Reflections on Community, Responsibility, and Legal Education

By Wayne D. Brazil*

The themes for this essay emerged from two separate incidents, neither consequential in itself.

The first occurred as I was walking one morning from the commuter train station to school. I encountered one of those dirty, hapless, vaguely threatening people whose presence gives the Tenderloin section of San Francisco its special charm. To make my story easier to tell I'll call him Archie.

My first reaction to Archie was fear, but that's not particularly remarkable, because my first reaction to almost everything is fear. My second reaction was more noteworthy. It was a crisp sense of indignation. I was moralistic, condemning him (silently, of course) for being in the state he was in, for not working, for not seizing control over his life and earning the money to pay his own way.

Then, before these feelings had played themselves out, I became self-conscious about the way I was reacting. I began to think about the distance that seemed to separate me and Archie. It occurred to me that I really had no understanding at all of him or his situation. I had no idea what forces had been at work in his life, what limitations God or history had imposed on him. I had no idea whether he had the capacity to be anything other than what he was—whether he had that morning, or ever had, any meaningful control over his fate.

As I became more self-conscious about my ignorance I also became more embarrassed by my initial moralistic and condescending reaction.

I realized that my reaction had been born in the gulf that separated me and Archie—and that that reaction was graphic evidence about how wide that gulf had become.

I began to think about the many different ways the distance between me and the Archies of the world has grown in the last several years.

As I have worked hard to succeed and to contribute, I have become more specialized, and more sophisticated in my specialty. And I have spent almost all of my time with comparably specialized and sophisticated people.

*Professor of Law, University of California, Hastings College of Law, San Francisco
The hard work that has brought me material comfort and professional achievement has made me tired, and tired of being tired. So I have become much less patient with people who don't seem to be trying as hard, or who appear to rely on others to meet even their most basic needs.

In short, I have become preoccupied with my struggle to do better and with what that struggle has cost me. And in the preoccupation I have permitted self-serving, moralistic assumptions to displace the more open-minded concern about people like Archie that I once felt.

This train of thought led to the perception that troubled me the most; just as the situational distance between me and Archie has grown largest, my empathy—my impulse to try to understand him—has been evaporating.

Pretty heavy stuff to be pondering on a summer morning. There was one more thing. As an erstwhile historian it occurred to me that I probably was not the only person who had drifted in these emotional directions during the last decade. It was the spectre of many people who occupy positions like mine moving in emotional directions like this that inspired my first theme: deterioration in our sense of community.

My second theme is illustrated by a conversation reported to me by a proctor at this summer's bar exam. During a break some of the people taking the exam began complaining to her about the low recent pass rates. The proctor asked why the rates had been so low. Without hesitation or qualification the examinees blamed their law school faculty. The recent graduates insisted that their teachers simply had not taught them the rules they needed to know to pass the exam.

In recounting this exchange, the proctor, a woman in her sixties, told me she was not surprised that students would cast some blame on their teachers, but she was surprised that they acknowledged no responsibility at all in themselves.

That observation inspired my second theme: The retreat I see in so many places from a sense of individual responsibility.

Even recent increases in the volume of litigation might reflect, in part, that retreat. The disturbing number of suits the federal government must file to collect student loans suggests that many students who were given opportunities refuse to acknowledge even modest accompanying obligations. Retreat from responsibility also might help account, in some modest way, for the increasing volume of civil rights litigation. That volume might reflect, just in some part, growth of an impulse to lay all the blame for complex problems on the government.
And one reason there is so much commercial litigation might be that some corporate managers use lawsuits against competitors, suppliers, or customers to try to deflect attention from their own errors of judgment.

In sum, it may be that the so-called “litigation explosion,” a phenomenon whose intensity we could debate, but whose reality we cannot deny, is one piece of evidence that we are living through a period in which more people are less willing not only to accept responsibility for others, but even for themselves.

I will not try to defend the view that these problems are more severe in our times than they have been in others, though I suspect they are. My goal is not to make a point about history. Instead, my goal is to encourage us to step outside of ourselves and our daily routines, just for a moment, to examine larger trends or forces that might be affecting our lives and our work.

In a way, this is a selfish exercise for me. I have been aware for some time that my attitudes have been drifting, but I have not forced myself to think about why, or what the consequences of that drift might be.

Before turning to these questions I should develop further my thoughts about the characteristics of our times that concern me. When I talk about deterioration in our sense of community, what do I mean?

Among other things I am troubled by how out of vogue it has become to be idealistic. I have the feeling that students who are openly concerned about social issues are, regardless of their politics, increasingly isolated—they tend to be viewed by the majority as quixotic, or silly, or even psychologically imbalanced.

I am particularly concerned about the professional interests of our best students. Some of these, but not many, get involved in high visibility “causes” while in law school. But very few of the people in the top of the class seem committed to careers in politics, government, or social service. And some of our students who express an interest in jobs in the public sector seem motivated not by desire to serve, but by recognition that they cannot successfully compete for the “better” jobs in the private market. Too often those who are entering public life simply aren’t the best and the brightest.

Another indicator of the state of student “morale” (in the literal sense) is the prevailing attitude toward the course in professional responsibility-legal ethics. One might expect students to view this subject as among the most vital and important in the curriculum, since it covers such big questions about what responsibilities accompany the
power of being a lawyer. Unfortunately, however, many students seem to approach this course with an enervating blend of cynicism and derision.

Facts like these about current student interests and attitudes are especially troubling because among all age strata we expect the young to be the most idealistic. If our young people are predominatly cynical and selfish, our greatest source of energy and initiative for improving the quality of our society is in jeopardy.

I would be remiss, however, if I illustrated my point about the current state of our sense of community only with examples from students. For the sake of balance, and to bring the matter even closer to home, I should cite evidence based on the behavior of faculty. I will use myself as my prime example.

