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# Essay: Recent Trends in American Legal Education

Paul D. Reingold\*

## Introduction<sup>1</sup>

An American law professor in Japan has much more to learn than to teach. A foreigner like me – who comes to Japan on short notice, with no knowledge of Japanese culture and institutions, and with no Japanese language skills – sets himself a formidable task. Happily, the courtesy of my hosts, the patience of my colleagues, and the devotion of my students, have made for a delightful visit. I thank all of you.

You asked me to talk about American legal education. As you surely know, the system of legal education in the U.S. is very different from the system of legal education in Japan. In this talk I will start with a little history. Then I will describe the present legal education system in some detail, to give you an overview of its structure, and of the core curriculum as it is taught at most law schools. Next I will discuss recent developments in legal education, to bring you up to date. I will end with some of the problems that face U.S. law schools, and in particular I will address a unique problem that confronts my own school, the University of Michigan Law School.

## 1. History

To practice law in the U.S. originally required no formal education at all. Until the middle of the nineteenth century, a man (and in those days it was all men) learned the profession by serving as an apprentice to others, the same as in any other trade. Famous American presidents like Thomas Jefferson (the third President, and an author of the U.S. Constitution) and Abraham Lincoln (the President during the American Civil War) home-schooled for the most part, and learned law by serving in the law offices of established attorneys, who taught them. Even the early justices of the U.S. Supreme Court “read law” and apprenticed with other lawyers (what the English call “articling”) to learn the profession. By Lincoln’s time, in 1860, only nine of the 39 states required a specific period of study before the bar examination. Moreover, at that time the bar examination was oral, and it was quite easy to pass.<sup>2</sup>

Some practicing lawyers began to specialize in keeping apprentices, and it was in

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1 This paper is a slightly expanded and edited version of a talk delivered to the law faculty in June 1999.

2 In this section, as well in the section on American law teaching, I have borrowed heavily from Burnham, *An Introduction to American Law*, (2d ed. West Group 1999), Chapter IV. Professor Burnham served as a visiting professor at Kwansei Gakuin University, Department of Law, in May 2000, and he also lectured in Japan in 1995.

this way that the first “law schools” were born. By the mid-nineteenth century, universities began to show an interest in acquiring these schools. Lawyers have always been in a position of power and influence in American society, and the universities wanted the benefits that having a law department would bring them. To this day, however, law departments of universities are called “law schools” because of their original independent status.

In 1878 the American Bar Association was formed. The ABA was the first major professional organization for lawyers. One of its missions was to establish uniform educational requirements, in order to strengthen the profession. Over time, because of the ABA’s increasing influence, a longer course of legal study became more common. In the twentieth century, the practice of apprenticeship or articling declined, and more and more states began to require a formal education in law. Today all U.S. lawyers must attend a three-year post-graduate law school. So the modern course of study is: first, complete high school; second, complete a four-year undergraduate program resulting in a *baccalaureate* degree or its equivalent; and third, complete three years of law school.

In every state, in order to sit for the bar examination, applicants must now have a *Juris Doctor* degree.<sup>3</sup> Note that I said, “In every *state*.” The licensing of lawyers, the same as the licensing of most other trades and professions, remains a *state* function. Each state supreme court decides what is required for licensure (to be admitted to practice in that state), and admission to the state bar is governed by a state board of bar examiners.

Not surprisingly, the 50 states vary considerably in their requirements. For example, if a person attends law school in the state of Wisconsin, and wants to practice there, the bar examination is waived: he or she is presumed to know the law well enough to be admitted without examination. Wisconsin is unusual because it has but one law school, at the state university, in the state capital city. Wisconsin apparently has enough confidence in its own graduates that it is willing to let them practice law without testing their readiness. Other states require every applicant – even the most accomplished lawyers, who might have been licensed for years in other states – to take the bar exam.<sup>4</sup>

But apart from exceptions like Wisconsin, the ABA’s influence has been substantial. Most states have adopted a uniform “multi-state” bar examination, which is an all-day multiple choice exam, designed to test a law graduate’s knowledge of basic

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3 Some U.S. law schools grant advanced graduate degrees in law, usually an LL.M. after two years, and an S.J.D. if a dissertation is written. But both are ordinarily *academic* degrees, sought by teachers. Neither is required to practice law. Many foreign lawyers and law students also earn advanced graduate degrees in the U.S., after having completed law school in their home country.

4 Many states permit experienced lawyers to “waive in” to the bar – that is, anyone who has practiced for five years in one state may apply to be admitted in another state, without examination, provided that the “sending” state allows the same easy access to lawyers from the “receiving” state. These mutual arrangements are referred to as “reciprocity.” Some states, however, choose not to grant reciprocity, usually out of a fear that far more lawyers will move *in* than will move *out*. States like Florida and California, in warm climates, attract many retirees, who might compete with full-time members of the bar. By refusing reciprocity and requiring that all new residents take the bar examination, these states are able to prevent retirees from flooding the legal market with part-time practitioners.

substantive law. Most states also add a second day of short essay questions, designed to test the law graduate's knowledge of the substantive and procedural law unique to that state. The score required to pass the multi-state exam is also set by the state: a passing grade in one state may be a failing grade in another. In some states, if the score on the multi-state examination is high enough, then the state (essay) portion of the exam will not be read or graded.

Given what I have said about the bar exam, you might think that most law schools would design their curriculum with the bar exam in mind, to guarantee that their graduates do well on the exam. But that is not so. Indeed, at most law schools, and especially at the elite law schools, nothing could be further from the truth. The bar exam is viewed as something entirely separate from law school, and not as a part of formal legal education.

