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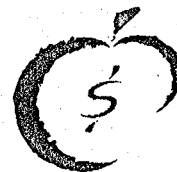
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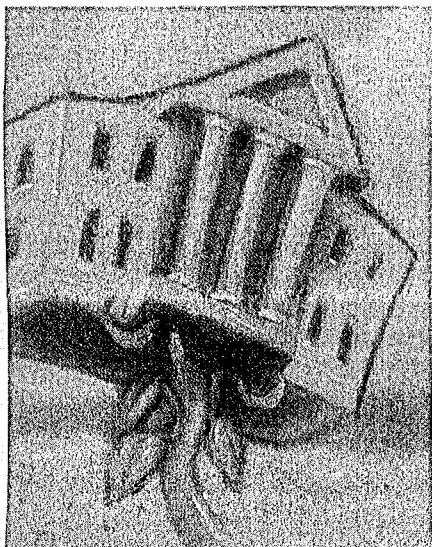
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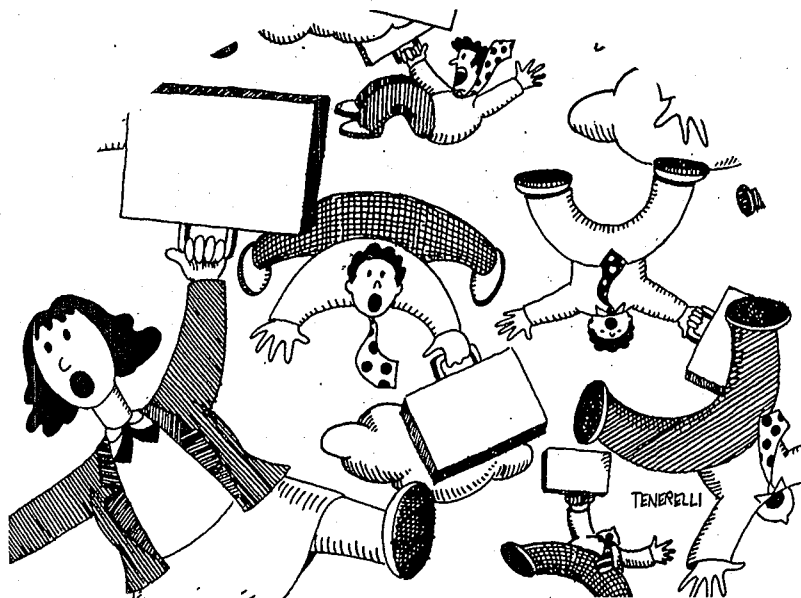
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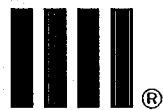
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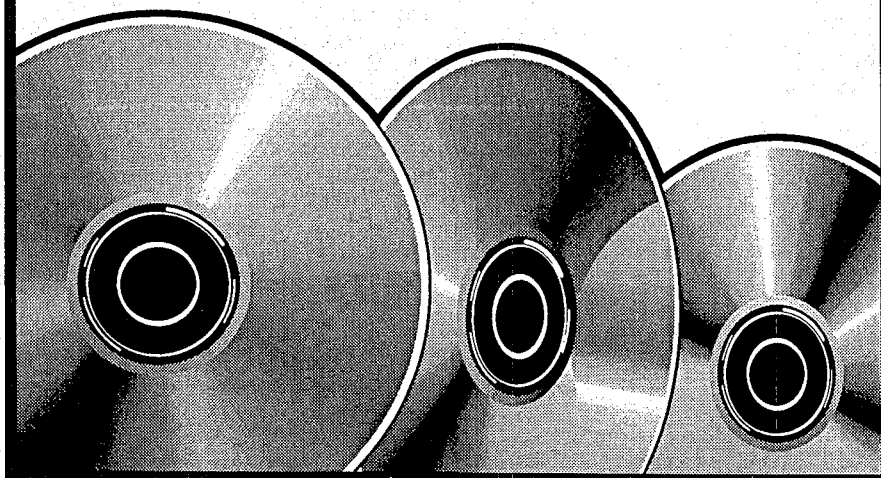
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Mr. Michael Rich is the State Solicitor. He is a past President of the Delaware State Bar Association and has previously contributed articles the *The Delaware Lawyer*. He has been a member of the Board of Bar Examiners of the Delaware Supreme Court since 1987 and currently serves as Chair of the Board.



Anthony J. Santoro. Prior to assuming the Presidency of Roger Williams University in 1993, Anthony J. Santoro was founding dean of the Roger Williams University School of Law. He is a graduate of Boston College, Chestnut Hill, MA, and the Georgetown University Law Center, Washington, D.C.



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Steven Lamb practices with the Wilmington firm of Lamb & Bouchard. He received his undergraduate degree in 1971 from the University of Pennsylvania (cum laude) and his law degree in 1975 from Georgetown University Law Center. Mr. Lamb had served as a Member of the Council of the Corporation Law Section (1985-1991) and as a Member-at-Large of the Executive Committee (1994-1995) of the Delaware State Bar Association.

EDITOR'S NOTES

FROM THE EDITOR

BY LAWRENCE S. DREXLER

We would like to extend our best wishes for a continued speedy recovery to Arthur Frakt, Dean of Widener Law School, who was to be a contributor to this issue. Several weeks before our deadline, Dean Frakt underwent emergency surgery which sidelined him for the summer. Similarly, we thank Professor Louise Hill, also of Widener, for ably pinch hitting under the adverse circumstance of very short deadline in which to provide the article. This issue also marks the return of two friends of the magazine, Robert D'Agostino and Anthony Santoro. Bob D'Agostino was involved in this magazine's earliest days while he was a professor at Delaware Law School. Similarly, Tony Santoro was a valued colleague during his tenure as Dean of Widener Law School nee Delaware Law School. Tony left Widener to begin a new law school at Roger Williams University. In 1993, he became President of the University.

This issue raises a number of critical questions facing our profession. Perhaps most pressing is defining the audience served by a law school. It strikes me as elementary that law schools must view the consumer of legal services as the law school's ultimate consumer, yet Mike Rich's article is clear that law schools do not consider themselves guardians of the profession. It is short sighted and harmful for law schools to view its targeted audience as the law student.

Our profession can no longer tolerate the trade school mentality that a law school's job is to prepare a student for the bar exam with the success of a law school being measured by bar passage rates. Law schools should be measured, not by student satisfaction but rather in terms of whether its graduates are well prepared to serve clients. Universities must abandon the view of law schools as cash cows and make changes necessary to allow greater individual attention which will likely result in a smaller number of better prepared lawyers. The market place is not and cannot be the ultimate arbiter of a law school's success. First, the market place offers no protection to the first set of clients; second, the nature of our profession does not give the client enough information to know whether services were well performed.

A legal education will always be a valuable asset but a legal education does not necessarily translate into competent lawyering. Law schools must recognize that in training lawyers the ultimate consumer is the public and that the schools have a duty to the public to produce well educated, well trained individuals to join the legal profession.

TRADING PLACES

by Steve Lamb

Recently I was reading a book by Milan Kundera, called *Immortality* (Harper Collins, 1990), in which he describes two methods people use to cultivate the uniqueness of the self: the method of addition and the method of subtraction. Some people, "in order to make [the self] more visible, perceivable, seizable, sizable, ...keep[] adding to it more and more attributes" and identify with these attributes even at "the risk that the essence of [the self] may be buried." Others subtract "everything

that is exterior or borrowed, in order to come closer to [their self's] sheer essence." Of course, as he points out, the danger of the method of subtraction is the risk "that zero lurks at the bottom."

It struck me that Kundera's observations also applied to lawyers, to lawyers in large firms and, in particular, to this lawyer. I recently underwent a radical "subtraction" process. By the start of 1995, I had been at the bar twenty years, fourteen of them with the Wilmington office of Skadden, Arps, Slate Meagher &



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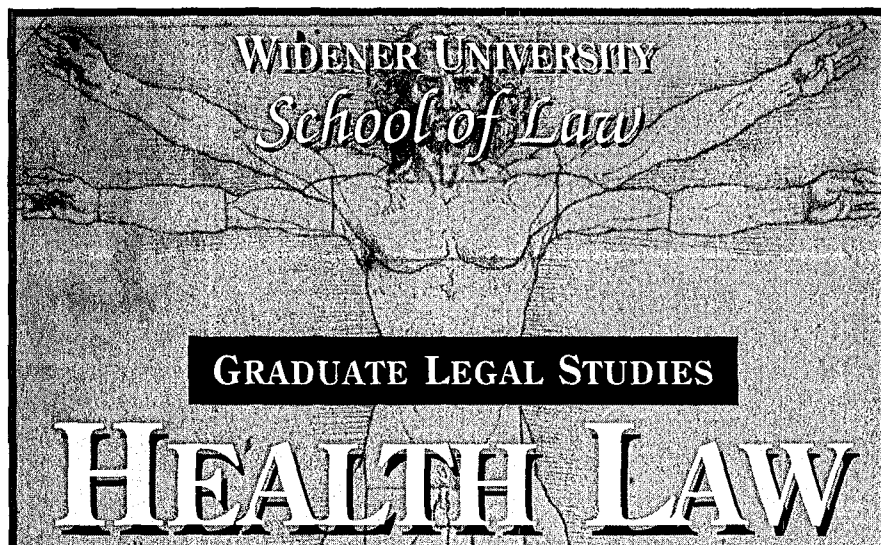
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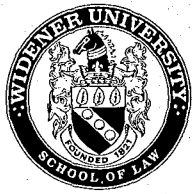
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Flom. I was well along the road of "adding" to my professional self (and identifying with or being identified by others with) layer upon layer of what I did and where I did it. I am not complaining. This was largely a rewarding process. I was pleased to belong to such a professionally distinguished group and proud of the work done by the firm. Nevertheless, in January 1995, I came to the conclusion that some "subtraction" was in order. I decided to withdraw from Skadden and strike out on my own, even at the risk that "zero lurk(ed) at the bottom."

Why would I leave a situation that others are working day and night for years

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hoping to achieve? The answer lies in what I suspect is a common paradox. I eagerly joined Skadden, found the work stimulating and benefited by the association. At the same time, I never wanted to belong to an organization as large as Skadden became and left when I managed to convince myself and my wife, Joyce, that we no longer needed to rely on the professional security the large organization provided.

Law school was supposed to be a way for me to avoid becoming a "company man." As professionals, I envisioned that lawyers' lives were not ruled by CEO's or command-style management. Moreover, I was warned-off big New York law firms by my father's Depression-era perception of them as inhospitable places where one had little chance of gaining a partnership

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without business or social attributes more often acquired by birth than education and hard work. Nevertheless, after finishing law school and a judicial clerkship, the urge to be engaged in a more interesting or varied practice gradually overcame my objections to a "big city" practice, if not to the "big city" itself. In retrospect, my move to Wilmington (from Washington where I worked for the SEC) seemed predestined by the need to compromise the urge for an interesting practice with my inherited reluctance to live in or commute daily to New York. Where better than Wilmington to do this in 1980 and since?

Skadden's bigness (outside of Wilmington where I was only the eighth lawyer) seemed merely necessary to generate varied and challenging assignments. The people I met at the firm in Wilmington (and New York) were energized and interesting. The fact that Skadden was regarded as a foreign presence by the Delaware bar (and by the Establishment in New York) was more of an attraction to me than a turn off; after all, I wasn't from Delaware (or the Establishment).

Nevertheless, as the years passed by, a growing desire to revert to type, to "subtract" all the attributes that go with being part of an increasingly large, complex and established organization finally overcame the by-then well-ingrained sense of professional identity that a large law firm provides. Of course, the process of deciding whether or not to leave created significant anxiety. Would I be able to generate business and, if so, what kind. Could the small office I had in mind perform necessary tasks without the support of a large organization? How would judges and other Lawyers react to me as a solo or nearly solo practitioner? As Kundera might put it, if I subtracted so much of my professional self would there be any professional self left?

