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Attention Consumers of Justice: Court Reform Should Begin in the Classroom Part II

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"[T]he country has outgrown our present judicial system."
President Lincoln, 1861[1]

"[T]he present impact of the caseload crisis on the federal courts . . . is serious now, but it threatens to become even more so."
Chief Justice Rehnquist, 1992[2]

INTRODUCTION

Over the last century, well intentioned court reformers have succeeded in creating a judicial machine of Frankenstein-monster proportions. It is not likely that any of the latest reform proposals, just as those which preceded them, will guarantee a more speedy and less expensive civil justice system. The problem is that we have been working on solving the wrong problem. We see only the symptoms of a disease in the dysfunction of our civil justice system. The disease we need to cure is not in our system of litigation, but rather in our system of education.

Part I of this two-part article described some ideas for court system design generated by undergraduate seniors in a dispute resolution course which I taught at Northwestern University in the Fall of 1990.[3] In Part II of the article, I will review the history of court reform in this country as well as the most recent suggestions for reforming the civil justice system. Then, I will explain why the best way to reform the American court system is to reform the American legal education system.

I. TWO HUNDRED YEARS OF JUDICIAL REFORM

In response to complaints about the civil justice system, specific efforts have been made over the last two centuries to improve the delivery of civil justice in our federal court system. The Constitutional Convention adopted Article III of the Constitution requiring that the "judicial power of the United States, . . . be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish."[4] Recognizing the chaotic state of the English system of justice in the seventeenth and eighteenth centuries,[5] after which the colonial and state systems were modeled, the First Congress enacted the Judiciary Act of 1789. It created a system of lower federal courts to function alongside the courts already established in each state.[6] The design consisted of three levels of federal courts: the Supreme Court, composed of a chief justice along with five associate justices; eleven circuit courts, consisting of two Supreme Court justices and the district judge from the state in which the circuit court was sitting; and thirteen district courts, each with its own district judge.[7]

A. Organizing the Expanding Courts

Historically, the period between 1789 and the Civil War was one of unprecedented expansion of the federal court system. Both the number of states and the number of U.S. territorial possessions increased.[8] Also during this period, the number of circuits

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and the number of Supreme Court (circuit riding) justices increased.[9] By 1861, a growing sense of frustration with the ineffectiveness of the federal court system influenced President Lincoln to warn dramatically in his first message to Congress: "[T]he country has outgrown our present judicial system."[10] Afterward, a slight restriction on the circuit-riding obligations of justices brought temporary relief. But as time passed, case overload swelled and the federal court system's ability to respond to it deteriorated.[11]

In 1875, Congress adopted another Judiciary Act, which established general federal question jurisdiction in the federal trial courts for cases involving $500 or more. Federal question jurisdiction allowed the federal courts to try controversies arising under the constitution and laws of the United States

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and, as a result, federal court filings mushroomed.[12] Numerous proposals to revamp the court system were advanced during this period, but they resulted only in tinkering with the number, size, and terms of the federal courts. Federal trial courts were inundated with case filings; the number of cases on the Supreme Court's docket (1,816 cases by 1890) meant, for practical purposes, that most trial court decisions were unreviewable.[13]

The bench, bar, and legislature were unable to discover an effective scheme of court organization. Of the many proposals considered, some of them curious measured by today's thinking,[14] the one to emerge successful was an idea to create an intermediate court of appeals. The Circuit Court of Appeals Act of 1891 eventually gave this proposal life, creating a circuit court of appeals for each of the nine circuits.[15] In essence, the 1891 Act shifted the appellate caseload burden from the Supreme Court to the courts of appeals, thereby making the federal district courts the system's primary trial courts. While the Act did not abolish circuit riding specifically, it made circuit riding "optional," allowing a judicial anachronism to disappear quietly. The Act's favorable impact on the Supreme Court's workload was almost immediately obvious. New filings totaled 623 in 1890, fell to 379 in 1891, and to 275 in 1892.[16] On paper, the Act seemed to have solved the Supreme Court's overload problem. In actuality, the Act simply created another tier of the judicial machinery — the federal courts of appeals — which would be straining under extreme overload about a century later. As the twentieth century dawned, a new spirit of court reform was in the wind.