Most students graduate in May and take the bar exam in late July. Between May and July graduates attend rigorous private "bar review" courses to help them pass the exam. The bar review courses are like the *juku* system in Japan: for-profit private classes and tutors prepare students for the licensing exam, outside of the educational system. Unlike law schools, the bar review courses give students detailed outlines of the substantive rules of law, trying to anticipate every possible question on the examination. Studying for the bar is mostly a task of rote memorization, and to tell the truth, most students forget what they learned within a few weeks (or in my case within a few hours) of taking the exam.

In thinking about the curriculum of American law schools, you must also remember that students admitted to law school are a diverse group, with no common academic training. All of them will have a B.A. degree (or its equivalent), but in the U.S. there is a very wide range of undergraduate study. American undergraduate education is called "liberal arts."

Many colleges and universities have distribution requirements to make sure that students do not specialize too much: they must take a certain number of courses outside their major field, "distributed" among the humanities, the arts, the social sciences, and the hard sciences. The curriculum is intended to be wide-ranging, with minimal specialization. Students entering law school, therefore, may have majored in English literature, or history, or political science, or economics, or psychology, or sociology, or even physics or biology or geology. So law schools admit students from all over the academic map: the only thing the new law students have in common is essentially no prior study of law!

## **2. Curriculum**

### **a. The First Year**

The first year of law school is viewed as a kind of indoctrination into legal reasoning. It is a very tough year. Students are immersed in reading cases and being questioned about them. In the first year the professors stress the ability to make fine distinctions, to engage in sympathetic counter-argument (that is, to make and meet arguments for different propositions or outcomes arising out of the same set of facts). The first-year curriculum at most schools is mandatory. Students customarily study five

courses: torts, property (both of which include a fair amount of English legal history), contracts, federal civil procedure, and either criminal law or constitutional law, or both.

Most of these are year-long courses, taught in large sections (60-100+ students). But the classes emphatically are not lectures: most of the teaching is done by calling on students. The professor conducts a series of conversations with the students, asking progressively harder questions. The goal is to engage the students. The theory is that students will learn more and better if they are active participants in their education than if they are mere passive receivers of the teacher's wisdom. For a Japanese student accustomed to lectures, the give and take – the sense of challenge and debate that characterizes an American law school class – can be profoundly disorienting. First-year courses do not focus on the substance of the law (or not only on that), but instead force the students to think, to argue, to defend their positions against intellectual attacks by their professors and their peers.

This style of teaching is often called the “Socratic method” (because it was used by Socrates in the famous dialogues of Plato). But today the Socratic method has been modified to allow broader discussion and less rigid control by the questioner. In the first year the “case method” of teaching is also used. This was a teaching method developed at the Harvard Law School in the early twentieth century. In the case method students read mostly appellate opinions, learning how to argue from one case to another, using analogy and inductive and deductive reasoning.

In a Socratic-style class, using the case method, the professor will first ask about the case itself: its facts, and the legal rules that can be derived from it. But then the professor will move on to harder issues. Students will be asked to explain the court's legal reasoning, and why the court applied a legal rule the way it did. The professor may ask the students about the implications of a rule: when and how it should be applied in similar situations. Or the professor may explore the public policy behind a legal rule, and push the students to think about how a different policy might result in a different rule (or a different application of the rule in this case).

Many law teachers would say that the purpose of the first year is to teach students “to think like a lawyer” – to adopt a style of reasoning rather than to learn the specific subjects (although both will occur in a successful first-year class). My own view is that the first year puts too much emphasis on the “case method,” with the result that the curriculum exaggerates the importance of legal *rules* and pays too little attention to the *facts* of the case. In appellate cases the facts are presented as if they were true, and set in stone. But in my experience, both the life of the law and the outcome of most cases depend upon the development and presentation of the facts. (Really I mean the development and presentation of the *proofs*, because the “facts” in most cases are disputed, and often they remain unknowable, even after trial.)

## **b. The Second and Third Years**

The second and third years of law school, in contrast to the first, are almost entirely elective. Usually students take four or five courses a term, including some large classes and some small classes or seminars. Students know that they must pass the bar examination, and therefore they take courses in the substantive areas that are covered by

the multi-state exam. Many schools also encourage students to take certain core courses that are viewed as central to the training of any lawyer, no matter what his or her specialty will turn out to be. These core courses include commercial transactions, business organization, tax, labor law, trusts and estates (the law of wills and inheritance), administrative law, conflicts of laws, and so forth. But it is probably fair to say that no two law professors would recommend the same list of “core” courses. Every professor has his or her own opinion about what are the most important courses offered, and about what a lawyer ought to know before starting practice.

Other popular courses are anti-trust law, insurance law, international law, environmental law, immigration law, family law, patent and copyright law (now often called intellectual property law), and so on. These are usually one-term courses, offered for three or four credits (which means that they meet for three or four class hours a week). Some courses are taught in sequence, to allow for specialization. For example, complex litigation might follow advanced civil procedure, or advanced constitutional law might follow a jurisdiction course. Sequences of courses are common in tax (including gift and estate taxation), in individual rights (including the First Amendment), and also in legal history and jurisprudence.<sup>5</sup>

But today everyone recognizes that the substantive law has gotten so big – there are so many fields of specialization in practice – that it is impossible to teach *all* the law in law school. Therefore most law schools let students choose their own courses after the first year, so that they can get a solid grounding in the areas that most interest them. Some law schools also require a substantial research project (or require it for honors), so students might take an advanced seminar or independent study in order to write a lengthy research paper.

