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THE FUTURE OF LEGAL EDUCATION: SOME REFLECTIONS ON LAW SCHOOL SPECIALTY TRACKS

Peter V. Letsou[†]

I had the good fortune of receiving my first law school teaching position from Dean Manne at the George Mason University School of Law in 1990. I immediately became a part of the law school's "Corporate and Securities Law" specialty track, and continued to teach in that track until I joined the faculty at Cincinnati in 1997. To me, the wisdom of specialty tracks in legal education seemed obvious: since the practice of law had become increasingly specialized during the twentieth century, particularly with the tremendous expansion in federal law that began in the 1930s, law students who took an "integrated curriculum, carefully planned with a professional specialty in mind,"¹ could expect to enjoy a competitive advantage in the legal marketplace over those who did not. This wisdom was confirmed during my years at George Mason. But the apparent logic of the specialty track system leads to a puzzle: If George Mason's specialty tracks are so advantageous, why do they remain the exception at American law schools, rather than the rule? This essay provides an answer.

In order to understand why law school specialty tracks remain rare, it is first necessary to understand how they operate. Many law schools in the United States provide their students with the opportunity to specialize in particular areas of law by offering a number of different courses within those areas. But the George Mason specialty track program, at least in its original form, goes well beyond this limited notion of specialization. As Dean Manne explained, "[t]he idea was to design a three-year curriculum for a student who was willing to select an area for specialization but who would accept the faculty's decision as to what courses to take and in what order."² In other words, "track" students at George Mason would "give up the right to select a large number of electives during law school in exchange for

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¹ HENRY G. MANNE, *THE INTELLECTUAL HISTORY OF GEORGE MASON UNIVERSITY SCHOOL OF LAW* 19 (1993).

² *Id.*

having a planned and coherent curriculum in one area,"³ with specialization beginning during the first year of law school.

In the area of corporate and securities law, this meant that the student would follow a structured, three-year program, which required approximately 40% of the student's class time to be devoted to corporate, commercial, and securities law courses. The key components of this program included: (1) a number of courses open to track students only, including a four-hour course in business associations during the spring of the first year, a five-hour, two course sequence in federal securities regulation during the second year, and a two-hour "capstone" thesis course in the third year; (2) other basic courses in corporate and commercial law, including financial theory, corporate acquisitions, secured finance and insolvency, bankruptcy, and commercial paper; and (3) a full complement of tax classes, including a four-hour course in basic federal income tax and separate three-hour courses in corporate tax and partnership and subchapter S taxation. The remainder of the track student's class time would be devoted to courses in the general law program, including the standard first-year courses, professional responsibility, constitutional and administrative law, as well as other courses considered valuable for the corporate practitioner such as labor law and antitrust law. All the above-listed courses were required of track students, and had to be taken in the order specified by the track coordinator. As a result, students enrolled in the Corporate and Securities Law Track had time in their schedules for only two electives during their three years at the law school, one in the fall of their third year and the other in the spring.

The benefits of an integrated specialty track program, like the Corporate and Securities Law Track described above, were described by Dean Manne in his monograph on the intellectual history of the George Mason University School of Law:

This kind of integration of courses allows an advantage unknown in the schools which allow students to elect a number of courses in one area of emphasis. By integrating courses as the student progresses, each course builds on those going before, thus allowing greater and greater sophistication in the work done because every student has had all the prior material. In the typical system followed in most law schools, apart from an occasional "required prerequisite," every course has to be pitched to the novice in that field. The result of the GMU approach is a much more thoroughly trained student in the area of specialization selected.⁴

³ *Id.*

⁴ *Id.*

In addition, Dean Manne offered an answer to those who argued that “specialization narrows the education students get and thus deprives them of some intellectually broadening consequence of electing special, detailed, and varied seminars.”⁵ Dean Manne wrote:

Probably that argument is exactly backwards. Without some degree of depth (not one course) in a field of law, a student comes out of school without any real intellectual sense of how the law actually operates. Only by seeing one field in depth can a student be well prepared for what the practice of law is actually like. And this greater sophistication that comes with in-depth study will serve the student well regardless of what field of law he or she eventually specializes in.⁶

Thus, Dean Manne concluded that the “greatest advantages” of the specialty track system were pedagogical, rather than vocational.⁷

For me, the wisdom of Dean Manne’s argument was confirmed in my seven years of teaching at George Mason. During those years, I taught many classes where both “track” and “non-track” students were enrolled. In those classes, track students routinely demonstrated a greater depth of knowledge and an increased ability to deal with sophisticated arguments. In addition, non-track students appeared to recognize the track students’ advantages, with non-track students frequently expressing concern about enrolling in courses where track students might dominate.