B. Reform at the Turn of the Century

In 1906, a young lawyer from Nebraska named Roscoe Pound, struck the spark that some say, "kindled the white flame of progress" for the civil justice system.[17] He delivered an address at the American Bar Association's ("ABA") annual meeting entitled: "The Causes of Popular Dissatisfaction with Justice." Pound believed that the causes of popular dissatisfaction with the courts included an archaic system of courts, outmoded court procedures, wasted judicial power, and the politization of the courts. These existing conditions, he believed, had almost destroyed the traditional respect for the courts.[18]

Conservatives viewed Pound's speech as a drastic and unjustified attack which was initially "decently buried."[19] In a short time, however, Pound's ideas began to spread. In 1909, the ABA's specially appointed committee issued a report discussing the concept of court unification and rulemaking. The ABA failed to endorse the report. Partially in response to this event, the American Judicature Society ("AJS") was formed in 1913 and came to the forefront of court reform.[20] By 1916, the ABA, under the presidency of Elihu Root, had changed its direction and began to support the causes for which AJS was striving.[21] During the 1920s and 1930s, court reformers seemed most occupied with court rule-making and organizing case law. In 1921, Herbert Harley, founder of the AJS, became secretary of the Conference of ABA delegates and the ABA began to focus seriously on court reform.[22]

In the same time frame, Chief Justice Taft, noting the tendency of each federal judge to insist on exercising his own methodology, succeeded in establishing the Conference of Senior Circuit Judges in 1922 (later, in 1939, to become the Judicial Conference of the United States) to facilitate and coordinate rule-making and to assist in the management of the business of the courts.[23] In 1923, the American Law Institute was founded for the primary purpose of codifying American case law.[24] These rule-making efforts culminated in the mid and late 1930s with Congress passing a law in 1934 empowering the Supreme Court to revise the federal rules, and with the adoption of the Federal Rules of Civil Procedure in 1938.[25] Also, one year later, Congress created the Administrative Office of the United States Courts and enacted various changes relating to the management of the federal court system.[26]

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In 1940, court reform attention shifted to the state court systems. It

was in that year that Roscoe Pound published a treatise on court reform and suggested several state court reform goals, including: consolidation of court structure and jurisdiction, simplification of court procedures, merit selection, centralized court administration under a supreme court, professionally trained court administrators, and a unitary court budget.[27] For almost two decades following World War II, the courts, in large measure, continued in their "time-honored, but often dysfunctional, methods and procedures virtually without examination or challenge."[28]

C. Burger Renews Reform

Then, in 1969, Warren E. Burger began his tenure as Chief Justice of the Supreme Court with a preplanned agenda for court reform.[29] His agenda had two basic components: remedies for "deferred maintenance" of the federal and state court systems and mechanisms for governmental interbranch communications. Soon after Burger assumed his position, the Institute for Court Management was established with the assistance of the ABA, the Institute of Judicial Administration, and other groups. In 1971, Congress created the position of Circuit Executive, and, in that same year, the National Center for State Courts was created.[30] One of the highlights of Burger's court reform crusade was the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, cosponsored by the ABA, the Conference of (State) Chief Justices and the U. S. Judicial Conference. The conference, soon dubbed the "Pound Conference," convened leaders of the bench and bar as well as scholars from nonlegal disciplines.[31] Some of the recommendations arising out of the Pound Conference related to establishing Neighborhood Justice Centers, revitalization of small claims courts, use of compulsory arbitration, increased use of administrative agencies, correction of discovery abuse, use of sanctions, reassessment of the class action procedure, reassessment of scope of the jury trial right, and reexamination of the utility of diversity jurisdiction.[32] The 1980s hosted experimentation by both federal and state court systems, particularly in the area of using court-annexed compulsory arbitration and mediation programs.[33]

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Despite the potential synergy of efforts of a number of professional and civic court reform organizations for nearly ten decades, as we approached the 1990s we were still experiencing the same congestion, delay and cost complaints concerning our present civil justice system.[34] The reason for this cannot be fully understood without an examination of the present recommendations for civil justice reform.

D. Recent Efforts at Reform: More of the Same?

Perhaps at no time in history has there been so concentrated an inquiry into the functioning of the federal civil justice system, by all three branches of government and the ABA, in such a short period of time. During the last two years, the Federal Courts Study Committee issued its report (April, 1990); Congress enacted the Civil Justice Reform Act of 1990 (December, 1990); the President's Council on Competitiveness issued its *Agenda for Civil Justice Reform in America* (August, 1991); and the ABA released its *Blueprint for Improving the Civil Justice System* (February, 1992). Each group identified problems with the present civil justice system and proposed specific remedies.

1. The federal courts report on problems

In late 1988, responding to "mounting public and professional concern with the federal courts' congestion, delay, expense and expansion,"[35] Congress authorized Chief Justice Rehnquist to appoint a fifteen-member bipartisan Federal Courts Study Committee to explore the problems facing the federal courts and to develop a long-range plan for the federal judiciary.[36] The final report of the Committee was presented on April 2, 1990. Contending that "the long-expected crisis of the federal courts, caused by unabated rapid growth in case filings, is at last upon us," the Committee report made separate recommendations to various branches of the federal government, to the state courts, to the bar, and to the research community generally.[37] Included among the seventy topic areas of recommendations were those related to administrative appeals, appellate courts, alternative dispute resolution, attorneys fees, civil case management, discovery, diversity jurisdiction, judicial administration, juries, and pendent jurisdiction.