### **c. Extracurricular Activities**

In addition to classes, it is common for students to be active in student organizations like the newspaper, moot court competitions, and student government, but almost never to the exclusion of their studies. Grades are important when it comes to jobs, because many law firms and government departments will only hire graduates who finish at or near the top of the class. As a result, law students tend to be highly competitive with each other, and law schools have a reputation for being quite cutthroat (compared to other graduate schools). Especially for students who want to become law school teachers, academic performance is crucial: most law schools will only interview candidates with exceptional academic records. Unlike in Japan, where undergraduate law majors may devote a lot of attention to sports clubs and other student organizations, in the U.S. most law students take their studies so seriously that they have little time for anything else.<sup>6</sup> For some students law school is a time of real intellectual awakening.

5 A copy of the catalogue of any major U.S. law school will show an astonishing number and variety of courses.

6 Again, it is hard to generalize. At the top law schools, very few students have outside jobs, and student clubs play a relatively minor role in the life of the school. At some law schools, however, many students have jobs, and some may even work full time and take their law classes at night. At these schools extracurricular activities may play a bigger role, especially if they can help students to land full-time law jobs upon graduation.

For others law school is a demanding rite of passage, but it is not a particularly happy three years, because the workload is so very high.

The most important and prestigious extra-curricular activity is the law review.<sup>7</sup> As you may know, the U.S. is unusual in that most of the best American law journals are run by students: professors publish primarily in journals that are juried and edited by students. For example, the Harvard Law Review and the Yale Law Journal (two of the best journals) have *student* editorial boards who review the submissions, choose what to publish, edit the work, and produce each issue of the journal. They may have faculty advisors, but the great bulk of the work of publishing the journal is done exclusively by the students – usually by those who are among the top students at the law school. Because serving on, and writing for, the law review can be a considerable education in itself, student editors devote an enormous of time and effort to it, and at many schools they can receive academic credit for their work.

Despite the rigor and difficulty of law school, the field of law remains attractive to students in the U.S. The three-year course to a graduate degree is shorter than all other professional schools except business school, which takes two years for an M.B.A. (Also, business is not really regarded as a “profession” in the U.S., and it is viewed as being less intellectually challenging than law.) At present admission to law school remains in high demand. There are now more than 185 ABA-accredited law schools in the U.S., and that number is growing.

### 3. New Developments

I have given you an overview of American legal education. Let me now move on to what is *new* in the law schools, which I think you will find even more interesting. The last 20-30 years have brought at least five major changes to American legal education. Each of them has left a mark, affecting the law schools in a significant way.

#### a. From Practice to Theory

The first major change is in the nature of the law school itself – I mean as an institution – from what might be characterized as a “professional” school to an “academic” enterprise. Let me elaborate. Law schools used to focus to a considerable degree on the *practice* of law. Many faculty – even at the elite law schools – moved into teaching from successful careers as lawyers. Their scholarly writing tended to focus on questions of legal doctrine and public policy, and what they wrote was widely read by lawyers and by judges. Put another way, until the 1970s or so, many law professors were experts in practice as well as in theory, and they had the real-world credentials – sometimes the battle scars – that came with such experience.

In the last three decades law schools have become far more *academic*. The change can be seen in three ways. First, legal scholarship has changed noticeably. Today’s

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7 At most law schools admission to the law review is decided primarily by class rank, which puts even more competitive pressure on students. Serving on the law review’s editorial board can greatly improve students’ job prospects, and is virtually required for the most prestigious judicial clerkships (on the federal appellate courts).

legal academics write for a limited audience – primarily for each other. Their articles tend to be more theoretical than in the past, and much longer.<sup>8</sup> One indication of the change is that today – unlike 25 years ago – it is rare to find lawyers and judges who subscribe to law reviews or who read them on a regular basis. Second, the typical career path of a law professor has changed. As noted, many law professors used to come from the world of practice. Today most aspiring law teachers finish school, clerk for a year or two in a federal appellate court, work briefly for a law firm or government agency, and then move straight into teaching. In the current generation, most law faculty are hired for their potential contribution to legal theory, not for their proficiency as lawyers or for their professional success in the non-academic world. Third, what they teach has also changed. The number of courses offered has mushroomed. Many of these courses are seminars that focus on narrow, esoteric topics that relate to law only in tangential ways. These courses would have looked out of place in the course catalogue of a 1950s law school.

The Michigan Law School is a good example. It is one of the so-called elite schools, meaning that it is ranked consistently among the very top U.S. law schools, and so it can be seen as something of a national trendsetter.<sup>9</sup> Michigan is a deeply academic institution. (Our last dean, who is now the president of the University of Michigan, never took the bar examination and never practiced law at all.) The Michigan Law School is famous for its interdisciplinary scholarship. The law faculty are sometimes called the “law and” faculty, because so many of the faculty have a law degree *and* a Ph.D. in another field. Some hold joint appointments in other University departments, and several have even chaired departments (history, sociology) while serving on the law faculty. A few professors have no law degree, but were recruited to the Law School because they wrote about the law from other fields. For example, one professor chaired the psychology department at both Yale and Stanford before coming to the Michigan Law School – she studies the psychology of juries. Another was a political theorist who now teaches full time in the Law School. The list goes on and on, with law faculty sharing appointments in law and literature, law and classics, law and philosophy, law and economics.<sup>10</sup> Unlike in times past, many of these professors never practiced law at all, or barely practiced, before beginning their teaching careers.

This first major change – the shift away from the profession and toward the academy – has not gone unnoticed, and many lawyers and judges have expressed concern about it.<sup>11</sup> In the U.S., law graduates go directly from law school into the

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8 This trend may not be universally true, but the best schools lead the way, and this trend is most pronounced at the top schools.

