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# **MANDATORY OBSOLESCENCE: THE THIRTY CREDIT RULE AND THE WISCONSIN SUPREME COURT**

PETER K. ROFES\*

## **I. INTRODUCTION: SETTING THE AGENDA, DEFINING THE TERMS**

Every family has its closet of embarrassing lore, its shameful experiences that family members intuitively understand are not to be introduced into conversation. Some of the experiences represent breaches of conduct that tarnished the family name within the community. Others concern less conspicuous incidents that caused substantial pain for one or another family member. Some of the experiences unfolded a generation ago. Others occurred yesterday. Regardless, these experiences often exert a powerful impulse on family members, their residue suffusing decisions large and small. Yet the understanding persists—rarely articulated expressly, but grasped by family members just the same—that such experiences are to be treated with deferential silence. Confronting them openly risks unleashing a flood of anger, bitterness, and irrational discourse.

In this respect especially, institutions operate much like families. Over time institutions come to declare off limits certain topics of conversation, inculcating members with the understanding that certain institutional decisions, regardless of their wisdom or propriety, are not to be discussed, let alone reconsidered. The institutional justification for such an approach can vary. Sometimes the institution concludes that the costs of turmoil likely to be created by reexamining a particular historical decision outweigh the benefits of such a reexamination. Sometimes those responsible for navigating the institution's ship are preoccupied with matters they perceive as more important to institutional success. Sometimes, quite simply, the institution's leadership is too lazy or too

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cowardly or too corrupt to do what ought to be done.

For the institutions that comprise the Wisconsin legal community—in particular the Wisconsin Supreme Court, the two law schools, and the State Bar of Wisconsin—the Thirty Credit rule<sup>1</sup> represents one such topic, one piece of family lore consigned to the closet. Since it burst onto the scene in 1971, the Thirty Credit rule has mandated that graduates of Wisconsin's two law schools who seek to be admitted on diploma privilege<sup>2</sup>—that is to say, without sitting for the bar examination—satisfactorily complete a minimum of thirty semester hours in ten specified subject matter areas.<sup>3</sup> In due course, this article will explore the historical emergence and contemporary operation of the Thirty Credit rule, concluding that the rule amounts to little more than one generation's desperate effort to freeze history, to bind the Wisconsin legal community to a vision of the competent entry-level lawyer that bears little resemblance to the professional arsenal needed to function effectively at the dawn of the twenty-first century. For now, however, the point to be made is merely that, despite its conspicuous shortcomings, the Thirty Credit rule—like Dad's infidelity, Grandma's drinking problem, and Cousin Suzie's embezzlement conviction—continues to be a family secret that the Wisconsin legal community labors to ignore. Above all else, this article endeavors to shine some light on an important patch of the Wisconsin legal framework that has been in the shadows for so long.

At the outset, it seems useful to make clear what this article seeks to accomplish and, just as important, what this article emphatically does *not* seek to accomplish. To be sure, every piece of scholarship carries within it this burden of authorial responsibility. But the responsibility

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1. Throughout this article, the phrase "the Thirty Credit rule" will be used as shorthand to refer to the requirement, currently codified in Wisconsin Supreme Court Rule 40.03(2)(b), WIS. SUP. CT. R. 40.03(2)(b) (1997-98), that diploma privilege applicants satisfactorily complete no less than thirty credits of law school study in ten subject matter areas.

2. Throughout this article, the phrase "diploma privilege" will be used to refer to the option available to entry-level graduates of the University of Wisconsin Law School (UW) and the Marquette University Law School (Marquette) to gain admission to the Wisconsin bar without having to sit for the bar examination.

3. As currently codified, the rule provides as follows:

*Mandatory subject matter areas; 30-credit rule.* Not less than 30 of the 60 semester credits shall have been earned in regular law school courses in each of the following subject matter areas: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates.

looms especially large when an author chooses to address a topic likely to prove explosive for the intended audience. Given that the Wisconsin legal community has experienced a difficult time engendering meaningful discussion about any matter that touches even tangentially on the diploma privilege, it seems useful to crystallize my thesis—as well as its limits—with precision.

This article has no bone to pick with the diploma privilege itself, no interest in entering the stale debate over whether the absence of a bar examination for graduates of the two Wisconsin schools is a wise or fair or constitutional<sup>4</sup> public policy. Put more directly, my purpose in exploring the Thirty Credit rule stems *not* from any desire to impose a bar examination on graduates of two schools who heretofore have been able to obtain licenses to practice law without undertaking the memorable rite of passage other prospective lawyers are required to undertake. Rather, my purpose is to demonstrate that one particular (and particularly onerous) aspect of the diploma privilege—the Thirty Credit rule—has substantial shortcomings, shortcomings that, taken together, should prompt Wisconsin's highest state court to return to the state's law schools the authority to determine the law school curriculum that best prepares entry-level Wisconsin lawyers for the professional challenges of the twenty first century.<sup>5</sup>

Among the rule's shortcomings, three stand out as especially striking. First, the rule—from its original formulation in 1970 right up to its operation today—is in every conceivable respect unprincipled.<sup>6</sup> Neither the contemporaneous material surrounding the formulation and adoption of the rule nor any intervening professional development provides a credible justification for the Wisconsin Supreme Court to have elevated the ten subject matter areas mandated by the rule over scores of other law school courses and experiences. Second, to the extent the rule's emergence three decades ago was grounded in a discernible vision of the

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4. For one court's treatment of a constitutional challenge to an analogous diploma privilege, see *Huffman v. Montana Supreme Court*, 372 F. Supp. 1175 (D. Mont. 1974). In *Huffman*, the court rejected an effort by a University of Chicago Law School graduate to invalidate Montana's (now repealed) diploma privilege, a statutory scheme that enabled graduates of the University of Montana Law School to be admitted to practice in Montana without having to undertake the bar examination but required all other prospective entry-level lawyers to sit for the examination.

5. Much of the criticism this article directs at the Thirty Credit rule applies as well to the Sixty Credit rule, the other curricular component of the diploma privilege. The Sixty Credit rule, discussed *infra* at text accompanying note 55, is codified in Wisconsin Supreme Court Rule 40.03(2)(a), WIS. SUP. CT. R. 40.03(2)(a) (1997-98).

6. See discussion *infra* at text accompanying notes 57-65.

competent entry-level Wisconsin lawyer, that vision cannot square with the realities of lawyering at the dawn of the new millenium.<sup>7</sup> Indeed, recent professional developments both in Wisconsin and nationally substantially undercut the vision of lawyering embodied in the rule. Third, the rule undermines the integrity of the legal education delivered by the state's two law schools.<sup>8</sup> By freezing into the Wisconsin statute books a permanent (and permanently obsolete) required curricula—a judicial act that reflects a xenophobic mistrust of the state's law schools and their students—the rule imposes unnecessary burdens on *both* the ability of the state's legal educators to deliver the curriculum they believe best suited to preparing students for the profession *and* the ability of students to take maximum advantage of the educational opportunities available to them.

## II. DUSTING OFF THE FILE AND UNRAVELING THE HISTORY

Students of political science and the creation of government policy would relish the opportunity to explore the history of the Thirty Credit rule. For, if ever there were a slice of law about which it could be fairly said that the manner in which it came into being both revealed its fecklessness and ensured its futility, the Thirty Credit rule is that slice. The way in which the rule was conceived, formulated, refined, and enacted guaranteed that the rule would not stand the test of time.

### A. *Prelude to the 1970 Proposal—Educational Change, Professional Resistance*

To understand the Thirty Credit rule as it now stands, some historical perspective will be useful. For most of this century graduates of Wisconsin's two law schools have qualified for admission to the Wisconsin bar without having to undertake a bar examination.<sup>9</sup> Indeed, as of

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7. See discussion *infra* at text accompanying notes 66-80.

8. See discussion *infra* at text accompanying notes 81-91.

9. UW graduates have received the diploma privilege courtesy since late in the nineteenth century. See Richard A. Stack, Jr., *Commentary: Admission Upon Diploma to the Wisconsin Bar*, 58 MARQ. L. REV. 109, 118 (1975). In 1931, the Wisconsin Legislature extended the privilege beyond UW graduates to graduates of "any law school in this state which the supreme court finds has standards as high as those of the University of Wisconsin. . . ." WIS. STAT. § 256.28(1) (1931). Curiously enough, prominent Marquette faculty members opposed the extension of the diploma privilege to Marquette. See Carl Zolman & John McDill Fox, *Diploma Privilege in Wisconsin*, 11 MARQ. L. REV. 73 (1926). No matter: the Wisconsin Supreme Court promptly invalidated the extension, concluding that the legislature lacked the authority to exercise that which the court deemed "an exclusive power" of the judiciary. *State v. Cannon*, 221 N.W. 603, 603 (Wis. 1928). During the next few years this inter-branch

1970—a decisive year in the development of the Thirty Credit rule—graduates of the two in-state law schools needed to demonstrate only that they (a) met age, citizenship, and residency requirements, (b) satisfied character and fitness standards, and (c) earned a degree from either of the law schools and in so doing satisfactorily completed any requirements set by the school for Wisconsin practice.<sup>10</sup> With the exception of these few legislatively imposed requirements, Wisconsin's lawmakers entrusted the legal educators at UW and Marquette to determine how best to prepare their students for the challenges of entry-level law practice in Wisconsin.

Events that began to unfold in late 1968 would trigger a marked stiffening of the diploma privilege, ultimately resulting in the enactment of the Thirty Credit rule. In particular, changes in the UW curriculum would threaten the views of legal education long held by some influential segments of the state's legal community. This response in turn would create the momentum that would culminate in a statutory fortress designed both to undermine the impact of the UW changes and to prevent future curriculum changes at the state's two law schools.

In late 1968, UW's Curriculum Committee recommended to the full faculty that the 2L and 3L curriculum become exclusively elective, that the courses students enrolled in subsequent to the first year required package be a product of student choice rather than institutional mandate.<sup>11</sup> In a memorandum remarkable (at least in academe) for its candor and persuasiveness, the Committee explained and justified its recommendation in part as follows:

We offer this proposal largely because the present set of requirements seems to us anomalous and anachronistic and no other set of requirements could be characterized any differently. The present rules require that students "learn" taxation but not

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squabble played itself out, and in 1933 the legislature gave it another try, this time extending the privilege to "any resident graduate of any law school in this state which law school was or is at the time of his graduation approved by the council of legal education and admission to the bar of the American Bar Association. . . ." WIS. STAT. § 256.28 (1933).

10. See WIS. STAT. § 256.28 (1969) (repealed 1971). In 1973, the Supreme Court of the United States invalidated on equal protection grounds state licensing requirements that excluded from law practice otherwise qualified individuals who were not American citizens. See *In re Griffiths*, 413 U.S. 717 (1973).

