

## ***Professional Legal Education in Scotland***

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### **1. Introduction**

In comparative terms, Scotland is a small jurisdiction. With a legal profession of around 8,800 solicitors and over 400 practising advocates serving a population of around five million, we are in size smaller than the legal bar of many states in the US. Our solutions to the problems of professional education are therefore those that are appropriate to our jurisdictional size, character and history. However it is one of the themes of this paper that whatever the size and legal structures of a jurisdiction, there are many educational issues common to even those jurisdictions significantly different in size, structure and culture. The second theme deals with what has been for us in Scotland a particular concern, and that is the problem of educating for practice; and especially those forms of programme and curriculum design that are most effective for training and education at the professional stage.

The first part of this paper will summarise the current Scottish professional legal educational programme, and set it in the context of legal education and the legal profession generally in Scotland. The second part will illustrate some aspects of the professional education programme with reference to a case study, namely the Diploma in Legal Practice at the Glasgow Graduate School of Law. Finally, I shall outline some of the issues or themes from the Scottish experience that might be said to be applicable to alternatives to the Bar Exam in the USA.

### **2. Current Professional Legal Education in Scotland**

Unlike the legal profession in the USA, we have a divided profession in Scotland. Advocates, as members of the Bar are called, can plead in any court in Scotland as well as the House of Lords and the Judicial Committee of the Privy Council, and many other courts and tribunals, eg courts martial. Until recently, they had exclusive rights of

pleading to many of these courts.<sup>1</sup> They are entirely independent (the motto of the Faculty is *suum cuique* – each to his own...). They normally take instructions from solicitors in criminal and civil matters, and act according to the so-called ‘cab-rank’ rule, by which an advocate is compelled to accept business from a solicitor, unless the he or she is barred by personal interest, or the case in question is unstatable in law.<sup>2</sup> Once they have accepted instructions and are in court, they have the widest remit in their conduct of an action. While they are grouped as a Faculty under the oversight of the Dean of Faculty, advocates are for the purposes of organised in ‘stables’, and their administrative matters are organised by a clerk.

By contrast solicitors had, until recently, pleading rights only to the inferior courts in Scotland. Solicitors accept instructions from members of the public, institutions, companies, partnerships and the like. They can, if they wish, instruct Counsel. Their work is highly diverse, and becoming increasingly highly specialised. They can work as employees, eg of the Crown as prosecutors (known in Scotland as Procurators Fiscal); or of institutions such as local authorities or the Scottish Executive; or of large corporate bodies -- banks, insurance companies and the like. By far the greater number of them, though, are organised into private law firms ranging in size from solo practitioners to firms with several hundred fee-earners. Solicitors have as their organisational body the Law Society of Scotland (LSS).<sup>3</sup> The LSS is charged with upholding the interests of the solicitor branch of the profession, and interests of the public.

The training of both advocates and solicitors in Scotland takes the same route at the initial stages. All lawyers in Scotland must qualify with a LLB from an institution recognised by the Law Society of Scotland, or they must pass the LSS’s examinations. The LLB can be studied in a variety of curricula. Those students taking the LLB as their first degree after leaving school can take an Ordinary, three-year degree, in which they take a minimum of optional subjects apart from those core subjects deemed necessary by the LSS. They can also extend this to an Honours degree lasting four years. Those students who already have a degree in another discipline may condense the Ordinary three-year degree into two years.

The first two or three years of the undergraduate degree are spent predominantly in the study of the subjects that are deemed by the LSS to be the core of knowledge demanded of a lawyer. These subjects, called the ‘qualifying subjects’ because they are seen as in part defining the core of knowledge required of law graduates, are dealt with under different categories and to different depths in each of the universities offering qualifying

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<sup>1</sup> Until the provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1992 came into force, which allowed solicitors rights of audience to enable them to plead before the supreme courts in Scotland. See Platts, A. (2000) *Solicitor Advocates in Scotland: A Research Overview*, Scottish Executive Central Research Unit

<sup>2</sup> See *Guide to the Professional Conduct of Advocates* (1988), paras 4.3.1.–4.3.3.

<sup>3</sup> In which their activities are governed by the Solicitors (Scotland) Act 1980 as amended by the Solicitors (Scotland) Act 1988 (c 42), and the [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1990 \(c 40\)](#).

law degrees; but in the LSS's terms, they deal with the following areas:

- Public Law and the Legal System
- Scots Private Law
- Scots Criminal Law
- Scots Commercial Law
- Conveyancing
- Evidence
- Taxation
- European Community Law.

In addition to the above, all universities require all students (except those taking the two-year graduate course) to take non-law options in other social science or arts disciplines. The undergraduate degree in Scotland is thus considerably varied. There is an emphasis generally on skills, but these are normally taken to be the skills of academic performance in case-analysis, essays, dissertations and the like.

After qualifying with an LLB degree, students who wish to enter the legal profession then begin the three-year course of professional training and education. This begins with a course called the Diploma in Legal Practice. Equivalent in many ways to the Legal Practice Course in England and Wales, the Diploma sets out to train law students in practice skills and knowledge, and to equip them for the two-year traineeship that follows the Diploma. The Diploma curriculum, around 27 weeks in length, is set by the LSS, and consists of the following subjects:

- Civil Court Practice
- Criminal Court Practice
- Private Client
- Conveyancing
- Practice Management
- Financial Services & Accounting
- Professional Ethics
- *Either Company & Commercial or Public Administration*

Learning outcomes are specified by the LSS for each of the above subjects, but local centres are given flexibility to design the syllabi and the assessments for the above subjects. The course is taught predominantly by tutor-practitioners working in specific areas of the law, and designed and administered by the local centres. Course materials in the form of student and tutor handbooks for each of the above subjects are issued by the LSS to the providers every year, and the LSS takes responsibility for updating these materials. The authors are for the most part drawn from the profession, and they produce what are for the most part resources for seminar discussion and workshops. The texts are an admixture of styles and precedents with some explanatory and didactic text.

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<sup>4</sup> See *Law Society of Scotland Examination Syllabus and Reading List*, at <http://www.lawscot.org.uk/> under 'Education & Training'.

