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If Wishes Were Horses: Reflections Without Footnotes on Legal Education

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Everyone has several favorite sayings, and two of mine are, "Shirtsleeves to Shirtsleeves in Three Generations," and, "If Wishes Were Horses, Beggars Would Ride."

I think there are serious flaws in how we train lawyers today and so I have some wishes I would like to actualize. This article is a brief discussion of some of the major flaws in legal training as I see them; some things I would do if I were starting from scratch (that's the wish, because we can't go back and start over again); and some modest proposals which could bring about significant change.

One can illustrate what's wrong with legal education by a hypothetical situation from medicine. Suppose that you were away from home in the United States and suddenly became blind in one eye. Suppose further that there were no hospital emergency rooms and no board certified ophthalmologists; that the only requirement for medical licensure was that a student, selected without any prerequisites, had to pass a series of largely non-clinical introductory courses in medical school in the basic areas of medicine over a period of about twenty-seven months and that the student then had to pass an academic medical examination. Where would you go for help? How would you find a competent doctor? Of course if you were in an area of any size there would be highly skilled eye doctors practicing either alone or in groups. But it would take some work to find one of them.

The example is hypothetical for medicine but largely true, in my opinion, regarding the law. Legal education today, unlike medical training, is an undergraduate endeavor (although usually postponed until the law applicant has completed a prior college education); the law school is almost entirely isolated from the practice of law, so that there is nothing like the teaching hospital component in law school; legal education is very short (I usually say twenty-seven months); there are no prerequisites for studying law, and there is very little real legal specialization. After twenty-seven months of mostly introductory academic law courses, a graduate is immediately licensed, upon passing an academic examination. Since there are no specialties like those

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in medicine, there are no residencies. Everyone is left alone to find his or her own way. The best students usually apprentice to large law firms and learn their craft that way. Most other graduates also find their way, but is this a good manner to go about training lawyers?

Now the wish. What if one could start fresh? What would one do? I suggest one of two routes, patterned after the fields of accounting or medicine. The accounting pattern would involve the academic training of prospective lawyers in an undergraduate, post-high school setting; would include a severe academic test and a practicum for those who wanted to become certified attorneys at law; and would leave it to the law firms to finish the professional training process. The remainder of law graduates could practice law, but they would not be "certified" attorneys at law and therefore would not be allowed to do some legal work.

The other pattern is to track medicine. Law school could begin after four years of college or earlier, but law school would require and test for some prerequisites, most importantly a basic facility with the English language. Some other prerequisites would be a basic understanding of our political and constitutional system, accounting (some students fail to realize that law is essentially a business-oriented endeavor), economics, and maybe psychology and statistics. Law school proper would be a mix of strict academic work at first, and then further training in a law school, full service law firm context—the analogue of the medical school teaching hospital. It would progress from academic courses to supervised apprenticeships. Legal training would move from the "academic" to the "actual" world and it would provide paths by which emerging lawyers could apprentice themselves to masters and learn an area of the practical art of lawyering very well. If a lawyer wished to become a board certified specialist, that option ought to exist. The length of study and of an apprenticeship would vary with the kind of law selected for concentration. If the profession were starting over and followed one of the two paths suggested, the law school curriculum would be in line with the current practice of law and remain so, because of the on-going cooperation between the teaching and practicing branches of the law.

If the profession were starting over, it also might want to look at the number of potential graduates produced. It has been, and remains, anathema to talk about restricting the number of attorneys we license, but I see nothing inherently wrong with limiting the number of law graduates in some situations, and the present may be such a time. The public discussion on this issue is never joined. My practicing colleagues worry about numbers. The response is usually that there are huge unmet legal needs in America. That response fails to admit,

what I think is a fact, that while there are huge unmet legal needs, needy people can't pay adequately for the services they require. In other words, the private sector of the bar cannot fulfill the unmet legal needs which do exist without some of it going bankrupt. Therefore, flooding the country with lawyers will not solve the problem. That only corrodes the legal profession (if it is one any longer) by increasing the competition for paying clients, and exacerbates existing problems, particularly discipline, since it is difficult for hungry people to be polite. If the legal profession does not provide an environment for the economic health of its members, that is a dangerous situation.

