

3-1-1981

## What Role for the Law School in American Legal Education? Purposefully Restructuring the Law School Curriculum

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### Recommended Citation

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# What Role for the Law School in American Legal Education? Purposefully Restructuring the Law School Curriculum

*Malcolm Richard Wilkey\**

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Whenever anyone sets out to discuss the role of the law school in legal education, possible curriculum changes, trial advocacy, or lawyer competence, I am reminded of a remark made by Robert Meserve at an early meeting of the Devitt Committee:<sup>1</sup> "When we undertook this assignment we thought we had hold of a thread. The more we pulled on it, the more we realized we had grasped, not a thread, but a cable or a hawser." For certainly, if legal education is viewed as a continuum that begins long before law school and extends far beyond it, then all the education an individual undergoes, from kindergarten to advanced post-graduate professional seminars, goes into the making of the legal mind and the creation of legal skills. In this process the law school is only the most clearly defined segment. Any changes in the law school's role or curriculum thus inevitably affect and

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1. The Judicial Conference of the United States Committee to Consider Standards for Admission to Practice in the Federal Courts (1975-1979) [hereinafter referred to as the Devitt Committee].

Appointed by the Chief Justice in 1976 and chaired by Chief Judge Edward Devitt of the U.S. District Court of Minnesota, the committee was composed of six active practitioners, six law school deans or professors, ten U.S. district judges, and two U.S. circuit judges. Shortly after it began work, three law student consultants were added, and by the time of its final report in September 1979, one professor had become a district judge and one district judge had moved to the circuit.

The committee's purpose was to study the problem of inadequate or incompetent counsel in the United States district and circuit courts by considering standards for admission to practice in those federal courts. Its three principal recommendations were (1) a federal bar exam on certain selected subjects specifically related to federal practice, (2) a minimum of four trial experiences before a lawyer is permitted to act alone (or as lead counsel) in any criminal proceeding or in any part of a civil proceeding requiring the taking of testimony, and (3) establishment of a peer review system. For a more detailed discussion of the Devitt Committee's recommendations, see *Final Report of the Committee*, 83 F.R.D. 215 (1979). See also *Report and Tentative Recommendations of the Committee*, 79 F.R.D. 215 (1979); Devitt, *Improving Federal Trial Advocacy—II*, 78 F.R.D. 251 (1978); Devitt, *Law School Training: Key to Quality Trial Advocacy*, 72 F.R.D. 471 (1977).

The Committee's recommendations are to be implemented on an experimental basis in approximately fifteen federal judicial districts. In those districts the exam requirement will apply prospectively only. The experience requirement, by contrast, will apply to all present and future licensed lawyers, and can be satisfied either by law school or post-law school trial experience or by a combination of both. The practical result anticipated is that all lawyers active, or desiring to be active, in federal trial practice will easily satisfy the four-trial-experience requirement, while those members of the federal bar who do not desire an active trial practice will still be able to do all things connected with federal litigation—file suit, draft and file pleadings, engage in discovery, argue motions—except the actual conducting of the trial itself. By reserving actual trial work to those who have met a basic minimum standard of experience, it is hoped that the gross errors resulting from inexperience can be eliminated. The peer review system is designed to deal with the problem of those who, despite opportunity for experience, have not yet achieved the minimum level of adequacy.

must be related to changes in educational opportunities and responsibilities available to the lawyer before and after law school.

Intensified study and debate following Chief Justice Burger's pronouncements concerning the lack of competency of many trial lawyers<sup>2</sup> may have put to rest the demand for elimination of the third academic year.<sup>3</sup> Logically, however, the Chief Justice's pronouncements should revive debate as to exactly how that third year should be employed. There seems to be an emerging consensus that the third year as now constituted is virtually useless for all but law review students. The third year may be the most obvious and easily defined aspect of the legal education problem, yet this may be true only because it is the topmost portion of a malformed structure. Before deciding whether architectural alteration or basic redesign of that structure is necessary, it might be useful to put the matter into historical perspective, *i.e.*, to see how we got where we are before deciding where we go from here.

### I. INTRODUCTION: HOW WE GOT WHERE WE ARE

If the reader will pardon personal reminiscing, during my years as a student at Harvard Law School, 1945-48, only the third year was available for elective courses. The first two years each contained four required full-year courses plus two required half-year courses. In the freshman year we absorbed the great fundamentals of property, contracts, torts, and civil procedure, with half-year courses in criminal law and agency.<sup>4</sup> In the second

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2. See Burger, *The Special Skills of Advocacy*, 42 *FORDHAM L. REV.* 227 (1973) (Sonnett Lecture). The Chief Justice has detailed the action taken by the courts, the bar, and the law schools following his 1973 Sonnett Lecture in a recent article. Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 *FORDHAM L. REV.* 1 (1980).

My colleague at the United States Court of Appeals for the D.C. Circuit, Judge Edward A. Tamm, has estimated that less than two percent of the lawyers appearing before him are genuinely qualified. See Tamm, *Advocacy Can Be Taught—the N.I.T.A. Way*, 59 *A.B.A.J.* 625 (1973).

3. Professor Emeritus David Cavers' proposal to restructure law school education into a two-calendar-year format, however, still remains a viable concept. See Cavers, *A Proposal Renewed: Legal Education in Two Calendar Years*, 66 *A.B.A.J.* 973 (1980). Professor Cavers' two-calendar-year proposal contemplates six academic terms corresponding to the six presently spread over three calendar years. All of my discussion is equally relevant to the present schedule and to Professor Cavers' proposal.

4. For an illustration of the timelessness of the subject matter of legal education, compare this list of courses with the divisions of Blackstone's great work of the 1760's, which divided law into four volumes: "The Rights of Persons" (Constitutional Law), "The Rights of Things" (Real and Personal Property), "Private Wrongs" (Civil Proce-

year we grappled with the related trio of future interests, trusts, and equity, along with corporations and two half-year courses: sales and bills & notes. Looking back, I find that all but one of these twelve courses (sales) have been useful in practice or on the bench.

While we did not find the first two years dull, we looked forward to the third year, during which we would have a choice among such courses as evidence with Edmund Morgan, constitutional law with Paul Freund, taxation with Erwin Griswold, international law with Manley O. Hudson, and jurisprudence with Lon Fuller—courses which were intellectually challenging, supposedly commercially rewarding, or both.

Today that recognized core curriculum of twelve required courses in the first two years has shrunk to four or six courses taught in one year or less. Some of the courses which for us were third-year courses, like constitutional law, have been moved to the first year. The student thus has at least two full years of electives, and it is not surprising that by the end of his second year he has had about all that he wants, and perhaps all he needs, of the regular academic-style law school courses.

Why this great change in the law school curriculum over the past thirty years? I see at least four reasons. First of all, the lawyer's role in some of these fields has been relinquished by the lawyers or taken over by others. For example, conveyancing now is largely handled by title companies; those companies, of course, employ lawyers, but conveyancing is no longer a large or regular law office practice. Estate planning, too, has largely become a function of bank trust departments, accountants, and even insurance agents. The significance of the great trilogy of future interests, trusts, and equity as we knew it has drastically declined in the law school curriculum, though whether in response to decreased demand for those subjects in the marketplace or increased demand for space for other subjects in the law school program is not clear.

