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Law Schools: Where The Elite Meet To Teach

Howard A. Glickstein

Howard Glickstein is the dean at Touro Law School. From 1980 to 1985, he served as dean at University of Bridgeport School of Law subsequent to his professorships at Notre Dame and Howard University. He was an attorney with the Civil Rights Division of the United States Department of Justice, 1960-1965, and was general counsel and staff director with the United States Commission on Civil Rights, 1965-1971. With a national reputation for his active leadership in civil rights organizations, in this essay which follows he turns his attention to the problem of faculty hiring at law schools.

It was 18 years since I had graduated from law school. During those years, I had worked for a leading New York City law firm, and for the Civil Rights Division of the United States Department of Justice, where I argued cases in the federal district and appellate courts, prepared briefs for the Supreme Court and helped draft major legislation. I also had been the General Counsel of a federal agency and served in a position to which I was appointed by the President of the United States and confirmed by the United States Senate. Now, I was applying for my first job as a law school faculty member. I was in the presence of a law school dean who was reviewing my resume. After a few minutes of reading, he looked up, smiled and said: "Oh, I am glad to see that you were on the Yale Law Journal." I can think of no better example to demonstrate the elitism and narrow hiring criteria that permeate American legal education.

The vast majority of law schools embrace a similar profile of the qualified law teacher. He (and that was the case until most recently) is a graduate of one of 10 to 20 law schools, he was on law review, he clerked for a judge or spent two or three years with a prestigious law firm. (More than five years in active practice might reduce someone's qualification for law school teaching. This is rather ironic if you believe that law teachers should be teaching students how to be lawyers).

The law schools have determined who are qualified to teach in them without any attempt to demonstrate that the qualifications they seek are related to the mission of law schools. Are persons with these

qualifications best able to teach in a classroom? Are they best able to prepare people for the practice of law? These difficult questions have not been answered. We have not imposed upon law schools the same obligations we place upon police departments, fire departments, or even elementary and high school systems to demonstrate that the qualifications they have established are job-related.

It is unusual at the many conferences, seminars, and discussions of problems in legal education for one to hear a discussion of who is qualified to be a law teacher. It also is curious that in the many recent critiques of deficiencies in legal education little was said about the qualifications of those who are teaching in law schools. Derek Bok, President of Harvard University and former Dean of its law school, bemoaned the deficiencies of law schools but never once suggested that perhaps part of the problem was the backgrounds of those teaching in law schools.¹ Justice Burger has criticized the performance of lawyers in the courtroom and their general insensitivity to issues of professional responsibility. He has called upon law schools to address those problems but has not suggested a need for law schools to assess who it is that is teaching in them.² The report of a task force on lawyer competency, chaired by Roger Cramton, former President of the Association of American Law Schools and former Dean of Cornell Law School, noted the relationship of the backgrounds of those selected to teach in law schools and the curricula and methods of law instruction.³ The report urged that in appointing and rewarding faculty, law schools should place substantial emphasis on potential and performance as a teacher but no detailed recommendations were offered about who should be selected to teach in law schools.⁴

One study that did look closely at the background of law faculties was a 1980 report known, after the committee chairman, as the *Foulis Report*.⁵ The report cited research that showed 59% of all law school

1. See Bok, *Law and Its Discontents, A Critical Look at Our Legal System* BAR LEADER 21 (March-April 1983).

2. See Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377 (1980); Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 FORDHAM L. REV. 1 (1980).

3. REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS, A.B.A. SEC. LEG. ED. AND AD. TO THE BAR 26 (1979).

4. *Id.* at 4.

5. See LAW SCHOOLS AND PROFESSIONAL EDUCATION: REPORT AND RECOMMEN-

teachers possessed J.D. degrees from one of the 20 top "producer" schools, while almost 90% of the tenure-track faculty at the 20 "producer" schools held the J.D. from those same schools.⁶ Nearly a third of full-time law teachers received their J.D. degrees from one of five law schools (Harvard, Yale, Columbia, Michigan and Chicago).⁷ The report wryly noted:

Were we biologists studying inbreeding, we might predict that successive generations of imbeciles would be produced by such a system. . . . It seems clear that the inbreeding here is likely to contribute to a form of legal education that serves large firms and their corporate clients better than it does the lawyers who handle the personal legal problems of average people.⁸

As a means of injecting greater diversity into legal education, the report recommended that "the law school recruitment process for full-time faculty increasingly look to the practicing segment of the profession for its potential faculty members and seek creative ways to attract practitioners to teach, such as 'practitioners in residence' programs and law firm sabbatical programs."⁹

The elitist hiring standards utilized by most law schools have posed a bar to the entry of minorities into the law teaching profession. A recent survey indicated that 5.6% of full-time faculty members were minorities in 1983-84 while 9.4% of all law students (or 11,900 of 125,000) were minorities. From 1981-82 to 1983-84 the percentage of minority faculty dropped and the number of female faculty increased 21%. Of the 247 full-time minority faculty members in 1983-84, 21.5% taught at four historically black law schools. Of the 57 law schools with no minority teachers, more than one-third were public institutions.¹⁰

Several reasons are advanced for the small percentage of minorities in law teaching. The most important is the belief that the pool of "qualified" minorities in teaching is small and that those who are

DATIONS OF THE SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION (1980).

