COMMENTARY

FOUR ISSUES IN THE ACCREDITATION OF LAW SCHOOLS

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Most of the people who want to become lawyers in the United States have to come to terms with the American Bar Association. The ABA, in form and in tradition a voluntary association of lawyers,[1] is a virtual governmental regulator of legal education.

People who want to become lawyers do not have to join the ABA—any more than people who are already lawyers have to join—but, in most states, a potential lawyer cannot sit for the bar examination unless he has first obtained a law degree from a school approved by the ABA.[2] And, although in form and tradition the Association's approval of law schools once was little more than a gentlemanly nod, today the "accreditation" apparatus maintained by the ABA is a formidable regulatory enterprise.

Scores of lawyers, judges, law deans, law professors, and nonlawyers are involved in the processes through which the ABA admits schools to its approved list and removes or threatens to remove them from it. The rules are set out in a booklet titled *Standards and Rules of Procedure for the Approval of Law Schools*,[3] in some forty pages of mimeographed

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1. Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 202-04 (1977).

2. *E.g.*, VA. CODE § 54-62 (Supp. 1981): "[E]very applicant before taking any examination . . . shall furnish . . . satisfactory evidence that such applicant has: (1) Completed all degree or certificate requirements from a law school approved by the American Bar Association . . . ." Virginia provides some alternatives including studying at least three years in an accredited college and studying law for at least three years in the office of a full-time practicing attorney. *Id.* § 54-62(2).

3. ABA, APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE (1981) [hereinafter cited as STANDARDS].

interpretations,[4] and in numerous decisions by the ABA's Accreditation Committee and the Council of the Section on Legal Education and Admissions to the Bar (which operates in most cases as an appellate court).[5]

There are now more than 170 approved law schools that provide business for this apparatus. Dozens of intricate issues flow among the schools, the accreditation teams the ABA sends to them (every seven years in normal course), hearing commissions, and committees that consider inspection reports, commission findings, appeals from schools,[6] and the legislative force of the *Standards* themselves.

ABA accreditation is (in the view of one who spent six years in the middle of it) hectic, demanding, inconspicuous, and misunderstood. It is important, though—partly because it is the only collective enterprise that seriously attempts to protect consumers of legal education, and partly because it is the gate to practice for most American lawyers. This essay discusses four issues that have become prominent in law school accreditation as the ABA and its constituents have adjusted to modern changes in the profession, in education, and in the flow of consumers of legal education noted by the McManis article.[7] These are four issues among many. I chose these because each of them suggests a characteristic concern with good education, and may, in a small way, show that the ABA's gate-keeping is a service as well as a necessity—a service to law students, most of all, but also a service to the profession and to those whom the profession serves. It would be interesting to ask, in this regard, whether the shift in emphasis that Greenhaw describes,[8] from delivery of legal services to competence, is reflected in the ABA's concern, and therefore in the concern of regulated law schools—and whether, if it is, this shift is somehow traceable to student concern.

I. BETTER BUILDINGS

Every year ABA accreditors demand new or remodelled buildings at

4. ABA, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS (Feb. 1981) [hereinafter cited as INTERPRETATION(S)] (Interpretations from various dates are contained in this volume and are referred to by the date of issuance.)

5. *See Foreword* to STANDARDS, *supra* note 3.

6. STANDARDS, *supra* note 3, at Rule IV.

7. McManis, *The History of First Century American Legal Education: A Revisionist Perspective,* 59 WASH. U.L.Q. 597 (1981).

8. Greenhaw, *Use of Social Science Materials in Teaching Within the Standard Generalist Law Curriculum: A Criterion For Refined Integration,* 59 WASH. U.L.Q. 809 (1981).

about ten percent of ABA approved schools.[9] This could mean that every law school in the country is required to refurbish or replace its physical plant every decade; and that thought might lead a wry observer to notice that the rate of renewal of law buildings is probably comparable to the rate of renewal of the residences occupied by those who work in law buildings. All of this might lead the observer, wry or not, to wonder whether the organized profession's clout is here combining with law professor trade unionism (most ABA inspectors are law professors or law deans) to produce what has been called the "edifice complex" in American legal education.