A second, more important reason has been the rise of the federal courts as a center for the legal business of predominant interest to current law students. The role of the federal courts has been greatly enhanced by the exponential expansion of government regulation of business and by litigation involving indi-

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dure, Torts, and Remedies), and "Public Wrongs" (Criminal Law and Procedure). See generally W. BLACKSTONE, COMMENTARIES.

vidual rights for deprived groups.<sup>5</sup> Government regulation and the assertion of individual rights could have been issues for state courts, but these issues are commonly litigated in federal courts, largely because the Congress of the United States has created a super-abundance of laws in this area.

Thirdly, big city, big firm practice has changed in a manner paralleling the above changes. An individual lawyer's broad capacity to deal with many problems as a general practitioner, perhaps created by the kind of law school curriculum prevalent thirty years ago, now has little recognized commercial value. Specialization has become the rule as big city firms have concentrated on the more lucrative fields of practice and eliminated service in the unproductive fields.

Lastly, it is quite apparent that the uses to which a legal education can be put are even more diversified now than they were thirty years ago. Lawyers appear in many roles, not only in the several branches of the legal profession itself, but in government, in business, and in the political action or service groups which now form an increasingly important part of our national life.

There is thus no longer as large a consensus as existed thirty years ago as to the proper size and shape of a law school's core curriculum. New statutes and creative areas of legal activity have multiplied the aspects of the legal profession and consequently those of the law school curriculum almost beyond comparison. While there remains an academic core curriculum of sorts, a core profession of law is no longer so widely recognized as it was before World War II.

This, in brief, is how I view where we are and how we got here. The question I now pose is, Where do we go from here? Analytically, though, the primary question should be, Where do we *want* to go from here?

To answer this question we must first define the *objective* of legal education in America. This, to my mind, must be the production of competent lawyers. Because lawyers play many roles

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5. The federal government has now managed to create whole new fields of law, perhaps unintentionally in some cases. These new areas increase the demand for lawyers and in some instances create material additions to the law school curriculum—for example, so-called poverty laws. Isn't it significant that the poor, like General Motors, now need lawyers just to deal with the government in regard to a multiplicity of aid programs? Is it too much to ask that Congress create programs and that the executive branch administer them in such a way that they do not become primarily relief programs for lawyers?

in American life, competence may be built on various attributes and skills. Hence, secondly, we must identify what skills any system of legal education should foster in its graduates, *i.e.*, its "products." Thirdly, as we identify the needed skills, we begin to realize that the law school is but one part of a continuum of legal education. So the inquiry becomes not only what skills are needed but where and when those skills may be best acquired along that continuum. Fourthly, this analysis brings into sharper relief defects in the present organization of the law school curriculum, defects which become strikingly apparent by the third year. To address these defects, I conclude by putting forward two alternatives as possible reforms of the present legal education structure.

## II. THE OBJECTIVE OF LEGAL EDUCATION: PRODUCING COMPETENT LAWYERS

One of the great military and governmental geniuses of all time, Napoleon Bonaparte (in between fighting more battles than any other general in history has ever fought) formulated nine principles of war. The first and overriding principle was "The Objective." Only when the objective was clearly defined could the other Napoleonic principles—the offensive, mobility, mass, economy of forces, surprise, simplicity, security, and coordination—have any relevance or application. The objective in any endeavor is basic to all further analysis; therefore, I suggest that we must first decide *the objective* of legal education.

Before making that decision, however, we must make a preliminary, clarifying determination: *Whose* objective? Must we examine the objective of legal education as determined by the law school? by the students? or by the consumer, *i.e.*, the client or the court? Since the ultimate objective of this article is to make some contribution to current thought on how to reform legal education to increase lawyer competence, it must be the objective of legal education as viewed by the *law school* which is critical. Nevertheless, views of the objective of legal education held by the ultimate consumer and the student must affect the objective of the law school as well.

### A. *Delivery of Competent Legal Services*

We forget only at our peril that we live in a consumer age. While the direct "product" of the law school might seem to be

the lawyer, *the ultimate product envisaged is legal services*. I suggest that the consumer's objective is, very simply and understandably, to receive *competent performance* from lawyers. For the law school, this means that its ultimate objective in providing legal education must be to ensure delivery of adequate legal services, which can only be accomplished by producing competent lawyers. The "successful" law graduate, then, from the view of both the school and the consumer, will be the lawyer who delivers to his client competent legal services in his chosen field.

From the consumer's perspective, the law school is the manufacturer of the direct product, the lawyer. It must be downright discouraging for law schools to realize that their products, the legal profession and the delivery of legal services, have won an approval rating of only about twenty percent from the American public. Surely even Chrysler, which has had considerable trouble, manufactures products which enjoy higher than a twenty percent approval rating. In all fairness, no one has argued that the law school is totally responsible for the making of a lawyer—teaching all of those skills essential to the competent attorney. Yet in America, unlike England, the law school is by far the greatest single visible factor in the creation of a lawyer. While the whole system in which the product (the lawyer) is employed must accept blame for the low approval rating, it is surely time to reexamine the design and the assembly line of this plant (the law school) which initially turns out the product (the lawyer).

### *B. Fields of Competence*

Turning now to the objective of legal education as viewed by the law student, we assume that he is aware that the law is not a monolithic profession. There are today at least five major fields for which legal training is either indispensable or extremely useful.

The first field, the one most visible to the general public, is litigation. Chief Justice Burger has centered his criticism upon incompetent advocacy in litigation. Yet litigation is a distinct minority field in the profession except in the federal courts. It should not be forgotten that federal practice consists of trial or appellate advocacy. There is no reason to belong to the bar of a federal court unless the lawyer intends to engage in litigation. Thus, the Chief Justice of the United States, concerned primarily with the administration of justice in the federal courts, was



thoroughly justified in focusing upon competence in litigation before the federal courts, as was the committee he appointed under the chairmanship of Judge Devitt.<sup>6</sup>

The second identifiable field is office counseling. While office counseling describes the majority of professional legal activities, that role covers a wide variety of substantive legal fields, including, among others, tax, estate planning, insurance, conveyancing, real estate, trade regulation, government contracts, and the ill-defined "corporate practice."

A third major field of competence is legal scholarship—namely, teaching and writing, with perhaps judicial clerking as a temporary position embraced therein.

A lawyer playing a strictly business role, the fourth major field, has long been part of the American scene. At least one-fourth of my graduating class thirty years ago intended to go into business, not law. Many more shifted from law to business as the years went on. It also has been shown that applicants for graduate schools shift between law and business administration as economic and social conditions change. Furthermore, the values and aspirations held by applicants for law or business training are much the same. The growth of joint-degree programs, e.g., the J.D.-M.B.A. program, reflects the continuing close affinity between business and law.

The fifth and last major field toward which law students are now working is government administration. This field includes a wide range of positions involving strictly legal, entirely nonlegal, and mixed roles.

### *C. Skills Essential to the Competent Practicing Lawyer*

Dean Roger Cramton's ABA Task Force Recommendation 3 was that "Law Schools should provide instruction in those fundamental skills critical to lawyer competence. In addition to being able to analyze legal problems and do legal research, a competent lawyer must be able effectively to write, communicate orally, gather facts, interview, counsel, and negotiate."<sup>7</sup> These conclusions accord with the findings of an intensive survey of six hundred actively practicing Chicago lawyers recently completed

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6. See note 1 *supra*.

7. ABA TASK FORCE, LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 3 (August 1979) [hereinafter cited as ABA TASK FORCE or Cramton Report].

by Frances Kahn Zemans and Victor G. Rosenblum.<sup>8</sup> In this study the authors examined both the nature of the skills which practicing lawyers deem important to the practice of law and the sources which lawyers themselves credit for their development. The authors' analysis of the empirical data illustrates how empirical evidence often confirms conclusions also reached by intuition or thoughtful prediction.

