

Reflections on the Future of the Legal Academy

The Honorable Antonin Scalia
Associate Justice of the Supreme Court of the United States

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2014 Commencement Exercises
William & Mary Law School
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Good afternoon. Dean Douglas, members of the faculty, graduates of the Class of 2014, their families and friends: It is a pleasure to celebrate with you and those who love you the significant accomplishment of achieving a law degree from one of the nation's oldest and finest law schools.

I have a philosophy of commencements. They are not for the benefit of the graduates, who would probably rather have their diplomas mailed to them at the beach. They are for the pleasure and satisfaction of the graduates' families and friends, who take this occasion to observe and celebrate a significant accomplishment on the part of those whom they love. In that respect a commencement is like a wedding or baptism: the primary participants in those events would rather be elsewhere as well.

Since that is the nature of a commencement, it does not much matter what the commencement speaker talks about. He can talk about whatever burr is under his saddle, so long as he does not go on too long. What I want to discuss with you briefly—and I promise to be brief—is whether (to be blunt about it) you have essentially wasted one of your three years here, and could have done the job in two.

It is a current proposal for reform that law students should be permitted to sit for the bar exam and otherwise be eligible to practice law after only two years of study. To be sure, this is not a new idea. In New York, for example, between 1882 and 1911, college graduates needed to complete only two years of law school to sit for the New York bar; only non-graduates had to do the extra year.¹ But then, in 1911, the New York Court of Appeals changed the rule to three years—which remains the rule today in almost all jurisdictions. But, now and again, it has been a source of controversy. In the 1970s prominent educators from President Derek C. Bok of Harvard University to President Edward H. Levi of the University of Chicago said publicly that switching to two years was at least worth a try.² Then in 1999 Judge Richard Posner embraced the idea.³ As did the President of the United States just last year, saying that third-year students would be “better off clerking or practicing in a

¹ Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599, 601 (2012).

² *Id.* at 603.

³ See Richard A. Posner, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 280–295 (1999).

firm.”⁴ Finally, joining the chorus—and this was a surprise, at least to me—was the American Bar Association’s Task Force on the Future of Legal Education, which suggested in January of this year that “bar admitting authorities could create paths to licensure with fewer hours than the [current] Standards require by devices such as: (1) accepting applicants who . . . have fewer hours of law-school training than the Standards require; or (2) accepting applicants with two-years of law school credits plus a year of carefully-structured skills-based experience, inside a law school or elsewhere.”⁵

I vigorously dissent. It seems to me that the law-school-in-two-years proposal rests on the premise that law school is—or ought to be—a trade school. It is not that. It is a school preparing men and women not for a trade but for a profession—the *profession* of law. One can practice various aspects of law without knowing much about the whole field. I expect that someone could be taught to be an expert real-estate conveyancer in six weeks, or a tax advisor in six months. And maybe we should train such people—but we should not call them lawyers. Just as someone might become expert in hand surgery without knowing much about the rest of the human body, so also one can become expert in various segments of the law without knowing much about the rest. We should call the former a hand surgeon rather than a doctor; and the latter a real-estate conveyancer, or H&R Block—but not a lawyer. Those of you who have walked the streets of Paris may have noticed (as I have) signs here and there—“Jurisconsult,” for example—advertising the services of people who give legal advice but are not *avocats* (lawyers). I am not even sure whether one must pass an exam or have any special training to work in such a capacity.

None of you who are being graduated today is being certified an expert in patent or employment law. You are instead receiving degrees that attest to your successful completion of a sustained three-year study of *law*. The mastery of *that* subject is what turns the student into a legal *professional*. This is the traditional view, well expressed by an earlier (and wiser) ABA panel in 1921:

⁴ Transcript of Remarks by the President in Town Hall at Binghamton University, White House Office of the Press Secretary (Aug. 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/23/remarks-president-town-hall-binghamton-university>.

⁵ American Bar Association Task Force on the Future of Legal Education, *Report and Recommendations* 28 (2014).

Legal education should produce a real knowledge of fundamental principles and a mind which thinks in terms of the common law. . . . The process of assimilation and of mental growth must be orderly and comparatively slow. Experience has shown that a student who gives substantially all of his working time to his studies should devote at least three years to his legal education. And even three years is scarcely enough, so great have the bulk and complexity of American law become.⁶

My guess is that the bulk and complexity of American law have doubled since 1921. Consider the areas of law which come before my Court *that didn't even exist when I was in law school*: employment law, including Title VII, the Americans with Disabilities Act, and the Employee Retirement Income Security Act; several major national-security statutes, including the Foreign Intelligence Surveillance Act, the Patriot Act, and the Aviation and Transportation Security Act; the Clean Air Act; the Freedom of Information Act; the Foreign Sovereign Immunities Act; the Affordable Care Act; Sarbanes-Oxley; and I could go on. And that's just federal law. State law has also grown—and grown increasingly complex. Any lawyer, if he is to call himself a professional, should at least be aware of all these areas and should have a fair understanding of most of them.

