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From The Law Schools

THOMAS G. KRATTENMAKER

Some Thoughts on the Education of Lawyers¹

I WANT to offer two fairly modest thoughts about the education of lawyers in the U.S. First, I believe that education in the profession of law is, and should be a two way street: You get. You give. Second, I believe our profession is better organized on the giving side than on the getting. If I am correct in these observations, I think they lead to some interesting conclusions as to how the bar and the legal academics can work together to improve our law schools.

Getting Educated in the Law

Of course, to analyze (or even just to ruminate about) the state of legal education one should have a vision or a model of what legal education is or should be. Frequently, however, we have discussions about legal education without clearly articulating those visions or models that underlie our thoughts. Let me try to avoid that shortcoming by identifying at the outset three propositions about legal education that underpin what I have to say about law schools.

First, I think it is important to realize that for any able, conscientious lawyer education in the law must be a life long process. Imagine, for example, a lawyer who (like me) graduated from law school in 1968 and who knows nothing of such post-graduation events as the widespread adoption of the Uniform Commercial Code. It is not only formal legal rules that change. Consider the Supreme Court's uprooting of previously long-standing constitutional doctrine that allowed states to impose disabilities on women in the workplace. The change in rules reflected also a change in our conception of law and law's role in affecting social institutions. Law changes and lawyers need to change with it.²

My second premise follows from the first: Legal education, especially during law school, should be training in self-education. No talent is more important to a competent attorney than the ability to teach oneself, to find out the facts, the applicable law, and where one seeks redress for legal wrongs.³ In law school, when we do it right, we help our students learn to teach themselves.

Finally, what I have already said shows that I do not share a viewpoint that seems to motivate much of the McCrate Commission's report on legal education. The McCrate Report, as I read it, appears to assume that one goal of legal education should be to take people who have had no previous legal education and, in only three years, to train them to be fully com-



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petent to act as an unsupervised attorney. In my legal career, I have taught antitrust law and telecommunications law and worked on fair number of cases in both areas. In neither of these fields is it conceivable that anyone could make any 25 year old neophyte competent to practice without supervision⁴

successful educational system, I believe there is a built-in bias that prevents us from being as good as we could be.¹²

Candidly, one reason I am proud to be the dean at William and Mary is that I believe we are much more a part of the solution than a contributor to the problem. But true candor—and a desire to speak here more broadly about legal education—requires that I mention some aspects of legal training on which even we are less than perfect.

Three cheers, then, for the aspirations that underlie our current system of legal education. Only two and a half cheers, however, for the methods by which we seek to achieve those aspirations. (In my concluding section I try to suggest some ways the law schools and the bar could join together to make things better, but first I need to review how we give legal education.)¹³

Giving Education in the Law

So much for getting legal education. What about giving it? At the risk of oversimplification, I define the giving of education in the law as scholarship and teaching about law. How is our profession doing on the giving side? Very well, I think, but again I see some omissions. Here, however, I am more optimistic that cures are available.

Legal Scholarship

Legal scholarship, as I employ the term, seeks to understand the nature of legal institutions and legal rules and to critique, refine, and reform those legal institutions and legal rules. Here, I think, our profession does quite well.

The 177 U.S. law schools accredited by the American Bar Association (ABA) sponsor over 300 law journals. Articles in these journals, at their best, illuminate legal rules and institutions from critical and often multi-disciplinary perspectives. They help us re-examine our beliefs about legal institutions and our commitments to particular rules of law. Existing alongside these academic scholars (indeed, often working carefully and fruitfully with them), are law reform associations, like the ABA and The Virginia Bar Association, that publish critical learned material. These associations make tremendous contributions to the growth of law and the evolution of legal institutions.

We can always, of course, produce more and better scholarship. I know that in the legal academy it is a constant struggle to supply talented, eager scholars with the resources they need to be most productive.¹³ And the pressures on private practitioners to generate business and to bill their working time may create a perverse new rule for some: publish *and* perish! Nevertheless, I believe we can say, thankfully, that American law does not suffer from under-study.

Law Teaching

I noted above the structural limits on funding for law teaching.¹⁴ Within these limits, however, I believe that law school teaching has been a great achievement. We underinvest in teaching, to be sure, but we do what we do very well.

