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Thomas D. Morgan

George Washington University Law School, tmorgan@law.gwu.edu

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The Changing Face of Legal Education: Its Impact on What It Means to Be a Lawyer¹

Thomas D. Morgan²

Abstract: In recent years, it has become less clear what it means to be a lawyer. Current efforts by the ABA to change accreditation standards for U.S. law schools make it important to think about the ways in which lawyers have common qualities. This paper considers both the changes in law practice and what they are likely to mean for U.S. law schools as they try to equip lawyers for the new reality.

Introduction

I have written a book called “*The Vanishing American Lawyer*.”³ My premise is not that too few people have a legal education. I say instead that what people now do with legal training is changing rapidly and likely will continue to become more diverse. That leaves me suggesting that there is little left to the general concept of being a lawyer.

Yet people still talk about lawyers, and the question of what it means to be a lawyer is especially timely in light of current American Bar Association efforts to revise the standards by which American law schools are accredited. That ABA project, in turn, must necessarily begin – at least implicitly – with the question of what kind of people law schools are charged with producing. That, in turn, is the question I hope to address in this article, and my answer will be

¹This was the Miller-Becker Center Distinguished Lecture, given at the University of Akron Law School, October 28, 2011. It will be published in the Akron Law Review in 2012.

²Oppenheim Professor of Antitrust & Trade Regulation Law, The George Washington University Law School. Professor Morgan has been chair of an Association of American Law Schools (AALS) committee that helped prepare a critique of some of the accreditation changes proposed by the ABA. This essay goes far beyond that committee’s work, however, and does not necessarily represent the views of the AALS, its officers or its executive committee.

³THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* (2010).

that the products of today's and tomorrow's legal education will need to be different than those professors have trained up to now.

I. What is happening to law practice that will change what it means to be a lawyer.

The traditional working definition of a lawyer has been someone licensed to engage in the "practice of law." But that definition is circular; it presupposes that we know what it means to practice law. The practice of law, in turn, has been said to consist of applying the whole body of law to a specific client's question or problem.⁴ That definition might seem broad enough to let the idea of being a lawyer remain constant. But changes from globalization, to the way clients get information, to the skills needed to perform many legal tasks foreshadow significant changes in what lawyers will actually do over the next twenty years and beyond.

A. The number of licensed lawyers has quadrupled over the last 40 years

First, over the last forty years, the American bar has grown more rapidly and changed more profoundly than in any comparable-length period in history. In 1970, the nation had about 300,000 lawyers.⁵ Academic year 1972-73 was the year of the most dramatic growth in the number of U.S. law students. The number of students enrolled in law school in that year was almost 100,000, or close to 1/3 of the total number of U.S. lawyers.⁶ High enrollment continued,

⁴This definition was used in ABA Code of Professional Responsibility, Ethical Consideration 3-5 (1970). A law professor does not practice law when teaching, for example, because he or she teaches the law as it relates to hypothetical, not real, clients. Similarly, one who writes a book about law is not thereby engaged in law practice.

⁵The most carefully collected data on the legal profession remains BARBARA A. CURRAN, ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S (1985), AND BARBARA A. CURRAN & CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S (1994).

⁶John C. York & Rosemary D. Hale, *Too Many Lawyers? The Legal Services Industry: Its Structure and Outlook*, 26 J. LEGAL EDUC. 1 (1973). In round numbers, there were just over 300,000 lawyers and 100,000 students were in law school. Indeed, the authors were so alarmed by the growth that they predicted that "up to half of the graduates in the near future may have to seek employment in fields where traditionally legal training is not a

and as a result, the number of U.S. lawyers went on to double during the decade of the 1970s.

The largest source of the increase in lawyers came from the new interest in law school among women and members of minority groups – both of which had been greatly under-represented among lawyers.⁷ Their new presence has enriched the bar, and since the 1970s, student interest in becoming lawyers has remained strong, but the legal profession has roughly quadrupled – from about 300,000 in 1970 to about 1,200,000 lawyers today, of whom about 1,000,000 are estimated to be now in practice.⁸

Demand for lawyers has increased over the same period, but not proportionately. University of Chicago economist Peter Pashigian convincingly showed that the most important stimulus for the need for legal services is not internal to the legal system.⁹ Demand for legal services correlates most closely with growth in Gross Domestic Product, the level of economic activity in the country generally.

The nation's gross domestic product in constant dollars has grown at about the same rate as the number of lawyers in times of prosperity, but ABA-accredited law schools regularly

prerequisite." Id. at 31. That prediction has proved prescient. See note 11, *infra*.

⁷The data is analyzed in Richard L. Abel, *The Transformation of the American Legal Profession*, 20 LAW & SOC'Y REV. 7 (1986), and Barbara A. Curran, *American Lawyers in the 1980s: A Profession in Transition*, 20 LAW & SOC'Y REV. 19 (1986). For reasons no one seems to have been able to explain fully, the number of white males in law school each year has remained almost constant since 1973.

⁸One of the chronic problems in determining the number of lawyers is the lack of data on lawyer deaths and retirements and the fact that many people with law degrees are not practicing law.

⁹It is not the growth in population, for example, or a growth in regulation or the receptivity of courts to new legal theories. See B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J. L. & ECON. 53 (1977); B. Peter Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 1978 A.B.F. RES. J. 51 (1978); B. Peter Pashigian, *Regulation, Preventive Law, and the Duties of Attorneys*, in WILLIAM J. CARNEY, ED, *THE CHANGING ROLE OF THE CORPORATE ATTORNEY* (1982).

graduate over 40,000 new lawyers each year in good times or bad.¹⁰ As long as U.S. Gross Domestic Product grew at about a 4% annual rate (as it did for most of the 1990s), new graduates could find jobs at good salaries. During the recent recession and the slow economic growth that has followed, however, production of lawyers has greatly exceeded the rate of GDP growth and at least three graduating classes of potential lawyers have struggled to get law-related jobs. According to the National Ass'n for Legal Career Placement (NALP), only 87.6% of the law school class of 2010 had jobs of any kind nine months after graduation. That is the lowest rate since the early 1990s. Even more important, only 68.4% of graduates got jobs for which bar passage is required; that is the lowest such percentage ever measured.¹¹ It is certainly possible that educational standards – and even the definition of what constitutes a lawyer – could be affected by the huge number of legally-trained advisors now available to clients.

B. Individual lawyers' practices are becoming more geographically diverse

Second, the increasingly global character of many clients' work means that the day has

¹⁰My own work in the mid-1990s to update the Pashigian numbers indicated that by even then, growth in the supply of lawyers was at least 15% greater than the growth in demand. Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 WASH. L. REV. 625 (1994).

¹¹NALP, *Jobs & JD's: Employment and Salaries of New Law Graduates – Class of 2010* (2011). If that is not bad enough, the Bureau of Labor Statistics predicts a 13% increase in the demand for lawyers over the next decade while the nation's law schools will increase the supply of lawyers by over 40%. U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 Edition, found at <http://data.bls.gov/cgi-bin/print.pl/oco/ocos053.htm>.

Nor have these developments been limited to the United States; it is a world-wide trend. The Japanese have copied the United States and expanded their law schools and numbers of lawyers. See, e.g., Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, in WILLIAM P. ALFORD, ED., *RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA* 136-56 (2007); Yasuharu Nagashima, *The Changing Landscape of the International Practice of Law in Japan*, in JENS DROLSHAMMER & MICHAEL PFEIFER, EDs., *THE INTERNATIONALIZATION OF THE PRACTICE OF LAW* 151 (2001). China and India similarly have encouraged their numbers of lawyers to grow in what is said to be an effort to promote economic growth. See, e.g., William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China*, in WILLIAM P. ALFORD, ED., *RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA* 287-96 (2007).

come and gone when national borders – and a fortiori state borders – likely have any real significance in deciding how a transaction should be structured or a matter litigated, and a lawyer who continues to focus only locally will neither serve her clients well nor retain her clients long.

Companies involved in global commerce hire or send employees all over the world. Those employees create family relationship, taxation and other financial issues that were largely unknown to earlier lawyer generations. No lawyer can be expert in all law everywhere, but even the drafter of a will today has to assume that some of the beneficiaries or some of the property could be in other states or nations. As the geographic scope of problems we handle broadens, the substantive breadth of matters we are likely to master seems likely to narrow. Professional contacts – or law firm partners – around the nation and the world are becoming essential.

