, THE DEATH OF CONTRACT 87-90 (1974); *see also* Bolla, *Contort: New Protector of Emotional Well-Being in Contract?*, 19 WAKE FOREST L. REV. 561 (1983); Note, *"Contort": Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance, Commercial Contracts—Its Existence and Desirability*, 60 NOTRE DAME L. REV. 510 (1985) and authorities cited therein.

17. *Compare, e.g.*, Mendel v. Pittsburgh Plate Glass Co., 25 N.Y. 2d 340, 305 N.Y.S.2d 490, 253 N.E.2d 207 (1969) *with* Victorson v. Bock Laundry Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975) (effect of statute of limitations on products liability claim depending on whether claim characterized as sounding in tort or contract).

any model.

So, I do not agree with the Outsiders' suggestion that CUNY students could "benefit from greater exposure to the paradigms of traditional legal education."[18] Alas, our students come to CUNY having been immersed in those paradigms—which prevail not just in traditional legal education but throughout the institutions of this society—to such an extent that it is very hard even to begin to work together differently. I see no need to reinforce a paradigm which maintains that legal analytical skills are best acquired in the classroom[19] or that there are "insignificant cases"[20] or (my favorite) that CUNY is tantamount to a "trade school."[21] Perhaps if all us at CUNY had less to unlearn, we would have more time to get on with the huge agenda of what the good lawyer needs to learn.

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So what happens to the Fool? Lear's Fool helped bring his beloved king to temporary refuge, and then disappeared from the scene powerless to prevent further pain. Very little to show for his loyalty. Anguish and exile the price of his love. Not a happy ending.

I got a call today from one of our graduates, one who got the job she thought she wanted more than anything in the world, the job I had fifteen years ago, with Legal Aid. She was assigned to a very difficult case, one that presents enormous legal and ethical and practical and tactical complexity. You might call it an insignificant case — the defendant, a person with AIDS among other problems, is a petty criminal, although he faces a lot of time on a drug charge. My former stu-

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18. *Id.* at 34.

19. *Id.* at 55. The passivity of the average law student in the average law school classroom is legendary, exceeded only, in the upper years, by the sheer absence of students, who find jobs and job interviews and clinical work activity less wasteful of their time. Our students develop and refine their analytical skills as lawyers do, by actively doing lawyering work.

20. *Id.* at 33. What, do you suppose, is an "insignificant" case? One that didn't matter too much to the parties? One decided by an insignificant judge? One involving insignificant people? The attitude belied by that casual term is precisely one of the paradigms we are struggling against.

21. *Id.* at 34. This term's origins in British aristocracy's disdain for those who made their money the old-fashioned way, by earning it, as John Houseman puts it for Smith Barney or Dreyfus or whatever (isn't the metamorphosis of his acting persona from redoubtable law faculty member to spokesperson for the most efficient accumulation of private wealth a fitting progression?), does not exactly recommend it as a useful tool of pedagogical discourse.

dent's supervisors, and many of her co-workers at Legal Aid, are urging her to get off the case, to ask to be relieved, to give up already on this useless piece of scum. We talked for about two hours about what it is to be a lawyer, and about what she *wants* to do, which is to stay with the case and try to help her client, in spite of his constant rejection of her assistance and frequent abuse. At the end she said, simply, "I'm so glad I went to CUNY." I said, "Me too." Then she said (and I am not making this up), "My supervisors say I am a fool." I said "You are — thank God, you are."