

LEGAL EDUCATION: PROFESSIONAL INTERESTS AND PUBLIC VALUES

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“All that is necessary for a [law] student is access to a library, and directions in what order the books are to be read.”¹ That was Thomas Jefferson’s view, and during the American bar’s formative years, it was widely shared. In the Eighteenth and Nineteenth Centuries, most legal education occurred through apprenticeships with practicing lawyers, which often provided more drudgery than instruction. Alternatively, students could enroll in one of the few for-profit law schools, where quality varied considerably. Toward the end of the Nineteenth Century, training for law, like other professions, grew more formal and academic.² By the close of the Twentieth Century, about 180 law schools had three-year programs that met the American Bar Association’s accreditation standards, and together graduated about 50,000 students each year.³

To many observers, the migration of legal education into these standardized academic programs seems a mixed blessing. Certainly, the overall quality of instruction has greatly increased. But so has the expense. And, despite some recent improvements, the disjuncture between legal education and legal needs remains substantial. America offers the world’s most expensive system of legal education, yet fails to address routine legal problems at a price most low and many middle income Americans can afford. Today’s law students can graduate well-versed in postmodern literary theory, but ill-equipped to draft a document. They may have learned to “think like a lawyer,” but not how to make a living in the process.

These concerns are by no means a recent phenomenon, and some are probably inherent in the enterprise. Legal education has multiple constituencies with competing agendas and expectations. Law schools are expected to produce both “Pericles and plumbers”—lawyer statesmen and legal scribes.⁴ Faculty, students, clients, consumers, and central university administrators all have priorities that push schools in different directions. But it is by no means clear that legal education has developed the most effective structure for

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1. THOMAS JEFFERSON, *WRITINGS* 966 (Merrill D. Peterson ed., 1984).

2. See ROBERT BOCKING STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 73-130 (G. Edward White ed., 1983).

3. See SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., *OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS* 449-50 (Rick L. Morgan & Kurt Snyder eds., 2000 ed.).

4. See William Twining, *Pericles and The Plumber*, 83 *LAW Q. REV.* 396, 397 (1967).

accommodating these varied concerns. As in other contexts involving professional regulation, the public has little influence over institutions that profoundly affect its interests. Key decisions are controlled by legal academics, who have the greatest expertise, but also the greatest self-interest in educational policy.

Any serious commitment to improvements in the practice of law and the regulation of lawyers must start in law schools. The foundations of our legal culture are laid in educational institutions. Significant reforms will be impossible unless we change how future lawyers think about their professional roles and responsibilities. In short, both the profession and the public need to provide more searching scrutiny of law schools.

Although there is widespread agreement about educational objectives, there is considerable room for improvement in the effort to realize them. At the abstract level, the educational mission is straightforward. Law schools should equip their graduates with legal knowledge, legal skills, and above all, legal judgment. Students should acquire the habits of mind and ethical values that will serve the public in the pursuit of justice. To realize those objectives, law schools should reflect the diversity in backgrounds and perspectives of the broader culture. Their curricula should address the diversity in American legal needs. By these standards, legal education falls short. For too many students, it is not an effective or efficient way of providing essential skills. In too many institutions, diversity remains an aspiration, not an achievement. For too many faculty, professional responsibility remains someone else's responsibility.

At the turn of the last century, Thorstein Veblen declared that a law school "belongs in the modern university no more than a school of fencing or dancing."⁵ In an effort to establish its place and pedigree, legal education lost touch with part of its mission. Legal academics have long sought to cast law as a "science," through the case method of instruction and rigorous doctrinal analysis. That legacy has proven inadequate. Meeting the needs of the profession and the public will require fundamental changes in law school structures, curricula, and priorities.

I. THE STRUCTURE OF LEGAL EDUCATION

The structure of legal education reflects a complex mix of public policy, professional oversight, market pressure, and academic self-interest. The United States Department of Education recognizes the American Bar Association's Council of the Section of Legal Education and Admission to the Bar as the accrediting authority for law schools. Under that authority, the Council has developed detailed standards governing matters such as classroom hours, student-faculty ratios, and library resources. About four-fifths of the states admit only lawyers who have graduated from an ABA-accredited law school and have passed a bar exam. Other states have developed their own accreditation systems, and some, like California, admit graduates of unaccredited schools who pass the

5. THORSTEIN VEBLEN, *THE HIGHER LEARNING IN AMERICA* 211 (1918).

bar exam.

The rationale for a system of accreditation parallels the rationale for other forms of professional regulation: a totally free market for legal education would not provide sufficient quality control to protect the public interest. Students, the most direct consumers of legal education, have limited information for comparing law schools and limited capacity to assess the information available. Seldom do they have a basis for judging how characteristics like faculty teaching loads, library services, or reliance on adjunct professors will affect the educational experience.

Many students rely heavily on aggregate rankings, particularly the *U.S. News and World Report* survey.⁶ However, the factors that most influence a school's position in such rankings are highly incomplete and often unreliable. For example, about two-thirds of a school's *U.S. News* score is based on the selectivity of its admissions, measured by LSAT scores, and on its general reputation among surveyed academics, lawyers, and judges.⁷ As the discussion below suggests, test scores are an inadequate measure of applicant qualifications, and reputational rankings are a similarly inadequate proxy for educational quality. Few of those surveyed possess enough systematic knowledge about a sufficient number of institutions to make accurate comparative judgments. Many participants rely on the word-of-mouth reputation of the university, which explains why Princeton law and professional schools do so well even when they do not exist. Moreover, the ranking system excludes many factors that materially affect a student's educational experience, such as access to clinical courses, pro bono opportunities, and a diverse faculty and student body.⁸

That is not to suggest, as some law school deans have claimed, that all ratings are inherently flawed and the enterprise is comparable to ranking religions. Some characteristics can be objectively assessed, and schools should be held accountable for their performance. Students also have a legitimate interest in subjective factors like reputation, however fuzzy the measures. Prestige is, after all, part of what they are purchasing. Ratings can supply a useful counterweight to complacency and a check on puffing. In their absence, applicants might well encounter an educational Lake Woebegeon, where all institutions are above average. But the problems with rankings like the *U.S. News & World Report* are that they assign arbitrary weights to an incomplete set of relevant characteristics, rely on inadequate measures of those characteristics, and offer a single final score. That score then establishes a pecking order for the top fifty schools and determines which tiers the remainder occupy. These rankings have assumed an importance out of proportion to their reliability, not only with prospective students, but also with administrators, faculty, and alumni. Such ratings often distort law schools' priorities; the temptation is to underinvest in features that

6. See LAW SCHOOL ADMISSION COUNCIL, LAW SCHOOL APPLICANT STUDY 7, 19 (1999).

7. See Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News & World Report Rankings of ABA Law Schools* (Feb. 18, 1998), <http://www.aals.org/validity.html> (report commissioned by the Association of American Law Schools).

8. See *id.*; Paul D. Carrington, *Tanking the Rankings*, AM. LAW., Apr. 2000, at 39-40.

U.S. News & World Report editors find unimportant, like diversity or public service, and to divert scarce resources to promotional campaigns showcasing reputational measures.