11. The central document in this slice of curriculum reform is a seven-page memorandum from the Curriculum Committee to the faculty. See Memorandum from the University of Wisconsin Law School Curriculum Committee to the Faculty of the University of Wisconsin Law School 1 (Dec. 6, 1968) [hereinafter "UW Curriculum Committee Memorandum"].

labor law; corporations but not securities regulation; constitutional law but not antitrust law; property law but not the fair employment practices law; and so forth. The present rules seem to reflect the assumption that a lawyer must know something about a given set of substantive rules, but fail to acknowledge that the body of substantive knowledge that is essential to competent client-oriented practice has expanded so vastly that we can no longer honestly hold the view that we are imparting in our required courses the minimal knowledge required in a business-oriented practice. . . . In other words, to maintain the kind of position that seems to be essential to a defense of the present set of requirements seems to be either fraudulent or, at best, narrow-minded and old-fashioned. To view the matter in somewhat different terms, it seems to us unrealistic to continue to indulge the assumption that one of the principal tasks of the Law School curriculum should be to insure that every graduate of this Law School will be prepared to embark immediately upon a career of general practice more or less on his own; and even if that view were accepted, we think it would be necessary to concede that the Law School simply could not achieve that objective without expanding our required program quite substantially and sacrificing not only the best interests of a large number of our students but also the proper conception of what a law school education should be. It is time for the curriculum to begin to reflect the notion that while one function of legal education is to convey an understanding of how legal rules operate, and the source and role of legal concepts, it is not the proper function of legal education to convey knowledge of the content of any particular set of rules or concepts.

To put this point somewhat differently, our present set of requirements seems to rest on the idea that we have a duty to the public to prepare students for the general practice of law. This idea requires the assumption that there is a certain body of substantive knowledge that all practicing lawyers must have, that we all know what it is, that we can convey it (without subverting more fundamental objectives), and that the students will learn it *and* remember a substantial part of it years after graduation. As the saying goes, to state the proposition is to refute it. It may be that the present set of requirements comes pretty close to preparing a man for a small-time general practice (that is, a practice in which a high level of sophistication and competence is thought to be unnecessary). But to impose a program on the entire student body with that objective in mind is really to let the tail wag the dog. It must be emphasized that to abandon requirements is

not, after all, to tell a student who wants to go into a small-town practice on his own that he *cannot* take a broad array of “bread and butter” courses (whatever those may be). And we know from experience that many students will adopt such a program without our telling them they must.

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There may be a basic set of concepts that each lawyer must know in order to be able to communicate with other lawyers; a “common language,” so to speak. We assume that these are now and will continue to be covered, as necessary, in the first year. [Many other schools] have already abandoned requirements after the first year; thus, the “common language” (if indeed there is such a thing) has already been limited to what is covered in traditional first-year courses.

Apart from our view that the curriculum should more accurately reflect widely shared concepts of the proper goals of legal education, we consider the elimination of unjustifiable (or at best marginally justifiable) requirements can be justified on the ground that a high value should be attached to maximizing a student’s freedom of choice. It seems to us that the time has come to abandon the paternalistic posture, inherent in our present set of requirements, that students cannot be trusted to exercise freedom of choice wisely. By the time they have completed their first year, many students will have developed an intelligent and constructive sense of academic and professional discretion, and ought to be given the greatest possible freedom in pursuing the objectives and interests (or expressing the aversions) that they have developed. It seems likely that most students, given free choice, would take most of the courses required by the present rules. But it is apparent that there would be occasions in which the direction developed by a thoughtful and diligent student would be at some variance with the present prescribed curriculum.<sup>12</sup>

In sum, three distinct but intertwined reservations about the existing upper-level curriculum animated the UW Committee. One was that the cluster of *required* curricular experiences could not be convincingly justified as being in any meaningful way more important to lawyer development than the many *non-required* experiences; put simply, the choice of existing upper-level requirements was arbitrary. A second was that the explosion of American law over the previous several decades had

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12. *Id.* at 2-4.



rendered it impossible to identify a canon of substantive law to which all entry-level American lawyers must be exposed in order to be competent lawyers. The third was that this plethora of upper-level requirements substantially diminished the ability of students to shape their distinctive professional identities by pursuing their distinctive curricular interests.

Several months later, in early 1969, the UW faculty approved the Curriculum Committee recommendation, changing its degree requirements to eliminate from the required curriculum upper-level courses that theretofore the faculty had required of all 2Ls and 3Ls and instead consigning such courses to elective status.<sup>13</sup> The practical effect of the change was to *reduce* (from approximately sixty to thirty-two) the number of credit-hours in the curriculum students were compelled to allocate to *required* courses and to *increase* the number of credits students were authorized to allocate toward *elective* courses.<sup>14</sup> Among the courses that moved from required or quasi-required to elective status were constitutional law, trusts and estates, commercial law, and evidence.<sup>15</sup> In short, the UW law faculty transformed the 2L and 3L curriculum from one that up to that time had been laden with required courses to one that enabled upper-level students to determine for themselves which courses in the burgeoning curriculum best fit their professional aspirations. These curricular changes out of Madison, more dramatic than those unfolding in Milwaukee throughout the same period, nonetheless loosely corresponded with incremental changes in the Marquette curriculum. By 1970, Marquette also had reduced—from approximately seventy-eight to sixty-five—the number of credit-hours students were compelled to allocate to required courses.<sup>16</sup> Moreover, a smattering of new elective courses had begun to creep into the Marquette curriculum, though still substantially fewer than those offered at UW.<sup>17</sup> In short, by 1970 it had become clear that the curriculum of the state's two law schools was evolving from a model in which the presence of very few electives resulted in most students enrolling in most of the same courses to one in which students began to go in dra-

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13. This approval is reflected in minutes of a UW faculty meeting conducted on February 11, 1969. A copy of these minutes is on file with the author.

14. Compare BULLETIN OF THE UNIVERSITY OF WISCONSIN LAW SCHOOL 1968-70, at 39-42, with BULLETIN OF THE UNIVERSITY OF WISCONSIN LAW SCHOOL 1973-75, at 21.

15. See *supra* note 14.

16. See MARQUETTE UNIVERSITY LAW SCHOOL BULLETIN 1971-72, at 25.

17. Compare *id.* at 25 (reflecting approximately two dozen electives), with BULLETIN OF THE UNIVERSITY OF WISCONSIN LAW SCHOOL 1973-75, at 28-29 (reflecting more than fifty electives).

matically different directions following their first-year studies.

These curricular changes—particularly those emanating from UW—triggered a flurry of defensive activity by the leadership of the Wisconsin legal establishment.<sup>18</sup> In early 1969, after UW Dean Spencer Kimball formally notified the Wisconsin Supreme Court of the UW curricular changes, the court—with the assistance of the State Bar of Wisconsin and the Board of State Bar Commissioners—set out to undercut the UW changes by drafting a statute that would enact into law a wide range of specific course requirements for those who wished to be admitted into the Wisconsin bar through the diploma privilege.<sup>19</sup> In March 1970, after a year of behind-the-scenes maneuvering, the court entered an or-

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18. This is a point that calls for some elaboration. There is substantial evidence in the historical record from which to conclude that the triggering event in the move toward the Thirty Credit rule was the UW curricular reform. Indeed, a distinguished and influential member of the UW faculty reports that he picked up the phone shortly after his colleagues enacted the reform and informed the court of this development, setting in motion the subsequent chain of events.

Nevertheless, three other phenomena unfolding throughout this period seem to have been converging alongside the UW curricular change to prompt the move to fortify the diploma privilege through the creation of the Thirty and Sixty Credit mechanisms: the periodic efforts springing up in Wisconsin to eliminate the privilege option; the trend in other states throughout this period to do so; and the early murmurings for a third Wisconsin law school—a public facility to be located at UW-Milwaukee that would, if created, threaten Marquette with an educational competitor just a few miles to the northeast. Each of these phenomena in its own way provided additional incentive for many of the state's legal institutions to beef up the diploma privilege through the mechanisms of the Thirty and Sixty Credit rules. For some illuminating details into the last of these considerations, see, e.g., *Law School at UWM Sought by Faculty*, MILW. J., Aug. 9, 1972 (reporting the release of a UW-Milwaukee faculty committee report urging that a second state-sponsored law school be created and located in Milwaukee at UWM); *More on New Law School*, MILW. J., Aug. 29, 1972 (editorial summarizing the recent state-wide developments toward the establishment of a second state-sponsored law school and opining that “[t]he case for a new law school has been strengthened, but still needs much shoring up.”); *MU Dean Attacks UWM Law School Idea*, MILW. J., Sept. 16, 1972 (reporting that Marquette University Law School Dean Robert Boden “blasted” the report of the UWM Faculty committee calling for the creation of a law school on the UWM campus and claimed the result would be “a rinky dink” law school); *UW Committee Turns Down 2d Law School Proposal*, MILW. J., Oct. 25, 1972 (reporting that a sharply divided committee at UW Law School had rejected the proposal calling for a second state-sponsored law school.).

19. The historical record reveals that, as early as February 1970, the institutions of the Wisconsin legal establishment were well on their way to finalizing a proposal that would blunt the impending UW changes by mandating that diploma privilege applicants fulfill a host of state-imposed curriculum requirements. By memorandum dated February 23, 1970, Franklin Clarke, secretary to the Board of Bar Commissioners, informed Chief Justice Hallows that, with minor exceptions, the Board members “concur unanimously” with the proposed amendment to the diploma privilege requirements. See Memorandum from Franklin W. Clarke, Secretary of the Wisconsin Board of State Bar Commissioners, to Wisconsin Supreme Court Chief Justice Hallows (Feb. 23, 1970) (on file with the Clerk of the Wisconsin Supreme Court) [hereinafter “Clarke Memo”].

der announcing an upcoming public hearing devoted to the proposed repeal and recreation of the portion of the Wisconsin statutes relating to the diploma privilege.<sup>20</sup> The first and most important section of the order proposed what soon thereafter evolved into the Thirty Credit rule.<sup>21</sup>

Looking backward, it takes no great insight to understand the institutional dynamic propelling these events. The landscape of American law was changing, and those changes in turn prompted legal educators to take a close look at the assumptions that had animated their curricula for much of the century. In particular, Wisconsin's law schools began to rethink (UW more deeply than Marquette) whether the curricula they had delivered for so long represented the most effective way to prepare their students for a changing profession. Not surprisingly, the changes put in place by the law schools—incremental though they were—met with resistance from some in the profession who had been trained as lawyers during the generations in which students had few (if any) curricular choices and the number of electives available to students could be counted on one or two hands. This resistance—fueled by other developments concerning legal education in Wisconsin<sup>22</sup>—culminated in a proposal that would evolve into the Thirty Credit rule.