One reason for this achievement that I wish to stress here is the great benefits that adjunct professors of law—most of

them practitioners, whether in private firms or public organizations—have bestowed on us. Full time professors of law and part time practitioner adjuncts teach the curricula side by side in U.S. law schools, just as they contribute in parallel fashion to legal scholarship. Each of these groups tends to possess a comparative advantage relative to the other. Adjuncts, I think, play a particularly valuable rule in skills courses, practice courses, courses designed principally to transmit advanced legal rules. Full time professors have a relative advantage in fundamental building block courses, interdisciplinary courses, and courses that center on the theory and history of law. (As I suggest below, the benefits adjuncts bring us are magnified when they are in teaching partnerships with professors as well as students.)

Moving Forward

What are the implications of the conclusions offered here? First, as noted and discussed above, I think we all need to do what we can to correct or reduce the systemic bias toward underinvestment in legal education. Legal education needs and deserves more resources.

A second implication, however, has little to do with money. I believe that even without huge monetary infusions we can improve both legal education and legal scholarship by reforming the mix of resources devoted to these tasks. I noted above that practitioners and academics both teach and produce scholarship, usually side by side in parallel fashion. I urge the profession and the academy to take the next step toward better teaching and scholarship: the greater integration of their tasks.

Here are some examples of what I have in mind: First, I think it should be commonplace that some courses—such as Lawyering Skills, Trial Advocacy, Business Planning, or Trusts and Estate Practice—are taught jointly by a full-time academic and a practitioner. In courses such as this, the practical and the theoretical should be identical. Professionalism and intellectual rigor are clearly one and the same in these courses. The cost? Apart from sacrifice of time for the lawyer, a relatively modest increase in the schools' adjunct budget.

Second, I am disappointed that I see relatively few law professors devoting their leave or sabbatical time to working with other lawyers, in firms or agencies. Why aren't law firms routinely housing law professors on sabbatical? In such cases the firm must leave the professor largely alone to pursue scholarly projects, of course, but the professor can also look over some of the firm's matters that fall within the professor's expertise. Both the firm and the professor can gain unusual insights from these sorts of collaborations. Why aren't government law offices dotted with professors on leave from their universities to undertake a project that will both resolve a major public issue or initiative and contribute to the professor's practical understanding of this area of law and policy? The cost of these endeavors? Putting to use an otherwise empty office and some moderate

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further sharing of institutional resources, such as computer assistance.

Third, I wish I saw more of the "visitor from practice." Where are the attorneys who are granted sabbaticals as short as four months by their firms or agencies so that they might spend time teaching law students what they know while doing research to expand further the frontiers of their own knowledge? The costs here are somewhat greater¹⁵ so legislative or alumni support for such programs may be necessary. But the payoffs, for the practitioner and the student, should be virtually incalculable.

In short, this dean does not believe we need money to cure every problem or to seize every opportunity. I urge the professors and the academics to work together on two fronts: increasing the resources available for legal education, while deepening the visible cooperation and collaboration between the bar and the academy.¹⁶

ENDNOTES

1. This essay is an extension of remarks I first delivered at the Fall meeting of the executive committee of The Virginia Bar Association in October, 1995. I wish to thank Dean Jayne Barnard, Dr. Gillian Cell, Professor Mechele Dickerson, Professor John Donaldson, Dean Hugh Macgill, Professor Alan Meese, Professor Jim Moliterno, VBA President Terrence Ney, and Dean Richard Overy for their helpful comments.

2. I think most lawyers are rather conscious of this point. Unfortunately, many law students are not. Perhaps nothing is more frustrating to the law teacher than the view, too often expressed by students, that they only care to "learn the rules."

3. If you are a lawyer, reflect back on your legal education. If you felt that your professors were not very instructive, if you felt driven to reach your own conclusions about what the law was and should be, if you felt that outfits like moot court or law review—where no professor was on the premises—were among your most valuable educational experiences, then you got a great legal education! I do not believe that professors are irrelevant. After all, I am one! But I do believe our central task is to guide people to develop capacities for self-education, not (for the most part) to instill a "received wisdom" by rote instruction.

4. I should make clear that I do not believe that "supervision," to be adequate, must take the form of a partner-associate relationship. As I use the term, an attorney could be practicing solo and still be "supervised" were that attorney mentored by a senior, experienced lawyer who (at least) discussed strategies and reviewed crucial drafts with the younger attorney before these were adopted or made public.