That development, in turn, is magnified by changes occurring in lawyer regulation in other parts of the world.¹² English lawyers, for example, have recently experienced the most radical change in the regulation in their history. As a result of the Legal Services Act of 2007,¹³ the number of activities that only a lawyer may do have been reduced,¹⁴ and a law firm may have non-lawyer investors.¹⁵ If American lawyers ignore the fact that their direct competitors play by different rules, they will have only themselves to blame when clients seek the same or better

¹²For additional information see, e.g., Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNATL. L. 989 (2001); Laurel S. Terry, *But What Will the WTO Disciplines Apply To?: Distinguishing Among Market Access, National Treatment and Article VI:4 Measures When Applying the GATS to Legal Services*, 2003 THE PROFESSIONAL LAWYER 83 (Symposium Issue). See also, Carol Silver, *Winners and Losers in the Globalization of Legal Services: Situating the Market for Foreign Lawyers*, 45 VA. J. INT'L L. 897 (2005) (discussing the increase in programs at U.S. law schools for foreign lawyers, many of whom hope to practice with U.S. firms).

¹³2007 Chapter 29.

¹⁴Legal Services Act of 2007, 2007 Chapter 29, § 12.

services at lower cost elsewhere.

It would be a mistake, of course, to assume that globalization will occur equally rapidly in every line of commerce. High-touch personal services are likely to continue to be delivered locally. Part of the challenge in considering the impact of globalization on lawyers, then, will lie in distinguishing which lawyer roles are more like the making of machine parts and which require a local touch.¹⁶ But the fact is that not all lawyer work is alike, and not all is high touch. American lawyers, firms and legal education will experience a need to become known as among the best in the world – or at least in their part of the world – at some important, distinctive tasks.

C. Clients have more ways to get legal information

Third, even as economic growth improves, the legal market is unlikely ever again to absorb traditional lawyers at its previous rate. The use of new technology means that legal services once thought of as unique to each client are likely to become like commodities produced by persons that each play only a modest part.¹⁷ Many real estate closings involve repetitive use of standard documents, for example, and uncontested divorces may at most require someone to help couples fill in the blanks on required forms. Even in litigation, where trial lawyers have traditionally determined how the process would work, document production is increasingly being

¹⁵Legal Services Act of 2007, 2007 Chapter 29, Schedule 13.

¹⁶Thomas Friedman says: “[N]o matter what your profession – doctor, lawyer, architect, accountant – if you are an American, you better be good at the touchy-feely service stuff, because anything that can be digitized can be outsourced to either the smartest or the cheapest producer, or both.” THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 13-14 (2005). Friedman also says it is likely over a half-million tax returns brought to CPAs in the United States are now outsourced to India.

¹⁷*E.g.*, THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* (2010); RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2008); William D. Henderson & Rachel Zahorsky, *Law Job Stagnation May Have Started Before the Recession – And It May Be a Sign of Lasting Change*, ABA J., July 1, 2011.

outsourced to India or rural America.¹⁸

The increasing importance of information technology to law practice also promises to transform tasks that used to be seen as complex, unique and worthy of substantial fees into simple, repetitive operations provided to clients by the lowest bidder. The simplest personal computer can be used to allow a lawyer to copy a document used in one transaction and change the names and terms for use in the next. The result will be terrible if the document is not equally relevant to the new situation, and knowing what changes are needed to fit new facts will always be a big part of the lawyer's service, but the benefits of standardizing forms in transactions promises to be enormous.

Yet another technology-based reality that will transform lawyers' practice is the world of free information that lawyers have traditionally sold, but that is now available on the Internet. Information may be provided free in a form available to all or only to those who have directly or indirectly paid a fee for the access. So far, the free or open-source approach has been more pervasive than most Americans might have imagined.¹⁹ Whether free or for a fee, however, ubiquitous help from information services increasingly will be available to individuals planning their own affairs, drafting their own documents, and even appearing pro se in litigation, just as

¹⁸Thomson Reuters, owner of the former West Publishing Co., has acquired Pangea3, one of the largest outsourcing firms in India. See ABA J., Feb. 2011, p. 27. The company has now opened a new office in Texas. Heather Timmons, *Legal Outsourcing Firms Creating Jobs for American Lawyers*, NY Times, June 2, 2011. Corporate general counsel are reportedly now testing document review technology that could replace human beings altogether for most of that part of litigation preparation.

¹⁹See, e.g., DON TAPSCOTT & ANTHONY D. WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* 11 (2006) (four major principles underlie these developments – “openness, peering, sharing, and acting globally”); THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 83 (2005).

software now helps millions of former accounting clients prepare their own tax returns.²⁰

In addition, the character of legal services is likely to change. Rather than retaining a lawyer to take a matter from beginning to end, clients are likely to buy only parts of a traditional representation. Disaggregating legal services in this way is likely often to be in the client's interest and lawyers will have to respond accordingly.²¹

Indeed, we may not be far from future development of "expert systems" that can even begin to do basic legal reasoning and analysis.²² For as long as computers are restricted to dealing with language rather than abstracts concepts, human beings are likely to be better at discerning patterns in apparently disparate information. There seems little doubt, however, that in areas of the law where words are regularly used in patterns, expert systems may indeed be possible.

D. Clients can increasingly get legal help from other than licensed lawyers

²⁰Up to now, lawyer responses to such developments have largely been self-defeating. In Texas, an unauthorized practice of law challenge was brought against sale of the Quicken Family Lawyer CD-ROM for use by people trying to draft their own legal documents. See *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*, 1999 WL 47235 (N.D. Tex. 1999), vacated and remanded, 179 F.3d 956 (5th Cir. 1999). Notwithstanding lawyer views, the Texas legislature promptly took the side of client freedom and made clear that the sale or use of such computer software does not involve the unauthorized practice of law.

LegalZoom recently settled a similar case after a Missouri federal district court held its preparation of personalized legal documents constituted unauthorized practice of law, *Janson v. LegalZoom.com, Inc.*, 2011 WL 3320500 (W.D. Mo. 2011), but the parties have apparently reached a settlement that will allow LegalZoom to continue to operate in Missouri. Clients' desire to avoid lawyer services is unmistakable. That desire might bother lawyers, but it is a reality that we ignore at our peril.

²¹Others, however, suggest that professionals bring practical judgment to a question that will consistently be inappropriately undervalued in such a process. WILLIAM F. MAY, *BELEAGUERED RULERS: THE PUBLIC OBLIGATION OF THE PROFESSIONAL* 45-49 (2001); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

²²See generally, RICHARD SUSSKIND, *THE END OF LAWYERS: RETHINKING THE NATURE OF LEGAL SERVICES* (2008).

In addition to the growth in the number of legally trained people around the world and the widespread availability of legal information, the rising power of in-house counsel promises to transform the way legal services is delivered. Today, the people many lawyers have to please are other lawyers – this time lawyers acting as general counsel to corporations, government agencies, and other organizations.²³ More and more, in-house counsel are cutting the number of outside firms a company retains, requiring highly-detailed case budgets, early assessments, regular updates, use of specific technology and minimum experience levels for lawyers working on their cases (e.g., no first year associates).²⁴

The logical outcome of corporate counsel managing legal needs, and the world-wide availability of help with legal matters, will be the declining significance of having an American law licence before providing traditional legal services. As we have seen, changes ranging from globalization to the way clients get information foreshadow similar changes in what it will mean to be a lawyer. Prohibition of the unauthorized practice of law is likely to do little to protect

²³Carl Liggio, former general counsel of Arthur Young & Co., says that the “golden years” for in-house corporate counsel were the 1920s and 30s. They were in eclipse from the 1940s to the mid-1970s but then began the resurgence described here. See Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201 (1997); See also, Carl D. Liggio, Sr., *A Look at the Role of Corporate Counsel: Back to the Future—Or Is It the Past?*, 44 ARIZ. L. REV. 621, 621-24 (2002). The resurgence period is discussed in EVE SPANGLER, *LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK* (1986); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L. J. 479, 481-90 (1989) (calling this the “age of enlightenment” for in-house counsel). See also, MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 33 (2006). The phenomenon of salaried “professionals” is not limited to lawyers: “Increasingly, doctors find themselves salaried employees or beholden to large, third-party payers and provider organizations. Other professionals, such as engineers, accountants, lawyers, and academicians, have long since submitted to some institutional control over their practices as they massively work for large organizations and professional firms.” WILLIAM F. MAY, *BELEAGUERED RULERS: THE PUBLIC OBLIGATION OF THE PROFESSIONAL* 3 (2001).