A second problem in the market for legal education is that the most direct consumers—students—have interests that are not necessarily consistent with the interests of the ultimate consumers, clients, and the public. Education is one of the rare contexts where buyers often want less for their money. Many students would like to earn a degree with the minimal effort required to pass a bar examination and land a job. In the absence of accreditation standards, law schools would have to compete for applicants who viewed “less as more.” Similar attitudes among central university administrations would compound the problem. Many administrators already view law schools as “cash cows.” Most legal instruction can occur in relatively inexpensive large classes, and tuition can be set at comparatively high levels that reflect students’ future earning potential. Without accreditation requirements, many universities would face even greater temptations to make law schools get by with less and to use more of their revenues for subsidizing other programs.

These concerns justify some regulatory standards, but it by no means follows that the current structure makes sense. A threshold problem arises from conflicts of interest. As a practical matter, control of the accreditation process rests largely with the ABA Council on Legal Education. In theory, its members are responsible for protecting the public. In fact, they are also representatives of, and accountable to, a profession with its own interests to protect. Lawyers have an obvious stake in limiting competition, preserving status, and preventing what many bar leaders perceive as “overcrowding.” From their perspective, “less is more” in legal education, but in a different sense than for applicants or administrators. Less rigorous educational standards mean more new lawyers, more hungry mouths to feed, and more competitive pressures.⁹

Legal educators have an even greater stake in the educational structure. In a *New York Times Magazine* profile, one faculty member put the point bluntly: whatever its other faults, “law school works pretty well for us.”¹⁰ On average, legal academics earn the highest salaries of all university faculty.¹¹ And the accreditation process protects key aspects of their quality of life, such as tenure, teaching loads, and research support.

Whether those standards protect the public as well as the profession is another matter. To be sure, the government makes some effort to ensure that the accreditation process is not narrowly self-serving. During the mid-1990s, the Justice Department’s Antitrust Division forced changes in some plainly

9. See Charles B. Colvin, “Yes, There Are Too Many Lawyers” Now What Do We Do About It?, 42 LA. B. J. 246, 247 (1994); Robert F. Potts, *Too Many Lawyers, Too Few Jobs*, CHRON. HIGHER EDUC., Feb. 2, 1996, at B1.

10. David Margolick, *The Trouble With American Law Schools*, N.Y. TIMES MAG., May 22, 1983, at 21, 39.

11. See Alison Schneider, *Law and Finance Professors Are Top Earners in Academe*, Survey Finds, CHRON. HIGHER EDUC., May 28, 1999, at A14.

protectionist standards involving matters such as faculty salaries and competition from non-accredited schools. Under recently revised regulations, the Department of Education also has authority to ensure that accreditation standards are "valid and reliable indicators of the quality of the education or training provided," and are "relevant to the . . . needs of affected students."¹² A Department review of law school standards is in process, and it is not yet clear how demanding government scrutiny will be. Traditionally, the views of legal academics have been given great deference in the accreditation process, largely due to concerns about academic freedom and difficulties in measuring educational quality. The price of that deference has been a structure that inadequately serves the public interest.

Accreditation requirements substitute detailed regulation of educational input—such as facilities, resources, and faculty-student contact—for more direct measurement of educational output. Yet no evidence suggests that greater variation in these characteristics would significantly affect performance in practice. The limited data available reflect no correlation between the quality of a law school by conventional measures and the frequency of malpractice among its graduates.¹³ Considerable research also suggests that the current educational structure leaves many students both underprepared and overprepared to meet societal needs. They typically are overqualified to offer routine assistance at affordable costs. And they frequently are underqualified in practical skills and inadequately exposed to interdisciplinary approaches that could inform legal practice in areas such as finance, management, counseling, and information technology.

On the infrequent occasions when attorneys are asked to evaluate their legal education, most report considerable dissatisfaction with skills preparation. For example, between two-thirds to four-fifths of surveyed graduates believe that negotiation, fact gathering, and document preparation could be taught effectively, but only about a quarter feel that those subjects receive sufficient attention.¹⁴ Similar inadequacies are apparent for problem solving, oral communication, counseling, and litigation.

This mismatch between what law schools supply and what law practice requires calls for a different approach. The diversity in America's legal needs demands a corresponding diversity in legal education. Accreditation frameworks should recognize in form what is true in fact. Legal practice is becoming increasingly specialized. It makes little sense to require the same training for the Wall Street securities specialist and the small town matrimonial lawyer. While some students may want a generalist degree, others could benefit from a more specialized advanced curriculum, or from shorter, more affordable programs that would prepare graduates for limited practice areas. A similar point was made

12. 34 C.F.R. § 602.23(b)(5) (1995).

13. See Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client Is Safe*, 47 FLA. L. REV. 1, 37 (1995).

14. See Joanne Marlin & Bryant G. Garth, *Clinical Education as a Bridge Between Law School and Practice: Mitigating the Misery*, 1 CLINICAL L. REV. 443, 448 (1994).

some seventy-five years ago in a prominent Carnegie Foundation report by Alfred Reed, *Training for the Public Profession of Law*.¹⁵ Since then, the variation across substantive fields has grown more pronounced. For some routine services, most law schools' current three-year program is neither necessary nor sufficient.¹⁶ Almost no institutions require students to be proficient in areas where unmet legal needs are the greatest, such as bankruptcy, immigration, uncontested divorces, and landlord-tenant matters. Other nations permit non-lawyers with legal training to provide these services without demonstrable adverse effects.¹⁷ American law schools could offer such training and help design licensing structures that would increase access to affordable assistance from paralegal specialists.

The profession, as well as the public, would benefit from an educational system that serves more diverse audiences in more diverse ways. As costs escalate, applicant pools decline, and placement markets tighten, law schools have much to gain from broadening their mission and potential student body. Abandoning a one-size-fits-all accreditation framework would open a range of possibilities. Some schools could offer less expensive two or three-year programs. A few states have accredited such programs, which cut tuition by strategies such as increased reliance on adjuncts and on-line library resources. Other institutions could supplement their standard curriculum with courses for paralegals, undergraduates, and professionals in law-related occupations. Many schools could develop advanced interdisciplinary opportunities for law students and practitioners, or shortened degree programs for individuals who would be licensed to practice in limited fields. More Internet-based distance learning could help decrease costs and increase access to specialized instruction that cannot be efficiently provided at all institutions. Each of these initiatives would, of course, present complicated cost-quality tradeoffs. Not all of them might ultimately prove desirable, but we have no way of assessing the potential benefits without more innovation than the current structure permits.

Greater diversity in legal education would also permit greater diversity in the legal profession and in the career paths of its members. The expense of current programs excludes many individuals from disadvantaged backgrounds. Others who obtain legal degrees acquire such substantial debt burdens that they cannot afford to pursue the public-interest or public-sector career choices that led them to law in the first instance. A growing number of graduates are unable to find jobs that pay enough to meet their loan obligations. Law school graduates have the highest default rate on student loans of all professionals, and almost a fifth declare bankruptcy.¹⁸ Although some schools have developed loan forgiveness

15. ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW 281-87 (1921).

16. See W. SCOTT VAN ALSTYNE, JR. ET AL., THE GOALS AND MISSIONS OF LAW SCHOOLS 43, 63, 83-85 (1990); see also Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 1014-18 (1998).

17. See Rhode, *supra* note 16, at 1015.

18. See Ann Davis, *Graduate Debt Burden Grows: Of All Professionals, Law Grads Have*

programs for graduates who accept poorly paid public service positions, these programs address only a small part of the demand. More varied and affordable educational programs could increase the number and career options of low income applicants.

