

STEPHEN GILLERS

**THE TWO-YEAR LAW DEGREE:
UNDESIRABLE BUT PERHAPS
UNAVOIDABLE**

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Abstract: Professor Stephen Gillers responds to Professor Estreicher's proposal for a two-year law degree that will qualify a graduate to take the bar examination. Professor Gillers states that while two years of law school may be sufficient to practice many types of legal work, it will put two-year graduates at a professional disadvantage. The lower knowledge base of two-year graduates will make them less attractive candidates in an already tight job market. Furthermore, even if New York allows a two-year degree to qualify for the bar exam, it will limit two-year graduates to practicing in New York only, as reciprocity from other states is not expected.

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THE TWO-YEAR LAW DEGREE: UNDESIRABLE BUT PERHAPS UNAVOIDABLE

Stephen Gillers *

rofessor Estreicher makes a strong case for a two-year law degree that will qualify a graduate to take the bar examination.¹ His idea is in response to the increasingly recognized problem of too much debt and too few jobs for law graduates. He is, however, more enthusiastic about the benefits of his proposed change than circumstances warrant. The two-year degree will create two different types of lawyers with different skills and job prospects, at least when starting out. Separately, his argument appears directed at the New York Court of Appeals. But states can't go it alone without limiting the mobility of the two-year graduate, as discussed hereafter. And most problematic, some students might actually find it harder to get legal employment with two years of law school instead of three. Two-year graduates may still be unemployed, albeit with lower debt payments. Disappointment will come sooner but at a lower price.

The Problem the Numbers Demonstrate. In the next decade, the number of job openings for lawyers is predicted to average about 25,000 annually.² This figure combines the prediction of the Bureau of Labor Statistics (a total of about 73,600 new jobs for lawyers in the decade 2010–20)³ and an annual attri-

* Elihu Root Professor of Law, New York University. A version of this statement was submitted to the ABA Task Force on the Future of Legal Education.

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

² BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 139 (2012).

³ C. Brett Lockard & Michael Wolf, *Occupational Employment Projections to 2020*, 135 MONTHLY LAB. REV. 84, 94 (2012).

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tion rate of 2.5% in the current practicing lawyer population.⁴ The Bureau of Labor Statistics estimates about 730,000 practicing lawyers.⁵

The current class of 1Ls at all American Bar Association (ABA)-approved law schools is about 44,500.⁶ That number may fall and the number of jobs may increase, but clearly there is a mismatch between jobs and graduates. Many graduates will be disappointed.

Until recently, this was not so. There were more jobs.⁷ Even if there were not as many jobs as there were new lawyers, the discrepancy was small enough so the problem did not attract the attention it has today. For a long time, decades in fact, it looked like that picture would never fade, but then it did.

Aggravating Factors. Three long-term trends have attracted comments and curiosity, but until recently they did not spawn the perception of a crisis. Now, they aggravate the problem.

First, in the last forty years, legal education has moved inexorably away from craft to theory, from performing the work of a professional school and toward a graduate school model.⁸ Of course, it is not one or the other. But this has been the direction. Clinics and adjuncts were enlisted to teach the craft of lawyering. This allowed the so-called academic faculty to pursue theory, which may

⁴ The 2.5% attrition rate is based on my assumption that legal careers last, on average, forty years.

⁵ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Lawyers, in OCCUPATIONAL OUTLOOK HANDBOOK* (2012–13 ed. 2012), available at <http://www.bls.gov/ooh/legal/lawyers.htm> (last visited Mar. 27, 2013). By contrast, as of April 2011, the ABA reported that there were 1,225,452 licensed lawyers in the United States. AM. BAR ASS'N, *LAWYER DEMOGRAPHICS* (2011), available at http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.authcheckdam.pdf. The discrepancy may be explained by the fact that some lawyers are licensed in more than one jurisdiction and some lawyers may not be in practice.

⁶ See Paul Campos, *Too many lawyers? Says who?*, SALON (Nov. 29, 2012), http://www.salon.com/2012/11/29/too_many_lawyers_says_who/ (discussing average numbers of students graduating each year from ABA-accredited schools).