²⁴2008 ACC/Serengeti Managing Outside Counsel Survey, reported in a joint news release, October 20, 2008, found at www.acc.com; Susan Hackett, *Viva La Revolution?*, CORPORATE COUNSEL, April 2007, p. 63; Thomas Sager, *Not Going to Take it Anymore*, CORPORATE COUNSEL, Sept. 2007, p. 67; Debra Cassens Weiss, *Wal-Mart Refuses Law Firm Fee Hikes, Cites High Associate Salaries*, ABA JOURNAL - LAW NEWS NOW, Nov. 9, 2007. See also, LARRY SMITH, *INSIDE/OUTSIDE: HOW BUSINESSES BUY LEGAL SERVICES* 151-69 (2001); EVE SPANGLER, *LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK* 100 (1986).

American lawyers against these fundamental changes.²⁵

In addition, corporations now use non-lawyers to help deliver a total package of services that they need done. Negotiating contracts, troubleshooting discrimination claims, even writing court documents can all be done by non-lawyers within an organization receiving a level of lawyer supervision and training to which unauthorized practice rules cannot effectively speak.²⁶

Non-lawyers can help lower costs, but more important, they can help the client get its whole problem solved, not just the legal elements.²⁷ Often, the non-lawyers will benefit from a degree of lawyer supervision, but the non-lawyers might be accountants or lobbyists, economists or nurses, statisticians or business specialists who are more than capable of acting on their own. Current legal ethics rules require a lawyer in a private law firm to supervise and take responsibility for the non-lawyer's work, but that requirement is easily met, and within an organizational client, lawyers need only supervise if it is cost-effective to do so.²⁸ ABA Model

²⁵An Executive Order signed by President Clinton, Executive Order 12988: Civil Justice Reform (Feb. 5, 1996), for example, has required federal agencies to allow non-lawyers to counsel and represent clients in agency proceedings. Many agencies have opened their proceedings to non-lawyer advisors, and the effect has been both increased assistance available to claimants and a decline in the number of potential clients that must rely on lawyers.

²⁶Professor Kritzer calls such persons "law workers" and sees them as examples of the kinds of people with whom lawyers are likely to compete in the future. See Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917 (2002). See also, HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS & ORDINARY LITIGATION* (1990); HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998); Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 LAW & SOC'Y REV. 3 (1999).

²⁷For the same reason, lawyers themselves are breaking down traditional unauthorized practice barriers as they assist their clients, not only in the state in which the lawyer is licensed to practice, but in other states or nations where the client has legal needs. The ABA Model Rule 5.5 now permits lawyers to do at least "temporary" work in states where a lawyer is unlicensed, and law firms have long used paralegal and other support personnel nominally working under the lawyer supervision that ethical standards require.

²⁸See, e.g., Susan Hackett, *Inside Out: An Examination of Demographic Trends in the In-House Profession*, 44 ARIZ. L. REV. 609, 616 (2002) (compliance programs in areas such as environmental, human resources, tax, marketing/antitrust, health/safety, are often under the direction of non-lawyer compliance officers who have access to lawyers but do not necessarily report to them).

Rule of Professional Conduct 5.4 today bars American lawyers from participating in multi-disciplinary firms that deliver legal services in the United States,²⁹ but clients can often get the services from firms operating out of Canada or Europe. Regulators act as though lawyers still operate in a world in which communication and travel are difficult. Clients know better, and law firms are likely to be under pressure to respond.

II. Proposed Changes in the ABA Accreditation Standards

Insofar as legal education is solely a field of academic study, universities are largely free to define its shape and character. America's colleges and graduate programs are accredited by organizations recognized by the U.S. Department of Education as "reliable authorit[ies] as to the quality of the education or training offered."³⁰ Accreditation helps students find schools that meet established standards, helps schools as a group improve standards, identifies schools whose credits should be recognized by other schools, and helps both government and borrowers identify which schools have programs that should be eligible for students to use federal financial aid.

But law school accreditation has one more consequence. To the extent law graduates want to practice, bar admission authorities can have a controlling influence on what law schools offer to and expect from their students.³¹ A graduate of an unaccredited business school may start a business, but only a licensed lawyer may openly practice law and only a graduate of a law

²⁹E.g., MODEL RULES OF PROF'L CONDUCT R. 5.4(a): "A lawyer or law firm shall not share legal fees with a nonlawyer * * *."

³⁰20 U.S.C.A. §1099b. The Department of Education does not itself accredit particular programs; it determines which organizations may make those determinations.

³¹See ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW 38 (1921) (courts retained control of entry to the profession and kept American from having a self-determining bar like the one in England).

school accredited by the Council of the ABA Section of Legal Education and Admission to the Bar may take all states' bar examinations.³² Schools can exist – especially in a large market like California – with only state accreditation, but an ABA-accredited education is the one that most students want and that most schools try to offer even if that education is more costly to produce.³³

When first adopted in 1923, ABA standards initially required schools to demand two years pre-legal study and three years of law school work. Schools were required to have an adequate library and only a few full-time teachers. A list of approved law schools that met these requirements was prepared and made public.³⁴ Opponents of accreditation standards argued that they would limit entry to the profession to those wealthy enough to afford a quality education. But by 1931, 77 U.S. law schools had received ABA approval.³⁵ By 1951, 124 were approved, and of those, 107 were also members of the Association of American Law Schools (AALS).³⁶

Almost twenty years later, in the early 1970s, the Carnegie Commission focused its

³²Since 1952, the Council of the ABA Section of Legal Education and Admission to the Bar, not the ABA itself, has been the “recognized national agency for the accreditation of programs leading to the first professional degree in law.” *2010-2011 ABA Standards for Approval of Law Schools*, p. iv. In this essay, ABA or ABA Section will sometimes be used as a shortened form of the Council’s full title.

³³George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998), argue that the increased cost tends to decrease the number of lawyers and increase the fees lawyers can charge. See also, ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

³⁴PHILIP C. JESSUP, *ELIHU ROOT*, Vol. 2, pp. 468-70.

³⁵ALBERT J. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 102-112 (1953).

³⁶ALBERT J. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 116-117 (1953). In 1950, the ABA adopted a requirement that law schools could admit only students with at least three years' undergraduate study.

attention on legal education.³⁷ This time, it made proposals that could have had dramatic effects on legal education as we know it today. In a report authored by Professor Paul Carrington, the Commission recommended making “legal education more functional, more individualized, more diversified, and more accessible.”³⁸ It proposed that law schools adopt a “standard curriculum” to be begun by students after three years of college. That curriculum could be finished in two academic years and would provide graduates with a grounding in core subjects and a chance for “intensive instruction” in professional skills. An “advanced curriculum” would be available to students who wanted a third year of law training, but that year could be completed in non-continuous units after leaving law school. An “open curriculum” would be available to students who simply wanted to learn more about law.

The proposal was imaginative and ambitious, but it was opposed by law schools that foresaw a decline in tuition revenue if their program were cut to two years.³⁹ The ABA Section on Legal Education and Admissions to the Bar refused to acknowledge the possibility of a two-year law schools in its accreditation standards,⁴⁰ so no law school adopted the proposed program.

For at least fifty years, accreditation standards established by the ABA have driven law schools toward homogeneity. Some schools come closer to meeting or exceeding the standards

³⁷Two prior studies had been done of pre-law education during the Survey of the Legal Profession. Arthur T. Vanderbilt, *A Report on Prelegal Education*, 25 N.Y.U. L. REV. 199 (1950), and Albert P. Blaustein, *College and Law School Education of the American Lawyer – A Preliminary Report*, 3 J. LEGAL EDUC. 409 (1951).

³⁸The report, originally called “Training for the Public Professions of the Law: 1971,” may be found as an appendix to HERBERT L. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* (1972).

³⁹E.g., Robert A. Gorman, *Proposals for Reform of Legal Education*, 119 U. PA. L. REV. 845 (1971). See also, Bayless Manning, *Law Schools and Lawyer Schools – Two-Tier Legal Education*, 26 J. LEGAL EDUC. 379 (1974) (proposing a two-year program of academic study, plus a one-year program run by the bar for trial lawyers and others who might want specialized training).

than others, but the required model of legal education has been largely the same for all schools.⁴¹

Now, partly as a result of pressure from the U.S. Department of Education, the Council of ABA Section of Legal Education and Admissions to the Bar is proposing to decrease or eliminate many of the standards to which it subjects the now almost 200 American law schools.⁴² The ABA is taking up its proposed changes through the work of subcommittees that seem to have little sense of how they relate to each other,⁴³ but the following eight changes give a sense of what is proposed.

