

On Returning to Legal Education

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Introduction

I was away from legal education and the law school for nearly four years. During that time and since my return people often commented to me that working in corrections must be strikingly different from the law school. While there are many differences, the distance between the functions of director of the correctional system and those of the faculty member is not as great as it might seem. Education has much in common with leadership, particularly with leadership in corrections. Both the leader and educator seek to stimulate and motivate others; both are responsible for taking the long view of issues and events; both should avoid the simply expedient; both are responsible for the standards and values to which others may be held. The measure of the contribution of the educator and leader, at least in part, is the performance of others. I became keenly aware that advancing "the art of democratic living" is a vital function of both our university and our correctional system.

So, I return to the law school with a fresh perspective and a renewed respect for our mission. Done well, education, public service, and research can play a vital role in our society and make a profound difference in the quality of the lives of our citizens. I now adhere to that view more strongly than ever.

As director of the correctional system, I had extensive contact with lawyers, my own, Department of Health and Social Services staff, Department of Justice attorneys, state public defenders, judges, private criminal and civil lawyers, labor lawyers, and jailhouse lawyers. I also had a wide range of experience with people in governmental agencies, including the Departments of Administration and Employment Relations, the legislature and the Governor's Office. And, of course, I worked closely with staff in prisons, probation and parole, juvenile services, and observed their work first hand. I had frequent contact with the public and with union leaders. My experience took me all around the state, since correctional responsibility is a statewide concern.

At the risk of stretching an example further than I have any right to, I want



to relate the way we, in corrections, responded to a critically important and controversial problem—AIDS. Doing so will enable me to do two things:

First, bring to life the qualities which are important in public service, especially services performed by lawyers; and

Second, look at the qualities we should be trying to create in law students so that they can become effective lawyers after graduation.

The AIDS Experience

When I became director of corrections, AIDS was receiving no media, governmental or correctional attention in Wisconsin. There were no reported cases in the state, let alone in the prison system. Now, AIDS has become a problem of international concern. There are at least twenty cases in the prison system, including two in terminal stages of the disease. It was necessary for the Depart-

ment of Health and Social Services to develop a thoughtful policy in response to a problem about which there was and is much ignorance, contentiousness, and fear. It had to be done quickly, without waiting for legislative or judicial action or guidance from other public institutions, but mindful of the fact that others in the society should and would have something to say about how this problem would be handled in and by institutions of government. Happily, the AIDS policy developed for the Wisconsin prison system is now a model used by the National Institute of Justice for other systems in this country.

We confronted more issues than I can list here as we wrestled with this extraordinarily difficult problem. How should our health services deal with AIDS patients? Where should we house them? Should nonterminal patients be in the general prison population? Who could we test for the infection under the law? Who

should we test? Who should have access to the results of the tests? How could we educate staff and inmates about the disease? Could we succeed in getting staff and inmates to deal with inmates with the infection in the atmosphere that existed? How could we change the atmosphere? How could we protect the AIDS patients? What was our responsibility to staff and inmates who do not have the infection? Who should be involved in the development of our AIDS policy?

This brief list of issues helps make many of the points I wish to emphasize in this article. Dealing with this problem required qualities that are essential to responsible and effective public service, including service by lawyers.

(1) Objectivity, Judgment, and Knowledge of the Law-In-Action

Administrators are called upon to exercise judgment constantly. The development of the correctional AIDS policy was certainly no exception. We needed to determine whether to test all inmates admitted to the correctional system, as some states are doing. To answer the question, it was necessary to know whether legal authority existed to do it, how useful the information would be, whether high risk inmates could be counseled into being tested, and what effect such a policy would have on attitudes toward AIDS and our planned educational efforts. This issue has multiple dimensions, including legal ones, and a competent lawyer's objective advice is most helpful. The lawyer or other public servant who brings objectivity to problems such as this and who understands the many factors that go into a decision are invaluable, in part because large bureaucracies, by their very nature, limit staff vision to single dimensions and often thereby limit objectivity. It is essential that the advice not be colored by what the lawyer wants to happen, but is based on the objective judgment as to what the law requires and what is likely to happen.

