THE UNIVERSITY LAW SCHOOL
AND LEGAL SERVICES

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Celebrating the orthodox view, Dean Carrington recommends that law schools, taking their university affiliation seriously, produce lawyers who display the twin virtues of integrity and competence, and open legal education to the broadest spectrum of applicants possible.

INTRODUCTION

It is the function of the law school to train competent, moral and economically wise lawyers. All of the rhetoric by the lawyers and bar leaders, and all of the complaints by the public will not measurably improve the profession unless and until the original product—the law school graduate—is improved. If we want real improvement, it must come from the root source, the law school.1

Readers of this review are professionals. This label, properly worn with pride, means that we are entitled to inclusion among an elite selected on merit and that we have assumed rather specific obligations to consumers of our services, one of which is the duty to regulate ourselves in the public interest.2

There are many benign aspects of professionalism. It reinforces the sense of identity of the professional. It enhances his ability to harvest the internal rewards of satisfaction from difficult work well done. And it is an assurance of external rewards of status and coin. These benefits are shared indirectly by consumers of professional services, who are assured of higher quality service than might be provided by workers whose pride is less involved in their work.

But there is an element of truth in George Bernard Shaw’s dictum that “[a]ll professions are conspiracies against the laity.”3 The self-regulation of professionals tends to restrict entry into the market for services,4 clogging the avenues of social mobility and raising the price of service in disproportion to the benefit of improved quality.5

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5 For an insightful discussion of the process and costs of professionalization, see B. BLEDSOE, supra note 2, at 87.
Professionalism can also have the effect of widening the social and psychological gulf between the server and the served, thus evoking mistrust and a sense of exploitation.\textsuperscript{6}

Even professionals can be disadvantaged by overbearing professionalism. First, an overdeveloped profession invites the development of lay competition that can perform equal service at a lower price.\textsuperscript{7} Second, highly developed professionalism results in hierarchical work organizations. Such hierarchies require the exercise of authority among workers; such authority, like all power, limits those who exercise it as well as those who are subject to its control.\textsuperscript{8} Possible effects of hierarchy include increased sensitivity to matters of status, increased anxiety, and diminished satisfaction from work. Finally, the specialization inherent in professionalism can be narrowing and can thus diminish the ability of the professional to experience the full range of life's satisfactions.

For these reasons, the widely shared impulse toward professionalism should be inhibited by a concern for excess. Professionalism is good, but only to a point. The precise location of the point, however, is very difficult to know. And none of us is able to view the problem free of the bias of an interest in his or her own status. Discussions of such matters tend to produce scant illumination and much heat.

I

Professionalism in the University

For our time, the cockpit for the struggle over professional status is the university. Prominent among those responsible for identifying points of diminishing return and drawing the appropriate lines are those who design higher education policy. The link between higher education and professionalism has been a development of the last century.\textsuperscript{9} A century ago, there was widespread adherence to the classical idea of the university, which rested on the humanist and rationalist assumption that the human condition could be improved

\textsuperscript{6} For an illuminating discussion of the gulf between lawyers and their clients, see D. \textit{Rosenthal, Lawyer and Client: Who's in Charge?} 143-77 (1974).

\textsuperscript{7} The extent to which this is true depends in part on the effectiveness of constraints on unauthorized practice. It seems unlikely that accountants, for example, could establish a monopoly position similar to that of lawyers in the courtroom. Where the price of professional service rises far out of proportion to improved quality, however, pressure may develop for the relaxation of those constraints.


\textsuperscript{9} See First, \textit{supra} note 4, at 333.
by thinking about it.\textsuperscript{10} The university was conceived of as a place where creative work could be sheltered and its product stored and transmitted. Students, it was supposed, might benefit from an association with this enterprise. But the benefit was not expected to take the form of professional status, except insofar as early American universities were organized for the purpose of training a competent clergy.\textsuperscript{11} Given the Protestant leanings of Americans, it was an easy step to suppose that the search for universal truth and the discipline of the humanities were sound training for ministers.

The evolution of the American university from an institution committed to the intellectual enterprise to a complex institution of many purposes was first chronicled years ago by Abraham Flexner.\textsuperscript{12} Robert Hutchins decried the change\textsuperscript{13} and Clark Kerr gave it a vulgar name: the "multiversity."\textsuperscript{14} Whatever its name, the contemporary university has clearly acquired as a major function the manufacture of professional status. There is now a widely perceived link between the status of a professional group and the time spent by its members within the cloister. This is not merely a social or psychological phenomenon, but also an economic one: The foregone income of students is the major initiation fee for many guilds, and the higher incomes of professionals are explained as a return on that investment of "human capital."\textsuperscript{15}

The relationship between professionalism and higher education in contemporary society is demonstrated almost daily by suggestions for professional training programs to be appended to some universities. Thus, accountants are now giving consideration to proposals for free-standing, autonomous, three-year Schools of Accountancy. One university in Michigan has recently inaugurated a new professional program in golf. Among the admissions requirements are an undergraduate degree and a golf handicap of eight or less. In order to achieve the degree, students must complete courses in salesmanship and golf shop management, and must demonstrate their proficiency in teaching a good golf stroke. The latter aspect of the program doubtless requires some surrogate for what is known in education schools as practice teaching, with an externship on a golf course.

\textsuperscript{10} The classical idea was perhaps most elegantly expressed by Cardinal Newman in J. Newman, \textit{The Idea of a University} (London 1852).
\textsuperscript{11} F. Rudolph, \textit{The American College and University} 3-20 (1962).
\textsuperscript{12} A. Flexner, \textit{Universities} (1930). See generally L. Vezev, \textit{The Emergence of the American University} (1965).
\textsuperscript{13} R. Hutchins, \textit{The Higher Learning in America} (1936).
\textsuperscript{14} C. Kerr, \textit{The Uses of the University} 6 (1963).
Most readers will be prone to make light of such programs, or even to condemn them as a prostitution of the idea of a university. It is certainly true that there is little intellectual content in golf; indeed, that is one of the reasons for its appeal to many duffers. Persons employed in the teaching of golf are not likely to be persons imbued with the spirit of intellectual inquiry, nor is there any apparent reason why they should be. Moreover, it does not seem likely that they will perform their jobs more ably by reason of their association with a community of scholars. Thus, if there is a social need for the training of golf professionals, there is no functional reason for linking such a program to a university.

But we ought not to be too quick to cast stones at academic golf. One would have to know more than I know, or have told, about the intellectual quality of the institution involved to know whether much would be lost by associating with it a graduate program in golf. There may be a substantial nonfunctional advantage in describing such a course of study as a university degree program. Many Americans exhibit an almost pathetic faith in the bauble of a degree. Many cannot secure employment for lack of an appropriate academic certification that they can perform work that they would be able to learn on the job. Indeed, many citizens lack confidence in themselves until they have been reassured of their own competence by the appropriate academic certifying authority. If a university can by the manipulation of a degree program enable people to find needed and rewarding careers, who can object? And if the university can by chance also increase the national supply of golf skill, is the world not bettered by that?

The craving for academic credentials that seems to be a prominent trait of contemporary man may be a consequence of the relatively open and classless nature of our society. All of us who share this craving do in some degree need to be told who we are and who we are dealing with. The evolution of the multiversity is, in part, a response to this general need. Nevertheless, our recoiling from the graduate program in golf has its reasons. Perhaps we can and should accept the blurring of the function of the university, but many of us do not mean thereby to abandon its classical purpose. There is nothing in our experience to indicate that we have outlived or outgrown a need for institutions that harbor the humanist tradition of seeking truth. Quite the contrary, as our lives are made more complex, as

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work becomes more technical and technocratic, and as the preservation of human society and even human life becomes increasingly difficult, the social need for creative thought and criticism is heightened. Providing a cloister in which future technicians and technocrats can seek to draw what they can from the sweep of human experience has not lost merit as a goal for institutions capable of pursuing it. That traditional academic pursuit is somewhat impeded when the institution joins in the pursuit of lower golf scores.

The delicate task of identifying the appropriate limits of professionalism is thus compounded. Not only is the problem of maintaining balance intricate, but we must view it through the tainted lenses of our own self-interest. And the chief instrument to be used in maintaining the balance, the university, is itself very complex and susceptible to injury. All this supports the preliminary assertion that the proper relation between contemporary universities and the professions is a question so rich as to be nigh inscrutable. Nevertheless, we have been summoned to examine it and so we will.

II
THE UNIVERSITY LAW SCHOOL: DUAL PURPOSES IN CONFLICT

In none of its aspects is the task of defining the proper role of the university in the promotion of professionalism more difficult than in regard to law, which was introduced to American universities with no purpose of professionalism. When William Blackstone was appointed at Oxford University in the eighteenth century as the first English legal academician, his discipline was considered close to Moral Philosophy.\textsuperscript{17} Such a humane discipline was expected to afford students a broader, deeper comprehension of the general human condition. When Thomas Jefferson advocated the creation of a chair in law at the College of William and Mary, and later at the University of Virginia, he was animated not by a desire to certify professionals to serve clients but by a desire to assure the republic a corps of public servants who would comprehend public goals and values, and pursue the public interest effectively.\textsuperscript{18}


\textsuperscript{18} Currie, supra note 17, at 354-56.

