



HARVARD LAW SCHOOL

Center on the Legal Profession

“Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century” Commentary

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Comments on the Heineman-Lee-Wilkins Essay

by

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The Heineman-Lee-Wilkins essay sets forth an exemplary vision of the responsibilities of lawyers, one that is particularly needed today because, as the authors note, we are living in a time of stress and transition for the American legal profession. Their essay also demonstrates the important insights that come from forging collaborations between the bar and the academy: Heineman writes as an experienced, former in-house counsel, Lee as a large law firm leader, and Wilkins as one of the rare academics who studies the legal profession.

Legal education is also experiencing a time of stress and transition. By the fall of 2013, the applicant pool in three years had dropped nearly thirty percent,¹ and a large majority of American law schools enrolled fewer first year students than in 2012.² Because most law schools are heavily dependent on tuition for revenue, the drop in enrollment meant most schools were operating in the red, a first for modern legal education. Indeed, until the last few years, more law schools were net contributors to the revenues of their universities rather than the other way around. The ABA has not yet published individual law school enrollment data for the fall of 2014, but it has reported that overall first year enrollment dropped another four percent from 2013 to 37,924.³ This is the smallest first year enrollment since 1973 when there were 25 fewer law schools approved by the American Bar Association. Interestingly, although the media is on the lookout for predictions of how many law schools may close, thus far the data show law schools are slimming down or merging rather than closing.

A key question raised by this dramatic contraction of both the applicant and enrollments pools is why so many fewer college graduates are interested in applying to law school. It does not appear to be a simple calculation based on their chances of obtaining jobs in a tightened job market, because the largest percentage drop has been in the number of applicants with the highest LSAT scores. With the highest scoring college graduates turning their backs on law as a profession in record numbers, we are in an unprecedented moment of challenge not only for law schools, but for the profession and possibly for the nation. The United States may soon face a *shortage* of lawyers that could rock the foundations of the rule of law itself.

Some of the downturn in the law school applicant pool may be due to what the essay authors recognize as “the striking discontent of many young associates, which often leads to a dramatic, voluntary

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¹ Daniel O. Bernstein, *The State of Law School Admissions: Where Are We in 2014 (2014)*, <http://www.aals.org/wp-content/uploads/2014/08/State-of-Law-School-Admissions-2014.pdf>.

² Fall 2012-Fall 2013 1L Comparison Data, http://www.americanbar.org/groups/legal_education/resources/statistics.html.

³ *ABA Section of Legal Education Reports 2014 Law School Enrollment Data*, Dec. 16, 2014, http://www.americanbar.org/news/abanews/aba-news-archives/2014/12/aba_section_of_legal.html.

exodus after only a few years of practice.”⁴ Word of that discontent has surely gotten back to the colleges and universities. Among the many valuable recommendations provided in the essay is that firms should permit their lawyers to have the time and energy to be involved in resolving a variety of societal problems not just through pro bono efforts, but by participating in charitable and religious organizations, and local and state civic groups. That would clearly be a good step, but large firms also need to do a better job of demonstrating how lawyers can have fulfilling professional lives as large law firm partners.

It is also important to keep the discontent of associates at large firms in perspective. As the essayists acknowledge, most lawyers in the United States practice alone or in very small firms, and many others work in the public and nonprofit sectors. What they failed to add is that most lawyers are not as unhappy as the associates in big law. A longitudinal study of lawyers who were admitted to the bar in 2000 recently found, for example, that 76% of the lawyers sampled were moderately to extremely satisfied with their decision to become a lawyer.⁵

When the essayists turn to what law schools should be doing differently, they begin by affirming that law schools should be more than trade schools. They also recommend that law schools should prepare law students to do more than serve client interests. Students should also be educated to fulfill their duties to the legal system, to their own institutions, and to society at large. To prepare students for these more ambitious goals, the essayists suggest that law schools establish “professor of practice” positions taught by lawyers with deep experience.

Although the idea of recruiting experienced lawyers to teach is not new, it is certainly true that law students headed for practice need role models that professors don’t provide.⁶ Many law schools for years have brought in accomplished members of the bar and bench to teach as adjunct or visiting faculty; the challenge is how to provide more exposure to practicing lawyers without turning law schools into mere trade schools. One good practice is both to select and to train the lawyers and judges brought to the classroom so as to ensure they have will not simply teach students to do whatever clients ask. Even better is the recommendation made in the essay of teaming visiting lawyers with academics who can help to bring sufficient critical distance to discussions in the classroom.