Dean Manne’s defense of law school specialty tracks, of course, has not persuaded all legal educators of the superiority of the track system. For example, in a recent article in the *Journal of Legal Education*, Deborah Jones Merritt and Jennifer Cihon decried specialization in American law schools. They argued that “[e]xtreme specialization might force out of existence all schools except those large enough to support the full array of courses needed by the next century’s students. Alternatively, schools might try to specialize in particular subjects, but this would force students to choose legal specialties before entering law school.”⁸

⁵ *Id.* at 21.

⁶ *Id.* at 21-22.

⁷ *Id.* at 22. Others share Dean Manne’s view of the advantages of law school specialty tracks. See, e.g., Robert A. Stein, *The Future of Legal Education*, 75 MINN. L. REV. 945, 959 (1991) (“The law school curriculum in the future will offer far more specialized courses and seminars, and some law schools will offer specialization tracks. This development is a reaction to the ever-increasing specialization in the practice of law.”).

⁸ Deborah Jones Merritt & Jennifer Cihon, *New Course Offerings in the Upper-Level Curriculum: Report of an AALS Survey*, 47 J. LEGAL EDUC. 524, 568 (1997).

But neither of these arguments undermines the case for specialty track programs like George Mason's Corporate and Securities Law Track. First, the failure of law schools that cannot offer the "courses needed by the next century's students" should be cause for celebration, not concern, at least for the next century's consumers of legal education—the students. Second, specialty track programs like George Mason's, *which exist side-by-side with more generalized "standard" programs*—within the same law school and/or at other law schools in the same geographic area—do not force specialization on anybody; they merely make specialization available for those students who are prepared to pursue it. Thus, arguments like those offered by Merritt and Cihon in no way undercut the wisdom of law school specialty tracks.

But if specialty track programs are superior, at least for students who are prepared to select a specialty upon entering law school, why do they remain so rare in American law schools? The analysis that follows highlights two factors that contribute to this result: (1) the resistance of existing faculty members to curricular changes in general, and specialty track programs in particular; and (2) barriers to competition in the legal education industry that render inoperative the market forces that would otherwise compel law schools to adopt curricular reforms that faculties find distasteful.

I. RESISTANCE OF LAW SCHOOL FACULTIES

In the typical American law school, the law school faculty and the dean control the law school curriculum. This model of law school governance is imposed by the American Bar Association's law school accreditation standards that require, among other things, that "the dean and faculty of the law school . . . have the responsibility for formulating and administering the program of the school, including such matters as . . . curriculum."⁹ Thus, material changes in the curriculum of an ABA-approved law school can only take place if the law school faculty and the dean approve of such changes; changes may not be imposed by university officials who might like to see the law school become more profitable may not impose changes on a law school, nor may changes be mandated by a law school dean over the faculty's objection.

A law school that operates under this governance structure is highly unlikely to adopt specialty track programs similar to the ones established by Dean Manne at George Mason. First, members of law

⁹ AMERICAN BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS std. 205 (1994), *quoted in* George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2112 (1998).

school faculties generally take a conservative approach to any significant change in the law school curriculum. This is because curricular reform can often impose substantial and certain costs on a law faculty, while offering only limited and speculative benefits. On the cost side, efforts to reform the law school's curriculum can be expected to take considerable faculty time, thus reducing the opportunities for other activities, such as article writing, professional consulting, or leisure. In addition, and perhaps more importantly, changes in the law school curriculum may result in alterations in an individual faculty member's teaching assignments, requiring additional investments in new course preparations. On the benefit side, the expected pay-off to any individual faculty member from investing in curricular change is likely to be small. This is because there is no guaranty that any individual faculty member will share in the reputational or financial benefits that the law school reaps from the particular curricular change. This analysis suggests that curricular reform will be rare in American law schools, and that reforms that do occur will be ones that impose few costs on the faculty—such as additions of clinical or skills programs which require little effort from the existing faculty—or reforms that offer more certain and direct benefits—such as seminar requirements which give the faculty the ability to offer exotic courses to relatively small numbers of students.

