BYU Law Review

Volume 1976 | Issue 2 Article 12

5-1-1976

Gee and Jackson: Following the Leader?: The Unexamined Consensus in Law School Curricula Jackson and Gee: Bread and Butter?: Electives in American Legal Education

Charles D. Kelso

BOOK REVIEW

FOLLOWING THE LEADER?: THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA. By E. Gordon Gee* and Donald W. Jackson.** New York: Council on Legal Education for Professional Responsibility, Inc. 1975. Pp. 56. (paperback).

BREAD AND BUTTER?: ELECTIVES IN AMERICAN LEGAL EDUCATION. By Donald W. Jackson and E. Gordon Gee. New York: Council on Legal Education for Professional Responsibility, Inc. 1975. Pp. 73, 60 (appendix). $4.95 (paperback).

Reviewed by Charles D. Kelso†

The practical arts of designing legal education, teaching law, and lawyering advance hand-in-hand with knowledge of what is going on in legal education, the law, and practice. Of greatest use to any practical art is a new theory about causes and effects that sheds light on an entire system or on relevant aspects of that system. New perspectives and priorities may emerge from the discovery of unsuspected systematic relationships or from an increase in the accuracy by which known relationships are measured. In the light of new knowledge, things formerly approved as good in themselves, or as means to specific objectives, may thereafter be perceived as so flawed by unfortunate side effects that they are no longer considered good.

The legal profession faces just such a situation as a result of Gee and Jackson's analysis of the relationship between bar examination topics and required and elective courses in American law schools. Their two monographs provide a factual imperative for asking whether our current system of offering an analytically oriented bar examination only after graduation from law school casts a restrictive and limiting shadow over too much of legal education. Specifically, the question raised is whether students concentrate too heavily on the analytics of bar-related subject areas and, as a result, fail to take advantage of opportunities for

* Associate Professor of Law and Assistant Dean of the J. Reuben Clark Law School, Brigham Young University. B.A., University of Utah; J.D., Ed. D., Columbia University.

** Associate Professor of Political Science at Texas Christian University. A.B., J.D., Southern Methodist University; Ph. D., University of Wisconsin.

† Professor of Law, Indiana University, Indianapolis Law School. A.B., J.D., University of Chicago; LL.M., Columbia University; LL.D., John Marshall University; J.S.D., Columbia University. Professor Kelso is currently Editor-in-Chief of *Learning and the Law*.

developing competencies needed for successful practice. A question suggested by the Gee and Jackson data is whether the bar examination shadow inhibits research and teaching experiments designed to discover better methods and materials for teaching lawyer competencies. I shall first recount Gee and Jackson's key fact findings and then discuss some of the many implications.

To prepare for *Following the Leader*?, Gee and Jackson first painstakingly studied the 1974-75 bulletins of 127 law schools. They learned that the mean number of credit hours required to graduate from an American law school was 86. They also discovered that the mean number of hours in required courses was 40 (46.5 percent of the total). Table 1 summarizes those statistics and illustrates the historical trends with respect to required courses and electives.

TABLE 1.—*Trend in the average number of required elective courses in law school curriculum*

	1925-26	1949-50	1969-70	1974-75
Number of Credit Hours Required to Graduate	78	80	85	86
Number of Required Credit Hours	53	43	48	40
Number of Elective Credit Hours	25	37	37	46
Percent of Total Credit Hours Required	67.9	53.7	56.5	46.5
Percent of Total Credit Hours Available for Electives	32.1	46.3	43.5	53.5

Source: *Following the Leader?*, pp. 12-14, 20-26.

Gee and Jackson next analyzed bar examination topics. They received codable responses from 43 jurisdictions (out of 51 requests). Each bar examination question was read by two different readers in order to determine the subject matters with respect to which students were being examined. Sixteen topics appeared on the bar examination in at least 50 percent of the jurisdictions. Those topics were characterized by Gee and Jackson as constituting an informal national bar examination curriculum. Combining that curriculum with the required course curriculum ascertained from an analysis of law school catalogs, Gee and Jackson hypothesized that there is a national standard law school curriculum which contains 63 semester hours. Table 2 presents that curriculum.