Looking specifically at the type of knowledge and skill found most important by the six hundred practitioners, the Zemans-Rosenblum study reveals that "fact-gathering" ranked first, rated as "important" by 93% of the lawyers.<sup>9</sup> "Capacity to marshal facts and order them so that concepts can be applied" ranked a close second with 91.6%. These first and second skills are different. "Fact-gathering" is usually done in the first instance by an investigator, such as the FBI for the Government (or a private investigator, like "Paul Drake" in the old "Perry Mason" series). The second skill, "capacity to marshal facts," is purely lawyers' work. This requires the application of legal analysis to determine what the relevant facts are and how best to order and relate these facts to each other to structure the line of proof and argument.

We can all agree that the "capacity to marshal facts" should be taught in the law school. But where is fact-gathering, an important skill in almost all disciplines, appropriately taught? If fact-gathering is deemed the most important skill of all by actual legal practitioners, should lawyers also be trained as investigators? If so, in addition to the traditional curriculum, do we want to give students FBI-type training in law school or earlier? (You will recall that for years FBI agents were required to be either lawyers or accounting graduates, since formal analytical thinking was viewed as basic to the FBI agent's investigative task.) Business doubtless emphasizes fact-gathering as much as law does. How does the Harvard Business School teach fact-gathering? Would a poll of their graduates reveal that the Business School had also been deficient in teaching this particular skill?

Turning to the third and fourth skills found important by practitioners in the Zemans-Rosenblum study—"instilling others' confidence in you" (88.6%) and "effective oral expres-

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8. Zemans & Rosenblum, *Preparation for the Practice of Law—The Views of the Practicing Bar*, 1980 AM. BAR FOUNDATION RESEARCH J. 1.

9. The survey's principal findings are collected in a table found in *id.* at 5.

sion" (87.4%)—we again find skills basic to success in many fields of endeavor. We all know the doctor's bedside manner is a tremendously important ingredient in his success, both in improving the patient physically and the doctor financially. But do the medical schools teach "instilling others' confidence" as part of their four-year curriculum? The fourth skill, "effective oral expression," is obviously necessary in any business or profession, yet it is a skill particularly associated with lawyers. "The Great Mouthpiece" connotes a lawyer, not a doctor or corporate executive.

One other skill found important in the Zemans-Rosenblum study deserves particular attention. "Negotiating" was ranked eighth in importance (78.9%), but had the highest ranking of all (84%) among the respondents' voting for the subjects given insufficient attention in law school.<sup>10</sup>

I find it is virtually impossible to quarrel with the survey's conclusions that skills in gathering and marshalling facts, winning others' confidence, expressing thoughts effectively, and negotiating are skills vitally necessary to the successful lawyer—one who delivers to his client competent legal service in his chosen field. If these skills are vitally necessary to the lawyer, then he must acquire them somewhere in his training before he is licensed to practice. But where? Only the capacity to marshal facts is now being effectively taught in law school; the percentage of respondents indicating that law schools pay insufficient attention to the other four vital skills ranges from 64 to 84%.<sup>11</sup>

### III. THE LOCUS OF LEGAL EDUCATION: WHERE LAWYERS SHOULD DEVELOP THESE SKILLS

Looking at legal education as a continuum, we must ask whether our legal system should provide for the acquisition of these essential skills before law school, in law school, or after law school. Surely some of these skills, such as writing clear and concise English, effective oral expression, and probably fact-gathering should be acquired *before* law school.

#### A. *Skills Best Acquired Outside a Legal Setting*

In the most practical vein, we must first recognize that not

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10. *Id.* at 20.

11. *Id.*

everything relevant to the various fields of legal competence *can* be taught in law school. In the Zemans-Rosenblum study, the lawyers' views as to what they felt they had missed in education previous to practice were not nearly so surprising as the lawyers' grandiose views as to what the law school could and should do within the framework of the present structure. While good-faith analysis and experimentation by the law schools are now called for to determine what additional skills can be taught in the law school, we should realize that most of the skills in which practicing lawyers now find themselves deficient have traditionally been acquired *outside* the law school setting, not only in our own country but also in England and other countries with similar legal systems.

More importantly, when we consider what is ultimately possible, we must concede that not everything relevant to the practice of the law which *can* be taught by law schools *should* be taught there. Fact-gathering, writing clear and concise English, drafting documents, negotiating, effective oral expression, and other skills are necessary to many other professions besides law. What kind of decisions can be made in any business or profession without first gathering facts? Some law schools are attempting to teach these skills and other subjects of a more academic nature, like accounting and economics, which arguably should be taught somewhere other than in the law school.

Why not put training for these universally useful skills earlier in the educational system? Even skills of the Dale Carnegie type—the art of persuasion, getting along with people, speaking effectively—are obviously useful in all walks of life. Dale Carnegie does not offer courses just to lawyers; it teaches skills that business and other organizations require. Some of the skills in which lawyers find themselves deficient are of almost universal applicability and usefulness, and the deficiencies are directly traceable to much earlier educational weaknesses. Surely writing clear and concise English, effective oral expression, and perhaps even fact-gathering are skills which lawyers could have acquired earlier in the educational process.

While the ABA Task Force recognized that the “[l]aw schools are not alone in their need to develop more effective methods of writing instruction,”<sup>12</sup> its recommendation in regard to writing skills is very strong: “Law schools should provide

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12. ABA TASK FORCE, *supra* note 7, at 15.

every student at least one rigorous legal writing experience in each year of law study.”<sup>13</sup> “Most of the writing that law students do is examination writing, done under extreme time pressure without either a chance for self-criticism and self-editing or constructive criticism from the instructor. The situation may, in fact, reinforce bad habits and poor standards rather than foster improved skills.”<sup>14</sup>

I heartily agree with the recommendation that the law school offer each student at least one rigorous legal writing experience each year, but I would also emphasize that deficiencies in the ability to write clear and concise English are so fundamental that they should be corrected at an earlier stage, regardless of any additional legal writing training the law school may offer. For example, one of my colleagues on the bench remarked recently that he had received an application for a law clerkship, on the first page of which were seven grammatical errors. The applicant had an excellent law school record and proudly noted that he had graduated from college *summa cum laude*.

If we insist on certain universally required skills being acquired outside of, and preferably before, law school, we must answer some hard questions, then be prepared for reverberations up and down the whole educational system. If we place the training for universally useful skills earlier in the educational system, would law schools then need to *require* students to demonstrate these skills, either by examination or by taking accredited courses in the subjects, to gain admission to law school? Does this suggest that a general “pre-law” curriculum be required for admission? If we do this, do we not run the risk of narrowing the student’s outlook, even if these skills are useful in many professions and businesses? When and where does the student get his broad view of civilization? Where does he dally with certain subjects just to see if they interest him, if not in the educational process before he enters law school?

Instead of requiring a general pre-law curriculum, but still recognizing the essentiality of these skills for successful practice, would it not be better for the law school to insist upon and *test* for these skills *before* admission, on the basis that the student must have them, however and wherever he acquires them? Alternatively, or perhaps supplementarily, might it be wise for the

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13. *Id.* at 3.

