THE PUBLIC RESPONSIBILITIES OF A PUBLIC LAW SCHOOL

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INTRODUCTION

TWO years ago, Richard Matasar, then dean at the University of Florida School of Law, wrote that the lines between public and private higher education were blurring and the differences disappearing.[1] Nevertheless, he concluded that certain essential distinctions—in price, in mission, and in accountability—remain even in a privatizing world. Although his focus was not on law schools or even graduate education generally, his thesis is a critical one for legal education in the United States. Has the distinction between private and public legal education blurred so that a distinctive mission for public legal education has been lost? My answer in this essay is no; despite the accelerating trend toward privatization of legal education and the apparent domination of private law schools, public law schools do and should retain their distinctive mission and role in the advancement of legal knowledge, the education of lawyers, and service to the public and the profession.

A brief history may be in order. As long as legal training was dominated by the apprenticeship system, the public-private distinction made no sense. This was an entirely private world. The first forms of more systematic legal education were also exclusively private. Early law schools like the Litchfield school were the private domains of individual lawyers like Judge Tapping Reeve.[2] Although legal courses and lectures became a part of both public and private universities as early as the 18th century, no law schools, as we understand the term today, were a part of university education until the mid-19th century.[3] It was not until the beginning of the 20th century that the current version of university-based legal education came into its own, following the famous lead of Christopher Columbus Langdell and the Harvard Law School. Even then there was no obvious distinction between the mission of publicly affiliated law schools and privately affiliated schools. These distinctions developed largely over the past 100 years.

What are these distinctions? In describing public and private universities in general, Matasar looked broadly at economic factors and social factors as distinguishing public from private higher education. In every area he examined he found convergence: in cost, pricing, purpose, product, services and resources—the economic factors; and in worldview, accountability, focus, work style, and atmosphere—the social factors. Yet, in the end, he suggested differences should and would remain, and that "even in a privatizing world, public education will maintain

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1. Richard A. Matasar, *Private Publics, Public Privates: An Essay on Convergence in Higher Education*, 10 U. FLA. J.L. & PUB. POL'Y 5, 9 (1998).

2. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 319-20 (2d ed. 1985).

3. *Id.* at 606-09.

its clear difference in price, mission, and accountability."[4] Public universities should remain relatively affordable for state residents; retain missions uniquely tied to their states; and, owe a duty of accountability to their states in their financial, personnel and programmatic functions. In the remainder of this essay, I want to build on these distinctions to begin to sketch a vision of what a public law school ought to be at the beginning of the 21st century.

In my view, public law schools must take into account public obligations and social responsibilities that purely private law schools and universities are free to disregard. In United States higher education, as the Kellogg Commission on the Future of State and Land-Grant Universities[5] recently reminded us, these responsibilities have a very concrete legislative basis. Justin S. Morrill, sponsor of the land-grant concept that greatly extended public higher education aimed at the widest possible dissemination of learning, and Abraham Lincoln, who believed that state and land-grant universities should be "the public's universities," noted that public universities today and their law schools need to renew their commitment to "wide access, excellent curricula, research of value to people and communities, and public governance and financing."[6] Four elements stressed by the Kellogg Commission particularly resonate for public law schools: (1) genuinely equal access; (2) learning environments that prepare students to lead and participate in a democratic society; (3) engagement—a conscious effort to bring resources and expertise to bear on community, state, national and international problems; and (4) open and public accountability.

I. GENUINELY EQUAL ACCESS

Legal education in our state university law schools carries with it an obligation to seek students from the broadest cross-section of the state public.[7] Public law schools need to do more than simply implement "color-blind" admissions processes. Even in places such as California, Texas, and Washington, where legal constraints eliminate traditional forms of affirmative action, admissions guidelines should maximize the opportunity of access to all segments of the state's population and seek diversity of race, ethnicity, age, gender, occupation, and social and economic background. Since many in underrepresented racial and ethnic groups view prohibitions on affirmative action as a sign they are not fully welcome at public law schools, we have an added obligation to do everything possible to counteract that

4. Matasar, *supra* note 1, at 22.

5. The Commission and its six reports can be found online at <http://www.nasulgc.org/Kellogg/kellogg.htm>.

6. KELLOGG COMMISSION ON THE FUTURE OF STATE AND LAND-GRANT UNIVERSITIES, RENEWING THE COVENANT: LEARNING, DISCOVERY, AND ENGAGEMENT IN A NEW AGE AND DIFFERENT WORLD (SIXTH REPORT) 9 (2000).