### *B. The 1970 Proposal*

As noted above, in early 1970 the Wisconsin Supreme Court announced that it would conduct a public hearing concerning the proposed repeal and recreation of the statutory section devoted to the diploma privilege. The crux of the court's proposal was that prospective lawyers who wished to be admitted on diploma privilege henceforth would need to demonstrate substantially more than they had been demonstrating for the better part of the century. In particular, rather than demonstrating merely that they had completed satisfactorily the curriculum prescribed by their law school, candidates now would be required to demonstrate that they had completed a host of courses devoted to specifically enumerated subject matters. A central purpose of the proposal was abundantly clear: to thwart the curriculum developments unfolding principally at UW and by so doing fortify the diploma privilege against those who periodically sought to eliminate it. This the proposal sought to accomplish in two interconnected ways.

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20. See Order for Public Hearing in the Matter of the Revision of Rules Relating to the Admission to the Bar (Wis. Sup. Ct. Mar. 17, 1970) [hereinafter "Order for Public Hearing"].

21. See *id.* at 2.

22. See *supra* note 18.

First, the proposal enumerated nine “subjects” in which all who wished to be admitted on diploma privilege must have earned credits: constitutional law, contracts, criminal law, evidence, jurisdiction of courts, legal ethics, pleading & practice, real property, and torts.<sup>23</sup> In this respect the proposal endeavored to overturn the decision of the UW faculty not to *require* students to earn credits in several of these areas and to compel UW and Marquette students to enroll in a variety of courses that their schools had concluded (or someday would conclude) were no longer worthy of a place in the required curriculum. In short, the proposal presented UW and Marquette students with a stunning quid pro quo: either continue to take courses in these subject areas or forfeit your opportunity to be admitted to Wisconsin practice on diploma privilege.

Second, the proposal enumerated a total of twenty-eight “subjects” that were required to account for at least 80% of the credits earned by an applicant for the diploma privilege.<sup>24</sup> In this respect, too, the proposal sought to discourage students from enrolling in courses devoted to areas of law different from those that had dominated the law school curriculum since the early portion of the twentieth century. This aspect of the proposal likewise featured a quid pro quo for Marquette and UW students: should you dare to obtain more than 20% of your credits in subject areas not listed in the proposal you will lose the ability to become a member of the Wisconsin bar without having to sit for the bar examination.

Conspicuously missing from the court’s proposal was any justification for the sudden change being urged, any indication that a problem had emerged that the proposal endeavored to solve. The proposal nowhere explained why the nine subject matter areas elevated to required status contributed more to the competence of prospective lawyers than did the host of subject matter areas not so designated. Nor did the proposal offer any defense of why it sought to discourage prospective lawyers from earning more than 20% of their law school credits in areas different from the twenty-nine included. But these important omissions were not to deter the court’s effort to freeze history—and with it the curriculum of Wisconsin’s two law schools.

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23. See Order for Public Hearing, *supra* note 20, at 2.

24. See *id.* at 2. The twenty-eight included administrative law, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors’ rights, criminal law, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, labor law, legal ethics; partnership, personal property, pleading & practice, probate law, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, and trusts.

### C. *The Law Schools Respond*

The day after the court entered its order, it mailed copies to UW Dean Spencer Kimball and Marquette Dean Robert Boden.<sup>25</sup> Each of the law faculties spent the next month scrambling to respond. In final form, the briefs submitted by the respective institutions differed dramatically in important respects, reflecting differences in character, educational philosophy, and mission that had long distinguished the two law schools.

#### 1. UW

The UW brief<sup>26</sup>—submitted over the signature of Dean Kimball—reflected a strong and fundamental disagreement with the proposal in virtually every dimension, challenging both the premises on which the proposal implicitly was based as well as its specific details. Beginning with the brief's opening page, UW cut straight to the core of the matter, criticizing the court's proposal on grounds both of procedural fairness and the merits.

As to the former, UW leveled three principal objections. One was that the proposal lacked justification, that it failed to inform either the law schools or the general public *why* a change in the diploma privilege has become necessary, what problem had emerged to which the proposal offered a solution. A second was that the proposal—undeniably a response to curricular change at UW—burst onto the scene without any input having been solicited from UW. A third was that a single public hearing was an inadequate and inappropriate forum at which to explore important issues of contemporary legal education.<sup>27</sup>

Powerful though these process criticisms were, UW's reply to the merits of the court's proposal was equally penetrating. The reply began with a bold challenge to the educational philosophy that, although never expressed by the court, lay at the base of the proposal: the philosophy that a prospective lawyer who did not undertake study in any of the nine subject matter areas required by the proposal by definition could not be

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25. Cover letter from Franklin W. Clarke, Clerk of Supreme Court, to Hon. Robert F. Boden, Dean, School of Law, Marquette University (Mar. 18, 1970) (on file with author). Mr. Clarke likewise forwarded a similar letter to UW Dean Spencer Kimball. For those of us who have spent the better part of our careers in legal education, the enduring mystery surrounding these letters is why Mr. Clarke refers to law school deans with the title "Hon."

26. Spencer L. Kimball, University of Wisconsin Law School Brief in the Matter of the Revision of Rules Relating to Admission to the Bar (filed Apr. 30, 1970) [hereinafter "UW Brief"].

27. See *id.* at 2-4.

a competent professional. To this premise UW replied as follows:

The practice of law is now so diverse that there is no single course of sufficient importance to be an absolute requirement for every student who seeks admission to the bar. No lawyer is competent in every field, but every adequately trained lawyer should be equipped to master by himself whatever subject matter is essential to the handling of a particular case. His legal training should provide him the skills for self-education as well as a substantial body of specific knowledge about legal subject matter. Although many subjects are so frequently needed that a student would be unwise not to study them, no single one is indispensable to every legal practice, both because it may be learned outside of the classroom and because no subject matter is needed for all kinds of legal practice. Legal Ethics is the one exception to that proposition except that no one has found a way to teach it effectively as a separate course. . . . [M]ost legal educators feel it is best taught pervasively and not separately.<sup>28</sup>

With these words UW was making clear from the outset that, in its institutional view, the court was embarking on a misguided mission to an undesirable destination. According to UW, the court's proposal represented an effort to identify and freeze into law an entry-level professional canon at a moment in American law that was singularly inappropriate for such an undertaking. But the state's distinguished public law school was not content with advising the state's highest court that the explosion of law in post-New Deal America had rendered the mandatory subject matter areas enumerated in the proposal less important than such areas had been in previous generations. The UW brief went one remarkable step further, suggesting that there may well be absolutely *no* connection between a required course in a particular area of law and the ability of a lawyer who has satisfied the requirements of that course to perform competently in that area of law. Dean Kimball expressed UW's institutional skepticism about the link between educational exposure and professional competence as follows: "For any course named (apart from Legal Ethics) [in the court's list of required subject matter areas], there is some kind of accepted law practice for which it is essentially irrelevant."<sup>29</sup>

In sum, a central strand of the criticism UW directed at the proposal

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28. *Id.* at 7-8.

29. *Id.* at 8.

went to the foundation on which the court had constructed its required curriculum—the premise that certain subject matters were indispensable to professional competence and the unproven link between the classroom and professional performance. As the brief made clear, UW believed that any rule setting forth the requirements for admission on diploma privilege should steer clear of a laundry list of required subjects. But the UW brief did not stop there. It proceeded to highlight a variety of flaws in the proposal's particulars, seeking to demonstrate that even if a laundry list of subject matter areas *were* to be promulgated, the list should be different from the one promulgated in the proposal.<sup>30</sup>

One flaw UW noted was that the proposal's chosen areas of subject matter ignored entirely a range of areas beginning to emerge as central to practicing lawyers, among them legislation, the bulk of intellectual property law, most areas of international and comparative law (both public and private), important aspects of business and corporate law (among them securities regulation, business planning, and legal accounting), and others. These omissions, UW contended, were symptomatic of the dangers of freezing into law a set of mandatory subject matters at any particular moment, let alone at a moment in which the legal culture was undergoing dramatic changes.<sup>31</sup>

A second weakness flagged by UW was that the court's proposal undervalued the importance of "theoretical subjects" such as jurisprudence and legal history.<sup>32</sup> The UW brief, reflecting a sentiment voiced periodically in the context of curriculum reform, observed that "from an Olympian perspective" such courses "may be the most practical and valuable courses of all, leading to real understanding of what other courses are really about."<sup>33</sup>

In short, the UW brief could barely conceal its contempt for the proposal's effort to dictate curriculum for prospective Wisconsin lawyers.

## 2. Marquette

The Marquette brief<sup>34</sup>—submitted over the signature of Dean Robert Boden—sounded a very different tune from the one played by UW.

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30. *See id.* at 7-11.

31. *See id.* at 10-11.

32. *See id.* at 10.

33. *Id.*

34. Robert F. Boden, Marquette University Law School Brief in the Matter of the Revision of Rules Relating to Admission to the Bar (filed Apr. 17, 1970) [hereinafter "Marquette Brief"].

As for the core of the court's proposal, Marquette observed that it "subscrib[ed] in principle" to the notion of requiring "certain minimums of academic credit in a practice-oriented selection of directly legal subjects."<sup>35</sup> This generally favorable institutional position taken by Marquette was not a function of happenstance. At least four substantial reasons accounted for it. First, the court's proposal sought to undercut curricular change at UW, not at Marquette; if enacted, the proposal would have little impact on Marquette or its students—at least in the short term. Second, Marquette, with the benefit of a faculty member recently elected as President of the State Bar of Wisconsin,<sup>36</sup> had been afforded the opportunity to play a role in the formulation of the proposal; UW had not. Third, Marquette at this juncture maintained a decidedly more vigorous institutional position on the diploma privilege than did UW;<sup>37</sup> it thus viewed the effort to use the Thirty Credit rule to put meat on the bones of the privilege as institutionally beneficial. Fourth, the proposal—by circumscribing student choices with regard to course selection—sought to place into the statute books an educational philosophy mirroring that which had long prevailed at Marquette: minimize student discretion in connection with curricular options by offering a curriculum that consists overwhelmingly of required or quasi-required courses.

Not surprisingly, therefore, the Marquette brief sidestepped the larger questions implicated by the court's proposal, the questions at which UW directed its institutional energies. Instead, Marquette focused on two more modest matters: to whom the proposed requirements should apply and how to express more effectively the core of the proposal.

In sharp contrast to UW, Marquette's principal concern with the proposal had to do with which candidates for admission to the Wisconsin bar ought to be made subject to it.<sup>38</sup> By its terms, the curriculum requirements set forth in the proposal purported to apply *only* to those admitted through diploma privilege (that is to say, graduates of Wisconsin's two law schools), liberating candidates for admission who opted for the bar examination route (that is to say, applicants who attended law school outside the state) from the constraints of the new rule. This did not please the Marquette faculty. Accordingly, it urged the court to re-

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35. *Id.* at 2.