The essayists also contend that law graduates need a broader understanding of their ethical responsibilities. Implicit in this vision of lawyering is the principle that at times lawyers must be prepared to say no to clients if “proposed actions are clearly illegal or highly unethical.”⁷ In a corporate setting, this may require reporting such inappropriate activities to the general counsel or other senior lawyers, who in turn have an obligation to report to top business leadership or even the board of directors if necessary.

Regrettably, there is too little attention paid to what sources should be used to decide what is or is not ethical in any particular situation. The essayists mention “the spirit and letter of the Model Rules of

⁴ HLW at 42.

⁵ D. Benjamin Barros, *Review of After the JD III, A Professor’s Take*, AALS NEWS Nov. 2014, at 1. By contrast, a recent study of physicians found that satisfaction ranged from 43-59 % depending on specialty. Physician Compensation Report 2013, <http://www.medscape.com/features/slideshow/compensation/2013/public>.

⁶ ROBIN WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* 136 (2014).

⁷ HLW at 24.

Professional Conduct” as a source of ethical guidance but not much else.⁸ They also overlook the opportunity to discuss the relationship between in-house counsel and outside law firms as a source for strengthening the ability of in-house counsel to serve as guardians of the company’s long term interests and reputation.

One reason for the thinness of sources cited for determining what is ethical is that law schools for the most part have done a very poor job of teaching students to think as rigorously about their ethical duties as they do about doctrine. Robin West in her pathbreaking book *Teaching Law: Justice, Politics, and the Demands of Professionalism*, traces this shortcoming to Langdell’s severance of the idea of law and sources of law from the humanities.⁹ The result is today most students are not exposed in law school to Cicero, Aristotle, Shakespeare, or Hume, or to such modern thinkers as Rawls, Nozick, Nussbaum, or Sen.¹⁰ West warns that a curriculum that fails to study competing notions of justice is both dispiriting to students and ultimately to the faculty charged to maintain it.¹¹ Another problem with the separation of the legal academy from the rest of the university is that the concept of justice itself has developed without the benefit of the collective wisdom of the profession, or the branch of the academy devoted to the study of law.¹² Finally, the separation means that the legal profession is educated in a way that omits systematic study of the moral ideals that might guide its exercise of professional judgment.

Not only do most law schools fail to analyze competing conceptions of justice, they typically do not prepare students for the ethical challenges that may lie ahead. There are a exceptions, of course. For more than a decade I have taught a course on judgment and decisionmaking. Former students have reported back to me that the most valuable sessions exposed them to situations in which other lawyers got into trouble. In the session entitled “Knowing What To Do Isn’t Always Enough,” students read selections from John Dean’s book *Blind Ambition*¹³ that recount how he was wooed to take the job of White House Counsel to President Richard Nixon when he was only thirty-one, then almost immediately found himself enmeshed in Watergate. They also discuss *In re Croson*,¹⁴ an opinion disbaring a lawyer for, among other things, trying to entrap a law clerk in a scheme to discredit a judge in order to influence the outcome of pending litigation. Finally they engage with an essay by David Luban that discusses the pressure on subordinate lawyers illustrated by the Berkey-Kodak litigation, and recounts the Milgram experiments that showed that most people involved in a fake experiment would administer what they thought were severe electric shocks to other human beings.¹⁵

It is encouraging to have two accomplished lawyers and an academic make the case for enlarging the responsibilities of lawyers beyond client service as well as for working with the nation’s law schools to achieve the goal. Their essay is itself an outstanding example of the illuminating classroom materials

⁸ The other sources cited are not very illuminating. They range from “an implied social contract between state-licensed professional and the rest of society” to “lessons about lawyers’ roles in the history of our constitutional democracy and political economy.” HLW at 11.

⁹ WEST, *supra* note 6, at 76.

¹⁰ *Id.* at 81.

¹¹ *Id.* at 26.

¹² *Id.*

¹³ JOHN W. DEAN III, *BLIND AMBITION: THE WHITE HOUSE YEARS* (1976).

¹⁴ 880 N.E.2d 352 (Mass. 2008).

¹⁵ David J. Luban, *Milgram Revisited*, 9 RESEARCH LAW 284 (Spring 1998).

that can result when leaders of the bar and the legal academy collaborate. Let's hope it marks the beginning of a new era.



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