9 Michigan has a reputation for producing a disproportionate number of legal academics. More Michigan Law School graduates teach at other law schools than the graduates of any other law school in the country.

10 One well-known Michigan law professor earned his Ph.D. in literature before getting his J.D. He teaches a unique course called Icelandic Blood Feuds. In recent years he has written wise and witty books on emotions – like humiliation and disgust – and at present he is writing about courage and cowardice.

11 See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992).



profession: no further training is required (beyond passage of the bar examination). The ABA worries that although legal education is richer and deeper and broader than ever before, it may become so academic that students cannot get the training they need to *practice* law.<sup>12</sup> Indeed, American law schools may now be the only graduate schools in which the faculty train students for a profession that is really quite different from the faculty's own career choice, as legal academics. In virtually all other graduate schools, students learn to do the same work as their professors (or at least work that their professors have done in past, and may yet return to).<sup>13</sup>

The tilt toward theory has made the law schools stronger units within the university. In faculty scholarship (the research agenda), in the hiring policies, and in the teaching, the law schools have clearly moved closer to the central academic mission of the university. On the whole, this is probably a good thing, in my view. But the shift *is* significant, and if the trend continues, there could be legitimate concern that some schools have gone too far in the academic direction, to the disservice of the legal profession.

#### **b. Clinical Law Programs**

Luckily, at around the same time that the shift toward theory started, a second major change occurred in legal education. The second change was the rise of clinical law programs.

The 1960s were a period of great social unrest in the U.S. That decade saw many new social welfare programs, including initiatives to provide free legal services to the poor. The Ford Foundation funded a related project to develop a new law school curriculum that would make young lawyers less self-centered and self-interested, and more accountable to the needs of society. The Ford Foundation thus helped to launch clinical legal education.

Using medical education as a model, the idea behind clinical legal education was to give students *some* real-world training while the students were still in school. The clinics also sought to instill an ethic of public service. These were not new ideas – they had been written and talked about since the 1930s – but in the 1970s and 1980s they took root. The new attention to the practice of law dovetailed well with the rising new academic influence, because the clinics brought people to the faculty who actually had an interest in practicing law. Thus, at the same time that the regular faculty were becoming more academic, the law schools opened up the curriculum to permit more focus on professional skills. The clinical courses turned out to be hugely popular with students, and clinical law programs spread like wildfire. Today clinical faculty comprise a significant percentage of the faculty at most major law schools.

Again I will use my own school as an example. When I started teaching at Michigan in 1983, there only two members of the long-term faculty who taught in the

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12 Some of the big law firms used to do their own "in-house" training, but in the current competitive legal market, there is very little time or money for that sort of training, and many firms have stopped it.

13 The U.S. system is not like Japan's and Europe's, where law is primarily an undergraduate field (with only a few graduate students taking advanced degrees in law, in order to teach and to do research in academic law).

clinical law programs. Today there are ten full-time permanent clinical positions, as well as several positions funded by grants or other outside money. Michigan opened its first clinic in 1969. Today it has five full-fledged programs, with a total budget of more than 1.5 million dollars.

The typical clinical course is offered for seven credits, which amounts to about a half-time course load (a commitment of about 20 hours a week). In the clinic seminar students learn the substantive and procedural law necessary to represent their clients competently. In addition, using simulated problems they learn about client interviewing and counseling, negotiation, pretrial pleading and motions, and discovery. Many clinics include a series of intensive trial practice workshops, in which students rehearse all phases of the trial, from *voir dire* (questioning of the jury) to closing arguments, with special emphasis on the direct and cross examination of witnesses.

In addition to the readings, the coursework, and the simulations, students are assigned real cases from the clinic's ongoing caseload of open files. By court rule, students who work in law school clinics are permitted to represent clients as if the students were members of the bar, with the one exception that their work must be supervised by a licensed lawyer, usually a member of the clinical faculty.

Students in Michigan's clinics handle a full range of representation in real cases, on real problems, under faculty supervision. The students interview and counsel clients, file and defend lawsuits, negotiate with opposing counsel, conduct depositions and other discovery, argue motions in court, and try cases in bench and jury trials. The clinics also do all of their own appellate work, including appeals to the Michigan and U.S. Supreme Courts. In most clinics the goal is to put as much responsibility on the students as possible: the cases are theirs, not their supervisors'. The *students* are the ones who are in charge of the litigation.

The range of work is far greater than you might expect. The clinics do not handle only simple cases, because simple cases do not produce a wide enough spectrum of teaching material. Both the students and the faculty need a varied practice in order to maximize their learning from it. The goal is to develop their skills as lawyers, whether they are in the clinic for a single term (in the case of the students) or over a 35-year teaching career (in the case of the clinical faculty). As a result, cases can range from the simplest administrative hearing or housing case to complex class actions involving hundreds of clients, millions of dollars, and legal issues of first impression. My own students have done long jury trials in federal district courts (in which I barely said a word); they have assisted on death penalty appeals; they have won and settled cases for hundreds of thousands of dollars; they have challenged state law or policy and changed it.

Michigan's clinics are typical of clinical law programs nationwide. I will describe the programs briefly, to give you a feel for the kind of work they do.

1. The General Clinic represents indigent clients in civil litigation and defends accused persons in criminal cases. The civil caseload includes a mix of easy and hard cases, in the areas of housing law, family law, consumer law, tort and contract law, *etc.* The more complex cases tend to be the ones involving employment law (especially

discrimination and other wrongful discharge claims), immigration law, and prisoners' rights cases. The criminal docket includes misdemeanor trials, plus some post-conviction felony appeals, and a few *habeas corpus* cases. The General Clinic also collaborates with state legal services offices, advocating for the rights of poor people in courts across the state.