36. Professor James D. Ghiardi served as president of the State Bar of Wisconsin for the year beginning in July 1970.

37. The UW Brief notes that "[t]he University of Wisconsin Law Faculty tends to favor the diploma privilege, but is not free from doubt about it." See UW Brief, *supra* note 26, at 6.

38. See Marquette Brief, *supra* note 34, at 2-5.



consider this difference in treatment. The Marquette brief thus endeavored to persuade the court to impose the new curriculum requirements on *all* applicants to the Wisconsin bar, contending that neither the diploma privilege mechanism for admission nor the geographical location of a law school should serve as a basis for distinguishing among curriculum to which applicants for bar admission should be exposed.<sup>39</sup>

The remainder of the Marquette brief sought to refine two aspects of the court's proposal: the nine mandatory subject matter areas and the 80% credit requirement. In so doing, Marquette moved the debate a critical step closer to what would soon become the Thirty Credit rule.

As to the nine subject matter areas flagged by the court, Marquette countered with two sets of suggestions. One tweaked the list by (a) proposing an additional area entitled "commercial organizations and transactions," (b) merging the "pleading and practice" and "jurisdiction of courts" categories into a single heading dubbed "civil jurisdiction, pleading and procedure," (c) adding the words "and procedure" to the "criminal law" category, and (d) renaming some of the other categories, including substituting "the ethics and responsibilities of the legal profession" for "legal ethics" and "property" for "real property."<sup>40</sup> More important, the Marquette brief proceeded to allocate a minimum number of credits that applicants be required to undertake in each of the nine chosen areas:

There shall be included in such minimum studies not less than four semester hours, or the equivalent, of each of the following studies: (1) civil jurisdiction, pleading and procedure, (2) commercial organizations and transactions, (3) contracts, (4) property, and (5) torts; not less than three semester hours, or the equivalent, of (6) constitutional law, (7) criminal law and procedure, and (8) evidence; and not less than one semester hour, or the equivalent, of (9) the ethics and responsibilities of the legal profession.<sup>41</sup>

Simple arithmetic reveals an intriguing fact: Marquette's counterproposal set forth a total of 30 required credits in a total of nine mandatory subject matter areas.

With regard to the proposal's 80% rule, the Marquette brief coun-

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39. *See id.*

40. *Id.* at 9-10.

41. *Id.* at 10.

tered with two suggested changes. One was to change the 80% requirement to a sixty credit requirement.<sup>42</sup> The other was to forego the list of twenty-eight subject matter areas by substituting the following:

that such studies have included not less than 60 semester hours, or the equivalent, of accredited study, satisfactorily completed, in regular courses having as their primary and direct subject matters a study of rules and principles of substantive or procedural law, in the contexts in which such rules and principles arise with substantial regularity in the decisions of the courts of this state or of the federal system.<sup>43</sup>

In short, unlike its sister to the west, Marquette embraced both the premises in which the proposal was grounded and the general way in which the proposal set out to accomplish those premises.

#### *D. The Response to the Responses*

##### 1. The State Bar of Wisconsin Committee on Legal Education and Bar Admission

In May 1970, at the public hearing devoted to consideration of the proposal, Chief Justice Hallows requested the State Bar of Wisconsin to appoint a committee that would consider the changes suggested by UW and Marquette and submit a report no later than July 15.<sup>44</sup> The State Bar delivered the task to its standing Legal Education and Bar Admission Committee.<sup>45</sup> Over the signatures of new State Bar President James Ghiardi and Committee Chairman George Steil, the committee submitted its report.<sup>46</sup>

Two aspects of the State Bar report stand out. First, the report—advancing the position advocated by the Marquette brief—recommended that the curricular requirements apply to *all* applicants, those admitted through bar examination as well as those admitted via diploma privi-

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42. *See id.* at 10.

43. *Id.*

44. *See* Letter from George Steil, Chairman, Wisconsin State Bar Association Committee on Legal Education and Bar Admission, to Wisconsin Supreme Court Chief Justice Hallows (May 7, 1970) (on file with author) (confirming the chief justice's request).

45. *See id.*

46. *See* WISCONSIN STATE BAR ASS'N., REPORT IN THE MATTER OF THE REVISION OF RULES RELATING TO ADMISSION TO THE BAR (filed July 6, 1970) [hereinafter "State Bar Report"].

lege.<sup>47</sup> This recommendation would ignite a skirmish with the Board of State Bar Commissioners, the agency responsible for conducting the bar examination. Second, insofar as the proposed curriculum requirements themselves were concerned, the report's recommendations—again, echoing the Marquette brief submitted two months earlier—sought to refine and massage details rather than to confront, challenge, or justify the larger questions of educational philosophy and professional competence on which the proposal was based. In particular, the State Bar recommended that (a) the list of nine mandatory subject matter areas to be studied by all applicants be *expanded* to include taxation and administrative law;<sup>48</sup> (b) in place of the 30 credit minimum suggested by Marquette, there be no minimum number of required credit hours set forth for these eleven mandatory areas;<sup>49</sup> and (c) as the Marquette brief had suggested earlier, the list of twenty-eight specific areas proposed to consume at least 80% of the credit hours taken be dropped, replaced by the impressively vague injunction that

not less than 80 percent of accredited study [be] satisfactorily completed in the courses having as their primary and direct subject matters a study of rules and principals [sic] of substantive and adjective law, in the context in which such rules and principles arise with substantial regularity in the decisions and activities of the courts, legislatures and administrative agencies of the United States or of the several states.<sup>50</sup>

## 2. The Board of State Bar Commissioners

Shortly after the State Bar filed its recommendation with the court, the Board of State Bar Commissioners entered the fray, firing off an angry letter to Chief Justice Hallows concerning "matters which we at least had never heretofore understood as being the proposal."<sup>51</sup> The Board had finally grasped—belatedly, but just in time—a central purpose and likely implication of the Marquette and State Bar recommendations. That feature, if adopted by the court, could—in the words of Board President W. Wade Boardman—"conceivably forever prevent graduates

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47. *See id.* at 2.

48. *See id.*

49. *See id.*

50. *Id.*

51. Letter from W. Wade Boardman, President, Board of State Bar Commissioners, to Chief Justice Hallows (Aug. 3, 1970) (on file with author).

of many of the 146 accredited law schools from getting admitted to the Wisconsin bar."<sup>52</sup> The Board's point—one that was indisputably correct—was that were the court to impose the proposed curricular requirements not merely on diploma privilege applicants (that is to say, graduates of UW and Marquette) but on applicants who sought admission via the bar examination (that is to say, applicants of all other law schools in the nation), the inevitable consequence would be to exclude permanently many in the latter category who had lacked the psychic powers as law students to undertake courses in all of the subject matter areas required by the rule. Put more starkly, the Board of State Bar Commissioners flagged for the court this astoundingly protectionist aspect of the Marquette and State Bar recommendations.

*E. Into the Statute Books—the Court Enacts the Thirty Credit Rule*

Over the next nine months, the court continued to refine its proposal. Finally, in March 1971—nearly two and a half years after the UW Curriculum Committee had disseminated the memorandum that triggered the storm—the court officially repealed and recreated the portion of the Wisconsin statutes devoted to bar admission.<sup>53</sup> The new provision contained within it three principal features, features that each had been the source of substantial controversy.

One such feature represented the triumph of those who set out to undermine the recent UW curriculum changes and freeze the evolution of new courses at the state's two law schools. The statute created the Thirty Credit rule, setting forth *ten* subject matter areas in which all who seek admission via diploma privilege need to have completed a minimum of thirty law school credits.<sup>54</sup> Late in the game, "wills and estates" had slipped into this mandatory category—again, without any express justification—joining constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, and torts. The efforts of the State Bar to elevate administrative law and taxation into the category of areas required of all diploma privilege applicants met with rejection.

A second and closely connected feature of the new statute likewise reflected a victory for those seeking to freeze curriculum development and circumscribe the options for students at the state's two law schools.

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52. *Id.* at 2.

53. *See* WIS. STATS. § 256.28 (1971).

54. *See id.* § 256.28(1)(b).

This provision informed all who sought to be admitted on diploma privilege that at least sixty of their law school credits needed to be earned in twenty-eight subject matter areas:

administrative law, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, labor law, ethics and legal responsibility [sic] of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates.<sup>55</sup>

The third principal feature of the new statute represented the triumph of the Board of State Bar Commissioners over Marquette and the State Bar Committee. The court refrained from imposing the new curriculum requirements on applicants who seek admission to the Wisconsin bar through the bar examination.<sup>56</sup>

The new Wisconsin regime had begun.

### III. FROM THEN TO NOW: THE SHORTCOMINGS OF THE THIRTY CREDIT RULE

Nearly three decades have elapsed since the Wisconsin Supreme Court, with help from other important players in the Wisconsin legal community, rushed into the statute books a set of curriculum requirements to bind Marquette and UW law students. In that time, the landscape of the American legal profession has changed dramatically; indeed, perhaps no prior era in American history has exposed lawyers to the magnitude of professional change demanded of them throughout the last third of the twentieth century. Not surprisingly, American legal education likewise has undergone substantial changes in this period, as legal educators seek to respond to professional developments unfolding outside their buildings.

Yet, curiously, throughout this span of unmatched professional and educational change the Thirty Credit rule—the central requirement for admission to the Wisconsin bar on diploma privilege—has remained en-

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55. *Id.*

56. *See id.* § 256.28(1)(b), (2) (providing that the mandates of the Thirty and Sixty Credit rules apply only to those lawyers admitted via the diploma privilege).

tirely untouched.<sup>57</sup> Put more directly, despite the changing face of American law and the changing demands on American lawyers, Wisconsin's highest court continues to require of entry-level lawyers emerging from UW and Marquette at the end of the twentieth century *precisely* what it required of them three decades ago. This fact alone should make us skeptical. After all, any set of professional-school curricular requirements that fails to account for three decades of professional change merits suspicion.

But there is more. The remainder of this article will explore the most conspicuous shortcomings with the court's insistence that the Thirty Credit rule serve as the means by which the diploma privilege option be effectuated. More specifically, we now turn our focus to demonstrating that the enactment of the Thirty Credit rule was a mistake in judgment, one whose consequences grow increasingly disturbing as the years go by.

