Manners, Morals and Legal Education

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Manners, Morals and Legal Education

by Thomas Ehrlich

Many spokesmen for the legal profession have been calling on the law schools to pay more attention to ethical responsibilities, usually meaning manners and civility. But many of today's law students believe that the profession is not meeting some of its public responsibilities. When that problem is squarely faced, with the law schools' help, then good manners should follow.

In the past few years leaders of the legal profession have appealed for law students—and law schools—to pay more attention to legal ethics. Their pleas usually have been public, occasionally strident. Over the same period many law students have urged more attention by the legal profession to ethical responsibilities. Their voices were less public but often more strident.

These appeals from two quite different quarters may sound similar. That similarity is only on the surface, however, and it hides a disturbing gap between many who are in law practice and many of their successors, now law students. It is difficult to discuss questions of ethics without taking on the role of preacher. While seeking to avoid that role, I shall try to describe these current though dissimilar concerns about legal ethics, to explain why the gap between the two groups is disturbing and to suggest an approach toward bridging it.

Law Schools Have Been Delinquent

Chief Justice Burger has been among the most forceful and eloquent in urging law schools to pay more attention to matters of professional responsibility. He has suggested—and others have reiterated with less tact—that law schools have been delinquent in failing to provide adequate grounding in legal ethics for their students.

Most law schools do offer several courses in professional responsibility. Most could and should do more in that field. But these offerings, like others in law school, generally focus on troublesome, borderline issues. Tough cases may make bad law, but they make good lawyers, or so most law teachers think. These courses, in the main, deal with close questions in the areas covered by the Code of Professional Responsibility. They consider, for example, the clusters of problems concerning a lawyer's conflict of interest and representation of a "guilty" criminal client. Some attention is usually given to the tensions between a lawyer's duties to his client and his duties to the court. But the borderline aspects of the case involved not the lawyers' conduct but rather what the legal system should do in response and how to go about doing it. The overwhelming majority of the Bar would agree that it is improper for a lawyer to say some of the things that were said by defense attorneys in the case. Sharp disagreements arise, however, about the propriety of alternative sanctions and particularly about the process of deciding on those sanctions. Law school offerings on professional responsibility concentrate on these and similar issues.

Although I support the call for more courses in professional responsibility, I doubt that those courses will solve the concerns of leaders of the profession who are doing the calling. As I understand them, the bad manners of some lawyers is of primary concern. They point particularly to the courtroom antics of a small but noisy group of attorneys and propose that law schools should meet the problem in the classroom through inculcation. Law teachers, the Chief Justice has said, "have the first and best chance to inculcate in young students of the law the realization that in a very hard sense the hackneyed phrase 'order in the court' articulates something very basic to the mechanisms of justice. Someone must
Manners, Morals and Legal Education

A graduate of Harvard College and Harvard Law School, Thomas Ehrlich is Dean of the Stanford Law School. Before he joined the Stanford faculty in 1965, he served as a law clerk to Judge Learned Hand, practiced law in Milwaukee and held positions in the State Department. He was appointed Stanford dean in 1971.

A Change Has Occurred Among Law Students

The paradox can be explained in part by examining the reasons for the increasing number of applications to law schools in recent years. As in the past, most students come as an act of faith in their own creative abilities rather than with any certain sense of what it means to be a lawyer. But two phenomena are relatively new. First, many more law students than ever before view law school as their second choice. They would have gone to engineering schools or to Ph.D. programs in some other field but for the perceived economic reality that those alternatives offer little promise of future employment. In the view of some of these students, but for the malfunctioning of the "system" they would be in some more attractive institutional training ground. Second, and much more significant, a host of forces makes many law students today more concerned than in prior years with their own responsibilities for helping others. Many law students today have absolutist notions of justice and injustice. Some urge simplistic solutions to social issues. But a change has occurred among law students generally in the last half decade. Many more today than five years ago believe that they have substantial obligations to others less fortunate than themselves, and they choose law as a vehicle to meet those obligations.

A heightened, if not new, concern with questions of social responsibility leads directly for many students to issues of professional responsibility and particularly of an individual lawyer's responsibility as a professional. These students recognize that many public offices have been established to provide legal counsel for the poor. Most students probably would agree that in the long run these subsidized arrangements should be the primary vehicles for delivering legal services to those who cannot meet the market price for private counsel. But these students also ask whether the individual lawyer should not have some duty to provide his advice to those who cannot pay. Large numbers of law students with

Responsible Lawyers Should Be Shocked by Lack of Respect

In my view, responsible lawyers should be shocked by the lack of respect accorded judges and their courtrooms by some attorneys. The behavior of those attorneys is often contemptible—literally and legally. But I doubt that it will be materially diminished, let alone eliminated, by increased attention to legal ethics in law schools.