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2. Congress acts to initiate reform

The Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (1990), was enacted on December 1, 1990, as Title I of the Judicial Improvements Act of 1990.[38] Congress noted that "high costs, long delays and insufficient judicial resources" all too often leave unfulfilled the "time-honored promise" of "the just, speedy and inexpensive resolution of civil disputes in our Nation's federal courts."[39] Consequently, Congress saw

the need to mandate each federal district court to design and implement a civil justice expense and delay reduction plan.[40] The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.[41] Each district court plan must be developed after consideration of the recommendations of a district court "advisory group" composed of attorneys and other representatives of litigants (consumers) in the courts as determined by the chief judge of the district court.[42] Each district court may consider and include the following in its plan: early ongoing control of the pretrial process, control of the extent of discovery and time for its completion, encouragement of voluntary exchange of information, reference of appropriate cases to alternative dispute resolution programs, requirement of parties with settlement authority to be present in person or by telephone during settlement conferences, and requirement of counsel to jointly present a discovery management plan.

After careful evaluation of the plans, the Judicial Conference of the United States must prepare and periodically revise a *Manual for Litigation Management and Cost and Delay Reduction* for distribution to the district courts.[43] The Federal Judicial Center and the Director of the Administrative Office of the United States Courts are required to develop and conduct comprehensive education and training programs for all judicial officers and clerks of court.[44]

3. The Executive Branch sets a reform agenda

In August 1991, Vice President Dan Quayle, on behalf of the President's Council on Competitiveness, introduced the Council's fifty point *Agenda for Civil Justice Reform in America* in a widely-publicized speech at the annual meeting of the ABA.[45] The stated purpose for developing the agenda was

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that in "the past 30 years, our legal system has become burdened with excessive costs and long delays . . . [and] [m]any features of the current legal system no longer serve to expedite justice or to ensure fair results."[46] It was labeled by critics as a pro corporation political agenda, which sought to alter the balance between individual plaintiffs and corporate defendants.[47] Some of the recommendations of the Council concerned voluntary alternative dispute resolution, pre-lawsuit notice, discovery reform, summary judgment reform, docket management, expert witness testimony, punitive damage containment, attorney fees, sanctions and diversity jurisdiction.[48]

4. The ABA proposes reform

The ABA's Working Group on Civil Justice System Proposals issued its *Blueprint for Improving the Civil Justice System* in February 1992.[49] The Blueprint was issued after the Working Group's careful study of the Council on Competitiveness' Agenda.[50] Regarding that Agenda, the Working Group acknowledged that while "many of the Agenda proposals are supported by the ABA," ". . . [t]he Agenda is in large part a piecemeal collection of proposals promulgated over the years by other entities, including the ABA, but the pieces chosen by the Council do not make a whole."[51] The ABA proposals for reform concerned access to and funding and management of the judicial system, accessibility of justice to the poor, and to the working population, tort and insurance liability, alternative dispute resolution, discovery, more effective trial procedures, expert evidence reform, punitive damages, attorney fees, and diversity jurisdiction.[52] The ABA Blueprint also contained a point-by-point critique of the Federal Courts' Study Committee recommendations, noting either support, opposition, or no position as to each recommendation.[53]

The above description of the status of current federal court reform should strike fear in the hearts of thinking consumers of civil justice in America. Here we have three separate bodies making what could be construed as two hundred or more recommendations for federal civil justice reform, while Congress is simultaneously requiring each of more than ninety district courts to develop separate plans to reduce the cost and delay of litigation. This seemingly unaligned, splintered, partially political, and in some aspects, adversarial approach to problem solving reflects a competitiveness regrettably characteristic of today's legal profession. The present situation calls for the services not of a Solomon-like decisionmaker, but rather of a Job-like peacemaker. Otherwise, we are destined to repeat the mistakes of history.[54]

II. A DIFFERENT APPROACH: REFORM LEGAL EDUCATION

For many readers, shifting attention from a perceived problem of litigation to a proposed problem of education may evoke a sense of disinterestedness — a "that's not my department" feeling. But, in reality, for every legal professional and every consumer of justice, education *is* our department. Education is the simple answer to the child's question: How can we make our justice system work? The creative design steps that must be taken now to guarantee an efficient, effective, and economical civil justice system in the twenty-first century involve only minimal court structural design modifications, but substantial educational design modifications.

While the solution to the justice system problem lies in the proper education of all strata of society, we must

teach our youth, in particular, about the nature of conflict and appropriate methods for managing and resolving it. I leave the generation of ideas regarding pre law school conflict resolution and management curricula largely to the education experts.[55] However, I would like to share some ideas about reshaping the way we train law students in the United States.

