MY TWO CENTS ON CHANGING TIMES

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The *Law Quarterly*'s invitation to the faculty indicated that this essay could be about almost anything. I began another article on the rule against perpetuities, but I soon stopped. That piece could wait; after all, they said the essay could be about "almost anything." I am a very senior member of our faculty—this is my thirty-fifth year at the Washington University School of Law. Seniority is supposed to bring privileges, and among them is the opportunity to reflect on the past, present, and future. Best of all, there is the opportunity to grouse, grumble, and forewarn.[1]

This issue celebrates our new building—a building for a new century.[2] For me and several other members of the faculty it is our second new building at Washington University.[3] For those who have had to live through the era of Mudd Hall, Anheuser-Busch Hall is a dream come true. Our new facility looks great and feels great. It promotes learning and scholarship, but it also enlivens and enriches the spirits of those who make it their professional home. Indeed, this change to a new building warrants both comment and celebration.

There have been other significant changes during the past thirty-five years that one must note and punctuate with pride. The student body is three times larger and much more diverse in terms of geography, race, gender, and background.[4] The entering credentials of these students also suggest that they

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1. As one might expect, however, people seldom listen, especially when one's forewarnings are of troubled times.

2. Our new building has been the focus of a fund-raising campaign—entitled "Building for a New Century." This campaign, which has been very successful, is also about building an institution for a new century. Consequently, it transcends the new building—Anheuser-Busch Hall—and includes fund-raising efforts targeted at scholarships, endowment, and annual giving. Through these efforts we hope to put into place strategies for integrating all alumni—especially young alumni—into the life of the law school.

3. I came to the Washington University School of Law in August, 1963, and its home at that time was January Hall. In September, 1971, the School was moved to a brand new home—Seeley G. Mudd Hall—and the move to Anheuser-Busch Hall was made during December, 1996. Along with me, there are several faculty members who have actively served the law school in all three buildings.

4. Certain information that is needed to make accurate comparisons is not readily available from the classes that entered the School of Law during the early to mid 1960s. Nevertheless, as a result of my experience as a teacher then and now, and my work on the admissions committee, I *know* that important changes have occurred. For example, our program for recruitment of students from across the country has yielded exactly that. When I began teaching in 1963, students who hailed from either coast were virtually nonexistent. Now, however, we have a substantial number from Florida, Maryland, New Jersey, New York, and California. Further, in 1963 nearly all students entered law

are more talented and accomplished.[5] The same might be said of the faculty. It is also three times larger and much more diverse. In particular, over thirty percent of the faculty are women[6] and just under ten percent are African-(American).[7] Young faculty come to us with outstanding records from outstanding law schools, with experience enriched by clerkships, practice, and sometimes prior teaching.[8] Their scholarship is innovative, thoughtful,

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school directly upon graduation from college. Some entered after three years of college and obtained their college degree at the end of their first year of law school. Today, however, most students do not come directly to law school from college. Typically, they will take a year or more to do something else. Consequently, the age and previous life experiences of the entering class have increased over the years.

There is, however, some information one can glean from Bulletins of the Washington University School of Law and from personal experience with students from the 1960s. This information further confirms diversification of the student body at the School of Law. In 1963, 86 students entered as freshmen. Three were women, two were African-American, and one was a member of another minority. Total enrollment for the entire school was 218, and these students had attended 57 colleges. In 1964, 95 students entered as freshmen. Six were women, one was African-American, and no other minorities were represented in that class. Total enrollment for the entire school was 238, and these students had attended 75 colleges. In 1965, 83 students entered as freshmen. One was a woman, one was an African-American, and two came from other minorities. Total enrollment for the entire school was 228, and these students had attended 78 colleges. Significant attrition occurred (a percentage much greater than that which occurs today) in each of these classes so that the numbers at graduation were considerably less than those at the time of entry. This attrition affected the representation of women and minorities just the same as it did the rest of the class. Because their numbers were so small to begin with, attrition sometimes completely wiped-out the representation of a particular group by the time of graduation.

By way of comparison, in 1997 197 students entered the School of Law as freshmen. Ninety-three (47.2%) were women, 18 (9.1%) were African-American, five (2.5%) were American Indian, 14 (7.1%) were Asian, and 9 (4.6%) were Hispanic. Further, this entering class of 197—a number close to the total enrollment of the entire school in the 1960s—attended 113 colleges.

5. One should note, however, that numerical credentials often belie talent. Although their "LSAT" test scores and cumulative "GPAs" were lower than applicants from the nineties, the classes of the sixties and seventies were extraordinarily talented as their careers have demonstrated. One thing I know for certain: the classroom dialogues of the sixties and seventies were as vigorous and sophisticated as any I have seen during my entire time at the Washington University School of Law.

6. In commenting on the Washington University School of Law, the *Princeton Review* observed: "The overall strength of the Washington J.D. program derives in large part from the law school's highly respected (read; highly published) faculty, more than one third of whom are women. (This degree of faculty gender balance is almost unheard of among the nation's finest law schools.)" PRINCETON REVIEW 432 (1996).

7. We have three faculty members who are black. Two come from the United States and one from an African nation.

8. The Washington University School of Law 1997-1998 Bulletin—which was actually published in 1996—included the following biographical information about its untenured faculty.

> Stuart Banner, J.D. Stanford Law School. Professor Banner joined the School of Law in 1993. Before beginning his teaching career, Professor Banner was a law clerk to Judge Alex Kozinski, United States Court of Appeals for the Ninth Circuit and to Justice Sandra Day O'Connor, Supreme Court of the United States. He has also been a staff attorney at the Office of the Appellate Defender and an associate at Davis Polk & Wardwell, both in New York.
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> Kathleen Clark, J.D. Yale Law School. Professor Clark, who joined the School of Law in 1993,

provocative, and very frequent.[9] And as an entire faculty, our articles, books,

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specializes in legal ethics and government ethics. After graduation from the Yale Law School, she was a law clerk to Judge Harold H. Green of the United States District Court, District of Columbia, and counsel to the Senate Judiciary Committee.

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Pauline Tongchoo Kim, J.D. Harvard University Law School. Professor Kim joined the School of Law in 1994. Before beginning her teaching career, she was a staff attorney at the Employment Law Center, Legal Aid Society of San Francisco, and a law clerk to Judge Cecil F. Poole, United States Court of Appeals for the Ninth Circuit. In 1984-85 she was a Henry Fellow at New college, Oxford University.

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Ronald Mann, J.D. University of Texas-Austin School of Law. Before joining the School of Law, Professor Mann was a law clerk to Justice Lewis F. Powell of the Supreme Court of the United States. He was also an assistant to the solicitor general of the United States, where his responsibilities included briefing and arguing cases... before the Supreme Court. Professor Mann has also practiced commercial law in Houston, Texas.

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Curtis J. Milhaupt, J.D. Columbia University School of Law. Professor Milhaupt joined the law faculty in 1994 after having practiced corporate law in the New York and Tokyo office of Shearman & Sterling. While still in private practice, he taught Japanese law and administered the Japanese Legal Studies Program as an associate research scholar at Columbia Law School, as well as conducted research on Japanese corporate law and securities regulation at the University of Tokyo as a Japan foundation Fellow.

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Karen Porter, J.D. Yale Law School. Professor Porter has worked extensively on issues surrounding AIDS and the law. Before coming to Washington University, she was assistant professor in the Department of Epidemiology and Social Medicine at Albert Einstein College of Medicine in New York. From 1989 to 1993, Professor Porter served as senior policy analyst and staff counsel for the National Commission on AIDS.

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Leila Sadat Wexler, J.D. Tulane University School of Law, L.L.M. Columbia University School of Law, D.E.A. University of Paris-Sorbonne. Professor Wexler has firsthand knowledge of international and comparative law. A member of the French bar, she clerked for the Conseil d'Etat and the Cour de Cassation, both Supreme Courts of France. Professor Wexler practiced international commercial law in Paris for five years before joining Washington University.

Washington University School of Law 1997-1998 Bulletin, 39, 40, 42, 43, 44, 45 (1996).

During the summer of 1997, Professor Mann left the School of Law to join the faculty of the University of Michigan Law School. At this same time, Brad Joondeph, J.D. Stanford Law School, joined the School of Law's faculty. The Course Directory for 1997-1998 includes this biographical information:

> Professor Joondeph joins us from his former position as Head Teaching Fellow at Stanford Law School, where he taught two first-year courses on Legal Research and Writing, as well as an upper-class Administrative Law course. Prior to his Stanford position, Professor Joondeph spent a year as a judicial clerk for Judge Deanell Reece Tacha of the United States Court of Appeals, Tenth Circuit. During the year of his judicial clerkship, Professor Joondeph also served as an Adjunct instructor for the University of Kansas School of Law.

