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LAWYERS IN THE PUBLIC SERVICE AND THE ROLE OF LAW SCHOOLS

*Frank J. Macchiarola and Joseph Scanlon**

New York City is home to seven law schools. These area schools and the New York community itself, should recognize and maximize their opportunity to work together in public service. Not only are the law schools the training grounds for future lawyers, by and large, they are the training grounds for many of the citizens of this City and other communities who have a professional responsibility to recognize the contribution they can make to their communities as attorneys. Law schools have an obligation to recognize this causal link between the education and values learned through the law school experience and the tremendous effect that this training can have on the community.

This essay examines the history of the traditional law school curriculum and poses practical and philosophical suggestions for the improvement of existing course work. Next, the essay examines the community beyond the walls of the law school as a source of instruction and application of the skills and values learned in the law school. Finally, the argument is put forth that a more expansive definition of professional responsibility must be instilled in the students and rewarded by the law schools. Through this redefinition, the law school and the community at large can benefit from one another through a compact of mutual obligation and support.

I. The Law School Community

A. Development of the Law School Curriculum

The way in which candidates are prepared for admission to the bar, legal education if you will, has undergone considerable change over the last century. Until the early 1900s the vast majority of lawyers received their legal education by "reading law". This term refers to the method by which they came to know both the substance of the law and the manner in which they ought to behave as lawyers through their direct association with other members of the profession and in

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their role as law clerks. However, during the twentieth century, legal education has moved rapidly from this local apprenticeship training to what is now almost exclusively education in law schools. These schools are usually accredited by the legal authority in the state, by the American Bar Association and by the Association of American Law Schools. This accreditation process demonstrates the significant and close association among the bench, the bar and law schools in the preparation of new lawyers.¹

By the early part of the twentieth century the debate over how aspiring lawyers should be educated was largely resolved. The consensus that emerged was that formal academic training was the preferable means of obtaining a legal education. Such a development meant that the opportunity to witness and to follow the examples of other lawyers, as was done in "reading law", was lost. The lawyer who served the public by providing pro bono legal service or other community service was no longer a mentor. Such a loss has not been inconsiderable. It has imposed a special obligation on law schools, an obligation to introduce to students the professional practices of the bar that are not grounded in the substance of the law.

There was an early effort made to introduce a form of realism to the study of law in law schools. Formal training had gone from rote memorization of legal principles to the case method as developed by Langdell.² While other forms of legal study going beyond the case method had also been introduced in this early part of the twentieth century, such as role playing in activities like Moot Court, the predominant approach to legal study has been for most of the twentieth century (and largely continues to be) the reading and analysis of appellate cases. This is especially true in the first year of law school. The main emphasis is based upon getting the student to "think like a lawyer". While this approach of immersion in case law has substantial merit, the implication of what "think like a lawyer" means is much broader than the case method.

B. Instilling Values at the Law School Level

"Thinking like a lawyer" to a large extent has been limited to ap-

1. See AMERICAN BAR ASSOCIATION, *THE AMERICAN BAR ASSOCIATION'S ROLE IN THE LAW SCHOOL ACCREDITATION PROCESS* 1-5 (1981).

2. Christopher Columbus Langdell (1826-1906), the first Dean of the Harvard Law School, initiated the case method of legal education in the 1870s. Students using Langdell's case method learned to "think like a lawyer" through extracting legal principles from appellate case decisions, rather than through the memorization of legal rules presented in lengthy lectures and divorced from their evolution. A.W.B. SIMPSON, *BIOGRAPHICAL DICTIONARY OF THE COMMON LAW* 302 (1984).

plying the law to a specific set of facts, identifying issues or performing tasks within a contained system. But "thinking like a lawyer" must also involve creating an awareness in students of the role of the legal profession within the larger society. The process must also create an appreciation of each student's personal obligation as an attorney and the public concerns that stem from these obligations. These concerns add an important dimension to the process of legal education. Specifically, they involve the process of teaching students to "have values like a lawyer".

It is therefore essential that law schools not limit the scope of their teaching to the subject-matter component of legal education. Since law schools in the twentieth century are the loci of almost all legal education before bar admission, they must also be places where the values aspect of legal education is taught and nurtured. Since law schools have taken on the responsibility of the virtual totality of legal education, they must have a curriculum that promotes the broadest definition of the law. This definition includes, of course, public service.