The basic point is a distinction between good manners and legal ethics. Stripped to the core, much of what Chief Justice Burger and others have been calling for in public addresses on legal ethics comes down to matters of manners. These are not small matters. No legal system such as ours can survive very long unless most of its participants behave with good manners. Not only is it more pleasant, but it is far more utilitarian if most people act and react with courtesy and respect for most other people. This is particularly important for our legal system because the institutions of that system depend in major measure for their effectiveness upon the degree of respect with which they are treated.

Without in any way demeaning or diminishing the importance of a lawyer's manners, I suggest that there is relatively little that a law school can do to instill those manners in students who do not already have them when they are admitted to the school. If family, church and prelaw schooling have not imbued the moral values that are the foundation for good manners, then it is unlikely that a law school can change the situation. In fact, most cases of concern to the Chief Justice and others involve, I suspect, not so much a lack of knowledge of good manners as a deliberate unwillingness to use them.

Law schools can and should, through their educational programs, encourage respect for legal institutions, and continued respect is a prerequisite for good manners. But law schools can only educate—they cannot inculcate. They can inform students about the institutions of the legal system, but it will ultimately be the behavior of those institutions that determines whether they are accorded continuing respect by future lawyers. Most important among the institutions, for this purpose, is the legal profession itself.

What can be done by the legal profession to promote that necessary, although not sufficient, respect among law students and young lawyers? I am disturbed by how many law students picture the legal profession as not simply amoral but positively immoral. In the past the public's opinion of the profession often has not been an attractive one. Since colonial times there never has been unqualified public respect for the legal profession. But it has rarely been viewed with as much disdain by as many who are about to become its members. Why is this so? It seems paradoxical that at the very time that more young men and women are seeking admission to law school, more law students also view the legal profession with troubled concern, if not outright scorn.

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whom I have talked in recent years are troubled by what they perceive to be the profession's failure to answer this question. They find in Canon 2 of the Code of Professional Responsibility that the profession itself has a "duty to make legal counsel available". But what, the student asks, does this duty mean for the individual practitioner? The code recognizes that "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer..." (Ethical Consideration 2-25). But there is no disciplinary rule to sanction a lawyer who refuses to perform the public service of representing an indigent client.

An Institutional Failing in Organized Bar?

In the view of many law students, the failure to come to grips with these problems is indicative of an institutional failing in the organized Bar. The public profession of law, they urge, should establish an explicit duty of public service to be met by each lawyer, and the profession should then regulate itself to assure that the duty is carried out.

A few years ago many large firms found that unless they were willing to offer opportunities for pro bono publico work, the best law school graduates would turn elsewhere. Many law students are now concerned that a depressed market for new lawyers may eliminate or at least dampen this interest on the part of major firms. It seems incongruous that as the number of new lawyers has increased sharply, thus making possible the provision of legal services to many more people than ever before, these services may actually be diminished because law firms are under less competitive pressure to provide them.

Some suggest that most students will lose interest in public service, particularly indigent defense work, after they are in practice for a time. There is some evidence to support this prediction, although it is too early to tell how much staying power the phenomenon really has. But my point is that the organized Bar should not allow current student interest in public service to become just a passing fad. Indeed, the Supreme Court's decision in Argersinger v. Hamlin, 407 U. S. 25 (1972), may require some action, apart from other considerations. In all events, law students are demanding more of the organized Bar than plaudits for lawyers who provide public service. They want some system of enforceable obligations.

In short, law students of today are looking to the organized Bar to establish standards for a lawyer's duty to provide public service. F. Raymond Marks in a new book, The Lawyer, The Public, and Professional Responsibility, published by the American Bar Foundation, suggests a number of ways in which such a duty might be both expressed and policed. He analogizes law practice to a monopolistic public utility and urges that the public service duties of its members be regulated under established standards of the public interest. One need not agree with any of the provocative approaches proposed by Mr. Marks to concur in his view that the time is overdue for the profession to grapple with the problem. Law schools, both teachers and students, can and should take part in this process.

To the extent that we are successful as a profession in coming to grips with this issue, if not necessarily resolving it for all time, I am convinced that the respect of law students for the Bar will increase. With respect for the legal profession and for the institutions through which it serves the public will come an increase in the manifestations of respect. Good manners is one of those manifestations.

Judicial Education Calendar

National College of the State Judiciary

November 3-4, 1972, Baltimore Sentencing Institute, Baltimore, Maryland

November 16-18, 1972, Special Court Judges Seminar, Baton Rouge, Louisiana

November 24-26, 1972, Special Court Judges Seminar, Atlanta, Georgia

December 8-9, 1972, Indiana Sentencing Institute, (Location not determined)

December 11-15, 1972, Appellate Judges Seminar, San Diego, California

Jan. 29-February 2, 1973, Appellate Judges Seminar, Baton Rouge, Louisiana

January, 1973 (dates to be announced), Graduate Resident Course, "New Developments in Criminal Law", University of Nevada, Reno, Nevada

January, 1973, (dates to be announced), Resident Course, "Court Administration", University of Nevada, Reno, Nevada

(For further information on these programs, write National College of the State Judiciary, University of Nevada, Reno, Nevada 89507.)