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### Repository Citation

William D. Underwood, *The Report of the Wisconsin Commission on Legal Education: A Road Map to Needed Reform, or Just Another Report?*, 80 Marq. L. Rev. 773 (1997).

Available at: <http://scholarship.law.marquette.edu/mulr/vol80/iss3/11>

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# THE REPORT OF THE WISCONSIN COMMISSION ON LEGAL EDUCATION: A ROAD MAP TO NEEDED REFORM, OR JUST ANOTHER REPORT?

WILLIAM D. UNDERWOOD\*

## I. INTRODUCTION: A CALL FOR REFORM OF LEGAL EDUCATION

Calls for reform of legal education, like these in the *Wisconsin Commission on Legal Education Report*,<sup>1</sup> are nothing new. Throughout this century, lawyers and law students alike have challenged law schools to do more than simply prepare students to “think like lawyers.” Indeed, as early as 1890, the Standing Committee on Legal Education of the American Bar Association cautioned that:

[t]he rapid growth and success of law schools must not make us forget that there were also peculiar advantages in the older method of office instruction which should not be lost sight of if we can help it, and that these schools, like all human institutions, are susceptible of almost indefinite improvement.<sup>2</sup>

Nearly twenty-five years later, in 1913, the Carnegie Foundation for the Advancement of Teaching issued a report highly critical of the increasingly academic focus of legal education.<sup>3</sup> In summarizing, E. Gordon Gee and Donald W. Jackson stated that the report suggested four ways to produce law graduates who had appropriate exposure to legal doctrine and practical skills:

(1) [f]aculty contact with legal practice, (2) law school courses in

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1. *Commission on Legal Education, Final Report & Recommendations*, 1996 STATE BAR OF WISCONSIN [hereinafter *Wisconsin Commission on Legal Education Report*].

2. E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695, 786-87 (quoting *Standing Committee on Legal Education Report*, 13 A.B.A. REP. 327, 329 (1890)).

3. ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW, (Carnegie found. Bull. No. 15 (1921)); see also ALFRED Z. REED, PRESENT DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA (Carnegie found. for the Advancement of Teaching the Law Bull. No. 21, (1928) (discussing the function of law schools in the United States and Canada).

practical application of the law, (3) imitation of practical activities within the law school, including moot courts, drafting of written instruments, and problem-method training in the use of judicial decisions, and (4) greater emphasis upon the concrete law of a particular jurisdiction, as distinguished from the generalized law taught by the leading law schools.<sup>4</sup>

Over the decades that followed, others continued to urge for a more balanced and practical approach to legal education. Among the many critics of legal education was Jerome Frank who argued that it was possible to provide practical training without endangering the academic process. Frank believed that "without giving up entirely the case-book system or the growing and valuable alliance with the so-called social sciences, the law schools should once more get in intimate contact with what clients need and what courts and lawyers actually do."<sup>5</sup> Frank demanded "lawyer schools" and argued that:

The law student should learn, while in school, the art of legal practice. And to that end, the law school should boldly, not slyly and evasively, repudiate the false dogmas of Langdell. They must decide not to exclude, as did Langdell—but to include—the methods of learning law by work in the lawyer's office and attendance at the proceedings of the courts of justice . . . . They must repudiate the absurd notion that the heart of a law school is its library.<sup>6</sup>

Consistent with these conclusions, in 1979 the *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools* (the *Cramton Report*) challenged law schools to assume greater responsibility for preparing students to actually practice law, rather than simply preparing students to learn to practice law.<sup>7</sup>

These calls for reform of legal education have gone largely unheeded. Rather than reforming the core of the traditional law school program to provide more practical training, legal educators have tended to create clinics, have hired clinicians to process cases through the clinics, and have admitted a handful of students to the clinical programs. Comforted by

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4. Gee & Jackson, *supra* note 1, at 757.

5. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 913 (1933).

6. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 156-57 (quoting Jerome Frank, *What Constitutes a Good Legal Education?*, Speech Before the Section of Legal Education (1933), in LEE, *THE STUDY OF LAW AND PROPER PREPARATION* 29 (1933)).

7. *Report and Recommendation of the Task Force On Lawyer Competency: The Role of Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 103 [hereinafter *Cramton Report*].

the belief that clinics would silence the calls for reform, the mainstream curriculum at many law schools has actually drifted even further away from the objective of training students for careers as legal practitioners. Though the reasons for this drift are many, the identity of persons hired to teach in law schools is at its core. The simple fact today is that many law faculty members have little experience practicing law, have little interest in practicing law, and have little aptitude for practicing law. As a result, law faculty members who do not comprehend, appreciate, or care about the problems of practicing lawyers are not likely to address those problems in their classrooms or in their scholarship. One commentator has thus observed that:

The elite journals (and, perhaps even more so, those that aspire to be elite) publish far more pages than formerly that are directed only at other academics and not at members of the bar. Few of the articles in most of the elite journals would be of interest to—some not even comprehensible by—a practicing lawyer.<sup>8</sup>