2. The Child Advocacy Law Clinic handles child abuse and neglect cases. The clinic operates in a multi-county area, giving students the chance to see the juvenile court system from all sides. In some counties students serve as prosecutors, bringing actions to terminate the parental rights of abusive or neglectful parents. In other counties the students defend the parents, trying to prevent the termination of their rights and to re-unite the parents with their children (where appropriate). In still other counties the students are appointed by the court to represent the interests of the children, serving as *guardians ad litem*, that is, as lawyers for the children for the duration of the case. Students work with psychologists, social workers, and foster parents in the preparation of these cases. In the mid-1990s students litigated a famous custody case that pitted the rights of adoptive parents against the rights of a natural father. The case garnered national press, and was featured on the covers of the major magazines *Time* and *Newsweek*.

3. The Legal Assistance for Urban Communities Clinic is a non-litigation clinic that does economic development work for poor communities in Detroit. Students represent non-profit groups (like churches and neighborhood organizations) who are trying to bring investment back into blighted urban areas. For example, students have worked on major housing projects, helping non-profit corporations to buy run-down or abandoned buildings. The non-profits convert the old buildings to new housing using government-backed low-interest loans to finance the reconstruction. The students put together the entire package – the financing, the bank loans, the necessary permits and approvals from all government agencies, the real estate purchase, the construction loans, *etc.* The clinic teaches students business, banking, real estate, and corporate finance law, at the same time that it gets them interested in helping indigent clients in the inner city.

4. The Environmental Law Clinic litigates environmental issues in a five-state region, focusing on water quality in the Great Lakes watershed. Students may challenge requests for discharge permits in administrative forums like the Environmental Protection Agency, or they may bring independent actions in federal court under federal laws like the Clean Water Act. In one case students helped with litigation against a big electric utility company. The company's "pump storage" generating plant caused massive fish kills when Lake Michigan water was pumped into a reservoir and then released to power the turbines. The settlement obligated the company to solve the problem, as well as to contribute millions of dollars to a state environmental fund. The Environmental Law Clinic is a joint project of the Law School and the National Wildlife Federation, a national environmental group.

5. The Criminal Appellate Clinic represents convicted felons in their appeals to the Michigan appellate courts. Students read the transcripts of the trials, research the law, and then write the briefs that go to the court of appeals or to the Michigan Supreme Court. (At present law students in Michigan are not permitted to argue in the courts of

appeal, although in some states, and in some federal circuits, students are allowed to make the oral arguments as well as to write the briefs.) The Criminal Appellate Clinic is a joint project of the Law School and the State Appellate Defender's Office, which supplies the supervising attorneys, who serve as adjunct clinical faculty for one or two years on a rotating basis.

The biggest difference between the clinical courses and the traditional academic courses is that in the clinics most of the learning is "hands-on" – it is learning by doing. In almost every clinic class students will be called upon to perform in some way, or will be required to work as part of a team to solve a legal problem or a question of litigation strategy. Often the students' work is videotaped for faculty review. The clinics are also an ideal way to teach legal ethics. The students have a stake in the outcome of their cases, and they must take full responsibility for the ethical decisions they make. (I would argue that ethical issues cannot be taught in academic classrooms, because what makes an ethical decision hard is that the moral choice is real, not hypothetical. In hypothetical situations we can all be virtuous; the ethical problem is only a problem when it has consequences.)

Not surprisingly, the sign-ups for clinical courses tend to be very high, and many of them are over-subscribed. Students love the clinics, because in them they get their first real taste of lawyering. The law comes alive for them, especially compared to the drier academic fare offered elsewhere in the law school. For a teacher, the clinics are a wonderful place to work, because the students are so motivated. Class attendance is mandatory (unlike other courses in the Law School), but students do not complain, and they come to class prepared, knowing that they will be working on their feet almost every day. The students who are enrolled in the clinics take more interest in their academic classes as well. Those classes, too, seem more connected to the world of practice – a world that the students could only imagine before, but that now, in a small way, they have entered through the door of the clinic.

The one drawback to clinical courses is that they are expensive: teachers work with students on an 8-1 ratio, as compared to the 80-1 ratio that is possible in a typical lecture hall. Some of that cost can be offset by cooperative arrangements with outside agencies (like the National Wildlife Federation and the State Appellate Defender's Office). Grant funding for clinics is also sometimes available, both from public agencies (like the U.S. Department of Education) and from private sponsors (like the Kellogg Foundation). Some clinics also help to defray their own costs by charging nominal fees to clients, or by winning attorneys' fees in the clinic's litigation. But clinical law programs are now a familiar sight at American law schools, despite their cost, and if the trend continues, they will keep growing.

### **c. Legal Writing Courses**

The third change in American legal education is the new interest in legal writing. Law schools used to pay little attention to writing, and law graduates were notoriously poor writers. American lawyers and judges seemed to take perverse pleasure in making the law dense, complicated, and mystical – something beyond the understanding of ordinary human beings (untrained in the law). But in the last few decades the public

attitude has changed. New consumer protection laws required businesses and insurance companies to write their contracts in “plain English” that any reasonably literate person could understand. The old legal forms, often derived from the centuries-old writs of England, were finally abandoned.

