At law schools, age bias co-exists with outdated practices

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The alarming decline in recent law school graduate placement has received much attention lately, including an instructive July 11 article in *The Wall Street Journal*, "Law Schools Get Practical," noting that more than twice as many people passed the bar exam in 2010 (54,000) as there were legal job openings in the United States. Perversely, at the same time, law schools are prospering financially on the backs of their students by substantially increasing both tuition and enrollment, as *The New York Times* found in a July 17 article, "Law School Economics: Ka-Ching!"

The current recession is, of course, a prime reason for the diminution in available jobs. But *The Wall Street Journal* article also correctly focuses on another major issue — the disconnect between contemporary law school education and the skills needed to be an effective, and therefore employable, lawyer. Unlike other professional schools, such as medicine and business, law schools continue to teach primarily based on a 19th century theoretical model that is good at developing critical legal thinking but severely lacking in teaching practical skills. That void is particularly acute in the business and corporate area.

I should know. For the 25 years I have spent the vast majority of my career as the attorney general of a state (North Dakota) or the chief legal officer of *Fortune* 500 companies (including H&R Block and Intuit). In that capacity I have supervised the hiring of scores of young lawyers and discovered that it is very difficult to hire someone straight out of law school and find anyone adequately prepared to step in and be effective. The same experience occurred in my use of outside counsel. The most junior associate work was generally not cost-effective, and only when lawyers reached their third through fifth year of practice did the billing rates charged for them become justifiable.

Beginning last year I decided that, in a small way, I would try to do something about it. I accepted a one-year visiting professorship at the University of Missouri at Columbia to teach business-related classes with a skills component embedded in them. Over the year I taught classes that integrated real exercises into classes in securities, mergers and acquisitions, banking and basic business skills and accounting for lawyers (a class I developed).

Because the experiment was by all accounts highly successful, I decided to try to continue teaching. In order to do so I had to enter the gauntlet of the American Association of Law Schools (AALS) annual hiring conference. The conference, which was held last fall in Washington, is the central hiring event for the 171 law schools that comprise its membership, including all accredited law schools in the United States.

I was aware that the usual ticket to law school faculty positions includes graduation from a top law school and other academic credentials — law review editorship, prestigious clerkships and perhaps some publication. I had all that — Stanford undergraduate, Rhodes scholar with first class honors, Stanford Law School and law review editor, clerkships in a U.S. court of appeals and the U.S. Supreme Court (for Byron White) and some publication. I also had a rich professional life that I believed would be helpful to teaching that included arguments in the U.S. Supreme Court and a lengthy tenure on the American Bar Association Amicus Curiae Committee, where I assisted in the preparation of some of the ABA's most significant briefs in the Supreme Court.

To my chagrin, however, what I do not have is the ability to roll my age back. Of all the law schools that interviewed at the conference, which I estimate to be about a hundred, each likely averaging about two to three dozen interviews, only a single school offered an interview, and needless to say, no job offers were forthcoming. While the AALS and its members proudly boast of their nondiscriminatory policies — including those against age discrimination — the truth of the matter is that they do discriminate, and pervasively so, on the basis of age.

Although some law schools are willing to hire older practitioners as temporary adjunct faculty to fill holes, they will not hire anyone past the age of 40 for permanent or tenure-track positions except for lateral hires from other universities, as has been alluded to elsewhere (M. Marshall, "Law Schools Could Face Age Discrimination Suits Over Faculty Hiring, Panelists Say," University of Virginia School of Law Web site, Nov. 28, 2005) and as my own experience illustrates.

The root cause of this discrimination is the way new hiring is done. Almost universally, it is done by faculty vote, usually anonymously. Those individuals understandably resent older practitioners who have not paid their dues in the same way they have and may also perceive them as a competitive threat to the entire tenure system. I am not without sympathy for this sentiment. In some ways current tenured faculty are caught in the middle of rapid and disorienting changes in the legal profession that they may not even fully comprehend. The globalization of our economic and regulatory structure has put a premium on lawyers who have sophisticated skills and training that enable them to operate in an increasingly nuanced environment. This requires a changed curriculum to prepare students for an increasingly competitive and global practice.

Although law schools still need to teach fundamentals like constitutional law where scholarly inclined 30-year-olds fresh out of a clerkship can focus their lives, an increasingly imperative need is for skilled and experienced practitioners teaching transaction-based classes. It is difficult to convincingly argue that a teacher who has spent his or her entire career in academe is more qualified to train transactional lawyers than those who have years of experience negotiating, documenting and closing actual business deals. Most long-term faculty members are ill-equipped to do so and likely do not fully appreciate it. They may be good scholars, but as Chief Justice John Roberts Jr. recently observed when commenting on their publications, "what the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law." Adam Liptak, "Keep Those Briefs Brief, Literary Justice Advises," N.Y. Times, May 21, 2011, at A12.

In short, law schools must change their model of instruction if they expect to see an increase in hiring of their graduates. Otherwise, these students will continue to be shortchanged by their education because they lose the opportunity to gain the skills they need by exposure to practice-based learning, particularly at the business level, and the enhanced opportunity that it brings for employment, whether in law or in business. That certainly will threaten the status quo, which currently operates much like a medieval guild system (in which "apprentice" assistant professors rise through publication to become "journeymen" associate professors and finish by becoming "master" or full professors), but the current system has become unmoored from its primary mission — training students to be good and productive lawyers.

Finally, law schools either need to live up to their stated ideals and confront the practical implications of their hiring practices or else abandon the charade that they do not discriminate on the basis of age. It may be possible to modify the current system to keep a tenured base teaching certain courses but open up the rest of the curriculum to teachers who — as in the medical profession — have actually practiced in real life the skills they are teaching. To do so, however, would require law schools to take a radical and completely open-minded look at what they do and focus on their primary mission — training lawyers to be successful practitioners who can actually find gainful employment.

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