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The Duty to Deliver Competent Counsel

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THE DUTY TO DELIVER COMPETENT COUNSEL

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Professor Kelso presents a statistical analysis of the procedures involved in the selection, education, and training of lawyers. He sees many problems with the current system and discusses various solutions. The most provocative alternative appears to be the proposal that the multi-state bar examination be given after the second year of law school.

Our Code of Professional Responsibility provides that every lawyer should assist the profession in fulfilling its duty to make counsel available.[1] Success in this endeavor depends in large part on the number and quality of available lawyers. There are many factors influencing the quality and availability of lawyers.

For example, the number of useful lawyer-client contacts could probably be increased by better publicity about legal services. A study in Detroit by sociologist Gresham Sykes suggested that the biggest obstacle to the greater use of lawyers is not inadequate income; rather, it is the absence of perceptions on the part of potential clients that seeing a lawyer would be useful or appropriate. It would be helpful in this regard if lawyers were allowed to publicize their specialties or areas of concentration in the telephone book or other appropriate lawyer listings.

Concentrating on the short run, there may be, as some suggest, a pent-up demand for alternative dispute settling mechanisms such as mediation. These demands might become the focus for law reform or experiments by practicing lawyers. The cost or financing aspects of legal services could be improved by better office technology, computer research, legal assistance, and prepaid plans or legal insurance.

For the long run, however, there is greater promise in improving our systems for the selection, education, and accreditation of lawyers. It is here suggested that the range and depth of professional reflect certain important graduates and new bar admittees is unduly inhibited. An analysis of the dynamics of the situation follows.

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1. ABA CODE OF PROFESSIONAL RESPONSIBILITY No. 2.

The cause of this unfortunate inhibition is an unintended and unforeseen interaction among: (a) the law school admissions process; (b) the traditional required curriculum; and (c) student perception of bar examination requirements and what is needed for success as a lawyer. If we are seriously interested in helping our profession fulfill its duty to provide competent counsel whenever needed, we should urge law schools and bar examiners to give close attention to these inhibiting interactions. With respect to improving the competence level of our practicing bar, more harm than good may be resulting from the bar examination process and the ABA's requirement that law schools offer a traditional "core curriculum." If so, remedial action should be taken promptly.

First of all, we are admitting to law schools these days a very large number of students who bring with them the best academic credentials in the history of the legal profession. Approximately 100,000 college graduates each year ask that their transcripts be sent to law schools. Less than 40,000 are ultimately enrolled. The pool is probably the best educated group of applicants ever to present themselves for a professional education. Let us look at the thrust of the selection process that is utilized by law school admissions offices.

The law school admissions process operates primarily on the basis of undergraduate grade averages (UGA) and LSAT scores. UGA and LSAT are given a combined weight at each school according to the records of its own students. This results in a prediction index for law school grades in each school that is accurate on the average to about .45[2]—a correlation equal to the relationship be-

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2.

CORRELATIONS BETWEEN TESTS AND GRADES

	Undergraduate Grade Average	LSAT	LSAT and UGA	Law School Grade Point Average	LSAT and LGPA
LGPA	.37	.36	.45		
MBE	.32	.51	.55	.58	.79
Bar Essay	.30	.36	.38	.54	
P/F on Bar	.24	.32	.32	.47	
Total Bar Exam Score	.32	.51	.57	.50	

tween height and weight. Research has not been able to improve the level of *grade* prediction. We have tried without success to use interviews, background information, recommendations, and a rating scale index of personal qualities. Nothing better predicts *grades* than UGA and LSAT.

The relevant inquiry thus involves determining what *competencies* are tested by the examinations which produce the grades predicted by the admission process. In other words, what competencies or potentialities are tested and predicted by UGA and LSAT? The Law School Admissions Council conducted research on this question at 15 law schools. An analysis was made of the content of actual examination papers that were graded, exchanged, and regraded by 15 law professors. It was discovered that grades correlate with the discovery of major legal issues and the recall or recollection of arguments "both ways" while driving toward a conclusion as to what rules of law are relevant and how they apply to the facts. There also was a correlation between grades and the length of discussion on major issues and the use of legal jargon and connectives such as "if," "however," and "because." These analytical and writing skills are important for a lawyer, but professional competency also requires other clusters of abilities. Are those other clusters adequately taught and tested? Is the admissions process sufficiently receptive to candidate aptitude in these other skills? Probably not; and yet the bias toward analytic skills increases in law school.

The 36,000 first-year law students already determined by UGA and LSAT to have ability in and/or to be receptive to instruction in legal analytics, take a fairly universal required curriculum during the first year at all law schools. In that first year, students engage in a rights and duties analysis of hundreds of appellate cases in the realms of business, property, injuries, and procedure. They get very little practice in finding or providing facts. They are seldom challenged to make an accommodation of values and reduce that accommodation to precise statements. These skills, however, must be used when drafting legislation or when practicing preventive law by counselling clients, planning transactions, or drafting contracts or wills.

Of course, case analysis is basic, and it is still agreed by almost all observers and participants that the first year in law school is an exciting time in higher education. Students begin to see society in a new way. They gain feelings of power and competence in many realms of human affairs and they form attitudes about what it

means to be a lawyer. These are all good things. However, the evidence suggests that most of the advanced required courses involve more of the same. In addition, when students choose electives, most of their choices appear to carry forward an image of the lawyer's role in society as an advocate or judge in litigating matters of business, injuries, or property. Although it is not known in quantitative terms exactly what lawyers are doing in society, the indications are that very few lawyers concentrate on trying cases. On the other hand, the relative amount of office work continues to climb. We are becoming a profession which facilitates relationships between people by plans that relate to the future.

In clinical and other elective courses (usually at least ½ of the hours required for graduation) there are many opportunities for law students to broaden their perspectives and to learn additional practitioner skills. However, there are two disturbing problems. First, the enrollment in clinical courses usually must be limited because of the need for close supervision. Thus, enrollment in clinical courses does not exceed 7 percent of the total elective course registrations in the law schools. The other phenomenon is that, although there are many non-clinical courses which involve simulation of law office practice or problem-solving other than litigating cases, these courses do not draw large enrollments unless the subject is on the bar or closely related to the required curriculum. There appear to be undefined factors contributing to this situation.

About a year ago, Professor Louis Brown, who teaches at Southern California, estimated that about 85 percent of the courses taken by students were chosen entirely, or to a large extent, by bar examination requirements.[3] His estimate was recently given substantial and quantitative corroboration by two research studies undertaken for the Council on Legal Education for Professional Responsibility, Inc., by Gordon Gee and Donald Jackson. Their first study[4] was of law school course requirements and the requirements of bar examinations. They concluded that we have an informal national law school bar-related required curriculum of about 63 hours.[5] In a second study, soon to be published, they have taken the further step of studying actual enrollments in the elective courses by a large

3. Brown, *The Call of the Question*, 1 LEARNING AND THE LAW 56 (Fall 1974).

4. E. GEE & D. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA (1975).

5. *Id.* at 39.

number of law schools. The details are illuminating.

Gee and Jackson obtained enrollment figures for over 5,000 elective courses in which there were a total of 210,524 course registrations.[6] The average class size in the 2,700 bar-related courses was 56. The average class size was only 25 in the 2,400 courses not clearly related to any bar examination. Thus, less than 20 percent of the total hours of credit earned in law school elective courses was attributable to subjects not related to the bar examination. Included in this figure were 636 clinical courses which accounted for 7 percent of total registrations.

