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What They Don't Teach Law Students: Lawyering

Schools Leave Practical Training to Firms

By DAVID SEGAL

PHILADELPHIA

The lesson today — the ins and outs of closing a deal — seems lifted from Corporate Lawyering 101.

"How do you get a merger done?" asks Scott B. Connolly, an attorney.

There is silence from three well-dressed people in their early 20s, sitting at a conference table in a downtown building here last month.

"What steps would you need to take to accomplish a merger?" Mr. Connolly prods.

After a pause, a participant gives it a shot: "You buy all the stock of one company. Is that what you need?"

"That's a stock acquisition," Mr. Connolly says. "The question is, when you close a merger, how does that deal get done?"

The answer — draft a certificate of merger and file it with the secretary of state — is part of a crash course in legal training. But the three people taking notes are not students. They are associates at a law firm called Drinker Biddle & Reath, hired to handle corporate transactions. And they have each spent three years and as much as $150,000 for a legal degree.

What they did not get, for all that time and money, was much practical training. Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions, like the variety of property law in post-feudal England. Professors are rewarded for chin-stroking scholarship, like law review articles with titles like "A Future Foretold: Neo-Aristotelian Praise of Postmodern Legal Theory."

So, for decades, clients have essentially underwritten the training of new lawyers, paying as much as $300 an hour for the time of associates learning on the job. But the downturn in the economy, and long-running efforts to rethink legal fees, have prompted more and more of those clients to send a simple message to law firms: Teach new hires on your own dime.

LAURA PEDRICK FOR THE NEW YORK TIMES

BACK IN CLASS *Drinker Biddle & Reath, a Philadelphia firm, trains its new associates to be lawyers. Here, Matthew McDonald, a partner, passes out instructions.*

"The fundamental issue is that law schools are producing people who are not capable of being counselors," says Jeffrey W. Carr, the general counsel of FMC Technologies, a Houston company that makes oil drilling equipment. "They are lawyers in the sense that they have law degrees, but they aren't ready to be a provider of services."

Last year, a survey by American Lawyer found that 47 percent of law firms had a client say, in effect, "We don't want to see the names of first- or second-year associates on our bills." Other clients are demanding that law firms charge flat fees.

This has helped to hasten a historic decline in hiring. The legal services market has shrunk for three consecutive years, according to the Bureau of Labor Statistics. Altogether, the top 250 firms — which hired 27 percent of graduates from the top 50 law schools last year — have lost nearly 10,000 jobs since 2008, according to an April survey by The National Law Journal.

Law schools know all about the tough conditions that await graduates, and many have added or expanded programs that provide practical

training through legal clinics. But almost all the cachet in legal academia goes to professors who produce law review articles, which gobbles up huge amounts of time and tuition money. The essential how-tos of daily practice are a subject that many in the faculty know nothing about — by design. One 2010 study of hiring at top-tier law schools since 2000 found that the median amount of practical experience was one year, and that nearly half of faculty members had never practiced law for a single day. If medical schools took the same approach, they'd be filled with professors who had never set foot in a hospital.

But sticking to the old syllabus has had little downside. The clients of law firms may be scaling back, but the clients of law schools — namely, students — are spending freely. Or rather, borrowing heavily. It is hard to imagine a 21-year-old without a steady income securing a private or federally guaranteed loan to buy a $150,000 house, but sums like that are still readily available for just about anyone who wants a doctor of jurisprudence degree. And while word of grievous job prospects is finally reaching undergraduates — there was an a 11.5 percent drop in applications this year — there were no empty seats in any of the 200 law schools in the country.

"I gather change is afoot at some law schools," Mr. Connolly says, "but it's going to be very slow."

So at Drinker Biddle, first-year associates spend four months getting a primer on corporate law. During this time, they work at a reduced salary and they are neither expected nor allowed to bill a client. It's good marketing for the firm and a novel experience for the trainees.

"What they taught us at this law firm is how to be a lawyer," says Dennis P. O'Reilly, who went through the program last year, and attended the George Washington University School of Law. "What they taught us at law school is how to graduate from law school."

LAURA PEDRICK FOR THE NEW YORK TIMES

MOOT COURT *At Drinker Biddle, Eric Kassab and Jennifer Kissiah, both first-year associates, in a training session. Law schools emphasize theoretical work, rather than lawyering.*

Allergic to the Practical

Law schools' aversion to all things vocational has been much debated, both inside and outside the academy. But critics are fighting both tradition and the legal academy's peculiar set of neuroses.