Studies of the history of legal education offer considerable evidence of this conservative approach to curricular change. For example, Robert Stevens, in his detailed history of legal education, *Law School: Legal Education in America from the 1850s to the 1980s*, reports that the model of legal education first introduced by Christopher Langdell at Harvard in 1870 had clearly overwhelmed all other models of legal education by 1920.¹⁰ Langdell's model featured a system of teaching that emphasized the scientific analysis of appellate decisions, the use of the Socratic method in the classroom, and a three-year curriculum.¹¹ Stevens further reports that the system pioneered by Langdell changed little after the 1920s, and that those changes that did occur could best be described as "marginal."¹² These changes included modifications championed by the Legal Realists of the 1920s and 1930s, who rejected the Langdellian notion of law as a value-free, exact science that could be taught through an exclusive

¹⁰ ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 41 (1983).

¹¹ See *id.* at 36-37. Stevens attributes the general success of the Harvard model of legal education to, among other things, (1) a desire to copy elite schools who had accepted the system, (2) law professors who "relished their increasing power and influence in the classroom" and were "happ[y] [to make] the change from treatise-reading clerk to flamboyant actor in a drama," and (3) the economy of a method that could be taught in large classes by a single professor. *Id.* at 63.

¹² *Id.* at 211.

focus on appellate decisions. Legal Realist-inspired changes included the addition of social scientists to law faculties at a few schools, the use of new casebooks entitled "Cases and Materials on X" rather than "Cases on X," and the introduction of the law school seminar.¹³ But more far-reaching proposals of the Legal Realists requiring law to be taught as an integral part of the social sciences were rejected.¹⁴ Curricular changes in the post-World War II period have been similarly limited, covering such matters as: (1) the introduction of new policy-oriented courses;¹⁵ (2) the addition of introductory and skills courses such as courses in negotiation, drafting, and counseling;¹⁶ (3) the sectioning of first-year classes;¹⁷ (4) the proliferation of seminars;¹⁸ and (5) the expansion of clinical programs.¹⁹ Thus, although the size and scope of the law has increased dramatically since the 1930s (particularly at the federal level) and the nature of law practice has been fundamentally altered by the rise of the large, multi-office law firm staffed by legal specialists, legal education remains much as it was in 1930: a three-year general program, based largely on the study of appellate decisions, taught by law professors using the Socratic method.²⁰

Thus, even without focusing on the specifics of specialty track programs, one would predict that law school faculties would oppose them. But when the specific effects of such programs are factored in, that outcome becomes even more certain. First, the shift to a specialty track program is a major one that can be expected to require a very substantial investment of faculty time, thus reducing faculty time for other activities. Second, the addition of specialty track programs to the law school's curriculum will, for all but the richest of schools, require an extensive alteration of course offerings: as

¹³ See *id.* at 158.

¹⁴ See *id.* at 138.

¹⁵ See *id.* at 211.

¹⁶ See *id.* at 212.

¹⁷ See *id.* at 212-13.

¹⁸ See *id.* at 213.

¹⁹ See *id.* at 216. For a similar view of the limited nature of curricular change since the 1930s, see Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063 (1986).

²⁰ Consistent with the model of curricular change advanced above, Stevens attributes the lack of fundamental changes in law school curricula largely to the influence of tenured law school faculty members. Stevens writes:

American law schools largely ignored academic ranks (most faculty members were full professors), a process that undoubtedly enhanced independence of thought. Particularly when coupled with tenure at any early age, this security was no doubt one of the reasons why so many able persons were attracted to academic law. Yet such an arrangement did not make for easy change and restructuring, particularly at a time when deans appeared to have declining authority and influence It was noticeable that law school reform in the 1960s was most obvious at those schools, like the University of Southern California, which had relatively small faculties with only a few tenured members.

STEVENS, *supra* note 10, at 276.

was the case at George Mason,²¹ the needs of the specialty track (or tracks) will greatly reduce the ability of faculty to offer highly-specialized courses and seminars in areas of their own choosing. Since tenure-track faculty members exhibit a strong propensity for offering such courses,²² they can be expected to exhibit forceful resistance to any curricular change, like a specialty track program, that results in the loss of that prerogative. Third, the particular specialties selected by the law school may not match the expertise of some of the law school's existing faculty members. These faculty members could be expected to be especially vociferous opponents of tracks, because the specialty track programs may result in new teaching assignments and a loss of prestige and influence. In short, then, the surprise may not be that specialty tracks have not been more widely adopted by American law schools, but rather that they have been adopted at all.