Currently there are four Diploma providers, all of them attached to university law departments or schools: Aberdeen, Dundee, Edinburgh and the Glasgow Graduate School of Law, a joint initiative between the universities of Glasgow and Strathclyde. Course fees currently stand around £3,750, with course materials costs (around £200 or so) above that. These fees, together with subsistence costs, are borne by students. Uniquely in the UK, approximately 60% of Scottish students obtain some form of fee grant (£2,750) and subsistence allowance, and this is calculated on the basis of academic results obtained by students in the qualifying subjects studied in the early years of their LLB degrees. The cost of the Diploma compares favourably with the cost of initial professional training courses elsewhere in the UK.<sup>5</sup> Nevertheless, recent research undertaken by the author on behalf of the Scottish Executive does indicate that the cost of the professional training programme, on top of the increasing levels of undergraduate student debt, does deter significant numbers of students from entering the programme.<sup>6</sup>

There is another route into the profession. Candidates can sit examinations that are set and administered by the LSS, while completing a non-Diploma, three-year traineeship. In order to be eligible to sit the Law Society of Scotland's professional examinations, candidates must be in or find employment as a pre-Diploma trainee with a qualified solicitor practising in Scotland. The pre-Diploma training contract lasts for three years during which time the trainee must receive training in the three prescribed areas of conveyancing, court work, and either trusts and executries or the work of a local authority. Very few intransits now enter the profession this way: the great majority enter through the LLB degree.<sup>7</sup>

Either before their Diploma or during it, students require to obtain a traineeship with a practising solicitor or a legal service employer in Scotland. On successful completion of the Diploma, they enter into a two-year contract of training with this employer. The traineeship is monitored by the LSS: trainees are required to submit logs of work undertaken in the office, and review sheets are completed every quarter and submitted to the LSS for monitoring. These form part of the ongoing assessment of the training programme known as the Assessment of Professional Competence (APC), which until recently was known as the Test of Professional Competence. (TPC)<sup>8</sup>

In the period 6 – 18 months into their traineeships, trainees are required to take another course called the Professional Competence Course. This course is designed to build upon

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<sup>5</sup> Comparable fees in Northern Ireland stand at around £4,000, and up to almost £8,000 for the LPC. It should be pointed out, however, that a number of the larger and City firms in England pay LPC fee costs.

<sup>6</sup> Anderson, S., Maharg, P., Murray, L. (2003) *Minority and Social Diversity in Legal Education*, Edinburgh, The Stationery Office. Also available at: <http://www.scotland.gov.uk/library5/justice/masd-00.asp>

<sup>7</sup> LSS website, at <http://www.lawscot.org.uk>, under 'Education & Training'

<sup>8</sup> For more detailed information on this, see LSS website, <http://www.lawscot.org.uk/>, under 'Education & Training', at 'The Post-Diploma Traineeship Training Programme'. It was originally envisaged that the TPC would contain an element of open-book examination; but following a series of closely documented trial assessments, it was decided not to proceed with this form of assessment.

the knowledge and skills developed in the Diploma, and relies upon the office experience that trainees will have gained in their traineeship to date. The course is compulsory, as is the Diploma; like the Diploma it is taught by tutor-practitioners; but unlike the Diploma it is not assessed (though of course trainees are given formative feedback on their performances in seminars and workshops). The course, around two weeks in length, consists of a core of 36 hours and 18 hours of elective syllabi.<sup>9</sup> This structure is quite different from the Diploma, where there is a large and compulsory core, and only one optional subject (Company & Commercial or Public Administration).<sup>10</sup> There are three other significant differences in the structure of the PCC as compared to that of the Diploma. First, unlike the Diploma which is offered within university law schools, any person or institution can apply to host a PCC, following accreditation by the LSS PCC Accreditation Panel. As a result, a number of larger firms have designed an 'in-house model' of the PCC for their trainees, while trainees in smaller firms attend the 'external provider model' of PCC at accredited institutions such as the GGSL. Second, as a result of more highly-structured accreditation procedures, the PCC is a regulated course in the way that the Diploma is not. Third, with very few exceptions, the PCC fees are paid by training firms as a form of trainee continuing professional development.

At the start of their second year of training, trainees obtain a restricted practising certificate which enables them to practise in the courts under certain conditions. They can also, with the permission of their employer, spend six months of their training in another EU country. At the end of their second year, having fulfilled all the conditions of the LSS, obtained a discharge of their training contract and a signing-off statement from their employer, they can apply for a full practising certificate and entry to the profession.

The procedure for those students who wish to enter the Faculty of Advocates is rather different. In addition to an undergraduate law degree, intrans to the Faculty must pass or gain exemption from the Faculty's examinations in law, and obtain or gain exemption from the Diploma in Legal Practice. They then serve a period, normally 21 months, in a solicitor's office as trainees, and then a further period of nine months as pupils to members of the Bar approved by the Dean of Faculty (termed 'devilling'). After passing the Faculty examination in Evidence, Practice and Procedure, the submission of references and the presentation of a petition to Court, they can be admitted as Advocates.

While they are still 'devils', trainee advocates now undertake a period of training, called the Foundation Course, which lasts for seven weeks. The course consists of workshops and instruction in specialist advocacy (examination of witnesses, jury speeches, submissions to the Bench, etc), pleadings-drafting and client consultations. More specialist work is dealt with in the Supplementary course, consisting of expert evidence,

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<sup>9</sup> For a list of the nine core modules, see the Law Society website at <http://www.lawscot.org.uk/> under 'Education & Training', at 'Professional Competence Course'. For examples of elective choice, see Glasgow Graduate School of Law, <http://www.ggsl.strath.ac.uk/courses/pcc.html>

<sup>10</sup> It could be argued that this option is not as relevant as it once was, given the developments in public-private partnership and the current role of private finance in the public sector.

criminal and civil appeals, civil jury trials and negotiation.

This, then, is a brief summary of the legal educational structures in Scotland. It must be said that this is only a snapshot of the programme as it exists at the moment. Much of the structure has undergone considerable change in the past three years, and it will change again in the coming three years. There is, for instance, a review of the Diploma about to be undertaken by the LSS, and this will inevitably involve a re-appraisal of the form and nature not only of the fundamental structure and the content of the Diploma, but of traineeship, APC and PCC as well. Before we look at some of the issues arising from this, however, it would be helpful to look in a little more detail at the work of a provider of the Diploma; for it is in the details of provision that it may be there are examples of practice and ideas that can be useful to (in the words of Henry James) the American scene.