The advice is usually better if the lawyer understands the factual setting in which the decision will be made, that the legal dimension is only one aspect of the problem and that it may not dictate which course to follow. Insight into how legal policy is apt to be implemented is also crucial to the exercise of sound judgment and such insight itself requires good judgment.

(2) High Standards

It was obviously important that the AIDS policy be developed as well as it

could be. The consequences of doing it poorly could be disastrous and possibly fatal. If ever there was a situation calling for high standards of performance, this was it.

I must admit to some frustration at what I felt were insufficiently high standards in government, among lawyers and staff. I believe that I know excellence when I see it; when a problem has been thoroughly analyzed; when a program has been thought through, described, implemented, and evaluated in accordance with the highest standards.

I also know that given the press of business, doing an excellent job is not always possible, though some matters are so important that the extra effort excellence requires is called for. I also believe that if one has the ability to do a very good job, though not the time, it raises the level of everything we do, much of which must be short of excellence.

While we may excuse less than excellent work on the grounds that there is not enough time; that there are too many other issues to address; or that this problem is not so important that it should take too much time, I do not believe that this fully explains why standards are not higher.

Indeed, I think that most of these are not explanations, but excuses. A most important reason is that people do not know excellence, have not had it consistently demanded of them or demonstrated to them. In short, the rigor that brings excellence has been lacking in their education and professional experience. The result is work that lacks the clarity and precision that ought to be required.

If I sound overly critical, let me point out what I am *not* saying. I am not saying that people are poorly motivated or that they do not care whether their work is good or not. I am not saying that they do not put substantial effort into what they do, that they do not try hard to do well. On the contrary, my overall impression of staff in government is that they are extremely well motivated and put a good deal of effort into what they do.

What I am saying is that had they been exposed to and *immersed* in experiences that truly pushed them, that taught them what a good job is and how to do it, the standard of everything they did would be raised.

(3) Working With Others

Given the complex nature of problems government is called upon to solve and the complexity of government itself, *effective* effort is *often* collective effort. A prob-

lem such as AIDS in prisons has medical, legal, security, personnel, treatment, and budget dimensions and calls for expertise in each discipline if a comprehensive policy is to be developed. It calls for these many perspectives to be reflected in a single policy.

It is essential, then, that people know how to work together, to share ideas, to advance and develop solutions, so that the collective effort takes into account all relevant factors and is a product that is better for the involvement of all in the group.

That sounds simple enough. For a variety of reasons, however, people's abilities to work together to solve problems is not what it should be. In part, the fault lies in our educational system, including higher education and legal education, which put little emphasis on collective efforts. There are other explanations, including a lack of leadership in government agencies, a bureaucracy that encourages looking out for one's turf, a general lack of trust within agencies and among them, and a system that stresses too many checks and balances and too little working together to solve problems.

People can learn to work together by working together. The results are better products and more learning than comes from people working alone. Two heads working together are better than one.

(4) Confidence and Determination

Given the complexity of problems like AIDS that confront government and its sometimes ponderous methods of decisionmaking, it is tempting to throw one's hands up, to be discouraged, to discourage others, and to say "to hell with it!" The fact is, however, that even if all problems cannot be solved, we can improve upon most situations, develop and choose the best of what may be disappointing alternatives, and generally advance the mission of the agency (or client) through thoughtful responses to problems. Most problems do present opportunities if we have the patience and vision required to find them.

To achieve this requires the *confidence* that issues can be resolved satisfactorily by careful attention to them and the *determination* to do so. In my experience in corrections, what often brought satisfactory solutions to problems was persistence born of confidence, the belief that the problem could be solved, and the willingness to try multiple ideas and approaches until the best one was discovered.

The people, including lawyers, who consistently performed well were those

with the confidence and determination to solve problems.

(5) *The Ability to Deal With Change*

The AIDS problem is a clear example of change in the world and the need for the world to cope with it. While it is also dramatic, I do not think it is atypical.

AIDS certainly required the correctional system to change its method of doing business. But so did increased populations in prisons and on probation and parole, increasingly large numbers of uneducated offenders, more dangerous offenders, and a climate in which the public was determined to "get tough" on crime.

