The Law School Critique in Historical Perspective

A. Benjamin Spencer, Washington & Lee University School of Law

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THE LAW SCHOOL CRITIQUE IN HISTORICAL PERSPECTIVE

A. Benjamin Spencer*

Contemporary critiques of legal education abound. This arises from what can be described as a perfect storm: the confluence of softness in the legal employment market, the skyrocketing costs of law school, and the unwillingness of clients and law firms to continue subsidizing the further training of lawyers who failed to learn how to practice in law school. As legal jobs become more scarce and salaries stagnate, the value proposition of law school rightly is being questioned from all directions. Although numerous valid criticisms have been put forth, some seem to be unfettered from a full appreciation for how the current model of legal education developed. Indeed, a historical perspective on legal education is sorely missing from this debate, as many of the criticisms merely echo charges that have been lodged against legal education for well over a century, but do not draw lessons from how those former critiques ultimately failed to deliver fundamental change. This Article reviews the historical development of legal education in America, including the critiques and reforms made along the way, to see what insight we can gain that will inform our own efforts to make law schools better at preparing lawyers for practice.

I. A PERFECT STORM.................................................................2
II. FROM BLACKSTONE TO LANGDELL..............................................8
   A. Private Reading & Office Apprenticeships .....................................8
   B. Professorships in Law ..........................................................10
   C. The Litchfield Law School ................................................................12
   D. University Law Schools ................................................................13
   E. Langdell and the Modern American Law School ...............................16
III. OVER A CENTURY OF CRITIQUE AND REFORM............................22
   A. Early ABA Reports ....................................................................22
   B. The Redlich and Reed Reports on Legal Education ..........................27
   C. Twentieth Century Critiques & Reforms ........................................36
   D. Contemporary Critiques ...........................................................41
IV. THE CURRENT STATE OF LEGAL EDUCATION ...............................46
   A. The Curriculum .........................................................................48
   B. The “Signature Pedagogy” of Law School .......................................52
   C. Assessment in Law School ..........................................................61
   D. Law School Faculty ....................................................................67
V. THE NEXT CENTURY IN LEGAL EDUCATION ..................................72
VI. CONCLUSION ...........................................................................77

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I. A PERFECT STORM

“The training received by American lawyers to-day has thus become a curious complex. It cannot be understood unless its main features, and the causes that have produced them, are presented in their historical sequence.”

Alfred Zantzinger Reed, Training For The Public Profession of the Law, 1921

Legal education is under attack. The value of a law degree is being questioned given the deterioration of the traditional legal job market and the substantial and growing size of the student loan debt of recent graduates. Further, law schools are being charged with failing to prepare their graduates adequately for practice. We thus have what appears to be a

1 THE REED REPORT, supra note ___ at 4.

I regret law school, but more specifically I regret not fully considering the debt I would be facing after law school and weighing that against the prospect of committing my 20s to paying off that debt. Finding out I had chosen the wrong profession for me was bad enough, but being trapped in that career for many years just to break even was worse.


2 See William D. Henderson & Rachel M. Zahorsky, The Law School Bubble, 98 ABA JOURNAL 30 (Jan. 2012) (“In 2010, 85 percent of law graduates from ABA-accredited schools boasted an average debt load of $98,500 . . . .”). Student loan repayment burdens are worse for students graduating from law schools placed at the lower tiers of the U.S. News rankings, as they tend to have median annual income well below graduates of higher ranked schools. See NALP Foundation for Law Career Research and Education & the American Bar Foundation, After the JD: First Results of a National Study of Legal Careers (2004).

3 See, e.g., David Segal, What They Don’t Teach Law Students: Lawyering, N.Y. TIMES (Nov. 19, 2011) (“What they did not get, for all that time and money, was much practical training. Law schools have long emphasized the theoretical over the useful . . . .”); John Caher, N.Y. State Bar Aids ABA to Support “Practice Ready” Law School Education, N.Y. LAW JOURNAL (Aug. 5, 2011), available at http://www.law.com/jsp/article.jsp?id=1202569595910&resize=1; William R. Rables, Conclaves on Legal Education: Catalyst for Improvement of the Profession, 72 NOTRE DAME L. REV. 1119, 1119 (1997) (“The practicing bar is demanding that law schools provide more training to prepare graduates to hit the ground running when they enter practice.”). Throughout this article, I will use the phrase “prepared for practice” or “practice-readiness” to refer to students who have sufficient mastery of the specialized knowledge, skills, and values of the legal profession to serve as competent attorneys and counselors without supervision. Thus, practice-readiness is not simply about having the technical skills required for
perfect storm\textsuperscript{7} in legal education: Law school graduates are underemployed, over-indebted, and under-prepared for practice.