7. Until the very recent past, the University of California law schools did this very well. In 1989, for example, the public law schools at Berkeley, Davis, and UCLA graduated 48% of the minorities who received JD degrees from ABA accredited law school within California. *See* Ad Hoc Planning Study Committee for Professional Education in Law, Analysis of Graduate Legal Education at the University of California 12 (University of California, Office of the President 1991) (copy on file with the author).

perception. We poorly serve the diverse populations of our states if we myopically declare that the exclusive criteria for admission are grades and test scores and ignore everything else. Outreach efforts to broaden the applicant pool, to encourage students to consider legal education as early as the high school level, to look beyond a few major feeder schools are all necessary to genuinely equal access. Our goal should be to create a public environment that welcomes applicants with assurances that each application will receive full and fair scrutiny. Although a particular student body mix may partly provide that encouragement, it is neither necessary nor sufficient. Ultimately, ambition and hope for the opportunity to attend our public law schools should reach every corner of our states and their diverse populations. Public law schools should consider expanded student bodies and educational programs if necessary to provide full educational opportunity.

Genuinely equal access also includes commitments beyond the admissions process. It must include a supportive learning environment for students after they arrive, one in which all persons are nurtured and supported, and all perspectives welcomed, both within and beyond the classroom. Public schools should make special efforts to develop financial aid packages that keep costs down and competitive with private schools that often have resources that more than equalize the (generally) lower costs of public legal education. All students should arrive with the expectation that they will be able to complete their studies in a timely manner, will be given the chance to participate in all curricular and extracurricular activities, will pass the bar examination (if they wish to seek a legal professional practice), and will have the opportunity to compete as fully as their efforts and talents allow for the range of job and career opportunities.

II. A LEARNING ENVIRONMENT THAT PREPARES STUDENTS FOR DEMOCRATIC LEADERSHIP

This democratic learning environment begins with access—bringing to the law school students with as broadly-based and broadly-shaped perspectives as our processes allow. This helps guard against undue isolation of our classrooms from the full range of social, economic, political and legal concerns that exist within the political realm. It also helps prepare law students for leadership, both as lawyers, and in business, politics, community participation, and their private lives, with a rich sense of the larger community of which they are a part. In the learning environment, public law schools have a special responsibility to seek a diverse faculty and staff as well, reflecting the public in which its graduates will practice and participate. Faculty can, through teaching and discussion of professional and academic work, provide models of behavior and lawyering for students. Public law schools should make a special effort to attract faculty members with diverse professional and academic backgrounds that emphasize interaction between legal and economic, social, and political processes.

A public law school curriculum should emphasize professional responsibility courses and other classes that give students the opportunity to develop leadership skills and tools to bring to bear on persistent public policy issues. Programs within the law school should do more than simply meet the ABA minimums for clinical opportunities; the law school should seek to make connections that link with state

government, state agencies, and the major public interest groups and organizations within reach of the law school. In particular, public law schools should consider supporting programs in which the law school and its larger university may directly assist state governments in providing helpful expertise, research, and legal support.