14. *Id.* at 15.

law school to adopt a policy of not hesitating to send the student away from law school for a year, even after admission, to make up perceived deficiencies? We are all aware of the venerable practice in baseball of sending a promising rookie back to the minors for more training and experience, in the expectation that more training will make him a real big leaguer. Similarly, it should be possible for a law student who writes atrocious English or ineffectively expresses himself orally, but who otherwise has recognizable reasoning ability and a capacity to learn the law, to be encouraged to take a year out of law school to improve these absolutely necessary skills before being allowed to resume his legal education. Even if he never completes law school, he will be better equipped for any other profession or business after receiving this training.

*B. Skills Best Acquired Within a Substantive Legal Setting*

Turning now to those subjects which should be incorporated into a legal education, I should first note that there are certain practical skills peculiar to lawyering. Oral advocacy, for example, needs to be taught within a substantive law setting. Interviewing and counseling likewise belong in a legal atmosphere as live and realistic as the instructors are able to make it. Drafting documents is another skill which goes beyond simply using clear and concise English; it should be taught in relation to principles of substantive law, again in as realistic a setting as possible.

By saying that training of this type should be given in a substantive legal setting, I do not propose, without reflection, to foist all these tasks on the law school, thereby pretermittting at least partial assumption of those tasks by other institutions. That these skills are essential is too obvious to deny; their development is best fostered in a legal setting. The question then becomes, To what extent and in which principal objective areas should the law school modify its traditional curriculum to provide this training, and to what extent and in which principal objective areas should these skills be learned outside the law school setting as it is currently conceived? It is possible to produce an answer based solely on the American experience, yet we might be more confident of our answer if we looked also at the experience of other countries.

*C. The English Alternative: Responsibility for Legal Training Borne by the Legal Profession*

The United States is so large, and its legal education system so immense in comparison with that of other countries, that we frequently overlook the merits of comparing our experiences with those of other countries. A glance at the English system, which has been transferred in part to the Commonwealth countries, reveals two differences with American legal training: First, the English system of training lawyers has always relied to a greater extent on the legal profession than on academic institutions; second, British university training in law has not sought nearly so much as American university training to provide training for the practicing lawyer. As a result, British university legal education has embraced a good many "liberal arts" academic subjects which are not included in the American law school curriculum.

English legal education has undergone some great changes in the past ten to fifteen years. During that time university legal education has shifted somewhat in its curriculum to emphasize and provide a firmer academic foundation in purely legal studies for those who intend to become practicing lawyers. At the same time the English system has given rise to the polytechnics, which offer a curriculum oriented almost entirely toward providing the academic legal background for either the barrister or the solicitor. Still, the university or polytechnic is regarded as only the first stage in the training and development of a practicing lawyer. The English law school is not required to shoulder directly the burden of preparing lawyers for practice, because the law student must undergo two further stages after leaving the university or the polytechnic.<sup>15</sup>

The first additional stage is a one-year course of training offered for a barrister by the Inns of Court Council of Legal Education and for a solicitor by the Law Society's College of Law. The barrister course emphasizes drafting, opinion writing, complete mastery of evidence and procedure, and actual experience with small cases in both civil and criminal courts. Advocacy

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15. For an excellent discussion of the English legal education system and proposed reforms, see Ablard, *Observations on the English System of Legal Education: Does It Point the Way to Changes in the United States?* 29 J. LEGAL EDUC. 148 (1978). The discussion of the present English system which follows in the text is drawn principally from Mr. Ablard's article and from my personal observations while lecturing at an English summer law school in 1979 and 1980.

techniques are taught by practicing barristers in both live and simulated sessions, and by video tapes of student efforts. The solicitor course carries the student in detail through a series of basic transactions—conveyances, probate, divorce, and formation of companies. As representatives of different parties, students draft and exchange documents in an adversarial setting somewhat similar to the Harvard Business School training in negotiating.

The second additional stage of post-university legal training, following the compulsory institutional course, is a year of pupillage for barristers or two to three years of serving “under articles” for solicitors. In the first six months the fledgling barrister only assists his tutor; during the last six months, however, he may take cases on his own. By contrast, the embryonic solicitor must normally serve under articles for two and a half years—a practice criticized as merely a cheap way for older solicitors to get young help.<sup>16</sup>

This recital of the formality and rigor of the post-university training for lawyers in England and in some Commonwealth countries demonstrates the great difference between the role of the law school in America and in those countries. At no time, not even after a heavy revision of the university and polytechnic legal studies curricula toward training the practicing lawyer, has the English academic institution ever been called upon to provide complete training for barristers or solicitors. The profession has always borne the brunt of preparing the would-be barrister or solicitor to be competent in the more technical legal skills of the professional. In America, by contrast, the profession has assumed little responsibility for the training of lawyers, although it has had much to say about the standards to be met by the law schools, which are expected to do the bulk of the training. The courts in England have little to say about admission to the bar; that is reserved for the profession itself. In America the courts are the exclusive admitting authority to the profession; they have exercised that authority by imposing a written bar examination to test those subjects generally taught in the law schools, without examining or challenging inadequacies of training in many practical necessities of the legal profession.

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16. Indeed, when English solicitors are asked what their young clerks under articles would do differently if they were labeled as full-fledged solicitors at the start of article training, the solicitors are hard-pressed to give any answer other than that they would necessarily be paid more.



As an aside, it should be noted that criticism that there are too many incompetent trial advocates in U.S. courts, as per Chief Justice Burger and the Devitt Committee Report, need not be construed as criticism of the law schools themselves. While English barristers believe they have a professional group superior to our trial advocates, English academics are envious of American law schools. Both views may be right, for, as we have seen, the English barristers attribute their trial advocacy skills to the contributions of the Bar and the Inns of Court, not to academic law school preparation. *The moral of this may be that where advocacy is recognized as uniformly excellent, the responsibility for training rests on the profession itself, not on the law schools.*<sup>17</sup> The law schools can reasonably be expected to do more about trial advocacy (and they are doing more), but they cannot be expected to do everything. Thus, the Devitt Committee Report, while calling for four trial experiences as a prerequisite for admission to the federal court trial bar, chose to define those trial experiences so that all could be acquired in law school, some could be acquired in law school and some in practice, or all four could be acquired in practice after graduation from school.<sup>18</sup>

Unfortunately, our options seem limited in this matter because the American bar has evinced little enthusiasm for assuming a teaching burden remotely comparable to the responsibility for perpetuating the profession traditionally carried by our English counterparts. Indeed, because of its size—an estimated 532,000 lawyers, of which 270,000 are members of the American Bar Association—and its lack of both homogeneity and geographical concentration compared to its English counterpart, the American bar hardly seems capable of playing a training role for young lawyers equal to that of the English legal professions. In England there are only 30,000 solicitors and 4,000 barristers; in Scotland 4,500 solicitors and 140 advocates.<sup>19</sup>

Although the American legal profession can—and there are some indications it will—more actively support legal education in the future than it has in the past, it remains unrealistic to expect it to play much more than an ancillary and fragmentary role. Practicing lawyers can offer office internships to law school

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17. Ablard, note 15 *supra*.

18. See note 28 *infra*.

19. Zander, *Scottish Royal Commission on Legal Services Reports*, 66 A.B.A.J. 1092 (1980).

undergraduates. Such internships have recently become increasingly commonplace, particularly during the law school summer vacation. Where the law student is paid, and the practitioner therefore feels some compulsion to get some value out of the undergraduate clerk, the internship usually becomes a meaningful experience. Where the student merely donates his time, however, the practitioner may regard the clerk as worth only what he is paid, with the result that the student is given merely low-grade, tedious tasks. In any event, the value of an internship will vary widely, depending heavily on the degree of supervision and interest of the practitioner.<sup>20</sup> And, the student able to obtain such an internship must always weigh that value against the return from investing the same period of time in law school attendance, with the realization that roughly the same type of clerkship experience will be available after graduation—at a larger salary.