When it is recalled that the required courses at law schools are related closely to bar examination subjects, it seems probable that only about 10 percent of the total law school credits earned by law students have no relation to bar examinations.

Whether that is good or bad depends on what is thereby excluded from the actual curriculum of most law students. Conversely, this is what is tested on bar examinations. Examination of Gee and Jackson's listing shows that the 2,400 law enrollment courses deal with interviewing, negotiation and counselling, legislation, interdisciplinary work, international law, jurisprud-

5. (Cont.)

INFORMAL NATIONAL LAW SCHOOL CURRICULUM

1.	Business Organizations	3
2.	Conflict of Laws	3
3.	Constitutional Law	3
4.	Contracts (2 x 3)*	6
5.	Criminal Law	3
6.	Equity	3
7.	Ethics	3
8.	Evidence	3
9.	Family Law	3
10.	Procedure (State & Federal) (2 x 3)*	6
11.	Property (Real & Personal) (2 x 3)*	6
12.	Research and Writing	3
13.	Taxation (State & Federal)	3
14.	Torts (2 x 3)*	6
15.	Trusts and Estates	3
16.	U.C.C.	3
17.	Wills	3
	Total Semester Hours	63

* Our data reveal that four courses (Contracts, Procedure, Property, and Torts) are usually two-semester courses and therefore should be assigned six semester hours (2 × 3 = 6). p. 39.

6. Gee and Jackson: Electives in American Legal Education

6. (Cont.)
Rank Order of Categories by Number of Category Registrations — Compared with Average Class Sizes and Number of Category Classes.

Rank	Category # and Name	Total Registrations	Average Class Size	Total # Classes
1.	Commercial Law, Debtor-Creditor Rights and Remedies	19,870	68.52	290
2.	Taxation	18,087	54.48	332
3.	Estates, Trusts and Future Interests	16,848	66.07	255
4.	Professional Skills, Training and Functions	15,018	23.61	636
5.	Business and Nonprofit Institutions and Finance	14,270	56.40	253
6.	Regulations of Business and Industry	10,117	45.99	220
7.	Administrative and Constitutional Law	10,006	44.47	255
8.	Criminal Justice: Law, Process and Procedure	9,595	47.98	200
9.	Civil Justice, Jurisdiction and Procedure	9,264	65.24	142
10.	Evidence and Proof of Fact	8,763	87.63	100
11.	Applied Legal Education	7,882	19.66	401
12.	Labor-Management Relations	6,736	37.63	179
13.	Family Law	6,141	57.39	107
14.	Basic Property Concepts, Real Estate and Finance	5,776	50.67	114
15.	Interdisciplinary and Allied Skills	5,363	28.23	190
16.	International, Foreign and Comparative	5,136	22.43	229
17.	Federal Practice and Procedure	4,524	51.41	88
18.	Remedies	4,327	61.81	70
19.	Miscellaneous	4,010	27.28	147
20.	State Law, Practices and Procedures	3,989	76.71	52
21.	Legal Profession, Ethics and Legal Education	3,868	53.72	72
22.	Natural Resources and the Environment	3,632	26.71	136
23.	Law and Social Issues	2,861	23.84	120
24.	Legal Theory, Philosophy and History	2,801	22.59	124
25.	Torts and Compensation for Injuries	2,395	40.59	59
26.	Land Resources Policy and Planning	1,999	36.34	55
27.	Patent, Copyright and Trademark	1,413	27.17	52
28.	Legislation and Legislative Process	1,204	26.17	46
29.	Admiralty	1,146	30.16	38
30.	State and Local Government Law, Policy and Relations	1,124	22.04	51
31.	Discrimination and the Law	1,104	19.71	56
32.	Juvenile Law and Process	917	23.51	39
33.	Contractual Obligations	238	21.64	11
	TOTAL	210,524	41.37	5,089*

* Note average number of category classes, assuming equal distribution, is 154.21 (5089 divided by 33).

ence, the formulation of law and policy on natural resources, the environment or social issues, and state and local government law and policy. A study recently conducted for the National Conference of Bar Examiners by Al Carlson of ETS shows that bar examinations test the same skills as do the LSAT and law school examinations.

It is submitted that more than 10 percent of a law school education should be devoted to study of things other than appellate cases. Lawyers need a lot more than case analysis. Many of the other "practice" skills can and should be implanted during law school years. Students seem to sense this with respect to clinical courses. It is difficult to see why this need is not translated to other kinds of courses that would broaden their range of professional competencies. Three factors seem to be at work. First, students may have unrealistic perceptions of what is important in practice, and those perceptions may be generated in substantial part by what they do in the first year. Second, students may feel pressure to confine their education to bar examination subjects—except for their very limited practical excursions into the clinic. Finally, they may feel intellectually comfortable when taking courses that relate closely to their first year's studies. These factors and others may be combining in various ways.

Whatever the cause, there is a problem. Some remedies can be suggested for the law schools and bar examiners and for both groups working together.

In the short run, the law schools should encourage or require a better balance of enrollment in courses now classified as electives. This might be done by requiring some of them, but the notion of building more rigidity into law school programs should be restricted since that is already a part of the problem. Perhaps students could be required to choose some hours of professional competence instruction from a list of electives (as some schools now do with respect to requiring a seminar or a course which calls for a research paper or a drafting project). Perhaps the law schools could embark on guidance programs presented in print or by dealing with individuals. However, so long as the bar examination picture remains unchanged, such efforts probably would not be very effective.

A better strategy would be to assign bar related courses to faculty members who will make the greatest use of pre-litigation or non-litigation problems which call for responses more complex than predicting or advocating the outcome of litigation. Material for such

problems could be gained from the operation of a clinical program, by law faculty members taking leave to practice with a firm, or by having practitioners join in the planning or presentation of courses. Professor Millard Ruud, Executive Director of the Association of American Law Schools, has long advocated that law teachers and practitioners should collaborate on the production of teaching materials from lawyer files. Of course, there are problems of preserving client confidences. Files can be "sanitized" before being turned over to professors to alleviate these problems.

Since part of the problem may be a "mind-set" created by the first year in law school, it might be better to reformulate that first year. At the very least, experiments should be undertaken in the first year to see what effect some other configuration would have on the elective choices of law students and, thus, the combination of competencies that they bring into practice. The faculty of the law school at the State University of New York at Buffalo recently decided to create an experimental section in the first year class in order to test whether a more competent breed of lawyers would result from a more varied approach in the first year. Those faculty members who intially opposed the idea argued as follows: The analysis of legal doctrine through appellate cases is a fundamental skill which must precede others. Therefore, intrusion of other methods may dilute its intensity. The traditional courses—contracts, torts, property, civil procedure, criminal law—contain basic building blocks. Most professors are realists now, so their teaching does include reference to legislative developments, social context, and policy perspective. The first year, having provided the law schools' most dramatic success, should not be meddled with.

The group with whom I agree would change the first year curriculum, or at least conduct experiments on it. The argument is that emphasis on the analysis of legal rules leads to a distorted view of the legal process that is difficult to correct in later training. It detracts attention from the application and operation of rules and institutions in real social situations; neglects institutions other than the courts as sources of rules, sanctions, and modes of dispute-settlement; and diverts attentions from the planning and preventive aspect of law and law practice—planning for individuals such as by drafting wills and contracts, and by changing the law's standards through legislation.