5. Of course, as I explain below, I agree with the McCrate Report that basic lawyering skills should be taught in law school. I do not, however, believe that the purpose of such skills training should be understood to be producing lawyers competent to practice without supervision on the day they graduate.

6. Of course, I am speaking in generalities here. Not all law schools and all law professors commit these sins to the same degree or with the same frequency. But I know of no law school that can plausibly claim it performs well in the respects identified in the text. I should note, however, that at William and Mary our Legal Skills program does address each of these common shortcomings of law school education. It is only a lack of resources that keeps us from achieving more. Further, I think it is noteworthy that education after law school—especially training programs conducted by law firms—has some tendency to compensate somewhat for our shortcomings.

7. In this part of the paper, when I speak of "law firms" I do not mean to include government law offices. The latter lack a profit or eleemosynary motive to invest in legal education. What I say here does, however, largely apply to in-house counsel operations of corporations.

8. The Thirteenth Amendment prevents firms from assuring a return on their investment by requiring students who benefit from their largesse to work for the firm in return.

9. I am not arguing that no one contributes to legal education. Alumni and, to a much lesser extent, law firms do contribute to law schools. These contributions deserve applause; frequently, they make all the difference between a school of mediocre quality and one that is justly proclaimed a "top tier law school." I am arguing that alumni (as a whole) and law firms *underinvest* in legal education. That is, they will not pay for the full value of what they receive from improvements in legal education because they can "free ride" on these efforts because we have no way of forcing them to choose between (a) not receiving the benefits of improvements in legal education or (b) paying for the costs of generating the benefits they do receive.

10. I believe there is a related factor at work as well, but whose effects are short-lived. The fact of improvement in education at any school is not transmitted rapidly to those who hire fledgling lawyers. Therefore, students are not likely to pay for a change whose value will not be recognized by those hiring them. Over time, the effects of this phenomenon should dissipate as hiring personnel learn that graduates of certain schools are proving more productive than others. In the short run, however, it is enormously frustrating to institute a wonderful new educational program and then to discover how hard it is to educate the bar about the program!

11. One might argue that mandating continuing legal education (CLE) should force lawyers to invest properly in their post-graduate legal education. But mandatory CLE imposes identical requirements on all of us when our needs are, I believe, not uniform.

12. And, of course, if I am right that the bias is a necessary part of the system, then it follows that we cannot eliminate that bias. Thankfully, many of us teach at schools where the support of alumni and friends has greatly reduced the bias that would otherwise overwhelm us.

13. For readers not aware of the depth of this problem, I offer this simple fact: the median faculty salary at the William and Mary School of Law is only a little more than *half* of the salary of sixth-year associates at the firm where I last worked. My faculty make enormous financial sacrifices every day they go to work at our law school. (No, they do not make enormous compensatory outside salaries in the summer.) Consequently, even relatively modest aid for those producing scholarship can have very big payoffs.

14. See the discussion above entitled "Underinvestment in Law Schools."

15. Two kinds of cost are apparent. First, the "practitioner in residence" needs to be paid by the practitioner's permanent employer, the school, or both. Many large law firms already have sabbatical programs. Funding such programs for smaller firms, in-house counsel, government agencies, and public interest firms will be more challenging. Second, the cost of space to the school is likely to be high. Most law schools are so pressed for resources that they build facilities adequate only to house a faculty of the then-current size. Adding faculty then becomes very expensive. My observations suggest that law firms, when they expand, often do so by renting an entire floor or half a floor. Firms, then, are more likely to be able to house a "professor in residence" at low cost. The typical government agency, I believe, experiences sufficiently rapid lawyer turnover that office space for a professor, working on a major agency project for a short time, should be relatively easy to come by.

16. Consider the list of programs whose absence I just bemoaned. Note that to generate more of any of them we must initially increase the extent to which the practitioners and the professors are acquainted with each other. For example, a firm with a fascinating zoning practice will not ask a first-rate zoning professor to come on board for a sabbatical if people in the firm do not know that professor personally. Thus, one way in which professional organizations like the VBA can further legal education is simply by helping to create opportunities for professional and social interaction between professors and practitioners.