As you might expect from the fact that I agreed to write this article, the answers to these questions have been reassuring. Uniformly, judges and other lawyers (beginning with my partners at Skadden) have been helpful and supportive. Work has come from a number of sources, some I was counting on, some wholly unexpected and gratifying. Other lawyers rarely referred business to me at Skadden, for what I assumed were sensible competitive concerns. Out on my own, those concerns seemed to fall away. For better or worse, I have "subtracted" the attribute



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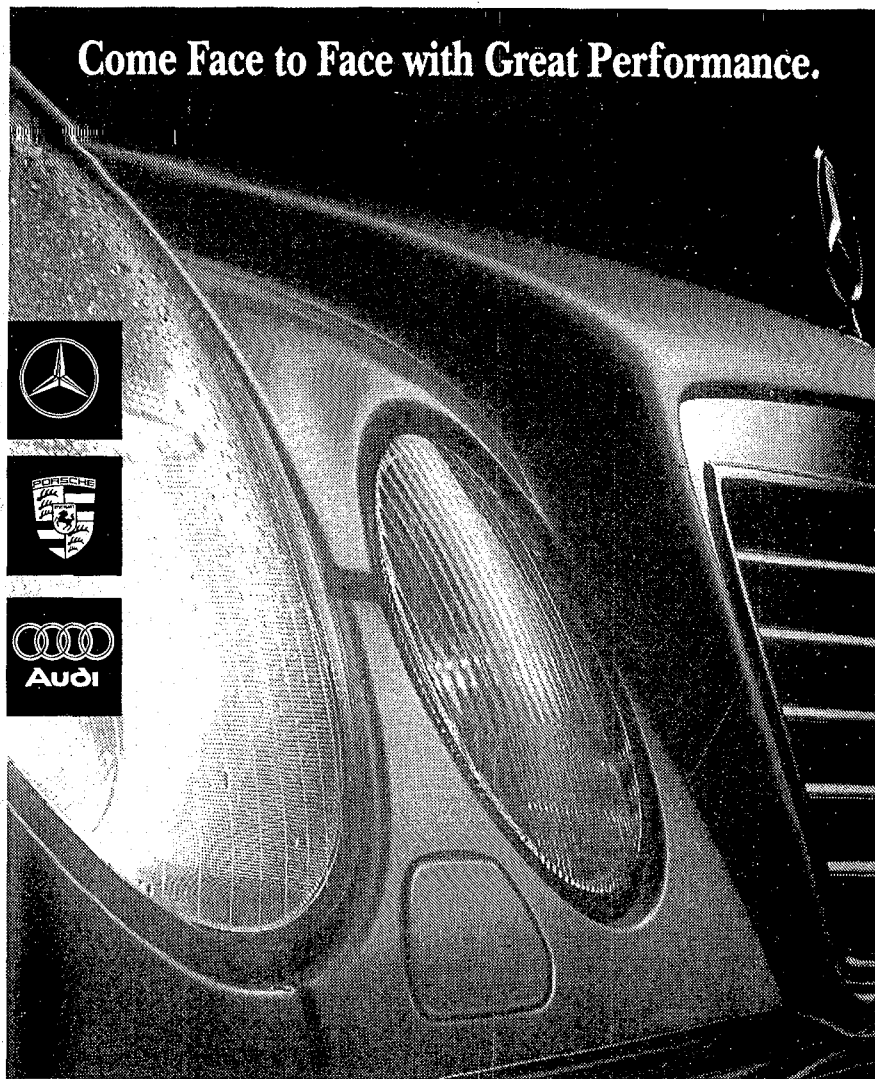
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of "big firm" lawyer. Others no longer need to identify with that attribute when they relate to me. On the whole, I find the level of interaction more direct and enjoyable.

With the indispensable help of Joel Friedlander, a young lawyer at Skadden who had the nerve to join me, and Anne Krames, our office manager, bookkeeper, and lone support staff person, we managed to do the work and keep track of what we are doing. We all experienced substantial "additions" to our job descriptions, as anyone involved in a small firm practice could have told us. We now know a lot more about leasing, insurance, computers, bookkeeping, purchasing, employee benefits, temporary help and business planning than ever before. Despite all of these nonlegal job requirements, we managed in our first year to work on a number of interesting and challenging matters. In addition to corporate and commercial litigation in the Court of Chancery and Superior Court, we represented special board committees of a Wilmington-based public utility and a New York-based closed end mutual fund.

A dramatic "addition" occurred on May 1, 1996, when I was lucky enough to have Andy Bouchard join me in forming the new firm of Lamb & Bouchard, P.A. This is an exciting and challenging time for all of us, working hard to get another new venture off the ground in new offices. Like me, Andy is a long time Skadden litigator. He is now undergoing the twin processes of "addition" and "subtraction" which I experienced last year. I am optimistic that we will succeed in establishing our new firm and, with it, new attributes of identity for all of us. For now, the daily challenges are rewarding and the risk of finding that "zero lurks at the bottom" is fast receding well into the background. ♦



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Michael J. Rich

GATEKEEPING FOR THE PROFESSION: IT'S NOT JUST FOR BAR EXAMINERS ANYMORE

Twenty-five years ago there were approximately five hundred practicing lawyers in the State of Delaware. There are now more than twenty-three hundred lawyers admitted to practice. Two hundred thirty people, a record number, have applied to take the 1996 Delaware Bar Examination. Legitimate questions have been raised which suggest that there has been an attenuation in the quality of the persons who have been admitted to practice. We should now ask whether the respective roles of law schools and boards of bar examiners have changed insofar as the profession and the public are concerned in assessing the quality of the lawyers who are admitted to practice?

The Delaware Board of Bar Examiners ("Board") is responsible for assuring that every applicant satisfies three prerequisites for admission. Each applicant must: (1) graduate from an ABA accredited law school, (2) pass the written bar examination and (3) establish that he or she meets the character and fitness requirements for admission to the Bar.

This article focuses on the character and fitness examination for admission to the bar, and in particular the tension between law schools and bar examiners in the evaluation of an applicant's character and fitness for admission to the bar as opposed to enrollment in and attendance at law school. All states require that bar applicants meet a character and fitness standard for admission. From time to time there are identifiable trends as to what issues are of particular concern to bar examiners. In the 1970's, drug use or arrests for civil protest activities were significant issues. During the last ten years, drug issues took on a different context focusing on the effect of habitual substance abuse. Financial responsibility has become more important as a greater number of applicants carry significant consumer and educational debt upon graduation. One consistent character

and fitness issue has been an applicant's honesty and candor in completing the bar application and responding to the Board's character and fitness inquiry. The applicant's candor in providing information to the Board assumes a higher level of importance when the issues under examination are subjective as compared to whether an act was strictly legal or illegal.

In assessing a candidate's application, the Board compares the applicant's responses to background questions on the bar application with similar questions on the candidate's law school application. A failure to disclose prior convictions, disciplinary proceedings, suspensions and the like on a law school application triggers a very close Board review after graduation, particularly if the applicant is less than candid in the explanation of those activities on the bar application.

The failure to fully or truthfully answer questions on the law school application has created a very significant area of disagreement between bar examiners and law schools. It raises significant questions about the law school's role in first granting admission to such a student and second whether the school should discipline or dismiss a student where, prior to graduation, he or she is found to have falsified the law school application. The law school's reluctance to consider disciplinary measures because of such misrepresentations or omissions raises the question of whether the law school is or should be a gatekeeper for the profession. Further, the law school's failure to respond to such issues can create significant difficulties, both financial and legal for an applicant who is later denied an opportunity to sit for an examination for reasons of character and fitness.

The following illustrations exemplify the dichotomy between law schools and bar examiners and the dilemma they face. Pat Smith, while in college, is arrested for a first offense driving under the influence charge. Pat accepts first offender status and no "conviction" is entered on Pat's record; Les Jones, while in high school pled guilty to a misdemeanor

shoplifting charge and was required to make restitution and perform community service; Jan Roe was placed on academic probation for one semester while an undergraduate because of a low grade point average. Jan subsequently graduated from college.

Virtually all law schools require a yes or a no response to the following questions: Have you ever been placed on probation, disciplined, suspended, or dismissed from any learning institution for any reason? Have you ever been convicted of any crime other than a minor traffic violation?

Pat, Les and Jan all answered the same questions at their respective law schools in the negative. Each made a timely application to take the Delaware Bar Exam. In reviewing the instructions contained in the application, they realized that Delaware places a significant emphasis on a full, truthful and candid response to all questions. In this case, all three applicants make a full disclosure to the Board of their criminal and academic background as required by the Delaware application. As also required, they provided copies of their law school application to the Board. Once the Board establishes that there is a conflict between the two applications, the Board questions (1) why the applicant failed to honestly answer the questions posed on the law school application, (2) whether and when the applicant disclosed the discrepancy to the law school and (3) whether and what action was taken by the law school once the applicant discloses (or previously disclosed) that the character and fitness responses on the application were inaccurate.

Upon discovery of inconsistent responses or an omission, the Board member reviewing the application immediately contacts the law school to determine what the school records reflect with respect to the discrepancy and to determine what disciplinary action the law school intends to take as a result of information indicating that the applicant had misrepresented his or her background in the law school application. The sad commentary is that most law schools have traditionally dismissed the bar examiner's inquiry with a curt reply that the misrepresentation would not have mattered and that the law school will take no action as a result of the disclosure. Even when the student makes a disclosure between matriculation and graduation, the school will generally take no action

other than a note to the student and his or her file that the student should not have failed to make the disclosure and that the failure may be the subject of a later inquiry by a board of bar examiners. The traditional reasoning has been that the goal of the law school is to provide an education and that it is solely the obligation of the respective boards of bar examiners to determine character and fitness issues for purposes for admission to the bar. (This presents an obvious conundrum in the face of pressure from the organized bar for law schools to place a greater emphasis on ethics and professionalism courses.)

Meanwhile, Pat, Les and Jan, depending on the nature of the offense and other background information, may be denied

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the opportunity to take the bar exam for character and fitness reasons after spending or incurring law school debt in the amount \$30,000 or more. They will rightly question the purpose of character and fitness questions on a law school application when they apparently have little meaning to the law school but have significant impact on the bar application.

On a positive note, some law schools are developing a greater sensitivity to the concerns raised by boards of bar examiners. In certain circumstances, although the law school may not take any action against the student, the law school, upon learning of a misrepresentation or other character and fitness issue, may admon-

ish the student that the student's failure to candidly complete the law school application is a significant problem and, even though it will not result in a disciplinary action or dismissal from the law school, it could jeopardize their bar application. It should be noted that law schools generally apply the same review standard to an incoming first-year student as they do to a third year student who only discloses a discrepancy a few weeks before graduation. If a law school refuses to take any action other than noting the post-admission disclosure, has it truly fulfilled its duty to the student and the profession?

Widener University Law School has adopted an approach while, if not entirely perfect, goes a long way toward addressing the character and fitness issues. The law school application contains a notice that any incorrect or misleading answers on the application may result in disciplinary action and may jeopardize a bar application. At orientation, the Dean specifically notifies all students that character and fitness issues are an essential element of lawyering. The Dean further recommends that any misrepresentations or errors concerning their background contained in the student's law school application could be a factor in their eventual application to the bar and that any student wishing to amend his or her application should do so promptly. Depending on the severity of the misrepresentation, Widener may or may not take disciplinary action but at a minimum, the student is advised and counseled concerning the incident and a record is made which may then reduce the discomfort the student will eventually face in a character and fitness examination. When a student begins the third year of law school, he or she is required to complete a character and fitness update which then becomes a part of their record.

There are two salutary effects which result from Widener's effort: First, students are sensitized very early to the practical problems of character and fitness as well as to the importance of truth and candor; second, the law school is drawn into an active role in defining the character and fitness issues as they relate to law school applications and later applications to the Bar. For the student who declines to come forward, thereby taking a chance that the Board will not later discover the discrepancy, the discrepancy then rises to the level of a misrepresentation setting in motion an even more intense inquiry because the student failed to come forward upon invitation

by the law school. The Board's inquiry will focus on the underlying conduct and to a greater degree the reasons for the student's refusal to disclose the conduct.

No Board of Bar Examiners should ever cede its authority to ultimately determine the character and fitness of applicants to take the bar. Law schools, whose faculties are members of Bars, should take a more holistic approach and consider that law schools have responsibilities similar to practicing lawyers to assure not merely that students can mechanically learn the law, but that they understand the ethics and morality of the law. If one of the attributes of a law school is its ability to place students in employment after graduation and if it is apparent that higher numbers of graduates are unable to find gainful employment, perhaps the time has come for law schools to consider whether they have an obligation to more closely evaluate their admission and retention policies consistent with policies generally utilized by boards of bar examiners. The states of Maine, New Hampshire and Vermont each have only one law school. The bar leaders, court representatives and law school deans in those states have formed a working consortium to review bar admission issues and critically examine the law school admission policies to consider reductions in law school class sizes to reflect the job market. They are also looking at the applicability of character and fitness issues in the law school environment. While this effort is in its early stages, it does point out that there may be a mutuality of interest between law schools and bar admission authorities.

Neither the law schools nor the bar examiners live and work in a vacuum. Character and fitness issues do not suddenly materialize upon one's application to take the bar exam. They are generally related to issues that significantly predated the application. Law schools and boards of bar examiners share an obligation to serve the public. The willingness of a law school to dismiss a student who has falsified an application or engaged in conduct that would be sanctionable if that person were admitted to a bar would go a long way toward making students realize that bar admission is a serious matter and that only the highest standards of character and fitness will be acceptable in those who seek admission to the legal profession. ♦

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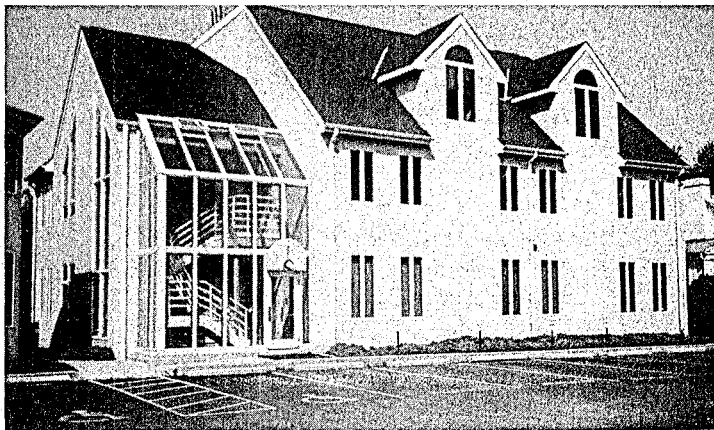


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Anthony J. Santoro

NEW LAW SCHOOLS: WHY AND WHERE

Why? Why have you started so many law schools? Having been introduced on several occasions as the Johnny Appleseed of Legal Education, dropping little seeds across America from which sprout little law schools, I am often asked that question. Rarely is the inquisitor satisfied with my answer. Then again, the inquisitor is invariably a lawyer concerned with the economics of law practice or a non-lawyer convinced that lawyers are the source of much of America's troubles.