II. The Law School and the Community At Large

A. Practical Training

The promotion of public service by law students goes hand in hand with an increase in practical training during the law school years. Public service and the law involves a responsibility on the part of the law schools to perform particular services for society. Arthur T. Vanderbilt, one of the leading proponents of public service in his lifetime, questioned the tools used by the legal education system to achieve the ends of public service.³ In terms of legal method, he stressed that law should not be taught as a series of unrelated courses as Blackstone⁴

3. Arthur T. Vanderbilt (1887-1957). Throughout his career, Vanderbilt worked for law reform, organization of the courts, and for reform in legal education. As President of the American Bar Association (1937-1938), Vanderbilt was a leader in the promulgation of the enormously influential Minimum Standards of Judicial Administration. As Dean of the New York University School of Law (1943-47), Vanderbilt initiated courses and programs to instill in law students and lawyers alike an understanding of the problems that confronted the law. In addition, he founded the Institute of Judicial Administration and the Law Center, institutes that are dedicated to contributing to the continued modernization of the law.

4. Sir William Blackstone (1723-1780) authored the treatise, *Commentaries on the Laws of England*, which was first published in 1765. In the first century of American independence, the *Commentaries* were not merely an approach to the study of law, but for most American lawyers they constituted all there was of the law. Prior to the twentieth century, a mastery of the *Commentaries* was sufficient to gain admission to the bar in many states of the Union. Moreover, the *Commentaries* provided the spokesmen of the

and Kent⁵ had presented it, but rather that courses should be taught as overlapping and interrelated.⁶ In such an approach, the question of why we are doing something becomes as considerable a matter as what we are doing. Technique must be balanced by ethics.

Law schools have yet to respond adequately to Vanderbilt's appeal on this issue. Almost all courses today are still neatly pigeon-holed into their own legal compartment. Although many of the second and third year courses apply basic concepts learned in the first year curriculum, for the most part students are taught subjects as isolated disciplines. Legal issues in today's complex society infrequently arise in the neat packages presented in law school.

Furthermore, Vanderbilt recognized that the case law method of teaching was also deficient in teaching the art of doing.⁷ He noted that other professional disciplines such as medicine, engineering and business did not rely solely on books as was the current practice in law schools. Students in these other professions were exposed to the practical side of the profession as well.

This point has been repeated on many occasions. Indeed, Chief Justice of the United States, Warren Burger, stated: "[t]he medical profession does not try to teach surgery simply with books; more than [eighty] percent of all medical teaching is done by practicing physicians and surgeons. Similarly, trial advocacy must be learned from trial advocates."⁸ In the almost twenty years that has elapsed since Burger's lecture, law schools have made great strides in incorporating the "doing" aspect of the law into their curricula. Most law schools now provide a variety of clinical experiences in which students can participate in the practice of law. These programs are designed to allow students to work in legal settings under the supervision of experienced attorneys. They allow students to gain at least a limited understanding of the practical side of lawyering. Additionally, clinical programs are public service efforts in and of themselves, as the courts or the indigent parties, the recipients of much clinical training, benefit to a certain extent as a result of this practical training.

Revolution with arguments against the government of King George III, and they also guided the members of the Philadelphia Convention in framing the Constitution of the United States. SIMPSON, *supra* note 2, at 57-61.

5. Chancellor James Kent (1763-1847), one of the great nineteenth century constitutional scholars, authored *Commentaries on American Law*, which is often regarded as the first great American legal treatise, "The American Blackstone." *Id.* at 294.

6. ARTHUR T. VANDERBILT, *MEN AND MEASURES IN THE LAW* 63 (1949).

7. *Id.* at 37.

8. Warren Burger, *The Special Skills Of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227, 232 (1973).

Sometimes, however, these clinical programs address only some of the defects of the legal education system discussed by Vanderbilt. The mere existence of clinical programs is not the solution to our problem. Clinical programs should not be used only as a vehicle for students to increase their skills. They should also provide the student with a high level of appreciation of the dilemma of those who are unable to afford legal representation. They should stress in students the need for legal professionals in the public sector, and inculcate in students the obligation of every lawyer to contribute to the needy. Legal clinics and externships have succeeded in giving students the type of practical exposure to the legal profession which Vanderbilt felt they needed. They should, moreover, be understood and appreciated as basic to what a lawyer has to know and sense. As Judge Vanderbilt recognized, that does not necessarily mean that every attorney must seek public office, but rather that every attorney should be prepared to answer some call for public service when it comes.⁹

C. Prerequisites for Law School and Role Models for Law Students

While Vanderbilt has had much to say about improving the law school curriculum, the central theme of his criticism of law schools was that very few schools gave consideration to the primary importance of lawyers assuming individual responsibility in political leadership and interesting themselves in local and community affairs. He maintained that in order to accomplish this goal, law schools had to foster a sense of personal obligation in their students to assist those less fortunate than themselves.

