Washington Law Review

Volume 65
Number 2 *Dedicated to Professor Robert L. Fletcher*

4-1-1990

The Education of Professor (and Associate Dean More or Less Emeritus) Robert L. Fletcher

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THE EDUCATION OF PROFESSOR (AND ASSOCIATE DEAN MORE OR LESS EMERITUS) ROBERT L. FLETCHER

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When teaching law to students is to be done, the professor's lot is not a happy one.

W.S. Gilbert did not write those lines, but he inspired them. More accurate than his, they describe the attitude of most law teachers toward classroom tasks since shortly after 1870 when Dean Christopher Columbus Langdell introduced the case method of instruction at Harvard Law School. The only task law professors find more onerous is reading and grading examination books.

Happily, there are exceptions. Robert L. Fletcher is the most striking exception I have known. He appears to enjoy reading examination papers. He even quotes short passages to his traveling companions while enjoying the sunshine of a Mexican resort during winter break. That two of his four children—Susan Fletcher French and William A. Fletcher—have followed their father into law teaching at U.C.L.A. and Berkeley, respectively, suggests that Bob's unusual trait may be genetic. That might be impossible to verify, unfortunately, if my memory of Biology 101 is accurate. Geneticists need at least one whole bottle full of fruit flies to draw any conclusion. Assembling a bottle full of law professors would be both difficult and inhumane.

I think that Bob's attitude toward teaching law stems from his education, and that theory is the thesis of these pages. First, however, one must understand why law professors find their heaviest lifting in the classroom. The reason is inherent in the nature of law itself.

Jurisprudence and legal philosophy are rich with competing definitions of law, but most law students starting out find these word of Justice Holmes, delivered to law students, adequate to describe what they expect to be taught: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[1] The shining, eager faces of each first-year law class in September glow

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1. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). Holmes has been criticized, as have law teachers who defend his definition, because he leaves out things like justice and morality. He did so intentionally. If law and morality do not coincide, is it a judge's task to follow the latter and disregard the former? Holmes thought not.

with expectation that the professor will impart knowledge for the open notebooks that will prepare students after less than three years to set themselves up in the business of making such prophecies. By Thanksgiving, however, the glow of eagerness fades, like most of the flowers. By May, eyes are heavy lidded. Attendance is mediocre to poor, and even faithful class attenders are often absent in spirit. If there is improvement by May of the third year, it is because of relief that the law school experience is about to end.

There are a few weary or incompetent law professors, but no sadists. No one enjoys disappointing students who arrive bright, young, and eager, but are graduated weary, dispirited, and cynical. But since Langdell, not many law professors have found a good alternative.

Nearly fifty years after his graduation, Franklin G. Fessenden recalled the consternation and travail in Fessenden's class to which Langdell had introduced the first casebook—one in contracts.[2] That casebook was not, given the earlier invention of the printing press, a startling innovation. Rather, it was and is the only way to enable a large group of students to prepare for class by reading the same appellate opinions. But reading and analyzing judicial opinions is hard work, sometimes dull work, and not what law students at Harvard or elsewhere had been accustomed to do.

Langdell's problem, and that of all law teachers who have used casebooks, has never been solved to student satisfaction. Unsatisfied students lead to dissatisfied professors, and never ending experiments to find a better solution to Langdell's problem. The problem: once students have read the authoritative judicial sources of the law, what task is left to the teacher?

Langdell emulated Socrates. He did to students what Socrates did to Alcibiades. When Alcibiades gave a dumb answer, Socrates pursued him with further questions, demonstrating that Alcibiades was, at best, slow. Students, who knew that Alcibiades was slow, rapidly grew restless. They had not paid tuition to listen to an Alcibiades. Worse, students became convinced that Langdell, although apparently a gentle fellow like Socrates, did not know the answers to his own questions. In fact, if Langdell's questions were worth the time spent on them, students were right.[3] Students flocked to classes taught by

2. Fessenden, *The Rebirth of the Harvard Law School,* 33 HARV. L. REV. 493, 498–90 (1920).

3. This point is mine, not Fessenden's, who would have disagreed with me: "[Langdell's] mind recoiled from temporizing or avoiding the real issue. He sought only the true solution, and when he had arrived at a conclusion, whether with reference to his method of teaching or dealing with a law question, he adhered to it tenaciously, even in the face of apparent pecuniary loss to the School or severe condemnation for himself . . . . His earnest endeavor was to lead his pupils

professors who clearly did know the law, and who did not harass them with questions. Langdell's attendance fell to seven or eight students. Law school enrollment fell to the lowest point since Civil War years. The teaching force fell to two professors, one of whom had resigned.