Not only should there be more choices in legal education, but students should also have more reliable information about the choices available. The need for such information is not met by rankings like those of *U.S. News & World Report* and its competitors or by the limited standardized information that the ABA supplies. Prospective students need more comparative data, and schools need more incentives to compete, across a broader range of characteristics than current rating systems address. So, for example, applicants might benefit from approaches adapted from undergraduate education that evaluate schools by reference to "best practices" in teaching. Such approaches can provide comparative data on students' experiences on matters such as faculty contact, effective feedback, skills instruction, and collaborative projects.¹⁹

That is not to suggest that a totally unregulated market in legal education with complete deference to consumer choices would be desirable. The public has an interest in maintaining threshold quality standards, and some students lack sufficient judgment, experience, or incentives to choose effective programs. However, given the inadequacies of the current educational structure, more variation, experimentation, and research are justified. To make intelligent policy decisions, both the profession and the public need to know more about how different educational approaches affect performance in practice. Whether or not legal education should let a thousand flowers bloom, it should at least permit choices between delphiniums and dahlias.

II. DIVERSITY

Not only has legal education provided too little diversity across institutions, it has also provided too little assurance of diversity within institutions. To be sure, the last quarter century has brought impressive progress. Until the 1960s, American lawyers received their training in institutions that were almost entirely white and male. Sol Linowitz, a prominent Washington attorney, recalls that there were only two women in his law school class. Neither he nor his classmates questioned the skewed ratio, although they did feel somewhat uncomfortable when their two female colleagues were around. And he ruefully acknowledges, "[i]t never occurred to us to wonder whether *they* felt uncomfortable."²⁰

By contrast, forty-five percent of today's entering law students are female

Compiled the *Worst Loan Default Record*, NAT'L L.J., May 22, 1995, at A1.

19. See Gerald F. Hess, *Seven Principles for Good Practice in Legal Education*, 49 J. LEGAL EDUC. 367 (1999); Ben Gose, *A New Survey of 'Good Practices' Could Be an Alternative to Rankings*, CHRON. HIGHER EDUC., Oct. 22, 1999, at A65.

20. SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 6 (1994).

and about twenty percent are from racial and ethnic minorities.²¹ But too many of these individuals still feel uncomfortable in the educational environment, and too few have advanced to positions where they can significantly affect it. Women and men of color are still overrepresented at the bottom of academic pecking orders and underrepresented in the upper ranks of tenured faculty and senior administrative positions. Only twenty percent of full professors and ten percent of law school deans are female, and only ten percent of those in either position are faculty of color.²² These racial and gender disparities in promotion cannot be explained solely by disparities in objective qualifications, such as academic credentials or experience.²³ Women and minority students are also more likely to be silenced in the classroom and harassed outside it.²⁴ Issues concerning race, gender, and sexual orientation are often missing or marginal in core curricula.²⁵ Given these patterns, it is scarcely surprising that women and minorities report higher levels of dissatisfaction and disengagement with the law school experience.²⁶ If our goal is to create an educational community, and ultimately a profession, of equal opportunity and mutual respect, we have a significant distance yet to travel.

At the same time, efforts to narrow that distance are under siege. California's Proposition 209 and a federal court of appeals ruling in *Hopwood v. Texas*²⁷ have prohibited reliance on race at universities within their

21. See Richard A. White, *Summary from the Directory of Law Teachers* (Nov. 1999) (unpublished memoranda, on file with author).

22. See *id.*; see also COMMISSION ON WOMEN IN THE PROF., A.B.A., ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION 23 (1996) (using similar statistics) [hereinafter ELUSIVE EQUALITY]; COMMISSION ON OPPORTUNITIES FOR MINORITIES IN THE PROF., A.B.A., MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 16, 17 (1998) [hereinafter MILES TO GO].

23. See Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299 (1992); see also REPORT, RICHARD A. WHITE, THE PROMOTION, RETENTION AND TENURING OF NEW LAW SCHOOL FACULTY HIRED IN 1990 AND 1991 (Sept. 22, 1999) (finding disparities in promotion without attempting to control for all variables) (on file with author).

24. See ELUSIVE EQUALITY, *supra* note 22, at 15-16; LAW SCHOOL OUTREACH PROJECT OF THE GENDER BIAS FREE JURISPRUDENCE COMMITTEE OF THE CHICAGO BAR ASSOCIATION ALLIANCE FOR WOMEN, WOMEN STUDENTS' EXPERIENCES OF GENDER BIAS IN CHICAGO AREA LAW SCHOOLS: A STEP TOWARD A GENDER BIAS FREE JURISPRUDENCE 24 (1994) [hereinafter LAW SCHOOL OUTREACH PROJECT]; Deborah L. Rhode, *Whistling Vivaldi: Legal Education and the Politics of Progress*, 23 N.Y.U. REV. L. & SOC. CHANGE 217, 218 (1997).

25. See LAW SCHOOL OUTREACH PROJECT, *supra* note 24, at 21-22, 24; see also LINDA F. WIGHTMAN, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN 25, 36, 72-74 (1996); Rhode, *supra* note 24, at 218.

26. See WIGHTMAN, *supra* note 25, at 36.

27. 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

jurisdictions.²⁸ Similar prohibitions are under consideration in other states as part of a national campaign against affirmative action. Opponents believe that policies based on race, ethnicity, or gender perpetuate a kind of preferential treatment that society should be seeking to eliminate. In critics' view, such treatment implies that women and men of color require special advantages, which reinforces the very assumptions of inferiority that our nation needs to counteract.

Yet while the stigma associated with affirmative action is clearly a problem, opponents mistake its most fundamental causes and plausible solutions. Assumptions of inferiority predated affirmative action and would persist without it. The absence of women and men of color in key legal roles is also stigmatizing. Moreover, we are unlikely to achieve a society without racial or gender prejudices by pretending that we already have one, or that all forms of preferential treatment are equally objectionable. Disfavoring women or men of color stigmatizes and subordinates the entire group. Disfavoring white males does not. Contrary to critics' assertions, the measures necessary for diversity do not compete with educational quality, but rather enhance it. The Supreme Court's landmark 1978 decision, *Regents of the University of California v. Bakke*,²⁹ recognized as much, and upheld the narrowly tailored use of racial consideration in admissions as long as they did not impose rigid quotas.³⁰ In his controlling opinion in *Bakke*, Justice Powell emphasized the crucial role that diversity plays in advancing intellectual inquiry and in exposing future leaders to different perspectives and values.³¹

Experience with affirmative action since *Bakke* has underscored the importance of those contributions. The value of diversity is widely acknowledged, as is clear from recent position papers by the Association of American Law Schools (AALS) and a coalition of virtually every other major organization in higher education.³² Empirical research consistently finds that students who experience racial diversity in education show less prejudice, more ability to deal with conflict, better cognitive skills, clearer understanding of multiple perspectives, and greater satisfaction with their academic experience.³³

28. See *id.* at 934.

29. 438 U.S. 265 (1978).