The argument continues that there is no reason to believe that modes of analysis used by lawyers in contexts other than appeals are

sloppy. More systematic and rigorous analysis of legal problems and processes might result from considering a broader range of problems in the first year. Indeed, the traditional division of courses is no longer functional; the real problems cut across the categories of the old core. There are other than court-made systems of regulation; and students now become too habituated to thinking in terms of hornbook rules and the methods of law growth which characterize judicial decisions, i.e., reasoning by analogy, finding exceptions, and moving from reasons already recognized by authority. There is almost no future perspective in the old core since problem solving is most often conducted within the constraints imposed by the judicial process. The realism which has become part of the appellate tradition has solved problems in various ways which cannot rationally be related to the teaching program when the old doctrinal categories are the organizing principle of the first year. The success of the first year may be gauged falsely. If it were so successful, why is not there a greater momentum of interest into the second and third years? It may be that students are overtrained in case analysis and hardened against other approaches and, therefore, limited in their perspectives. Until alternative approaches are tried, the success of the first year cannot be validated with any degree of scientific rigor. The faculty at Buffalo responded to these arguments by creating the experimental section which will provide us with some empirical data by which to judge the respective arguments.

Antioch School of Law has undertaken a very different approach to legal education. The school has assumed an institutional obligation to study the processes of lawyering as they may be observed in the clinic. For the past 3 years there has been heavy emphasis on clinical work. Students are introduced to live cases in their first year. They study interviewing and counselling as well as professional ethics in their very first semester. In a few years there should be some convincing evidence as to what difference this may make for the career success of a lawyer.

Such studies are very important. For the long run, both educators and bar examiners need to learn more about the nature of lawyer competencies and the distribution of lawyer work. We do not now have an empirically based definition or a set of criteria for the competencies involved in effective performance of various lawyer roles. The Law School Admissions Council, reacting to the *Duke*

Power case,[7] has decided that its top research priority should be to determine how lawyer competencies can be measured. If they can be measured, there would be a basis for enlarging admission programs beyond the prediction of first year grades. In addition, law school programs and bar examinations could then be validated against career performance.

It is estimated that this research, spread over a number of years, may cost over a million dollars. Spencer Kimball, director of the American Bar Foundation, has estimated that his organization will spend a comparable amount on studies dedicated to a similar goal. In addition, investments are being made by the law schools for faculty time and effort in clinical programs and other programs in which lawyer performances are simulated.

What is presently available to the legal profession is a good theory of appellate advocacy. Steps have been taken toward developing a comparable theory of trial advocacy. Beyond this, however, we must find comprehensive theories on legislation, on preventive law practice, and on such skills as negotiation and counselling. It is hoped that these various research projects will at least provide fruitful working hypotheses. It is suspected that we will discover that successful lawyering calls for the exercise of some general set of clinical skills such as those which the doctors believe are at work in their profession—that is, an ability to generate alternative hypotheses, to construct confirming and disconfirming tests, to seek additional facts to refine hypotheses or perform better tests, and to exercise a general "strategy skill" for deciding in what order to address these various tasks. This includes deciding when it is time to act in order to get feedback that will set off another round of hypotheses and tests.

An important component of this kind of research is the ability to draw a scientifically accurate sample of lawyers. Dean Frank Walwer of Columbia has proposed that an exit card be filled out by every graduating senior. Placement officers in many law schools are already having such cards prepared. What remains is to work out a

7. Griggs v. Duke Power Co., 401 U.S. 424 (1971). *Duke Power* was a class action by black employees alleging discrimination in hiring procedures. These included the requirement of a high school education or its equivalent as a condition of employment. The Supreme Court held that the employer was prohibited by the Civil Rights Act from requiring these qualifications where the employer has failed to show the relationship between successful job performance and the qualifications in question.

system to protect privacy and yet have the ability within a computer system to draw scientific samples. Cooperative efforts are being made to create the system through an informal consortium of the American Bar Association, Association of Law Schools, National Association of Law Placement, Law School Admissions Council, and the National Conference of Bar Examiners.

This takes time. What can be done in the meantime to deal with the problem of over concentration by law students in a very narrow band of courses and competencies? Professor Louis Brown has proposed a very practical short run policy that could be adopted at little or no cost. This would also have an immediate and very constructive impact on legal education by encouraging instruction in professional skills. Brown has suggested that bar examiners simply enlarge and diversify the call of examination questions. A law examination, he says, should do more than challenge students to make analytic predictions of rights and duties.[8]

> More diversified calls of the question would exact pressure on law instructors to include material and teaching approaches beyond analytical legal rights. This would be good. It would help law schools come closer to total lawyering. Given the present bar examinations, law teachers and the curricula are held back. If the bar exam calls were more diversified, the teachers would come to enjoy a freedom from the need to stress the limited "what rights?" type of learning. They would be encouraged to give a wider range of instruction needed to equip students for effective lawyering.[9]

The National Conference of Bar Examiners should adopt Louis Brown's suggestion as a policy recommendation to all state bar examiners and to the governing board of the Multistate Bar Exam and the committees which frame MBE questions. I suspect that no other single step by any organization would have a greater impact on legal education by enlarging the competencies of law school graduates. I know that MBE question calls could easily be made more diversified, and this would happen very promptly if some encouragement were provided.

Unfortunately, this writer also knows enough about how organizations drift to predict with some confidence that the suggestions

8. Brown, *The Call of the Question, supra* note 3.
9. *Id.* at 58.

just made are not likely to be promptly implemented by either the law schools or bar examiners. Both sets of organizations will have to feel more strain about the problem than now is the case. The interaction process can be heated up by suggesting that the profession needs an entirely new set of relationships between bar examinations and legal education. What is needed are relationships which reflect certain important changes that have occurred since our organizational practices were set in place. Today, neither the LSAT nor the bar examination is performing the functions that it was originally designed to serve. In fact, the net result of their interaction may be doing more harm than good.

In the beginning, around 1950, the LSAT was designed to help find qualified law students among those who had low grades. Now, with the great flood of candidates, the LSAT operates to exclude many students whose grades would have qualified them for an opportunity to obtain a legal education a few years ago. Since law students are now so well qualified academically, the attrition rate has fallen from between 20-50 percent at most schools to below 10 percent. Most of those who are admitted to ABA-approved law schools today catch on quickly to legal analysis and clearly have the ability to pass any bar examination (at least in the absence of arbitrary failure rates).

A similar change has occurred with respect to the bar examination itself. Bar examinations arose when law students were admitted to law schools without a college degree. Many students prepared by working with lawyers and there were many unapproved schools of low quality. Today we have a high quality national law school accreditation program which tends to insure at least a minimum floor for the calibre of every accredited law school. There are few unapproved schools outside of California. With this in mind, what purposes are served by a large national core curriculum and by requiring today's graduates to pass a bar examination?

The bar examination does require students to engage in a comprehensive review of legal doctrine in a number of areas of law to which students are introduced by the core curriculum. Second, by retesting these same general skills that are tested by law school grades, the bar examination provides a continuing comparison of the law schools (and, realistically, bar review courses) as training centers for legal doctrine. These results are defensible, although they are quite expensive in terms of lawyer and candidate time. The whole process might be more efficient if the law schools themselves

administered the comprehensive exam while the students were still in school.