⁷ See, e.g., Press Release, Nat'l Assoc. for Legal Career Professionals, *Class of 2010 Graduates Faced Worst Job Market Since Mid-1990s: Longstanding Employment Patterns Interrupted* (June 1, 2011), <http://www.nalp.org/2010selectedfindingsrelease> (explaining that in 2010, the employment rate for new graduates fell to 87.6%, and noting that “the Class of 2010 employment data reveal a job market with many underlying structural weaknesses, and the employment profile for this class marks the interruption of employment patterns for new law school graduates that have been undisturbed for decades.”).

⁸ See, e.g., David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html> (“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.’”).

have little to do with the workaday world of most (or any) lawyers. The consequence is that law graduates are less prepared for practice than they might once have been. A booming job market let us do that.

A second and related trend is the disappearance of many required courses that formerly encouraged the skills and knowledge used in law practice, so, today, little is required beyond first year classes, if that. At a recent conference, a friend who is a federal judge told me that law schools should require that students take at least one course from each of several clusters of courses tied to law practice. She would, she said, even support a required core curriculum. From her perspective, what lawyers know is the law. I've heard that refrain countless times in critiques of the modern law school curriculum.

Third, law school tuition has persistently risen faster than inflation and the cost of living.⁹ Consequently, the debt levels of graduating students also rose adjusted for inflation.¹⁰

But these long-term trends could be and largely were discounted as long as there were jobs for a sufficiently high number of graduates and as long as those jobs paid enough to repay loans.

The job crisis has now put the long-term trends front and center.

Further Employment Contraction Ahead. Jobs are likely to continue to fall, or at least not return, even after the economy revives.¹¹ Reasons for this include the ability of technology to do much of what young lawyers were once paid to do. As technology gets more sophisticated, that trend will continue. Further, technology today enables non-law firms like LegalZoom and Rocket Lawyer to perform many of the basic services that are a staple for small firms and to do it more cheaply.¹² Technological advances will also increase this capacity, further depleting the client base for traditional firms, especially small ones.

⁹ See Karen Sloan, *Tuition is still growing*, NAT'L LAW JOURNAL (Aug. 20, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202567898209> (noting that tuition has grown at more than twice the rate of inflation).

¹⁰ See *id.* ("Even with scholarship money on the rise, graduate debt loads continue to grow.").

¹¹ See Matt Leichter, *U.S. Legal Sector Contracting Even As Nation's Economy Recovers*, AM. LAW DAILY (Mar. 6, 2013), http://www.americanlawyer.com/PubArticleALD.jsp?id=1202591158008&US_Legal_Sector_Contracting_Even_As_Nations_Economy_Recovers.

¹² See *generally About Us*, LEGALZOOM, <http://www.legalzoom.com/about-us> (last visited Mar. 9, 2013) (explaining that LegalZoom's founders "knew there had to be an easier, more affordable way to take care of common legal matters" that included "an easy-to-use, online service that helped people create their own legal documents."); *About Us*, ROCKET LAWYER, <http://www.rocketlawyer.com/about-us.rl> (last visited Mar. 9, 2013) ("Our commitment to affordable and accessible legal services is at the heart of everything we do. Most attorneys and bar associations agree that much can and should be done to improve access to the law by reducing cost and complexity.").

Much of the work that would once have stayed at a law firm can now be sent abroad and performed at small fractions of the cost here (outsourcing).¹³ The outsource companies are advertising capacity to perform increasingly complex work, as a look at their websites instantly tells us.¹⁴ Thomson Reuters has acquired Pangea3, revealing a sophisticated company's confidence in the outsource market.¹⁵ Those performing the work may be lawyers admitted abroad, non-lawyers specially trained for a particular task, or lawyers admitted in the United States who have returned to their home countries. The significantly lower cost of labor in different labor markets makes outsourcing attractive, even irresistible.¹⁶

The Two-Year Degree. All of this is happening and will continue to happen, leading to calls to allow applicants to the bar to qualify with two years of law school. Students could attend for a third year, of course, but the schools would have to make it worthwhile for a student to pay a third year of tuition and lose a year of income. Or so the argument goes. Turning that third year into the first year of practice, even at a salary lower than first-year graduates who now get jobs might expect to earn upon graduation, will compensate for the knowledge lost.

It is not that the third year is useless, or that nothing will be gained during it. Rather, a student may conclude that the incremental benefit of the third year is not worth the cost in tuition and lost income, and that this benefit can be recaptured through a different kind of education in a different environment—*i.e.*, on the job. People may disagree with that decision, but it can hardly be doubted that it is not unreasonable, depending on the nature of the practice to which the student aspires.