To meet that challenge, law schools must look to what Vanderbilt and many others have identified as the source of the problem. Specifically, they have identified the lack of moral education and a lack of the basic foundation of courses at the undergraduate level which are important in order to prepare students for the study of law. Students ought to have a knowledge of economic, political and social consideration that help explain the environment in which the law operates. Colleges must infuse curricula with these necessary courses. Further, values formation — the way in which people study the differences between right and wrong — is an important requirement for students considering law.

At this point, it should be emphasized that choosing between right and wrong is a task that law students must appreciate as a require-

9. VANDERBILT, *supra* note 6, at 44.

ment of their legal practice. The difficulty of these decisions, and in fact the uncertainty that attaches to them, are factors that constantly challenge lawyers. In many circumstances there will be little assurance that a "right" decision has been made. The process, however, remains an important one, for the good lawyer must develop — almost as a habit — a strong sense of doing what is "right". The lawyer's integrity on this score is much like the integrity of a good product, one with warranties that mean a great deal to the customer, to the seller and to the manufacturer alike.

An often heard argument put forth by law schools in defense of the poor quality of their professional responsibility teaching is that general ethical standards are formed long before law school and that not much can be done in three years to change that. While this argument has considerable merit, it misses the point. No one is asserting that the shortcomings of legal education should be blamed on law schools alone. Ethical standards are certainly formed, to a great extent, prior to law school, however, complacency or inattention to values education is not acceptable. Law schools have to take a proactive stance in reforming the current attitudes toward professional responsibility, whether it be in the teaching of ethics or in recognizing that public service has an importance that must be emphasized and developed in legal education.

To instill this obligation of professional responsibility, law schools should actively seek to attract the most highly respected members of the profession and bring them to prominence in the law school community. It is from the experiences of these people that a sense of commitment can be impressed upon students. Indeed, something of that old legal apprenticeship — something quite sensible and useful — can be brought back to the education of the candidates for bar admission. Whether it is by honoring these professionals, or employing them as adjunct faculty members, law schools need to recognize them and incorporate them as role models within the law school community. The law schools must remain constantly aware of their status as a breeding ground for future practitioners and understand the ramifications of this reality in the legal profession.

III. Professional Responsibility, Law Schools and the Legal Profession

Indeed, legal education seems to be falling short of any meaningful effort to shape the legal profession. Rather than setting the standard for values, law schools seem to be largely accepting of some of the worst values of the profession. Law school has been characterized as

the "paper chase". It seems very clear that the color of that paper is green.

Rather than providing an opportunity to serve the public or to contemplate questions of law and justice, law school in more recent years has often been seen as a vehicle for students to obtain lucrative positions in large law firms. As the pressure for jobs and placement continues to affect the education process, the growth of these powerful firms over the past twenty years has had significant influence on the values that are emphasized in law school. To many students, the inordinate starting salaries that these large firms are willing to offer graduates represent the "brass ring" that is the reward of a legal education. In reaching for it, too many have responded to greed and shut out even the option of working in the public sector. The kind of money and prestige these firms are able to offer to starting attorneys has led to a disproportionate number of our ablest students being caught up in accumulating personal fortunes. Derek Bok, as President of Harvard University and former Dean of the Harvard Law School, characterized this overwhelming preference by our top law graduates as "a massive diversion of exceptional talent into pursuits that often add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit."¹⁰

These students seem to be devoting their entire careers to serving the needs of a substantial part of corporate America, the financial services community. With some starting salaries at these firms approaching \$90,000 a year,¹¹ the allure of such an offer is often difficult to resist. This phenomenon exists for a number of reasons. To a certain extent, we in the law schools have not been sufficiently attentive to this trend. In fact, we must share in a substantial part of the blame because, all too often, the cost of attending law school can place a severe financial burden on graduates as they struggle to meet the costs of repaying their student loans. Even for a student who appreciates an obligation to the public sector, it is unrealistic to expect a heavily indebted graduate to enlarge the burden of that debt by taking a low paying public sector job in the face of a lucrative job in the private sector.

Many of these graduates whose instincts toward public service were nurtured in law school try to take positions at firms that "encourage" pro bono work. But the fact remains, while some large firms do have a serious commitment to pro bono work for their new associates, they

10. Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 573 (1983).