The law schools responded first with low-budget legal writing courses, often taught by adjuncts who were practicing lawyers, but who had no special skill either as legal writers or as teachers. Not any more: today, at schools like Michigan there is a rigorous first-year writing curriculum, staffed by legal practice professors who are full-time members of the faculty. At some law schools there is now a separate track within the faculty devoted to the teaching of legal writing. Although most of these professors are not permanent and are paid less than the academic faculty, they are nevertheless earning increasing recognition, and their programs operate with far bigger budgets than was true in the past. The Michigan Law School now has eight legal practice professors, on multi-year contracts.

The legal writing course is required in addition to the five core courses of the first-year curriculum. Students are taught the basics of good writing. Every week they hand in written assignments. Over a semester they must draft opinion letters, retainer agreements, research memoranda, trial and appellate briefs, settlement documents, *etc.* The same as in clinical courses, in legal writing courses the students get to apply some of the theory from their first-year academic courses, while learning to write clearly, simply, and directly.

#### **d. The Students and the Profession**

The fourth dramatic change in legal education is really a reflection of a broader change in American culture – one that affects all American institutions, not just the legal profession or legal education. This change, of course, is the huge numbers of women and minorities who have entered the American workforce. The change is most noticeable at the front end – in the law schools – where the future lawyers take their first step into the profession.

Until 1960, there were hardly any women in U.S. law schools. Women made up just 3.5 percent of all law students. Today, women comprise about 45 percent of entering law school classes, and the percentage is still rising. (At some undergraduate colleges women now make up 50-60 percent of the entering classes, in all fields of study.) The figures for minorities are also rising, though not as quickly. Until 1960, the law schools were almost exclusively white (Caucasian). That is no longer the case. The number of people of color (African Americans, Asian Americans, Hispanic Americans, Native Americans) has steadily increased. The percentages vary in different parts of the country, but at the Michigan Law School minorities now comprise about 15 percent of every class. (That is a fairly low figure compared to some regions of the country. On the east and west coasts, for example, where America’s minority populations are concentrated, the percentage of minority students at law schools can run to higher than 25 percent.)

From my perspective, this is all very good news. The change in the composition of the class has changed the dynamic of the classroom. When all students were white and

male, their values and perspectives tended to be relatively similar. That is no longer true. The life experience of women and minorities can be quite different from the life experience of white men, and so the new students are more likely to challenge the underlying assumptions and values inherent in the legal system (that was mostly built by and for men). My own classes are now more challenging and more wide-ranging – though they are also sometimes more contentious – than when I began teaching 18 years ago.

The changes in the student body, and in the culture generally, have pushed the law schools to diversify their faculties. In this context “diversity” means women and minorities.

Women and minority students need and want role models on the faculty, and so the law schools are now competing with each other to attract the very best women and minorities to their faculties. Some of these new teachers have academic interests that are quite different from the white male law professors who dominated the faculty in the past. The new teachers have created new fields of inquiry. Feminist legal theory and critical race theory are two examples of new disciplines within the law; both make intellectual critiques of institutions and legal norms, from the perspective of gender and race. These new scholars do not see the law as being “value neutral,” but instead they view it as inseparable from Western culture, which has a long history of oppression and exclusion of women and minorities.

At Michigan the women students are doing very well, often taking home the highest academic prizes. This year a pair of women won the prestigious award for brief-writing and appellate advocacy, defeating every other team that entered the annual moot court competition. Last year two black students won the same competition. The legal profession may not be fully integrated by women and minorities for another generation or two, but based on who is attending law school today, the change appears to be inevitable.

#### **e. The Cost of Law School**

The fifth major change in legal education is the rising cost. At the elite law schools, tuition, room, and board, now cost more than \$30,000 a year. It is common for students to graduate with \$50,000 (or more) in debt, in the form of private, government, or school-financed loans. (A few years ago I had two law students who were married to each other. Between the two of them, this couple finished law school with total of \$120,000 in undergraduate and graduate debt.) The higher debt load is the twin result of rising costs and the elimination of many government grant programs; students must now borrow part of what the government used to cover for them.

The high cost of law school creates changes in the legal job market, as you might expect. Students who in the past would have preferred careers in government or in public interest law offices cannot afford those (lower paying) jobs, if they must begin to repay their student loans immediately after graduation. Their debt load forces them, in effect, to accept the highest paying jobs, in the private sector. In turn the increased competition for those jobs drives up the private-sector salaries, and works as a counterweight to the schools’ efforts to educate their students about the value of public

service and the importance of job satisfaction (other than money). The same market forces increase the wage disparity between private and public employment, creating a spiral effect.

The law schools have responded to the funding problem in several ways. Some have offered creative new debt management programs, spreading out loan payments over a longer period of time. Others forgive or defer loan payments to those students who choose public interest careers, precisely to prevent all students from having to work for private firms or large corporations. But the problem remains intractable.<sup>14</sup>

The higher costs have forced law schools to alter the way they raise funds. Most schools used to have relatively small development offices, whose job it was to conduct the annual campaign for alumni support. Success was often measured in terms of the percentage of graduates who donated to the fund, as much as the bottom line (the total dollars generated). In the last 15 years the law schools' approach to fund-raising has changed radically. The development office staffs doubled, then trebled, and their budgets took off. (The same thing is true in all units of the university, not just at the law schools.) With fewer public dollars available for education, and with costs soaring, the schools have aggressively sought support from their own graduates, targeting those who are able to give the most. Law school development offices now spend most of their time trying to garner major gifts.

For example, from 1991-98 the University of Michigan conducted a University-wide capital campaign. In that time the Law School's goal was to raise \$75 million in private gifts, pledges, and annual alumni giving. By the end of the campaign, the Law School had in fact raised over \$90 million in seven years, most of it in the form of major gifts. Even at a public university like Michigan, the level of state support has fallen so low – relative to the rising costs – that the Law School must rely primarily on private support in order to compete with the vast endowments of the wealthy private schools like Harvard, Yale, and Stanford.

