

Legal Education Reform for Grownups

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President Obama's recent suggestion that law school might be a year too long raised awareness of ongoing legal education reform debates, but like many other critics of the existing system, he did not really address what legal education involves, or the constraints under which it operates. Traditional legal education is far from perfect, but to avoid throwing the baby out with the bathwater our reform discussions must be informed by accurate assessments of what legal education needs to accomplish, as well as the constraints it faces. To put it simply, well-educated lawyers need to know four broad types of things about law, and traditional legal education is a very effective way to address three of these. We should be thoughtful as we undertake to reform legal education because, to paraphrase the noted legal philosopher Meatloaf, three out of four ain't bad.

Legal education must first teach students the answers to what can be thought of as "what" questions. These include not only classic legal questions like "what is the Rule against Perpetuities?", or "what is the Administrative Procedure Act?", but also basic civics questions like, "what is the Department of Justice?" There is a lot of stuff, for lack of a better word, that law students need to learn about the legal system, and traditional legal education, involving professors, textbooks, and students preparing for a wide variety of classes, is a pretty efficient way to convey that stuff. Expecting lawyers to learn basics like that on the job has always been problematic, but is especially so now. Knowledge gained on the job has always been partial because young lawyers are given specific tasks to handle, and are not given time to learn whole areas of law. This is especially true in the current climate, where clients are notoriously less and less willing to pay for junior lawyers' time. A legal education that combines comprehensive coursework with effective training in legal research skills is the best way to equip young lawyers to handle the "what" questions that they will continuously face in practice.

Legal education also involves "why" questions, such as "why do we require federal agencies to notify the public and accept comments when they enact regulations?," or "why is corporate law primarily a matter for the states, rather than the federal government?" These are "why"s about the "what"s, and members of an educated profession like law should have a good idea why things are the way they are. Reform and progress, to say nothing of basic professional sophistication, require that we know how what we observe has come to be. Moreover, even from a purely practical point of view, understanding the "why" helps lawyers assimilate new information about law and legal institutions, which makes it easier for them to deploy that information in the service of their clients. "Why" questions, perhaps even more than "what" questions, can be effectively addressed through traditional legal education conducted by intellectually

oriented faculty, but can be learned at best piece-meal by young lawyers engaged in modern law practice.

Closely related to the why questions are “whether” questions, as in “whether this is how things should be,” the normative or policy questions about existing legal rules, institutions, and practices. Traditional legal education may focus too much on these questions, as law faculty love classroom debates over questions like whether oral agreements should be enforceable, or whether the Supreme Court should have implied a right to privacy in the Constitution. Even granting that traditional legal education could pare back its focus on normative questions, however, being able to think deeply about them is a fundamental part of being an educated legal professional. And even though law practice generally involves pursuing client interests, not disinterested policy debate, pursuing client interests will sometimes require convincing others that client interests and the public interest align. When judges or regulators are left with discretion policy argument becomes central to effective legal advocacy, so systematic exposure to the policy arguments surrounding a field of law is important preparation for practice, especially in more complex matters.

The questions traditional legal education handles least well are of a fourth type, the “how” questions, such as “how do I form a corporation?,” “how do I depose a witness,” or “how do I draft a motion for summary judgment?” Traditional legal education has focused a great deal on two “how” questions, how to read and analyze cases and statutes, and how to craft legal and policy arguments, and these remain crucial skills for lawyers. It’s clear, however, that traditional legal education is not designed to teach students many things that lawyers do in practice, and that is the main criticism now being leveled against it by some members of the practicing bar, and by advocates for clinical education. Although their attacks on traditional legal education in favor of enhanced skills training tend to overlap, these two groups are motivated by distinct concerns.

Lawyers are calling for increased skills training by law schools because their bills are under increasing scrutiny from their clients, so they say they want new associates to be able to do more when they come in the door. Law firms remain better than law schools at teaching lawyers the how-to skills they need in practice, but their clients no longer want to bear the cost of that training, so the firms are looking to shift those costs to the schools. This is perfectly understandable, but their arguments should be taken with a grain of salt. Law schools did not create the law firm business model now under such pressure from clients, and even if law schools shift scarce resources away from traditional education toward skills training, there is little reason to think that will induce firms to hire more new associates.

The advocates for clinical education, on the other hand, are reacting to this period of uncertainty by emphasizing the importance of skills training because that is the area in which clinics have a comparative advantage. No one doubts that law school clinics are comparatively good at teaching students to perform specific lawyerly tasks because they are set up to mirror law practice. And because clinics allow students to experience law practice under supervision, and insulated from the pressures of actual practice, they can provide students with space to be reflective about their work that the real world generally does not. But because of the small numbers of students they train clinics are much more expensive than traditional legal education on a per credit basis, and there is no way that they can systematically address, for large numbers of students and across a range of subjects, the three primary questions that concern legal education, the what, why, and whether questions.

The current angst over legal education should not cause us to lose sight of the fact that there is a lot that we expect law students to know before they enter practice, and that traditional legal education, though far from perfect, is a pretty good way to deliver most of that. We are awash now in legal education reform proposals, but none deserve serious attention unless they address both the breadth of legal education's task, and the financial constraints under which it operates.