

WHAT THE LEGAL PROFESSION EXPECTS OF LAW SCHOOLS: A RESPONSE

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INTRODUCTION

In his paper, Chief Justice Randall T. Shepard poses the question: What does the legal profession expect of our law schools?¹ The short answer, of course, is a great deal. The profession has come a long way from the days of apprenticeships and “reading for the law,” as was customary in the Nineteenth and early Twentieth Centuries. Expectations have risen, at least in part, because of the success law schools have had in producing generation after generation of good, competent lawyers. Moreover, there have been enormous changes in the last twenty to thirty years—both in the way law is practiced, as well as how lawyers are viewed by the public and by themselves. These changes have caused other segments of the legal profession to demand and expect more of law schools.

Although each expectation discussed in Chief Justice Shepard’s paper is important and merits thoughtful consideration, this response focuses on only two and adds a third. The three areas of expectation discussed below are: producing good lawyers, providing useful scholarship, and promoting active participation by legal academics in the law reform process.

I. PRODUCING GOOD LAWYERS

As Chief Justice Shepard persuasively demonstrates, one of the legal profession’s primary expectations of law schools is the production of good lawyers.² This expectation underscores the importance of the accreditation work performed by the Section of Legal Education and Admissions to the Bar.

The profession expects law schools to have high admissions standards and admit only those applicants who have the ability to practice law competently. Law schools are expected to recruit highly intelligent, talented students who are among the best and brightest of college graduates. Law school is a rigorous intellectual experience that requires not only intelligence but also discipline and determination.

In addition, although high academic achievement is essential, other less tangible qualities are also important. For example, factors such as an applicant’s leadership qualities and commitment to the community are often taken into account in the admissions process. Students deeply rooted in their communities

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1. See Randall T. Shepard, *What the Legal Profession Expects of Law Schools*, 34 IND. L. REV. 7 (2000).

2. See *id.* at 9.

are much more likely to do pro bono work and become respected members and perhaps leaders of their communities. In addition to admitting students with strong intellectual and leadership capabilities, law schools must also serve the legal profession by recruiting classes of students that reflect not only diversity in gender, economic and social backgrounds, but also racial and ethnic identification.

The legal profession is the gatekeeper of our justice system. Society depends upon the legal profession to ensure the fair and equitable administration of justice. Although our country's population is roughly thirty percent non-white, minorities represent only about eight percent of the legal profession.³ Furthermore, the gap between the diversity of the profession and the diversity of American society as a whole is widening. For instance, in the next few decades, the percentage of minorities in the United States is projected to grow to more than fifty percent.⁴ However, even if the current minority enrollment trends in law schools continue, the legal profession will only consist of about twenty percent minorities.⁵

In 1999, under the leadership of President William G. Paul, the American Bar Association undertook an intensive initiative to develop programs to increase racial and ethnic diversity at all levels within the legal profession.⁶ Obviously, law schools must play a leading role in this effort. Both the bar and law schools must work together to identify and implement strategies that will increase the diversity of law school student bodies.

Law schools should be encouraged to experiment with alternative admission policies that promote diversity without sacrificing their perceived status in various published rankings.⁷ The experimental admission policies suggested by the Committee on Diversity of the Section of Legal Education and Admission to the Bar should be piloted at various law schools to determine whether they produce a more diverse, yet still highly talented, student body.⁸

In February 1998, the *ABA Journal* began a series of special reports on race and the law. The first of these reports, entitled *Race and the Law*, was published

3. See COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROF., A.B.A., MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION, at v, 1 (2000).

4. See *id.* at 22; see also Jennifer Cheeseman Day, *Current Population Reports—Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1993-2050*, DEPT. OF COMMERCE at xxii (1993).

5. See SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., 1999 STATISTICAL REPORT FROM THE ABA ANNUAL QUESTIONNAIRE TO LAW SCHOOLS, Table C-1 (1999).

6. See William G. Paul, *Our Millennial Mission*, A.B.A. J., Sept. 1999, at 8; see also William G. Paul, *Increasing Diversity*, A.B.A. J., Oct. 1999, at 8.