Washington University School of Law Course Directory for 1997-1998 (1997).

Professor Joondeph, since having arrived at Washington University School of Law, has accepted a clerkship with Justice Sandra Day O'Connor of the Supreme Court of the United States for the academic year 1999-2000.

9. In 1996 the Washington University School of Law had seven untenured faculty members, and during that year they published twelve articles. Here is a partial list of their publications: Stuart

and treatises compare favorably with other law schools throughout this country.[10]

There is more. The Washington University School of Law offers several advanced degrees.[11] It also offers joint degree programs with eight other departments, such as East Asian Studies, business administration, health administration, social work, and engineering and policy.[12] The curriculum of today is also larger and more diverse; indeed, it would be virtually unrecognizable for graduates of the sixties and early seventies.[13] To be sure,

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Banner, *Written Law and Unwritten Norms in Colonial St. Louis*, 14 LAW & HISTORY REV. 33 (1996); Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer From Fiduciary Theory*, 1996 U. ILL. L. REV. 57; Pauline T. Kim, *Privacy Rights, Public Policy and the Employment Relationship*, 57 OHIO ST. L.J. 671 (1996); Ronald Mann, *Bankruptcy and the Entitlements of the Government: Whose Money Is It Anyway?*, 70 N.Y.U. L. REV. 993 (1995) (not printed until 1996); Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law*, 37 HARV. INT'L L.J. 3 (1996); Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: a French Lesson*, 71 WASH. L. REV. 285 (1996).

10. Occasionally, attempts are made to compare the scholarly production among law schools. These comparisons must make judgments about the value of books, articles, and other kinds of publications. Some indices of scholarly value are ignored, while others might be weighted heavily. Whatever system of evaluation is used, the conclusions reached ultimately reflect some highly subjective determinations. With this in mind, here is evidence as to the quantity of scholarly work actually published during the year 1996 by the faculty of the Washington University School of Law. (This does not include work in progress or work that has been completed but not yet published.) As to books, including new editions—nine. As to chapters in books—three. As to pocket parts and book supplements—11. As to articles—42. This information comes from a compilation of faculty work accomplished in 1996, and it is on file in the Dean's office.

11. The Washington University School of Law offers two kinds of advanced degrees. First, there is the professional degree—the L.L.M.—which is designed to provide advanced training in particular areas of specialized practice. Currently, the School of Law offers the L.L.M. in taxation. Second, there is the graduate research degree—the L.L.M.-J.S.D.—that tailors course requirements to fit the independent program created for the candidate. This degree is designed primarily for those who intend to teach. The School of Law also offers a degree—Master of Juridical Studies, or M.J.S.—for people with other careers who desire some legal training but do not want a J.D.

12. In addition to the joint degree programs mentioned in the text, the School of Law also offers such programs with three other graduate departments. They are European studies, economics, and political science.

13. The Bulletin of the Washington University School of Law, published in December 1963, reveals that both the first-year and second-year curriculum—with one exception, a second-year elective course—consisted of prescribed courses all students had to take. The first year included these courses: contracts, criminal law, interpretation of written instruments, judicial remedies, legal bibliography, legal institutions, torts, agency, and property. No credit was given for moot court, which was a one semester requirement. Some of the foregoing courses were taught in both the fall and spring semesters. The second year included these courses: commercial law, corporations, federal system, restitution, trusts and estates, constitutional law, evidence, federal income taxation, international law, and the elective course. No credit was given for moot court, which was a two-semester requirement. The curriculum for 1997-98 includes fixed course requirements for only the first year. Thereafter, all course selection is made on an elective basis. Requirements for graduation include a course in ethics and a seminar, but there are numerous ways in which each student can fulfill these requirements.

A quick glance at the Washington University School of Law Course Directory for 1997-1998 reveals a very different elective curriculum from that offered in 1963-64. For example, in 1963 there

the faculty is larger so there should be more course offerings, but the curriculum is also fuller and richer than before. For example, to reflect the problems and challenges of the future, we now have courses and seminars on Asian Law, Japanese Law, European Community Law, Socialist Law in Transition, Comparative Employment Rights, Aliens and the Law, Secrecy Whistle-Blowing and Leaking, Corporate White Collar Crime, Health Law, Environmental Law, and Intellectual Property. Further, to reflect the importance of "applied lawyering skills," we now offer several courses that pertain to planning and drafting as well as courses or seminars on Alternative Dispute Resolution, Pretrial Practice, Trial Practice, and Business Reorganization.[14] And to create a practicum experience, we offer in most years the Urban Law Clinic, Federal Criminal Prosecution Clinic, Federal Civil Litigation Clinic, Public Interest Lawyering Clinic, Congressional Clinic, and Federal Administrative Agency Clinic.[15] Years ago, we had one law review and one moot court program. Today, we have two major law reviews, three moot court programs and competitions, a mock trial competition, a negotiation competition, and a client-counseling competition.[16]

These are, however, not the only changes that have occurred during the last thirty-five years.[17] Further, there are other changes that seem imminent as

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were 25 elective courses and four seminars. In 1997, there are 95 courses and 12 seminars. Further, some of these courses are offered with more than one section and some alternate every other year with another elective so that the choices available to any student during their second and third year should exceed the 95 courses offered. In 1963, the School of Law offered one required course and no seminars in constitutional law, but now there is one required course and there are seven elective courses and seminars. The curriculum in 1963 contained one required course in international law and one elective course on comparative law. In 1997, however, the School of Law offers seven courses and two seminars in these areas of law. In 1963, the curriculum contained no courses or seminars that pertained to the environment. In 1997, the curriculum includes five such courses and seminars. And in 1963, the curriculum contained seven courses that one might classify as training in applied lawyering skills. In 1997, the School of Law offers as part of its training in applied lawyering skills 26 courses.

14. The following planning and drafting courses have been offered in recent years, though not necessarily on an annual basis: jury instruction drafting, patent drafting, intellectual property and high tech planning and drafting, business planning and drafting, sports and entertainment law and contract drafting, estate planning and drafting, family planning and drafting, international business drafting.

15. Other practicums offered are the Criminal Justice Clinic, the Employment Law and Public Policy Clinic, the Judicial Clerkship, and the Capital Defense Clinic.

16. The two law reviews are *The Law Quarterly* and *The Journal of Urban and Contemporary Law*. There are three intramural moot court competitions. They are the Environmental Law Moot Court, the International Law Moot Court, and the Wiley Rutledge Moot Court. Each of these programs produces a school team that competes in its respective national competition. There are also intramural competitions in client counseling and in negotiation. Each of these programs also produces a school team that competes in a national competition. Finally, every year the school selects a team to represent it in the national mock trial competition. These selections involve a limited competition among interested students.

17. Perhaps the most significant change concerns the cost of a legal education itself. When I

one looks to the future.[18] We are on the doorstep of the millennium; already we have a building well suited to the twenty-first century. And with this, there may be a tendency to leave all that is old behind. But is this entirely good? I want to give my two cents worth, so here it is.

In 1963 the Washington University School of Law stood for commitment to teaching and education. Teachers and students alike entered each class prepared for rigorous dialogue that honed skills that would last a professional lifetime. Some faculty relied heavily upon the socratic method, but some supplied strong doses of lecture. Common to both, however, was a recognition that teaching only begins in the classroom. Inevitably, it would spill over to Holmes Lounge and then to individual offices. Our mission was to teach.[19] And to do this we had to engage students intellectually. This was a very personal and gratifying experience—once again for students and teachers alike.

Our classes were very small. First-year courses were offered with two sections of forty students in each, and elective courses typically had enrollments of fewer than twenty students. The curriculum was thin, but there were three years of writing requirements.[20] The final requirement was a

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arrived at the Washington University School of Law in 1963, the annual tuition was slightly in excess of $1000. Thirty-five years later it exceeds $20,000. In 1963, the educational debt load of most students was minimal. But today, by the time of their graduation from law school, many of our students will have incurred debts as a result of college and law school that exceed $100,000.

18. One cannot say too much about the effect of the computer. In planning for the new library in Mudd Hall 28 years ago, the faculty had to allow considerable space for annual expansion of our collection of books and documents. Planning for the future of the library in Anheuser-Busch Hall was and will be another matter. Indeed, it is conceivable that we will encounter a zero growth rate at some point in the future. The explanation is a simple one: the computer. Eventually, one may have access to all "published" materials on the computer. The impact of computer access may be even greater with respect to law firms. One of our graduates, a named partner of a major law firm with offices in several cities, has told me that his firm is looking to the day in which they will have no books and no file cabinets! Their computer network will cover all of their needs, and they will be able to tap into its resource bank anywhere and at anytime.