### **9. Case study: The Diploma at the Glasgow Graduate School of Law**

The Glasgow Graduate School of Law (GGSL) was formed in 1999 from the graduate law schools of Glasgow and Strathclyde Universities. It was set up in part under the auspices of Synergy, a funding initiative of the Scottish Higher Education Funding Council to encourage partnership and collaboration between higher education institutions in Scotland.<sup>11</sup> The GGSL currently offers both the Diploma and the newly-formed Professional Competence Course.

One of the key motivating factors for the joint graduate school was the results of the review by the LSS of the Diploma carried out in 1994. A brief overview of this process is essential to an understanding of the activities of the GGSL. The review began with a survey of opinion of the profession, from which it became clear that, as most stakeholders in the educational process then suspected, there was considerable dissatisfaction with many aspects of the course.<sup>12</sup> The 1994 survey of the profession indicated a concern on the part of solicitors that the course was yet another academic course, and that students could be better prepared for practical life in the office. As a result of this and other data, it became clear that the Diploma required to be reviewed.<sup>13</sup> However, it was felt that the training programme in Scotland required a more systematic approach than simply a review of the starter course, the Diploma. As a result, the new elements of the professional programme described above, namely the PCC and the TPC, were introduced; and the programme itself was grounded in a competence view of legal

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<sup>11</sup> <http://www.strath.gla.ac.uk/synergy/law.html>

<sup>12</sup> See *The Training of Solicitors: Review of Employers*, Law Society of Scotland, unpublished paper, July 1994

<sup>13</sup> The review was in line with a similar review of the newly-established Legal Practice Course in England & Wales. See for example, The Training Panel of the Recruitment and Training Sub-Committee of the City of London Law Society, *An LPC Brief*, unpublished paper, April 1996; Scott Slorach, *The Legal Practice Course: Benefits in Practice*, unpublished paper, Nottingham Law School, 1996

training.<sup>14</sup>

After considerable debate about the shape and content of the reviewed Diploma, the Diploma curriculum retained for the most part its pre-1994 shape. A course in Practice Management was added to the curriculum; learning outcomes were clarified; and the structure of some subjects was reviewed and altered – notably Financial Services & Accounting. Perhaps most important, the LSS signalled where, in the syllabus learning outcomes for each of the subjects, skills could be learned; and for the first time in the history of the Diploma since its inception in 1980, identified a body of professional skills that ought to be the focus of a considerable portion of the course, namely advocacy, negotiation, client interviewing, precognition-taking, legal writing, drafting and legal research.<sup>15</sup>

While this review was ongoing there was a realisation on the part of both Glasgow and Strathclyde university law schools that proper resourcing of skills-based legal education as required by the LSS would need the joint resources of both law schools. As a result, new teaching accommodation was built, with networked AV and IT equipment. We shall describe briefly some of our initiatives in the use of technology below; but for now it is useful to observe that the Law Society's policy of flexibility of delivery gave us the scope to determine our own curriculum to a significant degree. With this in mind we set out on a programme of skills and ICT development over a number of years. While not exhaustive, the initiatives below will give a sense of the general direction of our thinking, and our implementations. However while projects initiatives were crucial, we needed to implement within an over-arching theory framework, and it is to this that we shall turn first.

## **1. Cycles and spirals: applied educational theory**

The curriculum guidelines given by the LSS allowed a Diploma provider to offer a Foundation Course in skills. We constructed a Foundation Course in Professional Legal Skills that dealt with all the areas of skills mentioned above. After an initial 'induction' day, we move through each of the skills in cycles, on a highly cognitive *tell-show-do-review* model of syllabus design. The first year that we held it (1999/2000), we started off each skill cycle with a lecture/demonstration in the skill (*tell-show*) followed by a workshop in which students practised the skill in simulation, role play and the like, using prepared scenarios. The feedback was very positive; but students observed fairly consistently that they would have preferred to have had more of the *show* element of the cycle than they were given, and particularly in areas where they had no experience at all, such as advocacy.

The following year we authored a multimedia CD in which students could access

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<sup>14</sup> This will be examined in more detail in the conclusion.

<sup>15</sup> Set out in an unpublished paper, Law Society of Scotland, (1999) *Learning Outcomes for the Diploma in Legal Practice*

examples of practice that were also commented upon by the expert practitioners who were involved in the authoring of the multimedia units.<sup>16</sup> The resources, which were also made available online within the GGSL, were highly praised by students, who appreciated being given models of good and poor practice upon which to base their own practice. As a result of having such models available to play and re-play at will, they improved faster and became more confident in their ability to practise the role play scenarios we gave them at the *do* stage of the cycle.<sup>17</sup>

I cite this as an example of simple, applied cognitive theory that can work powerfully when used with students to introduce them to complex areas of skills. The original concept of *tell-show-do-review* belongs to the domain of cognitive psychology and is used extensively in dental education and paediatric education, and in the legal domain it has been used in fields such as court management for tribal court judges.<sup>18</sup>

There are, though, two disadvantages to the use of this strategy. First, after the in the second and subsequent cycles, use of the same class format can become tedious. For this reason amongst others, we created slightly different cycles in each skill. The multimedia resources were designed with a similar strategy in mind. Each of the units ended with a task to be performed by students; and this task varied according to the type of skill, the length of the workshops and the type of feedback that would be given by tutors. In addition, the use of multimedia allowed us to create explicit ‘scripts’ for students that could facilitate their own practice and the interaction between tutors and students in the workshops.<sup>19</sup> This was particularly noticeable in the students’ use of the advocacy unit. They studied the script closely for its rhetorical structure (which was described in the wraparound text in the unit), its courtroom register, and tried as far as possible to base their own first workshop motions upon this model. Their second motions tended to be based less on the model as they began to edge away from it. This was exactly what the Dreyfus model of skills development predicts, and we were happy that at this early stage students were beginning to achieve beyond the novice level with confidence.<sup>20</sup>

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<sup>16</sup> For a description, see Maharg, P (2001) Legal skills and multimedia: enhancing student learning, Third Learning in Law Initiative Annual Conference, <http://www.ukcle.ac.uk/lili/2001/maharg.html>