The law schools themselves are partly to blame for the belief that all the law you really *need* to know can be acquired in two years. For starters, they increasingly abstain from saying there is *anything* you *really need* to know. When I was in law school, Harvard's first-year curriculum included Agency, Civil Procedure, Contracts, Criminal Law, Property I, and Torts. No electives. The second-year curriculum required Accounting, Administrative Law, Commercial Law, Constitutional Law, Corporations I, Taxation, and Trusts—although the Course Catalog contained the following generous exception:

The Law of International Transactions and Relations or Labor Law may be substituted for Commercial Law by second year students. Those electing this substitution will normally be required to take Commercial Law in the third year. On a showing of special need, a second year

⁶ *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association, in REPORT OF THE FORTY-FOURTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION* 679, 684 (1921).

student may make other substitutions with the permission of the Faculty Chairman for the second year.⁷

Even the third year was not entirely elective. The Course Catalog said:

Third year students are required to take the course in Property II unless they have taken it previously. Students who took any course in the second year in lieu of Commercial Law are required, in the absence of special permission, to take Commercial Law.⁸

Now there was a faculty that had some firm views about what it took to become “learned in the law.”

Contrast that curriculum with the current scene. It is something of an open secret now that the second and third years of school offer a student the chance to study whatever strikes his or her fancy—so long as there is a professor who has the same fancy. It is also well known that many of the courses from which the student may choose have a distinct non-legal flavor, to say the least: from “Effective and Sustainable Law Practice: the Meditative Perspective” and “Elegance in Legal Thought and Expression” at Berkeley Law School, to “The Philosophical Reinvention of Christianity” at Harvard, to “Contemporary Virtue Ethics” at Chicago. Even the traditional first-year courses—torts, contracts, and the like—seem to be going out of style. Many schools now offer first-year students one or two “electives” to spice things up a bit. At Northwestern University School of Law, for example, 1Ls may choose two elective courses among options that include “Law and Psychology,” “Narrative Structures,” and—I’m not making this up—a class called “Large Law Firms.” At the University of Michigan Law School, a 1L may take a class called “Innocent Defendants.” (There appears to be no companion course on “Guilty Defendants.”) Georgetown University Law Center has made the bread-and-butter first-year courses *entirely optional*. The incoming student may choose “Curriculum A,” which is the set of traditional first-year courses, or “Curriculum B,” which includes courses such as “Bargain, Exchange, and Liability,” “Legal Process and Society,” and “Property in Time.”

⁷ Official Register of Harvard University, THE LAW SCHOOL: CATALOGUE FOR 1959–1960 38 (1959) [hereinafter HLS CATALOGUE FOR 1959–1960].

⁸ *Id.* at 45.

This elimination of a core curriculum, and the accompanying proliferation of narrow (not to say silly) elective courses has not come without its costs. In more than a few law schools, including some of the most prestigious (the University of Chicago, for example), it is possible to graduate without ever having studied the First Amendment. Can someone really call himself an American lawyer who has that gap in his compendious knowledge of the law? And can a society that depends so much upon lawyers for shaping public perceptions and preserving American traditions regarding the freedom of speech and religion, afford so ignorant a bar? And the problem is not just that students are not *required* to take such fundamental courses. Even those who wish to take them as electives are often frustrated because the courses are not offered frequently enough. The Harvard Course Catalogue I have been quoting from included the following significant statement regarding elective courses: “The courses in Government Regulation of Business, Evidence, Conflict of Laws, and Labor Law, are given in more than one section because they are the ones which are most frequently elected.”⁹ How student-friendly. Nowadays, when I ask a clerkship applicant why he or she did not take Federal Courts, or Evidence, or some other course that seems to me basic to a complete legal education, I often get the response: “It was not being offered the semester when I had room to take it.” The faculty resources were presumably being devoted to Legal Process and Society, or some other boutique course that was the subject of a faculty member’s interest and research.

Some of the belief that the third year of law school can be eliminated rests upon the notion that what it provides can easily be provided elsewhere—in the words of the ABA’s panel, by “a year of carefully-structured skills-based experience, inside a law school or elsewhere.” Who, one wonders, is going to do this careful structuring of skills-based experience outside a law school? Will law firms that are in the business of serving clients and making a living devote their time and resources to educating associates who are likely to go elsewhere after a couple of years? But more importantly, it is not “skills-based experience” that makes a person learned in the law. Legal learning is what only law schools can effectively convey. You graduates will never again have the opportunity to study systematically and comprehensively entire areas of the law—Intellectual Property, Commercial Law, Environmental Law, etc. Despite Harvard’s extensive core curriculum and frequently taught major electives

⁹ *Id.* (footnote omitted).

during the years I went there, I came out with some gaps—some blind sides—that I have always regretted. Intellectual Property, for one, and Bankruptcy.