19. In 1963, this tradition of commitment to teaching and education was personified by one person in particular, Frank W. Miller—who is now the James Carr Professor of Criminal Jurisprudence Emeritus. Frank was a brilliant teacher and a master of the socratic method. His devotion to students and his dedication to teaching were endless, both within and without the classroom. Although he was tough and sometimes harsh, students respected him enormously. Many revered him. Students who were prepared and wanted to learn always found him patient and giving. To be sure, Frank personified this tradition by example, but he also did much more. Frank was a mentor to every young faculty member in need. At first he would forge a friendship, invariably over lunch. With the trust that evolved, he would probe and provoke discussion of teaching and scholarship. And along the way we would be touched by his wisdom and direction. Some of us have never escaped his influence. For myself, Frank continues to read and comment upon everything I write. (This footnote appears despite his red pencil notation to delete it.)

20. During the first year, each student was required to take a course in legal bibliography in the fall and to fulfill a moot court exercise in the spring. During the second year, students were required to research a problem and to prepare a legal memorandum under the direct supervision of a full-time

seminar. Actually it was one-on-one supervised instruction with respect to research and writing. Those who were on *Law Quarterly* were exempt. Those who were not had a law review experience reproduced under the direct supervision of a full-time faculty member. The objective for each student was to produce a major paper of publishable quality. Nearly all students accomplished exactly that. And along the way faculty and student friendships were forged.[21]

This mutual commitment—this culture—was a tradition. I like to think it was unique. I do know this much: it was unlike my own law school and the law school where I served as an instructor before I came to the Washington University School of Law.[22] The uniqueness was also confirmed by students who transferred to or did graduate work at other law schools and by pre-law advisors who recognized something special at Washington University.[23]

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faculty member. Finally, during the third year students were required to take a seminar. These seminars were intended to reproduce the experience of writing a law review note, but the experience was under the direct supervision of a faculty member instead of a note editor. As one might expect, senior members of the *Law Quarterly* were exempted from this requirement.

21. This was certainly true for seminars, but it was also true for students and teachers in nearly every course. I can speak best for myself. It was my good fortune to have grown-up during this era of teaching at the Washington University School of Law. Students from that time—now older alumni—are the best friends that a person can have. I am describing my experience, but I know it has been the same for Professors Frank Miller, Jules Gerard, William Jones, Gray Dorsey, and Michael Greenfield.

22. I attended the University of Chicago Law School and I served one year as an Instructor at the University of Michigan Law School. In 1963, the faculty and student body at the former school were twice as large as the faculty and student body at the Washington University School of Law and the latter was nearly four times as large. Both of these other schools had outstanding students and outstanding faculties. Neither of these faculties, however, shared the same universal commitment to teaching excellence as did the 11 members of Washington University's full-time faculty. Neither faculty made interaction and accessibility a priority. And neither faculty seemed to generate the warm, close, and personal friendships with students that marked the experience of both the teachers and students at Washington University. Distance and indifference were not uncommon at these other schools, but at Washington University they were virtually unknown.

23. As one might expect, this law school has had its share of students who transfer to another school. Often these transfers occur because of tuition that can be saved by attending a state law school or because of personal problems that require a student's presence elsewhere. Sometimes, however, students who perform exceptionally well during their first year of law school will try to "upgrade" their degree by transferring to schools ranked at the very top of legal education. Additionally, we have had students who spend a year at another school but graduate with our degree, and we have had students who do graduate work elsewhere. Over the years I have heard from many of these students. Everyone agreed that their education at Washington University School of Law was superior because of the mutual commitment of faculty and students to serious teaching and learning.

Knowledge of this tradition has also filtered through to pre-law advisors. In the last 10 to 20 years, a handful of colleges have generated significant numbers of students who have applied to and attended this law school. These students do so because of the advice they receive from their respective pre-law advisors. These pre-law advisors continue to provide such advice because of direct contact we have with them and because of the positive feedback they get from their students who attend Washington University School of Law. At the core of the feedback they receive is a message of satisfaction with teaching within and beyond the classroom.

Although the pedigree of schools ranked higher than us may have offered instant recognition and opportunity, our graduates soon discovered that no school could compete with the education they had received.

The era of Mudd Hall commenced in 1971 and initiated a decade of change. Indeed, most of the changes described previously were hatched during that period of time.[24] And with these changes there were often subtle pressures to forego our commitment to teaching and accessibility.[25] Although the building was a disaster, our efforts at preserving this tradition were not. Commentators on law schools noted this commitment and ranked us number one in that regard.[26] The average size of course enrollments increased during the seventies, but so did the mutual commitment of faculty and students to high quality education. One could attribute this in part to senior faculty who zealously fought to preserve their tradition. But there was also considerable self-selection among new faculty who cherished these same goals and sought an institution that served them. The tradition that was conceived and nurtured

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24. The most profound curricular change has been within the area of applied lawyering skills. In academic year 1972-73, the Washington University School of Law had perhaps two courses that one might have classified as courses that focused on applied lawyering skills. For academic year 1997-98 (the first full year of the Anheuser-Busch Hall era), this law school offers 22 applied lawyering skill courses. Further some have multiple sections.

25. Mainly the pressures to forego our commitment to teaching and accessibility resulted from increased class size. From 1963 through 1968, the entering class averaged eighty people and the graduating class averaged around 60. First-year classes were divided into two sections of 40 each, and in most courses one teacher taught both sections. As one of these teachers, I got to know every member of the entering class. The enrollment of several upper level courses reached 80, but the average enrollment of other courses was much less—around 20.

Commencing with the entering class of 1969, the enrollment began to increase. Within a few years, our enrollment tripled. It has remained somewhere between 210 and 240 since then. We now have three freshman sections of equal size in every course. In some courses, one teacher still teaches two sections. As one would expect, the enrollment in elective courses has risen markedly. The largest courses are fixed at 120. Some courses have enrollments of less than 20, but most are much higher than that.

When the entering class size was 80—and some teachers taught and knew everyone within the first-year class—and when elective course enrollments hovered around 20, the teaching environment within the classroom was intimate, with accessibility its natural consequence. But three sections of 70 to 80 students a piece and elective courses of 50 to 120 students each seemed to change that environment. It was impossible to know everyone and to know them well. The numbers themselves made it impossible to involve everyone within the classroom and to get to know them beyond the classroom. The easy choice would have been to forego three freshman sections, multiple sections of large enrollment elective courses, and our "open door" policy with respect to faculty accessibility. We did not, however, do that. Instead, we renewed our commitment to teaching and accessibility and did the best that we could given the changed circumstances.

26. *See* BRUCE S. STUART & KIM D. STUART, TOP LAW SCHOOLS—THE ULTIMATE GUIDE 307-11 (1990). In this book, the authors evaluate the top 56 law schools in the United States. Their discussion of each school contains comparative evaluations with respect to a number of criteria. Two of these criteria are Quality of Teaching and Faculty Accessibility. The Washington University School of Law was rated "A" and "A plus" respectively. *None of the other top law schools was rated as high in these categories.*

in January Hall blossomed in Mudd Hall. Nevertheless, one must take note that, as we enter Anheuser-Busch Hall and the twenty-first century, there are severe storm warnings that threaten the quality of our product and even the foundation of our rich tradition.

In 1997, the law school offers better writing experiences than ever before. We have an intensive first-year program that uses the full time of four faculty members.[27] Further, during the second two years of law school we have a seminar requirement that features a significant writing component.[28] Although there is only one seminar requirement, students can and do involve themselves in more than one writing experience. These additional experiences might include an additional seminar, faculty supervised research and writing, one of the law journals, or moot court. With this training, one might ask: do students of the nineties write better or at least as well as students of the sixties and seventies? The answer is: no, they do not even write as well![29] And this includes all components of a good paper—research, organization, logic, and clarity of expression.[30]

Why? With better entering credentials and better law school training, how can this be? One of my retired colleagues[31] facetiously blames it on the "Xerox Machine." In truth, however, he may be on to something. Today

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27. These four teachers are full-time faculty. Three carry the title of Visiting Assistant Professor of Legal Writing. They are, however, not on the tenure track. They conduct a full year course that is worth four credits. Its principal purpose is to develop a student's ability to convert logical thoughts into clear, precise English. The course is intensive, with classroom exercises supplemented by a sequence of written projects that introduce students to research and the basic tools needed to accomplish it. Throughout the course, students receive extensive individualized feedback on their written work.

