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Professional Competence and Social Responsibility: Fulfilling the Vanderbilt Vision*

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It is a great pleasure to visit Vanderbilt Law School and to dedicate the Alyne Queener Massey Library. The University is fortunate to have friends like the Masseys who, by their generous gift, carry on a proud and honorable tradition. That tradition began in 1873 when Commodore Vanderbilt provided Bishop McTyeire with the gift that resulted in the establishment of this splendid university.

Sir Walter Scott once said that "a lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."[1] If I may "*build*" on Sir Walter's concept, I would add that before a lawyer is entitled to think of himself or herself as an "architect," two additional attributes—professional competence, and social responsibility are needed. While a background of history and literature is provided by the liberal education that American law schools typically encourage prior to the formal study of the law, it is the law school that bears the heavy responsibility of providing training to prospective lawyers in the areas of professional competence and the ethical practice of law.

On this occasion of dedicating the Alyne Massey library, Van-

 This speech was delivered at the dedication of the Alyne Queener Massey Law Library at Vanderbilt University School of Law on September 24, 1982.

** Associate Justice, United States Supreme Court.

1. W. SCOTT, GUY MANNERING 37 (1815).

derbilt Law School is presented with a unique opportunity to reaffirm its dedication to excellence in training lawyers whose professional competence is matched by their sense of professional responsibility. When the present Law School was dedicated almost twenty years ago, then-Dean John Wade proposed that the goal of the Law School "should be not merely to instruct in the principles of the law but to prepare the whole lawyer, the complete lawyer, the great lawyer . . . ."[2] Dean Wade believed that the "great lawyer" could be produced by training law students to fulfill the five functions of a lawyer as described by Chief Justice Arthur Vanderbilt of New Jersey.[3] These five functions of a lawyer included being a wise counselor, a skilled advocate, a contributor to the improvement of the legal system, an unselfish and courageous leader of public opinion, and a professional willing to answer the call for public service. As Dean Wade correctly observed, these five functions are related both to concern for a lawyer's ability to represent his clients effectively, and to concerns for the broader responsibilities of the lawyer to society. Dean Wade contended that while the law was an ordering process that required a certain degree of stability, a good lawyer should "seek to improve the law not just in order to aid his clients but in order to make it a more effective instrument to meet the general needs of current times."[4]

That vision of a professionally and ethically complete legal education should no longer be considered a goal to be reached by America's law schools *someday*. Rather, if lawyers are to serve their clients with the professional competence that those clients expect and deserve, while at the same time serving the needs of an ever more complex society and world, the Vanderbilt vision espoused by John Wade must become a reality for our profession as a whole, and it must become a reality now. It is in this context that I wish to make my comments concerning professional competence and social responsibility.

I. PROFESSIONAL COMPETENCE

The first responsibility of a law school is obviously to prepare its students for the practice of law in the sense of training them to

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2. Wade, *Legal Education and the Demands for Stability and Change Through Law*, 17 VAND. L. REV. 155, 161 (1963).

3. *See id.*; *see also* Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A. J. 31 (1954). Chief Justice Vanderbilt was no relation to Commodore Vanderbilt's family.

4. Wade, *supra* note 2, at 165.

be effective and competent advocates. That is certainly not to say that law schools should emphasize practical concerns at the expense of legal theory. On the contrary, professional competence begins with proper and complete training in legal method and legal reasoning. Only when the basic tools have been learned, does it make sense to focus on practical training. Young lawyers, of course, will receive much of their practical training after leaving law school and as they actually engage in the practice of law. However, it is folly to think that respect for the competent use of the tools of our profession will be developed "later on" in the "real world" if that respect is not also nurtured as part of the formal legal training.

A 1978 Law School Admission Council study of 1600 practicing lawyers who graduated from law school in 1955, 1965, and 1975, indicates that law schools played little or no role in developing many practical skills considered to be essential in practice.[5] For example, 77.3% said that law school provided no training or unhelpful training in teaching negotiation skills.[6] Further, 68.6% said that their legal education provided no training or unhelpful training in counseling clients.[7] Forty-four percent said that law school provided no training or unhelpful training in the ability to draft legal documents.[8]

When lawyers are licensed to practice law, the public has a right to assume and does assume that the person licensed has received training in how to perform the basic functions of a lawyer, including counseling, negotiating, and the preparing of documents. Certainly, a large number of the citizens feel, with justification, that lawyers should "not be let loose on the public" until they have received instruction in such matters. There are only two ways in which the public can be provided with this basic protection. One way is to insist that law schools provide such training. The other way is to impose a requirement that there be an internship program prior to licensing. Few people are supportive of an intern approach. This means that law schools need to fill the gap in providing the necessary training.