III. ENGAGEMENT WITH PUBLIC NEEDS

This element fits so closely with the second element that the two are not easily separated. Part of the engagement process is one that all law schools naturally participate in—bringing members of the bench and bar to the law school as speakers, guest lecturers, visiting faculty members, and participants in skills and other courses. Because lawyers themselves are deeply engaged in the larger community and responsive to public as well as private needs, we have a natural affinity for this type of outreach and public service. But there are ways to go beyond these typical linkages. How seriously do we accept the ABA's claim in the Preamble to the *Model Rules of Professional Conduct* that "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice"? And how do we treat the legal profession in our classrooms? Carrie Menkel-Meadow once asked, "*Can a Law Teacher Avoid Teaching Legal Ethics?*"[8] Her point was that we constantly create images of lawyers and legal practice, and in doing so profoundly influence our students' attitudes about the law, lawyers, good practice, and models of professionalism. All law teachers have an obligation to reflect on the many messages we relay in the classroom; but public law school teachers and administrators should be particularly careful about their images and models, because they speak, however attenuated the connection may seem, on behalf of the public.

In more concrete ways, public law schools should be leaders in presenting to our students opportunities in government and public interest work. We should actively support *pro bono* programs for our students; public interest links like the Public Interest Clearinghouse here in Northern California, and public interested clinical programs. At UC Davis, our in-house clinical programs all have a public interest bent. We also have active public interest externships and numerous links to the local legal services offices. Our students have a long-standing tradition of leadership in the California Rural Legal Assistance program. Our fully-funded public interest loan forgiveness program provides help to balance salaries in the private and public interest sectors. A distinct curricular emphasis may also be in order for public law schools. The Ad Hoc Planning Study Committee for Professional Education in Law created by the University of California Office of the President in its "Analysis of Graduate Legal Education at the University of California" wrote: "As publicly financed law schools, UC law schools have an obligation to devote greater effort to centering their curricula more around the problems of the poor and less around the problems of the corporate elite."[9]

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8. Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics*, 41 J. LEGAL EDUC. 3 (1991).

9. *Id.* at 17.

IV. ACCOUNTABILITY

Finally, we come to one of our truly more burdensome responsibilities—public accountability. This is a burden we should shoulder with as much grace as we can muster. It is difficult living in the glare of public scrutiny, as those of us at law schools in California, Texas, Michigan, and Washington must, regarding our admissions programs. Here in California there is a well-known and powerful website devoted solely to scrutinizing the admission practices of the University of California law and medical schools for signs of banned affirmative action.[10] Each fall the local and state newspapers await the admission statistics to see how well or poorly we have done in attracting certain minority students, boiling down years worth of work in attracting an admissions pool, making admissions decisions, and enrolling admitted students to a sentence about "minority admissions" and their decline or increase. These most visible efforts are but a part of the accounting we must do to the UC system on admissions each fall.

If our civil rights clinic represents a prisoner complaining of mistreatment at the hands of the state or local prison system, we can be sure to be asked why we "waste" state funds in such a quest; no one seems to ask why the state "wastes" its lawyers' time defending such suits to the hilt. Efforts on behalf of asylum-seeking immigrants[11] can provoke equally outraged responses. Members of the public, not to mention students and their families, can always complain about their tax dollars being misspent in some part of our academic programs.

CONCLUSION

These accountability requirements are a small price to pay, however. The careful scrutiny on behalf of the public is one of the reasons we are so often reflective about our roles in the education of law students, and the more thoughtful we are about what we do, the better and more careful we are likely to be about it. In this way, it facilitates our engagement with and participation in the communities of which we are a part. Most of the special responsibilities of public law schools I have outlined here are shared with our private sibling institutions. I don't claim any (at least not much) moral superiority because our name is attached to the name of one of the states and, if we are lucky, we receive substantial support from that state. Mostly, I suggest that we take more care with these issues, that we examine what we do in light of the public interest—and ask how we are to locate that public interest—more often than a private law school needs to. But, to some extent, there is a unique role we play as public law schools; responsibilities we accept as we accept the benefits of public affiliation; and I would be very sad to see these burdens and benefits lost or so obscured that it no longer mattered that we were linked to the uniquely democratic and egalitarian tradition of public higher education.

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10. *See* University of California Admissions (visited Oct. 17, 2000) <http://www.acusd.edu/~e_cook/>.

11. *See generally* Kevin R. Johnson & Amagda Pérez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423 (1998).