Students, or the parents of students, who are the beneficiaries of new law schools never ask the question. They instead express appreciation for the opportunity to attend law school they or their children—an opportunity that for many would have been denied if the school were not established.

Therein lies the reason for starting law schools. While a psychologist may probe my psyche to find a more perverse reason, I want to give qualified people the opportunity to attend law school.

To those who suggest there are too many lawyers, I say there can never be too many lawyers. Whether God given or man-made, law gives birth to civilization. Law nurtures civilization. And, when law dies, civilization dies. Have we learned nothing from our past? Have we forgotten that lawyers helped write the U.S. Constitution, that lawyers were in the vanguard of Jacksonian democracy, that a lawyer eliminated the abomination of slavery, that lawyers cultivated the Industrial Revolution and that lawyers descended upon Selma to right the wrongs that then existed? We must remember that law and the respect for law must exist in the hearts and minds of the people, but when they forget, the lawyer must be there to sound the alarm.

New law schools open the doors to the legal profession. Throughout American history, certain groups, by virtue of race, poverty or strange tongue, found themselves existing in a caste from which they could not assert their rights. However well intentioned those who decry the proliferation of lawyers, they forget that education, legal education in particular, is the means by which people climb out of the caste into which they were

born. To whom should we deny access to legal education?

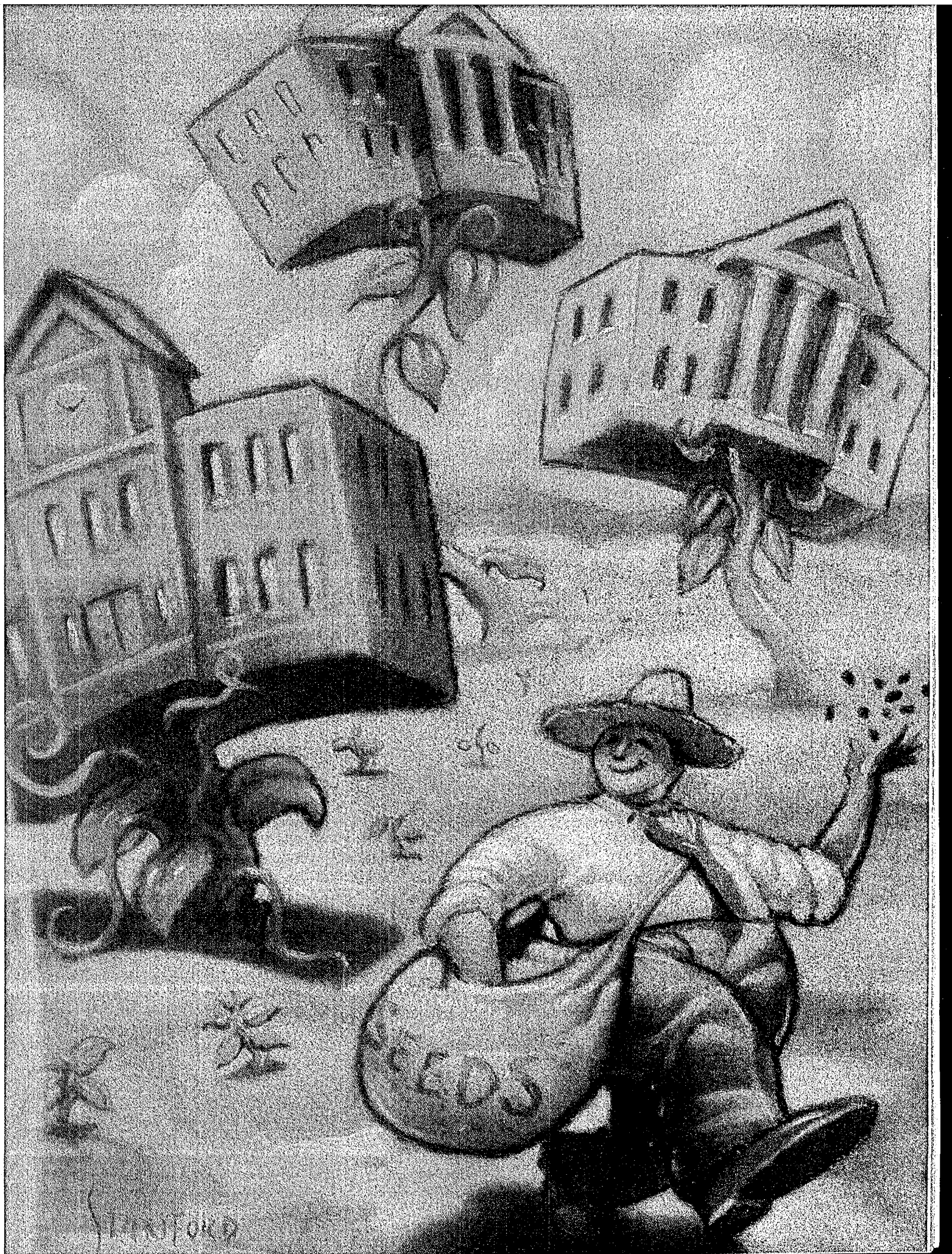
Law schools are the gate keepers of the profession. If these gates are slammed shut, they will not be shut against the wealthy and the privileged. They will be shut against women, minorities, immigrants, the poor and others struggling for their share of the American dream, and the legal profession will have reversed the proud course it has sailed for half a century. Unlike other great callings, the legal profession has embraced new members, transforming itself from a highly regulated, elite, white male dominated profession to one as diverse as American society, attempting to serve the needs of all the members of that society.

This is not to suggest that law school seeds should be planted on every street corner. Quite the opposite is true. The rationale for establishing a law school is the need to keep access to the profession open, but that need should go beyond a mere showing that a newly established law school can attract qualified students. Neither the legal profession nor society gain if the sole reason for establishing a law school is its apparent ability to divert students away from more established law schools. If this were the sole reason for establishing a law school, I would call into question the appropriateness of allocating scarce resources toward the establishment of that law school and away from other compelling academic or societal needs.

In order for a new law school to be credible and viable, it must not only attract students, but must also fulfill a need for the community on one or more of three levels—access to legal education, availability of legal services to the general population and the availability of resources to enhance the quality of legal services currently being delivered. The law school should be established. If not, the law school should not be established.

An institution investigating the establishment of a new law school must first define its primary service area. In the context of a new law school, the primary service area is the area encompassing the population for whom the proposed law school is closer than any existing law school.

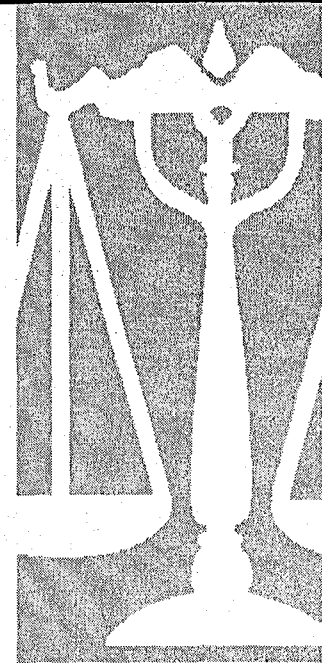
Defining a service area for a proposed law school may be somewhat misleading because it tends to suggest an illusionary precision to recruiting students which. Law schools do not attract students from within one state or one region. Many students disregard distance and state borders in choosing law schools. Defining a service area, especially one which does not intrude upon the natural recruiting area of an existing law school, is a log-



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ical starting point from which to analyze need and the availability of students.

The most important factor in determining whether to establish a law school is that of reasonable access to legal education for the population to be served. Reasonableness of access means more than convenience.

There are two classes of people for whom access to legal education must be considered, college graduates with little or no family or economic constraints limiting their mobility ("transients") and those who are so limited ("commuter"). The commuter class may generally be subdivided into two groups; candidates with no established families or jobs who could attend law school full-time if they had the economic resources to relocate and candidates with established families or jobs who can attend law school only on a part-time basis. This second group is effectively precluded from attending a law school unless they reside within a law school's primary service area.

In the context of the service area defined for any proposed law school, it is unlikely that the new school will stimulate many more than the normal number of law school applicants from among the transient class. Application and enrollment patterns across the country are fairly well established, and the current number of law schools serve the needs of the class fairly well. By hypothesis, cost is not an insurmountable obstacle to attending law school outside the defined service area. For this group, a law school within the service area would be convenient and less expensive, and many would attend, but the lack of one does not impede their ability to obtain a legal education.

This is not true of the commuter class. This class needs a law school within commuting distance. The members of the class cannot relocate or commute long distances without serious dislocation to their families or their pocketbook. If there exists within the defined service area a substantial population from this class, the law school should be established. If not, the law school should not be established.

An important, though less quantifiable, second factor relates to the welfare of the profession and the quality of legal services. As the late Chief Justice Daniel L. Herrmann once noted, a law school, through its faculty and students, can form a partnership with the bench and bar to improve the administration of justice through law revision commissions, law review comment, continuing legal

education, pro bono public programs and other such activities.

The rationale for establishment of a law school within a specific jurisdiction was summarized in a report prepared earlier this decade by the Council of the American Bar Association Section of Legal Education and Admission to the Bar. In relevant part it is stated: "Law schools have been, and should continue to be, the principal initiators of research into problems relating to law and the justice system." It stated further, "Only through constant inquiry into the factual and theoretical bases for the rules and practices of the system is it possible to revitalize and reform the justice system." Law schools are the custodians of the research process. A jurisdiction which lacks a law school lacks an essential resource for effective law reform and for continuing legal education. While the faculty of law schools and adjoining jurisdictions may try to respond to the jurisdiction's needs, they cannot do so without intimate and continuous collaboration with that jurisdiction's bench and bar.

Related to the issue of the quality of legal services is the matter of lawyer availability to the general public. A law school is needed where there are indications that the legal service needs of all segments of society are not being adequately addressed by the bar.

In the case of Roger Williams University School of Law, America's newest addition to the list of American Bar Association approved law schools, we knew intuitively that the opening of the law school would divert students away from the Boston area law schools, but deemed that such a reason was an inadequate basis for establishing the law school. The decision to open the law school came only upon the finding that Rhode Island produced fewer lawyers per population than its neighboring states and that women and second generation Americans in particular were under represented among Rhode Island lawyers. Bolstering the decision was Chief Justice Joseph R. Weisberger's opinion that "a law school would enhance the legal culture in Rhode Island and provide opportunities for research and continuing legal education which are now not available in this state."

The life of the law as Justice Holmes noted is not logic, it is experience. We must take care that the law is developed upon the experiences of all Americans. That can be done only if all Americans are provided reasonable access to the profession. ♦

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Louis Michael Seidman

THE GEORGETOWN EXPERIMENT

Over the past five years, Georgetown University Law Center has developed a bold and innovative first year curriculum that has changed the way students think about the law. Initially funded by a large grant from the Department of Education, the curriculum is now administered to one section (approximately 125 students) per year. The new curriculum retains the core of the traditional first year. It conveys the knowledge that every lawyer must know to practice law and to participate in a common legal culture. Yet it does so in a different setting and with a different emphasis that, we believe, better equips students to work in a dramatically changed legal environment.

As with any experiment, there have been bumps along the way, and the outcome has not always been free from doubt. When the program began, those of us who designed it put up a brave and optimistic front. Nonetheless, there were more than a few sleepless nights spent wondering if our students would demand a refund of their tuition, fail the bar exam in huge numbers, or end up unable to find work because hide-bound law firms were committed to the old ways. We figuratively held their breath as students moved into their upper level courses, accepted summer jobs, graduated, took bar exams, and began the practice of law.

Much to our relief, we are now prepared to say that the experiment has proved an important success. Graduates of the program scored at least as well as students from traditional sections in the upper years and often dominated moot court competitions, journals, and student organizations. They are now in clerkships, law firms, government jobs, and public interest positions across the country. They tell us that their experience in the experimental section has given them a far better understanding of the law and of how to practice it successfully.