The change in funding has had one other incidental but important effect on legal education. Until the 1970s, the dean of a law school customarily served for many years – sometimes a decade or more. A successful long-term dean was an academic leader, a figurehead, and also a kind of spiritual leader or shepherd for the students and faculty. The dean devoted most of his or her time to internal law school and university affairs, and he or she often had time to teach, and even to publish, while serving as dean. In many ways a dean could put his or her stamp on the school, and give it a unique character.

That too has changed. Today most deans spend an enormous amount of time on the road, fundraising. They work closely with the development office, arranging trips to meet with alumni, and generating enthusiastic support for the school. By the late 1990s the tenure of a dean had dropped below five years, in part because the job is so taxing. The job is now so outwardly focused that the dean is less an academic and community

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<sup>14</sup> There is a considerable difference in cost between what the top law schools charge and what the bottom law schools charge. Some state universities offer an excellent value to in-state students, whose tuition is supported by state tax dollars.

leader and more and more a fiscal specialist, concerned with balancing the budget, and fundraising.

#### **4. Problems in Legal Education**

I will close with a description of some of the problems facing U.S. law schools. Ironically, many of the problems stem from changes in American laws (or in constitutional interpretations), and thus they affect most features of American life, including the workplace, and not only the nation's schools.

##### **a. Disability Law**

New federal statutes have created important rights for the disabled. These new laws apply to large employers and to state agencies and institutions. For example, most new buildings must be wheelchair accessible, and some old buildings must be renovated to permit reasonable access as well. Blind and deaf students must be provided with interpreters or computer equipment so that they can keep up with their peers. And the term "disability" is not limited to physical handicaps. Accordingly, schools must accommodate students with mental or emotional disorders, if the students are otherwise capable of doing the work. For example, a student with a documented reading disorder (like dyslexia) may require extra time on his or her exam, and a student with an attention deficit disorder (ADD) may require a quiet room.

Laws like the Americans with Disabilities Act have a laudable purpose, and they grant rights to people who were long excluded from mainstream American life. But these laws are costly to implement. They also raise interesting issues about what skills are required to practice law. Must a lawyer process information quickly to be successful? (The answer may depend on what kind of law the person practices.) Can a physically handicapped lawyer succeed in the courtroom? (Yes, some of the very best trial lawyers are handicapped people.) Should a person with panic disorder be given extra time on the bar exam, because he or she is unable to function in high-stress situations? (The answer to this question may be decided by litigation.) What is certain is that these new laws have generated, and will generate, a lot of lawsuits, both by workers and by students, who seek an accommodation for their disability or handicap. Compliance with the new laws consumes faculty and administrative time. Every denial of a request for an accommodation runs the risk that the denial will provoke a lawsuit.

##### **b. Age Discrimination**

Another recent federal law forbids age discrimination (except, for example, in police departments or airplane cockpits, where youth, strength, or reaction time would be critical to the performance of the job). But it is hard to argue that law professors must be young, strong, or agile. The new law applies to public entities, which means that at public law schools like Michigan the time-honored policy of mandatory retirement from teaching is no longer enforceable. In theory, a senior professor could keep teaching, year after year, as long as he or she were able, and there would be nothing the dean could do about it. In practice, most members of the faculty are delighted to stop teaching by age 65, even if their research and writing continue full tilt



into their *emeritus* years. But a test case could occur – all it will take is a stubborn professor with a young heart (or a professor desperately in need of a full salary past the age of 65).<sup>15</sup>

### c. Race Discrimination and Affirmative Action

Discrimination on the basis of race has been illegal in the U.S. almost since slavery was abolished in the nineteenth century. It has persisted nonetheless. For many years the laws either were not enforced or they were circumvented with legal fictions like the doctrine of “separate but equal.” After the 1940s and 1950s, however, enforcement of the civil rights laws increased, and in the 1960s new laws were passed where the old ones did not work.

Discrimination laws raise interesting questions of remedies. For example, if a police department has a history of failing to hire African-Americans, one remedy is the preferential hiring of blacks, until a semblance of racial balance with the community is achieved. But such a remedy means that some (statistically) less-qualified blacks may take the open slots ahead of some (statistically) better-qualified whites. Such preferential policies are called “affirmative action” and they are permitted on the theory that they are necessary to overcome the harm of past discrimination. (In the U.S. some of the anti-discrimination laws apply not only to race, but also to age, to gender, and to religious and sexual preferences.)

Thus, using the doctrine of affirmative action, law schools could admit women and minorities whose law school entrance exam scores or college grade point averages were slightly below the scores or GPAs of some white male students. The preference would make up for the fact that the women and minorities were mostly excluded until recent times, in part for discriminatory reasons. Affirmative action gives people a chance they otherwise would not have, namely, admission ahead of other qualified majority candidates, to make up for the years of past discrimination, and to change quickly the composition of the group.

But today in the U.S. many conservatives argue that the effects of past discrimination are no longer evident, that racial and gender balance has been achieved in many settings, and that therefore everyone should have to compete on exactly the same basis. They argue that to allow affirmative action – to give preferences – now amounts to “reverse discrimination” against white males, who have become a legally disadvantaged class themselves. For a while this debate was largely academic, but in the last decade conservative groups have taken their arguments to the courts. They have filed a series of high-profile lawsuits on behalf of people who were denied a job or admission to school, alleging that someone less qualified took the plaintiff’s place (at work or at a school) because of affirmative action policies that are no longer needed. The relief they seek is the job, or admission to the school, money damages, and an injunction forbidding the use of affirmative action policies. As the U.S. Supreme Court

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15 In the fall of 1999 the U.S. Supreme Court heard arguments in a similar case, arising out of Florida. The state argued that Congress exceeded its power over the states in passing the federal age discrimination law, and that therefore the state need not obey the law. The High Court decided the case in the state’s favor in early 2000. See *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

has gotten more and more conservative in the last two decades, these arguments have begun to be accepted by the lower courts.