#### A. *The Absence of Principle*

The most remarkable feature of the Thirty Credit rule that Wisconsin's highest court insists upon imposing on diploma privilege applicants is its unprincipled nature. This feature is as evident today, in the rule's operation, as it was three decades ago, in the rule's formulation. Indeed, this lack of principle serves as a common thread uniting two different but intertwined weaknesses of the rule. First, neither the court that enacted and persists in retaining the rule nor any of the host of organizations that participated in the rule's creation has ever put forward expressly a credible justification for imposing on diploma privilege applicants and their law schools the curricular constraints imposed by the rule. Quite simply, the Thirty Credit rule has *always* lacked a principled reason for its existence, a legitimate explanation to account for it above and beyond the late sixties mix of hostility to curriculum changes unfolding at UW, desperation to insulate the diploma privilege from yet another of the periodic efforts to eliminate it, and sheer power politics. Second, to the extent that a meaningful professional objective can be imagined for the Thirty Credit rule, that objective has never been, is not currently, and is unlikely ever to be accomplished through the rule's op-

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57. Interestingly, before the ink even had dried on the *Sixty* Credit rule the court began to make corrections to its list, unmasking the absurdity of seeking to compose an exhaustive list of "subject matter areas" deemed central to competent entry-level lawyering. Effective June 1973, the court inserted "appellate practice and procedure" and "legislation" into the list of *Sixty* Credit areas. See 59 Wis. 2d vii (1973).

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Every now and then, that which is missing is more conspicuous than that which is present, the vacant place at the table speaks more loudly than those that are occupied. So it is with the history of the Thirty Credit rule. For, despite the many documents filed with the state's highest court over the course of the rule's gestation period, expressing the many perspectives of the many organizations helping craft the new rule, nowhere can be found the identification of any principled objective the new rule would accomplish and an explanation of why that objective was deemed worth accomplishing. The February 1970 memorandum from the Board of State Bar Commissioners to Chief Justice Hallows giving the green light to the court's proposal offers no explanation of why the Board believed the proposal was needed.<sup>58</sup> The March 1970 Order of the Wisconsin Supreme Court announcing the upcoming public hearing and setting out the proposed new requirements mentions no problem that the proposed rule endeavors to solve.<sup>59</sup> The April 1970 brief expressing Marquette's institutional support for the new curricular constraints fails to cite a single justification for that support.<sup>60</sup> The July 1970 submission of the State Bar Committee on Legal Education likewise supplies no explanation for its agreement with the thrust of the court's proposal.<sup>61</sup>

Lawyers typically do not conduct themselves in this manner. Indeed, perhaps the most prominent weapon in the lawyer's arsenal is the principled argument, the effort to clothe client objectives in the ineluctable garments of facts, law, and common understanding. It thus should prompt us to take notice that the historical materials central to the creation of the Thirty Credit rule do not pause at any point along the way to offer the principled argument, the reasoned justification, in which to ground the new curricular mandates for diploma privilege applicants. To be sure, the record makes clear that the controlling forces of the Wisconsin legal establishment believed the curricular changes undertaken by UW represented a step in the wrong direction. But the record leaves conspicuously *unclear* the serious professional harm these institutions believed would be worked by the prospect that graduates of at least one of the state's law schools no longer would be compelled to enroll in some courses in which theretofore the school had compelled them

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58. See Clarke Memo, *supra* note 19.

59. See Order for Public Hearing, *supra* note 20.

60. See Marquette Brief, *supra* note 34.

61. See State Bar Report, *supra* note 46.

to enroll. To be sure, the record makes loud and clear that proponents of the Thirty Credit rule believed UW had erred in liberating its students from having to take courses in, among other areas, constitutional law and evidence. But the record is curiously silent on the professional harm proponents believed would be worked were the list of lawyers licensed to practice in Wisconsin via diploma privilege to include some who as law students had refrained from immersing themselves in the magical land of *Marbury v. Madison*, the commerce clause, or the best evidence rule.

To repeat, the absence of a principled basis for the Thirty Credit rule leaps off the pages of the historical materials. To say this, however, is not necessarily to say that no principled basis could be conjured up in an effort to account for the rule. The problem is that the rule as designed simply cannot accomplish even the most noble of these seemingly principled justifications.

For instance, the Marquette Brief noted in passing that Marquette “concede[s] the general desirability of requiring of all candidates for admission to the Bar of this state certain minimums of academic credit in a practice-oriented selection of directly legal subjects.”<sup>62</sup> With this fleeting remark, Marquette appeared to be suggesting that a principle animating the Thirty Credit rule could have something to do with the practical use of these subject matter areas. Perhaps so. Unfortunately, neither Marquette nor any of the rule’s other proponents ever paused to explain why, say, constitutional law—a subject matter area mandated by the Thirty Credit rule—has more practical value than, say, family law—a subject matter area not mandated by the Thirty Credit rule—especially when a far greater number of diploma-admitted lawyers represent clients in divorce and custody matters than represent Congress or the Presidency in separation of powers disputes or private clients challenging a statute enacted by the national government on commerce power grounds.<sup>63</sup> Likewise, neither Marquette nor any of the rule’s other pro-

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62. See Marquette Brief, *supra* note 34, at 2.

63. Allow me a moment to ward off any misapprehension that may be engendered by this statement. The comparison set forth in this section of the text stems from no personal lack of respect for either the field of constitutional law in general or the traditional required course in that field in particular. Quite the contrary: I entered legal academe for the principal purpose of teaching and writing in the field of constitutional law; Marquette’s required course in constitutional law—the course that satisfies the Thirty Credit rule—continues to be a teaching assignment from which I derive immense professional satisfaction. My point, quite simply, is that if the usefulness of legal doctrine to the future of a legal career is the benchmark by which to assess the value of a curricular experience—a premise from which the Thirty Credit rule springs—the argument that what passes for, say, the required constitutional



ponents ever paused to explain why, say, wills and estates or criminal law—subject matter areas mandated by the Thirty Credit rule—have more practical value than, say, legal writing—an area not mandated by the rule—especially when a far greater number of diploma-admitted lawyers will be deploying skills of written communication than will be preparing estate plans for clients or participating on a regular basis in the criminal justice system. Indeed, the UW Brief, authored by no less an authority on legal education than a law school dean, self-consciously pauses to call into question the practical usefulness of one of the staples of the Thirty Credit rule, the required course in contracts. In the words of Dean Kimball,

there is a strongly held view that there is very little of substance left now in “contracts,” as viewed traditionally—that all the meat has long since gone out of it. The literature on the subject is too extensive to summarize, but perhaps it is enough to say that of all subjects in the curriculum, the traditional contracts course is the most obsolescent.<sup>64</sup>

This insight, too, went unanswered by the rule’s proponents. Add to all this the fact that, even were it the case that the subject matter areas set forth in the rule could lay claim for one reason or another to having been unusually “practical” three decades ago, the argument that they retain their distinctive practicality today is deeply unconvincing. In short, the argument rooted in the “practical” value of these subject matter areas—even were we to agree upon what exactly that means—did not wash three decades ago and does not wash today.

A second principle potentially at work in the rule implicates the relationship between the rule and the alternative bar admissions vehicle for entry-level lawyers, the bar examination. On occasion it has been suggested that a principled function of the Thirty Credit rule might be to ensure competency for diploma-privileged lawyers in some of the identical “subject matter areas” on which lawyers admitted to Wisconsin

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law experience at Marquette is more valuable than, say, a course in family law seems to me an argument difficult to sustain in good faith.

64. UW Brief, *supra* note 26, at 15. The UW brief leveled a similar indictment against the area of torts, another of the Thirty Credit rule’s chosen few. The brief observed that “it is possible that there has never been a solid four semester hours worth of basically important work” in the course and that the area receives the attention it does because “it is an unusually good vehicle for teaching ‘legal process,’ or how to read and analyze opinions and ‘think like a lawyer.’” UW Brief, *supra* note 26, at 14.

practice through the bar examination route are typically examined.<sup>65</sup> Again, however, embarrassing syllogistic and historical obstacles stand in the way of this alleged principle.

One is that this principle cannot explain the vigorous efforts of the rule's proponents to apply the Thirty Credit rule *both* to diploma privilege applicants and to those admitted to practice via the bar examination. Indeed, were the Thirty Credit rule sought to be explained away as little more than a watered-down bar examination, the relentless push to require it of entry-level graduates of non-Wisconsin schools—*the very individuals forced to take the Wisconsin bar examination*—poses quite the puzzle.

A second, more disturbing problem with this asserted principle is that it completely undercuts the rationale trotted out over the years in support of the diploma privilege itself. Time and again the enduring legacy of the (now unique) Wisconsin diploma privilege has been attributed to the steadfast confidence the Wisconsin Supreme Court reposes in the state's law schools. Indeed, this has been essentially the *only* justification set out for public consumption over the past several decades: we know these institutions; we trust these institutions; we have confidence that these institutions turn out competent entry-level lawyers. Accordingly, the argument that students from UW and Marquette—the

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65. The only document in the historical record that reflects a concern with this principle is attached to an undated, handwritten note to Wisconsin Supreme Court Justice Robert Hansen from "Steve," perhaps a law clerk. That document purports to be a draft of the proposed repeal and recreation of Section 256.28, that portion of the Wisconsin Statutes devoted to bar admission requirements. That draft includes the following observation:

The third change is a substitution of the general list of courses required for the diploma privilege for a more particularized list of courses and credits in each course. The present generalized list allows any law students to escape courses required on the bar exam. The proposed list offers concrete requirements for every student yet leaves enough free credits to allow each student to concentrate on a specialized area of law.

As it turns out, however, this document contributes little to our understanding of the principles that underlay the Thirty Credit rule because it was prepared at least two years *after* the Thirty Credit rule became law. What appears to be going on in this set of documents is that the author of the handwritten note is passing along to Justice Hansen yet another effort by proponents of the Thirty Credit rule to constrain diploma privilege applicants and their law schools even more tightly than the original Thirty Credit rule. This collection is almost surely to have originated in the vicinity of 1973-74, because one of the four changes proposed to Section 256.28 concerns the elimination of the requirement of United States citizenship for admission to Wisconsin practice. The document observes that "the requirement of U.S. citizenship . . . has recently been held unconstitutional by the Supreme Court." The High Court took that action in 1973. *See supra* note 10.

very schools supposedly known and trusted by the Wisconsin Supreme Court—should be hog-tied by the Thirty Credit rule by being forced to confront subject matter areas confronted on the Wisconsin bar examination by graduates of *other* schools—schools in which the court has self-consciously chosen *not* to reposit the trust it reserves for UW and Marquette—is an analytic non-sequitur. Either the court trusts the legal educators at UW and Marquette to produce competent entry-level lawyers or it does not. If it does, the Thirty Credit rule serves absolutely no function (and indeed is counterintuitive); if it does not, the diploma privilege option itself has outlived its usefulness and the Thirty Credit rule provides no safeguard from the harm produced by that fact. The court cannot have it both ways. Its logic in endeavoring to do so is akin to a parent departing for the evening telling his child that “I trust you to decide for yourself what a reasonable bedtime is. Ten o’clock is that reasonable time.”

The search for a principled explanation to account for the Thirty Credit rule comes up empty.