Jefferson himself had been clinically trained as an apprentice to George Wythe, the first holder of the Law Professorship at William & Mary. Wythe plainly regarded his work as a professor as quite distinct from his former role as a master of apprentices. He sought to form "characters . . . useful in the national councils." J. Blackburn, George Wythe of Williamsburg 103 (1975). For a description of his efforts, see 1 A. Beveridge, The Life of John Marshall 157-59, 174-76 (1929).
This classical view of law as a university discipline was not wrong. The intellectual pursuit of law can be performed within universities; it can draw on and contribute to other disciplines found there. Law as an intellectual pursuit has special potential value in a society as given to rules and organizational complexities as ours. Indeed, there is a need to subject our intricate institutions to intensive scrutiny and research by able minds. Moreover, Jefferson was right that a democratic society benefits from leadership trained to reflect on the values at stake in the difficult problems that the law confronts. Indeed, in the hands of the right teachers, few windows can be opened to young adults that provide a broader or deeper vista of man and his society than does the study of law.

In an institution committed to the study of law as an intellectual discipline, the primary concern of the professoriate is systematic examination of law and its institutions, their practical functioning, and their theoretical aims and values. A reflective and critical bent of mind, a taste for bookishness, a capacity for long-sustained effort on the small range of matters that can be fully explored within one lifetime, and a willingness to forego immediate rewards even of recognition are among the qualities needed for this kind of work. Freedom from deadening routine and the stimulation of association with colleagues who share the habits and values of the intellectual life are among the working conditions needed to maintain such a professoriate. The role of the professor thus defined is elevated, indeed, highly privileged. Many of us aspire to that role and this, of course, has a profound influence on our aspirations for the institutions of which we are a part. Making allowance for this self-interest, I yet hold that the role is one that should be maintained. If we often fail, if we are arid or idiosyncratic or unrealistic or simply wrong, that is not disproof of the worth of our enterprise, but only further evidence—if we need it—of how difficult a discipline ours is. If our students are often uninspired to cogitate at all deeply about anything and lack interest in our enterprise, that is a reason for concern, but not a reason to forsake the task. The intellectual discipline of law is important; there are no other institutions that can or will assume responsibility for it; it is still the first reason for the existence of university law schools.

The commitment to the intellectual enterprise does not necessarily preempt all other commitments, however. Indeed, it would be difficult to contend that all law schools should be required to have such a commitment. The idea of the university law school responsible for law as an intellectual discipline has long been under attack. Almost a century and half ago, Joseph Story commenced teaching law at
Harvard with the idea that he was supplementing the apprenticeship programs of the practitioners. Story was a systematizer and organizer whose intellectual product was useful to the practitioner, albeit never sufficient in itself to qualify the student for the management of practical affairs. As his successor, Christopher Columbus Langdell, put it, the university should be concerned only with legal science and not with the handicrafts of law. But knowledge of "legal science" was presented as saleable knowledge.

It is, of course, the Langdell model of legal education, not the Jefferson model, which has shaped our institutions for the last century. Like its parent institution, the university, the law school has acquired a distinctly vocational role. Indeed, university law schools have acquired a monopoly position in the market for legal services. Whether or not this development was the product of conscious planning by legal academics, they did not resist and they did accept the associated benefits. Thus, when the apprenticeship system was eroded and abandoned, no academics sought to revive it. When bar examinations were made to measure the product of the academic learning of Story, Langdell, and their colleagues, there were no professors to complain, or to urge that there were other important qualifications for the practice of law. As accreditation standards have been raised to require larger and larger investments of time devoted to academic preparation by all law licensees, no law school deans have raised their voices to protest that some of that mandatory investment might be of no benefit to the clients of those who were to be thus trained. Law schools have been so far from resisting an evolution of high expectations that they have sought to reassure constituents of the superior quality of services delivered by their graduates. We have, indeed, often been pleased to think that this alleged superiority was in some way owing to the quality of the training we have given and received. Thus, we accept our tuitions and appropriations on the basis of engendered expectations that we are producing the providers

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22 See Stevens, supra note 20, at 504-11; First, supra note 4, at 327-32.
23 See First, supra note 4, at 000. But cf. J. Auerbach, Unequal Justice 74-101 (1976) ("scientific" law teaching was promoted while acceptable alternative modes of legal education were deliberately narrowed).
of needed legal services. Universities and their law schools are not, in a word, virgins. We have acquired some control of and responsibility for professionalism in law. We may either deplore or celebrate that power and responsibility, but we cannot deny its presence. Whatever yearnings we may have for purity of motive and a total commitment to the intellectual enterprise, it would require a profound reordering of universities and our professions to regain such a state, if it ever existed.

This duality of function—the teaching of law as an academic discipline and the training of law students to provide legal services—poses a greater problem for us today than it did for Langdell. Legal realism has laid waste the concept of law on which his theory of legal education was premised.24 It is much harder for us to distinguish the "science of law" from other academic disciplines. At the same time, we are also troubled to distinguish the "science of law" from its handicrafts.25 Yet as we become more engaged in the vocation of law, we find ourselves pulled away from the values and habits of mind that sustain the intellectual enterprise. The self-doubt that this dilemma evokes is made more acute by our critics, many of whom implore us to make a fuller commitment to professionalism.26 Some may even decry intellectual rigor, belittle the importance of what they perceive to be our pretensions to intellectual inquiry, and express doubts about the relevance of our intellectual product to the practice of law.27

Those of us, institutions and scholars, who are convinced of the worth of the intellectual enterprise are bound to reject such criticism. Those who despair are necessarily disavowing the classical premise that law or other aspects of the human condition can be improved by thinking about them. We of the true faith will not hear the entreaties nor accept the bribes of such nihilists. We will keep the lamp lit and will make no apology for doing so. But we are entitled to the assurance that sharing the intellectual enterprise with professional students is of some value to them. Students who engage in it will learn about

24 See Woodward, supra note 21, at 703-05.
26 An example can be found in almost any issue of Learning and the Law. For an example, see Redlich, Lawyer Skills Can Be Taught, LEARNING & L., Summer, 1976, at 10.
law and legal institutions; such information remains saleable. Students who are experienced in the intellectual pursuit of law will also take to their work a broader perspective that may better enable them to plan creatively, counsel wisely, and learn more when more learning is needed. Moreover, experience with the intellectual pursuit may enable practitioners to perceive what is intricate and beautiful, what is idealistic and uplifting, about the materials of their daily work. Much of the work of the law is tedious or prosaic. The ability to see beyond the immediate task adds not only to the ability to perform it well, but also to the ability to enjoy it by seeing its place in the texture of our common experience.

But it is surely true, and we should be first to proclaim it, that experience in the academic pursuit of law is not a sufficient means of fitting persons to perform most of the work that lawyers perform. Standing alone, the assurance that the professionals have engaged in the pursuit is very little protection, indeed, for the client who fears being victimized by the incompetence or mendacity of his counsel. Even less assurance can be given that singleminded institutional pursuit of the intellectual enterprise will serve the public need in regard to the availability of legal services. The quantity of services available is, in varying degrees, a product of the size and number of law schools. But questions of size and number are not unrelated to the other features of their programs, features that are the product of their sense of purpose. The standard curriculum of law students, if there is one, must ultimately affect who it is that does the work.

In all these respects, we must recognize that the exclusive commitment to the intellectual enterprise may disserve the future of our students, to whom we have assumed an obligation. At question is the extent of that obligation. I submit that we are obliged to do anything we can that does not seriously obstruct the academic pursuit. But we ought not to dilute our efforts with fruitless undertakings that are mere cosmetics of concern for a public interest that will not be served. Critical judgment is required, and we must apply the same standards of rigorous criticism that we espouse generally to the specific issues posed by our own roles and functions. Sellers of pie in the sky and seekers of selfish interest should receive no more favorable attention in this discourse than in any other in which the law professoriate engages. This should be so even if we get a commission on pie sales and the selfish interests are our own. If the public interest requires some discomfiting departures from the academic lifestyle to which we are accustomed, we cannot refuse to make accommodations and yet expect to maintain our privileged status. On the other hand, we should be quick to resist the imposition of additional re-
sponsibilities that impair the academic enterprise and promise only small and speculative benefit to the public.

III

THE AVAILABILITY OF LEGAL SERVICES

A. The Need for Legal Services and the University's Obligation

Concern for the availability of legal services has been widely shared for less than two decades. Even today, the relationship between the availability of professional services and the availability of professional education is not well understood. It is generally supposed that no single law school is in a position to contribute significantly to meeting any perceived need. For these reasons, few law schools have given serious attention to the availability problems. Nevertheless, some contemporary criticism of legal education has rested on the premise that more should be done to provide for the public need for legal services. Jerold Auerbach28 is not the first to suggest that law schools should seek to imbue their students with ambitions to serve those who are most in need rather than those who are best able to pay for their services.29 If this is possible at all, it would seem that the first step would be to conduct the institutions in a manner that manifests concern for public manpower needs. Yet doubts linger as to whether university legal education can or should respond to the concern about availability.