There are two counters to that line of thought, which in fact is not an unusual line of thought if one substitutes "university president" for "wry observer" in the previous paragraph. One answer is that buildings are of importance as places, quite aside from their significance as symbols. The other answer, an empirical answer, is that the typical law building is in worse condition than the alumnus who returns to his law school for a summer bar association meeting supposes. Under either response, buildings are vital to the intellectual analysis Dr. Redmount explores,[10] the simulated clinical regimen Professors Anderson and Catz describe,[11] or the teaching devices Professor Shreve has developed.[12] The ABA can defend its pressure for better buildings without allusion to symbol and professional status; the issues of place, and the Association's record on those issues, can be discussed in terms of the physical needs of students, law school community needs, and conditions for learning.

Physical needs of students are elementary—security, a place that is warm when it is cold outside, cool when it is warm outside, and dry when it is wet. No one can pay attention to learning if he is consciously uncomfortable or afraid of assault or theft.[13] No one can learn until he can see, hear, be heard, find enough isolation to think, and have a place

9. The number of law building dedication ceremonies provides a rough index for validating this rate of renovation and construction. Analysis of more specific information, to the extent it would not be limited by confidentiality obligations, is beyond the scope of this Commentary.

10. Redmount, *Law Learning, Teacher-Student Relations, and the Legal Professional*, 59 WASH. U.L.Q. 853 (1981).

11. Anderson & Catz, *Towards A Comprehensive Approach To Clinical Education: A Response to the New Reality*, 59 WASH. U.L.Q. 727 (1981).

12. Shreve, *Bringing the Educational Reforms of the* Cramton Report *Into the Case Method Classroom: Two Models*, 59 WASH. U.L.Q. 793 (1981).

13. *See* T. SHAFFER, LEGAL INTERVIEWING AND COUNSELING 196-98 (1976) (discussing Abraham Maslow's "hierarchy" of needs).

where he can talk with his teachers and fellow students. At any one time the ABA has in its toils two dozen schools that do not provide these basic physical needs.

Most *community needs* relate to collaboration—obvious collaboration in classroom and seminar settings, and informal collaboration in places such as meeting rooms, eating rooms, and lounges.[14] ABA inspectors find overly crowded law schools more often than they find any other species of deficiency, a situation that became almost epidemic in the early days of the modern boom in law school enrollment.[15] They find buildings that fail even to provide space for the posting of notices and bulletins. Others have no space for group study, or no place for socializing. Students who occupy these buildings tend to the classic psychological defenses of fight or flight:[16] They become testy with one another and with their teachers, or they talk, study, and socialize elsewhere. In effect, the law building becomes a bus station. Energy that could be used for learning, building confidence, and promoting competence is used instead to cope with stifling proximity and incessant inconvenience.

Learning needs include the opportunity to see, to hear and be heard, and to read and write in peace. Beyond these physical aspects of learning, the place where students work advances or retards creativity, insight, and reflection. Law buildings should provide places for quiet reflection, quiet talk, intellectual intimacy, and mutual support. In modern law school programs the needs of creativity, insight, and reflection include places for interviewing clients in clinical programs, places to perform and to make and discuss videotapes of student performances in the sort of experience based skills programs that the Shreve[17] and Anderson-Catz[18] articles describe, and places where a student can lay out his work and leave it to get a cup of coffee.[19]

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14. *Id.;* T. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS, AND PEOPLE 193-229 (1977).

15. *See generally* Shaffer, *The Shortcomings of Our Law Schools Are the Vices in Our Great American Virtue,* LEARNING L., Fall 1976, at 18 (law schools have become too large).

16. *See generally* A. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS 56-57 (1976).

17. Shreve, *supra* note 12.

18. *See* Anderson & Catz, *supra* note 11.

19. *See* R. SOMMER, PERSONAL SPACE (1969); Steele, *Physical Settings and Organizational Development*, in H. HORNSTEIN, B. BUNKER, W. BURKE, M. GINDES, & R. LEWICKI, SOCIAL INTERVENTION (1971). For a discussion of the importance of environment in interactions between lawyers and clients see T. SHAFFER, *supra* note 13, at 84-104.