American practitioners have long given of their time for law school moot court work and are now increasingly being brought into clinical litigation courses as adjunct professors. Yet all experience here indicates that careful supervision and coordination by a full-time faculty member, preferably one with tenure, are necessary for an effective clinical litigation program.<sup>21</sup> The active practitioner functions best in an ancillary role as part of a teaching team. Postgraduate, continuing education courses and seminars, staged by bar associations, offer an opportunity for the practicing lawyer to keep up with current legal thought, usually in his own field of special interest, but rarely prove useful in introducing a young lawyer to a new field, adding new skills, or remedying old deficiencies.

Of course, there are significant exceptions.<sup>22</sup> In welcome contrast to the usual uncoordinated effort to better the individ-

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20. In this respect the American experience may not be far different from articling and pupillage in England. For an example of unusual training offered by a law firm, see, *e.g.*, the so-called Kirkland Institute of Trial Advocacy, in which the Chicago firm of Kirkland & Ellis gives its summer law clerks a two-week training course in taking depositions, cross-examination, and oral argument. Direct supervision by firm partners and videotape replays are widely used in the Kirkland program.

21. Final Report of the Devitt Committee, Subcommittee on Rules for Limited Admission to Practice of Law Students at 35, 49-50 (1978).

22. The National Institute for Trial Advocacy, both in its permanent site at the University of Colorado at Boulder and in its regional short courses, has an excellent record in conducting intensive sessions aimed at enhancing the trial advocacy skills of its students, who are by and large practicing attorneys.

ual lawyer or the profession is the American Inn of Court, established at the law school of Brigham Young University largely through the efforts of Senior Judge A. Sherman Christensen. In the ancient common-law, English Inns of Court tradition, this professional study and social group brings together the bench, bar, and academia through regularly scheduled meetings programmed to improve the art of trial advocacy. The American Inn of Court is presided over by six "benchers," at least two of whom must be practicing attorneys, one of whom must be a student, and one of whom must be a judge; membership is by invitation of the benchers and is limited to twelve experienced lawyers, twelve lawyers admitted less than three years, twelve law students, five judges, and two law professors, plus senior (formerly active) members, whose attendance is voluntary.<sup>23</sup> The success of "American Inn of Court I" has led to its duplication: There are now Inns at both Provo and Salt Lake City, Utah, as well as at the University of William and Mary in Williamsburg, Virginia.

This exceptional case notwithstanding, my brief review of the areas in which active practitioners of the American bar are now contributing, or could contribute, to American legal education leads to two discouraging conclusions: (1) The active practitioners' role has been—and, because of the decentralization, lack of homogeneity and tradition, and visible lack of desire to do otherwise in the American bar, will likely continue to be—limited and ancillary to established legal educational institutions; (2) the most important observed deficiencies in lawyer training—the ability "to write, communicate orally, gather facts, interview, counsel, . . . negotiate," and "[instill] others' confidence in you"<sup>24</sup>—are not skills that the busy American practitioner can easily adapt the mode of his professional life to teach or learn.

Given that the American bar has traditionally been so different from the English bar, and given that the English university or polytechnic has likewise played so different a role from the American counterparts, the American law school remains hard put to resist the obligation to turn out an almost complete, competent lawyer. The English university or polytechnic is easily able to resist such pressure, because it keeps the student only three years and then turns him over to the profession for at least

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23. See Charter of American Inn of Court I, Feb. 12, 1980.

24. See text pt. II.C. *supra*.

two and perhaps three and one-half years of further training. The American university usually keeps the student six or seven years in its college and law school and therefore may rightfully be expected to do a more complete job than the English university, which, even with only three years to train a student, must combine legal studies with some of what is taught in the American liberal arts college.

All in all, what is called for is a reexamination of what additional tasks the American law school can effectively perform in training the would-be lawyer, what skills and previous training it should insist upon as a prerequisite before accepting the student for legal training, and what training the bar must offer to a lawyer, if such training is to be offered at all, after graduation from law school.

#### IV. THE PROPER ROLE OF THE LAW SCHOOL IN THE CONTINUUM OF AMERICAN LEGAL EDUCATION

If the five major fields discussed above<sup>25</sup> (and different observers may discern others of equally valid status) exist as areas of endeavor toward which the law student may reasonably and legitimately aspire to dedicate his legal education and talents, then I submit that the law school can reasonably be asked to prepare students for competent initial performance in one, more than one, or all of these five fields.

The notion that young lawyers should gain an acceptable level of competence in the practice, in effect learning at the expense of their first clients, is today not an acceptable one.<sup>26</sup> And many believe that reliance on a period of informal apprenticeship to experienced seniors in a firm to bridge the gap between law school instruction and the demands of practice is no longer practicable for a large number of law school graduates, if it ever was.<sup>27</sup>

At this point we must recognize that different law schools will offer different degrees of preparation in the various areas of

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25. See text pt. II.B. *supra*.

26. For an example of young lawyers learning at the expense of their opposition, the U.S. Government, see *Copeland v. Marshall*, 641 F.2d 880 (D.C. Circuit 1980) (en banc).

27. ABA TASK FORCE, *supra* note 7, at 14-15 (footnote added). The best training opportunities are probably with the large metropolitan law firms and some well-administered government agencies, but only a comparatively small percentage of law graduates can gain entry there. These employers take the "cream of the crop" who need the additional training less than the bulk of the law school graduates.

their curriculum. Not only will resources such as money and faculty vary, but other factors, such as the location and size of the school and the characteristics and goals of the student body, will also vary. It is obviously easier to offer real live courtroom experience to a large number of students in Chicago, with its huge court system, than in Oxford, Mississippi, or Gainesville, Florida. This is not to say that law schools in small university cities cannot or should not offer clinical experience in their trial practice courses, but rather to recognize that it would be more difficult for them and that such experience would necessarily be available only for a more limited number of students.

It is also essential that the law school's product be fairly and accurately labeled, so that the graduate is made realistically aware of his capabilities and limitations, and that, like a medical doctor, he be allowed only to undertake tasks for which he has been competently trained. This is where postgraduate training by the profession and licensing by the courts come in, both subjects worthy of treatment by themselves but beyond the scope of this essay. It is sufficient here to point out that when an inexperienced and unqualified member of the bar hacks up a case and represents his client miserably, we cannot say with assurance that it was because the law school failed to train him; we can say with assurance only that he had the opportunity to misrepresent a client because the court admitted him to practice.<sup>28</sup> The bench and bar must therefore bear the ultimate responsibility for screening out incompetent lawyers.

The law school's only valid objective, then, is to prepare the student for whatever role he intends, or is likely, to play—and to prepare him to the limit of the law school's capacity. This preparation has been accomplished traditionally in two ways: First, by teaching the student how to "think like a lawyer" through theoretical academic courses, and second, by giving him a substantive background in certain basic subject matter areas; or, as Judge (formerly Professor) Robert Keeton would say, teaching

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28. Hence the Devitt Committee's Final Report on 20 September 1979 (approved by the Judicial Conference of the United States) proposed written examinations of subjects related to federal trial practice for all new applicants, plus a requirement of four trial experiences for all members of the bar of U.S. district courts who intend to try either civil cases involving oral testimony or any type of criminal proceeding. The admission to the federal bar on the basis of examination and completion of supervised trial experience before conducting actual trials is an effort simultaneously to protect the client-public against inexperienced litigators while providing the fledgling lawyer with an opportunity to gain necessary experience. See note 1 *supra*.

the student both the skill of legal analysis and the substantive knowledge of legal doctrine.