If we are to reduce pressure on the courts and increase the prospects of speedy and inexpensive civil justice, we must completely revamp our approach to legal education in the United States. We must seriously consider discarding the case method approach to legal education or at the very least, we must drastically de-emphasize it.[56] By focusing on cases practically from the first day a student enters law school, we are communicating the impression that the courts are the primary resource for resolving conflict. Actually, case law largely represents documented failure of the parties and counsel to reach a mutually acceptable resolution of their conflicts. In many instances, mutually acceptable solutions are not reached because most lawyers were not taught how to negotiate effectively. Our present justice system exacerbates the situation by relentless publication of stories about failed negotiations elevated to the status of "judicial opinions." The judicial system needs fewer judicial opinions and more effective group decisionmaking by disputants and their lawyers.

> ***". . . [m]any features of the current legal system no longer serve to expedite justice or to ensure fair results."***

Emphasis in law school training should be on the cognitive and behavioral processes that are the essence and foundation of lawyering skills. The underlying cognitive and behavioral processes need to be understood in order to develop efficient lawyering skills. Courses should be designed around processes of thinking, learning, communication, investigation, problem solving, and decisionmaking. After these foundational process courses, law school training should focus on conflict resolution processes such as negotiation, alternative dispute resolution, trial, and appeal. Ethics should be taught in relation to all of the processes.

Knowledge of specific bodies of law is useful, but secondary. Any competent lawyer can become an expert on any legal issue in any topical area through legal research. However, a lawyer cannot develop negotiation or trial skills overnight. Nor can these skills be learned by reading a book. Learning these types of skills depends on multiple behavioral experiences in a variety of factual and legal situations. It is on these types of process based skills that law schools should focus in order to prepare graduates to be of more immediate value to their clients (as consumers of justice) and to the legal profession, generally. Just as importantly, nationwide law school training of this type would aid in solving the problem of an overused, unresponsive, and impractical civil justice system.

A. The Japan Analogy

To determine the specific components of a model of legal education that would help solve the continuing problem of court system congestion and expansion, we must employ a lateral thinking technique called "thought reversal."[57] As an example, consider a society possessing no civil court system or judicial branch of government for civil disputes, but rather a system where all disputes are resolved, interpersonally, by the disputants themselves or through the assistance of third parties. In such a society, what would law school education be like?

As an aid to answering this question, we could employ another lateral thinking technique called "analogy."[58] We would try to think of a society which closely approximates our imaginary society.[59] One such society would be that of Japan. An examination of the nature of the legal training in that society generates ideas helpful in designing an answer to the question posed.

It is true, as some commentators have suggested, that a direct comparison of the Japanese legal system with that of the United States is unfair and inappropriate.[60] There are significant historical[61] and cultural differences[62] between the two countries which account for Japan's small number of lawyers[63] and judges and its tiny, yet functional, court system.[64] But that fact does not preclude the production of ideas based on an examination of the way that Japan trains lawyers in a court-adverse system. These ideas are useful in creating a legal system focused on private dispute resolution as opposed to excessive court involvement.

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In Japan, there is only one law school in the whole country. Located in Tokyo, it is called the Legal Training and Research Institute. To enter the Institute, one must pass a grueling, competitive examination. Less than 2 percent of all applicants (usually numbering 30,000) qualify for admission. Each year, the Institute admits about 500 students and graduates about the same number. Graduating from its two year training program is a prerequisite

to being admitted to the practice of law in Japan. An unusual feature of admission to the Institute is that the students are considered to be employees or "legal apprentices" of the supreme court and are paid a salary during their time of study.[65]

Training at the Institute is directed toward: (1) transforming students into legal practitioners who handle "live facts" of the complex society (as opposed to mere legal theories); (2) helping students acquire technical skills needed for legal professionals; and (3) providing students with uniform training regardless of whether their ultimate choice is to be a judge, a prosecutor, or an attorney.[66] All Institute instructors are appointed by the supreme court and are highly experienced sole practitioners, prosecutors, and judges. Fifty instructors are divided into ten five-person teams. Students receive instruction and personal guidance from the same team of instructors throughout a good portion of the two year training period. Judges teach civil and criminal judging; prosecutors teach criminal prosecution; and practicing attorneys teach civil and criminal practice.[67] But more relevant for our purposes, is the nature of the training the students receive.

The two years of training are divided into three terms: four months of initial training, sixteen months of field training, and four months of final training. Initial training consists of introductory lectures, problem study, draftsmanship, special lectures, simulated trial and inspection tours, extracurricular courses, and general culture courses. In the introductory lectures, students are introduced to the organization, basic functions and operational procedures of the court, the prosecutor's office, and the bar. In problem study sessions, students draft judicial-type opinions based on actual court records, and their writing is openly discussed in class with appropriate critiques by an instructor. Draftsmanship sessions not only improve the students' writing skills, but also help them cultivate the ability to analyze facts and sharpen skills in both inductive and deductive logic. The students must watch a full day simulated trial conducted by the instructors followed by a half day commentary by two instructors. In addition, student groups observe actual trials and may also elect to attend a number of one to four, eighty-minute seminars on a variety of about sixteen legal topics.[68]

This seemingly unaligned, splintered, partially political, and in some aspects, adversarial approach to problem solving reflects a competitiveness regrettably characteristic of today's legal profession.