The Need for Reform

Although the practice of law has been transformed over the past several generations, the first year curriculum has remained remarkably resistant to change. Dominated by common law subjects such

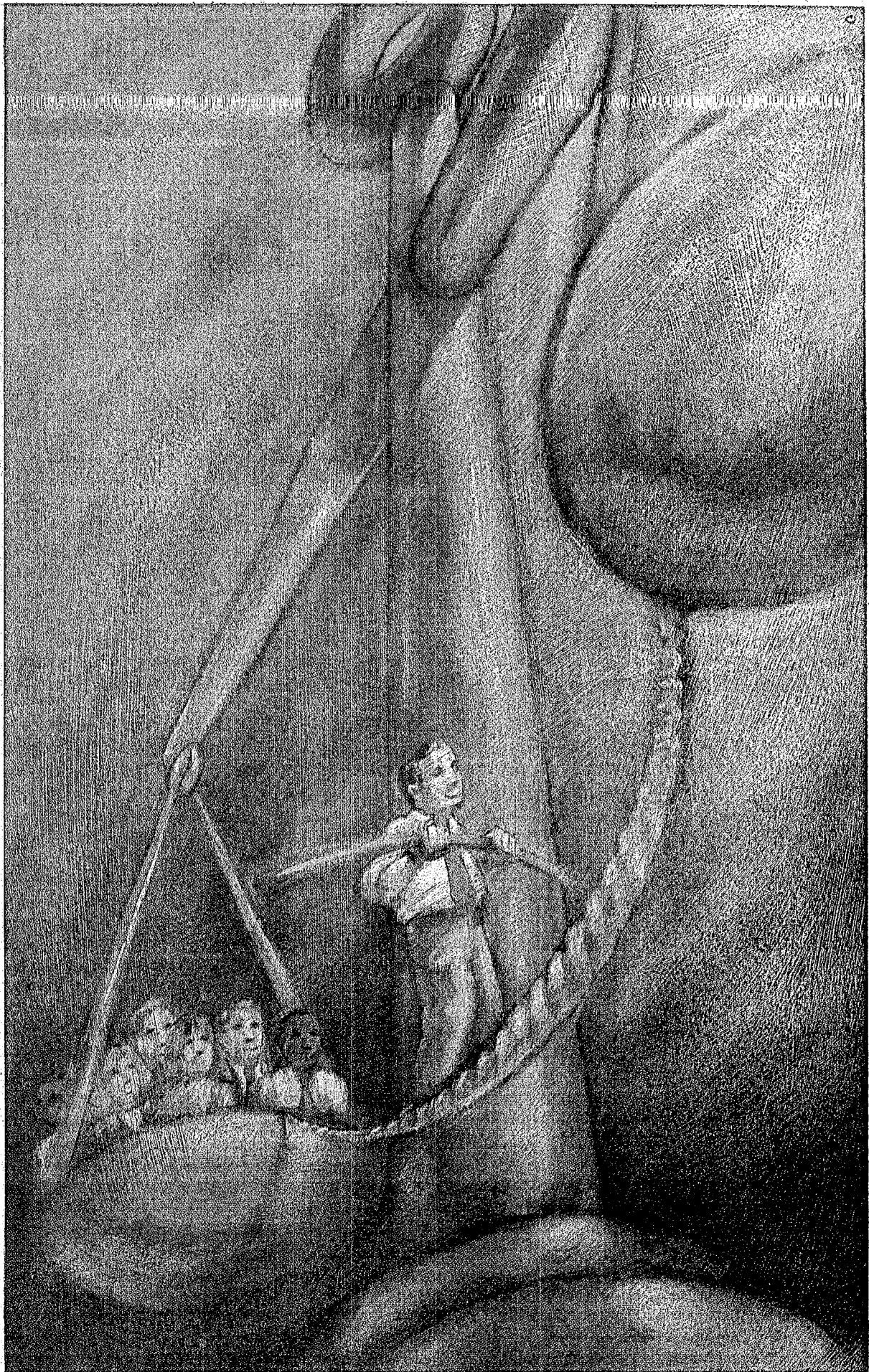
as property, torts, and contracts, the teaching of first year courses has been characterized by use of the "case method" whereby students concentrate almost exclusively on appellate cases with scant attention to statutory or secondary material, by little effort to integrate the subject matter of separate and sharply defined courses, and by neglect of any theoretical overview of the lawyering process.

At the time this curriculum was developed, it represented an important advance over what had come before. It served to familiarize students with nineteenth century categories of thought and to prepare them for the kind of local, client-centered practice that they were likely to encounter. But today, for many law students, the curriculum is clearly anachronistic.

First, the emergence of the regulatory state and of pervasive statutory control in most common law areas has transformed the nature of lawyering for our students. A curriculum dominated by common law subjects and by a model of individual representation might prepare a student to enter a store-front general practice in a rural community. It fails to prepare our students for the world they will in fact enter, where legal problems are national and international in scope, where there is often no individual client who is being represented, and where Congress or a regulatory agency is often a more important player than a court. As a result of this inadequate training, many lawyers fail to provide their clients with a legal framework that facilitates efficient transactions in a multinational setting and instead impede such transactions because of an insistence on seeing them through the lens of outmoded doctrine.

Second, law students need to understand that the old doctrinal boundaries between torts, contracts, and property have broken down and that common law rules in all three areas present common problems of incentives, distribution, and social control. They need a curriculum that is integrated and that emphasizes the interconnections between and common theoretical underpinnings of various legal doctrines and arguments across traditional subject matter lines.

Third, students need to think in a more self-conscious way about the lawyering process. Many students enter law school ignorant of the realities of legal practice. Yet the standard first year curriculum does virtually nothing to educate them about the nature of their future work. Early in their academic career,



students need to be better acquainted with what lawyers actually do. They need to think systematically about the ethical implications of their work, about the appropriate role for lawyers in our society, and about the limits of that role.

Finally, other disciplines — especially economics, philosophy, history, and political science — have had important influences on how modern lawyers think about law. Yet the standard curriculum does little to acquaint students with the intersections between these disciplines and the law or with the skills in statistical and quantitative analysis often essential to a sophisticated practice of law.

Despite widespread dissatisfaction with the current curriculum, little has been done to remedy its defects. Reforms have fallen into two categories: First, there have been efforts at piecemeal change. For example, some schools have attempted to teach torts and contracts in a single, unified course. Others have introduced a single new course, in "government regulation" or "jurisprudence," for example into the first year. Still other institutions, including Georgetown, have attempted to "bridge" programs. For a few weeks each year, regular classes are suspended, and students address problems that transcend normal course divisions.

These piecemeal efforts have met with mixed success. The "bridge" programs have generally been popular and intellectually exciting. But because they are concentrated within a week or two, they often have had little impact on the rest of the first year. Year long experimental courses, on the other hand, while occasionally contributing insights, are often seen by the students as token gestures or frills that are less significant than the "real" law courses.

Second, there have been a few efforts at radical restructuring. For the most part, these efforts have involved an increased emphasis on clinical teaching. Although an important advance in legal pedagogy, clinics in the first year have proved costly and have only marginally addressed the fundamental defects noted above. In a few cases, where proposals for nonclinical restructuring have been proposed, they have been defeated by opposition from faculty members with a vested interest in the status quo and by insufficient attention to the capabilities and needs of students subjected to the new curriculum. In addition, a serious effort at wholesale

reform requires a major commitment of time on the part of participating faculty members and a willingness on the part of the institution to allocate very considerable resources to the project. It has been repeatedly demonstrated that without this sort of commitment, even the most original and thoughtful reforms are doomed to failure.

Georgetown's Response

Georgetown's experimental first year project was intended to address these problems that have caused the curriculum to ossify even as dissatisfaction with it has grown. The reform involved comprehensive change rather than marginal tinkering. As described in more detail below, first-year study was regrouped under rubrics more in keeping with modern

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legal thought. Of course, we continue to teach those portions of standard doctrine that remain useful and relevant. Students learn about the necessary requirements for formation of a contract and about what it means to hold a fee simple. We remain acutely aware of the need to provide students with a common core of understanding before they take advanced courses in the second and third years.

However, the doctrine is taught in a more coherent and theoretically self-conscious fashion. Insights from other disciplines are brought to bear on legal problems in a systematic fashion. Assigned material goes beyond standard appellate cases so as to make certain that students have basic literacy in the theoretical works that explain and animate current legal discourse. At the same time, students are made more conscious of, and

given more experience with, the day-to-day work of lawyering.

We have also made a serious effort to integrate the material in the curriculum. For the first year of the experiment, every faculty member participating in the program regularly attended classes offered by every other faculty member. Although we no longer regularly attend each others classes, we continue to meet periodically to discuss ways in which different courses can "talk" to each other. We have tried hard to break down the barriers that separate the different courses and present the students with a unified picture of the law as a whole.

Our reforms have not only been comprehensive; they have also been experimental. The experimental nature of the program has had a double impact. First, we successfully avoided the risk aversion and strangulation by vested interests that have stymied other reform efforts. Only one section of the first year participated in the experiment. The section was filled by a process of self-selection. Each year, approximately half of the entering student-body has expressed a desire to participate in the experiment, and we, in turn, have randomly chosen about half of these volunteers. Moreover, Georgetown initially approved the experiment for only five years, with a review to be conducted after three years. Because the change affected only one section of volunteers, and then for only a limited period, the faculty has felt more comfortable taking risks that would have been unacceptable if the entire institution were permanently committed to the new curriculum. Only now, after a successful run of five years, will the faculty as a whole be asked to retain the experiment on an indefinite basis.

Second, the experimental nature of the program has produced an excitement and interest that has, itself, contributed to its success. Students feel that they are on the cutting-edge of legal education — that what they are doing is new and important. Faculty have been motivated to rethink fundamental questions of pedagogy and substance. Students and faculty together have reflected in a self-conscious fashion on what is occurring in the class room and how to make it better. After each of the first two years of the experiment, we conducted symposia on the program at which students voiced their views and outside experts evaluated what we had accomplished. In addition,

we had the assistance of a Practitioner's Advisory Committee, whose members included some of the most distinguished lawyers in the city, and who provided us with valuable advise as we developed the curriculum. Over the course of the last five years, we have made many modifications in the program in response to detailed student feedback, and we plan to remain flexible and open to change for as long as the curriculum is offered.

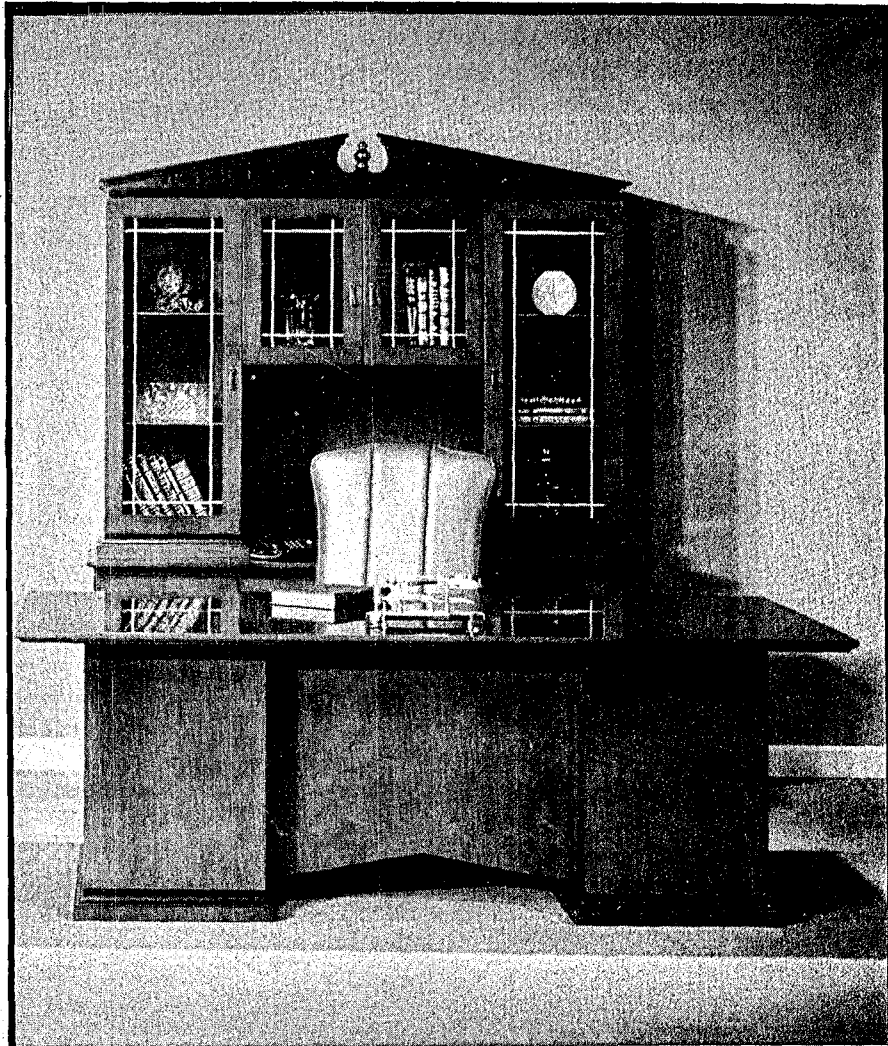
The Curriculum

What, specifically, does the new curriculum teach? The program consists of eight new courses with fancy new titles. Although much of the material is new and all of it has been reorganized, much is also familiar. Even where we teach the same material, however, we have tried to place that material in a more illuminating and exciting context. A brief description of each new course follows.

1. The First Year Seminar. At the core of the new curriculum are student meetings once per week in small group sessions with a single faculty. The purpose of the meetings is to provide a theoretical overview of the main doctrinal questions raised in each of the other courses. Students are familiarized with the main strands in American legal thought, including legal formalism, American legal realism, legal process theory, law and economics, and critical theory.

2. Legal Practice. This course introduces students to the analytical and rhetorical skills used by lawyers in practice. Students receive training in legal research, planning, legal writing, and oral argument. The course also examines how economic and technological forces have changed the nature of contemporary law practice.

3. Bargain, Exchange, and Liability. An amalgam of the traditional torts and contracts offerings, this course examines the ways in which the law can regulate relationships between individuals. The first half of the course examines the legal doctrines applicable to the relationships between strangers. The second half examines the greater range of instruments for regulation that are available when the parties know one another and thus are in posi-




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tion to define their relationship by contract. The unifying theme of the course is an examination of the ways in which these two areas intersect and interpenetrate. We ask, for example, whether the law should regulate the relationships between strangers by imagining what they would have agreed to if they had had a chance to negotiate between themselves to define their own relationship. Conversely, we ask whether the law should impose constraints upon contracting parties that deprive them of full negotiating freedom, and, if so, to what end?