These theoretical scholars inevitably tend to teach law students the impractical subject of their scholarship. They find their scholarship interesting and naturally view it as important. As one commentator has observed, “despite the frequent discomfort of the fit, it is difficult to resist the temptation to translocate one’s research interests into the classroom.”<sup>9</sup> Therefore, a course on contracts becomes a course on microeconomics, with little attention being paid to contracts doctrine. In the same vein, teaching an advanced course in corporate law is less attractive to the theoretical scholar than teaching an advanced course on sociology and law, with a significant emphasis on sociology. Accordingly, one faculty member of an elite law school recently observed that:

[c]ompared to the curriculum of a faculty made up exclusively of lawyers, our curriculum is less rich in practical or substantive law courses and more rich in courses drawing principally on the Arts and Sciences. In part because more and more of our teachers have graduate degrees from, or attachment to, a particular area of the Arts and Sciences, other curricular changes are now being proposed that may also lead further from and not closer to the bar and practical legal practice.<sup>10</sup>

The bottom line is that the law taught in today’s law schools bears only a slight resemblance to the law practiced by graduates of those

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8. James J. White, *Letter to Judge Henry Edwards*, 91 MICH. L. REV. 2177, 2184 (1993).

9. Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1439 (1995).

10. White, *supra* note 8, at 2182-83.

schools. Despite a century of calls for reform, the training currently received in law schools generally does not adequately prepare law school graduates to practice law. Instead, as one recent graduate observed, "[l]aw school is about training scholars."<sup>11</sup> The result is that criticism of legal education has intensified in recent years. As a past president of the ABA recently reported, "I can't find many people who are that happy with legal education."<sup>12</sup>

This unhappiness with legal education led to publication in 1992 of the *MacCrate Report*.<sup>13</sup> While recognizing the obligation of the profession in training new members, the *MacCrate Report* has also charged law schools to make "education in lawyering skills and professional values central" to their mission.<sup>14</sup> The *MacCrate Report* has thus provoked an unprecedented debate among legal educators regarding what should, and indeed, can be done by law schools to produce students who are competent to represent their first clients upon graduation.<sup>15</sup> Practicing lawyers have joined the debate, primarily by endorsing the view that law schools should do more than they traditionally have, and can do more than they think they can. The *MacCrate Report* challenged the nation's state bar associations to review legal education in their own jurisdictions'. The *Wisconsin Commission on Legal Education Report* is the response of State Bar of Wisconsin to this challenge.

## II. RECOGNIZING THE OBLIGATION OF LAW SCHOOLS TO PRODUCE GRADUATES EQUIPPED WITH THE KNOWLEDGE AND SKILLS REQUIRED TO PRACTICE LAW COMPETENTLY UPON GRADUATION

The foundation of the *Wisconsin Commission on Legal Education Report* is the Commission's conclusion that "[o]ur law schools are expected to graduate lawyers who can do what lawyers do."<sup>16</sup> To one not familiar with the modern culture of legal education, this conclusion

11. Scott Turow, *Law School v. Reality*, N.Y. TIMES, Sept. 18, 1988, (magazine) at 54.

12. Talbot D'Alemberte, *Law School in the Nineties*, A.B.A. J., Sept. 1990, at 52.

13. *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS [hereinafter *MacCrate Report*].

14. *Id.* at 330.

15. See, e.g., THE MACCRATE REPORT, BUILDING THE EDUCATIONAL CONTINUUM, CONFERENCE PROCEEDINGS (Joan S. Howland & William H. Lindberg eds., 1994); John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993); Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, 44 J. LEGAL EDUC. 89 (1994); Jack Stack, *Dean Costonis on the MacCrate Report*, 44 J. LEGAL EDUC. 126 (1994).

16. *Wisconsin Commission on Legal Education Report*, *supra* note 1, at 25.

would hardly seem controversial. In fact, however, this conclusion is quite disturbing to many legal educators, who believe the goal of graduating competent lawyers is unattainable. These educators have adopted the far more modest goal of equipping students with the background needed to "learn to be competent lawyers" after graduation.<sup>17</sup> Other legal educators have rejected the goal of training students to practice law as being inconsistent with the mission of a university-affiliated law school. Consequently, an increasingly prevalent view among academics is instead that the "basic missions of the law school are to produce knowledge for its own sake, and/or knowledge which is useful to society . . . ."<sup>18</sup> One leading academic has actually declared that "[l]aw professors are not paid to train lawyers, but to study the law and to teach their students what they happen to discover."<sup>19</sup>

This philosophical mission would be entirely appropriate in one of two contexts. One would be a law school where the students are not preparing for entry into law practice, but are studying law in preparation for pursuing some other career path. At this type of law school, preparing students to actually practice law would be inappropriate. Of course, admitting graduates of these schools to the practice of law would also be inappropriate. The philosophical mission might also be appropriate, or at least would do little harm, if graduates of the law school were to receive a closely supervised and practical post-graduate legal education. Unfortunately, this type of post-graduate education is not readily available to today's law graduates. Many law students today have principal responsibility for representing clients almost immediately upon graduation. Approximately half of all lawyers in private practice today are solo practitioners.<sup>20</sup> Nearly thirty percent of graduating law students in 1990 joined very small law firms or entered solo practices.<sup>21</sup> And the most recent trend is toward a higher percentage of law school graduates joining small law firms or opening their own practices.<sup>22</sup> Small-firm lawyers typically bear sole responsibility for providing services

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17. See generally Stark, *supra* note 14, at 157.

