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SHOULD AMERICAN LAW SCHOOLS CONTINUE TO GRADUATE LAWYERS WHOM CLIENTS CONSIDER WORTHLESS?

CLARK D. CUNNINGHAM*

The United Technologies Corporation (“UTC”), which makes everything from elevators to jet engines, is the sixteenth largest manufacturing concern in the United States and America’s thirty-seventh largest corporation.¹ It pays law firms more than \$100 million per year for a variety of legal services.² On April 9, 2010, its Associate General Counsel, Paul Beach, told a national conference on the future of legal education that UTC does not “allow first or second year associates to work on any of our matters without special permission, because they’re worthless.”³

Inasmuch as the “worthless” young lawyers whom UTC does not want working on their matters are in all likelihood being paid over \$150,000 per year by the leading law firms that had energetically recruited them as the top students from the most prestigious law schools,⁴ Beach’s comment might engender severe cognitive dissonance. Yet describing new associates as worthless to clients is actually

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1. *Fast Facts*, UNITED TECHS., <http://www.utc.com/About+UTC/Fast+Facts> (last visited Jan. 3, 2011) (citing *Industry Week* and *Fortune* lists from 2010).

2. Webcast: Future Ed Conference: New Business Models for U.S. and Global Legal Education, Panel 1, held by New York Law School and Harvard Law School, at 00:36:13 (Apr. 9, 2010), http://www.nyls.edu/centers/harlan_scholar_centers/institute_for_information_law_and_policy/events/future_ed (follow “Video” hyperlink under “April 9–10, 2010 @ New York Law School,” then select “Future Ed Conference – Panel 1” hyperlink) (remarks of Chester Paul Beach, Assoc. Gen. Counsel of United Techs. Corp.); see also INT’L F. ON TEACHING LEGAL ETHICS & PROF, www.teachinglegalethics.org/content/future-ed-pt1 (last visited Feb. 18, 2011).

3. *Id.*; see also Elie Mystal, *Corporate General Counsel Puts Fear of God into Legal Educators (and You Should Be Worried Too)*, ABOVE THE LAW (Apr. 9, 2010, 6:08 PM), <http://abovethelaw.com/2010/04/corporate-general-counsel-puts-fear-of-god-into-legal-educators-and-you-should-be-worried-too>.

4. *See How Much Do Law Firms Pay New Associates? A 14-Year Retrospective as Reported by Firms*, NALP (Sept. 2009), <http://www.nalp.org/2009septnewassocssalaries> (noting that the median starting salary for first-year associates in firms of more than 250 attorneys in Chicago, Los Angeles, New York, and Washington, D.C. was \$160,000 in 2009).

consistent with an account of the famous “Cravath system” for training large firm lawyers provided by another speaker at the same conference, Professor William Henderson.⁵ When the New York law firm Cravath, Swaine & Moore LLP developed what has been called “the template for the Wall Street law firm,”⁶ according to Henderson, they did not expect the top students from elite law schools they hired to provide much value to clients until after the firm made the long-term investment of intensively training those young lawyers.⁷

Henderson describes the Cravath system as a “profoundly powerful method of developing human assets.”⁸ Among its key features were the following:

- The pace of training was deliberate and gradual, spanning a number of years, thus allowing new lawyers to “acquire skills at an optimal pace.”⁹
- Lawyers learned under close supervision.¹⁰ They were not “thrown into deep water and told to swim; rather, they [were] taken into the shallow water and carefully taught strokes.”¹¹
- Lawyers were told that they “should not specialize . . . until they had attained a general experience over several years.”¹²

5. Bill Henderson, *Part II: How Most Law Firms Misapply the “Cravath System,”* LEGAL PROF. BLOG (July 29, 2008), http://lawprofessors.typepad.com/legal_profession/2008/07/part-ii-how-mos.html; see also INT’L F. ON TEACHING LEGAL ETHICS & PROF. (Apr. 27, 2010), www.teachinglegalethics.org/content/cravath-system (last visited Feb. 18, 2011).

6. MILTON C. REGAN JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 20 (2007).

7. Henderson, *supra* note 5.

8. *Id.*

9. *Id.* Donald Bradley, a large California law firm’s general counsel, described a similar approach to training at a 2005 conference on “Professional Challenges in Large-Firm Practices”:

[When I entered the profession over thirty-five years ago, I received] on-the-job training . . . sitting with a senior partner and a mid-level partner for about five years, [who were] trying to teach me what it meant to be a lawyer and the values I should possess and the skills I should develop.