30. See *id.* at 307-16.

31. See *id.* at 312.

32. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 218-55 (1998); DARYL G. SMITH ET AL., *DIVERSITY WORKS: THE EMERGING PICTURE OF HOW STUDENTS BENEFIT* (1997); *ON THE IMPORTANCE OF DIVERSITY IN HIGHER EDUCATION*, *Grutter v. Bollinger*, Statement by 67 Higher Education Organizations, in Amicus Curiae Brief of the Association of American Law Schools et al., *Grutter v. Bollinger*, 16 F. Supp. 797 (E.D. Mich. 1998) (on file with author) [hereinafter *ON THE IMPORTANCE OF DIVERSITY*]; Expert Report of Patricia Gurin, *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998) (on file with author) [hereinafter *Expert Report*]; Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 746-50 (1998).

33. See GARY ORFIELD & DEAN WHITLA, *DIVERSITY AND LEGAL EDUCATION: STUDENT EXPERIENCES IN LEADING LAW SCHOOLS* 9-25 (1999); see also BOWEN & BOK, *supra* note 32, at

In a 1999 survey of some 1800 students at two leading law schools, some ninety percent reported positive effects of diversity on their educational experience.³⁴ As the AALS statement recognizes: "different backgrounds enrich learning, scholarship, public service, and institutional governance. They promote informed classroom interchanges and keep academic communities responsive to the needs of a changing profession and a changing world."³⁵ A commitment to diversity is socially necessary, constitutionally justified, and morally imperative. In legal education, that commitment requires initiatives aimed at restructuring admission processes and fostering law school environments of mutual respect.

To ensure adequate representation of students of color, law schools need admission criteria that more adequately reflect the range of talents required in legal practice. Most schools place undue reliance on LSAT scores and undergraduate grade point averages, a practice encouraged by *U.S. News & World Report* and similar rankings. Ironically enough, the quantitative criteria that were once introduced to limit biases and equalize opportunities are now having the opposite effect. Yet these ostensibly "merit" based criteria do not adequately assess it. Grades and test scores together predict only about a quarter of the variation in law school performance.³⁶ And we have no idea how well they predict performance in practice. The few attempts to follow students after graduation have not found significant relationships between law school grades and later achievements.³⁷ In one of the most systematic studies to date, Michigan Law School found that LSATs and GPAs did not correlate with its graduates' earned income, career satisfaction, or pro bono contributions.³⁸ Minorities admitted under affirmative action criteria did as well on these measures as other graduates.³⁹ Although national studies find that applicants of color have lower bar pass rates than whites, about eighty-five percent are successful.⁴⁰ Without affirmative action, the vast majority of these attorneys would never have had the opportunity to attend law school.

A serious commitment to diversity as well as educational quality argues both for maintaining affirmative action programs and developing more inclusive, less quantitative admission standards. As experience in some California law schools

218-55; SMITH ET AL., *supra* note 32; ON THE IMPORTANCE OF DIVERSITY, *supra* note 32; Expert Report, *supra* note 32; Hallinan, *supra* note 32, at 746-50.

34. See ORFIELD & WHITLA, *supra* note 33, at 14-16.

35. ASSOCIATION OF AMERICAN LAW SCHOOLS, STATEMENT ON DIVERSITY (1998) (on file with author).

36. See MILES TO GO, *supra* note 22; WIGHTMAN, *supra* note 25, at 11.

37. See David L. Chambers et al., *Doing Well and Doing Good, The Careers of Minority and White Graduates of the University of Michigan Law School, 1970-1996*, 42 L. QUADRANGLE NOTES, Summer 1999, at 60.

38. See *id.* at 70.

39. See *id.* at 70-71.

40. See Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 38 (1997).

indicates, reliance on economic class as a substitute for race and ethnicity will neither ensure diversity nor capture the range of qualities likely to ensure professional success.⁴¹ Rather, schools should follow the approach of a growing number of institutions that are experimenting with additional characteristics such as leadership ability, employment experience, community service, distinctive talents, and perseverance in the face of economic disadvantage or other hardships.⁴² Consideration of such factors does, of course, carry a cost. More time is required for review of applications and more room is created for idiosyncratic bias. However, the costs of overreliance on quantitative factors are greater. Merit is an inescapably value-laden concept. There is no neutral, objective basis on which to weigh relevant characteristics. Nor is there any such foundation for determining which groups deserve special consideration and how much representation from different constituencies is appropriate. However, some evaluation processes are more defensible than others. Both the public and the profession have a stake in ensuring judgments that consider applicants' full potential and that foster diverse learning environments. As with other issues of educational structure, questions about how best to pursue these goals should be subjects of continuing experimentation and evaluation.

Similar diversity-related initiatives are necessary in other educational contexts. One area of concern involves women's underrepresentation in tenured faculty and administrative positions, and minorities' underrepresentation at all academic levels.⁴³ The inability to explain these disparities by objective factors should come as no surprise. Racial, ethnic, and gender biases persist within the legal profession generally, and there is no reason to expect legal education to be different.⁴⁴ But there *is* reason to expect law schools to address the issue. Without a critical mass of similar colleagues, women and minorities bear disproportionate burdens of counseling and committee assignments and lack adequate mentoring and support networks. Institutions also lose valuable guidance, and students lose valuable role models. A true commitment to diversity will require more sustained recruitment and retention efforts.

Law schools would also benefit from more effective treatment of issues related to race, gender, ethnicity, and sexual orientation throughout the educational experience. Too often, such topics are tacked on as curricular afterthoughts—as brief digressions from the “real” subject. Some teachers exclude issues of obvious importance, such as domestic violence, same-sex marriage, or racist speech, because the discussions may become too

41. *See id.* at 40.

42. *See* LAW SCHOOL ADMISSION COUNCIL, NEW MODELS TO ASSURE DIVERSITY, FAIRNESS, AND APPROPRIATE TEST USE IN LAW SCHOOL ADMISSIONS (1999).

43. *See* WHITE, *supra* note 23; WIGHTMAN, *supra* note 25; Merritt & Reskin, *supra* note 23; *see also* Lani Guinier, *Lessons and Challenges of Becoming Gentlemen*, 24 N.Y.U. REV. L. & SOC. CHANGE 1, 12 (1998); Kacy Collons Keys, *Privileged Classes*, RECORDER, May 28, 1997, at 4; Wightman, *supra* note 40, at 40.

44. *See* MILES TO GO, *supra* note 22, at 17; RHODE, *supra* note 1, at 38-44.

volatile.⁴⁵ When such issues do arise, students who express strong views are frequently dismissed or demeaned.⁴⁶ Most institutions have experienced racist, sexist, and homophobic backlash in e-mails, graffiti, or anonymous flyers.⁴⁷ Law School Admission Council surveys find that discrimination is reported by about two-thirds of gay and lesbian students, a majority of African-American students, and a third of women, Asian-American, and Hispanic students.⁴⁸ Less systematic surveys suggest that harassment of vocal conservative students is also common.⁴⁹

What is especially disturbing about such patterns is the tendency among some faculty to dismiss their significance. For example, when one law school published guidelines endorsing gender-neutral language in class discussions, a male professor responded by changing all “man” endings to “person,” as in “Doberperson Pincher.”⁵⁰ A more common faculty response is simply to ignore inappropriate comments or to let other students respond. Yet such tolerance of intolerance falls short of ensuring the equal opportunity and mutual respect that professionally responsible professional schools should demand. Sustaining these values requires active efforts to promote diversity, civility, and empathy.

