

# “ADVANCED” LEGAL EDUCATION IN THE TWENTY-FIRST CENTURY: A PREDICTION *OF CHANGE*<sup>1</sup>

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THIS essay carries a prediction of significant change in the structure of the curriculum of American law schools. This will not be the type of change found to be annoying because its weight in the purse is greater than its value. Although annoyances will be present, the value gained will be well worth the cost.

The curricular change foreseen will affect our understanding of “advanced” legal education. Today, the modifier “advanced” is properly taken as the usual reference to formal law-school-based education beyond the first degree in law; programs of this sort are commonplace in American law schools and usually lead to the award of the LL.M. degree after the equivalent of a full year of study.

Although “advanced” legal education, as defined above, has grown enormously in the last quarter century, it will soon fall victim to a confluence of academic, professional, and related economic forces. It will survive only to the extent that it caters to the needs of non-U.S. lawyers who seek some training in U.S. law. With that one exception, “advanced” legal education will come to mean something very different—it will more properly become a reference to the third year of law school! This anticipated development is best explained by first considering the recent history and present status of the J.D. curriculum and LL.M. programs.

In 1990, American law schools awarded 1,690 LL.M. degrees (including all professional master degrees in law, except for the M.C.L. and the M.C.S.). In that same year, 36,385 J.D. degrees were awarded. By 1999, 93 American law schools, through the vehicle of more than 175 LL.M. programs, awarded 3,069 LL.M. degrees. In that same year, 39,071 J.D. degrees were awarded.

To summarize, there was an 82% increase in the number of LL.M. degrees awarded in just ten years! During the same time, there was only a 7.4% increase in the number of J.D. degrees awarded. For another perspective, consider that LL.M. degrees, as a percentage of J.D. degrees, grew from 4.6% to 7.9%. The advanced degree in legal education has become the market phenomenon in legal education.

It is especially notable that this expansion of LL.M. education is not in the form of the traditional “general” LL.M. of old, which was offered by only a few of the most prestigious American law schools and principally designed to produce law teachers. While the number of LL.M. programs tailored for foreign lawyers continues to grow, the principle growth of LL.M. programs is in specialized areas of American law; and the students are American lawyers. The most popular LL.M. programs for American lawyers continue to be Taxation and International and Comparative Law. Their number continues to grow. But this genre has been around for many years. The new development is the proliferation of programs in other areas of specialization.

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1. A version of this essay was presented in London in July of 2000 as a paper at the “Joint Programme” of the University of London and Section of Legal Education and Admissions to the Bar of the American Bar Association: “Legal Education in the United Kingdom and the United States in the New Millennium.”

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The trend, beginning in the 1990s, has picked up momentum in the last two years. Thus, since 1998 the Council on Legal Education and Admissions to the Bar of the American Bar Association has acquiesced in new LL.M. programs in Insurance Law, Environmental Law (2), Health Law, Intellectual Property (2), Employee Benefits, Dispute Resolution, Estate Planning, Law, Religion and Culture, Bankruptcy Law, and Criminal Law.

There are probably many good reasons for the growth of these specialized LL.M. programs in American legal education. Law schools are looking for new market niches as they continue to cope with the dramatic drop in applicants that occurred during much of the 1990s. LL.M. students can replace J.D. students and thus counter the various effects of the shrunken J.D. applicant pool. Law schools have also been forced to reckon with the competitive J.D. marketplace by seeking ways to distinguish themselves from the pack and to enhance recognition. Specialty LL.M. programs are perceived to be a useful competitive tool. Finally, one might suppose that the growth of specialty LL.M. programs may be a function of law school efforts to meet a perceived market demand for greater specialization in the practice of law—specialization beyond that which is typically found in the curriculum of today's law school graduate.