The ABA has five explicit standards on physical plant; all of them speak to these physical, community, and learning needs more than they speak to symbol and status. One, for example, requires private offices for each member of the full-time faculty.[20] The idea is not prestige, but to provide a quiet place for teachers and students to talk together. Former Attorney General Edward Levi once said that law school is graduate liberal education; President Garfield said that liberal education was Mark Hopkins on the other end of a log. The private office rule is an attempt to protect that log. Another standard requires, for obvious reasons, that seating spaces in the law library accommodate at least half of the school's full-time students,[21] and requires "one or more suitable conference rooms under the control of the law school library."[22]

II. STUDENT-FACULTY RATIOS

Legal education is a mass production industry.[23] Its model in the United States, the Harvard Law School, has a student-faculty ratio of about thirty to one. Many of Harvard's emulators in the intellectual backwaters of America are in worse condition, although most are better. Liberal arts education, by comparison, operates at ratios of fifteen to one or lower. Graduate education operates at about ten to one, and medical education under five to one.

The ABA recently decided to work for a ratio in its approved schools of twenty to one.[24] Only a few schools now provide a ratio that

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20. Standard 703. *See generally* Standards 701-705.

21. Standard 704. (Where the school exclusively offers an evening program, seating for 25% of total enrollment is required.)

22. *Id.* Standard 701 requires a physical plant "adequate for [the school's] current program and for such growth . . . as should be anticipated in the immediate future." Standard 702 speaks more specifically to classroom, seminar room, and courtroom requirements and specifies that "physical facilities shall be under the exclusive control and reserved for the exclusive use of the law school."

23. T. SHAFFER, *supra* note 13, at 61.

24. Standards 201, 401-405; INTERPRETATIONS of Standards 401-405 (June 1978) (in part):

> Ratios are indicative and useful, but in no case are they a sufficient guide to compliance . . . . Based on the [Accreditation] Committee's recent experience:
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> (1) a ratio of 20:1 or less is favorable, but the Committee and Council should inquire into the effects of faculty size, to make certain that the size and duties of the fulltime faculty meet Standards 201 and 401-405.
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> (2) A ratio of 30:1 or more is not favorable; the Committee and Council should require schools with unfavorable ratios to demonstrate that their programs meet Standards 201 and 401-405.

Standard 201 requires "resources necessary to provide a sound legal education and accomplish the objectives of [the school's] educational program." Standards 401-402 speak to the qualifications of

favorable; most are about twenty-five to one while many have ratios as poor as, or even worse than, Harvard's. The ABA Council has twice ruled that ratios of thirty-six to one and worse are grounds for disaccreditation.[25] In defending its 20:1 model, the ABA Accreditation Committee noted that ratio has a pervasive effect on the quality of education. For example:[26]

—Large classes mean large student loads for teachers, who either refuse to see students privately or take time from necessary scholarship and class preparation to do so.

—Schools with poor ratios tend to offer relatively few small-group classes and seminars. A student who spends most of his law school time in large classes is denied most of the benefits of close discussion and skills training in counseling and advocacy.[27] Because few law teachers are Kingsfields and most law students are beyond the first semester, the student is, by all reports and most of the time, bored.[28] Law teachers lose the rapport, growth, and stimulation that come from working closely with small groups of bright students. They lack the time and space to experiment with new teaching methods (such as those that are urged and reported in this symposium). Necessity forces teachers to lecture and to propound rigid syllabi, not to listen. Boredom then becomes a cycle, the bland leading the bland.

—Student-faculty contact is less (in frequency and in intensity) when the faculty is decimated and embattled. The ABA expects that a full-time law teacher will be able to spend time with each of his students, in each of his courses. The ABA imposes rules (such as limits on consulting practice)[29] to protect the principle. Whatever is gained by encour-

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the faculty, the numbers of full-time faculty members (in terms of minimum educational standards, the program of the school, and "adequate opportunity for effective participation by the faculty in the governance of the school"). Standard 403 puts the "major burden" for setting policy on the full-time faculty and requires that "substantially all . . . instruction in the first year" and "a major proportion of . . . total instruction" be given by full-time teachers. Standard 404 sets maximum teaching loads; Standard 405 requires that compensation, provision for leaves of absence, secretarial assistance, and tenure and promotion policies be "adequate to attract and retain a competent faculty."

25. INTERPRETATION 2 of Standard 402(a) (Aug. 1977 & May 1980).

26. *See* note 24 *supra*. That *Interpretation* contains a detailed rationale on the "educational effect" of student-faculty ratios.

27. Standard 302(a)(ii) requires that the school offer "training in professional skills, such as counselling, the drafting of legal documents and materials, and trial and appellate advocacy."