There may, indeed, be some question as to whether there is a need to make legal services more available.30 If there are unmet needs at present, they are not being asserted by the needy. The market is now a buyer's market, and young lawyers are not finding full employment. Nevertheless, a need for services might exist due to three causes: the market price of the service may be artificially high; some potential users of services may be too impecunious to have access to that market; or, the potential users may be too improvident to recognize the worth of legal service unless it is pressed upon them. These different suppositions seem to call for different strategies of

solution. Most strategies that will come to the minds of readers, however, will not call for the participation of university law schools.

The "need" for legal services might also be expressed in jurisprudential terms. The advocates of increased availability of service may desire a deeper and broader penetration of law into the entire fabric of our social, economic, and political relations. One way to make the members of the society more right-conscious and rule-conscious is to station trained lawyers at every point of potential conflict. One might suppose that saturation of the society with lawyers may make its members more law abiding or more independent. However the problem is viewed, there is now a clear professional orthodoxy that holds that legal services should be as widely distributed as possible. Thoughtful observers may well reject this orthodoxy. One might well question whether legal service, like a gentle spring rain, would bring the flowering of social justice and human satisfaction. Legal service can make small wounds seem larger as well as heal them.\footnote{Staunch advocacy can enlarge the wants of claimants, and can leave citizens "rubbing the poor itch" of their opinions, making scabs.\footnote{It is not at all certain that the public itself places a very high priority on the acquisition of more legal service. Quite possibly, those who would receive the benefit of additional service would prefer that the resources needed to provide it be put to a different use. And there is risk in excess supply, for rigorous competition in the legal service market may have serious effects on the lives and ethics of those under-employed professionals having the greatest difficulty selling their service.\footnote{For all of these reasons, it is less than clear that increasing the supply of legal services is a wise public policy. Is this uncertainty one that a university or a law school can resolve? Whether we want a society that is more rule-conscious and right-conscious is a question that ought, if possible, to be resolved in a politically responsible way. It is difficult to regard a law faculty meeting as such. Avoidance of the issue, however, is not entirely possible. Universities and law faculties make decisions that do affect the availability of professional services. To the extent that this is so, how should they approach the issue? Three possibilities appear: the issue might be ignored despite the effect, or institutions might favor or disfavor increased availability.}}

\footnote{Paradoxically, this point is most forcefully made by Jerold Auerbach. Auerbach, As Lawyers Multiply, Civilization Decays, LEARNING & L., Summer, 1977, at 10, 50-51.}

\footnote{W. Shakespeare, Coriolanus, Act I, scene 1, line 169, reprinted in THE COMPLETE WORKS OF WILLIAM SHAKESPEARE 811 (W. Clark & W. Wright eds. 1964).}

\footnote{See J. Carlin, LAWYERS' ETHICS 47-61 (1966).}
Leaving the problem to constituent faculty members to resolve individually, the approach most favored by universities in dealing with troublesome issues, seems impossible in this context.

Ignoring a significant consequence of an institutional decision is irresponsible, especially for an institution that presumes to train persons who will be responsible for making many decisions of public consequence. Between the other two alternatives, the correct position for American university law faculties is to accept the orthodoxy and favor increased availability, to the extent that this can be rendered consistent with the primary academic goals of the institutions. The controlling rule should be that university law schools will be administered with due regard for the rights of all citizens to acquire, transmit, or sell ideas, information about law, and legal skills. No university law school should restrict access or give service to any external institution or program if the effect would be restricted access to ideas, information, or skills, except when its own limited capacity so requires.

This suggested standard need not be based on the premise that legal service is a basic necessity for a large, unserved public clientele. It is better rooted in a set of principles closely related to the university's own primary purposes. Thus, one primary goal of a university is to purvey ideas, and the policy of availability is linked to freedom of expression. Related to these goals, and also a source of a policy favoring availability, is the democratic political tradition. Democracy requires effective political representation of all groups within our society, which can be achieved only by means of liberal access to information about and understanding of the processes of government. All of these ideas are further related to the concept of economic freedom embodied in the antitrust laws of the United States;\(^\text{34}\) all favor a standard of openness, access, and availability. Although the case for increased availability has not been proved, the claim is strong enough to merit a presumption to be used in the making of educational policy. If there is to be a contrary policy, the proponents of restriction should bear the moving car in the sea of public debate. No university law faculty is justified in anticipating their success.

\section*{B. The Costs of Professional Training}

1. The Medical Analogue

The more available the requisite education, the more available the service. The cost of legal education is thus intimately tied to the

\footnote{\textsuperscript{34} See First, supra note 4, at 312-14.}
availability of legal service. No one law school can by its own efforts have a very significant effect on the national market for legal services, but many exercise significant control over and responsibility for local markets. The major educational policies that exercise control are the size of graduating classes and the costs imposed upon graduates. The relationship between educational costs and the availability of professional services is illustrated by the role of medical schools in the evolution of health care in the United States. At the beginning of the present century, the medical profession was virtually open. Health care was cheap; house calls and personal attention were expected. There was concern about quality, however, with quackery widely suspected. As a result of a strenuous effort by the American Medical Association, medical education was transformed. The famous Flexner Report provided the impetus for this transformation. Admissions standards were raised, the program of instruction was lengthened and made more demanding, and intimate clinical education became the norm. These reforms were soon embodied in educational accreditation standards, and marginal schools were eliminated in large numbers.

Well intentioned as these reforms were, they were not necessarily beneficial to the public. As educational costs rose, fewer students enrolled and the medical schools became a tight stricture on entry into the service market. Inevitably, service became scarce and those entering the market expected incomes that would provide a return on their investment in professional education. The prices of services rose rapidly, as did the incomes of medical doctors. The apparent side effects of this economic development included the alteration of the demography of those entering the schools. The offspring of upper-income families tended to appear in greater proportions, impelled less by a Hippocratic urge than by the attraction of large incomes. In addition, the high value of the doctor’s time has led to a reorganization of the health care delivery system. When the cost of house calls and personal attention became prohibitive, medicine became more hierarchically organized, with most professionals using increasing

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26 R. Shryock, Medicine and Society in America (1960).
27 A. Flexner, Medical Education in the United States and Canada (1910).
numbers of assistants. Both the professionals and assistants came to be cast in increasingly narrow work roles.

Other consequences did not become fully apparent until the last decade or so. It has become necessary to import hundreds of foreign medical graduates each year to provide a semblance of health care in such places as inner city hospitals and remote rural communities. These persons were trained at the expense of foreign governments, many of which are repaying our foreign aid by providing health care to our poor. But many immigrant doctors, who sat at the top of the socioeconomic ladder in their homelands, have little in common with the poor American citizens they are expected to serve. Meanwhile, many young Americans seeking opportunities in medicine have been forced to obtain training in Mexican, Italian, and other foreign institutions. These developments have now brought us to the point of substantial political intervention by Congress in the management and admissions policies of medical schools.

In return for these costs, the consuming public has received some benefits. Quackery has diminished. Health care is better. An open question remains, however, as to the degree to which improved American health is the product of higher academic standards imposed on those seeking to enter the service market. The primary beneficiaries of the elevation of standards have been the doctors who enjoy much larger incomes. When this history is reviewed, one may reasonably conclude that the universities were misused, or at least overused. We might hope to learn from experience: Educational pol-

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29 See Margolis, Why 117 Medical Schools Can't Be Right, CHANGE, Oct., 1977, at 29.

The sacred doctor-patient relationship so lovingly promoted by the American Medical Association is now just a pleasant memory; it has vanished in the wake of specialization, technology, and third-party reimbursement, which encourages doctors to view their patients as walking insurance policies. An accurate portrait of the new doctor-patient relationship would in no way resemble Norman Rockwell’s painting of a kindly physician ministering to the patient at his bedside; more likely it would depict two recorded messages locked in deaf soliloquy.

Id.

40 Margolis describes our health care system as steeply pyramidal . . . with some 320,000 practicing physicians perched elitely at the top and about 4.5 million other health workers toiling humbly beneath. The pyramid is distinguished less by class than by caste: It has no elevators. Nurses remain nurses forever, hospital orderlies often spend their entire careers emptying bedpans. The only way to get to the top is to begin there.

Id.

41 For a broader perception of the social and political implications of modern medical professionalism, see I. Illich, MEDICAL NEMESIS: THE EXPROPRIATION OF HEALTH (1976).

icy which restricts entry does have adverse effects on the public. Such policies should be accepted only with cautious assurance that the benefits promised are real and substantial. University law schools face a number of issues bearing on entry costs. A number of reforms of modern legal education have had significant cost consequences. Many reforms now urged would have further inflationary effects. Reformers rarely take these effects into account. I suggest that these costs must be carefully examined in the formulation by law schools of educational policy.