Field training consists of rotating through assignments in the district court (eight months; four months each in the civil and criminal sections), district prosecutor's office (four months), and an office of a practicing attorney (four months). In the district court, the students are assigned to a judge to observe court proceedings, draft judgments, and receive critiques from their assigned judge. In the prosecutor's office, they learn investigation techniques, how prosecutorial discretion is exercised, and how to draft indictments. They also accompany prosecutors to trial and must be given the opportunity to be involved in at least twenty-five cases of various crimes during this training period. In the practicing attorney's office, the students learn to prepare complaints, briefs, and other documents.

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They also attend trials with the instructing attorneys to observe trial proceedings.[69] The one-on-one aspects of this phase of training finds an analogy in the American method of training medical interns and residents.

The purpose of the final training term is "to consolidate the learning from the field experience, to correct discrepancies . . . resulting from uneven field experiences and to administer final educational polishing."[70] During this period, students attend advanced lectures, study more complex factual and legal problems, and do impromptu drafting of documents in the classroom. They also participate in a mock criminal trial in the roles of judges, prosecutors, defense counsel, witnesses, and the accused. The trial is followed by classroom discussion during which the students share their views and hear the instructor's comments on specific portions of the trial.[71]

To graduate from the Institute, a student must pass a final examination. There are four days of written examinations on civil and criminal trials, civil and criminal practice, prosecution, and general culture. This is followed by a two day oral examination testing the students' knowledge of civil and criminal matters.[72]

B. Application to the United States System

It cannot be denied that many law schools across the United States have, in the past decade or so, adopted law school skills training opportunities for law students resembling aspects of the Japanese model. These include negotiation, alternative dispute resolution, trial practice, appellate practice courses and other practice oriented courses. But rarely do we find a law school in the United States which has taken a comprehensive approach to legal education in its institution which, like the Japanese model, de-emphasizes the case method, emphasizes development of practice skills, provides for non-elective rotating internships, and requires team teaching. These four elements are

necessary to produce effective legal practitioners and to resolve the problems of congested courts. The Japanese model is a start, but for us to achieve these two goals, that model must be modified. Our model must compensate for the fact that our system of government is primarily based on the concept of individual rights and that, as Americans, we do not have the historical and cultural orientation toward conciliation as the primary method of resolving disputes.

The law school curriculum described below represents only initial ideas intended to inspire further thought about the topic. It is also based on a few assumptions: (1) that elementary and high school education will, in the future, have modules of instruction involving conflict management and dispute resolution processes (including traditional court adjudication); (2) that the ABA and the Association of American Law Schools will agree on specific courses (such as survey courses on contract law, tort law, property law, and constitutional law) that must be taken and passed as a prerequisite to applying to law school; and (3) that the goal of legal education will be to teach students a full range of practice skills with an emphasis on those skills related to extrajudicial dispute resolution.

During the first two years, students would be taught by instructor teams. All of the instructors would not have to be lawyers. At least one person on each First Year instruction team would have to hold a master's degree or Ph.D. in either psychology, communications, or some related field. All lawyer-instructors would be required to have at least five years of experience as a practitioner (advocate, legal advisor, arbitrator, mediator, etc.), prosecutor, or judge.

Legal research, analysis, and writing would be taken by the students all three years. Each semester, these classes would focus on different law topics, such as torts and contracts. The instruction team would also concentrate on these topic areas in teaching the other courses during the semester. The law topic focus would change during other semesters with all preceding topics available for use in the simulations. The system would heavily emphasize the use of the computer both in legal research and in dispute resolution.[73]

If we are to reduce pressure on the courts and increase the prospects of speedy and inexpensive civil justice, we must completely revamp our approach to legal education in the United States.

The first semester of the first year curriculum would include courses on law and dispute resolution processes, communication processes, and learning processes. A course on thinking processes would include logic, creative thinking, theories of cognition, perception, problem design, and problem solving.[74] The second semester of the first year would consist of a traditional moot court course involving written briefs and oral arguments. Other courses would address decision-making processes, investigation processes, and judicial decisionmaking processes.

Second year courses would include, in the first semester, negotiation processes, mediation processes, hybrid processes, and trial advocacy. The second semester would cover advanced negotiation and mediation, arbitration judging, arbitration advocacy and appellate advocacy.