<sup>17</sup> Informal feedback from tutors during the Foundation Course and afterwards. This was confirmed by student feedback *via* course questionnaire in this and subsequent years

<sup>18</sup> See for paediatric and dental health example (the literature is considerable), Freeman, R. (1998) Tell-show-do: reducing anticipatory anxiety in emergency paediatric dental patients, *International Journal of Health Promotion and Education*, 36, 87-102. See also Brigman, G, Molina, B. (1999), **Developing social interest and enhancing school success skills: a service learning approach**. *The Journal of Individual Psychology*, 55:3. For the reference to court management for tribal court judges, see National Judicial College, at [http://www.judges.org/courses/course\\_dates/2003/Course.2003-05-05.1221](http://www.judges.org/courses/course_dates/2003/Course.2003-05-05.1221)

<sup>19</sup> I use the word ‘scripts’ in its cognitive sense here. See for example Schank, R. C. and Abelson, R. P. (1977) *Scripts, Plans, Goals and Understanding*. Hillsdale New Jersey. Erlbaum.

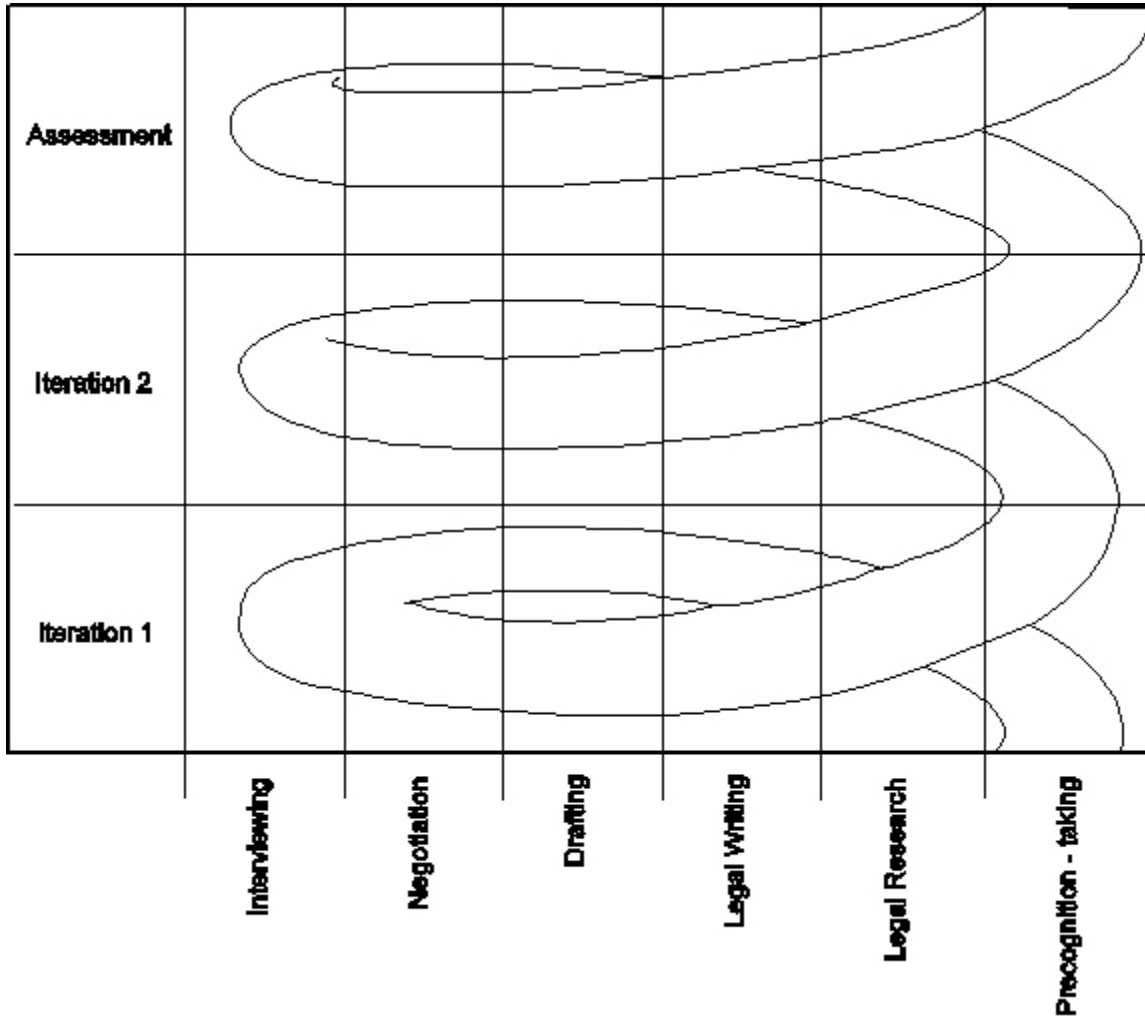
<sup>20</sup> For the Dreyfus model of skills development, see Dreyfus, H., Dreyfus, S.E., Athanasiou, T. (1986) *Mind over Machine: The Power of Human Intuition and Expertise in the Era of the Computer*. New York: Free Press

Secondly, the Foundation Course cycle is flat: the same cycle repeated over a number of skills areas. There needs to be further development of the cycle later in the course, and for this reason we developed our spiral curriculum model of skills development throughout the Diploma (Figure 1).<sup>21</sup>

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<sup>21</sup> See Bruner, J. (1976) *On Knowing: Essays for the Left Hand*. NY: Atheneum,; Bruner, J. (1996). *The Culture of Education*, Cambridge, MA: Harvard University Press. The spiral curriculum is close in concept to Reigeluth's 'elaboration theory' – see English, R.E. & Reigeluth, C.M. (1996). Formative research on sequencing instruction with the elaboration theory. *Educational Technology Research & Development*, 44(1), 23-42; Hoffman, S. (1997). Elaboration theory and hypermedia: Is there a link? *Educational Technology*, 37(1), 57-64.