2. Foregone Income

The most substantial cost of legal training is the income foregone during the training period. By rapid steps taken in a few decades, the number of years required to qualify to deliver legal service was increased from two academic years to seven. I joined, some years ago, in suggesting that some persons might be ready to enter the market after five or six years of higher education, rather than seven.43 One purpose of that proposed retrenchment would be to reduce entry cost. I do not propose here to revisit the broad issues raised by that proposal, but I will point to a few matters bearing on the amount of foregone income exacted from students as a toll on entry into the service market.

One of these is the matter of part-time employment. The prevailing attitude of most university law schools, embodied in accreditation standards, is to discourage such employment. That policy was born of experience with students who were too distracted from study to participate effectively in learning. Although it would be a mistake to forget that lesson, we may have learned it too well. Part-time work is not an unmixed evil. A job can support study as well as distract from it.44 It can provide an emotional balance wheel for students who are not gratified by their studies. A job can be an opportunity to develop professional skills and traits. For younger students who lack exposure to what they like to think of as the real world, a job can increase maturity. And, in addition, there is the reduction of entry cost.

With these considerations in mind, some university law schools should consider more seriously the work-study tradition pioneered by

43 See H. PACKER & T. EHRlich, supra note 38, at 77-85; Stolz, supra note 38, at 258-61; cf. Stanley, Two Years +, LEARNING & L., Winter, 1977, at 18-20 (third year should be spent studying the law of a particular jurisdiction in depth).

44 My own recent data suggest that students who are working part-time are studying more in law school and are less alienated from the educational process. Carrington & Conley, The Alienation of Law Students, 75 Mich. L. Rev. 887, 891 (1977).
Greater effort and imagination might be devoted to making more effective use of federal work-study money. It might also be appropriate to experiment with the use of financial aid grants to subsidize attractive part-time employment. Unseen hazards doubtless lurk in this last suggestion. But there must be many useful and interesting work opportunities that are not fully exploited because they generate small economic returns; by subventing such activity, the small returns now lost might be recaptured and applied to diminish the costs of otherwise foregone income. This might also be a strategy to stretch financial aid funds further.

Related to the matter of outside employment is the amount of study required to complete the university law degree. Accreditation standards now require ninety weeks of instruction and the completion of eighty semester units of work for completion of the first degree. These norms should generally also be regarded as maxima for degree requirements. Many students want more instruction than that, and it goes without saying that they should have every opportunity to receive as much as they want. But a university law school attuned to its responsibility to minimize the costs imposed on its students should take a modest view of the essentiality of those last few days and hours of instruction, for those hours reduce the ability of students to avoid the loss of foregone income.

3. Tuition

Tuition is the entry cost most visible to students and most directly within the control of universities. Normally, tuition is fixed by the university and not by the law school, and the price is much influenced by the marketplace. Universities, like other sellers, are unwilling to price themselves away from student demand. There is some choice of pricing policy, however, because law schools compete in quality as well as price. The perception of quality that influences the price is often that of legal educators. There is thus a relation between costliness of educational programs and tuition, and a concomitant responsibility to take into account the social, political, and economic consequences of high tuition when we appraise programmatic proposals that raise the real cost of legal education. The responsibility becomes most acute when we seek to require costly program

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improvements as minimal accreditation standards, for the costs must then be borne by the most marginal students, some of whom are thereby excluded from the market.

Like tuition itself, most of the costs of operating a university law school are responsive to external market conditions, particularly in regard to faculty salaries and working conditions. The market for the services of law teachers is a national market; moreover, it is a sub-market in the sense that it must respond to price levels in the market for lawyers' services. A university that seeks to practice economy in regard to faculty salaries and working conditions will therefore diminish the relative quality of its faculty. The need to attract faculty affects a wide range of customary expenditures, including much of the expense of libraries, and substantially restricts freedom to hold down costs.

But one substantial dimension of cost is subject to adjustment: the teaching ratio. Between 1955 and 1970, law school instructional costs, adjusted for inflation, increased by one-third. The chief cause of this increase was a substantial reduction in teaching ratios. Because of this increase in cost, there was an even greater increase in law school tuitions measured in real dollars. Significant educational improvements—smaller class sizes, a wider choice of electives, and seminar programs—accompanied this expenditure. But we should be aware that there are potential social costs associated with these benefits. Tuition costs are ultimately reflected in the price of legal services paid by the consumers. Extended over a longer period, such increased costs can have very visible effects, as the experience in medicine confirms.

It is not easy to maintain an awareness of the responsibility of universities for the availability of legal services, the significance of which is pervasive, but always marginal. Institutional politics often militate against the weighing of external considerations in the making of internal policy. And the status of law schools, as well as the status of the profession, becomes deeply entangled in the issues, greatly complicating our effort to think clearly about them. The difficulty is nowhere more apparent than in the contemporary advocacy of clinical legal education. It would be unfair to suggest either that the clinical movement is unconcerned with cost, or that it is animated by a conscious desire to enhance the income and status of lawyers at the ex-

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47 See First, supra note 4, at 319-26.
49 See text accompanying notes 35-42 supra.
pense of their clients. But discussion of the issues raised by clinical legal education can rarely proceed for long without invoking medical analogues. If doctors can spend so much training themselves, why can’t we? Shouldn’t lawyers be more like doctors?50 Indeed not, I urge. For reasons that have been fully stated,51 medicine is a negative example of the way in which universities should not bear their responsibilities to the consumers of professional services.

This should not be understood to be an argument for Spartan economies. Professional education is not a place for harsh austerity. Years in professional school are an important phase of our lives and it is important to avoid the drabness and unsociability that results from relentlessly high teaching ratios. Some expenditures, such as those needed to maintain seminars, may be very important to the intellectual liveliness of our institutions. But all costs should be incurred carefully—not merely because there are always other uses to make of our money, but because we have a social responsibility to keep our gates open as wide as we can. Most especially, we should take care not to establish costly minimum standards that cannot be justified by reasonably certain benefits to both the students and their future clients.

4. Qualifying Examinations

While foregone income and tuition constitute the major entry costs of professional training, there are significant exit costs, as well. Most graduates invest substantial amounts of time and money in bar review instruction. Few, if any, university law schools make any effort to assist their students in reducing these costs. To the contrary, most of the instruction is given by moonlighting law faculty who are generously compensated. One reason for this arrangement is that accreditation standards discourage intramural bar review courses.52 These standards are indefensible. As long as university law faculty are giving the instruction, it seems difficult to explain why their own students should be required to make such a side payment. The evolution

51 See text accompanying notes 35-42 supra.
52 ASSOCIATION OF AMERICAN LAW SCHOOLS, EXECUTIVE COMMITTEE REGULATIONS 7.1 (1977). The traditional posture of the law professoriate is to view the bar examination process with mistrust; to some extent, this is justified by the effect of the bar examination on academic programs. See Stevens, supra note 20, at 537. For an example of a particularly offensive use of the bar examination, see Givan, Indiana’s Rule 13: It Doesn’t Invite Conformity, It Compels Competency, LEARNING & L., Summer, 1976, at 16.
of the Multistate Bar Examination has greatly simplified the task of
bar preparation, and it would be a modest undertaking for most law
schools to provide an appropriate and effective series of lectures to
accompany standard outlines. Such an effort could make a significant
contribution to the reduction of training costs for many students.

The bar examination cost might also be reduced in another man-
ner. The cost associated with the risk of failure could be diminished
by administering the examination earlier. There is no persuasive rea-
son for bar examinations to be administered only to those who have
completed their studies. The Multistate Bar Examination, in particu-
lar, could be administered to students who have completed three
semesters of work. Not only would this reduce the cost of failure for
those excluded, but it would also reduce the cost of preparation for
those who pass. Organizations that might properly seek to provide
leadership in reducing these costs include the Association of Ameri-
can Law Schools and the Society of American Law Teachers.

IV

The Quality of Services: Competence

The client benefit generally associated with more costly educa-
tion is an improvement in the quality of service delivered. We are
now awash in statements that the present is a period of crisis over the
quality of legal service to which university law schools should re-
spond.53 Most of these statements are connected to proposals for
program changes that would contribute to educational costs.