28. A survey of reports and opinions on law student boredom is discussed in T. SHAFFER & R. REDMOUNT, *supra* note 14, at 35-58.

29. INTERPRETATION 2 of Standard 402(b) (July 1977 & May 1980): "Faculty who are 'of

aging student-faculty contact is lost, though, when heavy student-hour loads put law teachers into the bind of either neglecting intellectual preparation or neglecting students. The bind draws tighter as law teachers begin, with other university professors, to face threatening tenure decisions, budget reductions, and advancement-through-scholarship. Teachers interested in survival are encouraged to neglect students. The result in many law schools is that it is only an occasional student, or the exceptional student, who even seeks the benefit of personal conferences with his or her teachers.

—If the embattled full-time teacher decides to risk an adverse tenure decision, or a static salary, and maintain an "open door" policy for students, class preparation and scholarship suffer and the teacher is less available for public service than the community and the bar expect him to be. "Open door" teachers learn how to duck committee assignments and thereby fail to comply with one of the oldest aspirations in university legal education: that the full-time law faculty take responsibility for the school.[30] The ABA interpretation on student-faculty ratios relates numbers to the requirement that "all law-school programs be constantly open to re-evaluation"[31] and that the "fulltime faculty . . . have personal resources for study and planning . . . and extensive self-study."[32]

—Most law school course work is evaluated in single, stiff, end-of-course examinations.[33] An efficient, conscientious teacher will spend at least half an hour on each student blue book. Grading a class of seventy-five requires one working week, and most teachers say they spend more time on the task than that. A professor responsible for 300 students (and the ABA has found many with this load) must devote a month for each set of examinations; that could mean two months a year

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counsel' to a law firm, have a permanent and ongoing relationship to a law firm, having their names on a law firm letter head, maintaining a separate law office, or having a professional telephone listing, may not be considered as fulltime faculty . . . ." *See* note 24 *supra*.

30. *See* note 24 *supra;* O'Connell & O'Connell, *The Five Roles of the Law School Dean: Leader, Manager, Energizer, Envoy, Intellectual*, 29 EMORY L. J. 605 (1980).

31. *See* INTERPRETATION of Standards 401-405 (June 1978), at para. B(7).

32. *Id.*

33. Standard 304(b):

"The scholastic achievement of students shall be evaluated from the inception of their studies. As part of the testing of scholastic achievement, a written examination of suitable length and complexity shall be required in every course for which credit is given, except clinical work, courses involving extensive written work . . . and seminars and individual research projects."

for grading, and obvious temptations to neglect other duties—including the duty to evaluate and improve the examinations themselves. Even if the teacher feels no pressure toward scholarship and public service, the ABA interpretation says, "[A]n unreasonable grading burden . . . is certain to accelerate entropy in the examination process."[34]

The student-faculty rules operate on a set of rough and ready presumptions (more than 30:1 is probably bad, less than 20:1 is probably all right)[35] and are relatively easy to administer. They are controversial less on educational grounds than on fiscal grounds. Almost everyone in the process has an economic interest in mass production: universities (who make more money because of it), professors (who think they are paid more if they have fewer colleagues), and students (who suspect a correlation between larger faculties and higher tuition). The ABA is defending an obvious and admirable principle with relatively arbitrary rules, and almost everybody complains—not about the principle but about the enforcers of the principle.

III. Restricting Law Schools to A and B Students

The law student boom of the sixties and seventies brought prestige and prosperity (money) to law schools and their sponsoring universities. It also brought the intellectual benefit of brighter, more stimulating students and the moral benefit of low attrition rates and reduced competition. Law students became more secure, more interesting, and more human. Law schools that had been accustomed to losing a third of their entering classes by academic failure during the first year found their academic attrition rates declining to less than five percent.[36] The so-called better schools virtually abolished failure.

The student boom is over. Law school applications are declining and enrollment has levelled.[37] The ABA now must decide whether to insist that approved schools limit enrollment to good students at the price of fewer students, tighter law school budgets, higher tuition, and cries of pain from university administrators who skim a fifth or more of

34. Interpretation of Standards 401-405 (June 1978), at para. B(8).

35. *See* note 24 *supra*.

36. Memorandum QS8081-25, from Dean James P. White, Consultant on Legal Education of the ABA, to deans of approved schools (April 13, 1981), reports national average attrition rates in recent years of between five and six percent from *all* causes. About a third of these are due to academic difficulty.