Figure 1: spiral skills curriculum



The spiral metaphor is a useful way of envisaging the curriculum because it allows for any number of passes through the material to be learned, at higher or more sophisticated or complex levels of knowledge or attainment. This is crucial for the development of skills. An example of this in practice – albeit in a constrained way at the moment – is the development of interviewing skills on the GGSL Diploma. Following on from the lecture, multimedia unit and two workshops in this in the Foundation Course, students can practise on unseen scenarios throughout the Diploma. Their performances are videotaped, and sent to a tutor who gives feedback on the taped performance. At the end of the second semester students then go through the same cycle of *tell-show-do* and the same skills set but at a *higher* level of sophistication – this time, the second set of interviews is actually a second interview with the same client, instead of yet another initial interview. At the end of the week they are assessed by videotaped unseen client

scenario, with the role of the client played by another student or actor..

The spiral curriculum is also amenable to integrative teaching and assessment. It is flexible enough to accommodate other forms of teaching, learning and assessment – for example, the ‘triple-jump’ assessment used in problem-based learning medical programmes.<sup>22</sup> There, a student is given a case-history of a patient, at which stage the student presents an analysis of the case-history. Stage two consists of diagnosis: the patient (an actor) presents with a complaint. The student demonstrates analytical and clinical skills, as well as those of patient care and management. Stage three consists of prognosis: the likely projectory of the complaint, given the patient’s case-history, together with supporting evidence. Transferring this to the legal domain we could storyboard a business client coming to the firm with a problem. Stage one would involve an interview, for which students would require to carry out preparatory reading and research based on the client’s case-file. Stage two, *post*-interview, would involve problem-solving analysis and legal research. Stage three may involve negotiation or advocacy, or both; and at any of the stages there could be writing or drafting tasks built into the integration. The case-study could be used for teaching purposes only, or for assessment.

From the point of view of professional legal education, the spiral curriculum is a significant move away from the shape of an academic curriculum towards that of problem-based learning. In this respect it is quite different from that of undergraduate education. It is dangerous to generalise about as complex a matter as curriculum design; but it might be said that, in many respects, the undergraduate legal curriculum is literally what the word means – a running race. In the early years of the LLB, for example, each subject has traditionally been taught in a series of what are effectively watertight containers, and there is little if any cross-curricular integration between subjects, or cross-curriculum assessment of skills. The system of undergraduate teaching works well to build upon the basic work of the early years of the LLB degree and points students to more sophisticated academic understanding in Honours courses. Staff learn to pace their degree so that it climaxes with the relative sophistication of Honours intellectual content in a correspondingly complex curriculum design that is generally more open, individualised and flexible than earlier years. Law’s boundaries become, to quote Boaventura de Souza Santos, more ‘porous’ for students as a result of the more open curriculum at the Honours stage.<sup>23</sup>

The one-year Diploma requires equal if not more complex curriculum thought given to its design, and it requires a significantly different design. It ought to build upon the sophisticated academic understandings that students achieve in the Honours curriculum

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<sup>22</sup> Also known as the ‘objective structured clinical examination’. See Reteguiz, J-A., Cornel-Avendano, B., McDonough, M. (2001) *Mastering the Objective Structured Clinical Examination and Clinical Skills Assessment*, McGraw-Hill/Appleton Lange, New York, second edition

<sup>23</sup> de Souza Santos, B. (1995) *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*. Routledge, New York & London

by presenting a variegated, multi-layered and complex description and analysis of the reality of legal practice students will encounter in their traineeship. In addition, since the Diploma is a preparation for practice, students need to be given the opportunity to practise skills and knowledge in safe settings, and to move beyond the novice stage of legal practice. The curriculum devices described above help to do that. How, within the structure of the Diploma, we set out to enable students to make the change from acting as students to acting as lawyers is described in the next three sections

## **2. Skills-based curriculum planning**

To illustrate how the spiral curriculum was enacted, we could take the example of negotiation. In the Foundation Course, legal negotiation was the focus of an initial lecture, followed by the multimedia unit, and then three workshops and face-to-face large-group feedback sessions. The scenarios for the workshops were of course progressively more difficult to negotiate; but nevertheless, this was still a relatively closely-bounded set of activities that needed to be taken to another level. We did so by relaxing the boundaries and, by building simulations in the medium of ICT, bringing students much closer to the reality of actual legal transactions.

For some years now we have been building a virtual community on the web – a fictional town called Ardcalloch, on the south bank of the river Clyde, within which we have websites for businesses, institutions, people, and of course law firms. The students are all attached to firms – four to a firm – and each firm has a passworded website that functions as their law firm. The site has an intranet, and collaborative tools – firm diary, task list, discussion forums, case files, text editor, and much else. From their intranets, students can act as trainees and communicate with others in Ardcalloch, while working on transactions.<sup>24</sup> To date, there are three main projects embedded in the virtual community, one of which is a Personal Injury negotiation project. In this project, the firms represent either the injured claimant or are the insurer's solicitors, and they are required to investigate the claim, carry out legal research on issues such as liability, contributory negligence and quantum, form a negotiation strategy and perform the strategy in the timespan of the project (nine weeks). The negotiation skills required in this simulation are significantly more sophisticated than those in the tightly-bounded workshop activities.

These projects take place over the span of the Diploma, which then ends with a return to the skills focus of the Foundation Course at a higher level, called simply the Skills Week. Here, negotiation skills are taken in a different direction with a two-day workshop on

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<sup>24</sup> See Maharg, P. (2001) Negotiating the Web: Legal Skills Learning in a Virtual Community, *International Review of Law Computers & Technology*, 15, 3, special edition, *Web-based Teaching, Learning & Assessment in Law*, edited Maharg, P., 345-361; Maharg, P., Paliwala, A. (2002) Negotiating the Learning Process with Electronic Resources, in *Effective Learning and Teaching in Law*, edited Burrige, R. *et al.*, Kogan Page, 81-104; Maharg, P., Muntjewerff, A. (2003) Through a Screen, Darkly: Electronic Legal Education in Europe, *The Law Teacher, Legal Education in Europe*, 36, 3, 2002, 307-332

Mediation as an alternative to litigation.<sup>25</sup>

Curriculum planning of skills development cannot, of course, taken place in a vacuum. There are many contextual factors that affect the success of the implementation such as the appropriateness of the area of law, the prior experience of tutors, and the context of skills workshops within a subject syllabus. An example of this is our first attempt to embed interviewing skills into the Criminal Advocacy & Pleadings course. We tried to do this for two years by altering our pre-existing tutorial structures to accommodate the new skill workshops. Our practitioner-tutors, who had been trained in advocacy-tutoring, had to adjust to the skill of teaching interviewing. The results were not a success. The levels of tutoring quality were, according to student feedback, highly variable, and tutors themselves saw the embedding of the interviewing tutorial as an intrusion into their pre-existing structure of tutorials that focused largely on criminal pleadings. In addition, the interviewing workshops were not linked to, and therefore were unsupported within, the remainder of the Criminal Advocacy & Pleadings syllabus. In other words, embedding the skill at this point in the curriculum required more time, more subject-specific resources, and more transfer. In the end, we abandoned this attempt at integration, having learned much in the process about the requirements for success in this type of implementation.