There are several other effects which are harder to justify. In a number of states the bar postpones the ability of law school graduates to earn money as lawyers for 4 to 6 months—a period of time that is socially wasteful and humanely unconscionable. As has been shown, the bar exerts a powerful influence over law school curriculum offerings and choices. This control tends to result in a less professionally useful pattern of course registrations than probably would be the case without such control. It seems likely that student expectations of what lawyering will be like and their understanding of what lawyers consider the most important "practitioner competencies" are shaped to some extent by the requirements of the bar. Finally, the only credential information provided by a bar examination is that the individual passed or failed.

This situation can be improved by new relationships between the law schools and the bar. It would be better to free up at least the third year for elective choices made on the basis of professional or educational considerations untrammeled by fear of failing the bar. Accordingly, it is suggested that states offer the MBE at the end of 2 years in law school. An MBE score, whenever taken, should be given full faith and credit for a reasonable number of years in any state to which the student thereafter applies for admission.

Further, in view of the fact that the MBE and bar examination essays are testing the same array of skills, it would be reasonable for states to admit to the practice any candidate who has graduated from an ABA approved school and obtained a satisfactory score on the MBE. A state still might want to have candidates examined with respect to local rules of procedure and practice, including trial practice, before a candidate could conduct litigation in the courts of that jurisdiction. Such a state could give a one day essay and/or objective examination on these matters if it chose. Many do this today.

With respect to practicing law in ways other than litigation and, arguably, even with respect to litigation, there should be created something akin to medical boards in various areas of legal expertise. Passing such a board would provide a lawyer with qualifications he could use for placement purposes or in professional notices. Law firms and other employers might indicate the desirability or need to pass certain boards in order to qualify for employment. Like the MBE, these boards could be created on a national basis.

They should not be restricted to subject-matter areas, but should also be available for various professional skills. Like the MBE, they should be available whenever, after the second year in law school or after graduation, a student or lawyer felt ready to take them.

The MBE would enable the bar to compare the general level of law schools and law students, as it does now, and to keep both schools and students on their analytical toes. Presumably, the MBE could be enlarged to test for a broader range of competencies than litigation analysis. A trial practice board could supply courts with proof that those who conduct litigation have some mastery of rules and practice methods. Employers would get more specific evidence of competencies than they now get from law school grade point averages. Lawyers could be able to make a public statement of the boards they have passed, along with other information about their areas of specialty or concentration. This, particularly, would aid potential clients.

A total analysis of the subject would have to include two areas of increasing strain between legal education and bar examiners: minority admissions and instruction in specific courses as a prerequisite for taking the bar. It is important that these matters be discussed because the long run cooperation needed for a better meshing between bar examinations and legal education may be jeopardized by disagreements over these specific subjects.

For a number of years the law schools have been seeking additional minority students to add greater diversity to their educational programs and, ultimately, to the bar. Because the pool of minority college graduates is much smaller than the pool of Anglos, and maybe also because of the aftermath of *Plessy v. Ferguson*,[10] the average UGA and LSAT of minority students admitted to law school is lower than that of Anglos. Minority students suffer a higher rate of attrition in many law schools than do the Anglos. Now when they do graduate from law school, how are they faring on the bar exam?

A study just completed by Steve Klein for the California Bar Examiners shows that the average LSAT score for Anglos taking the California exam was 567; for Blacks it was 443; for Chicanos, 462. Based upon those figures and the high correlations between LSAT scores and bar examination grades (about .5), it was statistically

10. 163 U.S. 537 (1896) *Plessy* validated the "separate-but-equal" concept.

predicted that 60 percent of the Anglos would pass but only 18 percent of the Blacks and 21 percent of the Chicanos. The actual pass rates were very close to those statistical predictions: 56 percent, 17 percent, and 18 percent respectively.

Looking to the future, we know first, that both the Anglos and minorities who present themselves for future examinations will have higher LSAT scores. That can be found by looking at the data with respect to students now in law school. Predictably, those students should make higher scores on the bar examination. Second, it is just as predictable that arbitrarily lowering the pass rate on the bar examination (as is being considered in some states) will have a distinctly racial effect. I suspect that this racial effect would make the action constitutionally suspect and defensible only on a finding of a compelling state interest. It appears that bar examiners should adopt another stance. They should study the level of candidates whom they have in the past judged to meet their minimum level of competence and, before making adjustments with respect to passing or failing the bar, compare the qualifications of yesterday's students with today's. Of course, the law schools should be offering courses in legal analysis and writing for all seniors whose grades indicate that they still have a need to learn about these very important skills.

Let us now turn to special course requirements as prerequisites for practice, such as those recommended by the Clare Committee. I do not think that requirements with respect to federal jurisdiction, procedure, and trial practice should simply be piled on top of all of the other existing credential requirements. If the present bar examination were replaced by the MBE and offered at any time after the second year in law school, it is submitted that the Clare Committee recommendations could be defended as an appropriate qualifying procedure. Taken by themselves, they would give the federal courts some assurance of trial competence. As things now stand, however, they merely compound those narrowing inhibitions which tend to put all law students into a single mold—a mold which is becoming obsolete.

A plea should be made to state supreme courts on behalf of both bar examiners and law schools: Do not follow the Indiana Supreme Court's new Rule 13 which will require 52 hours of instruction in certain listed course areas as a prerequisite for taking the bar. This locks legal education into a curriculum which inevitably will become obsolete and it encourages overemphasis on analysis in the listed areas. Further, it starts us down the path toward balkaniza-

tion of legal education. The Indiana Court has also just passed a rule which provides that the graduate of any law school that has been certified by the highest court of the state in which the school is located is eligible to take the bar examination in Indiana. Thus we welcome into Indiana the graduates of California's "proprietary" schools. This would mean that Indiana would be sharing in California's problems and encouraging the proprietors. More important, however, the court did not publish tentative rules on these matters so that there could be public discussion of pros and cons before they became effective. In view of the many interrelated effects of what is done in legal education and in bar admissions, important developments should be given a little sunshine before they are hammered into place. In short, what is needed is a continuing dialogue between educators and bar admission authorities. Only by the kind of working dialogue which can be triggered by meetings such as this Conference, are we likely to make decisions and embark on programs that can best fulfill our duty to provide the public with competent counsel whenever needed.

PANEL DISCUSSION

The following are excerpts from the panel discussion which followed Professor Kelso's address. Moderator for the panel was Mr. George Freeman, an Instructor at the University of Miami School of Law. In addition to Professor Kelso, the panel consisted of Mr. Thomas Cobb—Chairman of the Student Education and Admissions to the Bar Committee of the Florida Bar and a partner in the law firm of Mahoney, Hadlow and Adams; Mr. Talbot D'Alemberte —Chairman of the Florida Commission on Ethics, a member of the American Bar Association Counsel on Legal Education and Admission to the Bar, adjunct Professor of Law at the University of Miami School of Law, and a partner in the firm of Steele, Hector and Davis; Mr. Earl Hadlow—Past President of the Florida Bar, current Chairman of the Federal Judicial Nominating Commission of the Florida Bar, Chairman of the Designation Coordinating Committee of the Florida Bar, and a partner in the firm of Mahoney, Hadlow and Adams; Mr. Roland Nachman—Past President of the Alabama State Bar, current Vice-Chairman of the Permanent Study Commission on the Alabama Judicial System, Member of the Board of Bar Examiners of the Alabama State Bar, and a partner in the firm of Steiner, Crum and Baker; Mr. Samuel Smith—Member of the Florida Bar's Board of Governors, Lecturer

at the University of Miami School of Law, and a partner in the firm of Smith, Mandler, Smith, Parker and Werner.