### A. *Present Defects*

I suggest that the traditional teaching techniques and organization of the law school curriculum are no longer completely sufficient to prepare the current law student for his legitimate goals. This is not to say that a drastic overhaul is necessary but only that changes in direction and emphasis are called for, as one would logically expect with the passage of time. A number of recent studies support this conclusion, including the ABA Task Force on *Lawyer Competency: The Role of the Law School*, headed by Dean Roger Cramton of Cornell, and the Judicial Conference of the United States Committee to Consider Standards for Admission to Practice in the Federal Courts, headed by Judge Edward Devitt. These studies suggest that an overall reevaluation of the law school curriculum is necessary. Focusing on "trial advocacy," "student practice," and "clinical studies" is only a part of this reevaluation. The content of the third year, as well as the first and second years, should be determined by the varied career objectives of the students in the same way as the law school curriculum has been influenced by those objectives over the years.

Reevaluation is not just a matter of introducing new courses into the curriculum, for many of those necessary are already there. For example, "clinical" courses are offered in eighty percent of American law schools.<sup>29</sup> Doubtless many of these courses could be improved and would be if the overall objective of legal education were more clearly defined and the curriculum more specifically structured to meet that objective. Nor is reevaluation simply a matter of introducing new clinical teaching techniques into courses other than trial practice—such as drafting conveyances or negotiating contracts—for this likewise is being increasingly done. Reevaluation means a thoughtful, coherent reorganization of the whole curriculum with the defined objectives of the student in mind.

Yet reorganizing the curriculum with the defined objectives of the student in mind may be easier said than done. By alluding to the "defined objectives of the student" I surely exaggerate the degree of certainty with which most law students recognize

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29. ABA TASK FORCE, *supra* note 7, at 18.

their goals. What we do know in retrospect is that law graduates have found themselves in various lines of endeavor, and that legal education has an obvious preparatory value for those fields. Some observers would argue that most pre-law students, law students, and even most recent law graduates do not know what they want to do and are uncertain about just how law school will help them in the long run. The enormous influx of students into law schools in recent years is surely in part a result of the widespread belief that a law degree is a good thing *per se* for one's credibility in the real world, and that it may even place one in control of the levers of power.

A frank recognition by the law schools that many of their students haven't the foggiest idea of what they really want to do, along with an appreciation of the well-defined but varied goals of those students who do know their own minds at an early age, should not lead to schizophrenia in modeling the curriculum. While both factors suggest that some variety is necessary (within the school's reasonable capabilities), both point to a much more structured curriculum rather than an ultra-flexible, highly elective approach.<sup>30</sup> The students who know what they want to do are not looking for courses taking them all over the landscape, and there is no good reason to offer such a diverse range of

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30. Throughout Dean Cramton's report, beginning with Recommendation 7, this theme is constantly reiterated:

"Law schools should seek to achieve greater coherence in their curriculum. Even if it entails the loss of some teacher autonomy, the three-year program should build in a structured way . . . ."

ABA TASK FORCE, *supra* note 7, at 4.

"Law schools can do a better job than they presently do in . . . providing integrated learning experiences focused on particular fields of lawyer practice, including but not limited to trial practice."

*Id.* at 14.

"Even if it entails the loss of some teacher autonomy, the three-year program should build in a structured way . . . ."

*Id.* at 17.

"[T]he upperclass curriculum in many law schools does not build in a sufficiently structured way . . . ."

*Id.* at 24.

"The principle of teacher autonomy . . . leads to an elective curriculum and stands in the way of any significant institutional effort to provide greater coherence in structure to the three-year course of study . . . ."

*Id.* at 26.

"Hard though it may be, we believe that law school should seek greater overall structure in the curriculum . . . even though this requires surrendering some classroom autonomy."

*Id.* at 27.

courses to the uncommitted. There is no reason why law schools should not subscribe enthusiastically in their own programs to the strong "back to basics" trend in education, while at the same time demanding assurance that their applicants possess basic oral and written skills.

### *B. Two Remedies*

#### *1. A Radical Solution: Two Tiers of Legal Education*

One of the answers to the complaint that legal education currently takes too long (seven years) and, particularly, that college and law school are too long a continuation of the same type of training (academic, lecture, and library) is to set up two types of legal training leading to different degrees. Along with those enrolled in law schools who have no idea what they will do after graduation, there are many enrolled who plan never to practice law but who study law solely for the intellectual discipline and the content of the courses. For those who do not plan to practice, a purely academic course of perhaps a total of five years instead of seven would not only suffice but actually might be more desirable as less time consuming and less expensive. Such a five-year course would combine two years of present law school with three years of academic liberal arts, probably with an emphasis in government, political science, economics—in other words, the traditional law-related subjects. The other option for legal training would be a full seven years containing substantial clinical training in areas such as trial advocacy, interviewing, negotiating, and drafting. Graduates of the first type of program would be awarded an LL.B.; graduates of the second type, a J.D.

Those following the five-year program leading to the LL.B. might or might not get a law license. Licensing would be at the discretion of the individual states and would also depend upon the desire of the individual himself. An LL.B. might aim for the business world or a career as a teacher of political science, economics, or law. Or, the LL.B. holder might well be licensed to perform office counseling but not to appear in court. This would give him a wide range of law practice opportunities—including some of the most lucrative—available to many lawyers today who, while licensed to appear in court, never in fact appear.

The lawyer trained for trial practice after seven years would of course expect to sit for the bar examination in one or more states and in the federal courts. He would have received the



maximum preparation possible in law school to be a fully rounded trial practitioner, although a great percentage of his hours would still, as now, be spent in the office.

This two-tier program would have several advantages for the persons and institutions concerned. It would enable some individuals to launch into creative and monetarily rewarding work two years earlier, fully prepared to begin the work they intend to do anyway. For the law schools, the dual program would take away the burden of providing trial advocacy and clinical training for those students who have no desire to "practice" law in the full sense of the word as it is presently used. This would prove an economical use of faculty, money, and training facilities. In those states granting some attorneys law licenses to "counsel" only, it would mean that the public could secure legal services of the same quality as is now available in the many fields which constitute the office practice of law. More importantly, it would also mean that the public could turn with much greater confidence to those licensed to appear in court or before administrative agencies, because those lawyers would assuredly have received a better quality education for those functions than most law schools offer at the present time.

While a two-tier program of legal education bears some similarity to the English system, separating the office counselor (the solicitor) and the trial practitioner (the barrister), this is not a proposal to set up that system. The range of legal services rendered by those taking the full seven-year course, receiving the J.D. degree and becoming licensed to practice in the state and federal courts, would be much broader than those rendered by the English barrister. Among other differences, the seven-year graduate would deal directly with clients. The practice of the American trial lawyer, involving adversarial litigation before not only the traditional courts but also administrative agencies and regulatory bodies from the municipal level to the national level, is much broader than the English barrister's spectrum of work. On the other hand, the roles played by those receiving the LL.B. degree after only five years of university work might be somewhat similar to those played by the English solicitor, who is an office counselor. In many instances the roles played by those receiving LL.B.'s may become broader, insofar as many of those taking only the five-year program would choose fields of endeavor outside the practice of law as presently known in either the United States or Great Britain.