It is axiomatic that curriculum planning for professional skills learning should be student-centred. However, it became clear to us after the first year of the course that we needed information on what students actually spent time on in the timetable, and which activities they found difficult, rather than what we thought about these activities. In 2001 we employed a student to take do some research with other students, and then on the basis of their experience and his own, to construct a simple timetabling tool in Excel, based upon a log of time over activity, that would give us a graphical representation of time spent by students on all aspects of the course. This included all course-related activities: face-to-face teaching, preparation for tutorials, lecture-notes revision, exam revision, project- and coursework, etc.

The results were quite remarkable. Overall, the course consumed many more hours for students than we had predicted. In addition, many activities that we thought would take students little time and trouble to complete, caused problems in the timetable because they were more difficult than we thought, or else information or teaching was not well structured around them for students. Our course timetable, it became clear, was really structured around our tutor and timetabling needs, not those of the students. Moreover, it became clear that the tool, originally designed to be a timetable planning tool, was giving us information about student performance and preference within the course timetable that even extensive questionnaire feedback was not giving us. Finally, the information that the tool gave us verified one of the key issues in the literature on curriculum planning, namely that a significant shift in the forms of teaching learning and assessment required

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<sup>25</sup> We are currently creating multimedia units for this workshop.

not only teaching events to be re-designed ('constructive alignment'), but the student timetable needed considerable re-design as well.<sup>26</sup> This also fits with other research that has investigated the effect of collaborative use of 'authentic task' materials. In an experimental / control group experiment on use of such materials, for instance, Vermetten *et al* found evidence of improved performance in students only where the authentic approach was a prominent element of the curriculum.<sup>27</sup>

As a result of using the timetable tool, our curriculum planning, which was based largely on avoiding class and assessment clashes, became much more truly student-centred. We consolidated classes to ensure that the timetable was more streamlined for students, and created blocks of time for self-study, collaborative group working or part-time work, based on the tasks we were asking students to carry out. In the following years we were able to plan classes and course-related time more accurately. However, as the course began to change significantly over the next few years, the tool became progressively less useful; and it became clear that Timetabler, as we came to call it, would need to be updated fairly regularly if it were to be useful to us on what was fast-changing course.

### **3. Transactional Learning**

Our use of generic skills taxonomies and practical tools such as our timetabling tool made us aware that we needed to define the basis of our own developing practice. What was it that we wanted our students to be able to do at the end of the course? Quite apart from integration of knowledge and skill, we wanted them to be able to perform a specific number of transactions, and thus demonstrate knowledge and skill. In a series of internal working papers, therefore, we developed what we called 'transactional learning' guidelines, to act as a template for the direction of the course. We focused on five points, summarised below.<sup>28</sup>

#### *1. Transactional learning is active learning.*

Transactional learning should be active learning, not passive. In that sense, we want students to be involved in activities within legal actions, rather than standing back from the actions and merely learning about them. There is, of course, a place for learning about legal actions. Indeed, transactional learning is rarely possible unless students first have a conceptual understanding of what the process actually entails. However, transactional learning goes beyond learning *about*

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<sup>26</sup> Biggs, J. B. (1999) *Teaching for Quality Learning*, Buckingham: SRHE and Open University Press. See also Chickering, A. W. (1995) *Education and Identity*, second edition. San Francisco: Jossey-Bass; Prosser, M., Trigwell, K. (1999) *Understanding Learning and Teaching: The Experience in Higher Education*, SRHE and Open University Press

<sup>27</sup> Vermetten, Y.J., Vermunt, J.K., Lodewijks, H.G. (2002) Powerful learning environments? How university students differ in their response to instructional measures. *Learning and Instruction*, 12, 263-84. See also Vermunt, J.D., Verloop, N. (1999) Congruence and friction between learning and teaching. *Learning and Instruction*, 9, 257-280

<sup>28</sup> Maharg, P. (2001) Transactional learning. Internal Working Paper No. 17, Learning Technologies Development Unit, Glasgow Graduate School of Law

legal actions to learning *from* legal actions. We would claim that there are some forms of learning that can only take place if students go through the process of active learning: the learning of procedural or adjectival law provides many examples of this

2. *Transactional learning is based on doing legal transactions.*

As befits the type of learning that students do in a professional legal course, we aim to give them experience of legal transactions. In addition to learning about how property might be conveyed *via* purchase and sale, for example, students also take part in the simulated transaction. They thus learn considerably about the practical realities of this legal action, all the more so because all our teaching supports, and all their learning in the subject is focused on, the transaction.

3. *Transactional learning involves reflection on learning.*

Transactional learning involves thinking about transactions -- indeed (to go back to the root of the word) thinking *across* transactions. It includes the ability to rise above detail, and 'helicopter' above a transactional element; or the development of the ability to disengage themselves from potentially damaging views of the group process within the firm, and re-construct that view. This includes documenting firm transactions, in the same way that the word is used, eg, in *Transactions of the Royal Society*. But it is done using documents that are focused, private to the firm and its Practice Management tutor/consultant. Reflection, even in a group, is an intensely private event, and the products require careful handling if the process is not to be fatally inhibited.