TABLE 2.—*The standard required law school curriculum*

1.	Business Organizations	3
2.	Conflict of Laws	3
3.	Constitutional Law	3
4.	Contracts	6
5.	Criminal Law	3
6.	Equity	3
7.	Ethics	3
8.	Evidence	3
9.	Family Law	3
10.	Procedure (State & Federal)	6
11.	Property (Real & Personal)	6
12.	Research & Writing	3
13.	Taxation (State & Federal)	3
14.	Torts	6
15.	Trusts & Estates	3
16.	U.C.C.	3
17.	Wills	3
	Total Semester Hours	63

Source: *Following the Leader?*, p. 39.

The inquiry continued into elective courses. As shown by table 1, the mean number of credit hours a student may elect increased from 37 (46.3 percent of the total curriculum) in 1949-50 to 46 (53.3 percent of the total curriculum) in 1974-75. Asking what new innovations might have occurred as a result of the increased number of available electives, Gee and Jackson turned once again to law school bulletins and found that

> there has been an explosion in the variety of subject matter courses offered as well as an increase in seminars, tutorials, colloquia, and "problem" oriented courses. But one need only review the literature of legal education over the past several years to discover that the major attempt at curriculum reform has occurred in the area of clinical legal education. (*Following the Leader?* p. 40)

The investigators discovered that law schools with higher levels of resources offered a larger total number of electives and had adopted clinical programs more frequently. These details are noted in table 3.

Concluding their first monograph, Gee and Jackson acknowledged the risk of grave error in examining law school curricula in a vacuum and noted that the best evidence on point would be actual course enrollment figures. They also suggested that since only one year of law school appears to be open for electives free from the influence of the standard "required" law school curriculum, dramatic changes in law school curricula, to be effective, would have to be accompanied by a coordinated change in bar examination practices.

TABLE 3.—*Listed hours of electives and clinical programs in law schools grouped by resource rankings*

	Resource Rankings	Average Elective Hours	Percentage of Schools with Clinical Programs
High	1A	258.0	94.1
	2A	200.1	90.0
	3B	182.5	93.3
	4B	156.5	85.7
	5B	134.6	72.2
	6C	123.1	69.2
Low	7C	131.9	70.0

Source: *Following the Leader?*, pp. 31, 45.

In their second monograph, *Bread and Butter?*, Gee and Jackson took up part of their own challenge. Analysis of registrations in elective courses in 68 law schools for 1974-75 revealed total elective course registrations of 210,424. Of that total, 147,840 (70.4 percent) were in bar-related courses; only 62,346 (29.6 percent) of the registrations were in nonbar-related electives. What this means in terms of specific subject areas is evident from table 4 which, extrapolating from Gee and Jackson's work, compares bar examination requirements and registration in bar-related electives.

Now, let us put together the two important facts. First, required courses are almost exclusively devoted to bar-related subjects and comprise, on the average, 46.5 percent of the hours necessary to graduate. Second, more than half of all the elective course registrations are also in bar-related areas. On the average, then, 82 percent of all course registrations in law school are in bar-related subjects; only 18 percent of all course registrations are in subjects not clearly related to the bar examination. The largest portion of that 18 percent, 6.2 percent, is in clinical courses and lawyer competency simulations, while specialty areas and theory and policy courses draw only minimal registration. Table 5 gives a detailed breakdown of nonbar-related elective courses.

It seems clear from these data that legal education is pervasively influenced by bar examinations. Designed only to test analytic capacity to apply legal knowledge to given fact situations, bar examinations thwart efforts by legal educators to encourage law students to become more capable of performing a variety of professional tasks. Arguably, bar examinations hold legal education within narrower limits than are needed if the profession is to have (1) expertise in a diversified and expanding range of knowledge and competencies and (2) the breadth of perspective needed

TABLE 4.—*Comparison between bar examination subjects and registrations in bar-related electives*

Subject Included on Bar Examination in at Least 50% of 43 States Surveyed	Percent of 43 States Requiring Subject on Bar Examination	Percent of 127 Schools in Which These Courses Are Elective	Bar Examination Related Electives (68 schools: 1974-75)		
			Total Registrations (1974-75)	Total Number of Courses	Average Class Size
Criminal Law	100	9.5	9,595	200	48
Evidence	100	59.1	8,763	100	88
Torts	100	.8	2,395	59	41
Property (Real & Personal)	97.7	1.6	5,776	114	51
Contracts	95.3	0.0	NA	NA	NA
Procedure (State & Federal including Conflict of Laws)	90.7	7.9	17,777	282	53
Business Organizations	90.7	70.1	24,387	473	52
U.C.C.	90.7	100	19,870	290	69
Constitutional Law	88.4	27.3	10,006	225	44
Wills	88.4	100	{16,848}[1]	{255}[1]	{66}[1]
Trusts & Estates	86.0	100			
Equity	72.1	100	4,327	70	62
Ethics	67.4	66.5	3,868	72	54
Family Law	67.4	100	6,141	107	57
Taxation (State & Federal)	51.1	70.9	18,087	332	54
			147,840	2,579	57