7. See AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION RESOURCE GUIDE: PROGRAMS TO ADVANCE RACIAL AND ETHNIC DIVERSITY IN THE LEGAL PROFESSION 25-46 (July 2000).

8. See SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., REPORT OF THE COMMITTEE ON DIVERSITY IN LEGAL EDUCATION (1998).

in collaboration with the *National Bar Association Magazine*.⁹ This special report was intended in some ways to close the division between the races; instead it yielded a frightening reality. From partnerships to tokenism, from clerkships to judgeships, and from jury selection to racial profiling, black and white lawyers do not seem to see eye to eye.¹⁰

Likewise, divergent viewpoints exist between white and Hispanics lawyers. As a continuation of these special reports, the *ABA Journal*, in conjunction with the Hispanic Bar Association, published another report on race entitled *Waiting to Celebrate*.¹¹ The report indicated that Hispanic lawyers and non-lawyers alike perceive the American justice system as having a “set of harsh rules for minorities and softer ones for whites.”¹² The article cites examples ranging from higher incidents of arrest of minorities due to racial profiling to more subtle forms of discrimination such as requiring minorities to provide additional identification to cash personal checks.¹³

Regardless of the accuracy of these examples, the negative perceptions continue to persist and threaten public support for the justice system. The law school experience, in many respects, is a time to broaden one’s intellectual horizons and thus an ideal time to learn the importance of diversity. As part of the law school experience, students are challenged to detach themselves from personal biases, and they are therefore more likely to consider the merits of opposing points of view. Learning the importance of diversity is essential because diversity is not merely a matter of numbers, nor is it just about better jobs, better education, or financial security. Diversity is about the recognition of the equal value of human life, regardless of race. And law school provides an environment in which learning the importance of diversity can be achieved.

In addition to expecting law schools to play a leading role in diversity, the legal profession also expects law schools to adequately train their students for the practice of law. This includes traditional training in thinking and reasoning, sometimes referred to as teaching law students to “think like lawyers.” This learned skill of critical analysis has equipped law school graduates with the tools to succeed not only in the practice of law but in a variety of fields, including the judiciary, business, and government.

Today, law schools must do more than train students in traditional analytical skills. Law schools must also teach students ethical lawyering skills. Changes in the legal profession have reduced the likelihood that lawyers will acquire these skills in their practice. For example, for the majority of lawyers today who practice in solo or small firm settings there is very little, if any, on the job mentoring available.¹⁴ Likewise, larger firms have little time for mentoring due

9. Gary A. Hengstler & Maurice Foster, *Race and the Law*, A.B.A. J., Feb. 1999, at 41.

10. See Terry Carter, *Divided Justice*, A.B.A. J., Feb. 1999, at 43, 43-47.

11. Julie Amparano, *Waiting to Celebrate*, A.B.A. J., July 1999, at 68.

12. *Id.* at 69.

13. See *id.*

14. See AMERICAN BAR FOUNDATION, *THE LAWYER STATISTICAL REPORT—THE U.S. LEGAL PROFESSION IN 1995* (1999).

to economic forces.¹⁵

In the early 1990s, the Section of Legal Education and Admissions to the Bar published a Task Force Report, entitled *Law Schools and the Profession: Narrowing the Gap*.¹⁶ This report became known as the MacCrate Report, named after the Chair of the Task Force, former ABA President Robert MacCrate.

The report was published shortly before my term as Chair of the Section of Legal Education and Admissions to the Bar. During the year I served as Chair, a national conference was held to discuss the MacCrate Report and encourage its implementation.¹⁷ I am pleased that in the six years since that conference, the recommendations of the MacCrate Report have been largely embraced by the nation's law schools.

The MacCrate Report identified ten fundamental lawyering skills that needed to be taught by law schools:

1. problem solving;
2. legal analysis and reasoning;
3. legal research;
4. factual investigation;
5. communication;
6. counseling;
7. negotiation;
8. litigation and alternative dispute resolution procedures;
9. organization and management of legal work; and
10. recognizing and resolving ethical dilemmas.¹⁸

Today, most law schools attempt to teach these lawyering skills. However, since doing so requires intensive instruction in smaller class settings, it is much more expensive than traditional legal education. Additionally, because law schools must continue to offer the traditional legal education as well, utilizing this new form of teaching as an add-on imposes further financial burdens.