The third year curriculum would focus on internships, allowing students to develop practical skills. A unique feature would be a choice of a teaching internship or service in the Law School Clinic Program. The teaching internship would be either at the law school or in a local college, high school, or elementary school. The purpose of this internship would be to enhance the oral and presentation skills of the law students and to help educate law students and other members of the community on effective methods and techniques of dispute resolution. Students would also do internships with an arbitrator, the prosecutor's office, a private law office, and a trial or appellate judge. Third year students would also take a law training synthesis course similar to the final four month training period at the Japanese Institute. Its purpose would be to review and synthesize the learning of the previous five semesters.

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If this type of law school curriculum were widely adopted, law school aptitude and bar examinations would have to be modified appropriately. Also, the legal profession and the public, working together, would have to devise new ways of compensating lawyers for their services. For example, incentives such as "creativity bonuses" for a speedy resolution of disputes with win-win or superoptimum solutions might be considered.

CONCLUSION

Harvard educator Derek Bok probably summed it up best when he said:

> If law schools are to do their share in attacking the basic problems of our legal system, they will need to adapt their teaching as well as their research . . . . T]he capacity to think like a lawyer has produced many triumphs, but it has also helped to produce a legal system that is among the most expensive and least efficient in the world.[75]

With regard to that expensive and inefficient legal system, former Chief Justice Burger, in the 1970s, said:

"[p]erhaps what we need are some imaginative Wright Brothers of the law to invent, and Henry Fords of the law to perfect, new machinery for resolving disputes."[76] Creative consumers of justice know that what we need now is imaginative people to invent and perfect new ways to produce law school graduates who know how to use new machinery for resolving disputes.[77] Absent that creative focus, continuing efforts at federal court reform, however well intentioned and intellectually inspired, are largely wasted and futile. ❖

ENDNOTES

1 RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 14 (1989).

2 William Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 THE THIRD BRANCH 1, 2 (1992).

3 John W. Cooley 4 LOY. CONSUMER L. REP. 117 (1992).

4 WHEELER & HARRISON, *supra* note 1, at 1.

5 FANNIE J. KLEIN, THE JUDICIAL ADMINISTRATION DIVISION HANDBOOK (6th ed. 1981). Colonial government was marked by a lack of distinction between legislative, executive and judicial functions. *Id.* at 1.

6 WHEELER & HARRISON, *supra* note 1, at 4.

7 Maeva Marcus, *Introduction* to ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789 4 (Maeva Marcus ed., 1992). *See generally,* EDWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 2-3 (1987); WHEELER & HARRISON, *supra* note 1, at 10.

8 WHEELER & HARRISON, *supra* note 1, at 11.

9 *Id.* at 11-14. In 1867, legislation fixed the Supreme Court's authorized strength at nine justices. *Id.* at 14.

10 *Id.*

11 *Id.* at 11.

12 *Id.* at 18.

13 *Id.* at 21.

14 One proposal envisioned an eighteen-member Supreme Court, with nine justices serving on the circuits through a three-judge rotational scheme. Another proposal suggested that the Supreme Court's nine justices be divided into three panels to hear common-law, equity, admiralty and revenue cases, with constitutional cases to be heard by the court en banc. *Id.* at 22.

15 *Id.* at 24.

16 *Id.*

17 John H. Wigmore, *Roscoe Pound's Saint Paul Address of 1906, The Spark That Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 176 (1937).

18 KLEIN, *supra* note 5, at 6-7.

19 *Id.* at 7.

20 AMERICAN COURTS & JUSTICE 60-61 (Glenn R. Winters & Edward J. Schoenbaum eds., 1976). One of its first projects was a proposed Statewide Judicature Act suggesting a variety of judicial council prototypes having rule-making authority. *See* KLEIN, *supra* note 5, at 7.

21 Winters & Schoenbaum, *supra* note 20, at 61.

22 *Id.*

23 WARREN E. BURGER, DELIVERY OF JUSTICE: PROPOSALS FOR CHANGES TO IMPROVE THE ADMINISTRATION OF JUSTICE 5-6 (1990).

24 Winters & Schoenbaum, *supra* note 20, at 61.

25 *Id.* at 53. These efforts were supported by Arthur T. Vanderbilt, a friend and long time admirer of Roscoe Pound, who became President of the ABA in 1937. KLEIN, *supra* note 5, at 8.

26 BURGER, *supra* note 23, at 6.

27 *See* ROSCOE POUND, ORGANIZATION OF COURTS, (Nat'l Conference of Judicial Councils, 1940). *See also,* KLEIN, *supra* note 5, at 8-9; *see generally* Larry C. Berkson, *The Emerging Ideal of Court Unification*, 60 JUDICATURE 372 (1977); Susan Carbon et al., *Court Reform in the Twentieth Century: A Critique of the Court Unification Controversy*, 27 EMORY L.J. 559 (1978).