I encourage this law school and other law schools in our country to address this problem in more depth than has formerly been the case. Thousands of lawyers each year commence practice with-

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5. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978).
6. *Id.* at 273.
7. *Id.*
8. *Id.*

out the benefit of the help and training they should have had. Both they and their clients will benefit by any improvements in the practical training provided in law school.

II. Ethical and Moral Responsibility

In placing a very high value on training our young lawyers to be efficient advocates, we must not see professional competence alone as the sole aim of legal training. In addition to teaching our young lawyers to be skilled and responsible in a technical sense, there is another type of responsibility—moral and social responsibility—that should not be ignored. Even technically competent lawyers who fail to recognize the fundamentally moral nature of their tasks and their responsibility to society to serve the abstract ideal of justice, are, as Jonathan Swift once said, engaged in activity no loftier than "proving by words multiplied for the purpose that white is black and black is white, according as they are paid."[9]

In his dedication address at Vanderbilt Law School twenty years ago, Dean Wade said that "[i]t is . . . in the area of public responsibilities that the law schools have heen least adequate in their endeavor to prepare the law student."[10] Unfortunately, it does not appear that in the intervening years legal education has significantly improved in this regard. There is perhaps more public skepticism than before about the ability of lawyers to serve as a constructive force in society as a whole.[11]

The extent to which some members of the bar neglect their responsibility to society is illustrated by the current controversy concerning whether bar associations ought to impose a mandatory *pro bono* requirement on their members because of the failure of the private bar to respond voluntarily and adequately to the needs of the poor and the underprivileged.[12] The American Bar Association has instituted the Pro Bono Activation Project to help state and local bar associations to establish volunteer pro bono programs because current *pro bono* activity is "simply not sufficient to meet the needs of all those who are unable to afford a lawyer."[13] These activities serve to highlight an unfortunate failure of some lawyers

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9. J. Swift, Gulliver's Travels 152 (1952).

10. Wade, *supra* note 2, at 162.

11. *See, e.g.*, Auerbach, *A Plague of Lawyers*, Harpers, Oct. 1976, at 27.

12. *See, e.g.*, Christensen, *The Lawyer's Pro Bono Publico Responsibility*, 1981 A.B.F. Res. J. 1; Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 Cardozo L. Rev. 255 (1981).

13. Smith, *President's Page*, 66 A.B.A. J. 1166, 1166 (1980).

to recognize the social and moral responsibilities of their profession.

In addition, there are some lawyers who do not meet minimal ethical standards when it comes to serving their own clients. A recent American Bar Association study of the public discipline of lawyers by state and federal courts covering 1977-1981 indicates that there was a 72% increase in the instances of public discipline of lawyers by state courts and a 66% increase in the instances of public discipline by federal courts.[14] Some of the increase is no doubt the result of the increased number of lawyers admitted to practice, and some may be the result of a more effective effort by the bar and the court to discipline those who transgress. Nevertheless, there is no room for complacency.

Although lawyers have historically not been the most popular group of professionals in society, it can scarcely be doubted that, for better or for worse, lawyers occupy a special position in the administration of justice. In a society of laws, lawyers control the tools that are necessary for orderly social change. In many respects the public can gain access to our system of justice only through the services of lawyers. As lawyers, we must recognize fully the heavy responsibility that comes with the special privilege that we hold as the primary actors in our legal system.

In my view there is some relationship between any failures within the legal profession and a failure of the transgressors to see issues of professional responsibility as involving *moral* questions requiring *moral* solutions. Not all problems faced by lawyers raise merely legal issues requiring solutions arrived at by applying "legal method."

In many respects, legal education is preoccupied with "legalism," or the theory that legal reasoning and method is autonomous and divorced from moral considerations or the institutions of society generally.[15] Although training in legal method is crucial to the development of professional competence, a view that legal methodology can resolve all the problems encountered by a lawyer ne-

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14. *See* American Bar Ass'n, National Center for Professional Responsibility, Standing Comm. on Public Discipline of Lawyers by Disciplinary Agencies, 1977-81 (July 1982). This study is based on voluntary reports by the appropriate jurisdictions to the National Center.

15. In a recent article Professor James Elkins of the West Virginia University has made this insightful comment: "Historically, legal education rests on a fundamental belief in the separation of law and morality. Current pedagogical practices and values implicit in law teaching push students to replicate this jurisprudential separation of law and morality in their conceptious of professional responsibility." Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. LEGAL EDUC. 11, 12 (1982).

glects other aspects of a socially responsible lawyer's professional life.