28. We have two kinds of seminars and either satisfies our seminar writing requirement. One kind of seminar is conventional. It has a limited enrollment and features both a classroom and writing component. The writing component may include one or more short papers. These papers are carefully critiqued by the teacher and, in light of such critique, the papers are then revised. The other seminar is essentially a one-on-one research and writing experience with a faculty member. The objective is to prepare a paper that is of publishable quality. Once again, the student's written work is carefully reviewed and then revised.

29. This conclusion is not based upon any empirical study, but it is based upon my experience and judgment as well as the judgment and experience of colleagues who have been teaching for many years. Also, there is anecdotal evidence that experienced faculty members at other schools share the same view.

30. The most distressing problem I observe—much more now than 20 years ago—is a disregard for organization and logical sequencing. More specifically, students have had difficulty developing a paper that consistently advances its purpose. Much too often, I have had to ask a student to explain how each section of his paper relates to the whole, how each paragraph advances the objective of its section of the paper, and how each sentence serves the purpose of its paragraph. This kind of instruction is basic. Clear organization is essential to all writing within the practice of law, yet it is something many students have not mastered when they enter law school and unfortunately do not master by the time they graduate.

31. He will remain nameless.

students conduct their research by finding, reproducing, and arranging duplicated cases, statutes, and other resource materials. Many students make no real attempt to analyze, digest, or synthesize these materials prior to writing the paper itself. Although this system allows more cases to be collected in less time, the product that ultimately emerges may be less thoughtful.

Ongoing synthesis of materials requires forethought and judgment as one proceeds through a search. Some materials stand out as central and essential, but others may be quickly discarded. The "Xeroxing System" presents a pile of materials at crunch time without prior discrimination. This can result in a final resource and discussion base with too little—through the exclusion of materials that are relevant—or it can present a base with too much—through the inclusion of materials that are unnecessary. Further, the "Xeroxing System" tends to condense "think time," while the digesting system spreads it out. The process of critical thought takes time. Sound organization, logical and persuasive progression, and creativity cannot be beckoned upon a moment's notice.[32]

From time-to-time, however, I am inclined to blame the decline in research skills on computerized research. In this regard, I blame the user and not the instrument. Computerized research clearly can produce more information than before, and it can accomplish this almost instantaneously. Nevertheless, it does have its limitations. Today's law students have been raised on computers. They depend upon them for work and often for play. Indeed, they are more comfortable before a computer than a book.[33] Consequently, many will conduct their research exclusively with the computer despite clear warning that its resource base is limited and, therefore, that it will not comprehend all potential authorities. This total reliance on computerized research produces a research base that is flawed and ultimately deficient. Additionally, because students conduct much of

32. Certainly one can say this about creativity. New ideas may just happen, but one can seldom rely upon them to be there exactly when one wants them. Fresh ideas need to percolate and that takes time and patience. One may have to work with a problem or puzzle again and again before a viable solution begins to emerge. And then there will be even more time—the time that it takes to test, critique, and shape this new idea or solution.

33. Many students today elect to do all of their research in front of a computer screen rather than wandering through the library in search of the right book. Computers offer instantaneous access to case reports, statutes, regulations, government documents, legal encyclopedias, and many other things that aid research. At this time, however, they do not cover everything. They do not include many important treatises and books that provide summaries and overviews that are essential to efficient and productive research. Consequently, a student or lawyer who does everything in front of a computer screen may sometimes take more time—rather than less—to complete a research project. Worst of all, it may yield a product that is skewed, incomplete, or defective.

their computerized research through key words and phrases, their collection of materials is often too large or too small—indeed, sometimes they find nothing at all. Frequently, the collection is too large because there are hundreds of cases that use or refer to the specific research terminology without regard to its importance to the case or the rulings within it. Conversely, the key word or phrase may yield too little because such language reflects an idea or concept that has not been reduced to specific language formats that are often repeated.[34]

One cannot, however, blame everything upon the "Xerox Machine" or the computer. In all probability, current law students do not write as well as they did thirty years ago because of inexperience. In short, the decline cannot be attributed entirely to technology or to what law schools are doing or not doing. Mainly it has to do with a student's previous education—in particular college education. Over the years the Washington University School of Law has included two questions in its application that are not used for admissions purposes. Instead we include them to track the writing experience of students at their respective colleges. These questions ask: in which courses the student had a timed essay test and in which courses the student had a substantial amount of writing. Unbelievably, all too often we will see answers that say none for both questions.[35] Even more unbelievable, we have seen history and political science majors from highly regarded universities who provide us with answers that say: two and two.[36] And they are the same two courses! These answers are not aberrations. This much is clear: writing requirements

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34. I am reminded of my first attempt to collect all cases that have applied or rejected the Rule in *Wild's Case* during the last 30 to 40 years. This rule, which is nearly 400 years old, governs the interpretation many courts have given to devises of real property that provide for a gift to a person (or a group of people) and such person's children. A classic illustration would be from A to "B and her children." I began my search with courts in a prominent state, but I was unsure of the key phrase or word I should use to conduct my search. I did know this much: I could not use to "B and her children." It would yield too little because "B" is a name and it would change from case to case in which the Rule in *Wild's Case* was discussed. So I tried simply "her children." This produced a thousand cases. Then I added "rule or doctrine in *Wild's Case*." This refined my research base to five cases. Two were relevant. But these two decisions were not the only cases to apply the rule in this state. By pursuing other cases referred to in these opinions, I soon discovered that a great many courts have applied the same rule but they do not refer to it as the Rule in *Wild's Case*. It either bears another name or no name at all. As a result, I discovered that the rule did not carry the same label throughout the United States. I wanted my collection to include all cases that applied this rule without regard to how a court styled such rule. And I knew full well that if I restricted my search to "*Wild's Case*" that I would be casting a net with much too small a reach.

35. This is especially true for students with certain kinds of majors and degrees. It is also true for students who attend certain schools. Nevertheless, it is not true for students from all schools. Indeed, there are universities and colleges that still include a significant writing experience for all of their graduates. *See infra* note 37.

36. These schools will remain nameless—after all, we depend upon them to send us students. But trust me they exist and they include universities that are generally ranked in the top 25.

and writing experience in undergraduate programs have declined precipitously, although not uniformly.[37]

To be sure, experience with timed essay tests may not prepare one to write better, but it does prepare college students for the essay tests they are likely to encounter in law school. More important, however, term papers in college courses—even those without research components—do produce better written work over time. The more one writes the better one gets, especially if each experience is accompanied by thoughtful scrutiny and feedback. Even today, students who come from colleges that create writing experiences in nearly every course do better in law school.[38] And I am convinced that these same students ultimately do better in practice.

The reason for the decline of writing in college probably has something to do with efficiency and economy in higher education. College costs have gone up dramatically in the last thirty years, and these costs have been met with larger enrollments and higher tuitions. A writing component that requires feedback from teachers is very time intensive.[39] With larger course enrollments, universities and teachers must struggle to find that critical resource. Colleges must either find more teachers, which they cannot afford, or teachers must allocate more time, which they cannot create. Multiple choice tests are more efficient than essay tests and far more efficient than term papers. Because of this, it is no surprise that multiple choice now dominates testing methodologies.[40] Mass-produced education has required

37. One should note that there are many schools—especially liberal arts colleges—that still include substantial writing components in nearly every course. Many of these schools require a major writing project—a thesis—for graduation with honors, but some include it as a basic requirement for graduation.

38. I have not documented this, but I am certain that I could because there are specific schools who send us students who typically do better work than students from other schools. If one were to compare students with comparable aptitude test scores and undergraduate grade point averages, the students from this select group of schools have done better at the Washington University School of Law. And I am confident that these are schools who are known for the amount of writing experience their students acquire.

39. Multiple choice tests take a substantial amount of time to prepare and perfect, but they take virtually no time to grade. Additionally, recycled multiple choice tests eliminate almost completely any time commitment on the part of the teacher. Essay tests require much more time, especially to grade them. Nevertheless, one ordinarily can grade tests without written comment or extensive individualized feedback. A worthwhile writing project, however, requires much more effort on behalf of the teacher. To be sure, teachers must still arrive at a grade, but the essence of their instruction lies in the feedback they give to each student—feedback that may take the form of written or oral commentary or both. The best kind of feedback is not an easy matter. It requires one to detect and carefully identify problems within a paper and to offer suggestions on how to resolve or overcome these problems. This necessitates meticulous reading and thoughtful contemplation. Above all, it takes a lot of time.

40. I must make a confession. Twenty-five years ago I began using multiple choice questions with respect to a portion of my first-year property exam. Originally, I did this because in one year we

many changes and the virtual disappearance of the term paper or thesis constitutes one of these important changes.