1. If the proposed changes are adopted, an accredited law school could have an almost wholly-elective curriculum. The only specific ABA requirements would be (a) one two-credit course in professional responsibility, (b) two rigorous writing experiences (one in the student's first year and one thereafter), and (c) one rigorous three-credit simulation, live client or field placement course that integrates legal doctrine and theory with ethics and professional skills.⁴⁴

⁴⁰See Preble Stolz, *The Two-Year Law School: The Day the Music Died*, 25 J. LEGAL EDUC. 37 (1973).

⁴¹See, e.g., E. GORDON GEE & DONALD W. JACKSON, *FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA* (1975). Law school accreditation is not without controversy. One effect of complying with accreditation standards may be to increase the cost of providing legal education, an effect that would traditionally raise antitrust issues. See, e.g., George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998); Marina Lao, *Discrediting Accreditation: Antitrust and Legal Education*, 79 WASH. U. L. REV. 1035 (2002). But see *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, et al.*, 107 F.3d 1997 (3rd Cir. 1997) (rejecting antitrust claim on the ground that harm to the plaintiff arose from action of states that denied graduates the right to take the bar examination, not directly from ABA denial of accreditation).

⁴²Part of the problem is following this debate is that the target keeps moving. The proposed Standards change both in content and numbering. Current proposals are most easily found on the website of the ABA Section on Legal Education and Admission to the Bar, http://www.americanbar.org/groups/legal_education.html. References in this part of this article are to Standards - Draft Chapters 1 to 7, for consideration by the ABA Standards Review Committee in January 2012.

⁴³This has been the principal criticism of the Association of American Law Schools (AALS).

⁴⁴Proposed Standard 304.

2. An accredited law school could abolish grades and substitute “a variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students.”⁴⁵ Acceptable outcomes would include but not be limited to (a) knowledge of substantive law, legal theory, and procedure; (b) skills such as legal analysis, critical thinking, legal research, problem solving, and written and oral communication in a legal context; and (c) development of professional skills and values such as a lawyer’s ethical responsibilities to clients, the courts and the public.⁴⁶ But there would be no predictable similarity between what a student learned at one law school rather than another.

3. While just over half of a student’s education would have to come from traditional forms of classroom teaching, almost 20 percent of a student’s academic credits could be earned over the internet or in other forms of education in which the teacher is separated “in time or place or both” from the students.⁴⁷ Over 20 percent of the credits could be earned simply based on work in a wide variety of off-campus placements.⁴⁸

4. Tuition revenue paid by law students would no longer be required to support the program of legal education, unless the school could not otherwise meet basic accreditation standards.⁴⁹ In short, a law school could become even more of a “cash cow” for a university or

⁴⁵Proposed Standard 305.

⁴⁶Proposed Standard 302. The ultimate standard would be that a school’s graduates be able to “participate effectively, ethically and responsibly as entry-level practitioners in the legal profession.” Proposed Standard 301.

⁴⁷Proposed Standard 311.

⁴⁸Proposed Standard 309(b).

⁴⁹Proposed Standard 203. Proposed Interpretation 203-1, however, would say that a university “should” explain all overhead charges to the law school.

for the increasing number of for-profit parent organizations now opening law schools.⁵⁰

5. There would no longer be a maximum student-faculty ratio. Larger classes and less personalized attention could become a common experience.⁵¹

6. Law school faculty would be required to have academic freedom, but academic tenure as a guarantee of that freedom would no longer be required.⁵²

7. By contrast to seemingly deregulating the educational program, the ABA would retain the three-year length of a legal education. Each law school would still be required to spread 130 days of law school instruction across at least 8 calendar months per academic year. No school could allow a student, even going to school year round, to graduate in fewer than 24 months.⁵³

8. The fundamental measure of a law school's continued right to accreditation would be the proportion of its students who pass a bar exam. Each ABA-accredited law school would be required to show for at least 3 of the last 5 years that either (a) at least 75% of the school's graduates passed some bar exam somewhere, or (b) its graduates' first-time pass rate in the jurisdictions reported by the school was no more than 15 points below the average first-time bar pass rate for graduates of ABA-accredited law schools taking the bar exam in those

⁵⁰There has been substantial interest in the profit potential from law school operation. For example, the InfiLaw System, backed by the private equity firm Sterling Partners and led by several former members of the ABA Accreditation Committee, now operates the Florida Coastal School of Law, Charlotte School of Law, and Phoenix School of Law. Kaplan Higher Education, a subsidiary of the Washington Post Company, operates the on-line Concord Law School, and reportedly has been seeking to open a new law school in Washington.

⁵¹Indeed that change has already been accomplished as a result of the ABA's deletion of its Interpretation 402-1 that defined how the ratio was to be calculated.

⁵²Proposed Standard 405(b).

⁵³Proposed Standard 309.

jurisdictions.⁵⁴

The accreditation challenge for the ABA Section on Legal Education and Admission to the Bar is real.⁵⁵ It is certainly true that excessive regulation can make problems worse instead of better. One can then argue that in an over-200 law school industry, the ABA's current effort is the wisest course. Competition among law schools might do a better job of producing the kinds of educational changes students require than detailed regulation could hope to accomplish. But I believe that abandoning the ABA's decades-long effort to sustain educational quality would be tragic. The nature of regulation may change, but the need for it is unlikely to go away.⁵⁶

The ultimate question for regulators should be what kind of trained person law schools are expected to produce. Outcome measures – measuring what a student actually learns and retains from a legal education – would be the gold standard for evaluating law schools, but no one has yet come up with reliable measures even as of the time of graduation. The kind of outcomes one really wants to know about is how well the school's graduates perform across several years, and no one has yet been able to produce that kind of measure.

The ABA proposal to make bar passage the ultimate measure of what students learn trivializes measurement of lawyer quality. A bar examination largely measures the ability to take a multiple choice exam testing a limited number of current legal rules. It may screen out the very worst bar applicants, but it does little to discern either a graduate's ability to provide

⁵⁴Proposed Standard 303.

⁵⁵Dean Conison provides a helpful framework for considering accreditation issues in Jay Conison, *The Architecture of Accreditation*, 96 IOWA L. REV. 1515 (2011).

⁵⁶Creative and quite different proposals for redesigning legal education are provided in William K.S. Yang, *The Restructuring of Legal Education Along Functional Lines*, 17 J. CONTEMPORARY LEGAL ISSUES 331 (2008); David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249.

services to clients or her capacity to absorb new legal principles as they evolve. One could imagine trying to change the nature of the bar exam completely, but doing so in a way that measures desired qualities reliably has so far proved an insurmountable challenge.⁵⁷

III. What Does It Mean to Be a Lawyer in the New Reality of Delivering Legal Services?

For the foreseeable future, law school accreditation likely will have to continue to look at how lawyers are being trained – at inputs more than outputs – if only because the inputs can be more reliably observed. But inputs are only relevant in terms of what clients will expect lawyers to be able to understand and to do. Does everyone involved in delivering legal services need to be trained in a three-year program, for example? Might the title “lawyer” be reserved for people with broad understanding that lets them to oversee the work of less-trained staff? Existing lawyers, clients, students, and the ABA will have opinions on such questions, and the process of reviewing accreditation standards is one in which those issues can be raised but only if the ABA Section on Legal Education and Admission to the Bar takes seriously the implications of what it calls an accredited law school.

A. The MacCrate and Carnegie Reports

There has been no shortage of proposals for changes in legal education. Both the ABA’s MacCrate Task Force in 1992⁵⁸ and a Carnegie Foundation report in 2007⁵⁹ have urged law

⁵⁷Currently, the principal proposal is for a Uniform Bar Examination (UBE), a multiple choice bar exam that would be administered across all states. Scores would be sent to any state, thus largely eliminating the rationale for state bar exams, and perhaps foreshadowing a national law license. So far, the UBE has been adopted in seven states. See the National Conference of Bar Examiners website, <http://www.ncbex.org/multistate-tests/ube/>. Of course, the problem of reliably testing of meaningful criteria remains.