What Will Be Lost? What would a sixty-credit law degree miss? We can configure the curriculum in many ways but assume that Property, Contracts, Civil Procedure, Criminal Law, Constitutional Law, Administrative Law (or the Administrative State), and Legal Ethics, which we can call basic courses, require between twenty and twenty-seven credits (depending on whether the first six

¹³ See Debra Cassens Weiss, *Are N.Y. Law Firms Outsourcing Legal Work to India? One Admits It, One Denies It*, AM. BAR ASS'N JOURNAL (Aug. 9, 2010), http://www.abajournal.com/news/article/are_ny_law_firms_outsourcing_legal_work_to_india_one_admits_it_one_denies_it/.

¹⁴ See, e.g., *Solutions*, PANGA3, <http://www.pangea3.com/solutions/legal-outsourcing-services.html> (last visited Mar. 9, 2013) (urging, among other things, that “it makes good business sense to turn over contract management and abstraction, contract drafting and revision, and M&A due diligence to the pros at Pangea3, just as many corporate legal departments already do.”).

¹⁵ See *Thomson Reuters Acquires Indian Legal Outsourcing Co. Pangea3*, AM. BAR ASS'N JOURNAL (Nov. 18, 2010), http://www.abajournal.com/news/article/report_thomson_reuters_to_acquire_indian_legal_outsourcing_co_pangea3/.

¹⁶ See *id.* (noting that in October 2007, “newly minted lawyers who joined [Pangea3] earned a mere \$7,000, compared to \$160,000 first-year lawyers earned at major U.S. law firms.”).

classes are three or four credits and whether Legal Ethics is two or three credits). Then we need to add a research and writing (or Lawyering) class, which can be three or four credits, bringing us to a range of twenty-three to thirty-one credits, more likely toward the higher end.

Let us assume twenty-eight credits for the basic courses, which is still low. At N.Y.U. the number is thirty-six to thirty-seven credits, as it is in many schools. To allow the fullest choice of electives in the second year, schools may be inclined to reduce the credit allocation for some or all basic courses (from four to three, for example), which must be counted as a cost of a two-year degree, especially if one subscribes to the proposition that what lawyers know is the law.

With a sixty-credit graduation requirement, the student with twenty-eight credits in basic courses is left with thirty-two credits to “spend” among the following traditionally popular classes: Corporations, Evidence, Criminal Procedure, International Law, Federal Courts, Securities Regulation, Conflicts of Law, Tax, Environmental Law, Intellectual Property, Employment Law, Bankruptcy, Trusts and Estates, Family Law, advanced classes in any of these subjects or in the basic subjects, and in clinics, which often take much more time than their credit allocation. If each elective class is three or four credits (but schools may feel the need to reduce four-credit electives to three credits, again reducing the amount of law learned, to enable students to take as many electives as possible), students could take between eight and ten additional classes. Taking thirty-two credits in one year—sixteen credits per term—is demanding even if a clinic is not among them. Students today take, on average, fourteen credits each term.¹⁷ We must recognize that learning suffers when study is so concentrated.

Furthermore, I haven’t included seminars, which are small classes of twenty-five students or so where the style of teaching and opportunity for student engagement is different and beneficial. In seminars, students can do a kind of work and get a level of faculty attention that is impossible in lecture classes. The number of seminars may decline as a result of reduced student demand for them. Seminars are the usual venue for a substantial writing requirement. Will that be eliminated for the two-year degree?

¹⁷ The current ABA credit requirement is eighty-three credits, which, when divided over six semesters, is fourteen credits each semester. AM. BAR ASS’N, 2012–2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 22–23 (requiring, in Standard 304(b), “[a] law school shall require, as a condition for graduation, successful completion of a course of study in residence of not fewer than 58,000 minutes of instruction time, except as otherwise provided” and explaining in Interpretation 304-4 that “[l]aw schools on a conventional semester system typically require 700 minutes of instruction time per ‘credit,’ To achieve the required total of 58,000 minutes of instruction time, a law school must require at least 83 semester hours of credit,”), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf.