4. *Transactional learning is based on collaborative learning.*

This involves transaction as collaboration, indicating the root of the word: literally 'acting across'. Students are valuable resources for each other, particularly if they have opportunities to engage in both cumulative talk (the accumulation and integration of ideas) and exploratory talk (constructive sharing of ideas around a task.<sup>29</sup> In the GGSL, collaborative learning is used to balance individual or cellular learning. There is of course a place for individual learning, silent study, literature review and so on, and we emphasise this as a preparation for collaborative work. But students can help each other enormously to understand legal concepts and procedures by discussing issues, reviewing actions in a group, giving peer feedback on work undertaken in the group, and so on. And perhaps what is even more important is that they begin to trust each other to carry out work that is important (there is assessment value to the projects, and many students have clauses in their traineeship contracts that insist they pass their assessments at first diet). In other words, students begin to learn how to leverage knowledge amongst themselves, and to trust each other's developing professionalism (learning about know-who, know-why, as well as know-what

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<sup>29</sup> Van Bostel, C, van der Linden, J., Kanselaar, G. (2000). Collaborative learning tasks and the elaboration of conceptual knowledge, *Learning and Instruction* 10: 311-330

within the firm). Often, we have found, if there are firms that do not produce good work or keep to deadlines, it is because they do not know how to work together effectively; and this often arises from a lack of trust.

5. *Transactional learning requires holistic or process learning.*

In seminars and lectures and in their reading of texts, students engage with ideas, and form understandings of legal concepts. They link up emerging understandings with their prior knowledge, and with their anticipation of future knowledge, and the more they become familiar with the practical discipline, in general the easier and more efficient this learning process becomes.

While the process of chunking and linking knowledge is often sufficient for undergraduate study of law, in the early years at least, it is not sufficient for professional students. In their traineeships, the students will be asked to undertake tasks that demand a more holistic understanding of legal process and legal procedure. In this sense, students need to arrive in their traineeships not only with a sufficient knowledge of the parts of a transaction – which letter is sent to whom, what it should contain, for instance – but also a holistic knowledge of the whole transaction. When they are given a file-in-progress in the office, for instance, they need to be able to move from part to whole, and vice versa, in order to identify what has been done and what needs done. This process is difficult for trainees precisely because they are unsure of the whole transaction. It therefore makes sense to give them as much practice in carrying out whole-to-part and part-to-whole thinking. Such thinking is effectively the basis of practical legal reasoning, and a form of Aristotelian *phronesis*.

## **6. Future directions and issues**

The LSS review of the professional educational programme is still ongoing, but already there are distinctive features mapped out in its lineaments which will play important roles in future reviews. Some of these might be helpful for an exploration of the alternatives to the Bar Exam. For the purposes of this paper, and particularly in the context of the New York and Arizona proposals, therefore we might summarise those elements that may be relevant to pre-existing alternatives to the Bar Examination, or to future proposals.

## **1. Competence-based learning**

The LSS has set out a competence framework for the two new elements of the training programme, namely the PCC and APC; and the set of competences that was the result of research work undertaken by the PCC and TPC committees of the LSS, as well as research undertaken by the author in a PCC research report, can be viewed on the LSS website.<sup>30</sup>

‘Competence’, though, can mean a variety of quite different approaches to professional education. Broadly speaking, there exist two approaches, one fairly focused on work-place performance, and the other a broader-based definition of the term. The first, narrower focus, can be defined in the work of the National Council for Vocational Qualifications (NCVQ). A competence is defined there as ‘the ability to perform the activities within an occupation or function to the standards expected in employment’.<sup>31</sup>

Each NVQ is a ‘statement of competence’, and comprises a group of ‘units of competences’ which are further defined in terms of ‘performance criteria’. Once defined, these criteria become the terrain from which a map of competences or a ‘functional map’ as it is sometimes termed, can be created. This map guides all teaching, learning and assessment.

Leaving aside the epistemological and theoretical problematics of this approach, the cost and complexity of such a system is considerable. There are two other reasons, though, why a strict competence-based system may not be appropriate for professional legal training. If at least some of the aims of a professional educational process are to foster continuous professional development, problem-based learning and professional responsibility, then it could be said that the setting and monitoring of highly detailed outcomes for trainees may inhibit this. Second, with its division and sub-division of trainee experience into elements of competence, the competence-based approach tends to atomise, rather than integrate, bodies of knowledge and skills. It is for these reasons that the LSS does not have a strict competence-based regime in Scotland.

In its place the LSS has a hybrid system, based as closely as possible on what lawyers actually do in practice – that much of the narrower focus is retained. We do so in the Diploma, for example, by having practitioner-tutors teach the course (they have, after all, a profound if often unstated ‘functional map’ of competence that they bring to the classes); and in the traineeship by basing the logs and quarterly review sheets that trainees must submit to the Law Society upon actual legal transactions.<sup>32</sup> This approach

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<sup>30</sup> For competence elements, see the Appendix to *Guidance Note for Trainees and Employers*, <http://www.lawscot.org.uk/>, at ‘Education & Training’, under ‘Test of Professional Competence’. See also Maharg, P. (2001) *Report: The Professional Competence Course*, Paul Maharg, unpublished report, 100pp

<sup>31</sup> *Guidance Note 8*, Employment Dept., London, 1991, p.1

<sup>32</sup> In addition we require longitudinal research to be carried out on current trainees and newly-qualified solicitors to determine the nature and function of their work. For a study completed on this subject taking newly-qualified solicitors as its subject, see Boon, A., Duff, L., Shiner, M. (2001) Career paths and choices in a highly differentiated profession: the position of newly qualified solicitors, *Modern Law Review*, 4, 563-

sits squarely with those educationalists who advocate a more general approach to competence in the professions.<sup>33</sup> In doing so, the Law Society provides indicators regarding appropriate approaches in what must necessarily be a hybrid approach to competence-based education.<sup>34</sup>

## **2. Experiential Learning**

Elements of problem-based learning can be used successfully in professional training; but awareness of the over-arching imperative of experiential learning in all its forms is crucial. Dreyfus & Dreyfus, for example, characterise professional learning as the ability to make decisions and perceive patterns within routinised tasks. In so doing, they account for the disparate ways that professionals solve problems. Drawing analogies from the psychological literature on the practices of novices and experts, they argue that there are times when professional work is composed of recognisable routine, and requires little expert attention. However if there are events which do not fit the normal gestalt, then this will give rise to extraordinary attention on the part of the practitioner. The ability to discern what situation requires an ordinary or an extraordinary response is the hallmark of an expert:

[a]n expert generally knows what to do based on mature and practised understanding ... the expert business manager, surgeon, nurse, lawyer, or teacher is totally engaged in skilful performance. *When things are proceeding normally, experts don't solve problems and don't make decisions; they do what normally works.*<sup>35</sup>