37. White, *Law School Enrollment Continues to Level*, 66 A.B.A.J. 724, 724 (1980).

law school revenue to pay for other programs.[38] If the ABA decides to support quality rather than quantity, it will have both intellectual and moral arguments: A and B students teach one another more than C students do and they make better lawyers because they can survive and learn without undermining one another. If the ABA makes these arguments—and that means its inspection teams and accreditation committee will make the unpopular demand that quality is more important than numbers in legal education—the system will probably emphasize, more than it does now, five variables:

(1) *Median and average grades and L.S.A.T. scores*.[39] Credentials may have to rise to adjust for college grade inflation and inflation in scores on the Law School Admissions Test. If these criteria are stable, or if they decline, the quality of legal education will decline.

(2) *Academic attrition rates*.[40] These rates should not increase. Increase in academic attrition, coupled with lower admissions criteria, means a return to the days when the first year of law school was a shoot-out. Students in a shoot-out do not help and do not want to help one another.[41] (The educational suggestions of Dr. Redmount,[42] Professors Anderson and Catz,[43] and Professor Shreve,[44] depend on cooperation, perhaps even more than these proponents admit.) Students learn less when survival is a primary concern and moreover, they may turn mean. Academic attrition is an especially important factor in law schools that are tuition dependent or that pay large "rip offs" to their sponsoring universities. One way to make money is to accept weak students and collect a year's tuition from them before they fail out.[45]

38. It is my opinion that "overhead" charges of 20% to 25% of total private law school tuition revenue are not uncommon. This means that the operating budget of the law school is only three-fourths of what its students pay. This situation, to the extent it exists, runs counter to the principles of the ABA. INTERPRETATION of Standards 105, 210 (Dec. 1978):

> "[R]esources generated by a university-affiliated law school should be fully available for the school to maintain and enhance its educational program. . . . The university should provide the law school with a satisfactory basis . . . for the use of such portion of the resources as may be employed to support non-law-school activities . . . ."

39. Virtually all law schools use grade-point averages and scores on the Law School Admissions Test as the primary indices for admission; the ABA does not require this process. The Accreditation Committee has not interfered with the few schools that attempt alternatives.

40. *See* note 36 *supra* and accompanying text.

41. T. SHAFFER & R. REDMOUNT, *supra* note 14.

42. *See* Redmount, *supra* note 10.

43. *See* Anderson & Catz, *supra* note 11.

44. *See* Shreve, *supra* note 12.

45. Standard 304(c): "A law school shall not . . . enroll or continue a person whose inabil-

(3) *Rates of passage on bar examination*. If the bar pass rate declines, the ABA should ask whether the school is taking weak students and *not* failing them out.[46] A tuition-dependent school that accepts and graduates C and D students, half of whom fail the bar examination, is exploiting somebody.

(4) *Plans for growth*. A school that is already in trouble in terms of other criteria may need to expand in order to pay its bills. It could do that by looking for new markets, but the likelihood is that it will expand by taking less able students.

(5) *Tuition dependence*. The first four variables become more acute when the school gets all of its resources from the tuition of its students, or when it is one of the many private university law schools that use law student tuition revenue to support other programs in their universities. The ABA faced this issue in 1971-72, and has faced it repeatedly since that time, in terms governed by its Standard 209(a):

> If tuition is a substantial source of the law school's income, the school is faced with a potential conflict of interest whenever the exercise of sound judgment in the application of admission policies or academic standards and retention policies might reduce enrollment below the level necessary to support its program. The law school shall not permit financial considerations detrimentally to affect those policies and their administration.[47]

The accreditation committee regularly goes to the mat with university presidents who contend it is not the ABA's business if they use law student tuition to maintain other university programs. And, although the Association continues to insist on the principle that law student tuition be used for law students,[48] in every such case on which I worked the school's program was so weak that the abstract principle did not become an issue.

A decision to restrict law school enrollment to A and B students is a concern for the profession, for an intellectual climate in which students

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ity to do satisfactory work is sufficiently manifest that the person's continuation in school would . . . constitute economic exploitation . . . ."