Complaints about the quality of legal service are reminiscent of
the rhetoric associated with the reform of medical education earlier in
this century. That reform had very serious effects on the availability
of medical education,54 but less apparent effects on the quality of
health care delivered to the public. Most of the improvement in
American health in the last half century is attributable to improve-
ments in public health, particularly water quality, and to a few sig-
nificant achievements in the research laboratories.55 While most of
us are now attuned to the virtues of scientific medicine, its results are

53 Again, almost any issue of Learning and the Law will document this statement. Much of
the comment has surrounded the Report of the Advisory Committee on Minimum Qualifications
to Practice Before the United States Courts in the Second Circuit (1975).
54 See text accompanying notes 35-42 supra.
55 See Llewellyn, On What is Wrong with So-Called Legal Education, 35 COLUM. L. REV.
651, 661 (1935).
not measurably better than the more intuitive medicine practiced elsewhere, or here a few decades ago. Longevity and morbidity rates have not improved significantly. Down time has improved, but in large measure this is due to the abandonment of bed rest as a standard remedy. When the long view is taken, it is unlikely that costly clinical medical education has made a material contribution to American health; its results seem to be roughly the same as those achieved elsewhere by much less costly methods of education. And surely few would contend that modern American medical education has produced health care that is more sensitive, civil, or humane. The lesson to be drawn from the medical experience is that it is easier to inflate the price than to improve the quality of professional services. The pursuit of competence, like the pursuit of truth, is a risky business.

This is not to say that there is no relation between professional competence and intellectual attainment in law. Few lawyer tasks are devoid of intellectual content. Lawyers who understand the law, and how and why it came to be as it is, will do better at most tasks than those who lack this understanding. There is surely much more to the practice of law, however, than understanding its theoretical bases. The greatest intellect may be rendered ineffective in the practice of law by other traits such as excessive shyness, excessive aggressiveness, sloth, inattentiveness to detail, and poor judgment about people and their behavior. The importance of these traits varies with different professional tasks. Perhaps in different patterns and contexts these tasks can be aptly described as skills such as advocacy, negotiation, counseling, interviewing, or drafting. The blend of knowledge, traits, and skills needed for effective conveyancing are quite different from those needed for effective negotiation of a collective bargaining agreement.

Thus, much of the contemporary criticism of university legal education calls attention to the inadequacy of our efforts in skills training. This is not a new criticism; it was received from such diverse sources as Karl Llewellyn\cite{Llewellyn} and Arch Cantrall\cite{Cantrall} some decades ago. Today, it is given new urgency by the clinical law movement. The call for skills training echoes in almost every issue of Learning and the Law, a publication of the American Bar Association.\cite{LearningAndTheLaw} University law schools are right to be slow in responding to these calls.

\begin{footnotes}
\item[57] E.g., Cranton, Getting the Law School Down to Where the World Is, LEARNING & L., Spring, 1976, at 48; Redlich, We Train Our Students to Work for Wall Street, LEARNING & L., Winter, 1977, at 6.
\end{footnotes}
The obligation to do what can be done to improve the quality of legal services is in competition with the obligation to maximize accessibility. For the most part it appears that the improvements in quality or competence that can be achieved are modest, whereas the costs that could be incurred in vigorous pursuit of competence are substantial. First, lawyer competence is an elusive goal. Second, to the extent that we know what it is, we know little about how to transmit it. And third, to the extent that we know how to develop competence, university education is not usually an efficient instrument for doing so.

A. Competence: An Elusive Goal

Many observers have noted the need for a better understanding of lawyers' work and legal skills as a basis for law school planning. And although the American Bar Foundation has undertaken to respond to this challenge, "[t]he truth is that we know embarrassingly little, and that only impressionistically, about what lawyers do."

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Cramton and Boyer commented on the difficulty of useful categorizing the tasks:

Everyone who has addressed the problem of defining lawyers' skills has had no choice but to extrapolate from his own experience and knowledge, and as a result there has been little agreement beyond the tautological observation that the fundamental skill acquired by law students is "learning to think like a lawyer."

Clearly, a more specific categorization of skills is necessary, but how much more specific? For example, is it useful to lump the office work aspects of law practice which are not related to litigation, drafting, or lobbying under the broad term "counseling"? Or should this function be broken down into constituent parts, such as ability to determine "safe bedrock-law," interviewing techniques, negotiating skills, knowledge of social institutions for referral purposes, and the like? Doubtless each of these component categories could be further divided, and this process of subdivision and particularization makes it extremely difficult to distinguish between "skills" that are common to a substantial segment of the profession, and "operations" that are unique to a particular lawyer or law office.

Finding a meaningful stopping point on this slippery slope is only the first step of the task. In evaluating the present practices of legal education, the question is not merely whether a particular skill, however defined, is necessary or desirable for the practicing lawyer; there are also the issues of whether the law schools can teach it, and if so, whether they should.

Cramton & Boyer, supra at 270-71 (footnote omitted).

The inquiry is therefore fraught with perils of self-deception and is
difficult to pursue without accepting the premise that skill or profes-
sional excellence is an objectively verifiable fact. As Robert Pirsig, in
his notable inquiry into the values of work, has warned, we are in
danger of believing that quality is in fact what we measure, thus con-
cealing from ourselves the sometimes sovereign importance of the in-
effable aspects of what we seek to do.60 A recent book by E.F.
Schumacher61 illuminates the dangerous spell that measurable
phenomena such as gross national product can weave over the unsus-
ppecting scientific mind. Because of its measurability, it has become a
greater factor in our political judgments than the qualities of our na-
tional life that the measurement was intended to illuminate.62 Closer
analysis of the professional competence of lawyers may well lead to a
similar misconception if we are not very guarded.

This prospect is illuminated by the history of parallel efforts in
the field of teacher education. Since the beginnings of the first nor-
mal schools in the last century, the field of education, like other
hopeful disciplines, has sought to amass an intellectual content of its
own. One form that this effort has taken has been the close analysis of
what it is that good teachers do. In 1920, a Carnegie Foundation
study of teacher preparation echoed the call for “a definite program of
attainments . . . which shall be both a guide to the teacher’s efforts
and a standard against which to measure his achievements.”63 Using
models of similar studies of bricklayers and secretaries, a 1929 Com-
monwealth Fund study published a monumental job analysis listing
83 teacher traits and 1001 teacher behaviors grouped into categories
and divisions.64 Among the traits are such items as progressiveness,
refinement, and optimism. Among the categories of desired behaviors
was “using interesting methods of instruction.”65 This category in-
cludes the following behaviors: avoiding mechanical repetition of
questions; explaining the need for voluntary attention; overcoming
group indifference by arousing curiosity; making work varied; and,
using competition and contests.66 The last category of behaviors
suggested by the study was “securing cordial relations with the

61 E. SCHUMACHER, SMALL IS BEAUTIFUL (1973).
62 Id. at 48-52.
63 W. LEARNED & W. BAGLEY, THE PROFESSIONAL PREPARATION OF TEACHERS FOR
AMERICAN PUBLIC SCHOOLS 219 (1920).
64 W. CHARTER & D. WAPLES, COMMONWEALTH TEACHER-TRAINING STUDY (1939).
65 Id. at 313.
66 Id.
superintendent," which was illustrated with a number of specifics such as "remembering superintendent at Christmas."67 Not listed among the desired behaviors was loving school children or evoking their pride, these "skills" presumably being too intangible for inclusion in such a hardnosed scientific analysis.

All of this seems very quaint, but it is serious business this very day in many states. The quest for teacher competence has been pursued vigorously in recent times.68 A number of states now base their licensing standards on Competency-Performance Based Teacher Education, norms evolved by committees producing consensus judgments about the competencies required of aspiring teachers. The similarities between these consensus competencies and the pioneering work of the Commonwealth Fund are the subject of one recent comment that concludes in a state of bewilderment:

1. Why is education so hospitable to panaceas, so ready to embrace with uncritical enthusiasm supposedly simple, guaranteed solutions to complex problems?
2. Why do educators so often overlook the unwanted but likely consequences of the reforms which are so urgently advocated?

If CBTE exhibits these characteristics typical of many educational reform movements, it is following an historic pattern of meretricious claims, monistic solutions, and consequent disillusionment or apathy. Undoubtedly, movements which will offer new or refurnished panaceas are even now growing unnoticed. Can we not deal with them sympathetically but realistically?69

Boyd Bode, a Deweyan, protested that this standardized competency approach to teacher education was yet another avenue to the formalism and routine in which his nascent discipline was mired.70 Moreover, he noted, the movement for consensus standards of competence are "at bottom unfriendly to the ideas of democracy because they center on the ideal of static rather than a changing social order."71 The same observation can be made about the threat of formalism and routine in the practice of law. Formalism can, indeed, serve to set the legal profession, like the teaching profession, in in-

67 Id. at 423.
68 Hertzberg, Competency Based Teacher Education: Does It Have a Past or a Future?, 78 TCHRS. C. REC. 1, 1 (1976).
69 Id. at 21.
70 B. BODE, MODERN EDUCATIONAL THEORIES 111-12 (1957).
71 Id. at 20.
intellectual and psychological concrete, obstructing our ability to adapt to new demands as they emerge, and inhibiting individual mobility and freedom.