"Law school has a kind of intellectual inferiority complex, and it's built into the idea of law school itself," says W. Bradley Wendel of the Cornell University Law School, a professor who has written about landing a law school teaching job. "People who teach at law school are part of a profession and part of a university. So we're always worried that other parts of the academy are going to look down on us and say: 'You're just a trade school, like those schools that advertise on late-night TV. You don't write dissertations. You don't write articles that nobody reads.' And the response of law school professors is to say: 'That's not true. We do all of that. We're scholars, just like you.' "

This trade-school anxiety can be traced back to the mid-19th century, when legal training was mostly technical and often taught in rented rooms that were unattached to institutions of higher education.

A lawyer named Christopher Langdell changed that when he was appointed dean of the Harvard Law School in 1870 and began to rebrand legal education. Mr. Langdell introduced "case method," which is the short answer to the question "What does law school teach you if not how to be a lawyer?" This approach cultivates a student's capacity to reason and all but ignores the particulars of practice.

Consider, for instance, Contracts, a first-year staple. It is one of many that originated in the Langdell era and endures today. In it, students will typically encounter such classics as Hadley v. Baxendale, an 1854 dispute about financial damages caused by the late delivery of a crankshaft to a British miller.

Here is what students will rarely encounter in Contracts: actual contracts, the sort that lawyers need to draft and file. Likewise, Criminal Procedure class is normally filled with case studies about common law crimes — like murder and theft — but hardly mentions plea bargaining, even though a vast majority of criminal cases are resolved by that method.

Defenders of the status quo say that law school is the wrong place to teach legal practice because law is divided into countless niches and that mastering any of them can take years. This sort of instruction, they say, can be taught only in the context of an apprenticeship. And if newcomers in medicine, finance and other fields are trained, in large part, by their employers, why shouldn't the same be true in law?

But those pushing for more practical content aren't looking for a bunch of classes in legal minutiae, nor do they expect client-ready lawyers to march off their campus. Instead, they would like to see less bias against professional training and more classes that engage the law as it exists today.

"We should be teaching what is really going on in the legal system," says Edward L. Rubin, a professor and former dean at the Vanderbilt Law School, "not what was going on in the 1870s, when much of the legal curriculum was put in place."

During his tenure as dean, which began in 2005, Professor Rubin tried to update some of the school's mandatory classes. First, he held a series of focus-group discussions, meeting with law firms to find out what managing partners wished that their new hires had already been taught.

Eventually, these conversations led to a new first-year class, the Regulatory State, an introduction to federal administrative agencies, statutes and regulations. Vanderbilt also made changes to second- and third-year courses.

But there were limits. Professor Rubin failed to sell his faculty members on a retooled first-year Contracts class.

"Some members of the faculty got a little overstressed by all the change," Professor Rubin says. "Planning a new course, you have to move out of your comfort zone a little in terms of teaching. And there is always the fear that your school will wind up being seen as an oddball place."

Another problem he encountered: there are few incentives for law professors to excel at teaching. It might earn them the admiration of students, but it won't win them any professional goodies, like tenure, a higher salary, prestige or competing offers from better schools. For those, a professor must publish law review articles, the ticket to punch for any upwardly mobile scholar.

There are more than 600 law reviews in the United States — Georgetown alone produces 11 — and they publish about 10,000 articles a year. Some of these articles are worthwhile and influential, and the best are cited by lawyers in arguments and by judges in court decisions. A study to be published in The Northwestern University Law Review found that in the last 61 years, the Supreme Court "has used legal scholarship" in about one-third of its decisions.

But citable law review articles are vastly outnumbered, it appears, by head-scratchers. "There is evidence that law review articles have left terra firma to soar into outer space," said the Supreme Court Justice Stephen G. Breyer in a 2008 speech.

Some articles are intra-academy tiffs that could interest only the combatants (like "What Is Wrong With Kamm's and Scanlon's Arguments Against Taurek" from The Journal of Ethics & Social Philosophy). Others fall under the category of highbrow edu-tainment, like a 2006 article in The Cardozo Law Review about the legal taboos of a well-known obscenity, the one-word title of which is unprintable in a family newspaper.

Still others crossbreed law and some other discipline, a variety of scholarship that seems to especially irk John G. Roberts Jr., chief justice of the United States. "Pick up a copy of any law review that you see," he said at a conference this summer, "and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."