MR. FREEMAN: *The first area of discussion is Professor Kelso's proposal to move the bar examination to after the second year. Perhaps a further step which he did not suggest is not having a bar examination at all. Instead, why not let the accreditation of the practicing lawyer go to the law schools?*

MR. NACHMAN: I would comment on the two alternatives separately. I have no real objection to having the bar examinations given at the end of the second year. I think this process would cause some difficulty, but I think it would certainly work better in states which have adopted the MBE.

As to the second question, we are talking about courts. The courts have the constitutional duty and authority to regulate admission to the bar, suspension of lawyers, and removal of lawyers. The problem is what the courts will do in the admissions process.

Bar examinations are a very imperfect method of determining who is unfit to be admitted to the practice of law and who should not be given a license to prey upon the public in a particular state or jurisdiction. We would not need bar examinations if the bar organizations, which usually operate as the arms of the court in the admission process, were able to supervise the law schools which were going to educate the students; the faculties of those law schools; the facilities of the law schools; the admissions requirements of the law schools; the grading process at the law schools; the number of electives that a student can take; and the number of required courses. However, they do not and there is no way that they can. Unless the courts abdicate their function of assuring the public that somebody who has a license to practice law at least has a certain minimum competence to do so, I would oppose doing away with bar examinations.

MR. SMITH: I think the problem is not when we give the bar examination or the subject matter of the test but rather what we teach in law school. Traditionally, law schools have followed the same educational pattern. They still teach *Palsgraf v. Long Island Railroad Co.* as the basis of torts, but nobody has exploding scales in railroad stations any more. In real property, we still read from a skinny little book by Moynihan and someone teaches you the passing of the twig. Yet no one in law school tells you where the grantor and the grantee go on a deed. You can go completely through law school, be on Law Review, be an honor graduate, be summa or

magna cum laude, and never see or speak to a client. Then that person goes to another examination which, I agree with Professor Kelso, no one knows whom it weeds out.

The recent graduate does not know where to go or what to do. He can research. He can handle an appellate argument, but he really does not know how to practice law.

Do we have a duty to provide competent counsel? Yes, and the only way we are going to provide for it is to teach the practice of law somewhere within the confines of law school. When I got out of law school about 90 percent of my class got jobs. Before that everybody used to get jobs. At that time a kindly legal secretary or beneficial lawyer would turn to you and teach you how to practice—a kind of internship. Today, though, 40 to 60 percent of the lawyers that graduate from law schools do not have anyone to teach them. These graduates are opening up storefronts; they are going into combined practices, three or four young lawyers, none of whom knows how to practice law. They force a conglomerate firm of three ignorant lawyers upon the public.

That is the problem. What Mr. Kelso said about testing is fine, but that is not going to be the answer. Until you have law students who graduate knowing what a fee is, what a contract is, and how to talk to a client, all the research and all the well meaning studies of *Palsgraf* are not going to help our profession. The result is that we are going to have these sophisticated people who know how to do high scale research come out into the public and face great malpractice cases. The key has to be that we have to reach back into law schools and teach the practice of law. If you allow the third year to be an elective and give the bar examination at the end of the second year, that is fantastic. On the other hand, if you do not teach any courses in the practice of law in the third year, what good is it?

The problem is not in the LSAT, not in the super-sophisticated testing programs, not even in the fact that after 3 years you have to go through two and one-half days to prove that you can practice law. Nobody is teaching anyone in these institutions, for the most part, how to be a full and complete lawyer. We just educate students to a sophisticated level, leave them and let them learn themselves. I think that is the problem.

MR. COBB: I think one thing we ought to consider is the protection of the public. I detect a flavor in the discussion thus far that some people have the idea that the sole function of law school is to train lawyers to practice law. I think many of you are probably

aware that this is not the sole purpose of a lot of law students. A few law students are going to pick up a few real property courses, or they are going to pick up a few tax courses, or they are using law as a springboard for more advanced scholarly studies. I think there ought to be room in law schools for this type of person. I think they contribute something to legal education, and I think a diploma privilege would unduly subject the public to a risk that people who graduate from the law school are not in fact qualified to practice law. I think there is a valid function in having difficult admission requirements.

I would certainly agree with Mr. Smith that more emphasis needs to be placed on practical application of legal principles in terms of counseling, negotiation skills, etcetera, which could probably best be learned through a period of internship. There has been some discussion in the bar that perhaps this should take place after graduation and after admission to the bar or on the basis of some kind of limited admission to the bar, followed by a period of a year's internship. A better way to approach the problem would be some form of certified internship program, probably offered by law schools, but not necessarily so. That is my idea of how to meet Mr. Smith's analysis of the major problem of legal education today. I do not think the way to go about it is to do away with the bar examination, or to reduce the number of subjects which the bar examination reaches, or to change the timing of the bar. You still have to have a bar examination and you still have to have bar admission requirements. Otherwise, you will indeed have people graduating from law school and delivering bad legal services to the public.

MR. FREEMAN: *I would next like to discuss the question of clinical education. Is the place for clinical education in the law schools or does it belong, as Mr. Cobb suggests, after law school?*

PROF. KELSO: I think you can do a great deal with clinical programs in the law school. It is easier if the law school is located within a large metropolitan area. Otherwise you have to resort to simulation techniques such as television and the like. We are doing a considerable amount of research on simulation by various kinds of devices. There is a great place for clinical education in law school.

According to the Gee and Jackson study, clinical courses are the third highest in number of courses offered, following business and evidence. The problem is that although they were fourth highest in registration, with 15,000, the average class size was only 23. Students wanted in, no doubt, but there is a necessity to limit the

size of classes in those courses which are most expensive to run.

There is a further problem involved in clinical legal education—the organization of legal education itself. Typically, the clinical law professors are the lowest people on the academic totem pole. Their objectives are a little different from the conventional faculty. They are not in there publishing for the law review; they are trying to relate to students, and they soon perceive that their professional careers are handicapped. At Indiana, and at most schools, we have brought on practitioners who say, "we would love to do your clinical training: that is what we do best." However, in a year they are saying: "I would like to teach Antitrust and get out of this clinical stuff." I think the problem is finding ways to motivate people to stay in clinical education. Several things can be done. First of all, I think the experience at Antioch will prove to be very favorable, and that this will tend to radiate to other law schools. The whole law school is built around a practicing law firm.

Second, there are training programs such as the ones at Harvard and, I believe, Columbia. These are graduate programs training teachers in clinical skills to fill this void. Additionally, the simulation efforts may be successful.

I think that the bar examination at the end of law school bothers schools. Therefore, they are not going to go way out and get over their heads in clinical programs, especially if they fear that it is going to lower the percentage of graduates who pass the bar.

I think a number of things are done to undermine clinical programs. My thesis really is that the bar examination system as we have it now, and the first year of legal education in terms of the way that students can see what law is all about, inhibits the teaching of "lawyering." We have to find a better way to handle the problem.

We have had experience with internship programs. They have been tried in New Jersey and Pennsylvania, and they were a resounding failure. The reason is that there are a number of lawyers who were very good teachers and who could help the students, but there were others who simply used the program for economic exploitation. On balance, the latter increasingly became the rule. The bar is changing. I think Mr. Smith portrayed it very nicely. Even in little towns, the lawyers are busy. They just do not have the time; they cannot afford to sit around all day and train someone else. The training has to be picked up in a different way. For these reasons, I do not think the solution is in internship programs. I do not think that the solution lies in "bridge-the-gap" programs. These too were

tried in Wisconsin and New Jersey but did not seem to work out either. I think that the solution is in the clinical programs in the legal education process, and if the bar and all of the interested constituents get together, we can solve the problem.