### *B. The Flawed Vision of Lawyering*

A second important shortcoming of the Thirty Credit rule concerns the crabbed, unrealistic vision of lawyering that the rule embodies. Pursuant to the rule, every applicant who seeks admission to the Wisconsin bar via diploma privilege must demonstrate that he or she has earned at least thirty credits in ten “subject matter areas.” As noted earlier, those “subject matter areas” are constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the profession, pleading and practice, real property, torts, and wills and estates. The use of the term “subject matter areas,” the ten categories of curricular experiences mandated, and the range of curricular experiences the rule self-consciously opts *not* to mandate together suggest that the rule is founded on a particular vision of the competent entry-level Wisconsin lawyer. That vision, perhaps defensible at some earlier moment in American history, clashes powerfully with today’s widespread professional consensus of the good lawyer.

In Wisconsin as elsewhere, today’s law students have a breathtaking range of educational experiences from which to choose, a range of experiences exponentially richer than their predecessors of a generation or two ago. The most common type of curricular offering is the almost boundless number of courses devoted to the acquisition of legal principles—doctrine. In some of these offerings (for instance, contracts or family law) the doctrine under scrutiny is rooted principally in state law;

in others (say, antitrust, constitutional criminal procedure, or income tax) it springs largely from the national government. In some of these offerings (for instance, administrative law or civil procedure) the doctrine at issue focuses on the processes of law; in others (say, property) it concerns the underlying legal rules that shape relations among people. In some of these offerings (for instance, torts) the doctrine is for the most part the product of judge-made common law; in others (say, criminal law, sales, or securities regulation) statutes and codes assume greater prominence. Nevertheless, the central objective of these (and a host of similar) offerings is inextricably bound up with the acquisition of doctrine on which the course titles, descriptions, and materials center.

A markedly different type of curricular offering focuses not on mastering legal doctrine, not on what lawyers *know*, but on developing and refining skills central to effective lawyering, among them skills of communication, research, negotiation, counseling, decision-making, fact investigation, organization, and the like—in short, what lawyers *do*.<sup>66</sup> Some of these offerings (for instance, the legal writing course invariably required of first-year students) seek to enable students to produce effective expository or persuasive writing; others (say, introductory and advanced courses in legal research) help students find the law within items that can be found on library shelves or in electronic databases. Some of these offerings (for instance, courses devoted to pretrial practice) focus on how to elicit facts *from* clients, adverse parties, and a range of other individuals; others (say, counseling courses or some clinical experiences) emphasize how to formulate and convey legal advice *to* clients. Some of these offerings (for instance, trial advocacy) focus on preparing students

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66. My colleague Michael McChrystal, in a thoughtful critique of the reports issued by recent ABA and Wisconsin commissions exploring the role of legal education in professional development—see *infra* notes 69 and 73—reminds that the line between the acquisition of legal doctrine and the development of the range of legal skills to which those reports devote themselves is “not . . . very sharp.” Michael K. McChrystal, *Central Planning or Market Controls in Legal Education: How to Decide What Lawyers Should Know*, 80 MARQ. L. REV. 761, 762 n.7 (1997). Moreover, Professor McChrystal cautions against allowing “the new characterization of the practice of law as a composite of skills and values” to induce us to undervalue the centrality of legal knowledge to effective lawyering. *Id.* at 762. The admonition is important. Nonetheless, among my contentions here is that the Thirty Credit rule must be found guilty of the analogous crime: the rule deeply undervalues the centrality of legal skills by eternally freezing into Wisconsin law a set of curricular requirements that suggests entry-level lawyers need not know how to *do* much of anything—craft a persuasive memorandum, find the applicable law, elicit the relevant facts, negotiate an acceptable settlement, etc.—but, instead, need only *know* lots of legal rules. To make matters worse, the rules of law to which the Thirty Credit rule demands students be exposed are very likely the rules of law students have long since forgotten by the time they take the professional oath shortly after graduation. See *infra* at text accompanying notes 68-71.

to speak effectively to judges, juries, and witnesses; others (say, courses in negotiation and alternative dispute resolution) endeavor to prepare students to barter effectively with professional adversaries. And some of these offerings (for instance, courses devoted to legislation, real estate conveyancing, or the drafting of legal instruments) introduce students to the challenges that accompany the effort to create a variety of written products purporting to be legally binding.

Still another type of course offering in today's law school curriculum seeks to enrich the understanding that prospective Wisconsin lawyers have of the law and legal system in which most of them will spend the bulk of their professional career by exposing them to the governing law and legal systems of other times and places and to alternative perspectives on American law itself. Some of these offerings (for instance, comparative law or canon law) seek to enhance understanding of the American legal system by comparing it to other systems; others (say, legal history) endeavor to illuminate the legal culture of today more clearly by exploring the legal culture of yesterday. And some of these offerings (for instance, law and economics, jurisprudence, law and literature, or feminist legal theory) strive to arm prospective lawyers with powerful tools deployed by social scientists and humanists that increasingly have impact on, and are wielded by, legal decision-makers.

To repeat, today's UW and Marquette law students have a truly impressive range of educational experiences from which to choose. Viewed against this backdrop, the Thirty Credit rule becomes all the more curious. For, of the range of educational experiences made available to prospective diploma privilege applicants, Wisconsin's highest court has chosen to elevate above all others—that is to say, to mandate for an indefinite duration of time—approximately ten such experiences. These ten experiences by and large (a) replicate each other, (b) occur during the first half of the law school experience, considerably before the time at which students become lawyers, and (c) devote themselves to the ingestion, mastery, and regurgitation of legal doctrine—much of that doctrine irrelevant to prospective lawyers<sup>67</sup>—rather than to the devel-

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67. Truth to tell, only a modest amount of the legal doctrine students ingest and regurgitate in the curricular experiences used to satisfy the Thirty Credit rule has much use to practicing lawyers. This observation, which comes as second nature to most practitioners emerging from Marquette and UW but is nonetheless rarely acknowledged by their law professors, is true for a host of reasons, only some of which are germane to the Thirty Credit rule's shortcomings. One reason is that client problems rarely appear in the clean, tidy, doctrinally straightforward packages in which the classroom presents them as appearing. For instance, however pedagogically crisp it may be to teach the great common law trilogy of contract formation—offer, acceptance, consideration—few law students will encounter as lawyers con-

opment of other specific skills needed for professional success. This judicial mandate of thirty credits in ten doctrine-laden subject matter areas thus cannot paper over the vision of lawyering out of which the mandate springs. That vision, stripped of its camouflage, reduces to this: *the good entry-level Wisconsin lawyer is the lawyer who, above all else, knows legal doctrine; the competent entry-level Wisconsin lawyer is the lawyer who, above all else, has demonstrated the satisfactory regurgitation and application of legal doctrine in ten different subject areas.*

Unfortunately, two large problems mar this vision of lawyering. One is that the vision does not reflect professional realities, is intrinsically at odds with what important recent studies of the legal profession—both nationally and within Wisconsin—conclude good lawyering is all about. The second is that, even were the vision credible, the Thirty Credit rule does not help achieve it.

Let us attend briefly to the second point first. Even were we to assume for the sake of charity that the competent entry-level Wisconsin lawyer was the lawyer who walked around with a competent grasp of ten gobs of legal doctrine, the Thirty Credit rule hardly seems a likely route to that destination. For, of the ten gobs of doctrine the Thirty Credit rule mandates, students grapple with at least seven in their initial two semesters of law study;<sup>68</sup> the other three tend to be confronted prior to the end of the 2L experience. Thus, even were we to grant the dubious

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tract formation problems that will be resolved through the deft application of any part of the trilogy. A second reason is that oftentimes the very doctrine that consumes substantial classroom time in the courses used to satisfy the Thirty Credit rule has little to do with the everyday practice of law. For instance, the number of lawyers emerging from UW and Marquette who in the course of their legal careers will confront a serious legal issue about the extent of national power under the commerce clause can probably be counted on one hand. A third reason is that the bulk of legal doctrine conveyed in the ten subject matter areas mandated by the Thirty Credit rule is the stuff of the generalist; today's UW and Marquette graduates enter a professional world in which employers and clients alike increasingly require specialization. Put somewhat differently, most of the legal problems UW and Marquette graduates will confront throughout their careers will not be found within the four corners of the subject matter areas set forth in the Thirty Credit rule. Add to all this the temporal problem mentioned in the text—the fact that the sheer passage of time from the *student* moment of doctrinal mastery to the *lawyer* moment of doctrinal usefulness virtually ensures that practicing lawyers retain little of the doctrine they were compelled to master and regurgitate in law school—and the value of the Thirty Credit rule as a doctrinal insurance policy seems, to engage in understatement, vastly overrated.

68. At Marquette, for instance, students encounter the subject matter areas constitutional law, contracts, criminal law, jurisdiction of courts, pleading and practice, real property, and torts as 1Ls. Most students encounter the three remaining areas—evidence, ethics and the legal responsibilities of the legal profession, and wills and estates—as 2Ls, although an increasing number of Marquette students, both full-time and part-time, enroll in these courses during the summer after their first two semesters in law school.

premise of the Thirty Credit rule—the premise that the essence of the good entry-level Wisconsin lawyer is an understanding of, say, the commerce power, promissory estoppel, proximate cause, compulsory joinder, and the rule against perpetuities—the practice of offering these curricular experiences early in law school suggests intuitively that they are the very gobs of legal doctrine entry-level Wisconsin lawyers have long since forgotten by the time they take their professional oath in Madison. In short, unless the justices can discharge the burden of explaining how students who study the law of contracts during their first law school semester maintain a competent grasp of that law three (and, in the case of students attending law school part-time, as many as six) years later, the usefulness of the Thirty Credit rule in ensuring lawyer competence in legal doctrine seems at best minimal.

Accordingly, were the “the good entry-level lawyer is the entry-level lawyer who knows lots of doctrine” vision of lawyering accurate, the Thirty Credit rule would not be of much help. But that vision, as most lawyers grasp, is not accurate.

A recent landmark study of the link between legal education and the professional challenges lawyers confront casts serious doubt over the vision of lawyering embodied in the Thirty Credit rule. In 1992, the American Bar Association published an influential report devoted to improving the ways in which new lawyers are prepared for the continuing challenges of law practice.<sup>69</sup> That report, commonly referred to as the MacCrate Report, identifies the irreducible core of effective lawyering as a series of skills (and, to a secondary extent, values) developed and refined along a continuum that, for each lawyer, “reaches its most formative and intensive stage during the law school experience” and continues to evolve throughout that lawyer’s legal career.<sup>70</sup> Indeed, the MacCrate Report equates the development of these skills—not the absorption of legal doctrine—with becoming “a competent and responsible member of the profession.”<sup>71</sup> The ten distinctive skills MacCrate enumerates are (1) problem solving; (2) legal analysis and reasoning; (3) legal research; (4) factual investigation; (5) communication; (6) counseling; (7) negotiation; (8) litigation and alternative dispute resolution procedures; (9) organization and management of legal work; and (10)

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69. See AMERICAN BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, (Robert MacCrate ed., 1992).