Clark D. Cunningham, *Legal Education After Law School: Lessons from Scotland and England*, 33 FORDHAM URB. L.J. 193, 194 (2005) (second alteration in original) (internal quotation marks omitted).

10. Henderson, *supra* note 5.

11. *Id.* (quoting 2 ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS*, 1819–1947, at 4 (1948)). Vilia Hayes, a partner at a large New York law firm, provided a similar account, noting that lawyers used to learn how to do corporate deals by “drafting [a document], by having somebody mark it up, by sitting there and talking to [the associate]. . . . I remember . . . when somebody would sit with you for two hours and go over the brief.” Cunningham, *supra* note 9, at 194 n.5 (alterations in original).

12. Henderson, *supra* note 5 (quoting SWAINE, *supra* note 11, at 4).

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- As lawyers' professional competency grew, "their level of responsibility increased."¹³

Lee Shulman, who led a ten year comparative study of professional education as President of The Carnegie Foundation for the Advancement of Teaching, has described the dominant form of professional preparation as a movement through the following five stages of an academically controlled apprenticeship: (1) from "the academic study of texts and examples"; (2) "to the observation of practice"; (3) "to assistance with practice"; (4) "to highly supervised and monitored practice"; (5) "to increasingly autonomous practice."¹⁴ In providing this description, however, Shulman pointed out, parenthetically, that it does *not* apply to American legal education.¹⁵ Shulman's description would appear, though, to apply to the combination of the traditional law school experience (the academic study of texts) with the Cravath model (except that associate training at the Cravath firm was not an academically controlled apprenticeship).

The Cravath firm seemed to view law school education rather like law schools view undergraduate education: as a way of identifying promising raw material that necessarily needs complete retraining, perhaps "worthless" at the outset but with great potential worth in the future.¹⁶

13. *Id.* (citing SWAINE, *supra* note 11).

14. Lee S. Shulman, *Foreword* to WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* xi (2d ed. 2005). Medical education is perhaps the paradigm of this approach to professional preparation.

15. *See id.* at xi. Shulman is also one of the authors of a widely discussed study of American legal education issued by The Carnegie Foundation for the Advancement of Teaching: WILLIAM M. SULLIVAN ET AL., *THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007). *See generally*, e.g., *AALS Concurrent Plenary Session, 2008 Annual Meeting of the Association of American Law Schools: Rethinking Legal Education for the 21st Century*, AALS ANNUAL MEETING, www.aals.org/am2008/friday/index.html#plenary (last visited Feb. 11, 2011); *International Conference on the Future of Legal Education*, GA. ST. U. COLL. OF LAW, <http://law.gsu.edu/FutureOfLegalEducationConference/> (last visited Feb. 11, 2011); *Legal Education Reform After Carnegie: Bringing Law-in-Action into the Law School Classroom*, U. WIS. LAW SCH., <http://law.wisc.edu/ils/2010legaleducationconf/homepage.html> (last visited Feb. 11, 2011).

16. *See* Henderson, *supra* note 5 (noting that the firm's decision to hire almost exclusively top students from elite law schools was not motivated by the belief that "[b]rilliant intellectual powers" were essential, but by the belief that such academic credentials were a proxy for the qualities it did value: "'character, industry, and intellectual thoroughness'" and "seriousness of purpose" (quoting respectively Paul Cravath in a talk at Harvard Law School; SWAINE, *supra* note 11, at 2)).

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The concluding force of Henderson's essay is that "[v]irtually all firms mimic the Cravath system without understanding its logic"¹⁷ that the early years of an associate's employment are an investment in human capital rather than an important source of revenue for the firm.¹⁸ Consider the following observations by a major news magazine as corroborating Henderson's point:

[T]he neophyte attorney is often as useless to his or her clients as a powdered wig. In the law, on-the-job training has become a chancy proposition.

. . . .

. . . Increasingly, impatient clients are balking at the idea of shelling out multimillion-dollar fees to legal teams that must devote costly "billable hours" to instructing fresh-from-the-campus lawyers in the rudiments of the law. . . . Now, suddenly, there seem to be too few jobs for too many lawyers.¹⁹

These statements—seemingly ripped from today's headlines like the plot of a television crime show—were in fact printed two decades ago.²⁰ More recently, the general counsel of one major firm made the same point at a national conference on "Professional Challenges in Large Firm Practices" hosted by Fordham Law School in 2005, stating that as a result of "tremendous" economic pressures, there was "clearly less time and more compression for mentoring, for on-the-job training."²¹

Whatever economic pressures at play in 2005 were paltry, however, compared to what has happened to law firms since 2009. According to a survey conducted by Altman Weil in April and May of 2010 of managing partners and chairs at law firms with at least fifty

17. Bill Henderson, *How the "Cravath System" Created the Bi-Modal Distribution*, LEGAL PROF. BLOG (July 18, 2008), http://lawprofessors.typepad.com/legal_profession/2008/07/how-the-cravath.html.