One final point. It occurred to me, as Mr. Nachman was talking, that the supreme courts of the states are indeed the ones which have the responsibility to the public for supervising admissions to the bar. The accrediting agencies in a sense are asking those courts to have faith in them. But the ABA, in its turn, has never brought these justices into that process except as occasional members of visiting teams. I intend to propose to the counsel at its February meeting that we consider a program whereby we would plan on a statewide basis for examining all the schools in the state and bring the supreme courts into that program along with the bar examiners. Through this we can tend to take a little of the pressure off the bar examination as a kind of a substitute accreditation agency.

MR. NACHMAN: I would like to inject one wistful note. One of the great problems that law schools inevitably have, as Professor Sutherland of Harvard observed a few years ago, is that they are really trying to train lawyers in the law which will be part of the body of law now and 30 years later when these lawyers come into their great maturity.

I think that there should be some clinical education and I am certainly not opposed to it. But clinical education in what? Perhaps 50 percent of the matters that I deal with now in my 26th or 27th year of practice were not even causes of action when I was in law school. If it had not been for analytical training, I do not know if I could have coped with some of the statutory analysis, for example, that I now have to go through. Therefore, I think that there must not be such a de-emphasis on the transcendent analytical training that law schools must undertake. It is the last opportunity that lawyers ever have to think about law in the grand manner.

MR. D'ALEMBERTE: I agree with Mr. Nachman. I worry very much that excessive emphasis on clinical programs will take law schools away from the analytical teaching altogether. Perhaps the problem lies in the way our early courses are taught in law schools. The classes are so immense that students do not have a chance to get out and get involved with the subject matter. It is not really the grand manner to be in a class of 100 or so and study courses as basic as contracts.

Perhaps the clinical programs are used to come back and deal with the business of counselling or trial work or whatever else the clinical programs do, because the classes are so large in the first two years that you cannot really discuss with students the pros and cons of practical problems. In other words, we find ourselves falling back on Mr. Smith's trade school to tell students about practical problems. It should be possible for professors to begin raising in the first year some of the practical as well as analytical problems.

Some of the ethical problems should also be raised, but the classes are so large that it just is not possible. We are trying to use clinical education to make up for the fact that we traditionally run our law schools as very inexpensive educational institutions. Law schools are the least expensive of any of the graduate programs. Any course, for example a home economics masters, is much more expensive that the cost of legal education at the University of Florida.

I worry when politicians and supreme court justices talk about the failure of the law schools to train. We are really thinking about an allocation of resources. If we allocate resources in a way to reduce these extremely large classes, we may solve the problem without altering the current "system."

MR. SMITH: What I have said does not mean that I would do away with the basic learning that you get in law school by the analytical technique. I am a graduate of this law school. There are professors here who have taught me tools that I will always use. I was taught contracts in this school. I could not draft a document now without the basic understanding of contracts that I obtained by the casebook method. I was really disappointed, however, that I left these halls and no one ever made me draft a contract. The bottom years have to remain the same. I would not give up the analytical reasoning, but I share with Mr. D'Alemberte concern with the lack of small classes.

The "trade school" tag does not bother me either. I think one of the things that has impeded the ability to deliver capable lawyers to the public, and the reason that we are going to have cries on legal advertising, group legal services, and paralegal offices is the fact that the legal profession in this day and age cannot deliver legal services to middle income Americans. The rich can have a lawyer, the poor can have legal aid, but few of the lawyers in this country can price legal services under $75, $85, or $95 an hour.

If it is a trade school approach that is needed in order to deliver these services to the public, then it is a trade school approach that

should be adopted. I think we are going to be the mastodons left in the tar pits if we continue to graduate lawyers who can only charge $100 per hour. We are going to find that people will go to nonlawyers for what used to be legal services. In fact, Senator Tunney and the Tunney Committee will tell you that the solution is to de-lawyerize many of the things that are now done by lawyers. The only reason is the fact that this profession is not meeting its obligations. If we do not meet this obligation by the trade school approach, by the clinical approach, or whatever, there will not be enough law around for any of us to practice. Then, maybe some of us will go back to "trade schools" to learn how to put in brake linings or something.

Senator Tunney rightly says that if a nonlawyer can marry you, why cannot two people with no children and with no property settlement problems go down to a clerk in a county court, pay $4 and get unmarried. The new probate code which went into effect in Florida on January 1, 1976, is a direct result of high probate fees. That has de-lawyerized a lot of the probate practice. Maybe that is the trade school approach that we need. We need the basic analysis, and we need the courses in contracts, in torts, etcetera. Then you have to have the ability to deliver it. Ten years from now, if the profession does not change and start delivering competent legal services, none of the members of this panel, and none of you in this room, will recognize the practice of law as people before us knew it.

MR. HADLOW: What we have been talking about so far is the education that people will get up to the point that they graduate. I have always noticed that law students are absorbed almost to the point of mania with the problems of the bar examination. That is certainly a problem that will dominate a student's thoughts for the 3 years in law school and shortly thereafter. Once you have taken and passed the bar examination, you will never think of it again. Then you have to go about the business of continuing your development as a lawyer, and translating the things you learned into actual practice. When you get into the practice, you suddenly find that you have been put in a position with the responsibility of carrying the burdens of a great number of people on your shoulders; but you cannot in any way identify yourselves to the public as possessing any specialty or expertise. You simply hold yourself out as a lawyer—expert in virtually any field. It is a very burdensome feeling.

In addition, you have left the comforting confines of a college. There you had advisors to consult with. They have taken the same

subjects and think the same thoughts which you have. It is a very comfortable environment. When you get out on your own, you do not know who to turn to for advice but you desperately want to keep up so you can show that you are capable of handling this responsibility.

For the 25 years that I have practiced, there has been a lot of lip service paid to two valuable tools designed to meet those responsibilities. One of them is specialization, and the second is continuing legal education. They are two things that are desperately needed if we are going to narrow the scope of responsibility and sharpen the tools needed to meet that responsibility. Nothing much has been done to translate those two theories into practicable effect, however. There has been de facto specialization in that some lawyers will just muscle up the nerve to say I am not going to do anything but tax work. Soon he gets to be a de facto specialist, but he cannot tell anybody that. On the other hand, a lot of people simply cannot take that economic risk. They cannot start turning away other work with the hope that nothing but tax work will come in. Realistically, the only people who can economically afford to specialize are those who will go into established firms that have the economic muscle and the client support that will permit them to do that. That does not seem fair because there are literally thousands of lawyers who do not want to take that route. Yet they would like the opportunity to become just as expert and just as specialized as those in large firms. We have an active and burgeoning continuing legal education program in Florida, but it has been entirely voluntary and, for one reason or another, the people who take advantage of the CLE programs are the ones who need it least. They are the natural scholars. The same people come back each time. The ones who need CLE never come.

This last year, the Florida Bar has tried to meet these problems by passing a specialization or designation plan. Under the new system you will be able to designate up to three areas of law in which you practice. You can identify the three designated areas on your letterhead, on your door where you practice, on your business cards, and most importantly, in the yellow pages of the telephone directory. If you want to practice in tax, estate planning, and administration of estates, for example, you can say so.