The search for an explanation for the decline is useful; however, the assignment of blame and attempts to shift responsibility are not. Law schools cannot redirect the course of college education. Even if we could, one could not await such redirection. We can, however, redouble our efforts. The problem is serious and immediate. Whatever the reason, the writing skills of the people we graduate are declining and many might view them as inadequate.[41] For the lawyer, there is nothing more important than the written word.[42] Lawyers write constantly. They draft letters, contracts, wills, trusts, complaints, motions, memoranda, and briefs. These documents must be clear, precise, comprehensive, accurate, organized, logical, and persuasive. No practitioner ever escapes the written word. And there is no evidence that things will be different during the twenty-first century.[43] Whatever the cause,

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went from an entering class of under 120 to a class that exceeded 200. Although I always begin grading a set of exams promptly, I have never been able to read and grade an answer quickly. I read a paragraph from an answer and then I ponder its meaning and value. Then I reread it. And then I anguish over the credit I must award. And then I move on to the next paragraph. Consequently, I was very concerned about the additional time it would take to grade nearly one hundred more essay tests. A component that consisted of multiple choice seemed to be the ideal solution. My reason was the same as the one I now criticize in the text.

Lawyers, and especially law teachers, are skilled at intelligent, sophisticated, and sometimes deceptive rationalization. If I am now asked to justify my multiple choice component, I will offer other reasons for retaining it for my property course. I might observe that it enables me to test basic information. But I add that it enables me to test certain kinds of analytical skills. In class I devote a lot of time to argumentation. Frequently I ask students to set out each of the steps of a plaintiff's or defendant's argument. I do this because argumentation is a significant part of what lawyers do. More importantly, however, I have found that careful analyses of arguments present a very useful vehicle for systematic identification of issues and their interrelationships. *See infra* note 56. Unfortunately, the essay test does not force all students to see connections between the issues they discuss. All too often they approach a question as if each issue exists in a vacuum. They do not see that a subsidiary issue only arises if a primary issue is resolved in a particular way. In the classroom I can force people to see interrelationships between issues. And on an examination, I have found that by testing argumentation through multiple choice questions I can examine these same skills.

41. Unfortunately, I hear all too often from alumni about these declining skills. Indeed, many practicing lawyers complain about the inadequate writing skills of their young associates. One should note that these complaints have not been restricted to lawyers who were among the elite students of their respective generation.

42. For an excellent piece on the importance of reading and writing and their relationship to thinking and to what lawyers do, see Francis A. Allen, *On the State of "The Word,"* 20 LAW QUADRANGLE NOTES (UNIVERSITY OF MICHIGAN LAW SCHOOL) 9 (1976).

43. Computers and word processing may enable us to access and create information faster, but still the written word is the medium for expression and understanding in our profession. Published forms—and the ease with which we can access and use them to prepare documents—may threaten the importance of the word. But every lawyer worth his salt will create his own forms or at least carefully scrutinize and amend the forms of others. Blind reliance on forms is unwise and can only lead to trouble. (For a discussion of the problems blind reliance upon standard saving clauses can generate with respect to the rule against perpetuities, see David M. Becker, *Estate Planning and the Reality of*

the decline in writing skills presents a very serious problem for the profession. But we are the training ground for the profession; so it is our problem and our mission to find a solution.

What can be done? To begin with, one must recognize that the problem is soluble; indeed, there are many different kinds of solutions. For example, many schools now have first-year writing programs taught by full time faculty, who are sometimes tenured but most often are not.[44] One could expand these programs so that they continue the intensive writing experience for the full three years. The training could be progressive. First-year programs often concentrate on legal memoranda and briefs. Second and third year programs could concentrate on other kinds of writing such as leases, contracts, statutes, and advisory opinions and letters. Or instead of extended writing programs modeled after the first-year experience, one might simply impose or increase writing requirements for the second and third years of law school. For example, two or three seminars might be required instead of one. Additionally, a school might require enrollment in one or more planning and drafting courses,[45] or in litigation-related courses with a significant written

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Perpetuities Problems Today: Reliance Upon Statutory Reform and Saving Clauses Is Not Enough, 64 WASH. U. L.Q. 287, 378-416 (1986)). Some may be tempted, but the conscientious lawyer will resist such temptation. Instead, he will shape documents and the provisions within them to meet the specific needs of his client.

44. Many have programs similar to ours. *See supra* note 27. There are some variations among them, including the title assigned to the teachers of legal writing. Tenure track appointments are, however, rare among those hired to teach just legal writing. More than 20 years ago, we tried to institute a one semester freshman course on legal writing that was taught by regular tenure track members of our faculty. Because this kind of course is very time intensive (*see supra* note 39), especially with regard to grading and student contact, faculty members assigned to teach this course soon burned out. Because no one was eager to replace them, this program was abandoned within a short time.

45. Because planning and drafting courses function best with limited enrollments, making them a requirement for legal writing would necessitate an increase in the number of these kinds of courses. This would, however, be a very wise addition to the curriculum. If one were to examine law school curricula throughout the United States, one would observe that inadequate attention is devoted to something most lawyers do or have done at one time or another—plan and draft. Two, three or, perhaps, four courses would probably be the norm in any given year. The focus of most courses—beginning with the first year—is upon cases and problems that evolve from disputes. The context is litigation, actual or potential. The facts or framework in which these disputes arise is fixed. And the strategy for negotiation and settlement or for litigation must be developed within such framework.

Planning and drafting are different. In an important sense, they afford greater freedom to shape the universe in which the transaction is to be consummated. This makes the task more difficult. The lawyer's role can be likened to an architect who must create a design that carries out a client's objectives. One must first extract and probe these objectives, then test their viability in light of numerous variables that the future may offer, and then—when necessary—reshape these objectives to account for problems of implementation. Finally one must develop a design that effectuates these objectives and then cast such design in documents that precisely and unambiguously achieve that design.

The task is creative and meticulous. Invariably, it cuts across many subject areas of law. It

component.

One thing, however, is clear. Because writing instruction is labor and time intensive, these additional experiences will bear a heavy cost. Expanded legal writing programs taught by full-time faculty will require additional faculty resources or reassignment of existing faculty to these programs. Expanded seminar and planning and drafting requirements could be accomplished with additional faculty. More than likely, however, it will be achieved through reassignment and, therefore, the elimination of some courses. Or it might be achieved through conversion of existing courses into seminars whose enrollments will necessarily be limited.[46] Either way there will be many students who lose out on a subject area they want. Either way there will be a significant cost.

Given the pressure to stabilize tuition and therefore to hold down costs,[47] the probable solution will produce a downsizing of curricular choice and opportunities for specialization. These consequences will not be popular at a time in which the profession is moving rapidly in the direction of specialization and law school curricula are mirroring that trend.[48] Most of all,

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requires legal knowledge, but it also requires experience in life. One must know the law, but even more important one must know and anticipate the situations in which such law becomes relevant. And when necessary one must then be prepared to overcome or bypass principles that obstruct implementation of a client's objectives. The analytical process required for planning and drafting is not easy, and the skills that the process requires cannot be learned simply through courses focused upon litigation and the resolution of actual disputes.

46. Enrollment limitations upon seminars that contain a substantial writing requirement are inevitable. The explanation lies simply in the time it takes to teach each student. For one thing, there should always be substantial student conference and contact time prior to submission of any major paper. This might involve selection of a topic, supervision of research, and review of outlines and preliminary drafts of the paper itself. And then there is a review of the end product itself and the time that it takes to grade it. *See supra* note 39. This should be followed by more conferences, a revised paper, and finally a graded assessment of the entire project. And this means even more time. One cannot accomplish this—and carry on with other teaching, research, and committee responsibilities—without enrollment limitations.

47. When I began teaching at the Washington University School of Law in 1963 the annual tuition was around $1000. By 1976, tuition had increased to approximately $3000. Tuition for students entering in the fall of 1997 is $21,675. As a result of debts incurred for college and law school education, many students today graduate with a debt load that exceeds $100,000. Tuition and debt load for students have risen annually, but applications for law school have begun to decline substantially here as well as elsewhere. Surely there are limits as to what we can ask students to invest in their education. Surely there are limits as to what the market will bear. Surely tuition will become an even more important factor in the competition for the best students in a declining applicant pool.

48. Large firms have for years been highly specialized. And as firms get larger and larger, the specialization seems to intensify. Indeed, many firms insist that law student summer associates select a specific area in which to work. Further, some insist that this selection must be made at the end of their second year of school before their summer work actually commences! One should note, however, that specialization is no longer the sole province of the large firm. The 1997 edition of the Southwestern Bell Yellow Pages covering greater St. Louis has 61 categories for its listing of attorneys by area of practice. A quick reading of these advertisements indicates that a substantial majority of those listed

the solution and its consequences will be difficult to sell to prospective students and sometimes even to the bar.[49] It may also be difficult to sell to alumni who are asked to support it through annual gifts. Information and the courses needed to provide it are "in."[50] Intensive skill courses, especially those that purport to teach students something they believe they already have, are "out."[51] The problem and the dilemma this trend creates are real, and the Washington University School of Law must address them if we are to remain true to our tradition and mission of excellence in education. We must swim upstream and be in the vanguard of schools that know the universal and eternal importance of the written word and are truly committed to teaching

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come from relatively small firms.