I was continually struck by how pervasive change was, how often situations that appeared similar to others were different, how important flexibility and the capacity to apply knowledge to new situations was. The effective staff member was not satisfied with the easy answer, but possessed the intellectual curiosity to look further at the problem and to tailor the solution to what was unique about it.

(6) *The Work Ethic*

The staff, including lawyers, who performed well were usually the hardest workers. They had the interest and ability to immerse themselves in an issue, such as AIDS, and pursue solutions that were developed through great effort. They had, what I took to calling, the work ethic.

But there is more to the quality I am trying to describe than the ability to work hard. Underlying the capacity for hard work was usually a well-developed sense that there was a direct relationship between effort and achievement. This lesson, simple to state and important to learn, seems basic to most high quality jobs. I thought a good deal about what values to impart to staff and inmates and this is one with which I was most comfortable: that effort brings achievement.

(7) *Concern for People*

An important and constant challenge that every administrator faces is keeping the agency focused on the people it serves. This seems true in all large bureaucracies, whether they are correctional systems, universities, or other branches of government.

The most effective public servants, including lawyers, at advancing the substantive vision of the corrections system, were those who cared about people. They were the most likely to identify and attend to the human dimension of problems, including the AIDS problem, and not become mired in bureaucratic objec-

tives. This is not a quality that is easy to develop or maintain in a correctional system, particularly because some of the people the administrator must be concerned about have behaved as destructively as convicted offenders sometimes have.

The problem is complicated when the public servant does not identify with or is otherwise not close to those about whom he is to be concerned. The distance between offenders and correctional staff is great, and I fear, growing. I believe it is the duty of both correctional administrators and educators to create opportunities for public servants to understand those whom they serve. From exposure to and understanding of those we serve comes the commitment to people that distinguishes the excellent public servants.

(8) *Understanding the Functions of the Three Branches of Government In a Free Society*

I often heard from judges, legislators, and the press their frustration with the operation of the correctional system. Many correctional staff expressed frustration, a frustration I sometimes shared, with the actions of judges, legislators, and the press that affected correctional policy and its implementation. It is one thing, however, to be concerned that a judge did not fully understand the implications of a decision on, say, inmate discipline, and quite another to believe inmate discipline is none of the court's business. The first view is a reflection of the limits on effective advocacy in a particular case, difference in perspective, judgment, emphasis, or values. The second view reflects a fundamental misunderstanding of our system of government.

As I often told my staff in corrections, our challenge was to run an effective correctional system *in a free society*.

By this I meant that we live in a society in which authority and responsibility is shared, in which formal and informal checks exist to insure that the system operates in accordance with our form of government, and in which there is a responsibility to be open about what is going on. This is the challenge even when that very openness apparently impedes one's ability to fulfill other responsibility. As I often told our staff, it would have been easier to run the prison system in the USSR, but much more costly in almost every important way.

But I, by no means, believe that inadequate understanding of our form of government is limited to those in administrative agencies. To be sure, the lines between the branches are not always

clear. I also observed what, in my opinion, was overreaching by other branches, including the legislature and judiciary, into the domain of others. I do not believe there is anything extraordinary about this, but I do believe it sometimes frustrated the implementation of public policy. Neither the legislature nor the courts can manage administrative agencies and to announce policy based on the false assumption that it is possible to do so in any systematic way only leads to the distortion of that policy in practice. Nor should administrative agencies intrude into the domain of the legislature or judiciary. A better understanding by all of their responsibilities and possibilities would have led to more effective creation and implementation of public policy. I say this recognizing that such "intrusions" are often the result of the "intruded upon" branch failing to do its job properly.

A better understanding of how administrative agencies operate by all branches including itself, would also make for more effective and efficient policy implementation. Lack of understanding when combined with our proclivity for checks and balances and the lack of trust this breeds creates bureaucracy that is stifling, uncreative, and sometimes paralyzed.

This is true primarily with respect to budget and personnel matters, which have considerable effect upon substantive policy. It is unfortunate that the solution to too many problems, particularly if it is in another branch of government, is more process, more review, more checks on the system.