Bode concluded that the emergence of the job analysis or specific objectives approach demonstrated that “we have not, so far, managed to translate the idea of a democracy into clear-cut educational theory and practice. There is no more urgent problem on our educational horizon at the present time than the clarification of the meaning and implications of democracy.”72 As applied to law, this statement would be hyperbolic, but it is true for legal education as well as teacher training that we have not yet clarified the meaning and implications of professionalism in a democracy. As with teacher training, clarification of our basic values is not likely to come from scientific scrutiny of what lawyers do. Illumination of that sort is more likely to result from the creative efforts of those who are engaged in the traditional intellectual enterprise of the university. Thus, I adjure the American Bar Foundation to observe the risks of taking its analysis of lawyer skills too seriously. In initiating a study of the particular demands to be placed on our graduates, the Foundation has embarked on an inquiry that should, and apparently will, also include some consideration of the deeper issue of what it is that our public ideals and values require of us.

Even without the results of the current efforts to study competence, some observations can be made about that elusive goal. One is that competence is relative. In law, as in art, there are few absolute standards of competence. Lawyers cannot be made uniform in skill, and efforts to reform training, intended to equalize talents, are simply misdirected. A second observation about competence is that it is largely a matter of attitude. Whether a lawyer conducts a trial effectively depends largely on his preparation. Preparation requires dedication, or at least some enthusiasm for the task. Charles Bingaman, himself an advocate of competence training in law schools, has analyzed lawyer competence to include motivation, dedication, intelligence, integrity, and the ability to learn from experience.73 One might dare to analyze further and assert that competence is largely the product of pride or self-esteem.

A third general observation to be made about competence is that it is situational. If work is performed under circumstances that do not reinforce the pride of the worker, competence will diminish. A

72 Id.
lawyer who must perform too many tasks will not perform them well. In part, then, competence is a product of professional economics. If his fee is sufficient to compensate the lawyer for careful work, higher standards of performance will result. It is unrealistic to expect competence from a lawyer who must perform on a treadmill to eke out a living. In a sense, therefore, the demand for greater competence has a distinctly elitist aspect insofar as it is an implied call for more expensive legal services. More efficient delivery systems are the only solution to this dilemma.

If competence is largely relative, attitudinal, and situational, it is not likely that substantially higher standards can be produced by educational means. Modest expectations are thus called for. Modesty should not come hard. We should all by now have assimilated the school effectiveness studies of recent years, which have exploded our assumptions about what can be accomplished through schooling.74 While these studies are measurements of early childhood schooling, there is little reason to suppose that schooling in later years has a more profound impact on students than what is presented to them in their youth.

One need not cynically dismiss the value of education in order to accept the lesson taught: Schools are important and even necessary despite the fact that differences in school resources and investments do not necessarily produce significant differences in learning outcomes. Respect for the limits of our tools is not inconsistent with our professional self-regard as educators. Not least among our limitations is our dependence on the desires and expectations of students. As Spencer Kimball has put it:

Much dialogue about legal education misses the point by emphasizing "teaching," not "learning." Education is a learning process, in which teaching plays a minor role. The best teacher can only stimulate, inspire, excite, even anger the student into learning. The difference between a good and a poor lawyer more than anything else is his capacity to learn from himself what he needs to know. Legal education is, therefore, not alone a task for the law schools, but begins at mother's knee and is finished long after law school, when the lawyer ultimately becomes competent, and confident in his competence, to take on tasks he was never taught and by his own efforts to learn to perform them well.75


75 Kimball, supra note 59, at 32.
If we were limited to choosing the most important skill for every lawyer to have, it might well be the ability to read very carefully. Yet it is clear that we have no demonstrably effective way to teach this skill. All our teaching methods seem to be more or less equally effective or ineffective in teaching reading to children. Though controversies over teaching methods have raged for centuries, the only conclusion we have reached is that it is important to give children an opportunity to read and then motivate them to do it.\textsuperscript{76} Is it feasible for us seriously to undertake to improve our graduates’ reading ability? If so, is there any more to it than giving them difficult things to read and telling them that their careers depend on their ability to achieve?

Perhaps we might seek to impart other skills with greater optimism. We hear much about advocacy, interviewing, counseling, and negotiating, yet we are still some distance from being able to demonstrate that our efforts to develop such skills actually affect the quality of service delivered by the graduate. Before accepting responsibility for improving the quality of service, university law schools should demonstrate their capacity to do so.

All of this is not to say that skills training has no place in university law schools. It is sound teaching to connect the intellectual framework of the law to its application in practice for the novitiates who are asked to master it. To make that connection and thereby stimulate student interest, it makes perfect sense to ask students to do some drafting, negotiating, counseling. Moreover, as we experiment in such exercises, we may gradually acquire a fund of knowledge that is worthy of systematic transmission. We might even learn how to make our students measurably better negotiators, drafters, and counselors.

But a significantly increased investment in skills training cannot be justified by the present levels of return in the coin of measurably improved skills. The relatively low teaching ratios that would be required to seriously undertake such training would be too expensive.

\textsuperscript{76} See J. Chall, \textit{Learning to Read: The Great Debate} 57-62 (1967). Reasons for our lack of progress were elegantly explained by William Page:

The reading process includes many such tasks, some of which are extremely difficult to study. Most of the reading process is not observable—much like an iceberg that only reveals a small portion of itself. The reading process is a complex, changing thing, dynamic and resistant to measuring techniques. Despite these barriers to understanding reading, researchers gather to study reading like moths about a flame, perhaps because it offers the challenge of knowing something about the distinctive characteristics of humanness. The study of reading is the study of a major facet of human thought. When we observe and try to explain the reading process, we look into ourselves and struggle to find verification of our speculations in publicly observable phenomena.

and would reduce too substantially the accessibility of legal education. Furthermore, skills training may present serious personnel management problems. There is some reason to suppose that persons who are quite interested in skills training are less interested in the academic enterprise of law.\footnote{Cf. Bergin, supra note 25, at 638-39. This may explain the problem of the status of the clinical law professor on the university faculty. See Oliphant, When Will Clinicians Be Allowed to Join the Club?, LEARNING & L., Summer, 1976, at 34.} If this is so, then it would be difficult to appoint large numbers of skills trainers to law faculties without jeopardizing the fragile environmental supports for law as a lively academic discipline.

B. Alternative Approaches

The difficulty of improving professional competence through formal university education suggests that we should examine alternatives. A few can be readily identified: competence, if measurable, can be rewarded more effectively and incompetence can be deterred more effectively. Indeed, I find it puzzling that those who proclaim that there is a problem of competence in the trial bar are so singlemindedly intent on education\_al reform. The most serious competency problem in the trial bar lies in the field of criminal litigation. The reasons for this are that the available services are spread too thin, there is no system for rewarding effective work, and there is little deterrence for sloppy work. Few persons engaged in criminal litigation depend for their livelihood on their success rates. Working conditions are often demoralizing. A lawyer assigned to represent ten felons a week will spend most of his time plea bargaining on the eve of trial, will rarely know which of his cases are likely to go to trial, and will often be ill-prepared to make an effective presentation. In such circumstances, it is quite unlikely that any educational palliative will effect improvements in competence. A larger investment of manpower and better judicial administration to assure effective accountability are the only possible remedies. Yet law schools can effect improvements, if only modest ones, in professional competence generally.

1. Admissions Policies

One possible way law schools might improve professional competence is to select more competent students for admission. If the number of persons admitted remains constant, the quality of services...
ultimately delivered by graduates might be improved with no corresponding decrease in the availability of service. Few university law schools deliberately try to admit students on the basis of a prediction of their general capacity to perform legal services. What is evaluated is the ability of admission candidates to do law school work, a related but different matter. Insofar as we have been able to measure candidates’ ability to engage in the academic study of law, we have improved the quality of the bar greatly in the last decade. The relationship between academic legal ability and professional skill, however, may be less secure than we had hoped. Some of the ablest potential deliverers of legal service may have been screened out of law school because their academic credentials were less impressive than those of other candidates less qualified to be effective lawyers.

For example, we may be better at measuring negotiating skill than we are at transmitting it. Negotiating tests can be devised that might resemble both duplicate bridge and poker; candidates who are most successful on such tests can be safely predicted to be better negotiators than those who are less successful. The general level of negotiating skill in the profession might be raised if we included such a test as part of the Law School Admissions Test. I cannot demonstrate that such a test is feasible, but I am certain that some marginal improvements in the selection of students with negotiating skills could be attained by this approach. The major cost would be that some candidates who would excel at the academic study of law would be screened out because of their incompetence as negotiators. Perhaps this cost might be minimized if the skills test were used only to distinguish among large numbers of candidates who appear to be equally well qualified for law study. Less mechanistically, university law schools might try to use more soft data to predict capacity to provide competent legal services. Although we cannot validate the results until we are prepared to measure the competence of later performance at the bar, this may nevertheless be a worthwhile effort where law schools are choosing among equally qualified candidates.