4. Process. This course introduces the students to the procedure followed in civil lawsuits, criminal prosecutions, and administrative proceedings, with an emphasis on civil lawsuits. Students follow the evolution of procedural doctrine over time and focus on its relationship to jurisprudential developments, such as formalism, realism, and legal process. Particular atten-

tion is paid to the values and structures of procedure in our society.

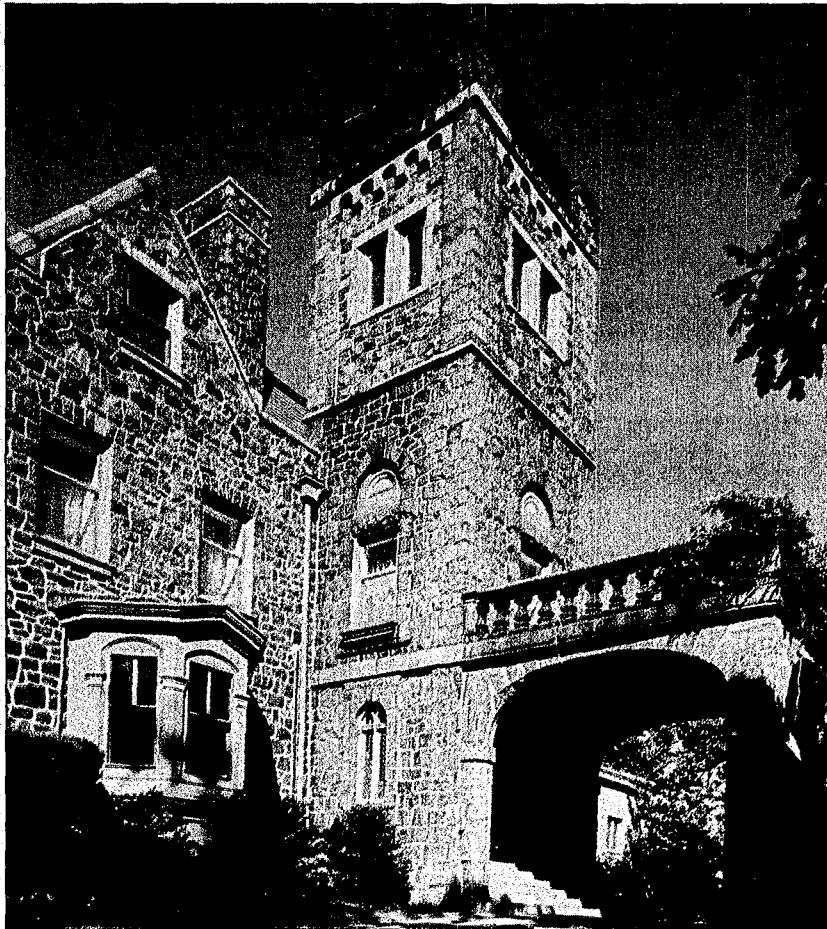
5. Property in Time. This course takes up topics from the conventional property course relating most

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directly to lower and middle-class housing in America: the law of landlord-tenant; servitudes; nuisance; and regulatory takings. Students learn not only the basic doctrinal rules of these and a handful of other conventional subjects, but also how to understand them in light of the history of American legal thought

and the expanding law and economics literature on property.

6. Democracy and Coercion. This course examines two conflicting postulates accepted by many Americans: a belief in democracy and a belief in individualism. Democracy implies a system of group decision making with the majority able to enforce its will against the dissenting minority. It is a system that rests on the value of community autonomy and community self-definition. Individualism implies a right of the individual to resist group decisions and to adopt one's own life plan free from interference. It is a system that rests on individual autonomy and individual self-definition. Democracy and Coercion addresses the means by which our legal system reconciles these postulates. The course examines the nature of democratic decision making as well as the appropriate limits on the coercive authority of the state. Materials drawn from constitutional law, from criminal procedure, from



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political philosophy, and from a variety of other sources are used to explore these problems.

7. Legal Justice. This course explores American law through an examination of competing conceptions of legal justice and the pervasive idea that achieving a just social order is — or should be — the central aim of the law. The course provides students with the vocabulary and conceptual tools necessary for making and assessing claims about the requirements of justice. It familiarizes students with the major traditions and trends in legal thought.

8. Government Processes. Focussing on the problem of injury in the workplace, this course examines on the various instruments the legal system has to deal with social problems. The virtues of contract, tort, criminal law, and administrative regulation are compared with each other. The course seeks to identify the advantages

and disadvantages of each instrument and to provide students with an understanding of why one rather than another is chosen.

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Half way through the second year of the experiment, a student group invited a well-known, very conservative law professor to Georgetown to speak about the program. Before a packed hall, the professor opined that the experiment was a disaster — that a bunch of wild-eyed reformers had recklessly ruined the future careers of their students. When one worried alumnus of the experiment asked for advice as to how to salvage his career, the professor responded that, unfortunately, the only option available was for the student to drop out of Georgetown and begin anew at some other law school.

As I sat on the side of the room listening to this attack, I feared the very worst: a student revolt, angry delegations to the Dean, and an ignominious end to the program. In fact, something quite different happened. During the question and answer period that followed the speech, students who had been through the program came strongly to its defense. More impressive still,

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it became apparent that the program itself had given these students the tools to defend it cogently and persuasively. These were students who knew the value of what they had learned and had the self-confidence and knowledge to express their views strongly and effectively. Students offered sophisticated and detailed arguments about practice of law in the regulatory state, the modern significance of common law doctrine, and the changed environment in American law firms. (Although most of the dialogue was civil and constructive, I remember, not without pleasure, one student, his voice dripping with sarcasm, who asked a two part question: just how long had Professor X spent studying the curriculum before he reached his conclusions; and did he consider his evaluation of it to be his "best work?")

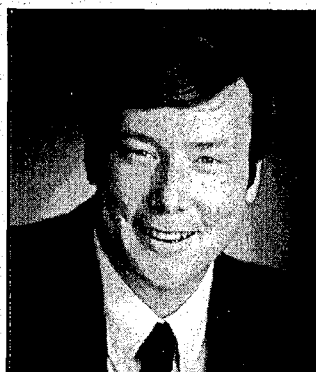
Today, the value of the experiment is no longer open to serious question. We have irrefutable proof of the worth of our efforts in the form of hundreds of former students working throughout the country at the top of their profession. Indeed, if there remains an open question about the experiment, it comes from the opposite direction: as the new curriculum becomes "standard" and regularized, will we be able to maintain the enthusiasm, sense of purpose and adventure that have fueled it in its early years?

I remain convinced that the basic insights that motivated the experiment are as valid as ever. Still, in the long run, it may prove difficult to maintain the commitment and dedication that has made the experiment a success. Even if the experiment eventually runs out of steam, though, we have demonstrated something important and lasting: that there is nothing inevitable or unchangeable about the curriculum that has dominated American law schools for a century.

Thus, if this experiment eventually winds down, that will demonstrate only that it is time for a new experiment, exploiting still other ways in which the law can be examined and utilized. In the end, the most important things we teach our students is the value of self-criticism, the importance of risk-taking, and the need to reflect constantly on the nature of one's work. More than the content of the courses or underlying theory of the curriculum, the very fact of experimentation effectively teaches these lessons. We believe that we have demonstrated that these are lessons that can indeed be taught, and we are as committed as ever to teaching them to future generations of law students. ♦

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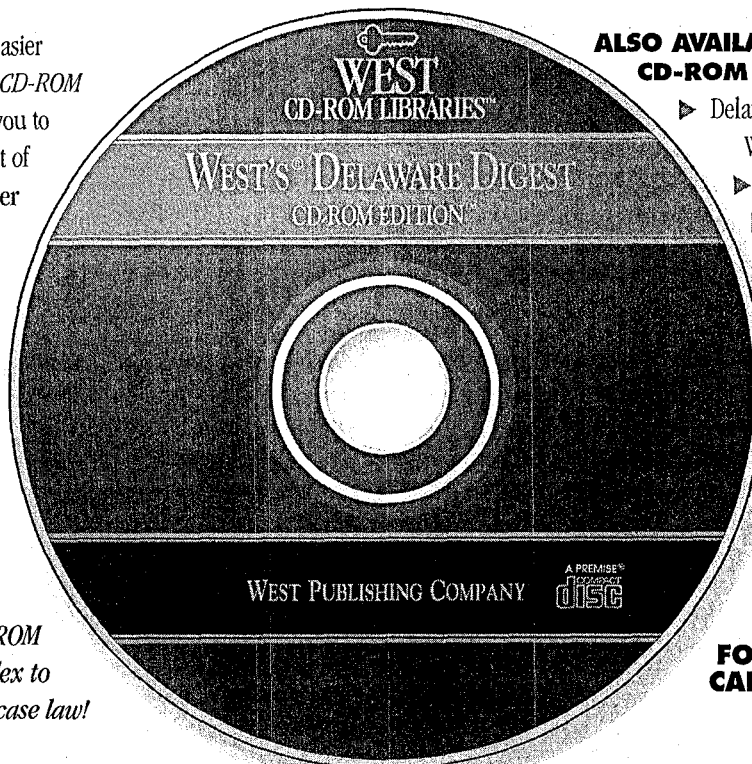
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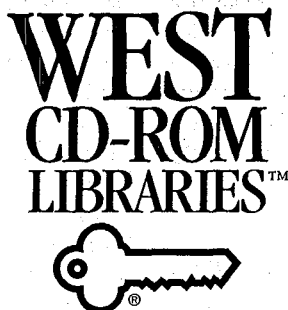


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Louise L. Hill

LEGAL EDUCATION IN THE 1990S

The past several years have seen a decline in the applicant base for law school admissions. Following a swell in law school applications in the late 1980s and early 1990s, law schools now face an applicant pool close in size to that of the pool fifteen years ago. It appears that this decline in law school applications has not yet bottomed out. In fact, registration numbers for the Law School Admissions Test (LSAT) indicate that this decrease is likely to continue into the coming academic year. At the time of the writing of this article, test registrants for the June, 1996 LSAT were down 8% from the previous year. Some hypothesize that the decline in law school applications on a regional and national basis is linked to a decline in job opportunities for the law graduates. While somewhat temporally related, the two are not necessarily mutually exclusive. Recent statistics indicate that the job market, after having declined for several years, has leveled off. In fact, it appears that some areas of the market have experienced modest gains. Overall, the job market for law graduates can be characterized as mature and, as always, it is highly competitive.

The situation facing law schools today is an interesting one. Law schools have always competed with each other to capture top law school applicants. With a shrinking applicant base, no doubt this competition will intensify. Law schools attract students by offering scholarships, rich and varied curriculums, faculties that are attentive and highly qualified, up-to-date facilities, and support in the form of financial aid, placement and the like. Law schools realize more than ever before that potential students are consumers and matriculated students are customers. Those of us in legal education strive to provide students with what they want, while being mindful of what, in our opinion, students need.

A law school has a student for a mere three years. In that short amount of time, analytical skills must be developed in the students, along with a firm foundation in fundamental legal principles. Concomitant with this, the development and mastery of legal writing skills is an essential component of the

law school curriculum today. Many schools mandate upper level writing requirements along with a research and writing program in the first year curriculum. Developing a student's ability to synthesize, analyze and communicate material within a legal context should be a linchpin of legal education. At Widener, in addition to two upper level writing requirements and an intensive first year legal research and writing program, this year students will also have writing components in several substantive required courses which will meet in smaller sections. This will enable faculty to integrate analytical and writing exercises within the course material, and provide students with meaningful feedback. Many schools find that entering students have writing skills which need to be further developed. While approached in varying ways, a strong writing program has become a fundamental of legal education. Many schools also offer academic support programs to address individual needs which members of the student body may have.

A comment from the practicing bar which seems to be surfacing more and more in recent years, is that law graduates no longer know how to use a library. Take the computer away and put recent graduates in a law library among hard copies of books and periodicals, many practitioners claim these recent graduates will be lost. Clearly, legal research by computer is a significant tool which law students learn to use during their course of law school study. However, I'd venture to say that almost all law schools initially train students to access the traditional law library. In most first year legal research and writing courses, it is customary for students to learn the basic legal research skills "the old-fashioned way," and move to computer-assisted research. First year students can be seen combing the



Reporters and checking all the supplements of Shepards as they pursue a particular project. As access to material becomes more cost-effective electronically, however, it may be that soon many law firms and law libraries will not have a traditional collection as we know it today. While law students still learn to find the right page in the book and check citations in a diligent fashion, the research climate evolving in the practice of law may make these techniques obsolete and inapplicable.

Law schools are given the task of developing analytical skills in students, while building a foundation in fundamental legal principles. To achieve this goal, law school faculty use a variety of teaching techniques. In law school today, innovative measures are often employed and encouraged by doctrinal faculty in their approach to classroom material. Role-playing, simulations, discussion and analysis of situation vignettes, are among the techniques used by some faculty when approaching aspects of their course material. It is my impression, however, that while many professors experiment with alternative ways to present certain issues, most law professors find themselves implementing a variation of the "Socratic method."