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<sup>33</sup> See for example Eraut's perceptive comment that educators 'should treat the compendia of standards resulting from functional analysis as foundations for course design rather than substitutes for it'. Eraut, M. (1994) *Developing Professional Knowledge and Competence*, Falmer Press, London, p.213. For examples of descriptions of occupational or functional analysis, see Jessup, G., (1991) *Outcomes: NVQs and the Emerging Model of Education and Training*, Falmer Press, London; and Boys, C. (1995) National vocational qualifications: the outcomes-plus model of assessment, *Assessing Competence in Higher Education*, Edwards, A. & Knight, P. eds, Kogan Page, London. See also Sherr, A. (2000) Professional work, professional careers and legal education: educating the lawyer for 2010, *International Journal of the Legal Profession*, 7, 3, 325-42; Jones, P.A. (2000) Theory and practice in professional legal education, *International Journal of the Legal Profession*, 7, 3, 239-59. For a similar example of 'hybridisation' in the field of medical education in the UK, see *The New Doctor: Recommendations on General Clinical Training Made under Section 5 of the Medical Act 1983*, General Medical Council Education Committee, [http://www.gmc-uk.org/global\\_sections/sitemap\\_frameset.htm](http://www.gmc-uk.org/global_sections/sitemap_frameset.htm), 'Practical skills frequently required by house officers', and 'General clinical training in general practice'.

<sup>34</sup> See for instance the guidelines for PCC providers, at <http://www.lawscot.org.uk>, at 'Education and Training. For a similar hybrid approach in the competence-based learning literature, see Sandberg, J. (2000) Understanding Human Competence at Work: An Interpretative Approach, *Academy of Management Journal*, 43, 1, 9-25; Sandberg, J. (2001) Understanding the Basis for Competence Development, in Velde, C., ed., *International Perspectives on Competence in the Workplace*, Dordrecht: Kluwer Academic Press

<sup>35</sup> Dreyfus, H.L., Dreyfus, S.E. (1986) *Mind over Machine: The Power of Human Intuition and Expertise in the Era of the Computer*, Basil Blackwell, Oxford, 30-1,

Other educationalists such as David Kolb and Donald Schön, and legal educationalists such as Julian Webb focus on different aspects of experiential learning; and their work on reflective pedagogies in particular has influenced the Scottish approach to professional legal learning.<sup>36</sup>

### **3. Participatory or collaborative learning**

I have described above the collaborative learning that takes place in the GGSL. This can extend into the traineeship as well. At present, around 57% of the total number of training firms in Scotland employ only one trainee. It is our belief that trainees have a great deal to learn from one another's experience. One of the great advantages of the PCC is that it allows trainees to open dialogue with other trainees from other firms, to share experiences, listen to different approaches to professional matters.

### **4. Simulation learning**

Much of the literature on professional learning emphasises the importance of these methods, particularly as regards skill- and culture-learning.<sup>37</sup> Often the simulations become events in which students and trainees can perform, be given feedback, and be assessed on their ability to synthesise large bodies of complex knowledge and skill accurately and to a specific purpose. Michael Eraut put this well when he commented that:

the process of becoming a professional involves learning to handle cases quickly and efficiently, and this may be accomplished by reducing the range of possible ways of thinking about them to manageable proportions. This leads to intuitive reliance on certain communal practitioners' concepts, while apparently more valid theoretical ideas get consigned to 'storage' and never get retrieved.<sup>38</sup>

The use of complex simulation activities is one effective way in which to build such

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their emphases. See also Dreyfus, S.E. (1981) *Formal models vs human situational understanding*, International Institute for Applied Systems Analysis, Schloss Laxenburg, Austria, 1981. For an analysis of different stages of expertise, see Dreyfus, H.L., Dreyfus, S.E. *From Socrates to Expert Systems: The Limits and Dangers of Calculative Rationality*

[http://socrates.berkeley.edu/~hdreyfus/html/paper\\_socrates.html](http://socrates.berkeley.edu/~hdreyfus/html/paper_socrates.html)

<sup>36</sup> Kolb, D. (1984) *Experiential Learning: Experience in the Source of Learning and Development*, Prentice Hall, Englewood Cliffs, NJ. Following the much earlier work of John Dewey ( eg *How We Think*, D.C. Heath & Co, Boston, 1924) his models of experiential learning describe the way that professionals develop knowledge through iterative processes and loops. See also Schön, D. (1983) *The Reflective Practitioner: How Professionals Think in Action*, Basic Books, New York

<sup>37</sup> See for example Webb, J. & Maughan, C.(1996) *Teaching Lawyers' Skills*, Butterworths, London, *passim*; and Kilpin, P (1996) Skills Teaching on the Legal Practice Course, in Webb, J. & Maughan, C.(1996) *Teaching Lawyers' Skills*, Butterworths, London, 241-58

<sup>38</sup> Eraut, *op.cit.*, p.43, citing Buchmann, M. (1980) Practitioners' concepts: an inquiry into the wisdom of practice, Occasional Paper 29, Michigan State University, Institute for Research on Teaching

‘intuitive reliance’, and to coach trainees in the development of it at any stage in the professional educational programme.

## **5. Holistic programme learning**

The LSS recognises that, from a student point of view, professional training should be coherent: from the first day to the last, the elements of it should lock together to build knowledge, skill and confidence. In that sense the programme should not only be internally coherent, but should lock into prior learning on the LLB, and future learning in CPD programmes and the like. Of the five points mentioned here, this meta-curriculum planning is perhaps the most difficult to achieve; but it is perhaps the most important, too. Much of the recent reforms carried out by the LSS have been aimed at achieving this holism. In this, as in many other aspects, the Scottish experience may have something to contribute to the ongoing debate regarding the Bar Exam, and the alternatives to it. <sup>39</sup>

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<sup>39</sup> Other calls for integration, holism and the importance of research and theory include Boon, A. (1998) History is past politics: a critique of the legal skills movement in England and Wales, *Journal of Law and Society*, 25, 1, 151-69; Nathanson, S. (2002) The real problem with the Legal Practice Course, *New Law Journal*, May, 152; (1993) Beyond the great divide: forms of legal scholarship and everyday life, in Sarat, A., Kearns, T.R., eds, *Law in Everyday Life*, University of Michigan, Ann Arbor 21-61