2. Grading Policies and Academic Standards

Traditionally law schools pursue greater competence at the bar by raising their academic standards. Although academic standards, as measured by grades, may have eroded somewhat in recent years, law

78 This would be a machine-graded tournament similar to that described in White, The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation, 19 J. LEGAL EDUC. 357, 358–62 (1967).
schools would not advance the interests of future clients by increasing failure rates. This assertion, though intuitive, rests on my earlier observations about the elements of competence. Students who would be screened out by higher academic standards would probably not be the persons most lacking in the personal traits required of effective lawyers. At least the correlation would not be very close, and many aspiring practitioners whose careers would be aborted would be quite capable of rendering effective service. We would do about as well simply by reducing the size of entering classes, which would adversely affect the availability of legal education and legal services.

One kind of competence might be increased by changes in academic standards. I have in mind the competence of speaking publicly and under stress. One cannot be certain about such matters, but it seems likely that most law schools are now substantially less effective than they were a decade or so ago in regard to their training of students to cope with the stress of exposure to an audience. Indeed, I suspect that many others than myself have responded to student consumerism by coming to tolerate a passivity in classrooms that would have aroused a sense of shame only a few years ago. Students who resent being prodded and challenged in the public arena of the classroom may have taught us teaching habits that deserve them and the clients they hope to serve.

While it is sometimes hard for law teachers to face the misgivings and suspicions of those of our students who are too inexperienced to understand, it may help to remember the gratitude of Learned Hand, who said of his mentors:

More years ago than I like now to remember I . . . listened to . . . [and] was dissected by—men all but one of whom are now dead. What I got from them was not alone the Rule in Shelley's case, or what was one's duty to an invited person . . . or what law determined whether a contract has been made, or how inadequate was the common law of partnership. . . . From them I learned that it is as craftsmen that we get our satisfactions and our pay. In the universe of truth they lived by the sword; they asked no quarter of absolutes and they gave none.

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79 It is striking to note that Daniel Hoyt reported no correlation whatever between professional school grades and professional achievement in business, medicine, engineering, education, and scientific research. D. Hoyt, The Relationship Between College Grades and Adult Achievement, American College Testing Program Research Report No. 7 (1965). For comment, see C. Jencks & D. Riesman, supra note 16, at 205-07.


3. Disclosing The Limitations of Legal Education

Assisting students to identify those traits, qualities, and skills that they may need or want to acquire but that are not planned products of the academic program may contribute to the development of professional competence. Too few of our students understand what it is that we are trying to do for them, and too few can relate that to their own professional goals. We could assist their self-development by telling them more precisely what it is that we are not doing. The Federal Trade Commission is engaged in an effort to improve the candor of advertising in the field of education.\footnote{See 16 C.F.R. §§ 254.1-.10 (1977).} We might do well to anticipate their advance on us by disclosing to students in our admissions literature and orientation programs those aspects of the task of self-development that we plainly intend to leave to them. After all, much of our students' sorrow results from their unrealistic expectations about the level of competence they can reasonably achieve in three years. We have fed that realism. Greater candor would be consistent with the advice we now frequently hear to lower our expectations.

4. Skills Training After Law School

Universities should be especially slow to invest heavily in skills training if there are better instruments readily available. And so there seem to be. University education is inherently the most expensive training ground because overhead costs and foregone income are highest. The least expensive form of training is self-instruction on the job. If professionals could be induced to acquire skills by means of work supervision, this would be the optimal method. Other forms of training are moderate in cost, and are preferable alternatives to formal university education.

These alternatives include programs of continuing legal education, the best method of transmitting legal skills. They pose no problem of foregone income, and can more easily enlist the participation of practitioners than can programs conducted as parts of university training. Many university law schools already provide continuing legal education. This use of university facilities is perfectly appropriate, even if it offends purist adherents of the classical idea of the university. If there is to be a big push for skills training, it should be made in such programs. There will be no problem in attracting lawyers who need skills, since very few prefer to be incompetent. The training
program need only be presented as one that is truly effective. But holding that audience will depend on results, and that is as it should be.

V

THE QUALITY OF SERVICES: INTEGRITY

The suggestion that law schools should do something about the integrity of lawyers is frequently heard. Some of this conversation is a faddish response to the national disaster that was the Nixon Administration. Though there were a number of well-trained lawyers during that period who revealed themselves to be woefully lacking in self-regard and self-restraint, it should be remembered that there were many others, most of whom called less attention to themselves, who performed nobly under very distressing circumstances. Watergate certainly did not prove that our system of professionalism "works," but it did not prove that legal education has been corrupting the land either.\(^{83}\)

A more persuasive argument for concern about professional ethics is based on the general erosion of ethical restraints across the breadth of our society. The rate of social upheaval has been unprecedented. Almost all of our values, as well as almost all of our institutions, have been called into question. Family relationships that once formed the core of our system of social control have become increasingly attenuated and insecure. Misconduct of all kinds by all ages and conditions of men and women seems to be on the long-term rise. We rely more and more heavily on our public institutions, yet find it harder and harder to trust the persons who operate them. These trends are foreboding, to say the least. Anyone in this society who has the means to contribute to the revitalization of moral standards in public life is obliged to exploit the opportunity. This is not a dictum that comes easily to institutions committed to the intellectual enterprise. An institution that is striving to remain open to the consideration of any possible truth is not well suited to the making of strong moral decisions. In recent years, we have striven to rid ourselves of the responsibility for making them. We leave some matters to bar examiners and others to psychiatrists, and as much as possible to conscience. Twenty years ago I shared this preference.\(^{84}\) Today I hold it irresponsible.

\(^{83}\) But see Himmelstein, supra note 50, at 517-21.

I do not believe that our impact on professional standards of conduct can be great. The older learning on moral education, from Durkheim\textsuperscript{85} to Piaget,\textsuperscript{86} demonstrates that much of it happens early in life. It seems unlikely that a spineless law student can be made stalwart by any educational process. Yet the prospect can be painted too darkly. Values may be more easily transmitted to either children or young adults than are intellectual or professional competencies. Moral learning is a lifetime activity. And it appears that changes in the values and attitudes of students are among the most measurable products of schooling.\textsuperscript{87} The process of transmission is often more effective if it is subtle, and even unintended. Preaching is not notably effective, but transmission may be achieved through the "hidden curriculum." The hidden curriculum is composed of the tacit assumptions underlying the learning experience. Thus, as mature adults, we are motivated to meet the expectations we believe others had for us at the time of young adulthood. If law schools are conducted in a manner bespeaking an expectation of responsible and ethical behavior, the message may well echo through decades of our graduates' lives. If we forbear in confronting irresponsibility and shabby ethics, however, we contribute to that corrosive sense of futility that is always gnawing on the vitals of self-regarding and self-restraining men and women.

Three steps deserve the consideration of most university law schools. One is to reinforce the faculty's sense of professional responsibility. A second is to reinforce the students' sense of accountability for their conduct. A third is to provide greater contact between students and practicing lawyers who manifest the traits of self-regard and self-restraint. There may be others. I will try to manifest my own capacity for self-restraint by commenting only briefly on these three.

\textbf{A. Faculty Professionalism}

Any favorable effect we may have on our students in inculcating ethical standards depends entirely on the students' perception of the faculty as a group of persons determined to maintain its own pride and sense of responsibility. In years past, we depended on deans to perform this function in a discreet way, but decanal control over faculty behavior has been much diminished by the rise of faculty con-

\textsuperscript{85} E. Durkheim, Moral Education (1925).
trol. Accordingly, we now operate most frequently on an autonomous basis, each faculty member setting and enforcing his own standards; there may be increasing numbers of law teachers who exercise this autonomy in ways that are self-indulgent and inattentive to responsibility. If this is so, we may be increasingly perceived by our students as a self-anointed elite who place ourselves above account for professional misconduct. This is not likely to reinforce students' appreciation of the need to sacrifice present comforts for honor when they are confronted with opportunities for self-indulgence at the expense of their clients.

There is, of course, no Code of Professional Responsibility for law teachers. If there were a code of restraints, it might have three canons. The first would adjure that law teachers are obliged to deliver fair value to all students. Thus, law teachers should meet all scheduled classes, well prepared to transact a full session of business; rescheduling work should be the rare exception and only for a reason good enough to be stated. A second canon would adjure that law teachers so demean themselves as to avoid any reasonable suspicion that they have used power over students for personal benefit or in a capricious manner. Consequently, law teachers should make their grading as open to review as circumstances admit, and avoid sexual contact with students who are subject to their power. The third canon would adjure that law teachers maintain strict standards of integrity in their scholarship and in other professional dealings. More specific constraints might restrict any dealings that call into question the motives of the scholar, such as presenting as a scholarly opinion research done in the pay of an undisclosed client or sponsor. Standards for law teachers should be much higher than for other academics who do not share directly our responsibility for the behavior of professionals who will deal in power.

I do not relish for anyone the task of drafting such a statement of good practice. One might hope that it is not yet necessary and that standards of academic conduct are understood and observed well enough that legislation is not called for. I am acquainted, however, with enough incidents of short selling, abuse of power, and academic fraud that I must wonder whether there are not some law teachers who do not recognize a special professional responsibility. There may be some who fail to see that the standards by which their conduct is to be judged are higher than those properly applicable to academics who are engaged in a purely intellectual pursuit and who have no responsibility to serve as models for professional behavior.