18. According to Charles Reich, a former Cravath associate who later became a professor at Yale Law School, under the Cravath system there was "no pressure whatever concerning billable hours." See Henderson, *supra* note 5 (quoting Charles Reich, *Cravath Veteran Recalls Law Firm Life of Yesteryear*, AM. L., Dec. 17, 2007). Likewise, "business-getting ability [was] not a factor in . . . advancement . . . at any level except in so far as that ability arises out of competence in doing law work." *Id.* (quoting SWAINE, *supra* note 11, at 9). R

19. Ted Gest, *In Law, the Case for Change*, U.S. NEWS & WORLD REP., Apr. 29, 1991, at 71.

20. *Id.* The same article contains another seemingly prophetic statement: "Proponents of change have proved their case beyond a reasonable doubt. The question now, however, is whether the nation's often slow-moving law schools will be able to carry out the verdict with the deliberate speed that the legal profession is demanding." *Id.* at 72. R

21. Cunningham, *supra* note 9, at 194–95 (quoting Bradley, *supra* note 9) (internal quotation marks omitted). R

lawyers,²² over half had reduced or completely discontinued hiring first-year associates in 2009 and almost forty percent planned to do so again in 2010.²³ Additionally, over half of all surveyed firms expected contract lawyers to be a permanent part of their staffing mix.²⁴ The most commonly expressed strategy for firm growth was lateral hiring of experienced lawyers who could bring clients with them, followed by the acquisition of groups.²⁵ Sixty-nine percent of those responding saw the changes in law practice that took place during 2009 as marking “[a]n accelerat[ion] of trends that already existed in the legal market,” while twenty-six percent saw the year as a “game changer that ha[d] fundamentally redirected the legal profession”; less than five percent saw the year as “[a]n anomaly” and expected that things would “soon . . . be back to normal.”²⁶ Summarizing this data, Altman Weil concluded that “the need for inexperienced associates has decreased and may never rebound.”²⁷

The basis of this Essay was my symposium presentation titled *Learning How to be a Lawyer in America: Before or After the Law Degree?*. Today, the troubling answer to that question might be: “Neither.”²⁸

22. THOMAS S. CLAY & ERIC A. SEEGER, ALTMAN WEIL, INC., 2010 LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY, at sec. “Survey Methodology” (2010), available at http://www.altmanweil.com/dir_images/upload/docs/2010LFITSurvey.pdf. Responses were received from 218 firms, including thirty-eight percent of the 250 largest law firms. *Id.*

23. *Id.* at sec. “Lawyer Staffing Structures.”

24. *Id.*

25. *Id.* at sec. “Workforce Reductions.” In contrast, one feature of the Cravath model was that the firm “very rarely hired lateral partners or associates.” Henderson, *supra* note 5.

26. CLAY & SEEGER, *supra* note 22, at sec. “Impact of 2009.”

27. *Id.* at sec. “Associate Programs.”

28. There are, however, intriguing signs that the economic crisis may be prompting a revival of the Cravath system principles. At a national conference on legal education hosted by Harvard Law School in October 2010, the President-Elect of the American Bar Association, William T. (Bill) Robinson, III, described a new “First-Year Associate Program” created at his law firm, Frost Brown Todd LLC, in 2009 in response to the reduced demand for new associates and the fact that “our clients have become increasingly frustrated at paying for lawyers who are learning on the job.” Webcast: FutureEd 2: Making Global Lawyers for the 21st Century, held by Harvard Law School Program on the Legal Profession, at 00:03:46 (Oct. 16, 2010), www.law.harvard.edu/programs/plp/pages/future_ed_conference.php#robinson. Characterizing this initiative as a “residency or intern program,” Robinson reported that the firm reduced billable hours from 1,750 to 1,000, while adding a “1,000 hour training requirement,” and also reduced starting salaries from \$115,000 to \$80,000. *Id.*; see also *First Year Associate Program*, FROST BROWN TODD LLC, <http://www.frostbrowntodd.com/careers/lawyers/firstyearassociates> (last visited Feb. 11, 2011). The program allowed “for more meaningful ‘live’ training and skill development opportunities and more hands-on involvement with clients.” Webcast: FutureEd 2, *supra*. Robinson concluded that “even though the economy is improving,” both the firm and the program participants thought the program was “a great advantage” and thus it is being continued. *Id.* Another interesting development, reported at a national workshop on