18. Linz Audain, *Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue*, 20 HOFSTRA L. REV. 1017, 1071 (1992).

19. Peter W. Martin, "Of Law and the River," and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1, 26 (1985) (Letter from Owen M. Fiss to Paul D. Carrington).

20. See *MacCrate Report*, *supra* note 13, at 36.

21. See *id.* at 37 n.24.

22. See *id.* at 39.

directly to individual clients.<sup>23</sup> Students who will bear such responsibility upon graduation cannot afford to spend law school learning only to be a statesperson, a philosopher, or a law professor.

A graduate school model of legal education fails to meet the needs of these students and it also fails to recognize the responsibility law schools owe to future clients of their graduates. As the *Cramton Report* concluded in 1979:

Greater concern for consumers—both the consumers of legal services and the consumers of legal education—also points toward greater law school responsibility for lawyer training. The notion that young lawyers should gain an acceptable level of competence in the practice, in effect learning at the expense of their first clients, is today not an acceptable one. And many believe that reliance on a period of informal apprenticeship to experienced seniors in a firm to bridge the gap between law school instruction and the demands of practice is no longer practicable for a large number of law school graduates, if it ever was. In all likelihood, the majority of law graduates never received first-rate on the job training. Many have always begun professional work in settings lacking both the resources and expertise necessary for effective supervision.<sup>24</sup>

For many law graduates, learning to practice law while in school is essential to ensure that their first clients receive competent representation.

Even those fortunate students who begin their legal careers in carefully supervised environments need a practical legal education while in law school. Like their less fortunate classmates, these graduates will also perform lawyering tasks for clients. Close supervision by experienced lawyers will provide a safety net for clients. However, supervision will only provide a quality legal education to the new lawyer if the supervisor is interested in educating that lawyer. Such an interest is increasingly uncommon. The *MacCrate Report* noted that “the availability of this education is uneven and unpredictable, that the education often fails to provide adequate feedback and evaluation, and that the amount of this education is often inadequate to meet the professional needs of many new attorneys.”<sup>25</sup>

Demands for increased productivity and expectations created by high starting salaries are, at least in part, responsible for the loss of mentoring

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23. See *id.* at 40.

24. *Cramton Report*, *supra* note 7, at 14-15.

25. *MacCrate Report*, *supra* note 13, at 300-01.

in practice. One observer recently provided the following assessment of on the job training programs:

The larger firms attempt to train those entering the profession with in-house programs. I say "attempt to" because, despite a strong effort by many law firms over the last ten years, a very high percentage are incapable of providing a structured training model for their associates . . . . The demand for billable hours can rightly or wrongly take precedence in an era of high associate salary.<sup>26</sup>

Given the absence of supervision of many new lawyers and the absence of adequate in-house training for others, providing legal education designed to ensure that law school graduates are competent to practice law is imperative.

Law schools can produce graduates competent to begin practicing law provided that competence is not confused with experience. No law school can produce graduates experienced in performing all the various tasks they will be called upon to perform in practice. Three years of education is insufficient to provide this level of specificity in training. Indeed, thirty years of education would be insufficient to give students experience performing every task they will be required to perform over their legal careers. But a lawyer need not have experience performing a particular task to competently do so. As the *Model Rules of Professional Conduct* recognize, "[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar."<sup>27</sup> Experience in competently performing one lawyering task enables the lawyer to competently perform other similar tasks.

Law schools should realistically aspire to produce students who know basic legal doctrine, possess certain core lawyering skills, and have experience using this knowledge and skill to competently perform a reasonable range of lawyering tasks. Training competent lawyers must begin with teaching basic legal doctrine. Legal doctrine provides the

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26. Fulton Haight, *Law Schools Are Still Training People to Be Associates in Major Law Firms*, B. EXAMINER, Feb. 1990, at 24, 25. See also Stephanie B. Goldberg, *Bridging the Gap: Can Educators and Practitioners Agree on the Role of Law Schools in Shaping Professionals? Yes and No*, 76 A.B.A. J. 44, 44-46. "When I graduated from law school 29 years ago, people learned to practice law at the feet of a master. Lawyers would take you under their wing, either within your firm or, in my case, at a government agency and later in a law firm. Even if you went into solo practice, there was someone in town to mentor you and teach you the practice of law . . . . Somewhere along the line in the last 30 years, however, . . . the mentoring system broke down." *Id.* at 44-45 (statement of David Link).

27. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. 2 (1996).



context for learning core skills, followed by engaging in lawyering tasks, which provides the context for the practice of law. Learning legal doctrine does not simply mean memorizing black letter rules. Rather, a student must develop a sophisticated grasp of the theory behind the rules. Abstract legal rules cannot be applied to resolve concrete factual problems without understanding the theoretical foundation of the rules. For example, contract law requires certain agreements to be in writing to be enforceable. Determining whether an agreement containing both written and oral terms is enforceable under this rule requires an understanding of the reason for the rule. Once the lawyer understands this reason, the lawyer is then able to determine if the reason requires invalidating the particular agreement. The ability to engage in this mental process requires knowing not just the rule, but the policies behind the rule. Knowing the policies behind the rule also allow students and lawyers to intelligently question the validity of the rule.

In addition to knowing the rules in this broad sense, a lawyer must also possess the skills needed to use this knowledge to resolve client problems. Lawyers essentially do three things in representing clients: they think, they speak, and they write. Thinking like a lawyer requires accurate application of rules to resolve problems. This is generally referred to as problem solving, or legal analysis and reasoning. Thinking clearly and analytically is part of being a competent lawyer. A competent lawyer must also communicate these thoughts clearly and persuasively. Furthermore, clear speaking and writing, like clear thinking, are core lawyering skills. Knowing the rules and possessing these core skills are prerequisites to providing competent legal services.

The final stage in the process of providing competent legal services is to use this knowledge and skill to execute lawyering tasks on the client's behalf. A competent litigator must know the rules and think analytically to develop a theory of the case. To produce results for the client, however, the litigator must then implement this theory by skillfully executing lawyering tasks, such as drafting pleadings, conducting pretrial investigation, engaging in motion practice, selecting a jury, and examining witnesses. Traditionally, law schools have largely ignored teaching these lawyering tasks, instead focusing on what law schools believed they did best—teaching analytical skills, substantive law, and perhaps legal research. Generations of law students have thus graduated with no more training in performing lawyering tasks than that provided in law school moot court programs—largely unsupervised research and drafting of a brief, coupled with oral argument. The challenge for law schools is to develop a program that exposes students to legal doctrine,

teaches the core lawyering skills of legal analysis and effective communication, and then gives students adequately supervised experience in performing a reasonable range of lawyering tasks.

The Wisconsin Commission on Legal Education should be applauded for encouraging Wisconsin's law schools to accept this challenge. The Commission rightly rejects the view that producing graduates competent to practice law is an unattainable or undesirable goal. Instead, the Commission recognizes that "the consumers of legal services have the right to expect that lawyers, including recent law graduates, are competent to practice law. The law schools, the bar, and the courts have a shared responsibility and an obligation to meet that expectation."<sup>28</sup>

### III. WHY THE COMMISSION'S REPORT MAY NOT BRING ABOUT SIGNIFICANT CHANGE IN WISCONSIN LEGAL EDUCATION

By recognizing that law schools are expected to graduate lawyers who practice law, the *Wisconsin Commission on Legal Education Report* has pointed legal educators in the right direction. The Commission has not, however, developed or recommended a program to achieve this expectation, instead choosing to defer to legal educators to develop needed reforms. Perhaps of even greater concern, the Report acknowledges as legitimate many of the traditional excuses articulated by legal educators for why law schools cannot do what needs to be done. None of these excuses is valid, and each could have been rejected. By failing to do so, the Commission may have assured that no significant reform will result from its efforts.

#### A. *Lack of Resources as Justification for Maintaining the Status Quo*

Effective skills training tends to be more expensive than other aspects of legal education because of the lower faculty-student ratios generally required to provide necessary supervision and feedback.<sup>29</sup> This cost is a principal reason why many legal educators have concluded that providing necessary skills training to all students is implausible. One law school Dean recently concluded that "there is simply no way the school can afford to distribute full-time faculty or four times their number in adjuncts over the significant number of multiple-section skills/values courses that presumably would be needed to staff such a 'coherent

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28. *Wisconsin Commission on Legal Education Report*, *supra* note 1, at 2.