46. Standard 301(a): "The law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar."

47. Standard 209(a). *See* INTERPRETATION of Standards 209, 501 (August 1980): "A law school which denies almost no one admission for academic reasons and which is experiencing consistently declining average L.S.A.T. scores, combined with low G.P.A.'s, for admitted students, and which has operating deficits and heavy dependence on tuition income, does not comply with Standards 209(a) & 501." In relevant part, Standard 501 provides: "The school may not admit applicants who do not appear capable of satisfactorily completing [its] program."

48. *See* note 38 *supra* and accompanying text.

are able to teach one another, and for the moral value law schools stumbled on in the last two decades when they found that better students mean less competitive learning communities.[49] The argument on restricting law schools to bright students is a recent and controversial one. Those who are concerned that the *Bakke* decision[50] and its aftermath will make it harder for students from minority groups to be enrolled in approved law schools can be expected to argue that concentration on low attrition, high bar passage, and strong entering credentials will make matters worse for blacks, Hispanics, native Americans, and others.[51] The traditional argument that people of modest achievement should have a chance at the profession is bolstered, perhaps, by stories of diffident, clever young lawyers who serve the profession and the public less well than the mediocre would.[52] Middle-aged lawyers, who often remember a past that never was, argue against the Calvinist assumption that unpleasant competition is inevitable when attrition rates are high. University presidents see no reason to give up the revenue from fifty to one hundred extra law students who are eager to pay for a chance.

IV. TENURE

The ultimate authority in the ABA is the representative, populous House of Delegates. Ultimate accreditation decisions are made there when a school is provisionally or fully approved, when a school is disaccredited, and when amendments to the Standards are approved by the House.[53] Most of these actions are thrashed out in committees of the Council of the Section; the House usually acts on them without significant debate.

Discussion of law faculty tenure is an exception. The Idaho Bar Association mounted a recent, unsuccessful but noisy challenge to the ABA Council's interpretation that the Standards require each law school to provide tenure for its full-time faculty.[54] The issue can be expected to return, either in the House or in the lesser forums of ABA

49. *See* note 36 *supra* and accompanying text.

50. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

51. The Association adopted Standard 212 after the *Bakke* case. It requires that approved schools "demonstrate . . . by concrete action, a commitment to providing full opportunities . . . [to those who] have been victims of discrimination . . . ."

52. *See* J. OSBORNE, THE ASSOCIATES (1979).

53. Standard 902.

54. INTERPRETATION 7 of Standard 405 (August 1978): "A law school which appears to have

educational policy. As matters stand, an approved school must have a tenure system and is encouraged to adopt the tenure and academic freedom system promulgated by the American Association of University Professors.[55]

Since 1975, and particularly in university affiliated law schools, the tenure system has come up against tight funding, a predicted decline in enrollment, and tenure quota that limits the number of members of a faculty who may have tenure. Because the most universal American tenure system requires that a teacher either be given tenure or fired within a stated period of time (typically seven years), a quota means that untenured members of the faculty may have to be fired, whether or not they are doing well. They must be fired, not because there are no places for them, but because these places should be kept open for unidentified "new blood." Defenders of this system argue that quotas save places on the faculty for new, better, and as yet unknown teachers. The tenure situation is aggravated by changes in law and custom that will probably abolish mandatory retirement for law teachers. Forced retirement of senior teachers can no longer be depended upon as the one certain way to ease tenure pressure.

Unfortunately, quotas produce uninhabitable law faculties. Young teachers who have professional interests, careers, and even neighborhoods in common can normally be expected to collaborate. However, when they are told that only half, or a third, or fewer of them will be rehired after their probationary periods end, they tend to see advantages in cut-throat competition and some even in less honorable paths of glory. It is sacrificial, in the quota climate, to obey the scriptural injunction to "stir one another up to love and good works."[56]

Law teachers moving into tenure have been compared to associates in law firms moving into partnership. But law partnerships have not been widely tempted to the adoption of quotas for advancement of associates; partners like to say to young lawyers that there is no obstacle but ability between being a hired hand and being a partner. Moreover, law firms can retain an associate indefinitely.[57] In what might have

no comprehensive system for evaluation for and granting of tenure is not in compliance with Standard 405." *See* note 24 *supra*.

55. Standard 405(d) & Annex I.

56. *Hebrews* 10:24.