Among jurisdictions related to the common-law tradition, the United States is almost unique in not requiring rigorous practice preparation between the law degree and bar admission, typically a combination of supervised on-the-job training and a postgraduate course of study that integrates the learning of jurisdiction-specific substantive law with practice skills and professional responsibility.²⁹

For example, in 1999 Scotland revised its lawyer licensing requirements to require completion of a year-long postgraduate Diploma in Legal Practice in addition to a two year apprenticeship.³⁰ Two of Scotland's leading law schools, Strathclyde University and the University of Glasgow, collaborated to form the Glasgow Graduate School of Law (GGSL), which became the major provider of the Diploma in Scotland. Under the leadership of Professor Paul Maharg,

"New Professionalism Opportunities in a Time of Crisis," is the creation of "incubators" by law schools to assist new lawyers in making the transition into solo practice. See GA. ST. U. COLL. OF LAW, <http://law.gsu.edu/niftep/WorkshopS10-CUNY.htm> (last visited Feb. 18, 2011); INT'L F. ON TEACHING LEGAL ETHICS & PROF., <http://www.teachinglegalethics.org/category/other-topics/incubator> (last visited Feb. 11, 2011).

29. See, e.g., Nigel Duncan, *Training and Licensing Lawyers in England and Wales*, BAR EXAMINER, Nov. 2005, at 16, 16–17 (explaining that the attorney training and licensing processes in England and Wales consist of academic, vocational, and real experience stages that also include ethical training); John M. Law, *Canadian Bar Admissions*, BAR EXAMINER, Nov. 2005, at 14, 14 (noting that Canadian legal education consists of "two stages: an academic stage at a university law school followed by a vocational stage [which includes a period] 'in articles,' a sort of apprenticeship of 10 to 12 months[] . . . [combined with programs] designed to augment the applicants' articling experiences"); Paul Maharg, *Transactional Learning Environments and Professional Legal Education in Scotland*, BAR EXAMINER, Nov. 2005, at 9, 9 (explaining that all aspiring lawyers in Scotland must complete a "three-year course of professional training and education" after receiving a university law degree); Peggy Maisel, *The Education and Licensing of Attorneys and Advocates in South Africa*, BAR EXAMINER, May 2010, at 15, 16 (training to become a lawyer includes a one year "pupillage" after receiving the law degree; pupils "perform both general work and specifically prescribed work under the supervision of their mentors . . . [and] attend a lecture series, participate in advocacy training exercises, and perform written exercises" (footnote omitted)). The only major jurisdiction in the common-law tradition other than the United States that confers bar admission without requiring rigorous postgraduate training is India; the Bar Council of India did attempt to impose a one year apprenticeship in 1998, but that requirement was struck down by the Supreme Court of India as beyond the rule making powers of the Bar Council. See *V. Sudeer v. Bar Council of India*, A.I.R. 1999 S.C. 1167 (India).

30. Maharg, *supra* note 29, at 9–10; see also E-mail from Paul Maharg to author (Dec. 13, 2010) (on file with author). Scotland has adopted new regulations for accrediting providers of the postgraduate training course, which go into effect in the 2011–2012 academic year and provide more specific goals for the course. See THE LAW SOCIETY OF SCOTLAND, PROFESSIONAL EDUCATION AND TRAINING STAGE 1 – PEAT 1: ACCREDITATION GUIDELINES FOR APPLICANTS (2009), available at http://www.lawscot.org.uk/media/39767/peat_1_guidelines_-_final.pdf (describing the new accreditation requirements and the relationship between the old and new requirements); <http://www.teachinglegalethics.org/content/scotland-peat> (last visited Feb. 18, 2011).