We should recognize a further cost. A student studying her options may decide that the kind of practice she desires will not benefit from certain of the traditional electives and so be content to avoid them. The student's prediction may prove true. But the consequence is the absence of exposure to an area of law that she might serendipitously have found attractive. She may never know. Further, absence of a course in particular field will put the two-year graduate at a further competitive disadvantage with a three-year graduate who has taken that course. Imagine that two students have applied for a job in a firm that does intellectual property or environmental law work, courses the three-year student had the time to take but which the two-year student has not. Of course, even in a three-year program there will be many courses not studied, but a two-year program leaves little or no room for exploration and surprise.

As stated, law schools today have few or no required courses beyond the traditional first year classes (some of which may now be taken in later years to allow for first year electives). Perhaps this development has gone too far. In any event, a three-year degree makes it more likely that students will take a sufficient number of "black letter" classes, i.e., traditional classes aimed at preparing a student for the kind of problems that arise in law practice. Will students who opt for a two-year degree be free of required classes in their second year?

One would think that two-year candidates would wish to take only black letter electives, the better to prepare for the kind of practice for which a two-year degree may be most apt. In that view, we might rely on self-interest. Learn as much law as you can. Or, instead, should we require the two-year student to take specific classes that three-year students are not required to take? It may be hard to justify treating the two-year and three-year students differently. Yet I think a two-year degree should have more course requirements than a three-year degree to compensate for the loss of a third year of instruction.

The Two-Year Fix Does Not Create Jobs or a Competitive Advantage. An assumption here must be surfaced, which is largely an assumption behind the argument of the advocates of the two-year law degree.¹⁸ The argument goes like this. Some students graduate with \$150,000 in debt and cannot afford to take jobs paying in the mid-five figures, say \$60,000 yearly.¹⁹ Their debt level is

¹⁸ See, e.g., Estreicher, *supra* note 1, at 607–08. (“[T]here is also a social benefit in lightening up a financial burden from students who go into public interest or small firm work that serves the needs of the relatively disadvantaged, lower income, or even average-income Americans.”).

¹⁹ See *id.* at 607; *Fall/Spring Tuition – School of Law (J.D.)*, N.Y.U. OFFICE OF THE BURSAR, <http://www.nyu.edu/bursar/tuition.fees/rate12/lawjd.html> (last visited Mar. 10, 2013) (listing tuition as \$25,575 per term at N.Y.U. Law). That figure does not include room, board, books, health insurance, and loan fees, which N.Y.U. Law estimates to be \$26,962 per year. *Student Expense Budget*, N.Y.U. FINANCIAL AID, <http://www.law.nyu.edu/financialaid/budgetandbudgeting/studentexpensebudget/index.htm> (last visited Mar. 10, 2013).

too high. They will be unable to pay back the loan. With a two-year degree, the debt level will be cut by a third—to \$100,000 instead of \$150,000—thereby enabling them to take mid-five figure jobs and repay the debt while also supporting themselves.²⁰

The problem with this argument is that it assumes without evidence that the two-year, high-debt student (\$100,000 is still a lot of money) will be able to get the mid-five figure job. Being able to afford a job is not the same thing as getting one, of course. Students who remain unable to find work as lawyers will find small consolation in a lower debt obligation. Further, the two-year graduate will compete with three-year graduates who are not in the high-debt category because they have not had to borrow as much. Other things being equal, we must expect that the three-year graduate will have an advantage in the job market. Not a decisive one, to be sure, but an advantage.

Furthermore, states cannot implement a two-year degree alone without limiting the geographic mobility of the two-year graduate. Today, the rules in nearly all states require a J.D. from an ABA-approved law school. (I put aside the LL.M. route to bar admission). If New York were to allow bar admission after two years of legal study, but the ABA standards did not change, a student who opted for briefer study could be locked out of bar admission elsewhere. This would further limit the job market for students with a two-year degree, as they could be forever limited to jurisdictions that allow bar admission after two years of legal study, unlike students with a three-year degree, who could change their geographic location to keep up with an evolving job market.

Allowing admission to the bar after two years of law school to reduce debt and make five-figure jobs affordable must conjure with the reality that there will still be many three-year graduates. The three-year “overhang” will weaken the market for the two-year graduate. That overhang would disappear if all graduates had two years of formal education, but that is not going to happen. So the two-year graduate will compete against the three-year graduate who can afford to take a five-figure job.