And what is the use of having a bar learned in the law? What is wrong with a conglomeration of “skills-based” experts? There are some pragmatic reasons. For one thing, the skills overlap, and even specialized practice in one field requires basic knowledge of another. One cannot write a contract or settle a case in utter ignorance of antitrust law—or, for that matter, the law of evidence; or write a will without knowledge of tax law and trust law; or litigate a case without knowledge of the substantive fields that are involved. Secondly, the lawyer who is familiar with many fields can apply the ancient learning or the new developments in one field to another—the constant interplay between tort and contract law is an example. In this way the law becomes a more cohesive whole, instead of a series of separate fiefdoms. But forget all that. Most of all, it is good to be learned in the law because that is what makes you members of a profession rather than a trade. It is a goal worthy to be achieved—as you have achieved it—for itself. To say you are a lawyer is to say you are learned in the law. And, to return to the point, you can’t do that in two years.

Now for a less palatable part of my talk. It is no mystery what has prompted the current calls for a two-year law degree. It is, quite simply, the constantly increasing cost of a legal education. William and Mary, even for out-of-state students, is a great bargain, but even so is not cheap. If I may advert to my own experience at Harvard, once again: In the year I graduated, tuition at Harvard was \$1,000. To describe developments since then, in the words of a recent article:

Over the past sixty years, tuition at Harvard Law School has increased ten-fold in constant, inflation-adjusted dollars. In the early 1950s, a year’s tuition at the school cost approximately \$5,100 in 2011 dollars. Over the next two decades this figure more than doubled, so that by 1971 tuition was \$11,664 in 2011 dollars. Tuition grew at a (relatively) modest pace over the course of the 1970s, so that by 1981 it was \$14,476 in 2011 dollars. Then it climbed rapidly again, rising to \$25,698 in 1991, \$34,484 in 2001, and nearly \$50,000 in 2011, again all in constant dollars.¹⁰

¹⁰ Paul Campos, *Legal Academia and the Blindness of the Elites*, 37 HARV. J. L. & PUB. POL’Y 179, 182 (2012).

Harvard's current tuition, by the way, is \$53,308.¹¹

This is obviously not sustainable, given that over the last 25 years there has been a sharp contraction of the legal-services sector, compared with the rest of the American economy.¹² Which means that a legal education has become less rather than more valuable—if you value a legal education in money, which I obviously do not, and urge you not to do. So things have to change. One solution, the worst in my view, is to shorten law school to two years. That will produce (or ought to produce, if reason prevails) a one-third reduction of faculty size.

But if law school is to remain three years, costs have to be cut; the system is not sustainable in its present form. The graduation into a shrunken legal sector of students with hundreds of thousands of dollars of student debt, nondischargeable in bankruptcy, cannot continue. Perhaps—just perhaps—the more prestigious law schools (and I include William and Mary among them) can continue the way they are, though that is not certain. But the vast majority of law schools will have to lower tuition. That probably means smaller law-school faculties—though not necessarily one-third smaller. That would be no huge disaster. Harvard Law School, in the year I graduated, had a faculty of 56 professors, 9 teaching fellows, and 4 lecturers; it now has a faculty of 119 professors, 53 visiting professors, and 115 lecturers in law. A total of 69 then and 287 now.¹³ And cutting back on law-school tuition surely means higher teaching loads. That also would not be the end of the world. When I got out of law school, the average teaching load was almost 8 hours per week.¹⁴ Currently it is about half that.¹⁵ And last but not least, professorial salaries may have to be reduced, or at least stop rising. Again, not the end of the world. To use Harvard again as an example: Faculty salaries have much more than doubled in real terms since 1969.¹⁶ Chief Justice John Roberts, “in his [unsuccessful] 2008 entreaty to Congress to raise

¹¹ Best Law Schools: 2014, U. S. News & World Report Best Grad Schools Rankings: Law, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings?int=992008>.

¹² See Campos, *Legal Academia*, *supra* note 10, at 183–84.

¹³ See HLS CATALOGUE FOR 1959–1960, *supra* n. 7, at 5–8.

¹⁴ Brian Z. Tamanaha, FAILING LAW SCHOOLS 40 (2012).

¹⁵ *Id.* at 42.

¹⁶ Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J. L. REFORM 177, 190 (2012).

the pay of federal judges,” noted that federal district judges are paid half as much as senior professors at top schools.¹⁷

But to return to my main point: Since the modern legal academy appears not to believe that there is a solid and significant core of courses that entitle someone to be admitted to the profession of law, it is small wonder that there are calls for shortening law school to two years. If and when that happens, the shrunken faculties will have only themselves to blame. But for the moment, for you graduating students who have had what I consider not the luxury but the necessity of soaking in the law for three full years, and for the parents who have paid for that experience, welcome to the ranks of—not tradesmen, but men and women learned in the law. Congratulations.

¹⁷ Tamanaha, *FAILING LAW SCHOOLS*, *supra* note 14, at 48 (citing U. S. Supreme Court, *2008 Year-End Report on the Federal Judiciary* (2009)).