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GGSL developed an innovative curriculum that taught almost all the required areas of substantive law (for example, civil litigation, criminal practice, wills and estates, real estate transactions) through highly elaborated simulations.³¹ According to Maharg, this curriculum was designed according to principles of “transactional learning” to be active, reflective, and collaborative through teaching how to actually do legal transactions: “We aim to give students experience of legal transactions. This learning extends not only to knowledge of parts of the transaction, but of the whole transaction, including the relational and ethical dimensions of a transaction.”³²

Scotland has no equivalent of the two day, paper-and-pencil American bar examination.³³ The equivalent gatekeeping function is instead filled by the Diploma requirement. Law graduates must first be accepted into a Diploma program and then pass a number of assessments internal to the Diploma.³⁴ At GGSL, starting in 2007 one such assessment was successful completion of a simulated initial meeting with a “standardized client,” a trained assessor who both portrays the client and simultaneously evaluates the candidate’s performance.³⁵ Completion of the Diploma, however, is only one step toward receiving a law license in Scotland. The aspiring lawyer must then complete a two year “traineeship” with a law firm or other legal service

31. See Maharg, *supra* note 29, at 9–10, 12 (describing Maharg as “co-director of Legal Practice Courses in [the] GGSL” and as “director of the innovative Learning Technologies Development Unit in the GGSL,” and noting that he “is in charge of all curriculum design and implementations on the Diploma in Legal Practice”). The collaboration between Strathclyde and the University of Glasgow ended in 2010, GLASGOW GRADUATE SCH. OF LAW, www.ggsl.strath.ac.uk (last visited Feb. 11, 2011), but the essential elements of the program designed by Maharg continue to be offered as a Diploma course by Strathclyde, U. OF STRATHCLYDE, www.strath.ac.uk/humanities/courses/law/courses/diplomainlegalpractice/ (last visited Feb. 11, 2011). Maharg is now Professor of Legal Education, Northumbria Law School, Northumbria University (England).

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32. PAUL MAHARG, *TRANSFORMING LEGAL EDUCATION: LEARNING AND TEACHING LAW IN THE EARLY TWENTY-FIRST CENTURY* 175 (2007).

33. See Maharg, *supra* note 29, at 9–10 (describing the requirements for admission to legal practice and noting that only a minority of students who pursue a path of self-study rather than matriculate into an undergraduate law institution must pass required tests for entry into the legal profession in Scotland); see also Karen Barton et al., *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 *CLINICAL L. REV.* 1, 13–15 (2006) (same).

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34. See Maharg, *supra* note 29, at 9–10.

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35. Barton, *supra* note 33, at 3–4. The methodology of standardized clients to assess competency in lawyer-client communication is modeled on the widely accepted use of “standardized patients” in medical education and licensing. *Id.* at 3. The Glasgow Graduate School of Law was the first law school in the world to conduct rigorous empirical research demonstrating that this assessment method was equally valid, reliable, and cost-effective as the then-current approach, video review by tutor. See *id.* at 2, 16–18, 50–53.

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employer.³⁶ A national licensing authority monitors the traineeship and requires trainees to complete work logs and review sheets, which the licensing authority reviews on a quarterly basis.³⁷ At the beginning of the second year of traineeship, students can obtain a restricted practice certificate that permits them to practice under the supervision of a licensed practitioner, but they cannot obtain a full license to practice unsupervised until the end of the year and without both a “signing-off statement” from their traineeship employer and the approval of the licensing authority.³⁸

It might seem unlikely that the United States will soon “catch up” to the rest of the common-law world by delaying bar admission until law graduates have completed training that includes both professional education and an apprenticeship that teaches skills of demonstrable worth to clients.³⁹ The New Hampshire Supreme Court, however, recently approved a “performance-based variant of the bar examination” that grants bar admission immediately upon graduation to students who are found by specially designated bar examiners to be “client ready” after completing a two year program at University of New Hampshire (“UNH”) School of Law.⁴⁰ (UNH Law School, which had been known as the Franklin Pierce Law Center prior to 2010, is the only law school in New Hampshire.⁴¹) The program is woven into the second and third years of law school, resulting in an educational experience much like the Scottish Diploma in Legal Practice.

36. Maharg, *supra* note 29, at 9–10.

37. Barton, *supra* note 33, at 14–15.

38. *Id.* at 15.

39. Two American jurisdictions have very modest apprenticeship requirements as a condition for bar admission: Delaware and Vermont. Del. Sup. Ct. R. 52(a)(8), (c) (requiring a five month clerkship); Vt. R. Admission B. 6(i)(1) (requiring a three month period of “office study” under the supervision of a judge or attorney). In Delaware, the required activities primarily consist of observation rather than supervised practice and almost all bar applicants meet most of the clerkship requirements during summers while in law school. Randy J. Holland, *The Delaware Clerkship Requirement: A Long-Standing Tradition*, BAR EXAMINER, Nov. 2009, at 28, 29. Vermont does not specifically require applicants to engage in supervised practice and allows the office study requirement to be met any time after completion of the first year of law school. Vt. R. Admission B. 6(i)(1).