I teach constitutional law and civil procedure, two big, core courses. One is primarily about power—the great power of government—how it is distributed and how it is contained in the name of the fundamental rights of the people. The other course is primarily about process—about the mechanism our society has developed for peacefully resolving conflicts.

I was attracted to these courses because the legal doctrine in them is the product of our society’s effort to resolve tensions between some of our most basic human values. Ironically, however, I have spent almost no time in class exploring, or asking students to explore, which of our values are most basic, most important. We talk very little about what ought to be—and why.

In constitutional law, for example, we do not directly ask what kind of society we want—a question that must precede questions about which legal rules are most likely to be beneficial. And in civil procedure we almost never step outside our adjudicatory system to ask questions about it. We don’t try to assess its health as a system. And we don’t seriously explore the possibility that alternative systems might better serve our values.

Between my students and me there are considerable intellectual resources, but we tend to use them for relatively “small” purposes—to expose inconsistencies, to seek out unarticulated assumptions, or to track doctrinal subtleties. Not surprisingly, lawyers who emerge from such training are adept at pursuit of the small—the technical and the tactical—but are neither equipped nor inspired to turn some of their considerable talents to larger purposes.

*Why* have I drifted into my narrow pedagogical canyon? Why have I retreated so thoroughly into technical analysis? There are, presumably,
many reasons. One is fear of being inept. I can appear more intelligent and retain greater control over my courses by dissecting appellate opinions than by venturing into larger areas of inquiry. I am poorly trained to analyze social forces, poorly trained to explore the social sources or social effects of legal doctrine, poorly trained to assess the relative importance of competing values, poorly trained even to define the word important.

But my title is professor, not technician. And maybe I am being irresponsible when I respond to the disparity between my equipment and the difficulty of attacking the big issues by ignoring those issues. Maybe I should work on improving my equipment.

In my civil procedure course I might rationalize my approach by arguing that the production of skilled technicians necessarily assures the smooth functioning of the adjudicatory machine. That, of course, is a widely accepted premise about the adversary system: many lawyers believe that if opposing counsel are competent and motivated, the truth will out—and that it will out as efficiently as possible. But that premise is unproven and largely unexamined. How do I know it is true? And shouldn’t the current clamour about the crisis in judicial administration—the predictions that our adjudicatory system is in danger of collapsing of its own economic and administrative weight—cause me at least to question the notion that all we need for a good machine is capable operators trained in time honored methods?

There are additional reasons, more directly related to the themes that integrate this essay, for my reluctance to spend time during my courses pursuing larger questions about values and social forces.

I am a creature of my times. I want to fit in with my times. And these are times when idealism, commitment to community, and open exploration of values seem disfavored. So I am afraid to be idealistic. I am afraid that I might be viewed by my students and my colleagues as quixotic, or silly, or psychologically imbalanced. I am afraid my students will ignore even my message about intellectual integrity if they think I am not tough-minded. And I am afraid they will think I am not tough-minded if I pursue the big questions that carry such emotional baggage.

I also must confess that I am reluctant to accept the responsibility that comes with taking positions.

Please don’t misunderstand. This is not a plea to be political. It is not a call to abandon mastery of analysis, doctrine, or trade skills as primary pedagogical objectives. It is simply an admission that the content of my courses has been affected too much by lack of courage
and too little by responsible decisions about which uses of my course time would best serve my students and my society.

I suspect I am not the only teacher who has fallen into these ways. In fact, I suspect that the strain in my sense of community and the erosion of my sense of individual responsibility reflect general trends of our times.

If so, what accounts for these trends? I'm sure the answer to that question is not simple. I doubt, for example, that it's just a matter of stress in our economy. In fact, data from the Bureau of the Census suggest that real (i.e., taking inflation into account) after-tax income for working Americans is higher today than it was twenty years ago—in the early 1960's. And even though unemployment is higher now than it was then, that fact has relatively little direct impact on the lives of the people who lead, or fail to lead, in setting the emotional and moral tone of our times.

But maybe it's misleading to focus only on the direct impact of economic stress. Unemployment, for example, might affect directly only 10% of the population, but unemployment figures of that size might provoke a lot of fear in the remaining 90%. And even if salaries and wages have increased steadily, high inflation rates can make people anxious about their future, about what illness, incapacitation, or old age could do to their ability to keep up.

But the future always has been uncertain. Why are we more afraid of it—more demoralized by it—in some times than in others? I can't answer that question, but I would like to suggest one thought about it.

I have a hunch that there is a direct relationship between the intensity of our anxiety about the future and the strength of our sense of community. The weaker our sense of connection to those around us, the more fearful we are likely to be. If our sense of connection is strained, we have less confidence that our community will be there to help us in time of need.

I also suspect that there is a direct relationship between weakness in our sense of community and the narcissism that has been associated so often with the 1970's and early 1980's. It seems natural for people to become preoccupied with themselves when they lose confidence in their community. If we cannot count on our society, our society becomes less real to us—and we turn in toward ourselves.

There is one more piece in this psychological circle. As our sense of connection to our community weakens, our suspicion may grow. If society is not to be trusted to help us, perhaps it is against us. As our confidence in the group wanes, we may begin to blame the group
for our difficulties. Gradually we may come to view our community not as a crucial source of comfort, but as the source of our problems. Society is no longer our support, but our scapegoat.

This completes the cycle that produces the final irony of our times: while we are preoccupied with ourselves, we refuse to accept responsibility for ourselves.

I believe that all of us, as judges, as lawyers, as citizens blessed by history with special opportunities, have a responsibility to work toward breaking this cycle. How each of us can best contribute will vary with our circumstances. I hope that these words mark the beginning for me—and that I can muster the courage to take these concerns in a meaningful way into my classroom.