What then *can* be done? I would continue the present system, since it can't be reformed overnight and since the best students from the present system will continue to find something like medical apprenticeships and become accomplished lawyers. But I would also broaden the avenues to study, release the law curriculum from the tyranny of the bar exam and slowly create full service law school, law firms which would be the law school analogue of the medical school teaching hospital. Specifically, I would allow students to begin law school after two years of college as well as keep the present system of admission after the undergraduate degree, so that the system is more fluid. This expanded program would mean that some students would receive a law degree at about age twenty-one and then could continue learning through an apprenticeship. Some might stay in school, and acquire specialized skills in a law school law firm setting. Other students, especially if they entered early, might feel free to drop out of legal training entirely. The student could take or finish an undergraduate degree and leave the law behind. As it now is, almost everyone finishes the first year of law school and by then, few can bring themselves to leave. The main reason for allowing students to enter law school after two years of college is the hope that formal legal training for all students could be extended. Law school would become a five or six year program.

I know of no convincing argument for requiring a college degree before studying law, other than that 20-year-olds lack maturity. But if we want more mature students, we could require some minimum amount of work experience, or Peace Corps-type service, before a person could enter law school. Work is a good maturing process. There is clearly no reason for delaying law study because of its subject matter. The law is no more conceptually challenging than poetry, mathematics, theology, physics, philosophy, accounting, astronomy and most of the other college courses that undergraduates take. If we could let students begin law school after two years of college, we could keep some of them in law school for a longer period of time,

and we could then fashion more specialized courses and so increase the competence of graduates.

I would experiment with the diploma privilege, to extricate law students and law schools from the pressure which the bar exam places on the curriculum. Most students take about the same courses in a particular jurisdiction, based on the subject-matters covered on the bar exam. The options for students should be greater. An accountant who knows that she wants to practice tax law may not want (or need in law school) to study constitutional law, or procedure, or evidence. Without a bar exam to take, students could take advantage of a variety of options, more suited to their career goals.

If abolishing the bar exam is too great a hurdle, I would hope that students could sit for some kind of exam after they have taken a set number of courses, or that the bar officials would change their examination so that it could still serve whatever function the states want to place on it but that it would not exert the weighty impact it now has on the law school curriculum.

At the same time that the law schools would be increasing, in terms of time, academic law training and the actual practice of law need to come closer together in a more formalized fashion. Everyone knows that many law professors practice law, and every law professor constantly hears students praising the value of clerking, which the student views as the "real world," as opposed to the unreal world of law school. Let's recognize these realities and institutionalize in law schools both the more academic and the more practice-oriented aspects of legal training. The separation of legal training from legal practice perhaps served a meaningful purpose at one time, but the separation is no longer justified; nor is it sufficient to allow a partial integration of the two sides of practice only in the litigation area under the guise of a "clinical" component. The law school should be, among other things, a practicing law firm. *Real* specialization may emerge out of this restructuring of legal education. *Real* apprenticeships might develop. We ought then to be able to set up computer banks and match law graduates with law jobs more accurately and effectively.

If none of the foregoing is possible, one thing is. Every law school, as presently structured, could do a much better job in developing each student's skill in legal research and writing. That is one thing that can be taught well in a largely academic environment. If writing skills were polished and honed during all three years of law school, and if every law graduate were truly an expert in research, writing and drafting documents, the possession of such skills would give to every law graduate a salable craft and a reasonable sense of self-esteem. It would thus help students find meaningful apprenticeships and also to feel better about their calling.

I would also require that every student take a rigorous course in English legal history, in order to learn about the grandeur of the law, dating back to twelfth century England, which in our current terminology would then have been called a backward or third world country. This "backward" England, in its isolation, was creating and polishing a jewel in its legal system, and students ought to know about it. It will help them to understand that even in their dreary hours, lawyers are making justice work. We could demand that students know this history, as well as our own Declaration of Independence and early constitutional history. Finally, I would require that every student acquire some solid notion on which to ground rights and obligations.

I do not despair that change is possible. Ideas do have consequences, and people do affect the course of events, but it will not be easy to put into place some or all of the proposals I have just suggested. Law firms, for example, will resist the law school full service law firms as a threat to their business. But in a small or medium-sized state, with one or two law schools, some change might be possible. A strong and persuasive Dean, with the cooperation of the faculty, and some influential members of the state bar association, could persuade and elicit the support of the supreme court and the legislature to create a new model of legal training. It could be an exciting adventure.