II. BARRIERS TO COMPETITION IN LEGAL EDUCATION

If the market for legal education was a competitive one, law schools would be forced to adopt curricular changes demanded by consumers (i.e. law students), even if their faculties found those curricular changes distasteful. Those law schools that refused to adopt such curricular changes would see their enrollments decline, their tuition revenues decrease, and ultimately go out of business. Faculty cognizant of these potential consequences would undoubtedly choose the route of curricular reform over unemployment, or worse, a return to the actual practice of law.

But as scholars have long noted, the market for legal education cannot be characterized as a competitive one.²³ In at least forty-seven American jurisdictions, graduation from an ABA-accredited law school is required for admission to the bar.²⁴ Thus, compliance with ABA-accreditation standards is essential for schools operating in these forty-seven jurisdictions, the vast majority of American law schools. These accreditation standards erect significant barriers to entry into the legal education business, thereby protecting existing law schools from competition from new entrants. Further, the need of existing law schools to retain their ABA accreditation limits the forms of competition between existing institutions.

²¹ See MANNE, *supra* note 1, at 20-21.

²² See Merritt & Cihon, *supra* note 8, at 532-33 (noting that one-third of all tenure track faculty created a new course during the three year period covered by the study).

²³ See, e.g., George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998); Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311 (1978).

²⁴ See Shepherd & Shepherd, *supra* note 23, at 2122 & n.76. California is the most significant jurisdiction that does not require graduation from an ABA-accredited institution. See *id.*

In a recent article, George Shepherd and William Shepherd summarize the ABA's accreditation standards and their effect on competition in the market for legal education.²⁵ They note that these standards require, among other things: (1) that compensation paid to faculty members at schools seeking approval be comparable with that paid to faculty members at similar approved law schools in the same general geographic area; (2) that faculty members not teach more than an average of eight class hours per week; (3) that each full-time faculty member be provided with a private office, paid research assistants, secretarial assistance, and a travel budget; (4) that law schools hire at least one full-time, tenure-track faculty member for each thirty students, have a full-time dean and a full-time librarian, and maintain an "adequate" physical plant, including a library that contains a specified long list of books, all in hard copy; (5) that law schools require at least three years of study for a law degree; and (6) until recently, that law schools be operated on a not-for-profit basis.²⁶ Shepherd and Shepherd also note that the ABA's substantive standards are buttressed by procedural rules requiring, as a condition to *provisional* accreditation, the preparation of a feasibility study, the preparation of a self-study, a site evaluation by a team of five to seven evaluators, all at law school expense, and the payment of a substantial application fee.²⁷ Further, once provisional accreditation is obtained, the law school must go through the site evaluation process for at least two additional years before full accreditation can be secured.²⁸ Shepherd and Shepherd estimate the direct and indirect costs of full ABA accreditation at more than \$1 million.²⁹ Moreover, they note, the process "creates a catch-22" for new law schools because "[a] school [cannot] receive accreditation unless it has students; but few qualified students are willing to attend a school that lacks accreditation."³⁰

In discussing the effects of these substantive and procedural accreditation standards on the legal education market, Shepherd and Shepherd focus on the impact of these requirements on potential low-cost competitors. They argue that the ABA's accreditation standards raise absolute barriers against the entry of new low-cost law schools by requiring all law schools to follow the high-cost, elite model of education pioneered by the Harvard Law School. These barriers free existing law schools from potential competition that might drive tuition and faculty salaries down.³¹ They also note that ABA accredita-

²⁵ *See id.*

²⁶ *See id.* at 2133-53.

²⁷ *See id.* at 2128-30.

²⁸ *See id.* at 2131.

²⁹ *See id.*

³⁰ *Id.* at 2130.

³¹ *See id.* at 2173 ("The ABA's exclusions directly reduce capacity and output when they eliminate schools that would otherwise be economically viable economic units, able to cover

tion reduces innovation in legal education by preventing existing law schools from experimenting with low-cost methods of providing legal education, such as methods that: (1) place heavier reliance on practicing lawyers or adjunct faculty; (2) substitute technology for shelved books; or (3) provide legal training in less than three years or even at the undergraduate level.³²