Another fact to consider is that many students who elect the two-year degree to save money and avoid debt will be those who are in greater financial dis-

²⁰ There is some question whether this argument fairly takes into account federal loan repayment assistance. See Philip Schrag, *Book Review: Failing Law Schools—Brian Tamanaha’s Misguided Missile*, 26 GEO. J. LEGAL ETHICS (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179625. But let’s assume it does or that, in any event, even with the federal programs, the size of the debt for these students precludes the mid-to-high five figure job. A further complication is whether, as a matter of policy, law school debt should be socialized to enable students to go to law school and be able to afford to take jobs that may or may not be there when they graduate.

gress. We would be making it easier for the economically-pressed students to choose two years, whereas those who can absorb the cost and the delay will largely go on to a third year. Some wealthier students will not take the third year, of course, just as some less wealthy students will opt for the third year despite the greater debt, but the primary incentive for choosing a two-year degree will likely be to contain debt and that incentive will fall most heavily on students with fewer resources.

What is the Question? If a prospective student asked my advice, I would strongly urge her to spend three years in law school and to choose courses wisely. But the question is different. It is whether we can say—and therefore urge state courts to say—that three years are needed to ensure the level of competence that a state should require for bar admission. I don't think we can say that. Certainly it is not needed for the practices of many—perhaps most—lawyers most of the time. For financial or other considerations, including the nature of her anticipated practice, a student might reasonably choose a two-year degree. Many foreign students with even less higher education than American bar applicants gain admission to a United States bar (most often in New York) with less education and only a year in an American law school earning an LL.M.²¹

Should the two-year degree have a different name than a three-year degree? I think so. It does not make sense to award the same degree for both a two- and a three-year program. An option might be to award an LL.B. instead of a J.D. for the two-year program. But I do not think the law license for the two-year graduate should differ in what it allows from the one available to three-year graduates. The two-year graduate may not be as able—or be as able as soon—to handle the same matters as the three-year graduate, but I think we must rely on the duty of competence, as we do now, to instruct lawyers to take care in the client matters they accept. The market will also be an influence. In any event, I suggest that it will not be possible to distinguish *sensibly* between the scope of work allowed to the two-year graduate from the scope allowed to the three-year graduate.²²

I am agnostic on the question whether the two-year graduate should be required to serve an apprenticeship, perhaps of a year, before gaining bar admission. The big question is whether those opportunities will exist and at what compensation (since cost is a main driver here)—the greater the demands on the men-

²¹ See, e.g., CAREER DEV. OFFICE, YALE LAW SCH., INTERNATIONAL LL.M. CAREER PLANNING GUIDE 6–7, 10–14 (2011–12) (describing the law firm job market and bar admission requirements for foreign LL.M. candidates, primarily in New York and Washington, D.C.), available at [http://www.law.yale.edu/documents/pdf/CDO_Public/final_LL.M_Guide_2011\(1\).pdf](http://www.law.yale.edu/documents/pdf/CDO_Public/final_LL.M_Guide_2011(1).pdf).

²² An LL.B. after two years of study may attract the attention of some prominent schools that do not now offer any law degree program. Indeed, it is not farfetched to imagine that some colleges may offer an LL.B. after five (rather than four) years of college study.

toring lawyer, the less likely that there will be volunteers to accept the responsibility. Another possibility is to require a year of practice before certain work can be undertaken, e.g., advising clients or appearing in court.

CONCLUSION: THE PERSISTENCE OF HIERARCHY

We have known for decades that the profession is greatly stratified, that some lawyers do highly sophisticated work in complex fields and requiring great discretion, and other law work is routine, repetitive, and with little discretion. We have known for decades that law schools are, or are perceived to be, unequal in the quality of the legal education they afford. Largely, we have ignored these differences, although some clients and many employers do not and will not. Now we are faced with the question of whether we should recognize hierarchy in legal education and legal work, at least by permitting bar membership after two years of post-college study, possibly accompanied by a law degree carrying a different name.²³ I would advise against the option. The question, however, is whether three years is the minimally acceptable course of study a state should require, and for many legal jobs, I do not think we can say that it is.



²³ Hierarchy may also come from the bottom up. There is an incipient movement toward recognition of licensed paralegals who need not work under the supervision of lawyers and whose permissible work is restricted. *See, e.g.*, Supreme Court of Washington, *In the Matter of the Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, Order No. 25700-A-1005 (June 15, 2012). That trend would have to be—and can be—reconciled with any decision to reduce the education required for a full law license.