In fact, many of these articles are not of much apparent help to anyone. A 2005 law review article found that around 40 percent of law review articles in the LexisNexis database had never been cited in cases or in other law review articles.

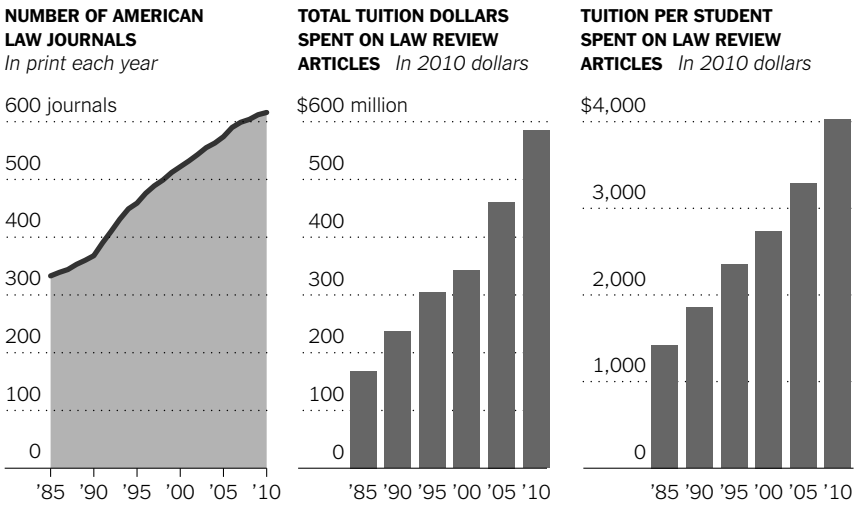
Of course, much of academia produces cryptic, narrowly cast and unread scholarship. But a pie chart of how law school tuition is actually spent would show an enormous slice for research and writing of law review articles.

How enormous? Last year, J.D., or juris doctor, students spent about $3.6 billion on tuition, according to American Bar Association figures, accounting for discounts through merit- and need-based aid. Given that about half of a law school's budget is spent on faculty salary and benefits, and that tenure-track faculty members consume about 80 percent of the faculty budget — and that such professors spend about 40 percent of their time producing scholarship — roughly one-sixth of that $3.6 billion subsidized faculty scholarship. That's more than $575 million.

Much of that comes from taxpayers in the form of federal student loans. Steven R. Smith, dean of the California Western School of Law, described this sum as "the equivalent of an involuntary fee" that students must pay to get a diploma. "It is not obvious that students are the ones who should be paying the cost of legal scholarship. They are generally borrowing the money to do this and they are the least able of all those in the profession to pay for it."

The Paper Chase

In recent years, a law school's reputation has been all but defined by the amount and quality of the law review articles produced by its faculty. The result has been an explosion of law reviews and law review articles. Though legal scholarship may be of little direct benefit to students — actually, much of it is never cited even by other academics — students pay for nearly every page of it through tuition. And the price is soaring.



Sources: Current Index to Legal Periodicals; Index to Legal Periodicals and Books; American Bar Association

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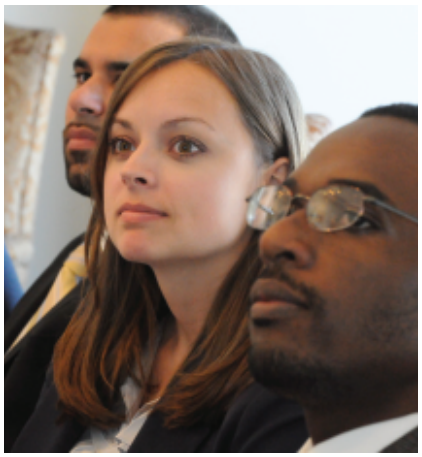

LAURA PEDRICK FOR THE NEW YORK TIMES

Associates in Drinker Biddle & Reath's training program.

The Prestige Game

About half of all law school hiring begins at the Faculty Recruitment Conference, widely known as the meat market, held by the Association of American Law Schools. It is conducted every year at the Marriott in the Woodley Park neighborhood of Washington.

At this year's conference, in October, nearly 500 aspiring law professors turned up for interviews with 165 law schools. Like the draft of every professional sport, there are superstars here and for two days they were hotly pursued. At the top of the pile were former Supreme Court clerks. Just under them were candidates with both a J.D. and a Ph.D. in another discipline. Law schools, especially those in the upper echelons, have been smitten by Ph.D.-J.D.'s for more than a decade.