While mention of the "Socratic method"

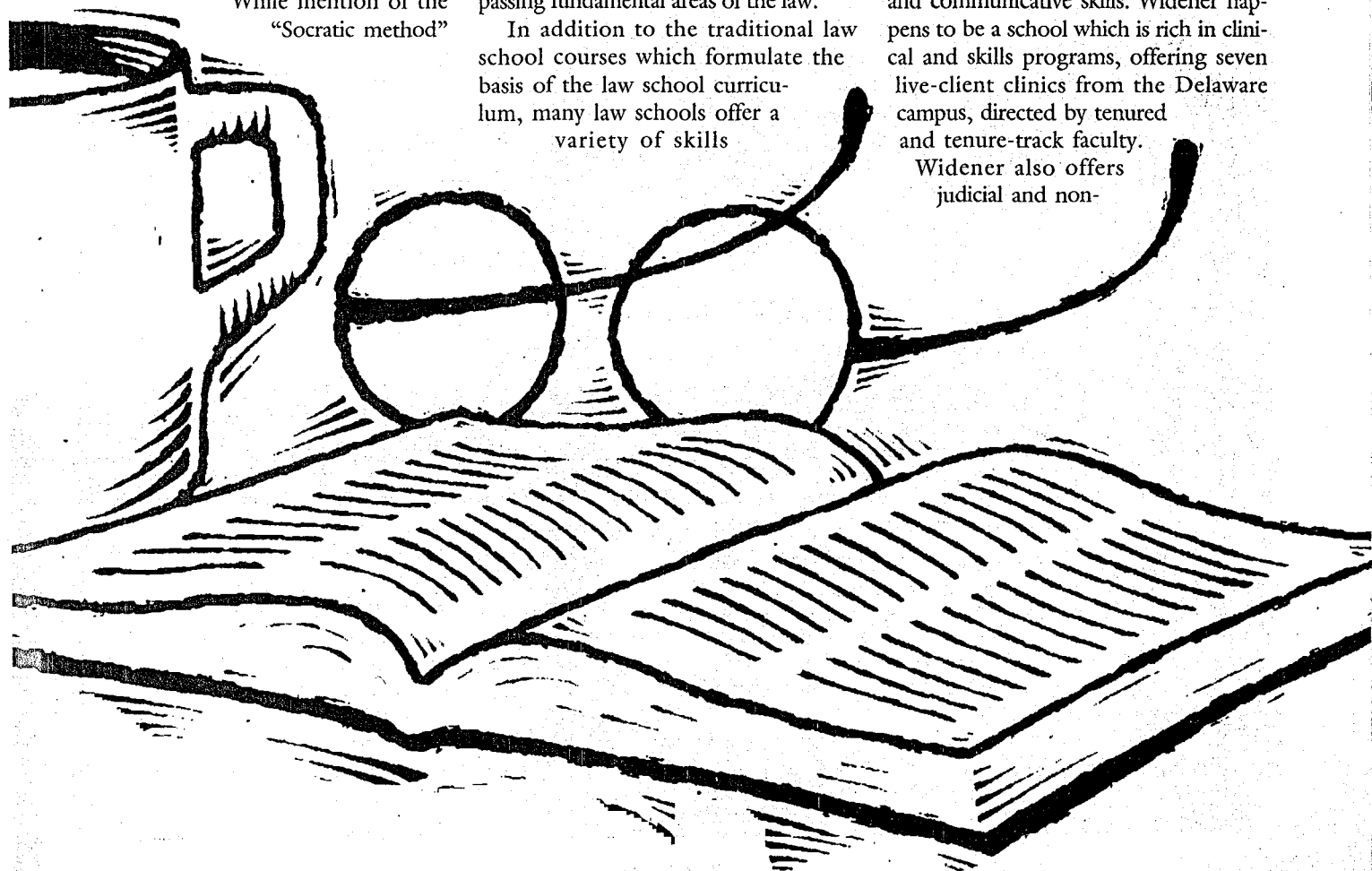
may inappropriately conjure up visions of an intimidating teacher drilling students in a demeaning and condescending fashion such as that depicted in the film *The Paper Chase*, by and large, this is not the case in law schools today. Most law faculty are demanding, but also customer friendly. The variation of the Socratic method most often implemented in law schools today continues to utilize a case study approach in which the professor guides the class by skillful questioning. A majority of doctrinal law faculty seem to find this to be a beneficial teaching methodology. In this teaching approach, students are forced to work through the facts and applicable law in a given setting, often grappling with the rationale, or lack thereof, employed by various courts. Students see that divergent answers to the same question can be correct, depending on the reasons given. Students also see that the same answer to the same question can be incorrect, depending on the jurisdiction, the fact finder, or the placement of the stars. The job of the law school is not to recite legal principles for the students to memorize and reiterate. Rather, students are, or should be, taught how to extrapolate and fully analyze legal principles within the context of a course of study encompassing fundamental areas of the law.

In addition to the traditional law school courses which formulate the basis of the law school curriculum, many law schools offer a variety of skills

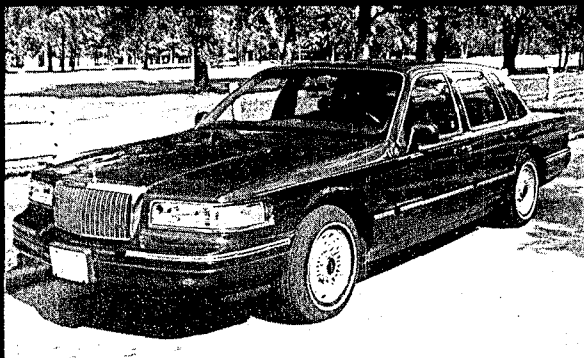
courses and clinical programs to supplement their curricular offerings. In recent years, some individual lawyers and bar associations have promoted a law school curriculum which would incorporate clinical and hands-on-experience law courses as part of the required course of study in law schools. Law firms claim that the cost-conscious clients of the 1990s no longer afford them the opportunity for on-the-job training of new lawyers. Gone are the days when several new associates can accompany and assist a partner on a matter, learning at the expense of the client. As a result, some practitioners clamor for a curriculum which provides extensive practical experience.

As mentioned above, law schools have each student for a mere three years. Within this time, students must learn how to analyze legal issues and acquire a knowledge of fundamental legal principles. Clinics, externships and skills programs, while having a place in Law School Education as an enrichment and supplement to the core curriculum, should not trump the traditional law school curriculum. The mission of law schools is to provide students with a firm foundation in fundamental legal principles, while developing their analytical and communicative skills. Widener happens to be a school which is rich in clinical and skills programs, offering seven live-client clinics from the Delaware campus, directed by tenured and tenure-track faculty.

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judicial externship opportunities, as well as extensive skills courses, such as trial advocacy, interviewing, counseling, negotiation, and the like. A very popular program at Widener is an Intensive Trial Advocacy course, where, for eight days at the close of spring semester, students meet and work for six to eight hours a day. The first six days are spent learning fundamental trial advocacy skills, culminating in a trial before a jury for the final two days. Students may also participate in the extracurricular moot court organizations which are available at Widener. Law schools recognize that skills and clinical courses are an important and valuable part of any curriculum affording students worthwhile and rewarding experiences. We should be mindful, however, that these experiences should not supplant the fundamental doctrinal course offerings, but enhance them. Law schools do not have the luxury of devoting a majority of their teaching time to skills courses. Students need basic doctrinal offerings which are afforded by the core curriculum. Skills courses and clinics are available, popular, and promoted, serving to enhance the experience of the student.

The 1990s present an interesting climate for the American law schools. Applications for law school admission are declining; the recent law graduate faces a mature job market that is not in a growth phase. Some practitioners are clamoring for more skills training in the law school curriculum; others claim recent graduates can't access a traditional law library. Today's law school must confront these matters within an institutional context, and attempt to create an educational environment that best serves the needs of the student, the profession and society.

As in the past, the law student must be given a firm foundation in fundamental legal principles. Students need to develop their analytical skills and learn to ably communicate, both verbally and in writing. Law faculties are challenged to implement teaching techniques which will further this process. Skills courses and clinics play an important role in the educational scheme, but are not substitutes for substantive doctrine. As the end of the decade and a new century approach, law schools will continue to be challenged in an evolving legal environment. The primary goal of the law school must be to give students a strong foundation which will form a solid base on which the individual can develop professionally. ♦

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SELLING FALSE DREAMS

Too Many Lawyers? Too Many Law Schools? Are Law Students Being Conned?

Depends. Probably. Of course. Why does a person go to law school? Silly question, easy answer - to become a lawyer. Or maybe to become a politician, change the world, make money, avoid math? Or because there is nothing better to do? Perhaps law school is the only professional or graduate school willing to accept the applicant, or there happens to be plenty of taxpayer money (i.e., student aid) available to subsidize a continuation of student life. "To be educated" is omitted from this list because so few law students are motivated by a pure thirst for education that this consideration becomes irrelevant. Like it or not, a law school (like a medical school), is a vocational school and it is so regarded by students.

Considering the various motivations and the marginal satisfaction of attendance, there are certainly not too many law students.¹

But what of student expectations? Recent statistics indicate that it is increasingly difficult for graduates of middle and lower tier law schools² to find positions, and for some the crushing burden of debt³ precludes the more modest paying career choices such as service to low income clients or the so-called "public interest law" practice. Such less remunerative employment choices nevertheless are accepted by many graduates, particularly those from of the non-elite law schools. A sizable number of lawyers in low paying positions are forced to take a second job⁴ in order to pay law school debt.

The current pressure on starting salaries, the lack of job opportunities, and the precipitous drop in law school applications⁵ implies that the discipline of the free market is working in response to the fact of too many lawyers⁶. But how many is too many?

Lawyers Helping Lawyers

Let's say there's a town which is too small for one lawyer but just the right size for two, and, if the two are particularly clever, eventually three or four lawyers could make a living, pay off law school debt and perhaps become affluent and powerful. If, as Hayek defines it, law is general, known, certain and

applied equally, (that is, law must not discriminate between persons for reasons that have no connection with the purpose of the law)⁷, then the cleverness of the attorney should not have such a direct relationship to the generation of legal work for self and others - but in reality it does.

Our country's law schools, whose teaching is almost solely based on the casebook method, persist in considering themselves educational institutions while paying lip service to the moral, ethical, instrumental and philosophical basis of the law. Whatever the merits of the casebook method, its glaring moral weakness is implicit. The law is reduced to a contest between two attorneys, and the most creating or clever advocate wins the day. The typical casebook emphasizes the essential lawlessness (unpredictability or manipulability) of the legal process rather than presenting the law as a morally or even an instrumentally grounded set of rules.

Lawyering for Social Change

Law professors, the clever but generally semi-educated bunch that they are, just love to show off their creativity and encourage students to be as creative as they are, that is, to defeat the plain language of the law in a quest for victory, for social change or to impose a personal agenda. Yet, ideas do have consequences⁸. Those in authority, no matter how little respected, do have the power to affect behavior. If the law schools teach that the law is uncertain and therefore easily manipulated, even if clearly enunciated, it becomes natural to equate "good" or a "fair result" with one's own definition of the good or a client's definition of fairness.

When the parties and interests to be affected by the laws were known, the inclination of the law makers would inevitably attach to one side or the other, and where there were neither any fixed rules to regulate their determinations, nor any superior power to control their proceedings, these inclinations would interfere with the integrity of public justice. The consequence of which must be, that the subjects of such a constitution would live either without constant laws, that is, without any known preestablished rules of adjudication whatever, or under laws made for particular persons, and partaking of the



TENERELLI

contradictions and iniquity of the motives to which they owed their origin.⁹

Why not, therefore, run any theory up the flagpole to see if some judge will salute it? If anything goes, then it is true that any lawyer worth his salt can create enough work to keep at least one other lawyer busy. And we can characterize much of this as advocating social change. Of course, a lawyer who can be unprincipled when advocating for social change can be unprincipled when advocating for a client.¹⁰

Nowadays, a lawyer's key function (not you, of course) is to instruct the client in the fine art of welching and blaming others and convincing some besotted judge or lottery-loving jury (and sometimes both) to go along. More lawyerly cleverness produces more welching or blame – shifting, which leads to more litigation, necessitating more lawyers. "Certainty" is not part of the modern legal lexicon.

Lawyers become judges. Trained to be clever and manipulative, with no anchor but their own judgment, one should not be surprised when judges seem arbitrary¹¹, inconsistent¹², and unpredictable¹³. You might object that at least judges can't get away with it; that there are legislatures, higher courts, and the U.S. Supreme Court to keep them in check. But, of course, if the Supreme Court itself is without principles, and legislatures abdicate their legislative responsibilities, lower courts essentially get a green light. Equity rules. It no longer follows the law, but swallows the law. "Equity is measured by the Chancellor's foot" in other words.¹⁴ But is the Supreme Court lawless? No less an icon that former Justice William Brennan answered that question. Thusly:

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to

the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be their measure to the vision of their time.¹⁵

Society needs lots of attorneys to be that creative. Since the Best and the Brightest¹⁶ (who hail largely from Harvard, Yale, Columbia, Stanford, and Chicago, among other "elite" institutions) become the professors, high court judges and even Presidents, their sense of social justice becomes the law. Edmund Burke warned about this sort of law making:

Political arrangement, as it is a work for social ends, is to be only wrought by social means. There mind must conspire with mind. Time is required to produce that union of minds which alone can produce all good we aim at. Our patience will achieve more than our force. if justice requires this, the work itself requires the aid of more minds that one age can furnish.¹⁷

Law Schools Attacking The Law

Are law schools selling a bill of goods? Do students enter law school with an unrealistic idea of income, power and status? Not if the applicant goes to Harvard, Yale, Columbia, Chicago and other first tier schools.¹⁸ Graduates from those schools can and do take full advantage of the complexities wrought by creative law making and the consequent economic advantages to its practitioners. But the vast majority of law graduates are disappointed.¹⁹ Judging from recent employment statistics, there are more lawyers than needed even to continue the assault on law as a set of rules, clearly stated the violation of which results in a defined penalty.