These efforts should invite rethinking of other classroom structures as well. A wide variety of studies have found that female students participate less in class than their male colleagues and that women of color are most likely to feel alienated and unsupported by their law school experience.⁵¹ Much of the problem lies in the hyper-competitive culture of many law school courses, which undermines self-esteem and discourages participation by less confident or less assertive students.

A critical first step in addressing these problems is to convince more legal educators that there *are* serious problems. To that end, law faculties should gather information from their institutions about the experience of women and minorities and the effectiveness of diversity-related initiatives.⁵² Such initiatives

45. See LAW SCHOOL OUTREACH PROJECT, *supra* note 24, at 39; Rhode, *supra* note 24, at 221.

46. See LAW SCHOOL OUTREACH PROJECT, *supra* note 24, at 39; Rhode, *supra* note 24, at 221.

47. See LAW SCHOOL OUTREACH PROJECT, *supra* note 24, at 39; Rhode, *supra* note 24, at 221; see also Janice L. Austin et al., *Results from a Survey: Gay, Lesbian, and Bisexual Student Attitudes About Law School*, 48 J. LEGAL EDUC. 157, 166-67 (1998).

48. See LORRAINE DUSKY, *STILL UNEQUAL: THE SHAMEFUL TRUTH ABOUT WOMEN AND JUSTICE IN AMERICA* 28, 39 (1996); LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 28-29, 56, 68 (1997); Austin et al., *supra* note 47, at 166; Rhode, *supra* note 24, at 220; Scott N. Ibrig, Note, *Sexual Orientation in Law School: Experiences of Gay, Lesbian and Bisexual Law Students*, 14 LAW & INEQ. 555, 568 (1996).

49. See Austin et al., *supra* note 47, at 166.

50. See LAW SCHOOL OUTREACH PROJECT, *supra* note 24, at 38.

51. See GUINIER ET AL., *supra* note 48, at 28-29; Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1, 6-7, 27 (1998); Rhode, *supra* note 24, at 223.

52. See generally COMMISSION ON WOMEN IN THE PROF., A.B.A., *DON'T JUST HEAR IT*

could include workshops, lectures, and support for curricular integration. Faculty should be encouraged to develop supplemental readings, case studies, and role-playing exercises that effectively engage students on sensitive subjects. Such efforts will be effective only if legal education rearranges its reward structures. Valuing diversity must become a central mission, not just in theory, but also in practice.

III. EDUCATIONAL METHODS AND PRIORITIES

To paraphrase former Yale Law School Professor Fred Rodell, there are only two things wrong with conventional law school teaching: one is style and the other is content.⁵³ The dominant classroom approach is a combination of lecture and Socratic dialogue, with a focus on doctrinal analysis.⁵⁴ Although the abusive questioning styles that once were associated with Socratic methods have largely vanished, the increase in civility has deflected attention from more fundamental questions about educational effectiveness. Part of the problem is that we do not encourage law school professors to ask those questions. We do not effectively educate legal educators. Most law professors get no formal training in teaching. Nor have legal academics shown much interest in building on broader educational research about how students learn. That research underscores a number of inadequacies in traditional law school teaching.⁵⁵

The first problem involves the overly authoritarian and competitive dynamics of many classrooms. Under conventional Socratic approaches, the professor controls the dialogue, invites the student to "guess what I'm thinking," and then inevitably finds the response lacking. The result is a climate in which "never is heard an encouraging word and . . . thoughts remain cloudy all day."⁵⁶ For too many students, the clouds never really lift until after graduation, when a commercial bar review cram course supplies what legal education missed or mystified. Highly competitive classroom environments can compound the confusion. All too often, the search for knowledge becomes a scramble for status in which participants vie with each other to impress rather than inform. Combative classroom styles also work against collaborative approaches that can be essential in practice.

That is not to suggest that Socratic techniques are entirely without educational value. In the hands of an adept professor, they cultivate useful professional skills, such as careful preparation, reasoned analysis, and fluent oral presentations. However, large-class Socratic formats have inherent limits. They discourage participation from too many students, particularly women and

THROUGH THE GRAPEVINE: STUDYING GENDER QUESTIONS AT YOUR LAW SCHOOL (1998).

53. See Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

54. See Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 27-28 (1996).

55. See *id.*

56. Grant Gilmore, *What is a Law School?*, Address at the University of Connecticut School of Law 1982 Commencement Exercises, in 15 CONN. L. REV. 1, 1 (1982).

minorities, and they fail to supply enough opportunities for individual feedback and interaction, which are crucial to effective education.

These inadequacies also exact a personal price. A growing body of research suggests that the highly competitive atmosphere of law schools, coupled with the inadequacy of feedback and support structures, leaves many students with personal difficulties that set the stage for problems in their future practice.⁵⁷ Although the psychological profile of entering law school students matches that of the general public, an estimated twenty to forty percent leave with some psychological dysfunction including depression, substance abuse, and various stress related disorders.⁵⁸ These problems are not inherent byproducts of a demanding professional education; medical students do not experience similar difficulties.⁵⁹

The law school culture can shortchange graduates in other respects as well. Despite recent improvements, most institutions do not focus sufficient attention on practical skills such as interviewing, counseling, negotiation, drafting, and problem solving.⁶⁰ The dominant texts are appellate cases, which present disputes in highly selective and neatly digested formats. Under this approach, students never encounter a "fact in the wild," buried in documents or obscured by conflicting recollections.⁶¹ The standard casebook approach offers no sense of how problems unfolded for the lawyers or ultimately affected the parties. Nor does it adequately situate formal doctrine in social, historical, and political context. Classroom discussion often is too theoretical and not theoretical enough. It neither probes the foundations of legal doctrine, nor offers practical skills for applying doctrine in particular cases. Students get what Stanford Professor Lawrence Friedman aptly characterizes as the legal equivalent of geology without the rocks: "dry, arid logic, divorced from society."⁶² Missing from this picture is the factual context needed to understand how law interacts with life.

Also absent is any sustained effort to address the interpersonal dimensions of legal practice. Law schools claim, above all else, to teach students how to "think like a lawyer." In fact, they often teach students how to think like a law professor, in a form distanced and detached from human contexts. The

57. See Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 524 (1998); Lawrence S. Krieger, *What We're Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from Its Roots*, 13 J.L. & HEALTH 1, 3 (1999).

58. See DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 910 (1995).

59. See Iijima, *supra* note 57, at 525.

60. See SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 234 (1992); Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5, 8-14 (1996).

61. CAMERON STRACHER, DOUBLE BILLING 50 (1998).

62. Lawrence Friedman, *quoted in* PAUL WICE, JUDGES AND LAWYERS: THE HUMAN SIDE OF JUSTICE 16 (1991).

psychological dimensions of lawyering are largely relegated to clinical courses. And, despite recent improvements, clinical training is still treated as a poor relation in most law schools. Without adequate resources, status, or class hours, clinical courses cannot compensate for the neglect of practical and interpersonal skills in the rest of the curricula. It is thinking about thinking—Grand Theory and doctrinal analysis—that earns greatest academic respect. As Professor Gerald López notes, law school is “still almost entirely about law and is only incidentally and superficially about lawyering.”⁶³

It is, moreover, about law from too insular a perspective. Despite growing recognition of the importance of cross-cultural and cross-disciplinary perspectives, the core curriculum stubbornly resists intruders.⁶⁴ With the exception of law and economics, which has managed a fair amount of infiltration, interdisciplinary perspectives generally remain on the margins. To many faculty, students, and legal employers, such law courses seem like “law and bananas”: esoteric fluff largely irrelevant to practice.⁶⁵ At most schools, a bit of borrowed intellectual finery dresses up the standard legal wardrobe, but the fashion remains the same. The consequence is to deprive students of approaches that could prove highly useful in their future practice.