Ori J. Herstein, who studied philoso-

phy in grad school and is a doctor in the science of law, says that "an economics Ph.D. is the most valuable," and that "the further away you get from the humanities the better."

Mr. Herstein was sitting in the Marriott lobby between interviews. Israeli-born and cheerful in a boyishly wonky way, he has a resume that seems custom-built to tantalize law school recruiters. He has two degrees from Columbia, which, along with a handful of other elite schools — most notably Yale — has become a farm team for the credential-obsessed legal academy. He has already published a handful of law review articles with promisingly esoteric titles ("Historic Injustice and the Non-Identity Problem: The Limitations of the Subsequent-Wrong Solution and Towards a New Solution") and has submitted another that sounds perfectly inscrutable ("Why Nonexistent People Do Not Have Zero Well-Being but Rather No Well-Being").

This type of scholarship, and the cash that keeps the law review conveyor belt spinning, are defended by law school professors as a way to attract the best and brightest to teaching. It is also said to enhance the prestige and sophistication of the American legal system. "Students want renowned scholars to teach them, period," said Francis J. Mootz III, a professor at the William S. Boyd School of Law at the University of Nevada and the author of "Neo-Aristotelian Praise of Postmodern Legal Theory." "They want to learn from the best and brightest."

It is true that a law school's reputation, and the value of its diplomas in the legal market, are almost entirely bound up in the amount and quality of the scholarship it produces. That's been especially so since the late '80s, when U.S. News and World Report started to rank law schools. The publisher's annual rankings all but define a school's standing in the legal academy's firmament, and 40 percent of the U.S. News algorithm is based on a "quality assessment" survey by hundreds of lawyers, judges, deans and professors.

The problem is that with rare exceptions, all schools play the same scholarship-and-prestige game. Even professors in the lowest rungs churn out scholarship, and one of the first items of business for new schools is starting a law review. The result is a kind of arms race, with articles playing the role of nukes and students paying the bill.

Experience Unnecessary

Another appeal of Ori Herstein's resume is what it's missing: many years of toiling in a law firm. It is widely believed that after lawyers have spent more than eight or nine years practicing, their chances of getting a tenure-track job at law school start to dwindle.

"Nobody wants to become a retirement home, or a place for washed-out lawyers," says Kevin R. Johnson, dean of the law school at the University of California, Davis, who came to the meat market with six positions to fill.

This might seem a paradox — experienced people need not apply — but the academy views seasoned pros with a certain suspicion. In fact, a number of veterans of legal practice who failed to land tenure-track jobs say that experience was a stigma they could not beat.

"It can be fatal, because the academy wants people who are not sullied by the practice of law," said a longtime lawyer and adjunct professor, who did not want to be identified because his remarks might alienate colleagues. "A lot of people who are good at big ideas, the people who teach at law school, think it is beneath them."

The exceptions are those who teach legal clinics, which are programs where students learn to counsel clients (usually poor), draft documents and even litigate, all under faculty supervision. Legal clinics are a growing presence on nearly every campus, and many — like Washington University's Law School in St. Louis and the CUNY School of Law in Queens — get high marks for quality and participation.

But a lot of these programs struggle with a kind of second-class status. Many are staffed, in whole or in part, by teachers who are not voting members of the faculty, and the programs are often modest. A soon-to-be released study of clinical programs by the Center for the Study of Applied Legal Education found that only 3 percent of law schools required clinical training.

"There has been an explosion in interest in clinical law programs," says David Santacroce, president of the center, "but the growth parallels an explosion in the total number of law students so we haven't reached anything close to the saturation point yet. The majority of law students still graduate without any clinical experience."

While most of law schools' professoriate still happily dwell in the uppermost floors of the ivory tower, the view from the ground for new graduates is growing uglier. It's not just that the market is now awash with castoffs from Big Law, and that clients can now retain graduates from elite schools and pay them $25 or $50 an hour, on contract. The nature of legal work itself is evolving, and the days when corporations buy billable hours, instead of results, are numbered.

To succeed in this environment, graduates will need entrepreneurial skills, management ability and some expertise in landing clients. They will need to know less about Contracts and more about contracts.

"Where do these students go?" says Michael Roster, a former chairman of the Association of Corporate Counsel and a lecturer at the University of Southern California Gould School of Law. "There are virtually no openings. They can't hang a shingle and start on their own. Many of them are now asking their schools, 'Why didn't you teach me how to practice law?' "