⁵⁸Its report was AMERICAN BAR ASS’N SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL

schools to move in new directions. Originally set up to study the “gap” between law school and practice, the MacCrate Task Force report evolved into a study of an “educational continuum” seen as running over the course of a professional career.⁶⁰ Noting that law schools had traditionally seen their role as developing a student’s analytic skills while other needed skills were to be learned in practice, the Task Force said law schools were capable of doing – and should do – more practical training before a student graduated.

The Task Force identified ten skills and four values that every lawyer should have and support.⁶¹ The skills are (1) problem solving, (2) legal analysis and reasoning, (3) legal research, (4) fact investigation, (5) communication, (6) counseling, (7) negotiation, (8) litigation and alternative dispute resolution procedures, (9) organization and management of legal work, and (10) recognizing and resolving ethical dilemmas. Values lawyers should further are (1) provision of competent representation, (2) striving to promote justice, fairness and morality, (3) striving to improve the profession and (4) professional self development.⁶²

DEVELOPMENT–AN EDUCATIONAL CONTINUUM (1992). The Task Force chair was Robert MacCrate of New York.

⁵⁹The report was published as WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND AND LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW* (2007).

⁶⁰The Task Force’s overarching presumption was that, although the legal profession “is larger and more diverse than ever before * * * the law has remained a single profession identified with a perceived common body of learning, skills and values.” The Task Force noted “how in virtually every practice setting the individual lawyer is compelled to concentrate in one or several areas of law, while clinging to the traditional image of being a ‘generalist.’” AMERICAN BAR ASS’N SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, *TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM* 11 (1992). The Task Force’s recommendations were based on the view that the primary task of a law school is to produce graduates capable of a non-specialized practice. *Id.* at 124.

⁶¹AMERICAN BAR ASS’N SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, *TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT–AN EDUCATIONAL CONTINUUM* 138-141 (1992).

⁶²Inevitably, not everyone thought the Task Force had comprehensively identified the relevant skills and values. See, e.g., Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What’s Missing From the*

The Task Force opined that those skills and values could be best enhanced by a student's active involvement in law school clinical programs. Its report eschewed any intention to affect law school accreditation standards or determine law school curricula, but the clear direction on both fronts in the years following the Task Force report has been an expansion of the number of clinical offerings in U.S. law schools.⁶³

Pressure to move education in a direction that mimics traditional practice increased with publication of the most recent Carnegie Foundation report on law teaching in 2007.⁶⁴ Its premise is that legal education has suffered from the desire of universities to have their students assume the “detached position of the theoretical observer” with respect to legal issues instead of “the stance of engaged practice.”⁶⁵ A practice-oriented stance has equal intellectual integrity, the authors assert, and from that stance, students can be trained for the task of exercising “judgment in action.”⁶⁶

The authors call for a return to the heretofore-largely-abandoned system of training

MacCrate Report – Of Skills, Legal Science and Being a Human Being, 69 WASH. L. REV. 593 (1994); Russell G. Pearce, *MacCrate’s Missed Opportunity: The MacCrate Report’s Failure to Advance Professional Values*, 23 PACE L. REV. 575 (2003).

⁶³AMERICAN BAR ASS’N SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 131-133 (1992). The ABA requires that all law students receive “substantial instruction” in skills training, for example, including “substantial opportunities” to work with actual clients, ABA STANDARDS FOR ADMISSION TO THE BAR, Standard 302(a)(4) & (b)(1), and the Clinical Legal Education Association has published “best practices” standards they advocate that all law schools adopt. ROY STUCKEY, ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

⁶⁴WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND AND LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW (2007).

⁶⁵*Id.*

⁶⁶*Id.*

lawyers by “apprenticeship,” albeit this time in a university setting.⁶⁷ People called “experts” in a field based on their practice experience rather than their academic study can be assumed to have worked out systematic approaches to legal issues, the authors posit, and everyone can assume these experts know how to apply their knowledge in an academic context. Thus, the report concludes, law schools should focus on three kinds of “apprenticeship” – “cognitive or intellectual” such as that taught in traditional law school classes, “expert practice” taught by practitioners in small groups, and professional “identity and purpose” taught by exposing students to the community of law practitioners.⁶⁸ In the view of this most recent Carnegie report, a legal education should consist of some courses in legal analysis, but they should be heavily supplemented with increased clinical training and work in public service jobs.⁶⁹

It is not my purpose here to critique the details of the MacCrate and Carnegie Reports. One should notice, however, that each begs the question of what kind of “practice” law graduates will be entering. An education that might have prepared students adequately for work during

⁶⁷Id.

⁶⁸WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND AND LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW 27-28 (2007). The call for professionalism training through apprentice-like experiences has been sounded by others as well. See James Moliterno, *Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprenticeship System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83 (1991); James Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71 (1996); Patrick J. Schlitz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998); Neil Hamilton & Lisa Montpetit Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. LEGAL EDUC. 102 (2007).

⁶⁹WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND AND LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW 29-45 (2007). The authors express admiration for CUNY Law School that was founded on a basis of training primarily in a clinical training, public service environment. In perhaps the most extreme response to the Carnegie report, the Washington & Lee School of Law has announced that its students will devote their entire third year in law school to “professional development through simulated and actual practice experiences.” Message from Dean Rod Smolla, found on the Washington & Lee website at www.law.wlu.edu/thirdyear.

most of the 20th century⁷⁰ may not ready students to enter the world in which we have suggested they will actually work. If I am correct that yesterday's practice and ways firms operate are changing rapidly and in fundamental ways, increasing a student's exposure to mentors from the old regime is likely to divert time and money from different and better uses.

B. Looking for the Core of a Legal Education

I suggest that the key to thinking about training future lawyers is a "Core-Plus-More" approach. To be a school accredited to train people who may call themselves lawyers, a law school should be required provide education in a "core" curriculum that I estimate would require up to three semesters of work. Then, to produce people who can successfully deliver legal services in part of the evolving legal market, a law school should provide "more;" it should go beyond core training to invite students to tailor their education to their individual skills and aspirations.

That then requires us to ask what is in the core of what all lawyers need to know. In my view, what lawyers need to know – and what people who go to law school but never expect to practice law should learn – can be expressed in three broad categories: (1) how to "think like a lawyer" about legal issue, (2) how to think about fundamental questions work in a legal system raises, and (3) how to apply practical skills to improve a client's outcomes.

1. What it Means to Think Like a Lawyer

The first of the categories, learning to "think like a lawyer," is what most law students find life-changing. Lawyer-think involves at least four elements. First, it involves learning how

⁷⁰Even this was a contested proposition. See, e.g., Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 73 (1970) (written while now-Professor Kennedy was a law student); Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551 (1973) (partial response to the Kennedy article); Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027 (1998).

to read carefully. A large part of a lawyer's initial training consists of studying relatively short judicial opinions, statutes or other texts and asking what each paragraph, sentence and word means within the larger whole.⁷¹ Does it matter that the case is in a supreme court rather than a court of appeals? Is it important that the stranger entered the home at night? Does it matter that the conduct is to be assessed against a standard of negligence rather than recklessness? Reading skills taught in most high schools and colleges do not demand a detailed, fact-driven focus; law school does.

The discipline and ability to read carefully is learned by repetition, and its corollary – sensitivity to ambiguity – is essential to a lawyer's work. Families may be frustrated when a budding lawyer seems not to take their statements at face value, but among the defining characteristics of a lawyer is a careful use of words and an intolerance of the ambiguity that words can create or mask.

Second, thinking like a lawyer involves learning to reason from a specific case to a general principle.⁷² Most people probably think of lawyers as doing the opposite, i.e., reasoning from general principles or statutory provisions to the facts of particular cases. Lawyers often do reason deductively, particularly when they try to apply constitutional provisions and statutes,⁷³

⁷¹The process is described extremely well and in much more detail in ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO THINK LIKE A LAWYER* 43-83 (2007).

⁷²See, e.g., EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949); KARL E. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 44 - 50 (1960). See also, MARY ANN GLENDON, *A NATION UNDER LAWYERS* 237 - 39 (1994) (describing reasoning she attributes to Edgar Bodenheimer and calls Aristotelian or "dialectical" in which the lawyer reasons from the specific to the general and back to the specific to develop a rule that is both practical and principled).