[1]Wills, trusts, and estates were combined into one category by Gee and Jackson.
Source: *Following the Leader?*, pp. 14-15, 37; *Bread and Butter?*, pp. 64-65.

to evaluate legal principles, institutions, and institutional relationships.

What should be done? Happily, Gee and Jackson have continued their investigation. They are now trying to find better ways of bridging the gap between viewing the study of law as an analytically oriented discipline (with certain required subject areas) and viewing it as a system of training for professional competence in dealing with clients and social interests. They have correctly advised that there needs to be a coordinated review of bar examination practices and law school curricula. They have suggested, at least tentatively, that some process for certification of practical clinical experience be created as a condition for admission to the bar. Supporting that notion, they point out that

> the increase in clinical programs reflected in our data is substantial, but *actual enrollment* in clinical programs is as yet rarely reinforced by bar examination practices or by law school requirements. (*Following the Leader?* p. 50)

TABLE 5.—*Registrations in elective courses other than bar-related subjects*

Category	Total Registrations	Total Number of Courses	Average Class Size
Skills			
Applied Legal Education (Clinical Courses)	7,882	401	20
Simulation			
Professional Skills, Training, & Function	15,018	636	24
Legislation & Legislative Process	1,204	46	26
Specialties			
Labor-Management Relations	6,736	179	38
International, Foreign, & Comparative Law	5,136	229	22
Patent, Copyright, & Trademark	1,413	52	27
Admiralty	1,146	38	30
Policy			
Natural Resources & Environment	3,632	136	27
Law & Social Issues	2,861	120	24
Land Resources, Policy & Planning	1,999	55	36
State & Local Gov't. Law, Policy, & Relations	1,124	51	22
Discrimination & the Law	1,104	56	20
Juvenile Law & Process	917	39	24
Theory			
Interdisciplinary & Allied Skills	5,363	190	28
Legal Theory, Philosophy, & History	2,801	124	23
Miscellaneous	4,010	147	27
Totals	62,346	2,499	25

Source: *Bread and Butter?*, pp. 64-65.

A variant on their suggestion would be to allow clinical experience as a substitute for some portion of the bar examination—perhaps for the optional questions that are used in some states. I think, however, that the most promising step would be for the bar examination to be made available at the end of the second year in law school (as it is today in Indiana) or, better, at the end of three semesters or four quarters in law school (after students have completed an established minimum number of hours). Those persons who pass the bar examination would not

be admitted to practice law until they graduated from an approved school. The last third or, better, the last half of their legal education would then be freed from the constraints imposed by concern over having to assemble substantive analytic knowledge in certain bar exam areas.

To alleviate concern that passing the bar before graduation might destroy motivation for postexamination study, to encourage the study of lawyering competencies, and to integrate law school education with lifetime legal education, I would suggest the development of "professional boards" by accredited national, state, or regional groups. These boards would measure the competencies of attorneys in the performance of special functions, such as counseling, negotiating, settling cases, planning, mediating, conducting a trial-type hearing, or researching law-related subjects. Passing one or more of these boards could (but probably should not) be made a prerequisite for certification to practice in a field or before a particular court or agency. Clinical experience in law school could itself lead to a board certification, and thus encourage students to take advantage of the opportunity for supervised "lawyering" while still in school. Perhaps board certification should even be used as part of the professional qualifications that the Code of Professional Responsibility will one day allow lawyers to state in appropriate public notices. The opportunity to qualify for such boards should provide new motivations for students and practicing lawyers, as well as providing new challenges for law teachers.

A useful step in achieving these goals would be a national conference on legal education attended by all interested groups. The conference should be preceded by carefully prepared materials that would assemble the facts and sort out the issues. Hopefully, by the time such a conference is organized, Gee and Jackson will again have taken pen in hand and will be pointing toward solution of the main problems that their patient and scholarly research has so clearly identified.