It happens that two important pending test cases involve the University of Michigan. Right now the University is the subject of two lawsuits brought by a conservative foundation, challenging both the University's and the Law School's admissions policies. The plaintiffs' claim is that by admitting minority students whose test scores or undergraduate grades were lower than the scores or grades of some white students who were denied admission, the Law School and the University engaged in impermissible "reverse discrimination." To defend the cases, the University has hired a Washington, D.C. law firm, and before the cases are over the University will spend millions of dollars in defense costs. For the senior administrators and the admissions departments, the lawsuits are an ever-present part of their jobs. The named defendants include the president of the University, the dean of the Law School, and many of the admissions officers. The Law School case went to trial during the 2000-2001 academic year, and the plaintiffs prevailed. Both cases are now on appeal to the U.S. Court of Appeals for the Sixth Circuit. Many lawyers and commentators believe that the cases will wind up in the U.S. Supreme Court.

The University's defense is a straightforward one. It asserts that "diversity" of the student body is a good thing in and of itself, regardless of whether or not the effects of past discrimination remain. The University argues that without preferences – and not just racial preferences – diversity would be lost. Accordingly, the University says that it can use a wide array of tools to achieve the goal of a blended academic community. For example, if it wants a top-ranked athletic department, it can recruit and admit some students whose board scores or GPAs are lower than the scores of some rejected applicants, because the school places a special value on the students' athletic prowess. The children of alumni have long been given similar preferences, in part to foster familial allegiance to the school, which in turn can result in increased financial support. At public schools like Michigan, in-state students get preferential treatment, which means that some in-state students are admitted ahead of out-of-state students with higher board scores or grades. Here the University has twin goals: to serve the children of in-state taxpayers who pay for part of the cost of public education, and to expose students to classmates who come from all around the nation, and not just from Michigan.

The University argues that there is little difference between racial affirmative action and all other sorts of preferences, and that in making admissions decisions the University must be free to set its own priorities and values, and not be limited to measures dictated by the plaintiffs (or by the courts). The University also points out that the so-called "objective" measures like board scores and GPAs are notoriously untrustworthy. Many standardized tests have been found to have built-in biases that disfavor minority test-takers, and grade point averages fluctuate from college to college and cannot easily be standardized (across colleges) with any degree of accuracy.

The stakes in these test cases are high, because without preferential policies the student body would be very different. Based on data from California, where affirmative action was abolished by a referendum of the voters two years ago, it is certain that far fewer blacks, Hispanics, and Native Americans, and possibly fewer Asians as well,

would be admitted to the University and to the Law School.<sup>16</sup>

I think the real point here is that the effects of 400 years of slavery and discrimination are much longer-lasting than they might first appear to be. Even though the Law School has achieved 15 percent minority admissions, most minorities in the U.S. still live in comparative poverty, most still attend the worst local schools, and most still suffer from subtle forms of discrimination. Without affirmative action programs, they will never be able to compete with the majority culture. Indeed, anyone whose early education was limited or sub-par – inner city folks, country people, poor people, foreign-born people, *etc.* – will lose the opportunity that affirmative action provides, if preference programs are eliminated. And of course all of the students who are admitted must meet the school's exacting standards. Affirmative action simply allows the school to shape the student body, by looking at more than numbers: it does not mean that *un*qualified students are admitted.

In the end the courts – probably the U.S. Supreme Court – will decide if law schools can set their own admissions policies to attain diversity of the student body, or if affirmative action policies violate the due process and equal protection clauses of the U.S. Constitution.

If the plaintiffs succeed in the lawsuits, and affirmative action is held to be unconstitutional, then I think America's minorities will face very, very hard times.

For me the question is what the profession is going to look like in the next generation. Will the profession include minorities and other disadvantaged Americans, or will it revert to the closed, privileged shop that it was for the country's first 200 years? The law schools want to make sure that minorities and women and other historically disadvantaged groups have access to the best legal jobs, in public and private practices. But without affirmative action, the recent progress – for blacks, for women, for gay and lesbian students, for all minorities – may be slowed, or stopped completely.

## Conclusion

By Japanese standards, the number of American lawyers is staggering. The number of lawyers has risen from around 350,000 in 1970, to 550,000 in 1980, to 700,000 in 1990, to close to 1,000,000 lawyers in 2000. That is a lot of lawyers, by any measure. Currently the ABA-accredited law schools are graduating about 45,000 new lawyers a year. In my home state of Michigan there are about 40,000 licensed lawyers, almost three times the lawyers in all of Japan. The U.S. is a nation of lawyers: there is now one lawyer for every 300 people in the country. Lawyers clearly play a major role in U.S. affairs. How they are educated in law school, and who they are, matters.

I have tried to give you an overview of American legal education, to show you how it began, how it grew, and how it operates today. I have focused on recent trends, so that you would have a good sense not only of its strengths, but also of its current

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<sup>16</sup> When California barred affirmative action in 1997, the number of black students in the first-year class at its top public law school (Berkeley) dropped in one year from about 25 to zero. Not surprisingly, even the few black students who got in to Berkeley chose not to go there.