40. The students must still pass the Multistate Professional Responsibility Examination. N.H. Sup. Ct. R. 42(13); *see also Daniel Webster Scholar Honors Program*, U.N.H. SCH. OF LAW, <http://law.unh.edu/websterscholar> (last visited Feb. 11, 2011).

41. In August 2010, pursuant to an affiliation agreement with the University of New Hampshire, the Franklin Pierce Law Center changed its name to the University of New Hampshire School of Law. *See* U.N.H. SCH. OF LAW, <http://www.unh.edu/unhedutop/university-new-hampshire-school-law> (last visited Feb. 11, 2011).

The New Hampshire program was “the brainchild” of Linda S. Dalianis, Chief Justice of the New Hampshire Supreme Court.⁴² In over twenty years as a trial court judge, she had seen “profound differences among the lawyers who are really good lawyers and lawyers who were not good at all.”⁴³ She thus became deeply concerned that there was nothing she could do as a trial judge outside the doors of her courtroom to protect people with incompetent lawyers.⁴⁴ The state’s practice of granting an unrestricted license to practice law based solely on a law degree and a passing bar examination score was particularly worrisome because many lawyers admitted to the New Hampshire bar went immediately into solo practice and “often lacked the skills and knowledge necessary to practice law effectively.”⁴⁵

After her appointment to the New Hampshire Supreme Court as an associate justice in 2000,⁴⁶ Dalianis formed a committee to create “a better bar exam” that would “bridge the gap” between legal education and practice.⁴⁷ The committee included two former presidents of the state bar association, two members of the board of bar examiners, two legal academics, and a fellow supreme court justice.⁴⁸ After two years of intensive work, the committee drafted their mission statement:

The Daniel Webster Scholar Program shall be established as an honors program at Franklin Pierce Law Center [now UNH Law School]. The Program will significantly increase practical experience, supplementing learning in law school to reflect the reality of today’s practice. Upon completion, Webster scholars will: know how to advise clients; know how to use existing resources; be well versed in the substantive

42. For more on the program, see John Burwell Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 DUKE F.L. & SOC. CHANGE 101, 115–26 (2009). Dalianis was appointed Chief Justice in December 2010. She previously served as an associate justice of the New Hampshire Supreme Court from 2000 to 2010. Tom Fahey, *Dalianis NH’s First Female Chief Justice*, MANCHESTER UNION LEADER, Dec. 9, 2010.

43. Linda S. Dalianis, Chief Justice of N.H. Supreme Court, How the Bar Exam Alternative Licensing Program Developed, Conference on A Performance-Based Approach to Licensing Lawyers: The New Hampshire Two-Year Bar Examination, Franklin Pierce Law Center (Apr. 23, 2010) [hereinafter New Hampshire Conference] (quotation confirmed by E-mail from Chief Justice Dalianis to author (Oct. 29, 2010) (on file with author)).

44. *Id.*

45. Linda S. Dalianis & Sophie M. Sparrow, *New Hampshire’s Performance-Based Variant of the Bar Examination: The Daniel Webster Scholar Program*, BAR EXAMINER, Nov. 2005, at 23, 23, 25.

46. Fahey, *supra* note 42.

47. Dalianis & Sparrow, *supra* note 45, at 23, 25 (internal quotation marks omitted).

48. Garvey & Zinkin, *supra* note 42, at 116 n.125.

law; and, have insights and judgment that usually develop after being in practice for some years. . . . The goal is to make new lawyers better, sooner. Because students who have successfully completed the Webster Program will have demonstrated core competencies required to practice law, Webster Scholars will not be required to take . . . the State Bar Examination in order to be admitted to the Bar in New Hampshire.⁴⁹

In July 2005, the New Hampshire Supreme Court amended its rules to allow for bar admission following a candidate's successful completion of the Webster program.⁵⁰ The first cohort of fifteen students entered the program in 2006; thirteen completed all requirements and were admitted to practice in New Hampshire upon graduation in May 2008.⁵¹ The Webster program has since been expanded to twenty students per class commencing with the class of 2011, and UNH Law School has the goal of offering the program to all qualified applicants as soon as possible.⁵²

Every semester, program participants take courses designed specifically for the program.⁵³ In the first of these courses, Pretrial Advocacy, students assume the role of junior associates in opposing law firms and simulate the pretrial portion of a federal lawsuit.⁵⁴ Each firm has an experienced litigator—a professor—who assumes the role of “senior partner.”⁵⁵ The students interview clients and witnesses (played by professional actors), prepare and answer a complaint and interrogatories, take and defend a deposition recorded by a real court reporter, and litigate a motion for summary judgment before a real trial judge in the judge's courtroom.⁵⁶ Although simulation-based courses in pretrial practice are now fairly common in American law schools, the Webster program appears to be particularly intense and realistic; for example, students regularly submit time sheets to their

49. John D. Hutson, *Preparing Law Students to Become Better Lawyers, Quicker: Franklin Pierce's Webster Scholars Program*, 37 U. TOL. L. REV. 103, 104–05 (2005).