This is most beneficial to the public. When the public has a need for a divorce lawyer, for example, they will not have to look at something like 3,000 names and wonder if any of them do divorce work. The present method is ridiculous.

This is an easy access plan. You do not have to prove yourself to any peer group; you do not have to take a new bar examination, or a board examination, to prove that you are an expert in taxation law. You simply have to have 3 years of substantial experience in the area. That is all it takes. We are trying to make it as easy as possible. The primary benefit to attorneys, of course, is that they will not be getting cases in other fields. As the years go by, their expertise will increase in those three fields because that is all they will be doing.

There is, of course, a CLE requirement. You can get in just by stating that you have the 3 years substantial experience. To renew 3 years later, however, you must then be able to show to the Florida Bar that you have had at least 10 hours of CLE per year in each area that you designate. It is not burdensome: you can get your 10 hours in 2 days of CLE per year. The program was designed to keep people in continuing legal education.

MR. FREEMAN: *In light of the criticism brought forth by Chief Justice Burger dealing with the level of trial attorneys, should equal criticisms be made of attorneys who do not specialize in the court room? Also, are required courses a really satisfactory answer?*

MR. NACHMAN: A major area of law school deficiency is in the administration of justice. A civilized society based on law must have a viable decision making process at some point, and disputes between citizens, and between citizens and their governments, have to be resolved. They have to be resolved in a fair, economical and expeditious way. I really think that if the law schools had been as assiduous in trying to improve the administration of justice as they have been in teaching substantive law courses, and if the American Bar Association had been more active in seeking to improve the administration of justice, our system would be more effective than it is today. It certainly would be held in a much higher degree of repute, or a lesser degree of disrepute, than it is today. This is all part of the delivery of legal services.

I would add to Chief Justice Burger's point—the caliber of judges can improve too. I also think that the caliber of law professors could improve. Certainly this is not a reflection on the outstanding members of the bench and the teaching profession. There is a quotation from Chief Justice Vanderbilt made in 1938 when he was President of the American Bar Association which is rather meaningful today: "If our law schools over the past 50 years had cultivated the study of the processes of the administration of justice with the

same zeal that they have tilled the field of substance of law, and if they had centered their attention on the elimination of archaic technicalities and the development of efficient business-like processes in the work of the court, is it not reasonable to suppose, not only that much of the criticism of the law might have been obviated, but also that the swarm of administrative agencies might have been to some degree moderated?" That swarm has not subsided since 1938.

PROF. KELSO: Mr. Nachman's remarks captured the problem in Burger's proposals. Mr. Nachman thinks that the law schools ought to do more in terms of the administration of justice. Other lawyers will say that the law schools ought to do more in criminal law, and so on. Soon our 85 required hours will blossom into 100.

There is a tendency to solve the problems of the legal profession by saying all law schools ought to do this. The question should be: How frequently is administration of justice, etcetera, being taught to students today? What is the content of the current course books? Do they change? What I would prefer would be to agree upon one solid, fairly small core that we can test by something like the MBE.

The second circuit has added yet another requirement. Its federal jurisdiction and required clinical course in trial practice added to what is already a required curriculum of 63 hours, brings the total up to about 70 hours for all the law schools. Nobody knows that much about the future or what everybody in the country ought to have. I tend to be concerned about those who say that everybody ought to have certain things.

MR. COBB: The law schools take the place of internship programs. I think that the type of internship program and the type of clinical education discussed here are not necessarily inconsistent. I do not advocate the type of internship program where you become a servant in another lawyer's office for a few years. We have seen that this has failed.

The specialization concept is going to go a long way towards saving the profession. As soon as you can tell the law schools and the bar what a person is supposed to be able to do, the law schools are going to know how to train that person. The bar then will really know how to test them. Presently we have people who are supposed to be able to do everything from springing uses to abuse of process. I have no objection to somebody not being tested on federal securities law, administrative law, federal taxation, or any other subject, except maybe basic contract law, if I can be assured that that person is not permitted to practice that type of law or render

any type of legal advice to any consuming member of the public on those subjects.

QUESTION: *I would like to direct the panel to the issue of minority ceilings. Three factors should be taken into account: First, the ability of minority applicants to secure admission to the law school; second, the high attrition rate of minority applicants entering law school; and third, the high failure rate on bar examinations.*

PROF. KELSO: In terms of the inability of minority students to secure admissions, in 1969 there were 2,933 minority students in law school. Five years later there were 8,333, which is an increase of almost three times in 5 years. There is definitely evidence of some improvement in that regard. Additionally, the CLEO program has made scholarships available to minority students, there have been some summer programs, and there are active recruiting efforts by many law schools. I do not know whether this is adequate. The fact remains that minority enrollment is going up at a very substantial rate nationally.

The second problem is the high attrition rate in law school. This is simply a matter of statistics. In predicting law school grades, one can see that the average LSAT score of minority applicants and the grades that they bring with them, are much lower. The recently published California State Bar Examination study by Steve P. Klein,[11] indicates that the average LSAT score of the Anglo candidate was 567. The average LSAT score of the Black applicant was 443, about 95 points lower. Statistically speaking it was computed that 60 percent of the Anglos and 18 percent of the Blacks would pass the bar. The actual results showed that 56 percent of the Anglos passed and 17 percent of the Blacks passed. There it is statistically.

There is a general phenomenon operating in the schools with respect to matters of prediction. Why is the minority score predicted to be lower? Today law schools are selecting Anglos out of the upper two-thirds of the available pool. Since you pick at the top, you are going to get a lot of people with high scores. The pool of available minority applicants, on the other hand, is much smaller. You have to dig more deeply into that pool to get the kind of increased enrollment figures that are desired. This does not mean minority applicants are being admitted into law school who are not qualified to

11. See Professor Kelso's address *supra* at 847, 860.

be lawyers. If we could turn the clock back about 10 years, we would find that the qualifications that Blacks are presently bringing to law schools is at about the same level of qualifications that the Anglos brought to law school 10 years ago. Blacks are just 10 years behind in this area—the same way that they are 10 years behind in economics and in many other areas. The problem is what to do about this.

Law schools have an obligation to see to it that those whose analytical ability is below what it should be receive special attention and concern in that regard, whether Anglo or minority. Giving the bar examination at the end of the second year would tend to focus on the issue and would be of enormous assistance to minorities. Statistics show that minority graduates who persevere eventually pass at the rate of 70 percent. Anglos have gotten through at the rate of 98 percent if they try two or three times.

There is another problem, however. There has been discussion in some of the state bars that we are passing too many. Our pass rate in the past has been between 85 and 90 percent. All of a sudden it has moved up to 95 percent, and some say that is too high; we are getting soft. In fact, the candidates who are presenting themselves for the bar examination are bringing with them better college grades and better LSAT scores. We should assume that unless their pass rate goes up, something is wrong with the bar examination. If the bar examination pass rate is lowered or even if it is kept at the same level, it will mean that those who are excluded will be almost exclusively the minorities since they start out at the bottom of the total pool. The bottom of the pool may be better qualified than the entire pool was 10 years ago. Since Blacks will still be at the bottom when you lower the passing rate, you will not be passing Blacks who would have passed just a few years ago. This may raise an interesting constitutional question. If the bar examinations were given at the end of 2 years, it would give the minority students a legitimate opportunity to focus on an analytical problem which they may have, and thereby solve much of the problem.