Furthermore, the legal profession also expects law schools to begin instructing students on the meaning of professionalism. Many observers believe there has been a decline in professionalism throughout the legal profession in recent years.¹⁹ This observation is based on:

15. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

16. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992) [hereinafter MACCRATE REPORT].

17. See Invitational Conference on the MacCrate Report, A.B.A., in Minneapolis, Minn. (Sept. 30-Oct. 1, 1994) (sponsored by the Section of Legal Education and Admissions to the Bar and West Publishing).

18. See MACCRATE REPORT, *supra* note 16, at 138-40.

19. See CONF. OF CHIEF JUSTICES COMMITTEE ON PROFESSIONALISM AND LAW. COMPETENCE, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM at vii (Report of the Working Group on Lawyer Conduct and Professionalism, 1998); see also SEC. OF

- more reports of unethical behavior;
- advertising that seems to reduce law practice to the level of selling used cars;
- evolution of law practice as a bottom-line business;
- large numbers of lawyers fiercely competing for legal business; and
- inability of lawyers to rely on another lawyer's word.²⁰

It is clear that law schools alone cannot change all of these developments. Indeed, every institution in the legal profession has a role. Law schools can, however, begin to teach the concept of professionalism to students. It is important for law students to explore the meaning of professionalism in today's world. Acceptable concepts of professionalism in a vastly different professional environment years ago may be inappropriate in today's legal environment and should be replaced with more suitable standards.

The Section of Legal Education and Admissions to the Bar Professionalism Committee, together with the ABA's Standing Committees on Professionalism and Lawyer Competence, sponsored an excellent symposium on professionalism in 1996.²¹ This symposium was developed under the leadership of former ABA President Reece Smith, who chaired the Section's Committee, and Dean Harry Haynsworth of the William Mitchell College of Law. The symposium produced an outstanding report entitled *Teaching and Learning Professionalism*.²² This publication continues to be one of the best sources of information on the meaning of professionalism.

II. USEFUL SCHOLARSHIP

Another expectation developed by Chief Justice Shepard is the need for useful scholarship.²³ The great legal minds in the academic branch of our profession must help address the difficult problems facing our justice system. These include the following major problems:

- How should the legal profession address the phenomenon of multi-disciplinary practices? Should they be prohibited or regulated under the rules of professional responsibility? How should the profession address the strong economic forces that operate to bring about multi-disciplinary practices? These are critical questions for the legal profession throughout the world, and the rest of the world is watching as the American legal profession attempts to resolve them.²⁴

LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., TEACHING AND LEARNING PROFESSIONALISM 2-3 (Report of the Professionalism Committee, 1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM].

20. See generally TEACHING AND LEARNING PROFESSIONALISM, *supra* note 19.

21. Symposium, TEACHING AND LEARNING PROFESSIONALISM (Oak Brook., Ill., Oct. 2-4, 1996).

22. See TEACHING AND LEARNING PROFESSIONALISM, *supra* note 19.

23. See Shepard, *supra* note 1, at 11-12.

24. See generally Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84

- How should the legal profession respond to continuing threats to judicial independence? Where should the line be drawn between fair criticism of judicial decisions and inappropriate threats to judicial independence? Judicial independence is an essential requirement for a free and democratic society. How can it be safeguarded in an environment where it is necessary for judges to raise funds from lawyers for their election campaigns?
- How can the legal profession provide access to justice for persons with low and moderate incomes? Millions of Americans are in danger of losing their opportunity for legal representation. Both continuing efforts to dismantle the Legal Services Corporation and court challenges to the IOLTA program are serious threats to the source of major funding for legal representation of low and moderate income Americans. They must be addressed to avoid rationing justice on the ability of clients to pay.
- How should the legal profession address the numerous questions in areas of substantive law, such as what law applies in cyberspace. In 1998, the United States Attorney General, Janet Reno, indicated to me that this matter was one of the most vexing law enforcement issues she is facing. Where, for example, does a crime occur when a person in a Latin American country fraudulently sends a computer directive to a bank in Europe to transfer funds from the account of an American corporation to an account of an Asian corporation at a bank in Australia?
- Who owns the great variety of electronic information available on the complex computer network throughout the world? These are some of the many difficult questions addressed by the Uniform Computer Information Transactions Act recently promulgated by the National Conference of Commissioners on Uniform State Laws.²⁵