50. Dalianis & Sparrow, *supra* note 45, at 23.

51. Garvey & Zinkin, *supra* note 42, at 117–18, 118 n.136.

52. John Burwell Garvey, *New Hampshire's Performance-Based Variant of the Bar Examination: The Daniel Webster Scholar Honors Program Moves Beyond the Pilot Phase*, BAR EXAMINER, Aug. 2010, at 13, 20 n.20 (noting that “[d]espite the program's stringent requirements, about one-third of the class (of approximately 150 students) has applied” in 2009 and 2010).

53. Garvey & Zinkin, *supra* note 42, at 118.

54. *Id.* at 118–20, 123–24.

55. *Id.* at 124.

56. *Id.*

“senior partners.”⁵⁷ What really distinguishes this course, however, is that it is the beginning of an integrated and quite comprehensive two year program. Accordingly, at the end of the course, students begin assembling what will ultimately become a portfolio spanning two years of work, including transcripts and videotapes.⁵⁸ They write a reflective paper identifying the skills and values implicated in the course, reflecting upon their own perceived strengths and weaknesses, and discussing how they plan to improve in the future.⁵⁹

In the spring of their second year of law school (their first year in the program), students conduct two trials in their Trial Advocacy course—a continuation of the civil case they handled in the previous semester and a full criminal trial.⁶⁰ The spring curriculum also includes an intensive Negotiations seminar that primarily focuses on business and intellectual property issues.⁶¹ Additionally, students take a Miniseries Course that consists of a number of short modules exposing them to family law, secured transactions, negotiable instruments, conflict of laws, and law office management.⁶²

The following fall, through another series of simulations, rising third-year students study the processes by which businesses are “formed, financed, operated, altered, and sold.”⁶³ The Webster program concludes with a Capstone Course in the spring of the students’ third year. In the Capstone Course, students confront a variety of factual situations involving multiple areas of substantive law but without guidance regarding what issues are relevant—as often happens in real life. The course focuses on the attorney-client relationship and aims to hone the students’ listening and counseling skills.⁶⁴

In addition to these specialized courses, which all involve substantial simulation, program participants are required to take four courses that are elective for law students not participating in the program: Evidence, Business Associations, Personal Taxation, and Wills, Trusts, and Estates.⁶⁵ Webster scholars must also engage in direct client assistance by completing at least six credit hours of clinic or externship courses and at least twelve pro bono hours.⁶⁶ The curriculum also

57. *Id.*

58. *Id.* at 117, 121.

59. *Id.* at 121.

60. *Id.* at 124.

61. *Id.*

62. *Id.* at 125.

63. *Id.*

64. *Id.*

65. *Id.* at 118.

66. *Id.* at 118–19.

includes standardized client interviews,⁶⁷ the assessment built into the GGSL Diploma program.⁶⁸

Every semester, one of the specially designated members of the New Hampshire Board of Bar Examiners⁶⁹ reviews the student's portfolio.⁷⁰ Martha Van Oot, a former president of the New Hampshire Bar Association⁷¹ with years of experience grading traditional bar examinations, supervising associates at the law firm where she is a senior litigator, and teaching legal writing, appellate advocacy, and professional responsibility, has been one of those examiners.⁷² She says that reviewing the portfolio of student work is very much like what she does on a daily basis—reading and editing the work of associates in her firm—though she does not engage in line-by-line correction of the written work as she might for an associate under her supervision. In addition to conducting an overall evaluation of the technical competence of the work product, she also pays close attention to what the portfolio reveals about the student's developing judgment and awareness of ethical issues.⁷³ In particular, she spends a lot of time on the reflective writing, which she finds to be the most helpful material in determining whether a student is progressing toward the goal of being “client ready” upon graduation. She wants to know how the student deals with fear, anxiety, and criticism. For example, when comparing a heavily edited first draft in the portfolio with the final version, she wants to see a student who is actively involved in reworking the mate-

67. *Id.* at 121–22.