Langdell had character, however, and also the strong support of President Charles W. Eliot. Eliot had persuaded the law professors to elect Langdell, who came with a notion of a new way to teach, as dean.[4] Once under way, Langdell was deaf to all proposals and entreaties that he water down his Socratic style. Fessenden recalled that the end of the furor began when word reached Cambridge from as far as San Francisco that law firms had found that graduates educated by Langdell's method came with more highly honed skills than those who had "read law" while apprenticed to a lawyer, or who had only listened to lectures about law at another school. Langdell was not required to drink hemlock.

Failing eyesight reportedly forced Langdell to turn to lecturing in his later years.[5] I find this hard to understand, however, because ability to read is all but indispensable however one teaches. I suspect that Langdell, like other law teachers I have known, grew weary of disappointing students who expect to be told some law, and to be asked one question to which a clear answer is at least possible. I have not seen Langdell's first edition of cases on contracts, but his second edition contains his outline—longer than the overpriced commercial outlines which students in our time cling to as security blankets.

A law school without casebooks is probably now impossible to find. Socrates, however, has largely disappeared from classrooms. Students willing to play Alcibiades can almost never be found. Some colleagues I have known substitute the "expert method." A student appointed as the day's expert reads the assigned material. A dialogue with the expert is not Socratic, but it relieves the monotony of professor and students listening for fifty minutes to the same droning voice. No teacher I have known to use the expert method brags about it. Is it possible that Alcibiades was Socrates' appointed fall guy, for whom

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to be as unerring as possible in their search for the truth .... [H]e felt [law] could be resolved into comparatively few absolute rules." Fessenden, *supra* note 2, at 505–506.

Fessenden, and probably Langdell, believed that the law has right answers. Professors today are not nearly as dogmatic.

4. Eliot, *Langdell and the Law School,* 33 HARV. L. REV. 518 (1920), described after fifty years his recollection of how he persuaded first the Harvard Corporation and then the Board of Overseers to elect Langdell as Dane Professor, and finally the law faculty to name him as its dean. "The intervention of the President in any Law School proceedings was . . . unexampled" and "awkward." *Id.* at 519.

5. Fessenden, *supra* note 2, at 514.

Socrates obtained a work-study grant to help serve his pedagogical purpose and to make Socrates look good?

There is nothing wrong with lecturing, particularly if the subject matter is something other than law. (Opening up on a history class, prepared or unprepared, with "what do you think about the Battle of Hastings" would not be a good idea.) Lecturers may be comforted that a more influential teacher than Socrates apparently lectured: "and when he was set, his disciples came unto him and he opened his mouth saying . . . ."[6] Jesus proceeded to give the Sermon on the Mount in three closely packed chapters of scripture.

Jesus, however, was teaching matters of faith to those already his disciples. The brightest first-year law student, exposed to a reading of those chapters for the first time, could not carry much away, either in his head or his notebook. Such students have nothing to remember and apply to a hypothetical examination problem several months later. We who have lectured about law from time to time have learned this.

Unless appearances deceive, Bob Fletcher is little concerned with techniques of pedagogy. Facing a class, he does what comes naturally. Justifiably he prides himself in the clarity, the accuracy, the syntax, and the simplicity of his prose. He does not heal the sick, raise the dead, or walk on water. He covers the planned subject matter in orderly fashion. And he treats students, as he treats everyone else, with attention and respect. He does not hide the ball. Unlike Langdell, if asked his personal view he provides it. But he forces that view on no one. None of his students has ever asked a stupid question.

Bob learned his skill with language early. His father was a public school principal who died early, but after somehow transmitting to Bob a deep respect for language. Bob was raised by maiden aunts, and has never learned to swear, either at students or at colleagues, no matter what the provocation. This is a pity. He tolerates, but I fear with some pain, friends who do swear. Tolerance is good.

More unusual among law professors is Bob's undergraduate engineering education at Stanford. Engineers are applied scientists who plan and design things. They crunch numbers. They are expected to know about how much the designed building will cost. In recent years, Bob has built a house with his own two hands.

His education as a young engineer led to a naval career that taught him both confidence and humility. Confidence came when Admiral Rosendahl, the Navy's one and only lighter-than-air Admiral, reached down and made the young ensign, just after he had learned to fly a

6. *Matthew* 5:1–2 (King James).

blimp, his personal staff collaborator to design gear which would make the Navy's K-type airship an effective weapon to kill submarines under water.

Collaboration with an admiral was itself a lesson in humility. Admiral Rosendahl, a true believer in LTA, expected that after the war skies would be filled with fleets of helium-filled airships carrying the commerce of the world more cheaply than surface ships or heavier-than-air craft. The collaborator with an all powerful man of such vision necessarily learns tact. He also learns how to do the impossible, and to give credit for success to the man with the most braid.