Of course, how much process is desirable is a matter of opinion and degree, but in government today it is excessive. The consequences are serious. The emphasis on process deflects concern from the substantive; it is difficult enough to keep staff focused on substance without creating a system so emphasizing process that people are more attentive to whether they have jumped through all the hoops than to whether they have achieved a meaningful substantive result.

Summary of Qualities I Believe Necessary To Be Effective as A Lawyer

To summarize, what separated the effective public servants, especially lawyers, from the ineffective were the following qualities.

Those who were effective:

(1) Were objective, possessed knowledge of how law and policy worked in action and exercised sound judgment;

- (2) Had high standards, an appreciation of what a good job is;
- (3) Worked well with others to solve problems;
- (4) Approached issues with the confidence that they could be satisfactorily resolved and with the determination to do so;
- (5) Could apply their ability and knowledge to new situations, could, in short, deal with change;
- (6) Worked hard and expected achievement to follow effort;
- (7) Cared about people and how what they did affected people;
- (8) Understood the roles and responsibilities of the three branches of government and that they operate in a free society.

Implications for Legal Education

It hardly needs emphasis that legal educator and lawyers ought to be concerned about the qualities which distinguish the most effective lawyers. I was prompted to write to share whatever insight I gained in my four years in corrections.

The comments which follow, then, are prompted by my observations of this wide range of people, many of whom were trained in law, and the qualities which distinguished the very effective from those who were less so.

What also prompts my writing is the situation of law students today. If we are to further the education of our law students, we need a sense of their values and aspirations. I have been listening carefully to the students in my classes to determine what is important to them; to discover whether they are seeking to develop the qualities I consider important in our law graduates; to gain a sense of how equipped the law school is, as a total

endeavor, to advance the educational objectives I believe are significant. I do not pretend to know the educational or vocational aspirations of law students. I worry, though, that what I see and hear suggests that they do not necessarily seek all that law school can provide and they need if they are to be effective.

Finally, as I return to legal education with a new perspective, I have been asking myself how I as a faculty member and we as a law school could provide better legal education. Are our present methods likely to encourage students to seek to develop the qualities I outline here? Do we as a law faculty believe them to be important? Do we strive to develop them? Does their achievement call for any different approach by the faculty?

Based on my recent experience I believe there are several important principles that deserve emphasis in our curriculum and teaching methods. These principles are responsive to the need for the qualities I have described. I hope brief mention of this less than comprehensive list of principles for legal education (some of which we at Wisconsin implement well) stimulates thought on the subject.

(1) As things now stand, jobs and job seeking divert substantial student energy from legal education, to the detriment of legal education. This is often done with the blessing of the law school. The primary, if not only, concern of the law school with respect to students ought to be education and their professional development. If this were so, and if greater educational demands were placed on students, they would be much more likely to be immersed in legal education. This itself would lay the foundation for many educational benefits for students for ultimate success in employment.

(2) Legal education should require intensive, closely supervised writing proj-

ects, particularly in the second and third year. These experiences should emphasize the production of a high quality written product, usually if not always, produced and improved through several revisions. This will do much for the student, including raise their standards and demonstrate what effort can achieve. It should also help develop their confidence.

(3) Students should be required to undertake projects in small groups that make them work together to examine a problem and propose a solution. The result should be a single work product that is the result of collective efforts. An obvious objective is learning how to work collectively.

(4) While the study of legal doctrine is certainly important, emphasis should also be given to the study of the law-in-action. Knowledge of how the legal system operates, of the interplay of institutions and influences that go into the creation and implementation of policy, is essential for law trained graduates.

(5) Students should be exposed, under careful supervision, to experiences that bring them into contact with people, the clients of lawyers and the legal system, so they can begin to understand the human dimensions of the problems with which they deal. This should require the student to consider the people for whom they work, assist in the development of judgment, and apply knowledge to a variety of different situations.

This is by no means a comprehensive list of either the qualities effective lawyers need or the principles that should be the basis for legal education. It is, based on my recent experience in government in Wisconsin, an outline of the qualities that made the most difference in the world in which I worked as a public servant and sometimes as a client of lawyers.