Careful examination of law school curricula reveals a similar phenomenon. As an example, the 1997-98 curriculum of the Washington University School of Law includes these specialized courses and seminars: international criminal law; corporate and white collar crime; Japanese law; European community law; immigration law; problems of the mentally ill; employment discrimination; pensions and employee benefits; construction law; two intellectual property courses; and four courses or seminars devoted to environmental law, including one that concerns the legal aspects of waste management. (And we are not even among the "large" law schools that can afford and have even larger curricula.) Much of the impetus for specialization derives from individual faculty research interests. In substantial measure, however, it reflects the business needs of the professional marketplace and a desire by students to get one-up on their competition through highly specialized training. For example, as a result of strong student demand, this year we have hired three adjuncts to co-teach a new course on sports and entertainment law planning and drafting.

49. Prospective students quickly learn about the importance of specialization and the competitive edge such specialization seems to offer in the marketplace for jobs. One need only observe the attention national magazines give to specialized courses and programs offered at schools across the country. Prospective students read these articles—especially those that provide rankings—and their judgment about law schools and legal education is heavily influenced by them. Further, although lawyers sometimes gripe about the decline in writing skills among law school graduates, they still insist that graduates must be prepared to contribute full value when they begin work. And this invariably translates into an education that has provided an adequate information base in the specialized area in which such graduate is about to begin practice, often at the expense of writing or other skills.

50. *See* discussion *supra* note 49.

51. The purest skill course that I have seen in our curriculum has been Legal Process. This is a course that has appeared at one time or another in nearly every law school curriculum, but it has not appeared in ours for many years. (At my law school, it was entitled Elements of the Law.) Legal Process is a course that disconnects itself from a body of law as such and instead concentrates on teaching analytic skills within the context of cases, statutes, and regulations. Student learning is entirely experiential. It does not offer a body of information that must be mastered, retained, and regurgitated on an examination. Test preparation may involve the recreation of old analytic tasks or the creation of new ones. Conventional course outlines do not help because the exam is likely to present problems involving an area of law that was not previously studied. As a result, students are frustrated. Without a comfortable body of information, they are unsure of what they are learning. And when examination time arrives, they simply do not know what to do. Most students, therefore, despise the course—though they may come to appreciate it years later. Because this attitude inevitably reflects itself in teacher evaluations, most teachers are reluctant to teach Legal Process. Consequently, because there is little demand from either the consumer or the provider, courses on Legal Process have become unwanted step-children that have had difficult times making their way into current curricula.

the skills needed to observe it.

This leads me to my next storm warning, something even more important and something connected again to the appeal of economy and efficiency. During the past academic year, we interviewed an entry level candidate to teach at this law school. His academic record was impeccable. He already had earned both a Ph.D. and a J.D., both from prestigious schools that everyone would rank in the top ten, and he had some previous teaching experience in a non-law school setting. Additionally, he had a record of excellent publications and an agenda for future work that was equally impressive. He was asked about teaching and here are some of his views.

To begin with, although he saw some merit in the socratic method when conducted without abuse, he would opt for lecture because it was the most efficient way to pass on information. And information and its comprehension were at the core of what he wanted to pass on to his students.

Additionally, he said that the first thing he would do when beginning his work as a law teacher would be to produce his own Web Site. Quite simply, this was the most efficient method for answering student questions. Many students would have the same question, and this was a way for each student to question him and for him to reach everyone at once. It was also an efficient method for interacting with students. He could respond from his office or home at any time and this was far more efficient than office hours or certainly an open door. Using the web site would enable him ultimately to trade office hours for research and writing. We did not make him an offer, but I am still concerned because his views about legal education are, in one form or another, becoming more and more prevalent.[52] I am deeply troubled because these views threaten not only the tradition and excellence of this law school, but because they threaten the very core of legal education. Indeed, they threaten the very things that make legal education different and better.

Lawyers are first and foremost problems solvers.[53] The solutions to

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52. To begin, one might examine the changes that have occurred with respect to course books. Today, they bulk up much larger than in the past and more often than not they resemble legal encyclopedias instead of materials that use a subject area to teach critical skills.

53. Karl Llewellyn made this observation many times, but perhaps he said it best when he addressed the University of Colorado Chapter of the Order of the Coif on July 10, 1942.

> Let me say it again: the essence of our craftsmanship lies in skills, and in wisdoms; in practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field; and then in skills for *regularizing* the results, for building into controlled large-scale action such doing of things and such moving of men. Our game is essentially the game of planning and organizing management (not of running it), except that we concentrate on the areas of conflict, tension, friction, trouble, doubt—and in those areas we have the skills for working out results. We are the trouble-shooters. We find the way out and set up the

problems require information; more importantly, however, they require analytic skills. These are the skills that distinguish lawyers from other professionals and often enable them to solve problems that transcend the law itself.[54] These skills are really what legal education is and must be about. To be sure, solutions to problems depend upon the application of rules. Without command of these rules, a lawyer is unable to forge a solution and perhaps unable even to recognize the problem. Rules are important, but they change over time—sometimes slowly, sometimes overnight. One must expect change during the course of a professional lifetime.

The one constant from law school, however, are skills. These are the skills that enable a lawyer to elicit the story (the facts), to identify within the story relevant problems and issues, to discover and master rules and principles that may affect these problems and issues, and to develop a strategy or solution that reflects what the lawyer thinks is the law, might be the law, and should be the law. These skills will always transcend information that is transitory. They distinguish the craft and therefore are at its core. Consequently, they must be central to the mission of legal education.

How then do teachers impart these critical skills to students? Students read a case and their teacher asks them to state the issue. The teacher or the course book may also present a problem or a hypothetical and again ask students to identify the issue or, often, issues. Sometimes the court will recite the issue, but sometimes it is plainly wrong.[55] A teacher may attempt to elicit

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> method of the way, and get men persuaded to accept it, and persuaded to pick up the operation. That is the essence of our craft.

KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 318-19 (1962).

54. This explains why lawyers have been so successful in things other than the law itself—especially business. Many of the leaders of industry throughout the United States have a J.D., and many of legal education's most prominent graduates are applying their training to the business world, not to the practice of law. This is true of other law schools and it is certainly true for this law school. One need only look at the membership of our National Council or at the list of recipients of our annual Distinguished Alumni Awards to discover the incredible success our graduates have had in business. Each of these people will have his or her own recipe for success. To be sure, the reasons for success have something to do with the special qualities of the people involved. Nevertheless, there is always a common denominator among their respective explanations—their legal education. What each of them retains and what each of them applies is not the information they received from law school but the analytical skills that trained them to solve problems, even those that transcended the context in which such skills were first acquired.

55. One case that I have always enjoyed teaching in my course on Future Interests and Estate Planning is *Security Trust Co. v. Irvine*, 33 Del. Ch. 375, 93 A.2d 528 (1953). In its opinion, the court viewed the primary issue to be whether a remainder interest created by a residuary trust vested immediately at the testator's death or thereafter at the death of the surviving life tenant. The court clearly misunderstood the issue. The real question was whether the remainder interest was subject to an absolute condition that required the remaindermen to survive the deaths of all of the life tenants. Whether such condition functioned as a condition precedent—and, therefore, deferred vesting until the death of the surviving life tenant—or as a condition subsequent—and, therefore, vested the remainder

the correct issue from a student with actual interaction, or she may explain entirely through lecture the issues to cases and problems. Students may become confused and ask the following question: I understand the issue when you carefully identify and explain it, but how do I go about doing that on my own? Our response—either explicit or implicit—is that they should follow along and sooner or later they will get the hang of it. Somehow by osmosis this experience will produce these skills. Even with a faculty explanation that provides concrete step-by-step instruction concerning the formulation of issues,[56] the emphasis in learning is still repetition over time.

Of necessity some of this process must be accomplished vicariously through observation of the work of others.[57] Nevertheless, anyone who has ever struggled with this knows that real learning of skills is accomplished experientially. Knowing the issue and developing basic tools for analysis and problem solving are much like learning to ride a bicycle. Quite simply, the skill of balancing a bike cannot be learned exclusively through books and

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immediately upon the testator's death—was irrelevant. Under either construction—contingent or vested subject to complete divestment—those remaindermen who predeceased the death of the surviving life tenant would be excluded from the group entitled to share the trust principal.