6. *Id.* at 82.

7. *Id.* at 79.

8. *Id.* at 82.

9. *Id.* at 105.

10. See Kaplan, *Hard Times for Minority Profs*, 7 NAT'L L.J., Dec. 10, 1984, at 1.

"qualified" are lured elsewhere, for example, to major private firms.¹¹ But there is a catch-22 aspect to this argument. It depends on one's definition of "qualified." Having set the qualifications for law teaching without proof of their validity, the law schools can deny that they have restricted access to minorities. They will argue that the test of discrimination is whether there is some disproportion between the available job pool and those who are employed. They will point out that if you look for minorities who have attended the 10 or 20 so-called best law schools, who have been on law review, who have clerked for a judge, or who worked for a prestigious law firm, you will find very few people. People who fall in those categories are much in demand by law firms, government agencies, and corporate law departments. According to the proponents of this position, the 5.6% representation of minorities on law school faculties actually exceeds the available pool of "qualified" persons.

For law schools willing to broaden their concept of who is "qualified" to teach — and this seems unlikely as long as mostly white males from some 20 law schools are left to define the term "qualified" — they would find a reservoir of minorities well-suited for teaching who are waiting for the opportunity to contribute to legal education and scholarship.

Recently, the Society of American Law Teachers (SALT) looked at the issue of minorities on law school faculties.¹² SALT reports that "[t]he efforts to integrate the law teaching profession have involved an excess of deliberation and a minimum of speed."¹³ Many schools hired a token minority faculty member in response to pressure from minority students in the late 60's and 70's.¹⁴ But now, as Dean Carl G. Singley of Temple Law School states: "Blacks [and all minorities] are no longer in style."¹⁵

SALT blames the poor results of minority hiring on "institutional discrimination" rather than "intentional or conscious" racial choices.¹⁶ SALT called for "voluntary quotas," concluding that:

11. *Id.* at 29.

12. See SOCIETY OF AMERICAN TEACHERS STATEMENT ON MINORITY HIRING IN AALS LAW SCHOOLS: A POSITION PAPER ON THE NEED FOR VOLUNTARY QUOTAS (1984) [hereinafter cited as *SALT Report*].

13. *Id.* at 1.

14. *Id.*

15. Kaplan, *supra* note 10, at 1.

16. See *SALT Report*, *supra* note 12, at 3.

[D]espite our best intentions, law school faculties will remain virtually all white unless we impose clear, unalterable obligations upon ourselves by holding designated positions open until they are filled by high caliber minority faculty.¹⁷

Elitism in law school faculty hiring also can affect law students. Often law school faculty members from the 20 "producer" schools find themselves teaching at "lesser" schools and tend to hold their students in disdain or to treat them patronizingly. After all, their current students are not quite like their law school classmates. Many of these teachers have a certain mind-set about what type of person should be in law school. Those of their students who do not fit this mind-set are less likely to be recognized as capable. On one occasion, a faculty member with an Ivy League background strongly recommended an applicant for admission to me. A major qualification he stressed was that "she is the sort of person you would like to have dinner with." Apparently, the applicant's social acceptability was a major consideration in the mind of the faculty member.



Out of touch with the world

Most faculty members from the 20 "producer" schools are proud of the legal education they received. Their teaching techniques generally follow what they experienced in law school. But are the teaching techniques that succeed at the 20 "producer" schools the best tech-

17. *Id.* at 1.

niques for other law schools? For example, techniques designed to teach students how to *think* like a lawyer, might be well-suited to schools where graduates begin their careers with large law firms that teach them how to *act* like lawyers. A heavy emphasis on such techniques might not be the best method for preparing students for solo or small firm practice. Good pedagogy requires that you adjust your teaching techniques to your particular audience. Student bodies differ from law school to law school. But flexibility is difficult for people who believe that the teaching techniques they experienced are unquestionably the best.

Faculty members who continue to try to teach as they were taught will have particular difficulties in these days of declining law school enrollments. In February 1985, at a conference of law school deans in Detroit, Michigan, one dean, the product of one of the elite law schools, predicted that declining law school applications would result in admitting persons without the very high qualifications we have known in the past fifteen years. He observed that law teachers have grown accustomed to treating their students as colleagues. His remarks suggested that he and other faculty members might not know what to do when some lesser breed of people begins entering law schools. What they might have to do, of course, is teach. There is something quite limited about a teacher who is incapable of teaching any but the best and the brightest. The law is not an occult science whose mysteries can be fathomed only by a select few. Reasonably intelligent people can be trained to be lawyers. Good teachers can successfully accomplish that training. Graduates of the elite law schools, however, come from an environment where scholarship is paramount to teaching. They often do not understand the importance of being a good teacher, as well as a scholar.

I have touched on some of the consequences I believe result from elitism in faculty hiring. Social scientists undoubtedly could identify many others. I do not mean to suggest that graduates of the "producer" schools or editors of law reviews are unfit to teach in law schools; but I do believe that other qualities and experiences also are relevant to selecting law teachers. This is an important topic that warrants discussion and study.