11. See Edward A. Adams, *NYC Firms Freeze Pay*, NAT'L L.J., March 23, 1992, at 2.

are too often the exception rather than the norm. Thus the private sector offers limited and sometimes nonexistent avenues through which a young associate can fulfill his professional responsibility. Unfortunately, pro bono work is available, but discouraged at many firms as it does not qualify as "billable" work in the efficiency equation.

All too often, moreover, in the way we measure "success", we in the law schools appear to perpetuate the attitude created by the "elite at the bar": once you have made it to Wall Street, you have arrived. This reinforcement is disturbing in that it seems to have infiltrated just about the entire law school community, from the student body, to the placement office, to the faculty. It is an understandable result when considered from the standpoint of many, but it is unfortunate nevertheless. We are responding to market forces; we are meeting the needs expressed by the students. Yet, in reality we are helping substantially to create that market and to shape those needs. In the way we deal with the matter of choice, we are forgetting that we have something important to say that students should consider when they make their choice.

We have the capacity, indeed the duty, to search deeply and help them discover what aspect of the legal profession would make them happy and satisfy their needs for challenge, growth and adequate compensation. But the matter of compensation — particularly when it is beyond the amount adequate to their needs — must be put in its proper place.

While this essay primarily singles out the legal profession and the law school as in need of reform, it should be noted that the prevailing values identified here are also fairly representative of societal attitudes as a whole. We live in a time and place where the concept of community in America is greatly deteriorating.¹² There has always existed a tension between the needs of the individual and the needs of the community, but this tension exists to a lesser degree when people perceive themselves as having a positive and personal duty to nurture their community.

The prevailing attitude of society today though seems to be excessively competitive. The sense of community is eroded by an emphasis on individual performance as people compete for advancement and recognition. To a large extent the legal system has contributed to this result. Our fiercely competitive adversarial system — where the ends

12. See John W. Gardner, *Building Community* (Independent Sector, 1991). This paper prepared for the Leadership Studies Program of the Independent Sector is an expansion of the ideas set forth in JOHN W. GARDNER, ON LEADERSHIP ch. 11 (1990).

seem to justify the means — has placed an excessive focus on the process, with limited attention to the product, or result. It has not been lost on Americans that justice in this country is often a matter of survival of the fittest. Those with better resources get better legal assistance, and in fact get a better result. At the same time, the adversarial method of dispute resolution — what we say is the way in which the law operates — has largely been discarded by many in business. They have adopted alternative dispute resolution strategies that reduce the number of lawsuits and ultimately trials. The shift from litigation involves not only civil justice, as plea bargaining now represents the method for resolving most criminal disputes as well. The adversarial system merely operates as a type of constraint setting limits upon the final result, but not being the basis for it.

There is some question then as to whether the focus on the techniques of the adversarial process gives due recognition to the communitarian process that is often at work in the legal system. In so many instances, the district attorney and the public defender reach an agreement, the buyer's lawyer and the seller's lawyer reach a settlement, and the law student focused on the adversarial process misses the significance of the result. In practice then, when faced with the prospect of a fair settlement, the young lawyer somehow gets the impression that she did something that she was not taught to do. The lawyer has "compromised" her beliefs. In this way, a result more beneficial to the community is often seen as something negative.

IV. Law School and Community in the Future

The combination of the lack of full appreciation for community values, and the growth of a "me first" attitude that we are seeing in America today has had a powerful impact on the enhanced stratification of communities in the 1980s. People in the upper class — many of them lawyers — have become less conscious of the need for community. Increased suburbanization and the availability of so many alternatives to public service have moved many lawyers away from the common experience. In addition, community breakdown is far less apparent in the suburban areas where these lawyers live, so they feel almost no threat to their lives and safety. Even when the problem of social stratification is recognized, it is usually perceived as a problem of the lower socio-economic classes.

Here too, lawyers and law students must focus their efforts on activities — in the classroom and public service — to enhance the sense of shared and common values. If we in legal education are in fact going to make the rule of law have meaning for citizens, we must

focus on results that enhance the community. This list which follows is not intended to be exhaustive, but it illustrates some of what we can do: adding to the clinical programs work with groups that are disadvantaged or who are usually unable to obtain legal assistance; adding to the instructional programs courses in public interest law; getting private funding for pro bono activities; selecting casebooks that contain greater material on justice issues and which see lawyering in terms beyond the adversarial system; sponsoring conferences on campus where public interest issues are raised; and creating a mechanism for dissemination of work in progress in these areas. Just this year, for example, the New York State Bar Association gave its Law Student Pro Bono Award to the Unemployment Action Center, Inc.. The Center, which provides free legal advocacy to those in the New York community who have been denied unemployment insurance benefits, represents the collaborative effort of law students from New York University, Columbia, Hofstra and Cardozo. This collaboration and its support by the New York State Bar Association is an important statement, in this regard. If the law profession takes an interest in these activities, it is sure to have a positive impact on the law student's view of public service.