The problems listed above are just a small sampling of the many difficult questions facing the justice system. Their resolution demands the thoughts, insights, and scholarship of the best minds in the country. Unfortunately, however, these types of problems are rarely addressed in the law reviews of this country.

Judge Harry Edwards commented on this problem in a significant article in the *Michigan Law Review* eight years ago.²⁶ As Judge Edwards concluded, “[t]here are too few books, treatises, and law review articles now that usefully ‘chart the line of development and progress’ for judges and other governmental decisionmakers.”²⁷ While the article may have overstated the concern, a serious

MINN. L. REV. 1529 (2000).

25. See UNIF. COMPUTER INFO. TRANSACTIONS ACT (amended 2000), available at the Uniform Law Commissioners’ official website, http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

26. See Edwards, *supra* note 15, at 38.

27. *Id.* at 50.

problem exists. A healthy balance is needed between theory and practice in both legal scholarship and in our nation's law schools.²⁸

III. ACTIVE PARTICIPATION BY ACADEMICS IN THE LAW REFORM PROCESS

I would like to add another expectation to those raised by Chief Justice Shepard in his paper. The legal profession needs the active participation of legal academics in every aspect of the law reform process. This can be satisfied in many ways, but particularly through involvement in such outstanding law improvement organizations as the American Law Institute and the National Conference of Commissioners on Uniform State Laws. These organizations need the active involvement of law professors, as well as judges and lawyers.

Professor Geoffrey Hazard discussed this need for law professor involvement in an article in the *Minnesota Law Review* in 1994, where he decried "the growing distance between the mental worlds in which practitioners and academics respectively function."²⁹ To most effectively reform the law, the legal profession needs both the ability of law professors to develop broad general principles and the ability of practitioners to set forth the details of the problems and convey their understanding of what is workable in a practical sense. In discussing this dual need in the context of the development of Restatements, Professor Hazard wrote:

[I]t is one thing to say that Article 2 of the Uniform Commercial Code should protect consumers against unfair overreaching by vendors of appliances and automobiles. It is another thing to formulate a rule that will not make every consumer transaction vulnerable to a credibility dispute. In the Restatement of the Law Governing Lawyers, it is one thing to recognize that a lawyer representing a trustee or other fiduciary has some greater responsibility to the beneficiaries than to other nonclient third parties. It is another thing to formulate a rule that does not make the lawyer an indemnitor for a trustee's malfeasance, or perhaps even misfeasance.³⁰

I agree completely with Professor Hazard when he concludes "[t]he possibility for ameliorative change in the law can be appreciated in encounters between practitioners capable of reflection on experience and academics concerned with how the law actually works."³¹ That is what the profession needs and

28. See Harry T. Edwards, *The 21st Century Lawyer: Is There a Gap to be Narrowed? Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession,"* 69 WASH. L. REV. 561, 564 (1994); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript,* 91 MICH. L. REV. 2191, 2195 (1993).

29. Geoffrey C. Hazard, *A Tribute to Dean Robert A. Stein: Former Dean of the University of Minnesota Law School,* 80 MINN. L. REV. 14, 16 (1995).

30. *Id.* at 17-18.

31. *Id.* at 18.

expects—law professors concerned with how the law actually works.

CONCLUSION

This response has focused on three general expectations the legal profession has of law schools. The legal profession expects law schools to:

- produce good lawyers;
- provide legal scholarship with a healthy balance between theory and practice in order to assist the profession in addressing the enormously difficult problems facing our justice system; and,
- encourage active involvement in law reform activities by law professors who are concerned about how the law actually works.

These are demanding expectations, but I believe the nation's law schools can deliver.