Problem solving is an obvious example. Although most lawyers find it central to their daily work, only a small number of schools address it directly. Adequate preparation for this role could offer background in counseling, risk analysis, game theory, and organizational behavior.⁶⁶ Similar interdisciplinary approaches could enrich understanding of other equally critical roles. Students planning to specialize in corporate law should have more exposure to economics and finance. Future matrimonial lawyers would benefit from a background in psychology. And almost all graduates, whatever their substantive interests, would be well served by more grounding in information technology, alternative dispute resolution, social science research methodology, and managerial strategies. More sequenced programs would better prepare students for many specialized practice areas.

Similar benefits would emerge from expanding clinical offerings and integrating more skills training in the core curriculum. Capacities for collaboration, legal judgment, and ethical analysis are most likely to develop through experiential learning. Simulation exercises and supervised practice offer opportunities to develop a more diverse range of skills than is possible in conventional Socratic or lecture formats. Clinics serving low-income clients offer especially valuable opportunities for students to learn how the law

63. Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 321-22 (1989).

64. See Aric Press, *We're All Connected*, AM. LAW., Nov. 1998, at 5 (noting the small number of students exposed to course work on international law).

65. See Arthur Austin, *Womanly Approach Harms Future Lawyers*, NAT'L L.J., May 18, 1998, at A23.

66. See Brest, *supra* note 60, at 12-16; Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the Association of American Law Schools*, 49 J. LEGAL EDUC. 5, 6-8 (1999).

functions, or fails to function, for the have-nots.

In principle, most law school administrators agree. They would like to offer more clinical opportunities, skills training, interdisciplinary approaches, and international perspectives. But talk is cheap and many educationally-desirable initiatives are not. There are obvious limits to how much time-intensive or specialized training law schools can provide without increasing tuition, which may further restrict access and raise student debt burdens to intolerable levels. Yet not all curricular initiatives require extensive additional resources or unreasonably burdensome faculty involvement. Much could be accomplished through greater use of interdisciplinary collaboration, on-line technology, case histories, role-playing exercises, and cooperative out-of-class projects. The problem with these strategies is generally not that they are unaffordable but rather that they are insufficiently rewarded. Improvements in the curriculum usually are not well reflected in law school rankings. Nor is excellence in teaching the path to greatest recognition for individual faculty.

Significant changes in law school curricula will require equally significant changes in law school incentive structures. A crucial first step is to develop more systematic ways of assessing educational effectiveness and holding institutions and individuals accountable. At a minimum, more information needs to be available comparing law schools on curricular issues and monitoring their efforts to insure quality. Educators need more prodding to educate themselves about effective teaching and to support curricular reforms.

IV. PROFESSIONAL RESPONSIBILITY

Law schools have always played a pivotal role in shaping professional values. But until quite recently, legal education seldom rose above one early commentator's apt characterization as "general piffle."⁶⁷ Few institutions offered any basic course in professional responsibility, and many made do with brief, ungraded lectures. Bar exams, if they addressed the topic at all, invited reflection on undemanding topics like "what the Code of Ethics means to me."⁶⁸

In the late 1960s and early 1970s, the rise of progressive social movements brought new attention to long-standing issues of professional responsibility.⁶⁹ Lawyers' involvement in the Watergate scandal pushed the profession's public image to new lows and prodded the ABA into action. Its primary initiative was to require law schools to provide instruction on professional responsibility.⁷⁰ State bar examiners felt similar pressure and most added multiple choice ethics tests to their admission processes.⁷¹ Such ethics requirements were not, of

67. George P. Costigan, *The Teaching of Legal Ethics*, Paper Read Before the Section of Legal Education of the American Bar Association, at Saratoga Springs, N.Y. (Sept. 4, 1917), in 4 AM. L. SCH. REV. 290, 295 (1917).

68. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1991).

69. See RHODE & LUBAN, *supra* note 58, at 928.

70. See *id.* at 928-29; Rhode, *supra* note 68, at 39.

71. See RHODE & LUBAN, *supra* note 58, at 929; Rhode, *supra* note 68, at 40-41.

course, an obvious answer to the criminal conduct involved in Watergate. Their focus was on ensuring familiarity with bar ethical codes, and ignorance of those codes was not an obvious factor in the felonies committed by White House lawyers. Nor did the superficiality of the bar's response escape notice. As Gary Trudeau put it in one *Doonesbury* cartoon, these new ethics requirements seemed largely symbolic: "Trendy lip service to our better selves."⁷²

Yet despite their inauspicious beginnings, these requirements produced at least some of their intended effects. They put professional responsibility on the educational agenda and laid the foundations for a respectable academic field. But progress has been uneven and the bar ethics exam has been a mixed blessing at best. Its multiple choice format trivializes many issues, and puts pressure on law school courses to focus on ABA disciplinary rules. Professors with more ambitious agendas bump up against resistance. In one all too typical case, a student was overheard advising a friend to avoid taking professional responsibility with a certain faculty member, who "asks a lot of uncomfortable questions about what you think is right [instead of] . . . teaching you the rules for the exam."⁷³

The result has been to discourage the kind of inquiry that professional roles and regulation demand. Most schools offer little attention to the subject apart from a single required course that focuses primarily on bar codes of conduct; almost half offer only one course.⁷⁴ The result is too often legal ethics without the ethics.⁷⁵ Students learn the disciplinary rules but lack the foundation for critical analysis. The inadequacy of this approach is of particular concern in bar regulatory contexts where codes are ambiguous or self-serving. For example, students may learn that the ABA's rules prohibit unauthorized practice of law by nonlawyers, but not whether less restrictive licensing structures for paralegal specialists might better serve the public interest.

Doctrinal frameworks also exclude many of the crucial issues facing the American legal profession: inadequate access to justice for low to moderate income citizens; disciplinary processes that fail to provide effective remedies for most complaints; excessively adversarial norms that impose undue costs; and workplace pressures that compromise pro bono commitments. Less than a fifth of surveyed lawyers feel that legal practice has met their expectations about contributing to the social good.⁷⁶ Yet code-oriented courses fail to address the structural reasons why legal practice so often falls short.

Neither these problems, nor other common ethical dilemmas, receive significant attention outside of professional responsibility courses. This

72. Gary Trudeau, *Doonesbury* (1975), reprinted in THOMAS D. MORGAN AND RONALD D. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* 1 (6th ed. 1995).