28 Mark W. Cannon, *Innovation in the Administration of Justice, 1969-1981: An Overview*, in THE POLITICS OF JUDICIAL REFORM 35 (Philip L. Dubois ed., 1982). There were a few bright spots in court reform during those two decades. In 1949, Arthur Vanderbilt published his MINIMUM STANDARDS OF JUDICIAL REFORM. KLEIN, *supra* note 5, at 10. In 1959, AJS, the Institute of Judicial Administration, and the ABA co-sponsored a National Conference on Judicial Selection and Court Administration out of which grew the Joint Committee for the effective Administration of Justice and the judicial seminars that eventually grew into the National College of the State Judiciary. Winters & Schoenbaum, *supra* note 20, at 62.

29 Cannon, *supra* note 28, at 39.

30 *Id.* at 40-41.

31 *Id.* at 46.

32 A. LEO LEVIN & RUSSELL R. WHEELER, THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 301-306 (ABA 1979).

33 *See generally* ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS, (Erika S. Fine & Elizabeth S. Plapinger eds., 1987).

34 *See* DANIEL J. MEADOR, AMERICAN COURTS (1991); DAVID W. NEUBAUER, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES (1991); THE ROLE OF COURTS IN AMERICAN SOCIETY: THE FINAL REPORT OF THE COUNCIL ON THE ROLE OF COURTS (Jethro K. Lieberman ed., 1984).

35 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3 (1990).

36 Diana G. Culp, *Fixing the Federal Courts*, A.B.A. J., June 1990, at 63.

37 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 35, at 6, 171-186.

38 1990 U.S.C.C.A.N. 6803, 6803. There is no specific indication in the legislative history of the Civil Justice Reform Act that the Committee on the Judiciary had considered the earlier recommendations of the Federal Courts Study Committee. It is clear from the legislative history, however, that the Senate Judiciary Committee believed that it received less cooperation from the Judicial Conference of the United States than appropriate. At a June 26, 1990 hearing before the Senate Judiciary Committee, the Judicial Conference announced a position of "disfavor" on the Civil Justice Reform Act. *Id.* at 6806-07. Federal judges had concerns that the legislation would be counterproductive if enacted. *See* Diana E. Murphy, *The Concerns of Federal Judges*, 74 JUDICATURE 112 (1990).

39 1990 U.S.C.C.A.N. 6803, 6804.

40 28 U.S.C. § 471 (1990).

41 *Id.*

42 28 U.S.C. §§ 472, 477, 478 (1990).

43 28 U.S.C. § 479 (1990).

44 28 U.S.C. § 480 (1990).

45 The Council's Working Group on Civil Justice Reform was chaired by Solicitor General Kenneth W. Starr and was composed of experts from the Department of Justice, the White House Counsel's Office, the Office of Policy Development, the Office of Vice President, the Departments of Commerce, Treasury, Energy and Health and Human Services, the Office of Management and Budget, the Council of Economic Advisors and the Environmental Protection Agency. Press Release of August 13, 1991 *accompanying* AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (President's Council on Competitiveness, Aug. 1991).

46 Memorandum from the Vice President *accompanying* AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA, *supra* note 45.

47 Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Re-*

form, 75 JUDICATURE 244 (1992). *See also* Gregory B. Butler & Brian D. Miller, *Fiddling While Rome Burns: A Response to Dr. Hensler*, 75 JUDICATURE 251 (1992).

[48] On February 4, 1992, President Bush submitted to Congress a special message to accompany his proposed Access to Justice Act of 1992 supporting the incorporated AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA. 138 Cong. Rec. H255 (H.R. Doc. No. 102-185) *reprinted* in 1992 U.S.C.C.A.N. D13 (No. 2, April 1992).

[49] The ABA Working Group consisted of the President, President-Elect and Past-President of the ABA, three representatives of the ABA Board of Governors, and representatives of thirteen Sections, Committees and sub-entities of the ABA. Working Group on Civil Justice System Proposals, ABA BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM (ABA 1992).

[50] *Id.* at *Acknowledgments.*

[51] *Id.* at vii.

[52] *Id.*

[53] *Id.* at Chapter VII.

[54] *See generally* LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY (1986); Carl Baar, *The Scope and Limits of Court Reform*, 5/3 Just. Sys. J. 274 (1980); Geoff Gallas, *Court Reform: Has It Been Built on an Adequate Foundation?*, 63 Judicature 28 (1979); MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL (1983); RICHARD NEELY, WHY COURTS DON'T WORK (1983); JEROME FRANK, COURTS ON TRIAL (1963); LEONARD DOWNIE, JR., JUSTICE DENIED (1972); CHARLES H. SHELDON, THE AMERICAN JUDICIAL PROCESS: MODELS AND APPROACHES (1974).

[55] Excellent elementary school materials already exist for teaching conflict resolution and its relationship to the court system. *See e.g.* LINDA RIEKES et al., CONFLICT, COURTS AND TRIALS (1991). Other materials similarly exist for teaching children conflict resolution skills. *See e.g.* VIVIAN EINSTEIN, CONFLICT RESOLUTION (1985).