Perhaps it is not surprising that legal education has not generally prepared lawyers to consider the moral and ethical values associated with the practice of law. No less distinguished a jurist than Oliver Wendell Holmes advocated that the study of law should be entirely separated from considerations of morality. In *The Path of the Law*,[16] he stated: "For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether . . . ."[17] This strong language has led legal scholars to fasten onto what they perceive to be the non-moral theory of law expressed by Justice Holmes in that essay, at the expense of an important limitation on that theory expressed by Holmes himself in the same essay when he said:

> I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men.[18]

Justice Holmes was right to emphasize that for pedagogical purposes, there is a difference between what law *is* and what law *ought to be*. It would be to encourage confused thinking if validity and morality were not considered to be two *separate* virtues of legal rules, at least for the purpose of learning what the law is in the first instance. Nevertheless, Justice Holmes' position is misunderstood and removed from context if construed to go beyond its status as simple, practical advice for clear thinking. His advice is surely consistent with teaching the *moral* bases of criticism of valid law.

The difficulties with separating legal education from all moral discourse are obvious and troubling. The fundamental principles and institutions of American law did not arise as a legal response to social problems. Rather, our principles and the institutions based on them arose as a moral response to the problem of social injustice, and they continue to evolve as our notions of what constitutes justice become more enlightened.

Moreover, as James Pike observed:

> The fact is . . . that virtually every lawyer wants to feel that he is not only a good lawyer (in the sense of technical proficiency) hut that he is a

16. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).
17. *Id.* at 464.
18. *Id.* at 459.

> lawyer of impeccable integrity. He not only wishes this to be his public image; he wishes to think this of himself. Self-acceptance is a very important element—perhaps the most important element—of a wholesome, serviceable personality.[19]

In our laudable attempt to train law students to "think like lawyers" by teaching them legal method, we must not lose sight of the fact that questions of professional responsibility cannot properly be resolved with the same legal framework of analysis. Rather, we must see that as professionals with almost exclusive access to our system of justice, we have moral responsibilities totally outside the scope of the legal rules, and not amenable to analysis in terms of legal method. It is time to return to consideration of the moral and spiritual foundations of our legal system. It is time to train our law students to face the hard issues with a conceptual framework that transcends legal reasoning alone. It is a mistake to think that moral philosophy and value inquiry have no place in law offices or law schools. Laws reflect, and sometimes even help to form, the moral beliefs of society. To neglect the moral basis of law is to neglect the lifeblood of the norms that establish social order and preserve liberty. Lawyers who are truly sensitive to their role as moral agents in society will view their responsibility to the public as a necessary consequence of being entrusted with exclusive access to our cherished system of justice.

III. The Vanderbilt Vision

Today, I urge this marvelous law school to recommit itself more strongly than ever before to the ideals that have made it unique among American law schools. In 1963, Professor Theodore Smedley presented the "Vanderbilt experiment" to legal educators in an article in the *Journal of Legal Education*.[20] This "experiment" was a law-school-wide effort to teach the broad issues of a lawyer's social and moral responsibility in the context of regular substantive courses so that morality and ethics would be presented as "integral elements" of a lawyer's professional status.[21] We must certainly also remember the late Elliot Evans Cheatham, a pioneer in the field of professional responsibility and long a member of this faculty, who developed a course on the Profession of Law that was

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19. J. Pike, Beyond the Law: The Religious and Ethical Meaning of the Lawyer's Vocation 91 (1963).

20. Smedley, *The Pervasive Approach on a Large Scale—"The Vanderbilt Experiment,"* 15 J. Legal Educ. 435 (1963).

21. *Id.* at 437.

intended to go well beyond the traditional legal ethics course. The course was supplemented by lectures from leading members of the bench and bar, and by discussions and debates on issues of law reform and public interest.[22] It is my understanding that Vanderbilt is now in the process of shifting from the pervasive method to a more traditional approach involving specific ethics courses. I urge you to consider carefully the value of the pervasive method, especially when used in first-year courses. The pervasive approach is a truly unique way of blending your concerns for professional competence and professional responsibility.

You at Vanderbilt Law School are the successors to a rich heritage of legal education founded on the assumption that a great lawyer is not only a competent technician, but a driving force in the development of his profession and society. You are justifiedly proud of the "Vanderbilt vision" of the training of lawyers committed to professional and moral excellence. The dedication of the Alyne Queener Massey Library affords the opportunity to preserve your heritage, and to recommit yourselves to the complete recognition of the ideals it embodies. By so doing you will continue to produce the type of lawyers that our nation needs to face the unparalleled demands of the next century.

22. Wade, *supra* note 2, at 162-63.