The whole lighter-than-air force—including Bob and the Admiral—learned humility in 1943 when, at long last, an American Navy blimp and a German submarine met each other in Florida waters and joined in combat. The blimp lost. A few weeks later I was assigned by the Navy Supply Corps to duty with a blimp squadron in Florida. On almost the first day, I stood at attention and watched the rescued survivors (only one man died) of the blimp's crew receive the Purple Heart in token of their hours of trauma awaiting rescue in shark-filled waters. The command pilot of the blimp, had he followed approved procedure, would have stayed out of range of the sub's deck gun so long as the sub remained on the surface, and radioed for help. He was immediately assigned to duty with LTA's administrative headquarters. After the war he became a professor of law in Indiana.

I did not see this man again until 1965, when I first met Bob Fletcher as a teaching colleague. Bob confirmed the details of the humiliation of the entire blimp Navy. Bob and the Admiral would have solved the problem if the war had lasted longer, and if the Admiral had continued to get the same support in new blimps, men, and materials that had been available before 1943. The difficulty was in airship design. The blimp's single machine gun could keep the sub's deck gun inoperative while approaching the sub, but after the blimp flew over the sub it could not shoot backwards or turn quickly and the gas bag became a helpless artillery target.

Adding a machine gun at the rear to shoot backwards was a problem the Admiral and Bob never solved. A rear machine gun would have shot the blimp's lower tail fin, indispensable to navigation. A few years after the war the Navy mothballed the last blimp.

I do not know why Bob abandoned his engineering career to study law after the war, but I suspect that frustration over the failure of the helium Navy—which even a junior command officer felt—had something to do with it. At any rate, on graduation from Stanford Law

School, Bob and his growing family moved to Puget Sound. Bob practiced law and made the family bread—literally and metaphorically. Betty Binns Fletcher, of Tacoma, who had started that family in blimp days at Lakehurst, New Jersey, enrolled at the University of Washington Law School and—with Bob's help in the bread and diaper departments—graduated at the head of her class. Then, continuing to raise the family, she joined one of the largest and most prestigious law firms in Seattle identified by a string of names, the last of which by 1979 was Fletcher.

Betty's reputation was such as to create speculation at that time that soon the firm would be Fletcher, followed by a string of names. But President Carter appointed her to the United States Court of Appeals for the Ninth Circuit. In legal circles with which I communicate most often, the Supreme Court wins praise when it affirms one of her opinions. When it reverses her, heads shake in disbelief. Disbelief usually becomes conviction as soon as the dissents become available to read.

Bob has never been heard to seek for himself a word of praise or to accept one in criticism related to any of Betty's achievements. Nevertheless it is clear that, whatever his effect on her education, hers has been of the greatest importance to him. As a student and in practice she was a window on the real world—of greatest value to a professor of property whose academic focus is likely to be events of the fifteenth century or earlier.

Since Betty has been a judge, her influence on Bob's continuing education is harder to appraise. Clearly, however, his reputation has been enhanced. Who can better be expected to prophesy accurately about what a court will do than a judge's spouse? Who would know the legal system better than the spouse of a judge of distinction like Betty Fletcher?

Fortunately, the legal subject on which Bob speaks with greatest authority does not often arise in a federal court. That is the Rule Against Perpetuities, which says that the dead hand of a grantor, devisor, or settlor cannot leave title to property unvested beyond lives in being plus twenty-one years. Before Bob first published on this subject the conventional academic wisdom approved invalidating dispositions in their entirety because of the possibility that an interest might vest in a child yet to be born to an eighty-year-old widow, or in the unborn spouse of a now ninety-year-old bachelor.

Bob has carefully exorcised the irrationalities from the rule, but so far has attracted little notice from those who continue to teach,

preach, and restate the rule in its weirdest form.[7] The reason? Bob is not a polemicist. He shrinks from attacking an adversary, just as he never suggests that a student is unprepared or stupid. But Bob is of good cheer and of continually good disposition. He knows, I think, that if our world survives at all, his legacy to rationality will some day prevail.

By accident or cosmic design, the education of Bob Fletcher produced a great teacher. But that education could not be replicated, even if we could order a repetition of World War II. Clearly, however, the end product of that education is more than worth searching for the elements that can be replicated.

Bob is not waiting for his reward in heaven. The first semester after retirement, so-called, he taught Property at Hastings, in San Francisco. The next semester, as I write, he is teaching Property at the University of Vermont. Near Puget Sound his friends, colleagues, former students, neighbors, and family hope that he may soon tire of this, and that he will not stop en route to tidy up the law of property in Illinois or in North Dakota.

Bob, your disciples are waiting for you!

7. Fletcher, *Perpetuities: Basic Clarity, Muddled Reform*, 63 WASH. L. REV. 791 (1988); Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting*, 20 STAN. L. REV. 459 (1968).