[56] Former Chief Justice Burger said in 1969 that the case-method of teaching law trained students in generalities and "divorced them from the problems of people." Warren E. Burger *as quoted in* EUGENE C. GERHART, QUOTE IT II 59 (1988). Recently, with the advent of increased skills training in law schools, at least two commentators have taken up the defense of the case-method. *See* Charles Donahue, Jr., *A Legal Historian Looks at the Case Method*, 19 NO. KY. L. REV. 17 (1991); Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517 (1991).

[57] EDWARD DE BONO, LATERAL THINKING: CREATIVITY STEP BY STEP 141-147 (1990); *see also* JOHN W. COOLEY, APPELLATE ADVOCACY MANUAL ch. 2., 167-171 (1989).

[58] *See* DE BONO, *supra* note 57, at 167-174; COOLEY, *supra* note 57, at 182-84.

[59] Using the analogy technique, the item compared does not necessarily have to be closely similar. Actually, the differences often spawn useful ideas. DE BONO, *supra* note 57, at 169.

[60] *See e.g.* Richard S. Miller, *Apples vs. Persimmons — Let's Stop Drawing Inappropriate Comparisons between the Legal Professions in Japan and the United States*, 17 VICTORIA U. WELLINGTON L. REV. 201 (1987).

[61] The Japanese legal system is a combination of European and American influences grafted onto historical customs and values that discouraged public resolution of disputes. Donald L. Uchtmann et al., *The Developing Japanese Legal System: Growth and Change in the Modern Era*, 23 GONZ. L. REV. 349, 350-354 (1987/88).

[62] In the Tokugawan period, litigation was seen to disrupt societal harmony so strongly emphasized by Confucianism. Conciliation was the dominant feature of civil procedure during the Tokugawan period and persists in Japan even to this day. ELLIOT J. HAHN, JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM 10 (1984) (chapter 2 of this treatise also published in a slightly revised form in 5 NW. J. INT'L L. & BUS., 517 (1983)).

[63] The widely-touted impression that Japan has a minuscule number of lawyers in comparison to the United States is quite misleading. First of all, the population of Japan is about half that of the United States. Miller, *supra* note 60, at 202. Secondly, Japan has several groups of "quasi-lawyers" (scriveners, benrishi, zeirishi) who perform many of the functions routinely performed by full-fledged lawyers in the United States. HAHN, *supra* note 62, at 14-15.

[64] The Japanese judicial system is similar to a typical state court system in the United States. An unusual feature of Japan's supreme court is that only ten of the fifteen authorized judicial positions need be filled by law-trained professionals. HAHN, *supra* note 62, at 19-20.

[65] HAHN, *supra* note 62, at 13-14; Edward I. Chen, *The Legal Training and Research Institute of Japan*, 22 TOLEDO L. REV. 975, 978-79 (1991).

[66] Chen, *supra* note 65, at 984. Upon graduation, much in the nature of the European tradition, the apprentices must choose to be appointed to career positions as either assistant judges or public prosecutors, or to register as practicing attorneys. The number of positions for judges and prosecutors is fixed by law. *Id.* at 994.

[67] *Id.* at 983.

[68] *Id.* at 984-88.

[69] *Id.* at 988-991.

[70] *Id.* at 992.

[71] *Id.* at 992-93.

[72] *Id.* at 993.

[73] *See* John W. Cooley, *Merging of Minds and Microcomputers: The Coming of Age of Computer-Aided Mediation of Court Cases* in SYSTEMATIC ANALYSIS IN DISPUTE RESOLUTION (Stuart S. Nagel & Miriam K. Mills eds., 1991).

[74] *See generally* COOLEY, *supra* note 57, at 40-49.

[75] Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 582 (1983). Lawyers have not been able to reconcile completely the separate roles of adversarial advocacy and nonadversarial advocacy — of competition and collaboration in the client's interests. We seem to have much to learn from the Japanese in this regard. *See generally* William J. McGill, *Peacemaking in an Adversary Society* in LEVIN & WHEELER, *supra* note 32, at 161-69; LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 52-70 (1987). For an overview of practice trends in the legal profession, *see* HENRY R. GLICK, COURTS IN AMERICAN POLITICS 81-100 (1990).

[76] Warren E. Burger, *Agenda for 2000 A.D. — A Need for Systematic Anticipation* in LEVIN & WHEELER, *supra* note 32, at 25.

[77] Consumers of justice must continually be conscious of the fact that our Britain-borrowed legal system, based on *stare decisis*, is, by its very nature, backward-looking. Therefore, we must make special efforts to become *future-oriented* in the way we approach problems and solve them. One way to do this, institutionally, would be to establish regional Centers for Creative Lawyering at law schools around the country. In essence, these would serve as creative "think tanks" in addition to the research-oriented "think tanks" already in existence. *See generally* THE MACCRATE COMMISSION REPORT: TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (ABA 1992).