56. "What am I to learn from these case by case illustrations of *the issue*? How can I systematically identify an issue?" At first, my response to these repeated questions was the same as others often give. I would carefully repeat the explanation for the case under consideration. I would offer some general principles; for example, that an issue involves a question that must be resolved in order to reach a result and, further, the parties must disagree about the resolution of such question. But mainly I would repeat the exercise again and again, hoping that students would catch-on and that their questions about a process for identifying the issue would ultimately disappear.

This made me very uncomfortable as a teacher. My job was to teach, or at least offer some kind of meaningful guidance. Over the years I have attempted to do better. For now, I am using reconstructed arguments to identify issues and their interrelationships. More specifically, I have a student set out each of the components of the plaintiff's argument. I ask, "What assertions as to fact and law must a party make in order to justify the result they wish to reach?" And then I will have this same student—or perhaps another—establish each of the components of a defendant's argument. In elaborating the defendant's argument—or the plaintiff's reply—I ask the student to identify carefully the opponent's assertions about which there is agreement and disagreement. And then I have students produce alternative arguments that begin with changes in agreement or disagreement as to particular assertions and then move on to new assertions that lead to a result still desired by the party on whose behalf the argument is being made. Once this is accomplished, one can easily identify the issues. Disagreement over the validity of an assertion yields an issue; however, agreement does not. This methodology is, of course, an over simplification. Further, it is somewhat misleading because one cannot reconstruct arguments in a case without some understanding of the issues and principles derived from such case. Nevertheless, for the time being it is the best that I can do.

57. Indeed, something is always gained by observing the experiential learning of others, especially if the observing student follows carefully and thinks ahead as to what her own response might be. The brightest students frequently may be several steps ahead of the dialogue because their understanding would not have caused the analytic detours that are needed to redirect the performing student back to basics. Nevertheless, these very bright students will get a lot from the dialogue when they pay serious attention. At the very least, they will reinforce their own understanding. More than likely, however, by observing the efforts of others they will view the problem from a teacher's perspective and thereby develop useful insights into the analytical process being studied.

lecture. Nor can it be learned merely through observation. Balancing on two wheels demands active participation. One must attempt to ride without expectation of instantaneous success. One must fall, get up, try again, get up, try again and over time succeed. One only gets the hang of it by actually doing it and, if necessary, doing it over and over and over again.

I am describing a process that is often labelled socratic, and the illustration concerning issue identification occurs within the context of the case method. But the process is not really tied to either. Because the subject of our classes is law, it only makes sense that the focus consists of cases, statutes, regulations, and constitutions. The problem method really involves the same thing as the case method, only it is more advanced. It focuses on the application of the law—cases, statutes, etc.—within the context of a specific problem and its solution. Presentation of a problem may test one's understanding of the law or it may assume that one has already mastered it. In either instance, one must take the next step and apply that understanding towards a solution. Along the way, one may discover that there are different understandings and different solutions for consideration. Indeed, the problem method achieves what teachers of the case method frequently try to accomplish with their hypotheticals.[58]

As for the socratic label, it is really a misnomer.[59] What I am describing is

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58. The problem method is an outstanding vehicle for teaching analytic skills because it requires students to develop and apply their understanding of law within a context that makes that understanding necessary. The practice of law is about problem solving and the problem method requires students to do exactly that. It enables one to see law as something more than a set of sterile principles that seem to exist in a vacuum. Rules affect the lives of real people in real situations, and the problem method enables students to observe that and to simulate the context in which these rules ultimately achieve significance. There are, however, drawbacks in using the problem method, especially if one introduces it too early and too frequently in law school. Because the focus and emphasis is upon a problem and its solution, there is a natural tendency to assume mastery of the underlying law and, therefore, to glide over the cases, statutes, and regulations upon which the problem is founded. And this may assume much too much.

59. Few of us—if any—are purely socratic teachers. Undoubtedly there are reasons why this is so. Several immediately come to mind. To begin with, many people are uncomfortable with socratic teaching, often because they are much better at doing something else. Consequently they do that something else. Socratic teaching requires exceptional patience and it consumes a lot of time. Some teachers do not have the patience. Others do not want to spend the time, especially when it forces one to exclude important information and thereby prevents adequate coverage of a body of law. The tension and conflict between in-depth inquiry through the use of interactive dialogue and substantive coverage is always present. As a result, most teachers must make some kind of compromise. Consequently, they invariably find it necessary to lecture—albeit straight or disguised. Additionally, many teachers recognize that not everything a teacher may want to address lends itself to a socratic inquiry that is accomplished with questions and answers. Indeed, sometimes straight lecture is the only way to proceed. Finally, even a committed and experienced socratic teacher recognizes that there are times in which one must expand an explanation, affirm and punctuate all or portions of a student's response, and provide introductions, overviews and summaries to various materials. Without this, critical understanding may be lost and important conceptual building blocks may be weakened—or

a method of rigorous inquiry that need not be socratic. It does involve forcing students to think critically and carefully. It requires them to formulate an understanding and to justify that understanding. It requires them to apply their understanding and to defend that application. It forces them to integrate, synthesize, critique, and explain. It forces them to examine things logically and to elaborate policy. The forum can be a classroom discussion with cases, it can be a seminar paper that develops and critiques a body of law, or it can be a clinical practicum or simulation that addresses a client's problem. Above all, it must be interactive—with teachers, but also with students.[60] The process requires students to formulate an idea that is then subjected to careful scrutiny. Next in light of that scrutiny, it requires students to improve on that idea or understanding. And if one does this enough times, eventually students are able to master the skill and analyze the rule or problem—critically and comprehensively—on their own.[61] This has been the essence of legal education and something the Washington University School of Law does best.

Once again, however, there are storm warnings on the horizon. For years, we have asked candidates for entry-level positions in teaching about their own learning experiences in law school. Indeed, times are changing. More and more we see candidates from outstanding law schools with little or even no history with the kind of experiential learning just described. Indeed, one can identify a very highly-regarded law school whose recent graduates inform us that there is not a single "socratic" teacher at that school. Many classes do have discussions, but these discussions do not include the rigorous examination or scrutiny that enable the student and the class to move to a higher level of skill and understanding. Undoubtedly, some people can

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worse never established.

60. Interaction with other students provides the most frequent—if not the best—opportunity for this kind of interactive education, and most of it occurs beyond the classroom. Lawyers somehow never forget the hours spent with study groups during their first year of law school. Most will recall hours spent on outlines devoted to rules, cases, and statutes. Many recognize that these outlines were much more than a streamlined regurgitation of straight forward information. Indeed, these outlines required syntheses built after debate over holdings, dicta, fresh hypotheticals, policy considerations, and critical commentaries. They recognize that such outlines were constructed as a result of collective effort and interaction. Most of all, they know that the real value did not lie in the outline itself, but in the process by which it was produced—a process that developed and honed the analytical skills that were the hallmark of their training.

61. The phrase "on their own" is critical. As teachers, we cannot be there for students to help them solve problems when they engage in the practice of law. Nor will there be others to do it *for* them. Consequently, we must teach self-sufficiency. This does not mean that we are training them for solitary problem solving. We are not discouraging interactive problem solving with colleagues. Quite the contrary, two minds are always better than one. At the very least, one must encourage students to seek the counsel of others so that they may test tentative analyses, strategies, and solutions.

master these skills on their own, or at least with minimal experience. These are the best and the brightest, and the people we often interview. They caught on, but only time and experience will teach them that this is not the way most of us learn and must be taught these critical skills.

My concern for Washington University is not so much now, but ten to twenty years from now when there may be fewer and fewer teachers who recognize the importance of these skills and how to teach them. I am concerned that there will be a time in which there will no longer be models for experiential learning that are a part of our faculty's recent memory and their own personal history. And when this happens, experiential learning as we have known it will disappear.

I am concerned about the future because I believe there will be greater and greater movement away from experiential learning and the skills that have distinguished our craft and our education. Today we have more law than we had ten years ago and ten years before that.[62] And with each generation of law student, the law becomes more and more complex.[63] The lure of information and the need to teach it is irresistible, and the desire to teach all of it may become compelling.[64] To be sure, information can be

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62. This really needs no elaboration. All one need do is examine the burgeoning regional and federal reporters or state and federal statutes and the regulations that accompany these statutes.

63. This should need no elaboration. As an example, all one needs to do is examine the body of law that governs our environment. And if that is not enough, one can always refer to our tax law. More specifically, one might illustrate with a tax creature born twenty years ago and substantially redesigned ten years ago: the federal generation skipping transfer tax.