⁷³In many ways, deductive reasoning is increasingly difficult as a lawyer tries to reconcile statutory and constitutional provisions with cases that pre-existed or construed the statute. The best treatment of such issues is GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

but it tends to be inductive reasoning from the conclusions in prior cases to the principles that govern all cases that constitutes the special art in which lawyers are trained. It is the ability to reason inductively – and by analogy between one set of facts and another – in turn, that allows lawyers to predict how a new case is likely to be decided.

Third, thinking like a lawyer involves seeing legal issues in a larger context of morality and social policy. One can use legal reasoning to justify all kinds of terrible results, but a lawyer who does so without realizing that few judges would decide a case to reach such a result does not serve a client well. Indeed, many would say that the difference between good law schools and great ones is measured by the extent to which graduates come away from their education capable of seeing the implications of legal rules and the long-term viability of principles.

Fourth, lawyers develop the ability to narrow the focus of their analysis on facts that are most immediately relevant to the matter at issue. What the facts are may be contested in any case, of course, and in a quest for critical facts, lawyers sometimes filter out human realities that many observers find important. In doing so, however, lawyers tend to be somewhat like doctors engaged in saving lives who have learned to ignore the shock most people have at seeing blood. At their best, lawyers clear away the facts that might attract others, so as to magnify the parties' – and potentially a court's – attention to the facts on which a case should properly turn.⁷⁴

Lawyers must think about the facts they know, other facts they would find it useful to know, and how to find out facts they do not have before them. They also must recognize that sometimes facts their clients characterize in particular ways are likely to be described quite

⁷⁴Thoughtful critics recognize that the professional distance lawyers learn to develop can cut the lawyer off from some of the emotional realities facing clients and the social implications or consequences that may be inherent in what superficially appears to be a simple legal question. The consequence may be what some call a lawyer's assumption of a "moral void" See, e.g., WALTER BENNETT, *THE LAWYER'S MYTH* 15-27, 91, 135 (2001).

differently by others. Thus, the ability to develop information and characterize facts as accurately and persuasively as possible is part of the work experience of a lawyer. The value of those instincts and skills will be as great in the future as it has ever been.

2. Key Questions Any Legal System Faces

Next, I believe that part of any accreditation evaluation should be how well a school helps students address issues fundamental to any legal system. I find it easiest to describe this process by describing possible courses.⁷⁵ There is no magic to creating new course names, but a few new names may help us see the law school curriculum through new eyes.

i. The Power to Make Law would be a combination of jurisprudence and constitutional law that would focus on government organization. Its point should be to examine who it is that can establish authoritative rules. The course would include both state and federal systems and the law-making authority of both administrative agencies and municipal entities.

ii. Sources of Legal Rights would consider individual rights against government and against other people. It would deal with the Bill of Rights, but also introduce civil rights legislation and property rights – including intellectual property rights – and their regulation.

iii. Enforcement of Agreements – most closely related to the present contracts course, this course would ask when and why the force of law may be used to enforce private agreements. It would consider statutory as well as common law responses to these issues and introduce students to issues surrounding selection and enforcement of remedies.

iv. Redress of Wrongs would integrate issues now seen in both torts and criminal

⁷⁵I expressed very similar ideas and course titles earlier in Thomas D. Morgan, *Educating Lawyers for the Future Legal Profession*, 30 OKLA. CITY. U. L. REV. 537 (2005).

law. It would ask how a jurisdiction defines an act as a wrong, and when it uses public law, private law, or both to address, sanction or remedy the act.

v. Resolution of Disputes would expand the current course in civil procedure and introduce issues of evidence, arbitration, negotiation and criminal procedure in an effort to understand the breadth of available alternatives. The course would also focus on the more general problem of finding facts, as opposed to applying the law to assumed facts.

vi. Internationalization of Law would be informed by both comparative and international law and would have students see the implications of the internationalization of commerce, human migration and human rights.

vii. Legal Analysis & Expression would be similar to the present course in legal research and writing, this program and would concentrate on a student's ability to synthesize legal materials and to express their analysis and findings both clearly and persuasively.

viii. Professional Roles and Values would go beyond the the content of lawyer regulatory standards to examine what it has meant to be a professional lawyer, alternative ways to use a legal education, and the evolving roles of lawyers in society.

Although I have expressed these as distinct courses, in reality they might well be parts of several traditional courses. Others might suggest different candidates for such a core curriculum. But each accredited law school should be accountable for knowing where and how these elements are becoming part of their graduates' understanding and practice. Courses should examine statutes and regulations, not case law alone. These subjects I have described as properly at the heart of every accredited law school's program are considerably more theoretical

than either the MacCrate or the Carnegie reports proposed.⁷⁶ In my view, however, they represent the kinds of understanding that should differentiate someone called a lawyer from others who perform more limited roles in the delivery of legal services.

3. Using Practical Skills to Get Things Done

But producing people capable of providing representation of the kind reserved to licensed lawyers today requires that the educational core not be limited to legal theory. Lawyers need to know how to investigate legal issues they have not studied before and how to keep abreast of changes in the law over the years. They also must recognize that in a world of many legally-trained people and multiple sources of legal information, knowing “the law” alone will be insufficient to set them apart and cause a client to seek out their services.⁷⁷

One of the defining characteristics of a successful lawyer is a recognition that theoretical understanding of the law is rarely the client’s goal. A client’s objective is typically changing a real-life situation for the better. Developing the practical art of getting things done also takes several forms.

First, it requires knowing what institutions, if any, are available from which to obtain an authoritative statement of a client’s rights. Lawyers call these legal principles jurisdiction, civil procedure and evidence. Understanding the relevant institutions to which the client might turn also helps the lawyer estimate what cost and time might be involved in getting to a result the client will find to be in his or her interest.

⁷⁶In this sense, they are more consistent with the ideas in Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649 (2011).

⁷⁷This reality has been called to public attention in several recent news articles, e.g., Karen Sloan, *Stuck in the Past*, NAT’L L. J., Jan. 16, 2012; David Segal, *What They Don’t Teach in Law School: Lawyering*, N.Y. TIMES, Nov. 19, 2011.

Second, good lawyers think in terms of legal process more broadly. A trial is often neither the only nor the best alternative. When a client describes a problem with her supervisor, for example, the lawyer's first question is likely to be whether the client has talked to the supervisor about the problem. If so, the next step might be to talk with the supervisor's boss or the office's human relations department. It might then be necessary to complain to an administrative agency before going to a court. The example is arbitrary, but the point is that lawyers at their best see problems in a context of possible routes to resolution. Some routes are simply possible, while some are legally required before later steps can be pursued, but getting results for a client without going to court is part of the thought process of any successful lawyer.

Third, lawyers get things done by dealing with another person or lawyer to seek common ground and to accommodate differences. Too often, we think of lawyers primarily as combatants, but in reality, it is by finding common ground that lawyers often make their biggest contributions. We may think of some people as natural negotiators, but negotiation is a skill that can be taught and law schools are among the best places to teach it.⁷⁸

Fourth, lawyers get things done through their ability to organize facts in ways that tell a persuasive story. Lawyers must develop sufficient skills to discern what the relevant facts are and what remain to be determined. But ideally, lawyers will be part poet and have the ability to tell stories that flow and develop in ways that leave little doubt what reasonable people should conclude would be the just resolution of a matter.

A thoughtful reader may well have concluded that all of these core lawyer skills – the ability to read carefully, reason systematically, negotiate effectively and organize relevant facts

⁷⁸See, e.g., CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (2005).

to solve concrete problems – are both susceptible to theory and not unique to lawyers. Successful people in many areas of life also need to develop such an understanding of the legal system, and that may be why lawyers often move easily into leadership positions in business, public service, or other organizations. Indeed, if I am right that up to one-third of law graduates may never practice law in a traditional manner, today's law schools can and increasingly will teach these skills to people who never plan to become lawyers.

C. The "More" A Law Student Should Be Able to Expect

The three elements of core instruction just described presumably would occupy about two academic years of a student's legal education. I believe that, as the 1971 Carnegie report proposed, that should be sufficient to permit a student to call himself or herself a lawyer. Given the job realities law graduates face, however, and the likely difficulty of changing bar admission standards, during the third year of law school, students should be encouraged to make themselves special to potential employers and clients, while law schools should be held accountable for making that possible.

Accreditation of this aspect of a law school's program should encourage experimentation and diversity. Competition among programs should be given free rein. What I am calling this place for "more" in legal education might involve making it possible for students to concentrate in a particular field of law – not to the exclusion of all other fields, but to become able to contribute to law firms and clients from soon after graduation.