Finally, the matters of technique, focus and community values — all of which have already been discussed — lead to the important issue of legal ethics. In discussing lawyer professionalism, a recent American Bar Association report stated: “[A]ny recommendation on professionalism (the issue of professionalism in this context is really the same as the issue of ethics) should begin with law schools, not because they represent the profession’s greatest problems, but because they constitute our greatest opportunities.”¹³ The great majority of the scholars that have addressed the need for reform in the system of legal education have echoed the same philosophy.

Law schools today stress that their primary role is to teach basic legal skills, increase awareness of ethical responsibilities and introduce students to the fundamental tenets of the major substantive legal fields. As indicated, schools tend to put great stress on analytical reasoning and the study of appellate decisions. To some extent, lawyering skills have also been introduced and adopted. Yet, while all of these skills are important aspects of legal training, they often take away from the human side of the law and are stressed at the expense of other important areas of lawyering. Early on in law school, stu-

13. See AMERICAN BAR ASSOCIATION COMMISSION ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE”: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 16 (1986).

dents should be introduced to the human and practical side of the law. In fact, they should know conceptually that they are only studying a part of the law. This is especially true today because of the educational system that is so lacking in any real sense of moral or values education. As such, professional responsibility has to be the basis for everything else that a law student learns.

We must change our prevalent teaching practice when it does not consider ethical issues as they arise in substantive courses. After all, ethical issues do not only arise in courses on professional responsibility. They are also interwoven in most of the other substantive areas of the law. It is important as these issues occur that they be recognized and taught in a way that helps the student to appreciate that these issues are just as important as the "substantive issues" in the case book.

All too often the way legal ethics is taught in law school sends an inappropriate message to students. Legal ethics are frequently presented in terms of "how far can I go without receiving any kind of disciplinary action or sanctions." This kind of attitude does a great disservice to the legal profession and lawyers in general. Although it is important to know where the profession draws its lines in regard to ethical conduct, we should be teaching our students to strive for standards well above that line in the normal course of their professional conduct. What we should be teaching in law schools is that we must maintain a level of professional conduct that is above minimum professional standards defined by the Code of Professional Responsibility.¹⁴

Law schools must come to the realization that you cannot simply teach professionalism from a book, rather professionalism must be taught by example. Law schools should be committed to seeking out the most highly respected and able people in the legal profession as teachers to serve as role models for its students. It is through these professionals that students will learn about commitment and responsibility and be imbued with a sense of obligation to public service.

Another more practical way that law schools could have an immediate impact on students and show our own commitment to values is through programs that involve loan forgiveness, or that toll interest payments for a period of time while students are engaged in public service. These programs are currently in place in many law schools.¹⁵ Loan forgiveness programs help students choose public service. Our

14. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981).

15. For example, Harvard, New York University, Columbia University and Fordham University are among the law schools that have implemented programs that forgive a

support for them means that, as the cost of legal education continues to rise and students take on more debt, we recognize the need to encourage students to choose public service and resist being driven by commercial ends alone.

The administration and management of law schools and universities must proceed from ethical principles that are understood and implemented as part of the school's mission. They concern how we spend tuition income, and also, how we spend donor gifts. They concern the matter of whether faculty reports student grades to the registrar in a timely fashion. They also concern the kind of programs we support and endorse at school.

When I first assumed the Deanship at Cardozo School of Law in August 1991, I was struck by what Jacob Burns, the Chairman of our Board of Directors at the law school, said to me about what we wanted our graduates to be. He said we should "graduate knowledgeable, sophisticated and ethical lawyers." His message made an impact not only for the quality of what he had to say. It made an impact because it reminded me of how much responsibility I have as a law school dean to help shape the lawyers that are to be our alumni. I know from considerable experience that I do not have the ability to authoritatively instruct our students to assume responsible roles. What I do know, however, is that if we challenge the moral sense that so many of them have, if we lead by example, and if we give their very best impulses the kind of approval that those impulses deserve, we will encourage our lawyers to develop their very best human qualities. I do know that for Fordham University and for Yeshiva University at least, that if we take and transmit our heritage purposefully — both national and religious — we will extend an extraordinary blessing that will sustain our professional women and men for the rest of their lives.

portion of a student's law school loans for the period in which that student is engaged in public service work after graduation. Cardozo will implement a similar program in 1992.