29. *See Stark*, *supra* note 15, at 184-87.

agenda' [of skills/values instruction]."<sup>30</sup>

The *Wisconsin Commission on Legal Education Report* provides little response to this excuse, aside from observing that "law schools face daunting fiscal constraints."<sup>31</sup> Certainly the expense of operating clinics makes it implausible to rely on live-client clinics to ensure that all students have access to adequate skills training. Presently, only thirty percent of all graduating law students have access to clinics during their law school careers.<sup>32</sup> Making clinics accessible to all students would require dramatically increasing funds available for skills training. The *MacCrate Report* estimates that the cost of providing full student access to at least one live-client clinical experience during law school would approximate an additional \$6,000 per student.<sup>33</sup> The cost of legal education is already high enough that many students graduate with debts which preclude entry into relatively low-paying careers in public service. The tuition increases required to fund full access to live-client clinics would make legal education inaccessible to some prospective students, and would further erode access to public service careers for those students who do manage to finance the tuition. Given this reality, the *MacCrate Report* correctly concludes that "[a] goal of offering enrollment in a live client in-house clinic to every student before he or she graduates may not be feasible from a budgetary prospective for some time."<sup>34</sup>

The high cost of clinics cannot, however, justify failing to prepare students to practice law competently upon graduation. There are other ways to provide skills training in a cost-efficient way. Skills training by simulation, for example, tends to be more cost efficient than training by live-client clinic. Clinics require a much lower faculty-student ratio than most simulations. The *MacCrate Report* estimates that clinics have an average student-faculty ratio of 8:1, while the ratio in simulations ranges from 14:1 to 18:1.<sup>35</sup> Moreover, while clinics offer the advantages associated with the presence of real clients, well-conceived simulations offer a number of advantages that may collectively make these simulations a superior device for providing skills training. Initially, because there are no real clients with real facts and real needs, the instructor in a simulation has more control over the student's learning experience

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30. *Id.* at 185.

31. *Wisconsin Commission on Legal Education Report*, *supra* note 1, at 31.

32. *MacCrate Report*, *supra* note 13, at 252.

33. *See id.* at 254, n.36.

34. *Id.* at n.36.

35. *See id.* at 250-51.

than the clinic supervisor. One criticism of clinics is that the skills training tends to be narrow and overly repetitive. The greater control found in simulations enables the instructor to select the lawyering tasks performed by the students. The instructor can thus ensure that students engage in an appropriate variety of experiences. This control also allows the instructor to determine the complexity of the tasks, and thus permits structured progression from relatively simple to more complex tasks.

Simulations offer an additional pedagogical advantage over clinics. Unlike clinics, simulations permit the integration of skills training into the substantive curriculum. Students can learn to draft wills in the context of a substantive class on estate planning, document a sale of assets in the context of a class on business planning, or prepare a motion to strike jury demand in the context of a class on procedure. The integration of substantive courses and skills training enhances the student's understanding of the substantive law by making that law less abstract. The student not only learns the rules, but experiences how they work. Learning the substantive law enhances skills training by demonstrating the relevance of substantive law in providing quality legal services. These educational advantages are not available in clinics, which tend to stand apart from the law school's substantive curriculum.

Task-oriented skills training can be made available in a wide range of substantive courses. Achieving this ideal concededly requires maintaining lower enrollments than would be tolerable in purely lecture courses. One way to accomplish these lower enrollments without significant increases in tuition is to divert resources from substantive courses taught in lecture formats by creating genuinely large sections in the lecture courses. This would free faculty resources to teach small sections in substantive/skills courses. Moreover, achieving the ideal of providing task-oriented skills training in the context of substantive courses requires law schools to reconsider the criteria applied in hiring faculty members. Faculty members without significant experience practicing law are ill-equipped to teach practice skills. For this reason, law schools must modify the criteria used to evaluate faculty candidates. Rather than viewing significant practice experience and achievement as a bar to faculty appointment, such experience and achievement should ordinarily be viewed as a prerequisite. Moreover, many existing faculty members may require periodic retraining in practice skills. This could be accomplished through "practice" (as opposed to research) sabbaticals, pro bono work, and even perhaps through practice-oriented research. The *MacCrate Report* recommends in this regard that:

Enhancing the ability of both practitioners and law faculty to

be effective teachers can be accomplished by having practitioners teach in law schools and faculty engage in practice. A few schools and employers have experimented with leaves of absence, allowing practitioners to teach or faculty to practice. This can help expose students, in the classroom, to the practical perspective of experienced practitioners and enable faculty to benefit from a period of practice.

After such an experience, it is hoped that a returning faculty member brings to the law school and presents to students an expanded view of practice while the returning practitioner might encourage colleagues to take a broader view of the firm's responsibilities in training student clerks and young lawyers.<sup>36</sup>

Finally, providing necessary skills training will require law schools to make a number of hard choices. To be cost-effective, an adequate skills training program will need to displace some of what presently occurs at law schools. Interdisciplinary and jurisprudential courses can be valuable, but offering a broad array of such courses is an unjustifiable luxury when students lack meaningful access to necessary skills training. The Wisconsin Law School's bulletin boasts of 12 courses in the areas of "jurisprudence and legal history" and "law and related disciplines," while there is but one course devoted to trial advocacy, no course devoted to pretrial investigation, and no course devoted to engaging in effective motion practice.<sup>37</sup> Absent impetus from outside legal education, this kind of misallocation of resources is unlikely to be corrected. By failing to provide such impetus, the Commission's Report may provide legal educators with a convenient excuse for inaction.