Or, law schools might move beyond teaching law to recognizing that learning about non-legal substantive issues will be at least as important as more law courses in the work of many

litigators and advisors.⁷⁹ Some lawyers may find how they spent their undergraduate years helps define the context in which to see what knowledge they can use to help a client. The most obvious example of this is the U.S. Patent & Trademark Office requirement that a lawyer have scientific or technical training in order to be able to become a patent lawyer, no matter how much purely legal knowledge the lawyer may have about intellectual property. But in other fields, rather than do litigation in the abstract, for example, a former nurse might focus on personal injury work or health care policy. Someone who has lived abroad might concentrate on international trade or public international law.⁸⁰

In short, the lawyer best able to help a client will typically be one who has the best understanding of the science or other subject matter with which the client works. As Professor Karl Llewellyn said almost a half-century ago:

“[I]t should be clear even to the blind that the work of business counsel is impossible unless the lawyer who attempts it knows not only the rules of the law * * * but knows, in addition, the life of the community, the needs and practices of his client – knows, in a word, the *working situation* which he is called upon to shape *as well as* the law with reference to which he is called upon to shape it.”⁸¹

⁷⁹This is by no means a new insight. See, e.g., Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (“For the rational study of the law, the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics”). From the more recent era, see, e.g., Carrie Menkel-Meadow, *Taking Law and _____ Really Seriously: Before, During and After “The Law”*, 60 VAND. L. REV. 555 (2007).

⁸⁰See, e.g., John Sexton, *Thinking About the Training of Lawyers in the Next Millennium*, NYU ALUMNI MAGAZINE, Autumn 2000, p. 35; Panel Discussion, *Legal Education in the 21st Century* (DC Cir. Jud. Conf. 2000); Jill Schachner Chanin, *Re-engineering the JD*, ABA J., July 2007, p. ___; Tresa Baldas, *Several Schools Adjust Their Curriculums*, Nat’l L. J., Sept. 10, 2007, p. S1.

⁸¹KARL E. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 16 (1960) (Emphasis in original).

For many students, non-legal study should be an integral part of their legal education. Combined law and business study has long been popular. Learning corporate finance may be equally or more important to a law student, for example, as more courses in taxation would be. A year in China learning Chinese language might set another lawyer more apart from her contemporaries than taking more courses in comparative law ever would.

Most law schools do not make development of that kind of non-legal understanding a part of their curriculum; for a law school to do so within its own walls would require replicating much of the rest of the university. The closest law schools typically come is when they allow students to receive credit for courses taken in other parts of the university. Courses in economics, psychology and communications – courses in accounting, computer science and public administration – each often seen as “interdisciplinary” and therefore collateral to a legal education – may over the next 20 years be understood as central to a lawyer’s ability to function in the world he or she will face.⁸² Indeed, law schools that have become used to having a certain independence within their university may again see themselves as dependent upon other departments to help them do their job.

My point is not to disparage legal study. It is to reiterate that a lawyer’s task will be to give clients and other lawyers a reason to seek out that lawyer rather than seeking out someone else. As communications technology – as well as multijurisdictional practice rules – make it increasingly possible clients to work with consultants located anywhere, the need to develop unique qualities and skills with which to serve clients will be essential, and non-legal skills may

⁸²See, e.g., John Palfrey, *The Law School Curriculum: What is Technology’s Role*, NAT’L L. J., Nov. 13, 2006, p. 30 (calling for law school instruction in uses and significance of technology).

be one of the best ways to be differentiated from the crowd.

IV. The Context in Which Any Such Accreditation Should Occur

A. The Need to Reduce the Cost of Legal Training

Law schools faced with more demand for seats than they could supply have felt free to act as though it is irrelevant to find more efficient ways to provide a legal education. I have said that lowering cost should not replace a drive for real quality, but an implication of, and reason for, the developments we have discussed is that as students see the demand for three-year-trained lawyer-generalists decline or disappear, schools are likely either to go out of business or face a need to reduce the cost of legal education considerably.

The cost of a year's study at several American law schools now exceeds \$50,000. Total educational debt for many law graduates can be \$100,000 or more.⁸³ Those figures may have seemed tolerable to graduates who expected to start their legal career making over \$160,000 per year, but such salaries are now available only to a very few. The average experienced lawyer makes only a little over \$100,000 annually over the course of a career,⁸⁴ and many lawyers find themselves forever digging out of the financial hole that the cost of their education has created.⁸⁵

⁸³See, e.g., John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 516 (2002); June Knonholz, *More Students, Higher Prices, Tougher Competition*, WALL ST. J., Jan. 31, 2005, p. R4.

⁸⁴Average lawyer incomes are hard to determine. BUREAU OF LABOR STATISTICS, 2004 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES, p. 211, reports the median earnings of all lawyers to be \$108,790.

⁸⁵One important development in legal education was passage of the College Cost Reduction Act, Pub. L. 110-84 (2007) that provides for some forgiveness of student loans if a law graduate goes into public interest work. But cf., Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry Into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829 (1995) (casting doubt on the importance of loan repayment assistance on getting students to choose public interest careers).

Part of the Obama Administration's move to direct federal lending has been tying student loan repayment at least partly to income earned. This has led to a concern that students may be willing to incur more debt than they

One way too reduce the cost of law study may be distance learning. Such courses take two forms. Synchronous distance learning occurs when the law teacher and law students are in different places but talk over what is essentially a picture-phone. The class takes place in real time, and in such a class, students in Akron can be taught by someone in Oxford, Washington or Tokyo. The professor can see, question, and answer questions just as if he or she were physically present with the students. It is a form of distance learning that seems likely only to enhance the legal education experience and only to come down in cost.

Asynchronous distance learning, on the other hand, sends lectures and recorded classes to individual students on-line or by CD-ROM. While not as good for the core phase of a legal education, as one gets farther along into specialty training, at the very least, such technology represent a way to deliver information from a single instructor to students all over the country at dozens of schools at a significantly reduced cost.⁸⁶ One may properly be concerned about a legal education received wholly from packaged or on-line materials,⁸⁷ but as a supplement in the upperclass curriculum, and as a way for persons working on advanced degrees to build upon groundwork laid in more traditional classes, it seems inevitable that law schools and their

should, much as home buyers did before 2008, because they believe the government will bail them out of bad results. See, e.g., William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble*, ABA J., Jan. 2012, p. 30.

⁸⁶Asynchronous technology has improved to a point that students can even do interactive drills with new material, and e-mail can make even asking questions of the instructor possible on a delayed basis. See, e.g., John Mayer, *Alternate Futures: The Future of Legal Education*; Ronald Staudt, *In Search of the Origins of the Electronic Casebook*; and James Hoover, *A Vision of Law Schools in the Future*, all in STEVE SHEPPARD, ED., *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES*, vol. 2 (1999). The Center for Computer-Assisted Legal Instruction, or CALI®, has been working on such materials for at least 30 years.

⁸⁷Currently, ABA Standard 306(b) treats both synchronous and asynchronous distance learning the same way and provides that a law student may earn credit for such courses only after the first year and may apply no more than 4 credits in any term or a total of 12 credits overall in such courses toward a degree in law. Surveys taken in 2002-03 and 2003-04 found that about 20% of law schools offer asynchronous courses while 10% offer synchronous instruction. William R. Rakes, *From the Chairperson*, 38 SYLLABUS 2 (Winter 2007).

students will start to turn to such technology.⁸⁸

Another important way to cut the cost of legal education would be to reduce the three years required to complete the J.D. program. Tuition and living expenses, high as they are, are only part of the cost of going to law school. Often the greater cost is income not earned during the years of schooling.⁸⁹ Such an accelerated approach will not be attractive to everyone. Unless the student starts the summer before most law students begin, it will deny both the student and potential employers the summer of employment many use to size each other up before offering or accepting a first position. What offering the opportunity recognizes, however, is that time is money, and cutting costs will be an important competitive element as law schools compete for students in what is likely to be a future of declining demand.