## 2. *A Moderate Solution: Restructuring the Third Year*

Even without a two-tier system, if we had a more logically structured curriculum, giving full vent to the diverse aspirations of the law students and making full use of the third year, the present three-year law school following a four-year college degree could give much better preparation than it presently gives for several types of careers employing a law school education. For any significant improvement, it will be necessary to refocus and revise law school courses. Let us assume that the first year remains as it is, a reduced core curriculum of fundamental courses. The second year would also remain generally as it is, a limited selection of largely traditional, solid academic course options.<sup>31</sup> The third year should offer a more varied choice—not just “student practice” or “clinical studies”—so that the entire curriculum will better reflect the five major fields of legal competence<sup>32</sup> to which students may aspire.

The first major area, litigation, would embrace clinical student practice in real courts, following extensive videotaped, critiqued classroom performances, which would in turn have been preceded by academic courses on evidence and procedure. It has long been recognized that the most effective method of instruction is not lecturing (indeed, this is the poorest, although the cheapest), nor even the Socratic-lecture method, but the three-step method consisting of demonstration and observation, performance by the student, followed by critique by the instructor.<sup>33</sup> Example-performance-critique is particularly well adapted to preparation for trial advocacy.

A second major area in any law school curriculum should be office counseling, in which many of the present substantive courses would be relevant. At the very least, drafting documents, negotiating, and interviewing real clients should be added to the customary substantive courses. There can be no simulation of responsibility; a real client with a real problem is necessary to evoke a sense of responsibility in the fledgling lawyer. Until he

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31. Dean E. Gordon Gee and Donald W. Jackson have pointed out that the required law school courses and the bar-related courses, which are heavily elected, now take up approximately two-thirds of law school hours. See E. GEE & D. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS AND LAW SCHOOL CURRICULA 39 (1975) (Council on Legal Education for Professional Responsibility, Inc.).

32. See text pt. II.B. *supra*.

33. “On too few occasions is a student called upon to do and redo a task until a professionally acceptable job has been done.” ABA TASK FORCE, *supra* note 7, at 17.

has a client, a law student's focus is on himself, on his own performance, and on how it will be graded. A real client transforms a law student's outlook; all professional ethics demand that the student's personal desires and interests be subordinated to the good of the client. For the large majority of students who will not secure employment with a prestigious law firm offering a thorough training program for junior attorneys, a carefully supervised clinical office counseling program in law school is not only the best but the only chance they will have to get this type of training. And, such a program offers the most realistic setting in which to teach professional ethics and responsibility. The same could be said for the trial advocacy students' practice in real courts.

For those students dedicating themselves to legal scholarship, including those aiming briefly to be judicial clerks, the program should consist of the current substantive courses plus a heavy dose of the supervised writing of legal memoranda and opinions. It is here that law review work makes its greatest contribution.

Those students aiming for a career not in law *per se*, but in business, should be offered a coordinated curriculum much like office counseling, except that in the third year the choice of substantive courses would be somewhat different. For a business career the third year should include trade regulation, international trade, economics, plus a negotiating clinic. Courses might include the kind of case method used in business schools, with an accent on factual situations interweaving business and legal issues.

The fifth major field, government administration, brings to mind—especially to the judicial mind—the necessity of training in legislative drafting, statutory interpretation, administrative rulemaking and adjudication, and various aspects of the budgetary process.<sup>34</sup>

I predict that any law school which offers an integrated curriculum in all or most of the major areas noted above will attract enthusiastic students and dissipate the ennui of the third year. A curriculum organized in this fashion is within the capacity of most law schools and would be relevant to their perceived mission.

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34. H.M. HART & A. SACKS, *THE LEGAL PROCESS* (1958) (tent. draft), is perhaps the most famous textbook attempting to teach these subjects.

However, it is not sufficient merely to offer courses bearing the proper titles. The courses must be coordinated to eliminate overlap and duplication and to fill in the major voids in coverage which inevitably occur when individual teachers are left to their own devices without overall supervision. Furthermore, the scheduling must be such that a student desiring to concentrate in, for example, government administration will be able to get all of the courses needed in that field in the proper sequence and not be forced to take fillers just to make up a full schedule because there are scheduling conflicts between the desired courses in his area of concentration.<sup>35</sup> This calls for a central law school administration attuned to the problems students face in attempting to structure their education toward definite career plans.

There are a few caveats to the above proposal.<sup>36</sup> First, only the largest law schools could offer a full and satisfying curriculum in all of the five major fields of concentration. Most law schools will be able to carry a student part way in all of these areas, but many law schools will find it difficult or impossible to offer third-year courses to complete the curriculum in all of the

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35. As Professor Archibald Cox notes,

The fault of the present curriculum, in my judgment, is the virtual absence of progression. In a class in Labor Law, for example, some students will have had Constitutional Law but not Administrative Law; some will have had Administrative Law but not Constitutional Law; some will have had neither; some will have had both. Students do progress in intellectual competence. It ought to be possible to progress to greater demands upon them in seminars and courses tailored for the third year.

Cox, *Book Review*, 92 HARV. L. REV. 1170, 172 n.4 (1979).

36. If the reader will pardon a second personal history vignette, my own experience demonstrates that it is easy for a law graduate unexpectedly to encounter a wide spectrum of law-related work calling for a variety of skills and substantive knowledge. Specifically, prior to my eleven years on the bench, I spent (or invested) eight years in private practice with a large firm in Houston, Texas, seven years as United States Attorney and Assistant Attorney General in Houston and Washington, D.C., and seven years as general counsel to a large corporation in New York City. I thus had experience in each of the five major fields of legal practice: (1) in *litigation* in private practice, as a U.S. Attorney (four years), and as Assistant Attorney General in charge of the Criminal Division (two years); (2) in *office counselling* in private practice, as Assistant Attorney General in charge of the Office of Legal Counsel (one year plus), and as a corporate general counsel; (3) in *legal scholarship* in five years of part-time law school teaching (and perhaps even on the bench); (4) in *government administration* in the Department of Justice and as a U.S. Circuit Judge; and (5) in *business* as a teacher of corporate law and counsel to business clients.

Since the law school can reasonably be expected to provide only a part of the background necessary for such a varied practice, it is all the more important that it select with particular care what it does offer the student.

five major fields, due to such limitations as budget and faculty talent. It will be up to the individual law school simply to determine what it considers the most valuable and most feasible field for the particular community it serves.

A second caveat: I make no prediction concerning the percentage of law students who will opt for any one of the five major fields of concentration as I have defined them. Indeed, it is obvious that this will vary widely from school to school and indeed may change from decade to decade. We should let the market decide. The market is, first and directly, the students; second and indirectly, the employers, and third and ultimately, the clients of the students. Over time, the verdict of the marketplace will inform the law schools where their greatest area of service lies.

It is not too far-fetched to suggest that one reason why there has been such a widespread ennui among third-year law students is that law school faculties have not been paying enough attention to the marketplace. There is a sneaking suspicion that the professors have been teaching what the professors have wanted to teach, not what the market has demanded.<sup>37</sup> So perhaps much of what currently constitutes the third year would be left on the shelf if the students had their way. While I would be the first to agree that "relevance" to ephemeral fads is the worst possible criterion on which to base what should be preparation for a lifelong career, a good part of the popular demand for training different from that conventionally offered in the third year of law school has been based on steady developments in the legal profession observed over a period of years. That demand should be recognized and satisfied in a coherent manner by integrating new courses into the traditional law school curriculum without sacrificing highly demanding intellectual standards.