### *B. Diversity as Justification for Maintaining the Status Quo*

The needed reallocation of resources is especially unlikely to occur if one concludes that training competent lawyers is only one of several equally important objectives of legal education. Yet, this is precisely what the Report does. In a remarkable passage, the Report observes:

Teaching law students how to practice law is not the only purpose law schools serve, however. Law schools must meet other expectations of the profession, of society, and of the universities that sponsor them: they are expected to help research and develop the law and the social policy that shapes it; to explore and refine new areas of law; to train scholars of the law; to graduate students in the mental discipline of legal reasoning,

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36. *Id.* at 271-72.

37. UNIVERSITY OF WISCONSIN-MADISON, LAW SCHOOL BULLETIN 1994-1995.

which is often put to work by graduates who never practice law; to comprehend the knowledge explosion in the field of law that is concomitant with the explosion of knowledge in other technological and professional fields with which law intertwines; to make that knowledge comprehensible to students, to practicing professionals, and to society; and to preserve and enhance the prestige they have earned within the academic, professional, and civic communities. In all of these ways law schools add tremendous value to society. *These expectations are valid, and they cannot be subordinated to the other expectations law schools must meet.*<sup>38</sup>

Training "legal scholars" as well as training "graduate students in the mental discipline of legal reasoning" are certainly worthy objectives. But there are several reasons why this graduate school within a professional school approach to legal education is undesirable. First, law schools do not tell the public which graduates are the lawyers and which graduates are the scholars and thinkers. They are all lumped together and given law degrees. Their law degrees are then accepted by bar examiners around the country as evidence that they have been trained to practice law. Many of the scholars and thinkers are likely to find that employment as a scholar or thinker is hard to come by. Sooner or later they instead enter the practice of law. Their law degrees permit them to do, even though they have not been trained to practice law and are clearly not competent to represent clients.

Second, one must question whether there really are many students within the law school training to become scholars or thinkers rather than lawyers. The vast majority of students who enroll at Wisconsin and Marquette probably instead hope to become outstanding lawyers. And nothing happens during law school to change this fact. The two schools combine to produce approximately 450 graduates each year; yet there are currently a total of only 137 law school teachers who graduated from one of Wisconsin's two law schools.<sup>39</sup> The overwhelming percentage of students do not become professional scholars or thinkers. Moreover, most of the relative handful who do eventually teach also practice law for at least a brief period before beginning their careers as scholars. They thus need to be trained to practice law. Nonetheless, allocating substantial resources to training a handful of scholars and graduate

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38. *Wisconsin Commission on Legal Education Report*, *supra* note 1, at 25-26 (emphasis added).

39. See ASSOCIATION OF AM. LAW. SCH., *THE AALS DIRECTORY OF LAW TEACHERS*, 1995-96 (1996).

students might be justified if law schools were adequately training the great majority of students who intend to become lawyers. But given the absence of satisfactory skills training for prospective lawyers, such a misallocation of resources can hardly be justified.

In the final analysis, one is left with the suspicion that “diversity of purpose” is really only an excuse by legal educators for not getting the job done in training lawyers. Every competent lawyer is a legal scholar. Every competent lawyer is skilled in the discipline of legal reasoning. And every competent lawyer is involved in developing law and social policy. Thus, every good law school should train all students in legal scholarship and legal reasoning for the single purpose of preparing students to be competent lawyers. But a good lawyer is much more than a scholar and thinker. The fact that a handful of students will stop short of practicing law is simply no excuse for failing to provide the vast majority of students who will practice law with the skills training required to do so competently.

### C. *Freedom as Justification for Maintaining the Status Quo*

Just as the Report embraces diversity of mission and lack of resources as excuses for legal education, the Report can also be read to endorse the concept of freedom as an excuse for failure. The concept of freedom as found in the Report has two manifestations. The first is freedom of students to choose a course of study, even if that course of study does not prepare them to practice law. The second is the academic freedom of faculty members to decide what they will teach, even if what they decide is contrary to the goal of preparing students to practice law. Freedom of choice is hard to challenge, unless one focuses on the fact that choices made by the students and faculty ultimately impact persons who had no input into the choice: members of the public who may be devastated in a moment of personal crisis by the provision of incompetent legal services.