But while Shepherd and Shepherd are clearly correct regarding the effect of ABA accreditation on the emergence of low-cost alternatives to existing law schools, their analysis supports a stronger statement about the impact of ABA accreditation in legal education. In my view, the barriers to entry described by Shepherd and Shepherd will operate, at least in part, to prevent the emergence of *all* new programs that existing law school faculties dislike—even programs that may be consistent with existing substantive ABA accreditation standards. This is because the barriers to entry described by Shepherd and Shepherd—particularly procedural barriers such as the requirement that the law school attract students before even provisional accreditation is obtained—operate to deter the entry into the marketplace of all new law schools, regardless of the type of educational program offered. Thus, existing law faculties need not be overly concerned that distasteful innovations will be forced on them by new competitors. Nor need they fear the introduction of distasteful innovations at *existing* law schools, at least in circumstances where the applicants for law school far exceed the available seats. This is because existing law schools operating in such a market have little incentive to compete with one another on any level, let alone adopt curricular innovations that all faculties find distasteful. Accordingly, at least in circumstances where accreditation standards are high and the demand for legal education is strong, existing law faculties are unlikely to face competitive pressures to consent to the introduction of unpopular specialty track programs, even if law students prefer such programs.

This essay began by asking why specialty tracks remain the exception at American law schools, despite their apparent advantages. What should now be clear is that the real puzzle is why specialty track programs ever emerged at all. That is, why did the faculty at George Mason consent to the introduction of specialty tracks when faculties should ordinarily be expected to resist such programs? My answer to this latter puzzle focuses on the unique circumstances that existed at George Mason when Henry Manne became Dean in 1986. At that point, George Mason was a relatively new school in a crowded marketplace that included several well-known competitors, such as the

their costs with revenues.”). The authors further observes, “[t]he [ABA accreditation] system locks in place the Harvard model of legal education.” *Id.* at 2181.

³² See *id.* at 2182-84.

law schools of Georgetown University and George Washington University. Whether a newer (and financially weaker) law school could survive in that marketplace was by no means certain. Understanding these stakes, the faculty at George Mason agreed to do what was necessary to ensure the school's survival, including adopting curricular innovations that stronger schools may have rejected.

Does this mean that specialty programs will be limited to rare cases where a school's survival is threatened or a school faces similar pressures to take dramatic steps to enhance its reputation? I think not. First, there is some evidence that the entry barriers that protect law schools from competitive pressures are breaking down. For instance, in response to the Massachusetts School of Law's (ultimately unsuccessful) antitrust challenge to the ABA's accreditation standards, the Department of Justice entered into a consent decree with the ABA weakening some of the ABA's requirements.³³ Second (and perhaps more importantly), the 1990s have witnessed a dramatic drop off in the number of law school applicants.³⁴ This decline in the applicant pool should give existing law schools added incentives to distinguish themselves from their rivals. Developing specialty tracks along the lines devised by Dean Manne is one way to achieve that goal.

³³ The Massachusetts School of Law commenced an antitrust suit against the ABA in 1993, after the ABA denied the law school's application for accreditation. The ABA denied the application because the Massachusetts School of Law's faculty was made up largely of adjunct, rather than full-time, professors and it failed to meet ABA requirements that law schools pay salaries competitive with other law schools in the region. See Wade Lambert, *Suit Says ABA Accreditation Is Out of Date*, WALL ST. J., Nov. 24, 1993, at B1. Following the filing of the suit, the ABA and the Department of Justice entered into a consent decree that required the ABA to: (1) stop considering faculty compensation in making accrediting decision; (2) eliminate the accreditation standard barring for-profit law schools; and (3) permit approved schools to accept credits for classes taken by students at schools that are state-accredited, but not ABA accredited. See Viveca Novak, *ABA Settles Charges a Committee Fixes Some Law-School Salaries*, WALL ST. J., June 25, 1995, at B6. But despite the consent decree with the Department of Justice, the Massachusetts School of Law's legal challenges ultimately failed. See Gregg Krupa, *Mass. School of Law Loses Accreditation Suit: Appeals Court Upholds Ruling ABA Acted Properly*, BOSTON GLOBE, Apr. 28, 1998, at 15D. In addition to the Massachusetts School of Law's legal challenges, the ABA's accreditation standards have also been attacked by the deans of some of the nation's most prestigious law schools, including Harvard, the University of Chicago, the University of Texas, and the University of Virginia. The deans have argued that the accreditation process is "overly intrusive, inflexible, concerned with details not relevant to school quality (perhaps even at odds with maintaining quality), and terribly costly." Paul M. Barrett, *Supreme Court Nominee Wins Business's Approval*, WALL ST. J., May 16, 1994, at B5.

³⁴ See Shepherd & Shepherd, *supra* note 23, at 2153 (noting that "[b]etween 1990 and 1996, applications to ABA-approved law schools declined 26%, and they are expected to fall 20% further in the next four years").