As I write this, I am reminded of a guest lecturer in my freshman torts class at the University of Chicago Law School. He was Roscoe Pound, Professor and Dean Emeritus of Harvard Law School—a person renowned in the law and in legal education. The year was 1957 and Dean Pound was in his late 80's or early 90's. Again and again he commented on how much the law of torts had grown in quantity and complexity. He added that in his "law school days" students could name every torts decision, and then he proceeded to do exactly that.

64. One need only examine the transformation of casebooks during the last 30 years. Earlier, casebooks were typically several hundred pages. They were designed to teach skills, and published cases were selected on this basis. Often the rules and result of a particular case rested upon a sound analysis and reflected a prevailing view among courts. But often the case was selected because its analysis was flawed and its result was nonsensical. The notes that followed each case elaborated various problems and questions. They did not, however, attempt to summarize a body of law. For example, casebooks on property provided basic information, but they did not offer the full range of information one might need for the practice of law or for success on a bar exam.

Casebooks today frequently exceed 1000 pages. They are longer but often they contain fewer cases than the older books that were much shorter in length. The difference lies in the information offered by casebooks of today. Invariably, these casebooks provide extensive summaries of various bodies of law. Consequently, at times they closely resemble legal encyclopedias instead of vehicles for teaching and imparting analytic skills. Instead of poking strategic holes in a body of law—matters that involve cases and principles ideally suited to teaching skills—the authors of these casebooks use much broader strokes to cover the subject matter. I suppose they reflect an author's unwillingness to commit the book primarily to skills. In the end, when in doubt, information is included and not excluded. And once included, there is always the pressure to teach it. *See infra* notes 65-66. Invariably, the user

disseminated through interactive and experiential learning that also concentrates on skills. Nevertheless, this experiential teaching methodology is terribly inefficient when it comes to dissemination of information.

Experiential learning requires extraordinary patience on the part of both the teacher and students. A student response requires scrutiny through a teacher's thoughtful reply. And when necessary, the teacher and student must resume the process with a principle and question that are more elementary. Ideally, the student must always see and achieve the light herself. This consumes time, and often it is a lot of time. Inevitably, experiential learning must sacrifice coverage and information.[65] Information begets vast knowledge and expertise, but without problem solving skills both are meaningless. Nevertheless, I fear that the lure of information will consume legal education during the twenty-first century.[66] And I firmly believe that legal education and lawyers will not be better off because of it.

This leads me to the other storm warning registered for me by the remarks of the teaching candidate previously mentioned. He would establish a Web Site to answer student questions because it would enable him to answer student questions efficiently and, therefore, trade student contact time for research and writing time. My first reaction concerned new technology—

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depends upon the author to be selective. If the author has selected something for inclusion in the book, then the user is inclined to do the same when it comes to making selections for teaching.

65. I recall a debate between two giants of legal education and scholarship that occurred at the first convention of the American Association of Law Schools that I attended nearly 35 years ago. The subject of the panel discussion was teaching and first year property casebooks. The discussion featured the casebook of one of these giants who carefully explained its lengthy contents. He constantly justified the inclusion of particular materials in terms of coverage and necessary information, but occasionally he would discuss the importance of teaching skills. The other giant—a teacher with a competing casebook at a competing school—explained that to teach skills he often found himself spending a week or more on a single case. He then asked for an explanation as to how this other giant could get through his lengthy casebook in the number of hours allowed for his course. Specifically, he asked: "In your casebook, please explain which materials are used for skills, and therefore are taught socratically, and which are used primarily for coverage of information?" The author replied: "I cover everything and along the way I use the socratic method to teach skills, and I do this with every case. The purpose of this casebook is to provide information along with skills, and this can be accomplished by everyone." The questioner then responded: "That is a pedagogical impossibility given the size of your book. One cannot emphasize vast coverage and teach skills at the same time. If you think otherwise, you deceive yourself and your students."

66. Certainly the computer has made it possible to acquire huge amounts of diverse and complex information almost instantaneously. Before the advent of the computer, often one would have had to use many research tools and techniques to acquire this same information and it would have taken many hours to accomplish this task. If you make something available, then people will use it, especially if it offers the potential for greater efficiency. Once used, they will not want to put that use to waste. Information will be there for the asking. Once it is discovered, such information will be taught and learned. The appeal to do so will be enormous, especially because information is always the easy way out for students and teachers. Because information can be mastered more readily than skills, teachers will want to lecture to students who happily and passively absorb their explanations.

computers and the internet. If you create it, people will use it. But they will also abuse it. To begin with, students have questions and a lot of them. Many questions warrant answers, especially if they exist and the teacher has them. Most questions, however, present the very best opportunities for experiential learning. Indeed, these opportunities should be a part of the total course package, where the learning of analytic skills and information occurs outside the classroom just as it does within it. These experiences again occupy contact time with students. They require a dialogue and careful guidance by a teacher instead of straight out answers. Although the teacher may accomplish this with a heavy hand, the student usually comes away with a sense of having solved his own problem. And surely this is what legal education should be about.[67] To be certain, one can conduct a personalized dialogue with e-mail. Nevertheless, something important is lost when the dialogue is spread out over hours and days.

Even more important, computers and the internet eliminate human contact. Every good teacher knows that many student questions reflect more than the question itself. Students are often terribly confused. A simple answer to their question would not begin to address the real reason for their question. Indeed, very often their question is fabricated into something readily answered or something impossible to answer. The teacher must detect the reason for the question. This is accomplished with the teacher's own questions and some explanations along the way. But it is also detected through a student's expressions and behavior[68]— something that escapes a dialogue through computers. Once detected, the teacher must fashion a dialogue that addresses the root source of the confusion. And this may require more questions, responses, and explanations.

In addition to confusion, every good teacher knows that student questions often reflect nothing more than a desire for human contact and feedback. This is especially true for first-year law students. Their anxiety level is enormous; it is something we must always anticipate and accept. They are learning skills that may not come naturally or immediately. They are

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67. Once again, in my judgment the ultimate focus of legal education is upon problem solving skills that students can exercise on their own. *See supra* notes 53-61 and accompanying text. Indeed, with these skills as the ultimate goal, there is no better learning experience than that in which a student actually does the task as expected—she utilizes her acquired skills to solve a problem by and for herself.

68. For example, even with the answer to her question, a student may still appear puzzled or even disturbed. If the student's question is her real one, then the answer should yield a sense of relief and perhaps accomplishment. If, however, there is more that underlies her question, invariably this will be revealed by a facial expression that reflects concern, maybe even anguish. Or perhaps such student will delay and not want to leave. These are important signals that something more underlies the original question.

accustomed to finding and giving correct answers. But now their responses receive a level of scrutiny unknown to them in the past. There may be no right answer, but they do not know that quite yet. Apart from what goes on in the classroom and faculty offices, they will not have feedback before the final exam. The feedback they seek may also transcend the course. The problem they really want discussed could concern future employment, whether they really wish to remain in law school, or it could be personal and unrelated to school. Whether their question masks their need to address anxiety or a personal problem, in these instances students approach their teacher with a question intended to invoke a dialogue about them and not a specific answer.

One should note that the foregoing discussion about the importance of face-to-face dialogue is truly about teacher accessibility. This has been the cornerstone of the commitment to teaching at the Washington University School of Law. It is something that has marked us as different and very special. But it is something that can easily be lost. The demands for faculty time will get worse, not better.[69] Contact time with students translates into less time for scholarship, committees, advisory positions, and other things. And the advances of technology will offer substitutes—albeit inadequate—for personal contact time. The appeal of these substitutes will be enormous. I fervently hope that the faculty of this law school will find them resistible.

Well, this has been my two cents worth. You may find it worth more or less depending upon your values and views about legal education.

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69. One should observe that some of these demands will be for things that have not traditionally fallen within the province of faculty responsibilities. To be sure, in the past the ivory tower of academia has shielded faculty from tasks that many have regarded as unpleasant. This has been especially true of law school faculty who have acted as if the business of legal education did not exist within a competitive world. But times have changed. Law schools must compete for students, faculty, employment opportunities for graduates, grants, and charitable contributions. When I arrived in 1963, the Washington University School of Law did not systematically recruit students or place them after graduation. And there was little effort at alumni development and fund-raising. Now, however, we have full time professionals that manage and staff offices of Admissions, Career Services, and Alumni Development. Nevertheless, one thing seems very clear. Despite the presence of these talented professionals, student recruitment, job placement, and alumni development will not be successful without full participation by faculty. At the very least, they are the linchpin in alumni relations. And alumni are a key to fundraising, job placement, and often student recruitment. In this respect, faculty members are a critical resource, and the demand for this resource should become greater and greater.