A third caveat: The restrictions which state bar exam re-

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37. Some observers comment on increasing tension between law faculties and the practicing bar concerning the context of legal education. Some law teachers view their role as purely legal scholarship and thus teach law as an abstract subject. The trend is away from the teaching of law as a profession in which the competent performance of legal tasks is the goal and toward the teaching of law as just one more pearl in the panoply of "letters." This trend in American law schools runs contrary to developments in England, where the trend has been to create additional courses more directly related to professional practice, *e.g.*, clinical training, and to define more clearly the respective roles of the university or polytechnic and the professional societies in the preparation of practitioners.

quirements now impose on the academic curriculum may hinder the law school in adopting a comprehensive curriculum in some of the five areas mentioned above. The student may find it difficult to take all of the offered courses that he feels he needs in his chosen field while still taking sufficient courses to prepare for the bar examination. This problem has grown as electives have proliferated and will be with us whether or not the above suggestions on integrated curriculums are adopted. The problem calls for understanding cooperation between the bar exam authorities and the law schools.

Two solutions come to mind. Perhaps the state bar exam should be reduced to cover a core of subjects similar to the subjects required in most law schools,<sup>38</sup> with an effort to make this exam a real test of analytical legal ability. Or, perhaps state bar exams should be modified to consist partly of required subjects and partly of subjects elected by the students, similar to the law school curriculum. In the law schools that structure areas of concentration more definitely, a partially elective bar exam would obviate the need for students to take many courses just for the exam; and the exam would more fairly test the student on those subjects in which he is really interested and for which he considers himself best prepared.<sup>39</sup>

A fourth and final caveat: While the demand for practical experience in preparation for different careers such as office counseling and government administration will likely continue, the demand for litigation training may lessen. Contrary to some

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38. There is already something of a "core curriculum" on the state bar exams, *i.e.*, the six subjects recognized as necessary by nearly all states and included on the uniform Multistate Bar Exam (MBE), prepared by the National Conference of Bar Examiners and administered by 43 jurisdictions. This "core" includes contracts, torts, property, criminal law, evidence, and constitutional law.

39. The newly proposed federal bar examination might conceivably be considered as one of the elective choices on a state bar exam. If a student has concentrated much of his effort on the substance and procedure of federal court work, it would be only fair to test his capacity for admittance to the bar, even a state bar license, by examining him in that field. It would be fair not only because it would test the applicant on what he has prepared, but also because it would reduce the necessity of his preparing to be examined on subjects which he has not had the time to study in law school.

The bar exam might also be redesigned in part to test *skills* rather than merely substantive knowledge. While we may be several years away from reliable exams, progress is being made in devising exams to test skills in clinical subjects related to trial practice. See, *e.g.*, the California bar, which has been experimenting with skill-oriented exams. Since the federal bar is concerned exclusively with litigation, the newly developing federal bar exam is perhaps the logical place to develop an exam that tests litigation skills.

expectations, the destiny of our entire country cannot be decided in courtrooms. Furthermore, as admission standards for trial practice are tightened, perhaps through requirements such as those proposed by the Devitt Committee,<sup>40</sup> trial practice will be seen more and more as a field principally for the dedicated, competent specialist.

### *3. Courses Less Necessary for the Undergraduate Law Student*

If law schools are to offer more practical, or more mission-oriented courses to cure deficiencies perceived by practicing lawyers, then thoughtful consideration must be given to those courses which can be dropped from the law school curriculum. Do we now have too much training in special substantive subjects in law? If it is the principal function of the law school to train people to think like lawyers, and this is generally accomplished with the substantive courses in the first one and a half to two years, why shouldn't we eliminate some substantive law courses from the last part of the undergraduate lawyer's diet? While some of these substantive law courses may be considered relevant to the areas of office counseling or teaching, areas in which some law students may already be certain they will specialize, many elective courses relate to specialties in which students may or may not get involved. A general training in law should enable lawyers to cope with problems in these areas, although perhaps with less than total proficiency. If the lawyer is genuinely interested in these specialized fields, perhaps it would be better for him to study these in graduate school either immediately after law school or after a few years of practice, when his judgment about what specialties of the law really interest him has matured.<sup>41</sup>

By dropping some of the more specialized substantive law courses from the law school curriculum, we would accomplish

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40. See note 28 *supra*.

41. One may question how likely it is that, once out of law school, a lawyer will actually have the time, the financial wherewithal, or the inclination to go back to school for graduate work. The answer probably is that if the courses are *essential*, the lawyer will arrange to get them if they are offered. He will look for short, intensive summer courses at a time when there is less pressure on his practice or business, or night classes spread over time. Consider, for example, the Harvard Law School's Program of Instruction for lawyers, which has now become an annual two-week summer program for some three hundred practicing lawyers.

two things: (1) We would prevent the fledgling lawyer from overloading himself with specialized courses which neither add to his general legal reasoning ability nor actually prove useful to him in later practice, and (2) we would make room in the curriculum for the additional skill courses which all lawyers need.

It must be frankly recognized that, if we drop substantive law courses in some of the specialties and insert in the curriculum courses which teach the more generalized skills vitally needed by all lawyers, much greater expense will be involved. Clinical training necessarily requires a much higher instructor-to-pupil ratio: greater expenses and materials may also prove necessary. For reasons of expense alone, some law schools will be tempted to stay with the traditional curriculum consisting of large classes with instruction delivered by lecture. This temptation must be resisted, however, because many of the skills essential to a competent lawyer simply cannot be taught in this fashion.

#### V. THE LAW SCHOOL AS PART OF A CONTINUUM OF LEGAL EDUCATION

We are accustomed to thinking of legal education as something which takes place in a finite period of three years. We think in terms of the finite moment in which we are admitted to the bar and become licensed to practice. This is not the view we should take of a learned profession. That reality is brought into sharp relief when we begin to ponder at what point in time and by whom absolutely necessary skills should be taught in the overall education of an individual who is licensed and continues to practice law.

Viewing legal education as a continuum, I suggest it is the duty of the law school to teach those skills which are of peculiar importance to lawyers and which can best be taught in the law school, even if the required style of teaching differs substantially from the traditional mode. However, many of the skills highly important to lawyers, particularly those which are useful in many walks of life, should be taught prior to law school. The law school should press for and insist on the acquisition of those skills before the student enters law school and should not hesitate to compel students deficient in those basic skills to take remedial training elsewhere before continuing with a law school education.

To make room for teaching of the practical skills recognized



as important to the lawyer, to which insufficient attention is now given in law school, we should drop from the regular three-year law school curriculum those substantive courses which are important to the law practitioner only if he becomes a specialist in a particular field. Those courses should be reserved for postgraduate study either in a regular law school setting or in a continuing legal education program in the summer or outside of regular court and office hours.

In conclusion, I think two options should be carefully considered: (1) The adoption of two tiers of legal education (*i.e.*, five years for those who want the intellectual discipline and substantive knowledge of law but who are aiming for a career requiring somewhat limited application of this legal training, or seven years for those intent upon the most complete utilization of all obtainable legal knowledge and skills), and (2) the refocusing and restructuring of the present three-year law school curriculum (particularly in the third year). Adoption of either option would make the process of teaching legal knowledge and skills more coherent in purpose and less confining in principle.<sup>42</sup>

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42. A more purposefully structured law school would help straighten out some matters *ab initio* by producing more reasoned and intelligent decisions by students about whether to go to law school and for what purposes. When students have worked out their reasons for attending law school in advance, they can make their legal education a more relevant preparation for the full spectrum of post-law-school careers, rather than what it has too often become—a three-year sentence to boredom, later discarded into the oblivion of past hardships endured!