73. Daniel S. Kleinberger, *Ethos and Conscience—A Rejoinder*, 21 *CONN. L. REV.* 397, 401 n.23 (1989).

74. See Wm. Reece Smith, Jr., *Teaching and Learning Professionalism*, 32 *WAKE FOREST L. REV.* 613, 617 (1997).

75. See William H. Simon, *The Trouble with Legal Ethics*, 41 *J. LEGAL EDUC.* 65, 66 (1991).

76. See YOUNG LAWYERS DIVISION, *A.B.A., CAREER SATISFACTION* 11 (1995).

curricular irresponsibility toward professional responsibility is well captured in a favorite story of Supreme Court Justice Ruth Bader Ginsburg. The professor in a core first-year course was discussing a lawyer's tactic that left a student "bothered and bewildered." "But what about ethics?," the student asked. "Ethics," the professor informed him frostily, "is taught in the second year."⁷⁷ Few law schools make systematic efforts to integrate legal ethics into the core first-year or upper-level curriculum, and few casebooks outside the field provide significant coverage. In one survey, less than two percent of the total pages in leading texts touched on issues of professional responsibility.⁷⁸ The classroom treatment that does occur outside the standard course is often superficial or ad hoc, with no assigned reading and no questions on exams. Here again, students get too little theory and too little practice; classroom discussions are too uninformed by interdisciplinary frameworks and too far removed from lawyers' day to day experiences. This minimalist approach to legal ethics marginalizes its significance. What the core curriculum leaves unsaid sends a powerful message that no single required course can counteract.

The failure of legal education to make professional responsibility a professional priority has multiple causes. For nonexperts in ethics, a little knowledge feels like a dangerous thing and more is not readily accessible in standard textbooks. These problems, however, are not as imposing as faculty often assume. A substantial range of material has been developed for integrating ethical issues into the core curricula.⁷⁹ With modest effort, most law professors could readily incorporate relevant topics of professional responsibility in their substantive fields. The real problem is that most prefer not to. Some faculty doubt the value of discussing values in professional schools. From their perspective, postgraduate ethics instruction promises too little, too late. A common assumption is that moral conduct is primarily a matter of moral character. Students either "have it or they don't." As NAACP lawyer Eric Schnapper once put it, "[l]egal ethics, like politeness on subways, . . . or fidelity in marriage" cannot be acquired through classroom moralizing.⁸⁰ Even if legal education can have some effect on students' attitudes, skeptics doubt that it will significantly influence their later practice. Moral conduct is highly situational, and many educators assume that contextual pressures are likely to dwarf anything learned in law school.⁸¹

77. Ruth Bader Ginsburg, *Supreme Court Pronouncements on the Conduct of Lawyers*, 1 J. INST. STUD. LEGAL ETHICS 1, 2 (1996).

78. See Rhode, *supra* note 68, at 41.

79. See, e.g., DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998); Deborah L. Rhode, *Annotated Bibliography of Educational Materials on Legal Ethics*, 11 GEO. J. LEGAL ETHICS 1029 (1998).

80. Eric Schnapper, *The Myth of Legal Ethics*, A.B.A. J., Feb. 1978, at 202, 205.

81. See Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 LAW & CONTEMP. PROBS. 139, 148-49 (1996) (examining research on factors influencing moral conduct such as authority, stress, competition, peer influence, financial incentives, time constraints, and similar pressures); Rhode, *supra* note 68, at 40-49.

Such concerns are not without force, but they suggest reasons to avoid overstating law schools' influence not to undervalue their efforts. Skeptics are correct, of course, that values do not, of themselves, determine conduct. One particularly sobering study found no significant differences between the moral beliefs of Illinois ministers and those of prison inmates.⁸² Ethical behavior reflects both situational constraints and personal capacities: the ability to recognize and analyze moral issues, the motivation to act morally, and the strength to withstand external pressures.

Although not all of these characteristics can be effectively developed in law school, some are open to influence. Research on ethics education finds that moral views and strategies change significantly during early adulthood and that well-designed courses can improve capacities for ethical reasoning.⁸³ Despite the importance of situational pressures, moral judgment does affect moral conduct, and education can enhance that judgment. Students can benefit from exploring dilemmas of legal practice before they have a vested interest in the outcomes. Law school courses have an important role in helping future lawyers evaluate the consequences of their decisions and respond to the economic and organizational incentives underlying ethical problems.

Moreover, many crucial issues of professional responsibility are not matters on which students already have fixed views. These issues often involve complex tradeoffs among competing values and professional standards that depart from personal intuitions. Future practitioners need to learn where the bar draws the line before they risk crossing one. Since some students eventually will help determine where future lines are drawn, legal education should also provide adequate background on the policy considerations at stake. In fact, most surveyed attorneys agree. They report that the ethics instruction they received in law school has been helpful in practice and that coverage should be maintained or expanded.⁸⁴

For some faculty, however, the greatest concerns regarding legal ethics material involve doubts not about its effectiveness, but doubts about their own. Many are wary about turning podiums into pulpits or inviting "touchy feely" digressions from "real" law. However, while many ethical questions yield no objectively valid answers, not all answers are equally valid; some are more consistent, coherent, and respectful of available evidence. So too, the risks of proselytizing are by no means unique to issues of professional responsibility. Faculty can abuse their prerogatives by self-righteous or peremptory

82. See Peter Caws, *On the Teaching of Ethics in a Pluralistic Society*, HASTINGS CENTER REP., Oct. 1978, at 32.

83. See Albert Bandura, *Social Cognitive Theory of Moral Thought and Action*, in 1 HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT 45, 53 (William M. Kurtines & Jacob L. Gewirtz eds., 1991); James R. Rest, *Can Ethics Be Taught in Professional Schools? The Psychological Research*, ETHICS: EASIER SAID THAN DONE, Winter 1988, at 22, 23-24; Rhode, *supra* note 81, at 148; Rhode, *supra* note 68, at 47.

84. See FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 176-77 (1981).

pronouncements on any subject. They do not avoid the difficulty by avoiding ethics. Rather, the answer is to educate the educators. Law professors cannot be value-neutral on matters of value. What they choose to discuss itself conveys a moral message, and silence is a powerful subtext. All too often, legal educators have substituted unimportant questions they can answer for important ones they cannot. When they decline to put ethical issues on the educational agenda, they suggest that professional responsibility is someone else's responsibility. And that encourages future practitioners to do the same.

To make professional values central in professional schools requires a significant institutional commitment. The conventional approach—add an ethics class and stir—is inadequate to the task. Professional responsibility needs to be integrated into the core curriculum, not isolated in a specialized course or trotted out on ceremonial occasions. Strategies for institutionalizing ethics are not in short supply. Law schools need to support course development and special programs related to professionalism as well as monitor their effectiveness. More attention should focus on the implicit messages in law school cultures: messages about the relative value of money, status, and social justice. More institutions should also follow the model of schools of public health and focus attention on broader issues concerning the profession's responsibility for effective regulation and delivery of professional services. Without such efforts, a wide distance will remain between the bar's rhetorical commitments and educational priorities. Students recognize this gap. Law schools should as well.

V. PROFESSIONAL VALUES AND PRO BONO OPPORTUNITIES

In 1996, the ABA amended its accreditation standards to call on schools to "encourage its students to participate in pro bono activities and provide opportunities for them to do so."⁸⁵ The revised ABA standards also encourage schools to address the obligations of faculty to the public, including participation in pro bono activities.⁸⁶ Although a growing number of schools have made efforts to increase public service, substantial challenges remain.⁸⁷ Only about ten percent of schools require pro bono participation by students, and fewer impose specific requirements on faculty.⁸⁸ Even at these schools, the obligations are sometimes quite minimal: less than eight hours of work per year.⁸⁹ Although most institutions offer voluntary public service programs, only a minority of

85. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 31 (1996).