The growth of specialization in the practice of law is discussed in the *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, otherwise known as the *MacCrate Report*. On the topic of lawyer specialization, the *MacCrate Report*, published in 1992 by the American Bar Association Council on Legal Education and Admissions to the Bar, had this to say:

[C]hanging law and new complexities have put an increasing premium on specialization to maintain competence and to keep abreast of subject matter. The process of professional differentiation has accelerated in clients served and kinds of legal work performed. Although solo and small-firm practice continues predominately to serve individual clients, the lawyers in these practice settings, like in other practice settings, are increasingly becoming "specialists." When asked, the great majority of lawyers now describe themselves as specializing by legal doctrine, lawyering skill, or type of client.<sup>2</sup>

The trend toward greater specialization in the practice of law has continued unabated since 1992. The *1990 ABA Model Standards for Specialty Areas* recognize 24 practice areas, and a score of states have formal certification programs for designated areas of practice. As the *MacCrate Report* noted, there are exceedingly strong market forces behind this trend. Clients are looking for lawyers and law firms with specific competencies, and there are very few impediments to lawyer advertisements, which highlight special competencies. Thus, lawyers now advertise their areas of practice in the telephone book yellow pages and in other directories.

This specialization in the practice of law will encourage changes in the current structure of the J.D. curriculum, and paradoxically these changes will cause

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2. *Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS B. 40-41.

American law schools to eliminate the specialized LL.M. programs directed at American lawyers! This seems counterintuitive to be sure. One might reasonably suppose that the growth of specialization in the practice of law will support and encourage the continued growth of LL.M. enrollment. But that will not be the case. The LL.M. for American lawyers will die out, although the LL.M. for foreign lawyers will survive as a remnant of the current regime of "advanced" legal education. Different market forces are at work. What follows is the explanation.

Although there has been a considerable growth in J.D. course offerings over the last 25 years, most notably the addition of practical skills courses taught by simulation and clinical method, the structure of the J.D. curriculum has remained largely unchanged. Students take the traditional first year courses, and the last two years are largely elective, except for the common requirements of a seminar and the professional responsibility course. The majority of law schools require between 88 and 90 course credits for graduation. The most common requirement for graduation is 90. Typically, of the 90 credits required for graduation, 30 are devoted to the first year required curriculum. Of the remaining 60 credits, one-half are usually consumed by student response to the bar examination of the various states. In many law schools upper level requirements exist, but they are usually directed to these bar courses. The bar courses beyond the first year usually embrace the subjects of nine or ten elective courses—30 credits in most law schools. After deduction of these 30 credits, and two more for the commonly required seminar, and three more for the ABA mandated professional responsibility course, 25 credits of the original 90 remain. This is the "true elective" portion of the law curriculum.

This calculation of the "true elective" portion of the law student's curriculum is obviously an approximation. Not all law students take all of the bar courses; some law schools require less than 90 credits for graduation, and some require more than 90. The subject matter coverage of the various bar examinations varies from state to state. Also, some students will take more than the minimum number of credits required for graduation. Nevertheless, the figure of 25 credits for the "true elective" portion of the curriculum is a fairly accurate approximation for the typical law student.

Student course selection for the "true elective" portion of the curriculum is governed by many factors, including teacher preferences, subject matter preferences, local custom, and schedule considerations. A number of law schools offer certificate programs and in those schools the "true elective" portion of the curriculum may be significantly devoted to attaining a certificate.

Certificate programs are similar to an undergraduate minor; they typically require the equivalent of one semester of course work, and, therefore, consume approximately one-half of the "true electives" that are otherwise available to a J.D. student. Certificate programs are growing in number throughout American legal education. Certificate programs are not governed by any ABA Standards.

For our present purposes, a fair summary of the present state of the pertinent structural features of the law school curriculum includes the following:

1. The "true elective" portion of the J.D. curriculum constitutes slightly less than two semesters of study, usually 25 credits;

2. LL.M. specialty programs require the equivalent of two semesters of study, usually 24 credits; and
3. Current certificate programs typically constitute no more than one semester of study.

Now, here is the prediction. Certificate programs will grow in two ways. First, they will increase in number. Eventually, all schools will have certificate programs focused on major practice areas in the law. Second, the certificate programs will increase in credit hours from one semester to two semesters of course work—the third year of the J.D. program. In other words, the J.D. certificate programs will eventually grow into the equivalent of what is now the fourth year of law study—what we now call the LL.M. And so the third year of the J.D. program will replace and render obsolete the fourth year LL.M.