#### 1. Freedom of Choice for Students

Teaching students all they need to know as lawyers is obviously implausible. Some choices must be made. The best option would be to teach each student what that student is most likely to use in the student’s chosen area of practice. Because career objectives differ from one student to the next, this option would necessitate allowing each student considerable flexibility in constructing that student’s course of study. The trend in legal education is toward allowing student’s greater flexibility, and the *Wisconsin Commission on Legal Education Report*

appears to accept the legitimacy of that trend. The Report concludes that:

[I]t may not be necessary for law students to learn these skills in law school if they will not need to make immediate use of them upon graduating and if the students will be in a position to learn the skills at some point after graduation. *Law students should decide for themselves* how they will concentrate their efforts in law school, but they should expect guidance from the law schools in structuring their course work to ensure they learn the skills they will need to practice upon graduation. Further, *to the extent that a law student wishes to become more than simply familiar* with these skills, the student has the right to expect that the school will offer courses or other alternatives whereby *the student may learn* to perform those skills.<sup>40</sup>

Allowing students to decide what they will learn based on their particular career objectives is certainly a superficially appealing answer to the question "what do we teach." But closer analysis suggests that the trend toward allowing students greater freedom in developing a course of study has actually materially interfered with the objective of preparing students to practice law. While many students believe they know precisely what direction their career will take, many early predictions prove incorrect. Students who enter law school with one objective in mind later change their career plans because of exposure to new and more appealing areas of practice, or perhaps because of the realities of the employment market. A student allowed to ignore courses and skills essential to most types of law practice will be ill-equipped to function as a competent professional upon graduation. Moreover, even students who accurately predict their career path at an early stage in law school are unlikely to have sufficient knowledge and experience to make wise curricular choices. Though perhaps not apparent to a student who has never practiced law, familiarity with concepts of corporate and partnership law is essential to a career as a personal injury lawyer. When an agent of the organization causes injuries, the personal injury lawyer must know who to sue, where to find assets of the organization, and whether circumstances might allow piercing of the corporate veil to reach the owner's personal assets. Similarly, a course on evidence may lack any apparent relevance to a prospective business lawyer. But evidence is really a course on reliability and probativeness of information. The

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40. *Wisconsin Commission on Legal Education Report*, *supra* note 1, at 33 (emphasis added).



business lawyer is continuously required to evaluate information in advising clients, and thus needs to understand the basic concepts that undergird the law of evidence. Imprudent curricular choices are a necessary consequence of inexperienced students being left entirely in control of planning their legal education.

Many law faculties attempt to address the problem of uninformed choice by providing extensive curricular recommendations in place of mandates. But faculty counseling is an inadequate substitute for requiring students to complete a course of study that the faculty believes students should take. There will always be students who fall through the cracks—students who fail to seek faculty advice in course selection, or students who reject the advice received and make poor choices. Nonetheless, if only the student were adversely affected by poor curricular choices, perhaps the virtue of individual freedom and autonomy would justify allowing the student to make serious mistakes. But, of course, the student is not the only person affected. Indeed, the student may not even be the person principally affected. Future clients are likely to also suffer from the student's unwise curricular decisions.

Requiring students to take courses the faculty believes should be taken has an additional virtue: it facilitates sequencing upper-level courses. Lack of sequence in the upperclass curriculum creates inefficiency. In the typical unstructured law school program, instructors teaching advanced classes have no assurance that students have completed any particular courses, aside from those required in the first-year and those designated as prerequisites for the advanced courses. This lack of structure impairs the ability of instructors in advanced courses to build on a pre-existing base of knowledge. An instructor teaching professional responsibility, for example, will have some students who have taken a course in business organizations and some who have not. When that instructor reaches the material on conflicts of interest in an organizational setting, the audience includes students who lack familiarity with the basic principles of corporate organization. The instructor must cover these principles as a prerequisite to discussing the conflicts issues. For those students who have taken a business organizations course, this review may be a waste of time.

Lack of sequence also limits the level of sophistication in upper-level courses. The professional responsibility instructor who cannot assume an existing understanding of corporate organization certainly cannot discuss issues that require a sophisticated understanding of corporate law principles, even if the instructor provides an overview of the basics of corporate law. Neither can instructors teaching courses in estate

planning, bankruptcy, or a host of other subjects which build on basic corporate law principles. The lack of upper-level structure thus interferes with a progression through materials of increasing difficulty in the second and third years of law school. Rather than building upon one another, the upper-level courses operate independently and seem unrelated. This seeming lack of interrelationship prevents students from fully understanding how law works. As one commentator has observed:

Later learning should reinforce, by drawing and building upon, earlier learning; that the later should also transcend the earlier so as to provide the student with a rewarding sense of advancement along an intelligible path of learning that culminates in advanced work on problems plainly beyond the powers of beginners; that there should be an orientation at each stage, so that students clearly and explicitly understand the purposes motivating the content and methods of instruction.<sup>41</sup>

The lack of progression is at least partially to blame for student apathy that tends to characterize the third-year of law school, in particular. A student who believes a particular course leads nowhere but towards graduation is likely to adopt a minimalist approach to that course.

Requiring students to complete courses also facilitates rigor, and rigor facilitates learning. We all tend to achieve more when we are challenged to do more. We are more likely to read for class if reading is insisted upon. We are more likely to attend class if attendance is insisted upon. And we are more likely to work hard to succeed if failure is a possibility. Yet, even though being challenged is good for students (indeed for all of us), there is a natural human tendency to prefer being comfortable. If a course is challenging (including the possibility of failure), many students will naturally avoid the course for this reason alone. An instructor who teaches an elective risks losing enrollment if students are made uncomfortable. Consequently, designating courses that all students should take as electives tends to negatively impact on the effectiveness of the instruction.