86. *See id.*

87. *See* WILLIAM B. POWERS, REPORT ON LAW SCHOOL PRO BONO ACTIVITIES 2-5, 75 (1994); COMMISSION ON PRO BONO AND PUBLIC SERVICE OPPORTUNITIES, ASSOCIATION OF AMERICAN LAW SCHOOLS, LEARNING TO SERVE 4 (1999) [hereinafter LEARNING TO SERVE]; Deborah L. Rhode, *Cultures of Commitment: Pro Bono For Lawyers and Law Students*, 67 *FORDHAM L. REV.* 2415 (1999).

88. *See* POWERS, *supra* note 87, at 5.

89. *See id.* at 3.

students are involved. About a third of schools have no law-related pro bono projects or have programs involving fewer than fifty participants per year.⁹⁰ In short, most law students graduate without pro bono legal work as part of their educational experience.⁹¹ As a 1999 report by the AALS Commission on Public Service and Pro Bono Opportunities concluded: "law schools can and should do more."⁹²

The rationale for pro bono service by law students and faculty depends partly on the rationale for pro bono service by lawyers. This justification rests on two premises: first, that access to legal assistance is a fundamental need, and second, that lawyers have a responsibility to help make such assistance available. Although many legal educators agree, they question whether requiring pro bono contributions is a cost-effective way of addressing unmet needs. Having corporate law professors or unwilling students dabble in poverty law seems like an inefficient way to assist the poor. Yet we lack adequate experience and research to assess that objection. Many law schools have developed pro bono training and placement strategies that accommodate a wide range of interests. And some mandatory pro bono proposals would allow individuals to substitute financial support for direct service. In any event, the question is always, "Compared to what?" The current political climate offers little hope of meeting legal needs through more efficient strategies, such as adequate government funding for specialists in poverty law and public interest causes. For many low income individuals, some access to legal assistance is preferable to no access at all, which is their current situation.

Pro bono work also offers law faculty and students a range of practical benefits, such as training, trial experience, and professional contacts. For many participants, this work provides their only direct exposure to what passes for justice among the poor and to the need for legal reforms. Involvement in public service is a way for individuals to expand their perspectives, enhance their reputations, and build problem-solving skills. And for law schools, pro bono programs can be a way to generate good will with alumni and with the broader community.⁹³

In addition to these educational and practical benefits, law school pro bono programs serve an equally significant purpose: to inspire long-term commitments to public service among students that will "trickle up" to the profession generally.⁹⁴ In surveys at several schools with required programs, most students report that participation has increased their willingness to provide pro bono contributions after graduation.⁹⁵ Although systematic research is

90. See LEARNING TO SERVE, *supra* note 87, at 5.

91. See *id.*

92. *Id.*

93. See *id.* at 7-8.

94. See John R. Kramer, *Law Schools and the Delivery of Legal Services—First, Do No Harm*, in CIVIL JUSTICE: AN AGENDA FOR THE 1990S, at 47, 57 (Esther F. Lardent ed., 1991).

95. See Committee on Legal Assistance, *Mandatory Law School Pro Bono Programs: Preparing Students to Meet Their Ethical Obligations*, 50 RECORD 170, 176 (1995); Rhode, *supra*

needed to determine whether law school experiences in fact makes future service more likely, related studies of American volunteer activity point in this direction. Involvement in public service as a student increases the likelihood of later participation.⁹⁶

Given these benefits, it is hard to find anyone who opposes law school pro bono programs, at least in principle. But in practice, there is considerably less consensus about the form that these programs should take and the priority that they should assume in a world of scarce institutional resources. According to some educators, if a law school's goal is to maximize future pro bono contributions by lawyers, then it should maximize contributions by students through required service.⁹⁷ Such requirements send the message that pro bono work is a professional obligation and may convert some individuals who would not have voluntarily participated.⁹⁸ Yet we lack sufficient research to determine whether mandatory programs in fact yield greater long term pro bono contributions than well-supported optional alternatives. Some law school administrators worry that required participation may produce incompetent service by unmotivated students, and may undermine the voluntary ethic that is necessary to sustain commitment after graduation.⁹⁹ Particularly for schools outside urban areas, it can also be difficult to find sufficient public interest opportunities to accommodate the skills, schedules, and time constraints of all graduating students. Yet voluntary pro bono programs also have limitations. At most schools, they attract relatively small numbers of participants, modest institutional resources, and few efforts at quality control.¹⁰⁰

Although different institutions may resolve those tradeoffs differently, they have a shared responsibility to promote commitments to public service. At a minimum, all law schools should follow the primary recommendation of the AALS Commission: they should "seek to make available for every student at least one well-supervised pro bono opportunity and either require student participation or find ways to attract the great majority of students to volunteer."¹⁰¹ Schools should also establish policies that encourage professors to meet the ABA standard of fifty hours per year of pro bono service or the financial equivalent. Research on volunteer activity finds that students learn better by example than exhortation. If faculty are unwilling to practice the pro bono that they preach, they again reinforce the message that professional

note 87, at 2434.

96. See VIRGINIA A. HODGKINSON ET AL., *GIVING AND VOLUNTEERING IN THE UNITED STATES: FINDINGS FROM A NATIONAL SURVEY* 12-13, 87-88 (1996).

97. See Notes of Focus Group Interviews Conducted by the AALS's Commission on Pro Bono and Public Service Opportunities in Law Schools (1998) (on file with author) [hereinafter Focus Group Interview Notes].

98. See Mark S. Sobus, *Mandating Community Service: Psychological Implications of Requiring Prosocial Behavior*, 19 *LAW & PSYCHOL. REV.* 153, 164, 170 (1995).

99. See Focus Group Interview Notes, *supra* note 97.

100. See *LEARNING TO SERVE*, *supra* note 87, at 5.

101. Deborah L. Rhode, *Foreword* to *LEARNING TO SERVE*, *supra* note 87, at viii.

responsibility is everyone else's responsibility. Mark Twain was, of course, correct that "[t]o do good is noble. To teach others to do good is nobler, and no trouble [to yourself]." ¹⁰² However, law schools could do more to reduce the difficulties and increase the incentives associated with public service. More adequate resources and recognition are obvious strategies. Legal education has a unique opportunity and a corresponding obligation to make pro bono involvement a rewarding and rewarded opportunity.

Finally, and most important, pro bono strategies need to be part of broader efforts to encourage a sense of professional responsibility for the public interest. Research on legal education suggests that the "latent curriculum" at most law schools works against that sense of responsibility. Traditional teaching methods leave many students skeptical at best and cynical at worst about issues of social justice: "there is always an argument the other way, and the Devil usually has a very good case." ¹⁰³ At most institutions, the standard curriculum fails to engage students in any searching scrutiny of what they want to do in the world. Legal coursework often seems largely a matter of technical craft, divorced from the broader social concerns that led many students to law school. Individuals who enter law school talking about justice often leave talking about jobs. ¹⁰⁴

Countering these forces will require a substantial commitment. But there is much to gain and little to lose from the effort. Enlarging students' sense of professional responsibility reinforces their best instincts and aspirations. By making professionalism a priority, law school faculty can reinforce the same aspirations in themselves.

102. Mark Twain, *quoted in* Rhode, *supra* note 87, at 2415.

103. Stewart Macaulay, *Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar*, 32 J. LEGAL EDUC. 506, 524 (1982).

104. See ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* 38-39 (1992).