There are several objections that may be made to this scenario, one to the likelihood of the scenario and the other to the desirability of the scenario. First, one may argue that this simply will not come to pass. Why should law schools give up the potentially lucrative market of the fourth year of legal education that the LL.M. represents? It does not make sense. Why should the law schools adopt the third year certificate program model when it will destroy the fourth year LL.M. model?

The answer is that the marketplace will encourage this change. First one, and then several, and then a growing number of law schools will adopt the third year certificate program model. This will give them a special niche in the J.D. market—they will provide the law student with the specialty benefit of the LL.M. in three years of law study, rather than four. This is a tremendous advantage, given the present cost of tuition and the size of starting salaries. The out-of-pocket savings and opportunity cost savings are substantial. The marketplace will encourage this result once the third year certificate program model takes hold in American law schools.

A second objection may be that this will not be good for the J.D. educational program. Students should not be encouraged to specialize in law school, at least not to the extent of a full year of course credits. Students should have a liberal and general education in the law. Very few can predict with any accuracy, at the time of course registration for the third year of law school, what their area of practice will be at the time of graduation. And certainly the experience of most lawyers is that over time their area of practice changes.

The answer to this objection is that the student will have that general and liberal education in the law at the conclusion of the second year. Beyond that, the current “true elective” portion of the student curriculum is, more often than not, a rather aimless cornucopia of courses, the selection of which is driven by a variety of student considerations that may only by accident produce a general and liberal education in the law. More often than not, the typical student’s “true elective” portion of the current curriculum is an incoherent amalgam. In contrast, the certificate program is a coherent, coordinated set of offerings and likely to be a much better use for the 25 credits.

Students will develop an expertise as a result of a systematic and progressively sophisticated study of a discrete area of practice, and what better opportunity for the development of the fundamental skill of “thinking like a lawyer!” Substance and method can be taught and learned in a thoroughly harmonious and complimentary

fashion. Capstone courses with significant writing, clinics and other practical exercise will ease the student's transition to practice. The disenchanted and disengaged third year student of the law, whom we all know today, will be transformed into the thoroughly engaged and enchanted student of tomorrow.

What will the certificate program areas be? The *ABA Model Standards for Specialty Areas* suggest 24 subject areas. The telephone directory of a large metropolitan area will typically include 30 or more practice area listings. Law school catalogs often present the elective curriculum in a dozen or more subject matter clusters. It is likely that the law school catalogs and current LL.M. programs are the best basis for predicting the certificate program areas. Faculty resources will be an important factor in the number and subject of certificate programs. Schools may seek distinction based on the number and uniqueness of programs offered, the market demand for the skills taught in their certificate programs, or the national recognition or "ratings" achieved by their specialty offerings.

As law schools develop certificate programs to fill the "true elective" portion of the curriculum, the following subject matter areas are likely to be considered for certificate program designation: taxation, comparative and international, real estate transactions, litigation/civil, litigation/criminal, business and corporate, estate planning and probate, marital and family, personal injury and property damage, health, government contracts and claims, civil rights, labor and employment, and general practice. Other candidates for certificate designation may include intellectual property, worker compensation, immigration and naturalization, and admiralty. Each school will probably settle on eight to ten certificate programs.

There will be considerable variation from school to school in certificate program offerings. Designations will be a function of the faculty strength in the various areas of the practice, student and applicant demand, and the needs of the profession. Law school applicants will consider certificate programs in deciding where to study law. Curriculum will finally become a significant factor in applicant decision making.

The development of the "true elective" curriculum into certificate programs will require careful curricular planning and implementation. Faculty will organize into subject matter departments in order to achieve the coherence and integration required of certificate programs. The creation of departments within the law faculty will challenge the ability of law schools to protect core values; it will also challenge traditional notions of governance. But the market forces for change will be inexorable.

The change in the structure of legal education will begin with the conversion of the "true elective" portion of the J.D. curriculum into certificate programs. The third year of the J.D. program will begin to flourish. The fourth year LL.M. for American lawyers will die off. The definition of "advanced" legal education will change.

You may note that this prediction is written in words of certainty, and you may suspect that in truth the language chosen may be more a function of wishful thinking than certainty about the future. Can't fool you!