An appropriate process for dealing with transgressions is also necessary. With great diffidence, I suggest that some means is
needed to reinforce our deans, who are generally in a weak position to deal with offenders. Perhaps the law faculty can itself provide some reinforcement; the action of approving standards of good conduct would be one way to try. But most deans, nevertheless, will have incentives to avoid confrontations except in the most blatant cases. What may be needed is a regular audit of the dean's management of this phase of his responsibility. An appropriate time for such an audit would be the occasion of decanal reappointment; even deans having no stomach for an extended tour of service might receive some reinforcement from the fact that their performance of duty in such matters is a proper subject of evaluation. The absence of any such system of accountability for the dean leaves him in the posture of a volunteer when he deals with any but the most egregious misconduct, and also creates the wrong kind of expectation in law students about their own accountability for performance of professional duty. If there is no method by which the university or the law faculty audits the performance of the dean in regard to matters of faculty conduct, one would be forced reluctantly to admit that others—student governments, visiting committees, alumni associations, and accreditation inspection teams—would be justified in performing the function.

The obligation of law faculties to make themselves accountable for the performance of their professional responsibilities will sometimes conflict with the intellectual pursuit that is the main business of the institution. For example, there may be academicians of great capacity who are not as sensitive as one might hope to the duties described. In such circumstances, some accommodation must be made. But accommodation should not always be in favor of protecting the intellectual pursuit. Great scholars are not entitled to immunity. If there is a great scholar who will not perform his duties, or who abuses his power, it would seem necessary that he be assigned some tasks other than the teaching of professional students in law.

B. Student Conduct

Establishing and enforcing standards of student conduct pose similar problems. Again, the traditional enforcement mechanisms have been weakened, not only by loss of decanal authority, but also by rising expectations of due process. One need not regret the passing of the authoritarian deanship to be puzzled about how to replace it. Law students who observe their law schools as flabby institutions incapable of dealing with dishonesty are thereby diminished in their pride and sense of responsibility for their own professional conduct. Wisdom begins with the rejection of the deterministic premises that
many of us take to issues of correction. There is a vast difference between the kinds of controversies presented to criminal courts and those presented in professional student disciplinary proceedings. Law students seek entry into positions of high trust; it is not too much to expect them to assume full responsibility for their behavior. Forget insanity as a defense. Forget psychiatric rehabilitation as an obligation of the school. Ignore the plea that serious misconduct is the product of anxiety and pressure. Anxiety and pressure are pervasive in professional life and professionals are responsible for maintaining their own mental health.

Thrusting responsibility on our students need not require the use of Draconian penalties. Student discipline is not limited to the remedies of suspension and expulsion. Providing for alternatives in non-professional schools may pose some problems, but there is no problem for law schools. The most appropriate sanction for almost every form of misconduct is simply recording the event. The important consequence of recording the misdeed is that it is then subject to review by those responsible for admissions to the bar. The lawyers' Code of Professional Responsibility imposes on deans and faculties a responsibility for cooperation in the work of excluding from licensure those who are unqualified. Most decisions to exclude an applicant on ethical grounds are not properly based on single acts of misconduct, but on a pattern of behavior that reveals that the candidate is not deserving of trust. It will thus be an exceptional case in which a student is actually excluded from licensure by reason of a single reported incident of misconduct in law school. To be sure, no student would want to be revealed to the bar examiners as a moral risk. None can reasonably deny, however, the right of bar examiners to the information needed to make their judgments. It is improper for deans and law faculties to conceal the pertinent information.

Some deans and faculties have undoubtedly engaged in such concealment from time to time. This behavior is motivated in part by charity and in part by overconfidence in the rehabilitative effects of warnings. In fact, it is rare that a law school would have sufficient information to know whether a single act of misconduct is an isolated event in the life of the wrongdoer or a revelation of general untrustworthiness; they have even less capacity to know whether offenders have rehabilitated themselves. Given the inherent limitations of their own knowledge, law schools that give false reports of clean records to bar examiners when knowledge of serious misconduct

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88 See ABA Code of Professional Responsibility EC 1-3 (1975).
is available act in grave disregard of their responsibilities. In general, law schools should record school-related misconduct bearing on the student’s capacity to perform professional work honorably, including betrayals of trust and the seizing of unfair advantage. Specifically to be recorded are any acts of cheating on examinations, plagiarism, credentials fraud, financial aid fraud, larceny, library abuse, and the gross neglect of poor clients’ affairs. Law schools that fail to deal effectively with such conduct are, in effect, teaching indifference and professional irresponsibility.

One cause of unethical flabby ness on the part of some law schools has been a pardonable reluctance to face issues of fact. No one wants to be cast in the role of juror or witness, nor does anyone wish to thrust such roles on others. These, however, are not new problems. Our legal system has had long experience with the means of overcoming such obstacles. Thus, law schools are justified in requiring the cooperation of students, making service as witness or trier of fact a compulsory duty. The creation of such a shared duty not only enhances the effectiveness of the procedure, but also reinforces the mutuality of the duty to observe appropriate standards of conduct. Insofar as the only outcome of a factfinding proceeding is the recording of an event for later reference to bar examiners, the process need not be modeled on criminal proceedings. Most inappropriate is the requirement that a trier of fact be convinced beyond a reasonable doubt that the event in question occurred; law teachers and law students always have doubts, and the licensing authority is entitled to be informed even if some members of the school are able to conjure up some doubt. Convincing proof should suffice to support the making of a record that can itself also include the denial of the apparent wrongdoer.

C. Contacts With Lawyers

In regard to matters of conduct, law professors are less effective as models for students than are practitioners. This is an intuitive judgment, but one that is not likely to be disputed. It imposes on university law schools a duty to provide systematically for some contact between students and lawyers deserving of emulation. Calling upon such lawyers to preach on ethics is not likely to have much effect. Using practitioners to teach basic courses may be more effective and may also be an economy, but is likely to involve a substantial sacrifice of substantive content unless extraordinary care is used in selecting practitioners who are also effective as theoretical teachers. What is needed is more imagination in contriving small roles for prac-
ticing lawyers to play in courses of instruction conducted largely by academicians. Traditional moot court using lawyers as judges is an example that might be replicated. Perhaps as important as the sharing of work between students and practitioners is the opportunity for social contact between them.

One obstacle to greater use of practitioners is the social gulf that has developed between professors and practitioners of law. This gulf is partially the result of differing interests and values, but it has probably been increased by the development of a national market in law teaching, which has surely reduced the proportion of law teachers who are acquainted with many lawyers in the community in which they teach. I have no suggestions for bridging this gulf, but perhaps taking notice of it may help.

It must be granted, again, that the inculcation of moral standards is difficult. Law schools cannot possibly reverse any pervasive trend toward lower standards of behavior. In ethical matters, as in all others, the legal profession is a part of the society and will do its bidding. If mainchancing is the order of the day, our graduates will be among the best of the mainchancers. But no one is in a better position than law schools to try to prevent such disintegration. Even if there is no connection between the intellectual enterprise to which we are committed and the problem of lawyer behavior, we cannot neglect so important a matter merely because it is distasteful. As we accept the benefits of professionalism, we must pay our share of the price. The hair shirt is ours.

**CONCLUSION**

Much that I have said may be disagreeable. In particular, the views I have presented conflict most sharply with those favoring a greatly enlarged and costly effort within the university law schools to improve the competence of American lawyers. These views will not be well received by many law students who, in their natural insecurity, often crave instant practicality in what they are asked to learn, nor by those who are mistrustful of the process of moral judgment, particularly that of bar examiners. And some will see in my remarks a treasonous indifference to the status of the profession.

In response to this last objection, I have a word in defense. If law is properly a profession at all, it is so because it belongs to the public and exacts from its practitioners a commitment to the public interest. If university law schools are indeed professional law schools, they share this commitment. Our calling as professional institutions is
to maintain that primary commitment by institutional self-restraint and institutional exercise of public responsibility.

Finally, I would add that both the competence and integrity of lawyers are the products of their own self-regard as individuals. If there is a way to teach competence or integrity, it is likely to be found in evoking students' pride. If we can convince them that we will adhere to our responsibility to the public even when it is not immediately rewarding or gratifying to do so, we can hope that they will be inspired to make similar personal sacrifices for the clients to whom they are responsible. But if university law faculties can be bought or intimidated or cajoled into accepting programs that are expensive cosmetics, we must expect our students to learn that lesson as well. When time or circumstance presses them to commit a shoddy deed, they will be more likely to yield on our example. Thus, it seems to me that the clamor for professional competence and integrity should lead us not so much to a direct curricular response as to a renewal of our sense of what it is that we stand for. I suggest that the values we can and should stand for are intellectual rigor, personal integrity, and a commitment to the future public welfare.