68. *See supra* note 35 and accompanying text. In fact, the standardized clients used by the program were trained by Paul Maharg and Karen Barton of GGSL in collaboration with a former Broadway actor. Garvey & Zinkin, *supra* note 42, at 122.

69. According to the former Chair of the New Hampshire Board of Bar Examiners, “[W]e picked the toughest bar examiners we could find.” Frederick J. Coolbroth, Why and How the Bar Exam Alternative Licensing Program Developed, New Hampshire Conference, *supra* note 43 (quotation confirmed by E-mail from Frederick J. Coolbroth to author (Oct. 29, 2010) (on file with author)). One graduate of the program described his bar examiner as a “collegial inquisitor . . . a cross between Bill Cosby and Hannibal Lecter.” Kirk Simoneau, Remarks at the New Hampshire Conference, *supra* note 43 (quotation confirmed by E-mail from Kirk Simoneau to author (Nov. 29, 2010) (on file with author)).

70. Garvey & Zinkin, *supra* note 42, at 121.

71. *Id.* at 116 n.125.

72. Interview with Martha Van Oot, New Hampshire Bar Examiner, in Concord, N.H. (Apr. 22, 2010) (quotations confirmed by E-mail from Martha Van Oot to author (Nov. 27, 2010) (on file with author)); *Martha Van Oot*, ORR & RENO, <http://www.orr-reno.com/attorneys/martha-van-oot/> (last visited Feb. 11, 2010). In the first years of the program Van Oot took responsibility for examining five new students each year, conducting four portfolio reviews per student over the span of their two year program. Interview with Martha Van Oot, *supra*.

73. *Id.*

rial in a constructive response to criticism rather than simply copying the professor's comments. She explains:

We bar examiners see a different progression than law professors do. We see how the students come to recognize their own strengths and weaknesses over an extended period of time, and develop confidence rather than arrogance. It is impressive to see how the students take the program so seriously.⁷⁴

On April 23, 2010, the New Hampshire Supreme Court and UNH Law School hosted a one day conference to showcase the program for supreme court justices and bar leaders from other states.⁷⁵ Delegations led by at least one supreme court justice attended from eight states: Georgia, Florida, Kentucky, Maine, Maryland, Missouri, Montana, and Vermont.⁷⁶ Frederick Coolbroth, then-Chair of the New Hampshire Board of Bar Examiners, reported: "The results of the program have been very favorable, much more than I or any of the other bar examiners expected. They are seeing much stronger skills than they usually see in new lawyers."⁷⁷

New Hampshire Supreme Court Associate Justice Carol Ann Conboy told the delegations:

Like some of my other colleagues on the court, I was very skeptical at first, but we have come 180 degrees. None of our fears have come to pass. The program teaches students that everything is connected to everything else, so that the graduates understand issues in context. They are wonderful at analysis. They have the ability to home in on critical issues that matter. They're more incisive and do it faster. And their writing skills are incomparable to those of other recent graduates.⁷⁸

The conference was opened by the then-Chief Justice of the New Hampshire Supreme Court, John T. Broderick, Jr., who said: "Learning the law and learning to be a lawyer are very different things. I was

74. *Id.*

75. Funding for the conference was provided by the Society of American Law Teachers, *Bar Admissions and Alternatives to the Bar Exam*, SALT: SOCIETY AM. L. TCHERS., <http://www.saltlaw.org/contents/view/317> (last visited Jan. 4, 2011), and the W. Lee Burge Endowment for Law & Ethics at the Georgia State University College of Law.

76. *Bar Admissions and Alternatives to the Bar Exam*, *supra* note 75.

77. Coolbroth, *supra* note 69.

78. Carol Ann Conboy, Remarks at the New Hampshire Conference, *supra* note 43 (quotation confirmed by E-mail from Justice Conboy to author (Oct. 29, 2010) (on file with author)).

not ready to practice law when I graduated.”⁷⁹ He, too, admitted that he was “a cynic about this program when it was first proposed, but the proponents have proven to be absolutely right.”⁸⁰ He concluded: “The program represents dramatic change, but change that is essential.”⁸¹

79. John T. Broderick, *The Court's Perspective*, New Hampshire Conference, *supra* note 43 (quotation confirmed by E-mail from Chief Justice Broderick (Oct. 29, 2010) (on file with author)). Broderick retired as Chief Justice of the New Hampshire Supreme Court on November 30, 2010 and has been appointed as Dean and President of UNH Law School. Fahey, *supra* note 42.

80. Broderick, *supra* note 79.

81. *Id.*