57. There is perhaps an analogy between the obvious disabilities of a permanent associate in a law firm and the situation of a permanently untenured law professor. This may indicate why tenure is necessary for the protection of academic freedom. *See* note 61 *infra*.

involved conscious consideration of the law firm analogy, if not of scripture, the ABA Council took the position in 1973 that tenure quotas violate ABA Standards.[58] The Association of American Law Schools, which presented the issue to its elected House of Representatives, took the same position shortly thereafter.[59]

This is one of many instances in which the academy could learn good morals from practicing lawyers. (And if this is true, an argument can be made for supervision of legal education by the practicing profession.) While there are undoubtedly law firms that continue to regard partnership as a "rendezvous with destiny," with all of the moral corrosion that sort of pretension entails, most law firms in America are likely to regard decisions on partnership as more inconsequent on collaboration than on disabling competition.[60]

Law faculties are now heavily tenured. About two-thirds of all law teachers who work in approved schools have tenure, while student enrollments are declining and will continue to decline if law schools maintain their high admissions criteria.[61] The Association's tenure policies—whether the ABA should require tenure, and, if it does, whether it should forbid tenure quotas—are certain to be reassessed.

Another response to the fear that law faculties will become "impacted" with tenured teachers is to create second class, untenured faculties, who are hired for terms of years, are ineligible for tenure, and are not subject to an "up or out" probationary period. The fact that some law schools are now establishing such second class faculties for

58. INTERPRETATION 1 of Standard 405 (Feb. 1973).

59. *See* Shaffer, *Report of the Dean 1973-74,* 50 NOTRE DAME LAW. 168, 183 n.54 (1974).

60. The model, I think, would resemble what I was told (in writing) upon becoming an associate in Barnes, Hickman, Pantzer & Boyd, in Indianapolis, in 1961:

> Our firm has employed you because . . . it believes you are probably of partnership caliber . . . . Your opportunity to become a partner of our firm will be based entirely upon your progress as a lawyer . . . . You have heard bandied about the Law School the dictum that the law is a jealous mistress. In practice you will find that that is so. Our firm will expect you to devote not only time during regular office hours, but such additional time at night and on weekends as is necessary to complete assignments entrusted to you. In your work, however, please remember that the competition which our firm emphasizes is competition in team work and helping other associates and partners to accomplish the desired end for a client. You will be given much more credit for furthering the cause of the people with whom you are working than for feathering your own nest.

61. The majority of approved schools have a tenure level of about 50%, and a fourth are at about 75%. The median percentage of faculty tenured increased 2.2% between the 1979-80 and 1980-81 academic years. Memorandum QS8081-24 (March 23, 1981) from the Consultant on Legal Education to the deans of approved schools.

law teachers in clinical programs has forced the Association, and may force law faculties, to re-examine the rationale for tenure. Tenure, by the common argument, is maintained in higher education in order to assure academic freedom: because it is important to preserve a teacher-scholar's ability to pursue and proclaim the truth, and because it is virtually impossible to prove whether a teacher who has been fired was fired because of *what* he thought, wrote, or said, as opposed to the *competence* of his thinking, writing, and saying, a teacher who is to remain in the profession indefinitely must become virtually unfireable. It may be that someone seriously disputes this rationale, but almost no one in higher education discounts it—and many of us, alas, find reasons to support it in our experience and observation. But if that is the reason for tenure, it seems indefensible to deny access to tenure to teachers who are training law students to represent those accused of offending the establishment. (Most clinical programs work heavily with mental patients, prisoners, persons accused of crime, racial minorities, and the poor.) The issue seems to be whether tenure is important at all, to anyone; if it is, it is *more* important for clinical teachers than it is for classroom teachers. That—in result, if not in concept—is the position of the Association.[62]

CONCLUSION

Law school should be fun. If not fun, it should be a place to grow because no one can learn anything worthwhile unless he or she can grow while learning. Tenure quotas challenge that common sense aspiration. So do decrepit and crowded buildings, mass production classes, and the triage theory of admissions. The hope for growth is, perhaps, what beckons bright college seniors to law school; and it is a reason to preserve and strengthen the relatively obscure Anglo-American legal tradition that the practicing profession sets and enforces standards for legal education.

62. INTERPRETATION 2 of Standard 405(d) (July 1980): "Individuals in the 'academic personnel' category whose full time is devoted to clinical instruction and related activities in the J.D. program constitute members of the 'faculty' for purposes of Standard 405, and denial to them of the opportunity to attain tenure appears to be in violation of Standard 405(d)."