70. *Id.* at v.

71. *Id.*

recognizing and resolving ethical dilemmas.<sup>72</sup>

Four years later, the State Bar of Wisconsin Commission on Legal Education, fueled by MacCrate's momentum, issued its evaluation of the status of legal education in Wisconsin.<sup>73</sup> The Wisconsin Commission in important respects out-MacCrates the ABA, vigorously endorsing the propositions that "lawyers must and can be taught a common set of professional skills and values" and that "legal education involves not only the learning of substantive law but also the acquisition of [this] relevant and universal set of skills and values. . . ."<sup>74</sup> Among the fifteen recommendations put forth by the Wisconsin Commission for implementing these skills-based objectives, several stand out as especially germane to an assessment of the usefulness of the Thirty Credit rule. First, the Wisconsin Commission endorses (with some additions of its own)<sup>75</sup> the MacCrate statement of fundamental lawyering skills and values.<sup>76</sup> Second, the Wisconsin Commission recommends that the state's two law schools "make explicit" to students that the identified skills and values "constitute the foundation of the practice of law" as well as accept responsibility for endowing students with "basic proficiency" in the five specific skills of (1) problem solving; (2) legal analysis and reasoning; (3) legal research, (4) communication; and (10) recognizing and resolving ethical dilemmas.<sup>77</sup> Third, the Wisconsin Commission—seeking to sidestep the political controversy likely to be created were it to expressly link its recommendations to the diploma privilege—advises that consideration and implementation of its own recommendations not get entangled in the long-standing diploma privilege debate.<sup>78</sup> In April 1996, the State Bar Board of Governors adopted the Wisconsin Commission Report.<sup>79</sup>

These recent landmark studies of the ABA and State Bar of Wisconsin reveal that the central institutional duty of Wisconsin's two law schools is to develop in their graduates the professional skills essential

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72. *See id.* at 138-141.

73. *See* STATE BAR OF WISCONSIN, COMMISSION ON LEGAL EDUCATION FINAL REPORT AND RECOMMENDATIONS, (1996) [hereinafter "Wisconsin Commission Report"].

74. *Id.* at 1, 3.

75. *See id.* at 17-23, 70.

76. *See id.* at 17-23.

77. *Id.* at 31-35.

78. *See id.* at 43.

79. *See* John S. Skilton, *President's Perspective*, WISCONSIN LAWYER, May 1996, at 5 (discussing the Wisconsin Commission Report and noting its adoption by the Board of Governors).



to professional success. In particular, UW and Marquette have been urged to understand their principal institutional duty as developing in their students the skills of problem solving, legal analysis and reasoning, legal research, communication, and recognizing and resolving ethical dilemmas. Measured against this standard the Thirty Credit rule fares poorly. Indeed, measured against this standard the Thirty Credit rule can be seen most clearly as imposing an obstacle to the achievement of the institutional duty suggested by the ABA and State Bar of Wisconsin rather than as assisting in achieving that duty.

To the extent that the bulk of the curricular experiences mandated by the Thirty Credit rule help develop *any* professional skill deemed indispensable to competent entry-level lawyering by MacCrate and the Wisconsin Commission, that skill—the generic catch-all “legal analysis and reasoning”—is the same for virtually all the experiences. Indeed, with perhaps one exception,<sup>80</sup> it is difficult to find within the mandates of the rule a curricular experience likely to develop any skill *other than* this most basic skill. The Thirty Credit rule conspicuously omits from its elevated list of doctrine-laden areas the notion that the ability to express oneself effectively in writing has anything to do with professional success. After all, the Wisconsin Supreme Court has not seen fit to include in its requirements *any* of the rich array of curricular experiences that focuses principally on written communication. The Thirty Credit rule conspicuously omits from its list the notion that the ability to express oneself orally has anything to do with professional success. After all, the Wisconsin Supreme Court has not seen fit to include in its requirements *any* of the valuable curricular experiences that focuses principally on oral communication. The Thirty Credit rule conspicuously omits from its list the notion that the ability to find the law, to plan and undertake competent research, has anything to do with professional success. After all, the Wisconsin Supreme Court has not seen fit to include in its requirements *any* of the important curricular experiences that focuses

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80. Presumably, the subject matter area referred to in the Thirty Credit rule as “ethics and the legal responsibilities of the legal profession” and satisfied through a single required course (at Marquette, formerly titled “Professional Responsibility” and now titled “The Law and Ethics of Lawyering”) is supposed to bear some connection to the MacCrate-denominated skill “recognizing and resolving ethical dilemmas.” As Dean Kimball observed three decades ago, however—see UW Brief, *supra* note 26—there has always been substantial sentiment in legal education that students grasp the significance of ethics law more permanently when they encounter that law together with, rather than separate from, other lawyering challenges central to particular practice areas. For trailblazing work in this regard, see DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998) (especially Part II, “Legal Ethics in Legal Context”).

principally on legal research. Indeed, the very curricular experiences that seek to impart the skills to which entry-level Wisconsin lawyers devote the bulk of their time and by which entry-level Wisconsin lawyers are routinely evaluated—the skills of writing, research, and speaking—the very curricular experiences MacCrate and the Wisconsin Commission indicate law schools are uniquely equipped to do well, these are the very experiences the Wisconsin Supreme Court has neglected to include in its Thirty Credit rule.

This makes for a troubling paradox. The very educational objectives that well-respected professional commissions in Wisconsin and nationally urge UW and Marquette to pursue just so happen to be the very educational objectives that the Thirty Credit rule both fails to advance in any meaningful way and renders more difficult for UW and Marquette to advance in other ways. With some reflection, however, the paradox dissolves. The reports from the ABA and State Bar of Wisconsin are rooted in a vision of the contemporary lawyer as a professional committed to developing the skills necessary to assist others in working through their legal problems. By contrast, the Thirty Credit rule—as well as the court that enacted and persists in maintaining it—appears to be animated by a vision of the contemporary lawyer that equates professional competence with exposure to legal doctrine. It is precisely because of this fundamental disconnect that the curricular experiences mandated by the Thirty Credit rule fail to accomplish much of what MacCrate and the Wisconsin Commission find essential to competent entry-level lawyering. The lesson that emerges is this: begin with a flawed vision of lawyering and it is difficult to avoid ending up with a flawed design for shaping competent lawyers.

### *C. The Harm to Wisconsin's Law Schools and Law Students*

This article thus far has sought to demonstrate that the Thirty Credit rule is both unprincipled and rooted in a misguided vision of the competent entry-level lawyer. These shortcomings are sufficiently troubling themselves to prompt a responsible court and legal community to revisit the current rule. But the rule's shortcomings run deeper. The state's law schools and law students pay a hefty price for the rule, a price that cannot be justified by that which they receive in exchange.

The deleterious impact the Thirty Credit rule has on the state's law schools is exemplified by recent developments that unfolded at Marquette. In 1995, the Marquette faculty, prompted in part by both the national discussion of legal education triggered by MacCrate and the ongoing effort of the Wisconsin Commission, undertook an exhaustive

two-year review of its curriculum.<sup>81</sup> The review began with a return to first principles, as the faculty worked to identify with some particularity the lawyers it hoped to produce as a result of the Marquette experience. With that foundation in place, the faculty proceeded to enact changes to its required curriculum and to reorganize in important respects its elective curriculum.

The revised curriculum places increased emphasis, and thus increased resources, on, among other things, (1) developing and refining skills of written communication, oral communication, research, and negotiation;<sup>82</sup> (2) facilitating the development of professional expertise by reconceptualizing and reorganizing the upper-level curriculum so as to encourage students to immerse themselves in at least one practice-area "stream" that moves from doctrine-laden foundational courses to skills-focused seminars, workshops, and clinical experiences;<sup>83</sup> (3) imparting an understanding of the evolution of the American legal profession, the vast range of professional roles contemporary lawyers assume and the vast range of day-to-day challenges confronted in these roles, and anticipated trends within the profession;<sup>84</sup> (4) endowing students with a richer perspective of the distinctiveness of the American legal system by illuminating both the historical development of that system as well as self-conscious comparisons with other legal systems;<sup>85</sup> and 5) acknowl-

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81. See Marquette University Law School Curriculum Committee, *Proposed Curriculum Revision* (Oct. 10, 1996) (on file with author) [hereinafter "Marquette Proposed Curriculum Revision"].

82. Some of the particular manifestations of this renewed emphasis were (a) separating out the research element from the required pair of first-year legal writing courses, leaving those experiences more exclusively concerned with effective written communication; (b) creating two required research experiences, an intensive foundational research course for 1Ls and a practice-centered advanced research experience for 2Ls; (c) increasing the number of required curricular experiences that compel students to submit substantial writing assignments above and beyond any final evaluative examination or paper; (d) creating an upper-level oral communication requirement; and (e) infusing negotiation exercises throughout the first-year required curriculum as well as creating a host of upper-level negotiation-related experiences. See *id.*

83. In addition to reorganizing the curriculum into "streams" to better reflect the profession's dominant practice areas, the new curriculum requires all students to complete a workshop and a seminar. See *id.*

84. In an effort to achieve these objectives, the faculty created a new required first-semester course entitled "The Lawyer in American Society." The principal function of the course is to establish an immediate connection between prospective lawyers and the profession they will soon be joining, a connection that the more traditional cluster of first-year experiences fails to provide.

85. To achieve this objective, the faculty created a "perspectives" requirement. The requirement calls for each student to complete a faculty-denominated experience designed to acquaint students with the relationship of law to other disciplines, to compare the American

edging and conveying the striking variety of post-law school employment alternatives available to those trained as lawyers.<sup>86</sup>

One consequence of the revised curriculum was that the Marquette faculty chose to eliminate from the required curriculum two courses—evidence and trusts and estates—that previously had been required for graduation.<sup>87</sup> In effect, the Marquette faculty in 1996 reasoned to much the same conclusion that the UW faculty had reasoned to in 1969: despite the unmistakable value of this pair of subject matter areas, it could no longer justify *compelling* students to enroll in these curricular experiences.<sup>88</sup>

Ordinarily, these curriculum changes would have been of little significance beyond the walls of the law school that promulgated them. But the Thirty Credit rule greatly enhanced their significance. For, as noted, two of the courses whose status the Marquette faculty converted from required to elective—trusts and estates and evidence—just so happened to represent two of the ten mandatory subject matter areas captured in the Thirty Credit rule. Indeed, the Thirty Credit rule hovered over the two-year curriculum examination much as a bumblebee hovers over a picnic. Accordingly, with its curriculum revision completed—and maintaining an institutional consensus rare for academicians—the Marquette faculty requested its dean to take the new curriculum to the Wisconsin Supreme Court, explain it to the justices, and urge the court to bless the students who would go through the new curriculum as worthy of admission on diploma privilege.