MR. SMITH: I get confused from time to time as to who the minorities really are in America. There are underprivileged people, educationally speaking, who are all colors. Somewhere in the legal education system, by raising these great standards in the practice of law, we are discriminating against the pool of talent who for reasons other than color, could not make it in law school. Some would have been better lawyers. Maybe this whole area needs to be revisited. I agree with Professor Kelso. As long as you go 10 years

down the road you will continue to be chopping out minorities. I have always been afraid to look at my records and see what my score was. I do not know whether I could have gotten into law school today. That frightens me because I think that I am a decent lawyer.

We are excluding a lot of people who are Anglo, Black, or otherwise who thought undergraduate schools and undergraduate degrees were a lark and, therefore, did not apply themselves. I do not have the same confidence that Professor Kelso has in the LSAT, and if I looked at my score that would probably reaffirm it. The reason that I do not have any confidence is that when I graduated from high school they gave us an aptitude test which asked all of the wonderful questions like "Would you rather read a book, or sit at home with a sick friend?" I thought that I was fairly clever, so I filled it out so as to impress whoever read it. The results showed that I was qualified in two outstanding categories. I was going to be either a male nurse or a social worker. I wonder about the forecasting reliability of the LSAT and the undergraduate degree. Maybe there is a place in legal education for those who just could not make that standard. I believe that they are the true minority. Some of them would make good lawyers.

QUESTION: *What are the law schools' duties with regard to night schools, and what can universities do for people with children and other family commitments?*

MR. SMITH: If someone has the perseverance to take 8 or 9 years to get through law school, then I think that avenue should be open to him. It is wrong to exclude those who have not had whatever benefits we have had—whether it is good education or money in the family—that allowed us to go to law school.

MR. NACHMAN: We must not forget, however, that there is a duty to safeguard the public against incompetent lawyers.

MR. D'ALEMBERTE: Earl Hadlow intends to see that lawyers are tested in these designated specialty areas. In other words, you will find that in about 3 or 4 years—when it is politically possible—Mr. Hadlow is going to propose that you be given an examination to test your competency in your specialty.

It is possible that in the future, lawyers are going to be able to advertise much more than today. Lawyers may even be able to advertise what fees they charge, and when that happens, tradism is finally going to serve a very good purpose. When they advertise, they certainly have to be competent. We are going to force higher and higher standards of academic excellence on people who wish to ad-

vertise in certain specialties. As much as lawyers dread advertising, it may be a good thing for the protection of the public because we are finally going to look seriously at competency. Earl Hadlow is eventually going to make you take not just the first bar examination, but he is going to have you take bar examinations the rest of your life.

MR. HADLOW: The plan is to try to upgrade standards whenever possible, but it is not the intent of the Florida Bar to make it exclusionary so that we end up with an element of elitism in specialty areas. There will be a continuing fight as to the best way to accomplish the one without the other.

JUDGE LEVENTHAL:[12] I suppose that LSAT does not correlate very highly with the ability to draft instruments, and other tasks of that nature, but does it correlate with the ability to negotiate a large part of a lawyer's work—or does it correlate with the ability to say to the trial judge, "have a heart." I do not know how to test those qualities. I think this is a much more serious question than Mr. Smith's first point which I thought was rather trival—where you get the forms, how to file them, and the sort of thing which you do not have to learn in law school. These other things that I have mentioned are very important, but not really identified through the bar examination.

PROF. KELSO: There are two questions. First, is the LSAT job related? Second, is there a way to measure the quality of performance in various lawyer tasks? Let us assume that the LSAT does not do either.

The LSAT has never been validated against the specific tasks. It has only been validated against grades in law school, the multistate bar examination, and the state bar examination itself. You can, however, find relationships or correlations between LSAT scores and jobs. Those who have higher LSAT scores and, predictably, higher grades are more likely to become law teachers and law clerks. They are also more likely to join large law firms where the incomes are higher and personal satisfactions are greater. That is not to say that other factors do not enter into those correlations, but generally there is a kind of halo effect around tests such as the LSAT. It is a kind of self-fulfilling prophesy. The editor of the law

12. Judge Leventhal presented the keynote address for the Conference, *supra* at 789 and was speaking from the audience.

journal gets a job with a big law firm, and he gets higher pay, and so on. One tends to assume that, yes, it was in fact the talent that got the high LSAT score which in turn took him along the path to success. It has not been validated though.

The second point is: can we test professional skills in some fashion, devise measures for them, and then predict the ability of specific individuals who will exhibit those behaviors later on? The Law School Admissions Counsel, in cooperation with the American Bar Foundation, The Association of Law Schools, the National Association of Law Placement Officers, The National Conference of Bar Examiners, has created an advisory committee to monitor research into that very question. The Counsel took the proposition to the Ford Foundation, to the National Science Foundation, and to a number of the various government and private foundations. The response was that the legal profession has a lot of money so why not pay for it yourself? It is your problem. We then decided to divide it out into smaller portions to see whether we could get it funded in that manner. We did get a grant to determine whether or not one can predict the performance of lawyers in, believe it or not, non-legal tasks. The American Bar Foundation is going to pledge a million dollars to do the other research in various ways. However, they will do it with their staff.

The Law School Admissions Counsel had decided to spend $750,000 over the next 5 years to do the specific job that has been suggested. We are going to begin with lawyers who tend to concentrate or specialize in advocacy, and more specifically advocacy in litigation—the area with which Chief Justice Burger is most concerned. It has taken us 2 years to work out a research design but it is still not complete because there are so many different tasks involved in the process. The difficulty with the project is to select a broad enough range of skills that is meaningful. The multiple influences on one thing and another are so complicated that I do not know whether we will ever be able to create a simple pen and pencil test that will do the job. My guess is that the best we will be able to do is to call for simulations of certain kinds of "lawyer tests" and then have those functions observed by others who are able to judge those tests. In that way, we can identify certain individuals who do them well and certain ones who do not.

The tough job is to find out which characteristics distinguish those who perform well and those who do not. My guess is that there will be some of the halo effect. Those who have higher academic

credentials will tend to do better simply because they are more adaptable to any challenge and environment that they have to cope with.

In all probability, the resulting test will be a simulation of professional tasks in such a way that they can be monitored by equipment. Then, you can compare the performance of a highly skilled attorney in the field in question against those who have less experience. Gradually we may be able to sift out the behavior.

Today the whole philosophy of testing is in the process of change and reexamination. In the past, we have used testing to say "yes" or "no," "on" or "off," "in" or "out." The Educational Testing Service, as a matter of policy at its highest level, believes that its real function is to provide educational service in a guidance sense. It is hoped that we will ultimately achieve a device whereby we can permit anyone who really wants to go to law school to do so.

QUESTION: *What exactly is the justification for licensing attorneys?*

MR. NACHMAN: Competence alone is a justification. If a doctor cuts off your leg because he is incompetent, it would be small comfort for you to know that you can sue him for malpractice. There are equivalent dangers that can be visited on the public by incompetent lawyers which can affect the lives of many.

MR. HADLOW: You have to give the public some protection against unprofessional people before damage is done. While you can later chase them, put them in jail, or sue them, they will have already taken a chunk out of so much of the public's hide that you will never be able to rectify the situation.

MR. COBB: The problem is that a lot of the effects of a lawyer's work are not known for years. For example, you may draft a will or a contract today and it may never be tested, or it may be tested 30 or 40 years from now. If you go into a barber shop and get a haircut you know immediately whether you have been damaged or not. Therefore, the potential for harm is a lot greater in the types of services and the types of things that lawyers do. That is the justification for licensing.