Consider the following sample of courses now being taught at law schools. The courses offered at Yale Law School include Feminist Theory Workshop, and Feminist and Critical Race Theory. At Harvard Law School, courses include Lawyering for Poor People, and Law Sex, and Identity. Consider, too, the statement of Dean Guido Calabresi expressing the wish that "troublesome judges" be "graduates of our school."²⁰

There can be no question that the manipulation of the judicial process (with the help of "troublesome judges") all the way to the Supreme Court is the preferred legislative method of the advocates

of our ever expanding victim groups. But such a career is for the few. How many lawyers, after all, are hired by the American Civil Liberties Union, National Lawyers Guild, or the Children's Defense Fund (and other such pursuers of political agendas masked as social justice)? Law school professors hardly ever mention that perhaps the best a good and ethical lawyer can do is to make his or her little corner of the world a little better. Not at all glamorous, is it? Insofar as the typical law student believes that the system can be manipulated to establish social justice, he or she is being conned. This deception is being perpetrated (with few exceptions) by unproductive professors with unrealized goals. J. Budziszewski put it well:

The desperationist acts to relieve his own; the pain of pity, the pain of impotence, the pain of indignation. he is like a man who beats on a foggy television screen with a pipe wrench, not because the wrench will fix the picture but because it is handy and feels good to use.²¹

It just feels good to these professors to use the students to relieve the pain. But, of course, the students will not and cannot relieve the pain. Perfection is not part of the human condition. "As it is written, there is none righteous, no not one..."²² Insofar as the typical law student believes one can change the world or establish social justice by being the modern version of a philosopher King and imposing one's views on others, he or she is being conned. It is a false dream of these professors.

Are there too many law students then? No, the students will decide that for themselves, although it would be beneficial for some to take up more remunerative work (like head mechanic at NTW) or more productive work (like a math teacher). Insofar as the typical law student believes the to graduate law school is to can immediately enter a world of affluence, he or she is being conned – conned by the image law schools like to project to justify their high costs, and conned by law school recruiters eager to justify their existence and, hence, the existence of their employer. In any case, the market is busily working to reduce their numbers.

Back to Question One

Are there too many lawyers? Recent declines in job opportunities and salaries support a conclusive "Yes" even in the

absence of radical reform. If the law were certain, if judges ended their legislative reign, (i.e., if hell freezes over) even fewer lawyers will be needed. The dominant view of lawyer as hired gun will give way, at least partially, to the more traditional view of lawyer as wise counselor.

Back to Question Two

Are there too many law schools? Yes, there are too many high priced law schools teaching too much creativity, giving too many students unsatisfactory vocational training while serving as an incubator for civil dissolution. Jean Elshtain's comment is instructive.

But "wedge issues" were generated in part by courts that made decisions in the 1970s on a whole range of cultural questions without due consideration of how public support for juridically mandated outcomes might be generated. Such juridical moves, in turn, deepened a juridical model of politics. This is a model first pushed by liberal activists, then taken up by their conservative counterparts.

Juridical politics is "winner take all" built on an adversarial model. Someone is "guilty" and loses. Someone else is "innocent" and wins. This zero-sum game model spurs direct mail and other mass membership organizations whose primary goal is to give no quarter in the matter that is of direct interest to them.

By guaranteeing that the forces on either side of hotly disputed issues (such as abortion or highly controversial mandated remedies to enforce racial or gender equity) need never debate directly with each other through deliberative processes and legislatures, juridical pre-emption deepened citizen frustration and fueled what I call a politics of resentment. This politics of resentment tends to reduce legislators to agents of single-issue lobbies and mass-mail overkill, thereby deepening the social mistrust that helps to give rise to such efforts in the first place.

This is a tragedy.²³

A good start would be to close Harvard Law School, where faculty is so busy thinking great and clever thoughts that they have little time to teach or

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reflect on the consequences of their cleverness. How much more productive would Harvard's students be as educated engineers, scientists, or businesspersons. Teach them math. And while we are at it, close Yale (thereby reducing the number of "troublesome judges") and Michigan, Stanford and Berkeley Law Schools too. All these lawyers creating work for all these other lawyers would start to disappear. Instead of 178 expensively run ABA accredited law schools, we might do with 60, ranging from inexpensive to expensive, from outright vocational institutions to research institutions. Innovations will be in the areas of teaching, training and reforming the legal process rather than refining the techniques by which to impose one's own agenda on an uncomprehending but increasingly hostile populace.

We as legal educators must take truth in education further even than the ABA's recent proposal for such a Standard. Students need to know that paying off student loans is not easy, that good paying jobs are not guaranteed, that the median lawyer income is "only" \$37,000²⁴, that legislation through judicial opinions has its dangers, that lawyering can be dull and paper intensive, and that nothing gives a lawyer a better perspective than a liberal education.

The true and achievable dream is the dream of service to individuals with individual problems and aspirations. To that end, a little more modesty by the law schools would go a long way.

ENDNOTES

1. Edward Sussman, "The Law School Shell Game," P.O.V., Careers, Cash and Living Large, (1996), p. 50.

2. "The Top 25 Law Schools," U.S. News & World Report, (1996), p. 86. (According to the National Association for the Law Placement, less than 70% of 1994 graduates obtained full-time legal employment within six months of graduation but this does not include data for some 20% of the 39,305 graduates of ABA accredited schools who did not supply employment information).

3. Edward Sussman, "The Law School Shell Game," P.O.V., Careers, Cash and Living Large, (1996), p. 46. (Median debt for law school students, according to The Access Law Group, is \$38,000).

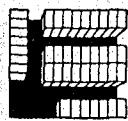
4. Janet Novack, "Let them eat loans," Forbes, (1996), p. 45. (Median reported salary is \$37,000).

5. Edward Sussman, "The Law School Shell Game," P.O.V., Careers, Cash and Living Large, (1996), p. 50. (According to the Law School Admissions Council, there were 78,000 applicants in 1994, compared to 94,000 applicants five years ago).

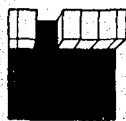
6. Edward Sussman, "The Law School Shell Game," P.O.V., Careers, Cash and Living Large, (1996), p. 49.

7. F.A. Hayek, The Constitution of Liberty,

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(The University of Chicago Press, 1960), p. 207-210.

8. Richard Weaver, *Ideas Have Consequences*, (University of Chicago Press, 1948).

9. W. Paley, *The Principles of Moral and Political Philosophy*, (London, 1824), p. 348 (quoted in F.A. Hayek, *The Constitution of Liberty*, (The University of Chicago Press, 1960)), p. 173.

10. ABA Model Rules of Professional Conduct, Adopted in 1983, as Amended in 1995, Model Code of Professional Responsibility, as Amended and in effect as of 1983. DR 7-101, 102, Preamble.

11. See, *In the Matter of Del Rio*, 400 Mich. 665, 256 N.W. 2d 727, cert. denied, 434 U.S. 1029, 98 S.Ct. 759, 54 L.Ed. 2d 777 (1978). (In that case, the judge disregarded a presentence report and told defense counsel to acknowledge that a blank sheet of paper was the presentence report. The judge also told defense counsel, in a criminal case, to submit a motion for directed verdict because the judge believed the testimony of the witnesses).

12. *Hirst v. Gertzen*, 676 F.2d 1252 (9th Cir. 1982) (jailer held liable for negligence under civil rights statute for failure to prevent suicide of inmate); *Compassion in Dying v. State of Washington*, 1996 WL 315922 (9th Cir. 1996) (choices central to personal autonomy, like when to die, are central to liberty under the Fourteenth Amendment's Due Process Clause); *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) (The Court struck down the law forbidding assisted suicide as applied to terminally ill patients ruling that the law violated the Fourteenth Amendment's Equal Protection Clause); The "mystery" passage in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed. 2d 674 (1992), does not confine the "right to define one's own concept of existence," (at 2807), to the terminally ill. Might a plausible argument be made that if a jailer interferes with an inmates' attempted suicide, he has committed a constitutional tort while if he does not do something is he liable for lack of due care? Perhaps the jailer should ask the inmate if he really wants to commit suicide. If he says yes, then the jailer should (is duty bound?) help.

13. *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 91 L.Ed.2d 140 (1986); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Romer v. Evans*, 116 S.Ct. 1620 (1996). Apparently, these cases mean that a state, by its constitution, cannot prevent special privileges being granted to an identifiable group whose defining characteristic is the commission of a felony.

14. John Bartlett, *Familiar Quotations* 11th ed. (Little, Brown and Company), p. 130.

15. William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," 19 U.C.D.L. REV. 2 (1985).

16. David Halberstam, *The Best and The Brightest*, (New York: Random House Publishers, 1969).

17. Edmund Burke, *Reflections on the Revolution in France*, 9 London, 1790).

18. "The Top 25 Law Schools," U.S. News & World Report, (1996) (Median income in 1995 was \$72,000 for Harvard Law School Graduates, \$82,000 for Yale Law School graduates, \$83,000 for Columbia University Law School graduates, and \$70,000 for University of Chicago Law School graduates).

19. Janet Novack, "Let them eat loans," *Forbes*, (1996), 45. (Median reported salary is \$37,000).

20. Yale Law School, Information and application forms for the class entering September, 1994, p. 5. Harvard Law School Applications, 1995, p. 28.

21. J. Budziszewski, "The Problem With Liberalism," *First Things*, 61 (1996) 26.

22. Romans 3:10 King James Version (World Bible Publishers Inc., 1986).

23. Jean Bethke Elshtain, "The Politics of Resentment is Killing Democracy," *The Atlanta Journal Constitution*, May 5, 1996, C4.

24. Janet Novack, "Let them eat loans," *Forbes*, (1996), 45. (Median reported salary is \$37,000). ♦

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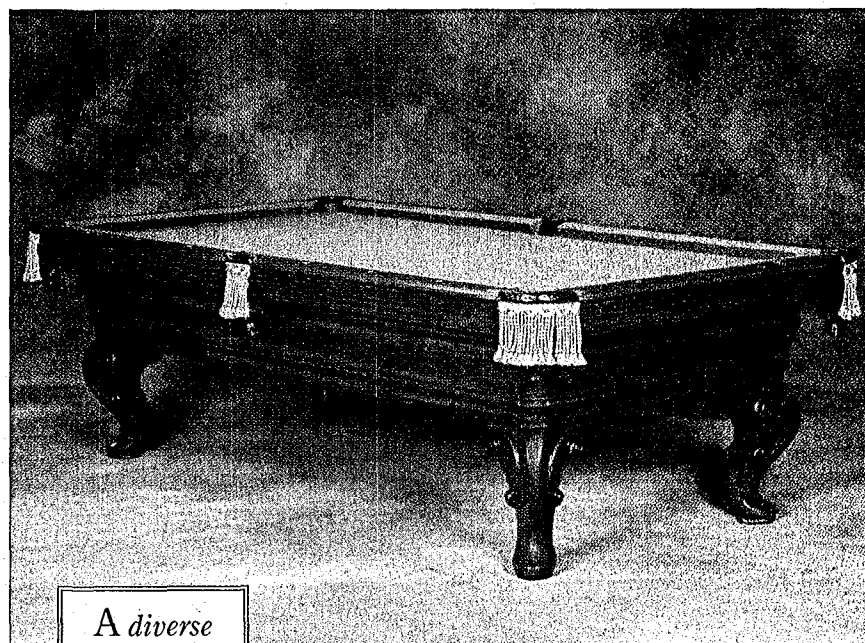
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continued from page 40

form books." The Commonwealth Court President Judge acknowledged a feeling of frustration at the deplorable writing and admonished law schools for admitting students who "can't write and speak." He noted that his law clerks, when asked, believed that legal education should include more mandatory legal writing and research and that an oral component should be added to the bar examination. These views abound throughout the profession.

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to borrow money to pay for their legal education, the loan default rate of graduates has reached a crisis level. In 1994-95, 70% of all students at ABA accredited law schools borrowed an astounding \$1.5 billion, the median indebtedness was over \$40,000, and those in the top 10 owed more than \$631,000. Almost 20% of borrowers are now defaulting on their loans, and some are declaring bankruptcy as early as the first year after graduating. In the meantime, private law school tuition since 1979 nearly has quadrupled, and law professors' pay in the past five years

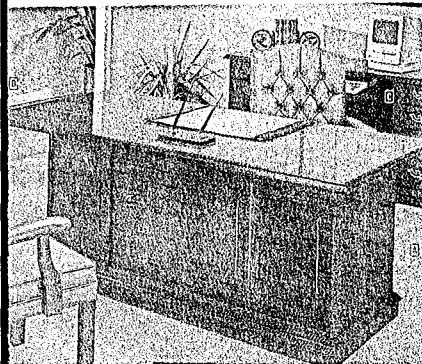


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On June 27, 1995, the U. S. Department of Justice filed a Complaint in the U. S. District Court for the District of Columbia charging "the ABA and its conspirators" with engaging in a continuing combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of the Sherman Antitrust Act. In essence, the Complaint alleged that, through the law school accreditation process administered by its Section of Legal Education And Admissions To The Bar, the ABA contrived (a) to fix, stabilize, and raise salaries, and working conditions for law school faculty, administrators, librarians, and other professional law school staff; (b) to subject state-accredited law schools to a group boycott by ABA-approved schools; (c) to subject students and graduates of state-accredited law schools to a group boycott by ABA-approved schools.