There are, of course, costs to requiring all students to complete particular courses. Most students would understandably prefer flexibility and choice. Even a student who intends to take a class in income taxation would probably prefer having the option of taking something else instead. Many students who are told what to take are resentful, especially in this age of indeterminacy in education. These resentful

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41. Frank I. Michelman, *The Parts and the Whole: Non-Euclidean Curricular Geometry*, 32 J. LEGAL EDUC. 352, 355 (1982).

students view faculty dictates as "antidemocratic." Implicit within this criticism is an assumption that students know as well as faculty what is required to succeed in the practice of law. Were this assumption true, of course, it would be illegitimate for faculty to direct students' course of study. But where a faculty has been selected from among the ranks of successful legal practitioners, that faculty does know more than students about what is required to succeed simply by virtue of its collective experience. This does not mean that every student should be required to complete the same course of study. But it does mean that all students should be exposed to fundamental legal doctrine, should be required to complete courses designed to develop critical thinking, speaking, and writing skills, and should be required to experience a reasonable range of lawyering tasks prior to graduation.

## 2. Academic Freedom for Faculty

Academic freedom has become a mantra in some circles for allowing the faculty members to do whatever they chose. The concept was never intended, however, to allow a faculty member *freedom from the responsibility of teaching the subject assigned*.<sup>42</sup> Consistent with academic freedom, an instructor assigned to teach Contracts can be required to teach basic contracts doctrine. An instructor assigned to teach Trial Advocacy can be required to teach trial procedure under the Wisconsin and Federal Rules of Civil Procedure. And an instructor assigned responsibility for developing certain lawyering skills or for exposing students to certain lawyering tasks can be required to accomplish these objectives.

The Report nonetheless cautions that the principle of academic freedom may create a practical challenge for law schools "in regulating what is taught in any given classroom by any given faculty member." This is, of course, nonsense. Like any freedom, academic freedom is not without limit. A school that recognizes its responsibility to prepare students for the weighty responsibilities that they in turn will shoulder as lawyers can insist that faculty members likewise behave responsibly. A teacher who will not teach basic contract doctrine in Contracts can be assigned a less important course. If the teacher proves generally incompetent or insubordinate, he or she should be fired. Incompetence

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42. The 1940 Statement of Principles Regarding Academic Freedom developed by the American Association of University Professors acknowledges that a teacher is entitled to freedom in "discussing his subject" and that a teacher "should be careful not to introduce into his teaching controversial matter which has no relation to his subject."

and insubordination are ordinarily grounds for termination of even tenured faculty members, provided the university administration and faculty have the courage to do what is necessary to ensure a quality education for their students.

Those faculty members who would feel their freedom threatened by any requirement that they behave responsibly might be wise to ponder why students enroll in their classes. It may be that students are willing to pay tuition dollars to hear whatever the faculty member has to say; more likely the students attend because the public tells the students they must attend in order to receive a license to practice law. It seems little to ask in exchange for providing the faculty member with a captive audience (and thus a paycheck) that the faculty member teach the students something useful.

Nonetheless, the Report at times appears to plead for cooperation from faculty members. The Report urges that teaching necessary skills and values will "require the collective cooperation and dedication of a *predominant portion of the faculty*."<sup>43</sup> The Report later "recommends that law schools *foster ways* for their faculties to emulate" those faculty members who do effectively teach lawyering skills.<sup>44</sup> Organizations outside the university are not, of course, in a good position to mandate directly what is being taught in individual classes. One way to monitor what is taught indirectly, however, is through external examinations as a prerequisite for licensing. To the extent the Commission truly perceives itself and administrators unable to control what is taught in law schools, perhaps the time has come to abandon the diploma privilege in Wisconsin.

#### IV. CONCLUSION

Legal education today is suffering from many of the same problems that plague higher education generally. Law school programs have become increasingly irrelevant, the attractiveness of becoming a lawyer has declined, and the cost of legal education has soared. Lawyers and law students alike have become increasingly dissatisfied. Many prospective law students are looking to other professions. There is a need for reform. And there is a growing perception that this reform will have to come from outside the academic community. Just as many state

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43. *Wisconsin Commission on Legal Education Report*, *supra* note 1, at 37 (emphasis added).

44. *Id.* at 38 (emphasis added).

legislatures are beginning to insist on accountability generally in higher education, it may be time for the legal profession to insist on accountability in legal education. The *Wisconsin Commission on Legal Education Report* makes a material contribution by insisting that law school graduates should be able to do what lawyers do. A real question remains, however, regarding whether legal educators, left to their own designs, are up to the challenge.