

Transferring the proof model to the mass-enrolment environment of the LLB proved far less difficult than had been anticipated. The course content for the JD was, with some simplification and reduction of reading material, replicated in the LLB. The same general teaching approach was also taken so that the classes comprised a similar mixture of mini-lectures and problems. The problems were also approached in the same way as on the JD; that is, the problem would first be expounded to students, who would then be given the opportunity to discuss it with whomsoever they happened to be sitting near, before being invited to contribute to the public discussion of the problem by the class as a whole.

One objection to a proof-oriented model of teaching evidence is that factual analysis is already dealt with in specialist subject such as advocacy, trial practice, or other clinical courses: that being so, there is no need to include factual analysis in Evidence. Reasons that factual analysis might well be sufficiently important to warrant a place in the compulsory and quasi-compulsory core of subjects include: any list of the skills required of lawyers is bound to include skills in factual analysis; factual analysis is not only central to litigation but also is an important component of any career which requires the marshalling and evaluation of the evidence and arguments for competing claims; if a course in 'Evidence' is to live up its label, then it should include a consideration of evidence as evidence, and not just an analysis of that evidence from the point of view of admissibility; it can be difficult for students to understand the purpose and operation of the rules of evidence when they are divorced from the process of proof; there are a number of exclusionary rules whose scope and operation depend on the purpose for or manner in which the evidence is being used; and finally, just as an emphasis on factual analysis can enhance students' ability to apply the rules of evidence, so can it open the door to the introduction of critical insights.

The shift towards a more proof-oriented model of teaching Evidence is now well entrenched. Its fundamental aim has been to increase students' skills in factual analysis, such skills being important to the practice of law, transferable, and essential to a proper application of many of the exclusionary rules of evidence. The change in approach has gone hand in hand with a change to the assessment, so that students are now presented with a task much more akin to that which they are likely to encounter in practice, namely the analysis of a brief of evidence in a criminal proceeding and the completion of an advice on evidence based on that analysis. Anecdotally, students have reported that the focus on factual analysis has improved their general thinking and arguing skills and more formal evaluation has confirmed that students are satisfied that the new assessment provides a better measure of their abilities than the assessment it replaced.

## LEGAL EDUCATION GENERALLY

### **The structure of legal education and the legal profession, multidisciplinary practice, competition, and globalisation**

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In a world in which the forces of change are intensifying and accelerating, the legal profession must respond to new challenges that it is ill equipped to meet. The value that the marketplace for legal services assigns to an entrant's degree directly reflects the status of the degree-conferring institution as a national, regional or local law school.

The differences according to which law schools are sorted into these three categories have become more pronounced over time, contributing to an increasingly stratified legal profession. The identity of the institution from which a graduate receives the JD degree may be the single most important factor in the graduate's career path. Legal education and the legal profession are inextricably intertwined. For at least the last seventy-five years, the national law schools have graduated students whose career paths have led to employment in prestigious and powerful institutions in both the public and the private sector. In sharp contrast, these career paths have been available for the most part to only a handful of the graduates of regional law schools, generally the students at the top of their class who were law journal editors.

Over the course of time, both the national law schools and their graduates have increasingly disassociated themselves from their regional and local counterparts and this disassociation is accelerating. Growing competition and the relatively fixed ranking of law schools, graduates, and jobs means increasingly that graduates from different law schools will have very little in common.

Careers in legal education are a prime example of the collision between stratification and marketplace. Except for those on the clinical side of the curriculum, academic careers are open generally only to the graduates of a handful of national law schools. A related question is whether the regional and local law schools will continue to attract the same number of applicants if it

becomes recognised that the elite careers are open only to a very small percentage of the graduates of those schools.

The legal profession may be moving to a world where law is so stratified that the elite will not even identify with the profession as such, making it all that much easier for multidisciplinary practice to become the norm. Does a Harvard lawyer have more in common with a Harvard MBA or a graduate from a less prestigious law school?

The stratification of the legal profession and law schools may promote out-of-the-box innovation in a profession and a scholarly community distinguished by its resistance to change and its embrace of the status quo. Regional and local law schools (but especially local ones) facing competition from online educational institutions will have to rethink the traditional three-year curriculum. Some will condense it to two years. Others will offer a new approach to the third year, emphasising intense clinical training or supervised apprenticeships. The market will demand that those law schools that choose a traditional approach to the third year provide compelling justifications for the tuition burden and the commitment of time. The justifications will become less and less persuasive as more students become accustomed to online learning at the undergraduate and postgraduate level, and more employers accept the value of a degree awarded for the successful completion of online course work.

The structure of the legal profession will correspondingly change as the marketplace assigns different values to a law degree earned online and one earned in a traditional program. Graduates with MA degrees in the law will compete with JD graduates for jobs in specialised sectors of certain industries.

Contrary to the popular belief of some, the collapse of the Enron Corporation, the criminal conviction of Andersen and the plethora of accounting scandals involving alleged wrongdoing by the Final Four are not the death knell for multidisciplinary practice in the United States or abroad. They will definitely slow or halt entirely for the immediate future the direct entry of the large accounting firms into the marketplace for the delivery of legal services. Multidisciplinary practice profoundly challenges both the self-image of the legal profession and its fundamental structure for the delivery of legal services, the independent law firm.

The relationship between multidisciplinary practice and the stratification of legal education and the legal profession is unclear. Before the current accounting scandals upset the marketplace for professional services, the Big Five had fine-tuned their growth strategy to reflect that stratification. They traditionally hired graduates from regional or local law schools to staff entry and mid-level positions. In recent years, however, the Big Five made a concentrated and very public effort to cherry-pick leading law firm partners and high-level government officials. Their goal was to hire elite lawyers, very often the graduates of national law schools or the brightest and best from regional law schools. In the future the consulting firms spun off by the Big Five and other large professional services firms are likely to re-emphasise the elite-seeking strategy.

The global hierarchy that places US law and law schools at the top leads US scholars to think that they know best what should be the norms in human rights, trade, constitutional law, and many other areas. Steps must be taken to facilitate a meaningful collaboration between US and foreign law schools and faculties. This collaboration will not be possible unless the faculties of US law schools acknowledge the important role interdisciplinary studies play in understanding globalisation.

Understanding globalisation demands much more than expanding the influence of foreign lawyers, law students, and law teachers on US legal education. US lawyers, law students, and law teachers must learn to see that law through foreign prisms. The profession too should acknowledge globalisation's importance by encouraging its inclusion as a topic of discussion in CLE programs.

The current structure of legal education systematically works against the study of the legal profession and legal practice in the way that business schools study and theorise about business practices. As a result, law faculty can only reproduce the debates they experienced in law school — public interest versus law firms, politics versus law — without any sense of the context that produces and structures those and other debates, and they know very little about the actual practice of law. For example, they tend to teach that lawyers are valued only for their expertise, because that is what academics value, when in fact lawyers are valued at least as much for the connections and clout. Similarly, much is said about judicial quality, but nothing is learned about the structures of judicial careers, incentives within careers, and how judges actually interact and decide cases. In short, law schools and law faculties must provide more emphasis on teaching and research about legal careers and the different segments of the legal profession. Theoretical and interdisciplinary knowledge and skills must be a regular part of this study.