The ABA's Board of Governors, after consulting with Section representatives decided to enter into a consent decree. The final Judgment, while embracing a non-admission clause, contained several prohibitions. It enjoined the ABA from imposing requirements as to base salary, benefits, and other compensation paid to law school deans, faculty, and other employees or in any way conditioning the accreditation of any law school on the compensation paid to them. It restricted law school deans and faculty in their membership and length of terms on the Section's governing Council, Accreditation Committee, and Standards Review Committee. It prevented law school deans and faculty from comprising more than 40% of the nominating committee for Section officers. It required the ABA to establish a special commission to review the substance and process of accreditation, develop an antitrust compliance program, and designate an antitrust compliance officer.

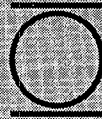
Along similar lines, the Massachusetts School Of Law at Andover, which was refused accreditation by the ABA, filed an action in the U. S. District Court of the Eastern District of Pennsylvania against the ABA, the Association of American Law Schools, and the Law School Admission Council (LSAC), charging them with a conspiracy to restrain and monopolize trade through the adoption and continued enforcement of unreasonable restrictive and anticompetitive ABA standards.

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Interestingly, despite the law school's refusal to use the LSAT mandated by ABA Standard 503, the law school established an impressive pass rate recently of 80.5% of first time takers of the Massachusetts bar examination, exceeding the state pass rate and fourth highest of that state's nine law schools, and 68.9 of all test takers, also exceeding the state pass rate and third highest in the state. The case is pending.

These charges against the ABA and its Section of Legal Education And Admissions To The Bar constitute a shocking indictment of legal education in this country. The charges are even more stunning because they are leveled against educators who are guarding the intellectual gateway to the profession. If true, the charges will adversely affect the profession's moral foundation for years to come.

To confront this serious problem, more than cosmetic touches and tinkering are needed. Dramatic changes must be made — perhaps the removal of the ABA or the legal educators from the accreditation process. The accumulation of power acquired by law school deans and faculty has demonstrated that, as a group, they cannot be entrusted with an exclusionary licensing system.

In conjunction with cleansing accreditation, the ABA should correct the faults of the admissions process:

1. Law schools should be required to devote more quality time and effort in the evaluation of each applicant for admission. Significant emphasis should be placed upon speaking and writing skills, and greater weight should be assigned to more authentic factors as undergraduate performance and personal interviews.

2. Law schools should be required to pay special attention in the admissions process to attributes that previously may have been overlooked or minimized — integrity, honesty, dedication, and the desire to achieve.

3. The multiple-choice LSAT should be eliminated as a factor either in the admission of students to law schools or as a condition of law school accreditation.

The LSAT deserves further mention, if only because law schools have clung so intensely to what has become so profitable. The LSAC, which administers the LSAT and is comprised of 193 law schools, saw its assets increase several years ago from \$27 million to almost \$60 million.

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Those attacking the LSAT argue that it does not measure every skill important to academic success. Those defending the LSAT concede its limitations, euphemistically called "guidelines", but assert that it simply tries to predict first year grades and must be considered in the context of all the admission criteria. However, more than a few observers insist that, in reality, the LSAT is paramount. A 1994 LSAC publication listed the test score first among 15 criteria for admission and described it as "a critical factor in the initial sorting of hundreds of applications submitted to a law school admission office."

The LSAT also is criticized on the ground that it discriminates against minority applicants and results in a homogenization of legal education and the legal profession. This criticism – that the LSAT is flawed because of race and gender discrimination – is not undeserved. A 1990 LSAC report concluded that "Afro-Americans earn the lowest mean score on the total test and on each of the sections." A 1994 LSAC report concluded that "men tend to earn higher LSAT scores than women regardless of demographic group" and that "women tend to be further below the average LSAT of accepted students across all the schools to which they apply."

In the overall scheme of things, a multiple-choice test seeking to predict the grades of a first year law student has no place in the admissions process. It is worth neither the time and effort devoted to it nor the flow of money it generates, for either the LSAC or the satellite enterprises feeding off of it. It places a heavy and needless drain on undergraduates and diverts the law schools from emphasizing the attributes having ultimate importance to the profession. If admission officers would spend as much time and money evaluating those attributes as embattled undergraduates have spent struggling with the LSAT, the profession would be in a better position to regain the high ground it once enjoyed.

The issue before the legal profession is no longer whether the current system of law school accreditation and admissions deserves support. The issue is whether the legal profession will resist the power structure within the ABA and embrace a truly corrective course. For the legal profession, the issue is, as it always has been, one of fortitude. ♦

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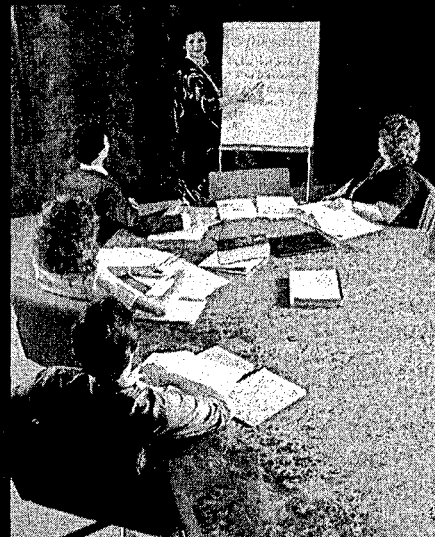
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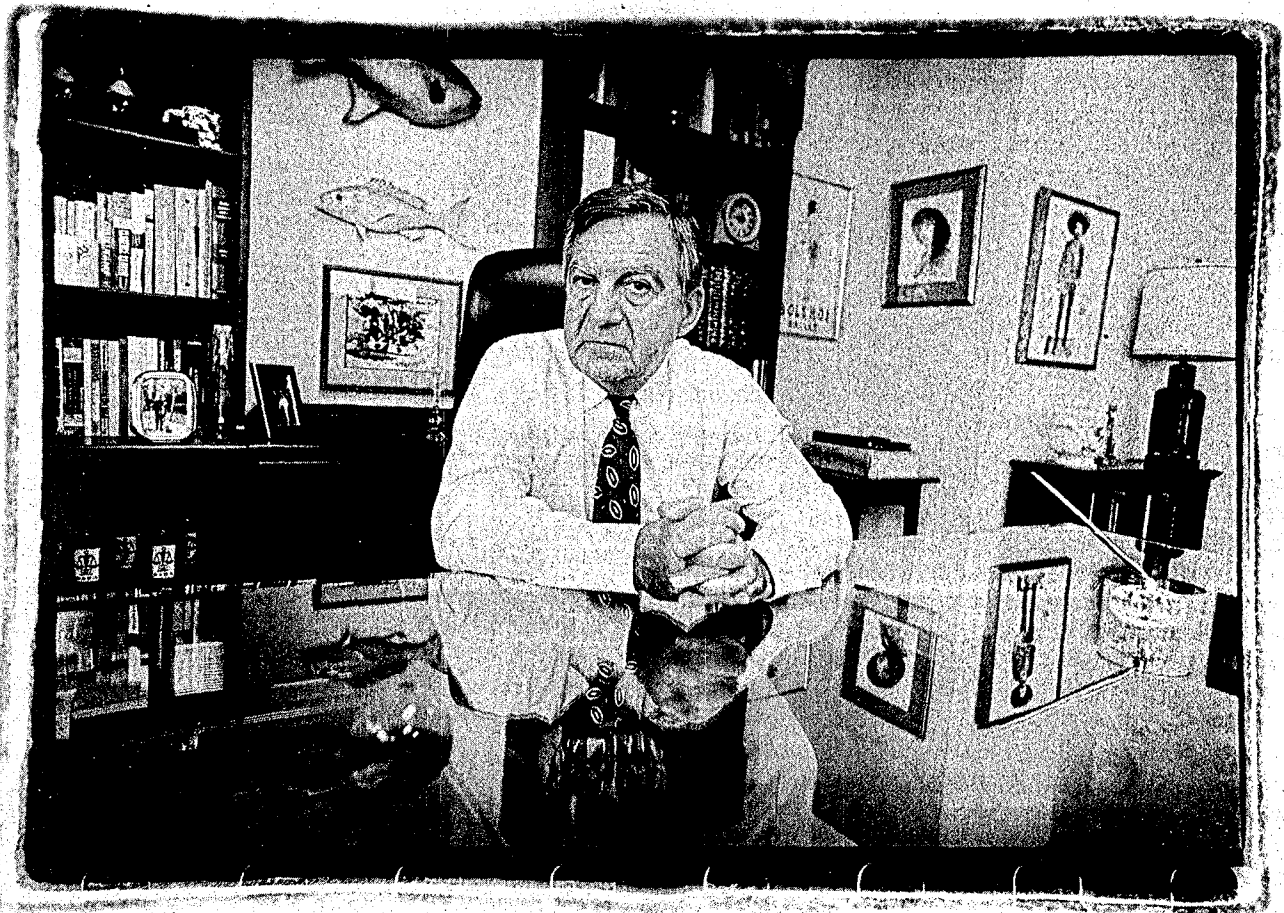
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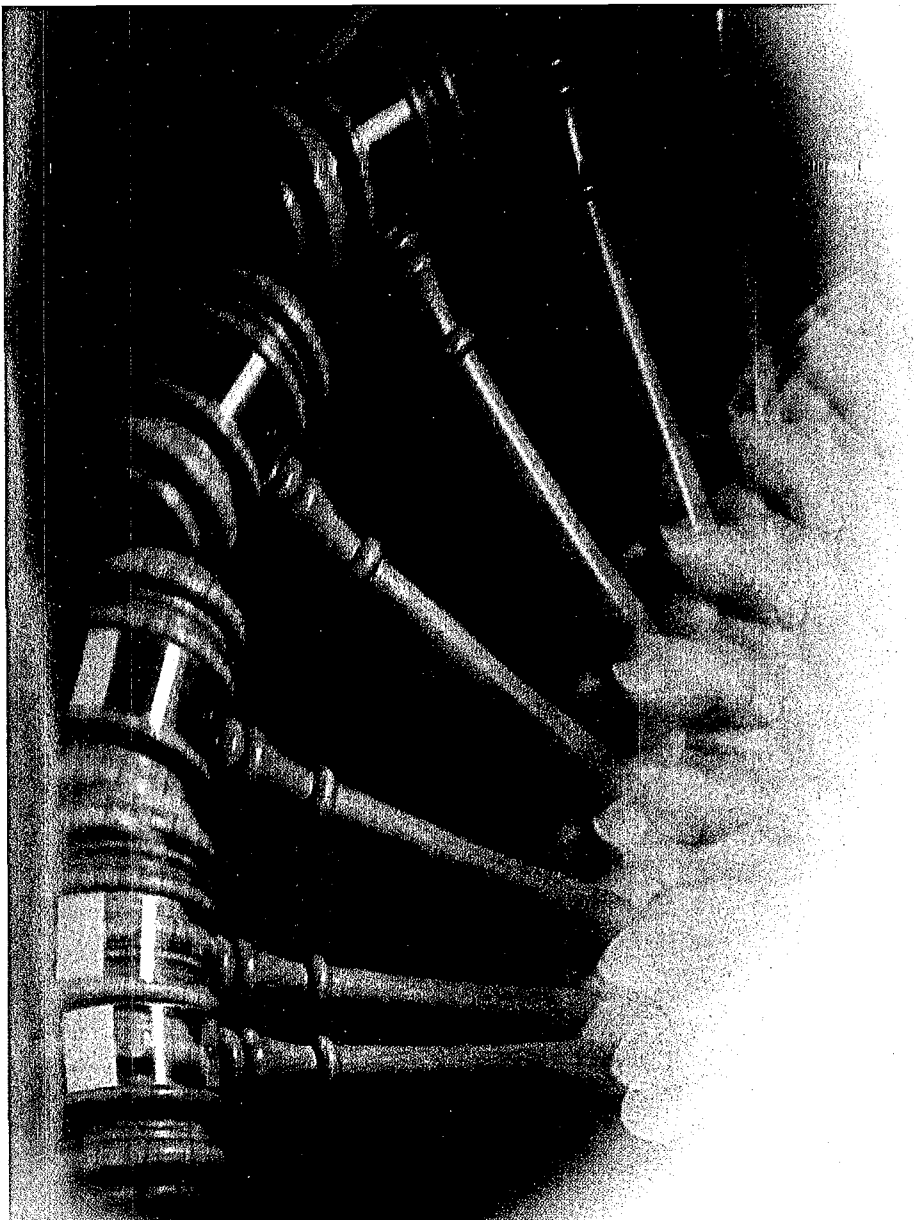
For law school graduates cast adrift into a lean job market, as well as for the entire legal profession, these are not the best of times.

At the Pennsylvania Bar Association's Legal Education Conclave last year, a candid dialogue took place. A Pennsylvania Supreme Court Justice declared writing and speaking skills to

have declined steadily and illiteracy to have crept into the ranks of lawyering. A Pittsburgh attorney spoke of a summer intern with good grades who was not offered employment because he "couldn't write a coherent memo". A solo practitioner was "baffled" by young attorneys "who could not write a brief or a prenuptial agreement, even from model

continued on page 36





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