Several months later, the dean returned with infelicitous news. He reported that he had indeed met with the chief justice, informed her of the curriculum revision, and requested the court's blessings for it. Unfortunately, he reported, the chief justice denied the request. She informed the dean that, because the new curriculum had "un"-required two subject matter areas mandated by the Thirty Credit rule—wills and estates and evidence—and because, as a consequence of that change, obtaining court approval for the new curriculum could require a recon-

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legal system with other legal systems, or to explore the historical development of the American legal system.

86. A recurring theme in the Marquette curriculum reform was that an increasing number of law graduates are opting to deploy their legal talents in professional contexts different from those traditionally chosen by law graduates. See, e.g., Marquette Proposed Curriculum Revision, *supra* note 81, at 4.

87. See Marquette Proposed Curriculum Revision, *supra* note 81, at 13-17 (listing and discussing new upper-level requirements).

88. See UW Curriculum Committee Memorandum, *supra* note 11; Marquette Proposed Curriculum Revision, *supra* note 81.

sideration of the Thirty Credit rule that in turn could open the Pandora's box of the diploma privilege, Marquette and the prospective lawyers paying it nearly twenty thousand dollars a year in tuition were out of luck: students who wished to be admitted on diploma privilege (that is to say, *all* Marquette students), the chief justice advised, will continue to be compelled to take courses in evidence and wills and estates, despite Marquette's institutional conclusion that this pair of requirements could not be justified.<sup>89</sup>

This recent episode featuring the Marquette faculty, its dean, and the state's chief justice leaves behind a residue of meaningful lessons. One lesson concerns the impact of the Thirty Credit rule on the legal education delivered at UW and Marquette. This first lesson is that Wisconsin's highest court<sup>90</sup>—the institution ultimately responsible for administering the state's bar admission requirements—cares surprisingly little about the impact the three-decade old Thirty Credit rule has on the educational program of the state's two law schools. Indeed, the message that emerged from the chief justice's response to the Marquette request came through loud and clear: *Do not squander your time seeking to provide the lawyers of tomorrow a better curriculum, one that will enable them to meet the professional demands they will encounter more effectively than did their predecessors; for now and forever your students will be compelled to experience the curriculum that three decades ago seven men (all of whom received their professional training in the first half of*

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89. The developments summarized in this paragraph of the text are captured in full in minutes of the Marquette faculty meeting of January 24, 1997. In particular, the minutes note that the chief justice "*does not favor seeking an amendment to the existing rule and suggests that Marquette does the same as the University of Wisconsin Law School. That is, inform students that they will have to take additional courses beyond the required curriculum if they want to be admitted in Wisconsin without a bar exam.*" (emphasis supplied). A copy of these minutes is on file with the author. Not surprisingly, the chief justice offered no principled explanation of her decision. Nor did she endeavor to explain how the result being forced upon Marquette and its students served any useful purpose for the Wisconsin legal community. Given this institutional cold shoulder, it is unlikely that the chief justice gleaned the significance of the fact that at essentially the same time she was rejecting the Marquette request, the Indiana Supreme Court was repealing a curricular requirement strikingly analogous to Wisconsin's Thirty Credit rule. Compare IND. CT. R. A.D. 13, § V (Michie 1996) (mandating that candidates for admission to the Indiana bar on written examination demonstrate that they have completed no less than 3 credit hours of law school work in administrative law and procedure, 3 in business organizations, 4 in civil procedure, 6 in commercial law/contracts, 3 in constitutional law, 4 in criminal law/criminal procedure, 3 in evidence, 2 in legal ethics, 2 in legal research and writing, 4 in property, 3 in taxation, and 4 in torts), with IND. CT. R. A.D. 13, § 4 (Michie 1998) (eliminating each particular requirement enumerated above with the exception of the 2 credits in legal ethics).

90. Nothing in the record of the events reported here in the text indicates whether the chief justice shared the Marquette request with her six colleagues.

*the twentieth century) deemed adequate to produce competent entry-level lawyers.* With that message from the chief justice, the portentous vision feared by Spencer Kimball has materialized. The Thirty Credit rule has stopped time, ensuring that tomorrow's Wisconsin lawyers will continue to be bound to yesterday's curriculum. Obsolescence has become mandatory.

That leads to a second lesson, a lesson that concerns the impact of the Thirty Credit rule on law students. With tuition at the state's only private law school approaching eight hundred dollars per credit hour, compliance with the Thirty Credit rule costs every student who receives a Marquette degree approximately \$24,000.<sup>91</sup> And the only direction that number is headed is up—way up. To be sure, were the Thirty Credit rule decoupled from the diploma privilege, as this article suggests, the Marquette faculty likely would continue to require some of the curricular experiences currently used to satisfy the mandates of the Thirty Credit rule. But, as recent developments make abundantly clear, *only some*. Just as important, those that continue to be required would be rooted in an educational foundation substantially firmer than is currently the case. After all, requiring twenty-first century law students to spend thousands of dollars on curricular experiences because in 1970 the state's highest court—without an especially good reason—decreed the experiences worthwhile ones is hardly a recipe for producing competent lawyers, let alone grateful, generous alumni.

With each passing year, the harm the rule wreaks on law students—no insubstantial matter today—will be exacerbated. The rule and whatever justification can be mustered for it are becoming increasingly obsolete, as the categories in which lawyers think and work today increasingly diverge from the categories that dominated law practice earlier this century. Put another way, the gap between the premises in which the Thirty Credit rule is grounded and the realities of contemporary American (and thus Wisconsin) lawyering continues to grow. This development will prompt the state's law schools increasingly to seek to narrow that gap by rethinking curricular mandates to maximize their usefulness to law students. Unfortunately, for each subject matter area experience the Thirty Credit rule mandates that the UW or Marquette faculty chooses *not* to mandate, students are dealt a double-barreled hit. First, they are required to shell out scarce resources to pay for these experiences. Second, the commitment of time and monies to such experiences hinders them from channeling their time and monies to other curricular

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91. To explain the arithmetic: 30 credits x 800 dollars per credit = \$24,000.

experiences. For now, the number of curricular experiences caught in this gap seems modest; the harm—financial and otherwise—thus seems minimal. Nevertheless, as legal educators grow increasingly skeptical of the usefulness of yesterday's required curriculum to tomorrow's professional challenges that number will increase, the harm becoming more palpable. And all in the pursuit of an objective that no one, least of all the Wisconsin Supreme Court, has coherently articulated for three decades.

#### IV. CONCLUSION

In Wisconsin as elsewhere, legal education is a partnership among the bench, the bar, and the law schools. And so it should be. But a partnership is more likely to flourish when its members acknowledge and respect the expertise their colleagues bring to the enterprise.

The Wisconsin Supreme Court has the raw power, the constitutional authority, to craft the requirements for admission to the Wisconsin bar. That power usually has been deployed wisely. Indeed, the persistence of the distinctive diploma privilege option for UW and Marquette graduates, whatever else it may say, speaks well for the court's skepticism about the usefulness of the bar examination as a tool by which to assess entry-level lawyer competency.

Unfortunately, the Thirty Credit rule—the middle-aged stick that accompanies the diploma privilege carrot—does not reflect well on the court. The rule emerged for all the wrong reasons, central among them to undercut incremental curriculum change at the state's distinguished public law school. In part because of how and why it emerged, the rule always has been in search of a principled justification, an explanation that persuades disinterested observers that it was crafted to help achieve, and can in operation help achieve, a desirable professional objective for Wisconsin and its lawyers. Worse yet, to the extent the rule appears to have been rooted in any comprehensible vision of lawyering, that vision does not square with the profession's widespread consensus of the good entry-level lawyer. Add to this the undeniable fact that the Thirty Credit rule imposes substantial harm on UW, Marquette, and their students.

In the face of all this, one might expect to discern a glimmer of hope somewhere on the horizon that the members of the Wisconsin Supreme Court—the institution responsible for retaining the rule on the books—will soon devote some institutional time to considering the usefulness of this obsolete set of curricular shackles, perhaps even seeking the assistance of the state's legal educators. Should recent events provide us a

glimpse into the future, however, such hope would be unfounded. The spate of media reports devoted to relations among the court's members over the past several months<sup>92</sup> suggests that the prospects remain slim that a matter as mundane as the competence of the next generation of Wisconsin-trained lawyers will receive serious discussion among the justices anytime soon.

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92. See, e.g., Jim Stingl, *Justices Say Resignations From Court Possible; Bablitch, Crooks Claim Abrahamson is Abusing Authority as Chief Justice*, MILW. J. SEN., Feb. 18, 1999, at 1 (reporting statement by high court member that as many as three incumbent justices are considering tendering resignations as a result of chief justice's administrative decisions); Richard P. Jones, *Computer Games Cited as Factor in Court Spat; Bablitch Was Upset by Policy Erasing Them From Machines, Bradley Says*, MILW. J. SEN., Feb. 16, 1999, at 1 (reporting that removal of solitaire and other games from court computers helped spark four colleagues to go public with criticism of incumbent chief justice); *Court Feud Gets Byte; Bablitch Irked as Computer Games Deleted*, CAP. TIMES, Feb. 16, 1999, at 1A (same); Doug Moe, *No Order In This Court—Again*, CAP. TIMES, Feb. 15, 1999, at 2A (noting the every ten-year recurrence of inside-the-court criticisms of (now Chief) Justice Shirley Abrahamson); Cary Segall, *Four Tried to Reduce Powers of Chief Justice; Bablitch and Three Others Sought a Rule Transferring Authority to Handle Many Administrative Matters*, WIS. ST. J., Feb. 13, 1999, at 1A (reporting that four members of the high court unsuccessfully sought to strip incumbent chief justice of authority to supervise court system); Richard P. Jones, *Justice Bablitch Admits to Aiding Abrahamson Foe; He Has Contacted Campaign Strategists on Rose's Behalf*, MILW. J. SEN., Feb. 7, 1999, at 1 (high court member admits to assisting challenger to chief justice); Richard P. Jones, *Bablitch Denies Wish for Abrahamson Loss; He Issues Statement Noting That Wouldn't Make Him Chief Justice Anyway*, MILW. J. SEN., Feb. 4, 1999, at 2 (high court member denies that ambition to serve as chief justice accounts for his behind-the-scenes efforts to oust chief justice); Cary Segall, *Bablitch Leading Trio Working to Oust Abrahamson*, WIS. ST. J., Feb. 4, 1999, at 1A (reporting efforts by three high court members to assist challenger to incumbent chief justice in contested race for ten-year term); Richard P. Jones, *No More Workouts Allowed in Courtroom; State High Court Restricts Use of its Chambers After Chief Held Aerobics Class*, MILW. J. SEN., Jan. 27, 1999, at 1 (reporting that at least three members of the high court were "astounded" that court's chief justice conducted an aerobics class in the high court's courtroom).