B. The Need to Acknowledge Differences in Training That Service Providers Need

As a practical matter, there is only one degree program for those interested in legal training today. The three-year program leading to a juris doctor (J.D.) degree is the only program for those interested in legal training. Earned only after a four-year college degree, it is costly both in money and time. Yet, as we have suggested, some understanding of how lawyers

⁸⁸Concord Law School, www.concordlawschool.edu, the nation's only entirely on-line program, remains unaccredited by the ABA. Concord graduates may not take the bar exam in most states, but they may take the California bar and several have become lawyers. NYU Law School has now announced plans to offer an LL.M. degree on line. It can do that because a graduate law degree is not subject to the same ABA accreditation standards. For a view of technology in higher education more generally, see John L. Lahey & Janice C. Griffith, *Recent Trends in Higher Education: Accountability, Efficiency, Technology, and Governance*, 52 J. LEGAL EDUC. 528 (2002).

⁸⁹Northwestern is the first "elite" American law school to initiate such a compressed program, although four other schools had taken the action even earlier. Leigh Jones, *Two-Year JD at Northwestern*, NAT'L L. J., June 23, 2008, p. 4. Earlier, Southwestern University in Los Angeles had adopted a six semester program. The University of Dayton Law School announced a five semester program in 2006, and Syracuse University and the University of Kansas also had accelerated programs. Leigh Jones, *Law School in Two Years Flat*, NAT'L L. J., May 29, 2006, p. 4. In all these cases, ABA Standard 304(c) prohibits actually awarding the student a degree less than 24 months after the student began law study.

approach questions is important to many other than lawyers. Programs requiring less training than that for the J.D. are likely to be – and should be – a part of accredited law school programs as opportunities for fully-trained law graduates decline.

A one-year program involving thinking like a lawyer, legal research and writing, and perhaps negotiation, for example, might be worked into an undergraduate college program, possibly leading to a major in legal studies.⁹⁰ For other students, such a program might represent a first year of post-graduate study leading to a masters of arts degree. Graduates of such a program would be unlikely to hold themselves out as legal advisors, but such an education might be highly useful, for example, to business people trying to understand the way law impacts their activities. Even people who start law school and decide they do not like it would find such a degree a tangible reward for their efforts and a face-saving way to turn elsewhere.

A two-year law school program, in turn, would be the limit of a lawyer's professional education if the Carnegie Commission's 1971 recommendation were given effect.⁹¹ I would encourage the ABA to take another look at that recommendation, particularly given the observed decline in student attention in the third year.⁹² Even without a general recognition of a two-year degree as sufficient to take a bar exam, such an education might be recognized as a basis for certification to appear before federal agencies and specialized courts, and help individual clients in specialized fields. Such a two-year law degree would be analogous to the two-year education

⁹⁰Indeed, an even more brief introduction to understanding law and legal skills could be offered to high school students and in programs of adult education.

⁹¹It is not clear what to name this degree. It might be an LL.B., which was long the basic law degree.

⁹²Mitu Gulati, Richard Sander, & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J.LEGAL EDUC. 235 (2001) (showing class attendance and class preparation declines sharply in the third year of law school).

leading to an MBA degree. Further education – indeed, possibly further degree programs – taught on a basis analogous to executive MBA programs, might then become a regular part of lawyers' lives as they keep up with new developments in their old field or transition to new areas of practice altogether as client demands change.

The three year program might remain the legal education gold standard, and students might even choose to take a fourth year of legal training as some do today.⁹³ As suggested earlier, those would be the years for the “more” in legal education. Students could broaden their exposure to a variety of fields, further concentrate their study in a single field, or even study non-legal subjects such as languages, finance, and science so as to enhance their ability to survive in a competitive world of client advisors.⁹⁴

C. The Need for Integrity and Transparency in Legal Education

One of the most disturbing issues in legal education today is a concern that some schools are not accurately providing students and potential students with accurate information. A big part of the problem is created by the annual ranking of law schools by U.S. News & World Report. Schools' preoccupation with the “tier” into which they are placed – or their rank within the top tier – has already made many law school administrators somewhat paranoid. The fear of declining in rank may discourage law schools from admitting a student body as diverse as it

⁹³A world somewhat like this was foreseen in Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership and the Law-as-Business Paradigm*, 27 FLA. ST. L. REV. 9, 13 (1999). Professor Pierce foresees three tiers of practitioners. The top tier, or “members of the bar” will be eligible to appear in all courts. A middle tier of “advocates” who have completed one year of undergraduate work in law and a one year training program after graduation will be eligible to appear in trial courts but not appellate bodies. The third tier, called “aides,” will have completed only a two-month training program and will only appear before administrative bodies or specialized courts, much as practitioners before some federal agencies do today.

⁹⁴LL.M. programs are already offered by many schools. They are particularly useful for lawyers who want to specialize in taxation, intellectual property, government contracts or similar subject areas, and they are widely used by foreign law graduates to add an American degree to their resumes.

could be, for example, or from introducing curricular innovations that might have ranking consequences.⁹⁵

The U.S. News rankings are arbitrary at best. It is as though football teams were ranked based on the weight of their offensive line. Large linemen are not irrelevant to a team's success, but weight does not begin to capture all the elements of a team's quality. Nor do the rankings in U.S. News. Furthermore, rankings make sense only if one assumes schools are trying to meet the same standard of strength. The diversity of student interests and the range of potential uses of a legal education are so great that ultimately rankings distort rather than measure reality.

At minimum, ABA accreditation standards should require law schools to provide accurate information about the financial investment and time commitment required for an education at a given school. They also should require accurate data about an applicants' employment prospects.⁹⁶ Employment data turns out to be more complex issue than it might seem. Statistics about the jobs taken by members of one year's class will not necessarily predict hiring patterns three years ahead. In addition, most information law schools have about students'

⁹⁵There is good evidence, for example, that law schools regularly give admission preference to students with high undergraduate grades and high LSAT scores, which are considered in *U.S. News* rankings, at the expense of age, life experience, service to disadvantaged persons, intent to engage in public service practice, and the like. See, e.g., William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L. J. 163 (2006). It has also led to conduct approaching fraud. LexisNexis and Westlaw provide their electronic research services to law schools for flat rates ranging from \$75,000 to \$100,000 per year. Because U.S. News ranks schools more highly if they "spend" more per student, however, the University of Illinois College of Law reported its "spending" for the services as \$8.78 million per year, a sum it said was the "value" students receive from the services. Alex Wellen, *The \$8.78 Million Maneuver*, July 31, 2005, Sec. 4A, p. 18, col. 1. More recently, the University of Illinois was found to have misrepresented the credentials of its entering class, also to improve its U.S. News ranking. See also, e.g., Bill Henderson & Jeff Lipshaw, *The Empirics and Ethics of USNWR Gaming*, http://lawprofessors.typepad.com/legal_profession/2008/08/posted-by-jeff.html (Aug. 27, 2008).

⁹⁶Recent revisions to the annual questionnaire that law schools are required to return to the ABA to include in its annual *Official Guide to ABA-Approved Law Schools* will generate statistics on each law school's admission data, tuition rates, financial aid, and now, detailed information on kinds of jobs graduates have taken, the principal locations of those jobs, and salary data about the positions.

employment comes from the graduates' own reports. Graduates have little incentive to tell the truth about the job they took and its salary. Further, what incoming students really want to know is how graduates' careers develop over time. Knowing that would require much more data collection than most schools will be able to manage, but the goal is worth pursuing.

Conclusion

New law schools continue to open every year. That may change as legal education responds to the need to reduce costs, admit a greater number of students who may need financial support, and otherwise address needs the future will present. But however the overall prospects for lawyers develop, law school curricula should look to the kind of world students are likely to experience than to the world their professors faced. In the world around the corner, the current homogeneity of law schools is likely to end as schools differentiate themselves in the education marketplace. Even law schools rendered redundant in a world that requires fewer traditional lawyers may reinvent themselves and play a role in undergraduate education, or continuing education of persons who initially took the one-year program.

If programmatic changes occur as suggested in these remarks, the world law many law professors now know may change in ways most do not want or expect. At many schools, for example, teaching will ascend in importance and scholarship will decline. Graduates and law schools are also more likely to be joined for life as lawyers come back for new training when their practices face challenges. Working with students over substantial periods of time is likely to be a part of the future legal education world.

Change of any kind will not be easy. Many schools will not want to be first with what might look like a revolutionary program, but when the moves begin at a few top schools, the rush

will be on and those who are ready to respond will have an enviable advantage. It is not too early for law schools to begin to plan for the changes that likely are ahead. In writing its accreditation standards, the ABA Section on Legal Education and Admissions to the Bar should be in the forefront of building responsible, high-quality programs at American law schools.