As the economic downturn has forced legal service providers to deliver services with leaner staffs\textsuperscript{8} or outsourced resources,\textsuperscript{9} technology has developed to the point that fewer attorneys are needed to complete many legal tasks than was the case in the past. For example, artificial intelligence has developed to the point where computerized document review has become faster, cheaper, and of a higher quality than traditional human review.\textsuperscript{10} This means that many lost legal jobs that related to discovery work or other legal tasks may not be coming back.\textsuperscript{11} Additionally, law firms and corporate law departments have recognized that there are some legal tasks that do not necessarily require the same level of training or expertise to complete. Thus, some firms have established differentiated career tracks that create non-partner track staff attorneys who receive lower compensation for completing more routine and less demanding legal tasks.\textsuperscript{12} Corporate law departments have kept more work in house with their employees\textsuperscript{13} or used low-paid contract attorneys to do routine legal

\textsuperscript{7} David Thomson uses this phrase to describe the current situation in legal education in which changes in the legal market, dissatisfaction with law schools, and a new generation of students with more technological savvy are combining to make this a critical moment for change. See DAVID I. C. THOMSON, LAW SCHOOL 2.0, 11 (Lexis-Nexis 2009).


\textsuperscript{9} Karen Sloan, Elite Firms Seem to Have Lost Their Appetites, THE NATIONAL LAW JOURNAL (Feb. 27, 2012), at http://www.law.com/jsp/tal/PubArticleNLJ.jsp?id=1202543428334&shreturn=1 ("Some of that more routine legal work that used to be handled by a lot of associates is now being done by contract attorneys or outside providers."); THOMSON, supra note 14 at 16 ("Many corporations send routine legal work to large shops of relatively low-paid attorneys in India. Law firms are doing it too—in a recent study, 80 percent of the largest firms admitted to having outsourced projects.").

\textsuperscript{10} See, e.g., Joe Dysart, A New View of Review: Predictive Coding vows to Cut E-Discovery Drudgery, ABA JOURNAL (Oct. 1, 2011), available at http://www.abajournal.com/magazine/article/a_new_view_of_review predictive_coding_vows_to_cut_e-discovery_drudgery ("Research has shown that, under the best circumstances, manual review will identify about 70 percent of the responsive documents in a large data collection. Some technology-assisted approaches have been shown to perform at least as well as that, if not better, at far less cost.").

\textsuperscript{11} See RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 2 (Oxford 2008) (I argue that the market is increasingly unlikely to tolerate expensive lawyers for tasks (guiding, advising, drafting, researching, problem-solving, and more) that can equally or better be discharged by less expert people, supported by sophisticated systems and processes. It follows, I say, that the jobs of many traditional lawyers will be substantially ended and often eliminated.").


\textsuperscript{13} One corporate general counsel reports, "It’s simply a situation where, for the most part, law firms have priced themselves out of a whole bunch of work I used to have them do. . . . If work is going to repeat at all, I’ll bring the expertise in-house. My in-house teams have simply gotten much bigger, and
work.\textsuperscript{14} Two commentators recently cited statistics predicting that the paucity of legal jobs will be stark going forward, as ABA-approved law schools will be producing roughly 45,000 graduates annually to fill only 25,000 lawyer positions.\textsuperscript{15}

This bursting of the legal job market bubble has laid bare two major deficiencies in legal education. First, its costs have risen to levels that could only be sustained as long as cheap student loans and high-paying legal jobs were available, conditions that are now eroding.\textsuperscript{16} Second, the Great Recession has led clients and thus law firms to have less capacity to subsidize the on-the-job training of law graduates\textsuperscript{17} that they had been expected to provide,\textsuperscript{18} revealing deficiencies in the ability of law schools to adequately prepare a sufficient number of their students to handle legal matters for clients.\textsuperscript{19}

\begin{footnotesize}
14 See Larry E. Ribstein, \textit{Practicing Theory: Legal Education for the Twenty-First Century}, \textit{97} \textit{IOWA L. REV.} (forthcoming 2011) (“Law partners who have to spend more time tending to their books of business have less time for building the firm’s value through activities like training younger lawyers. Also, increased competition reduces firms’ freedom to bill training time to clients.”); See Ashby Jones & Joseph Palazzolo, \textit{What’s A First-Year Associate Worth?}, \textit{THE WALL STREET JOURNAL} at B1 (Oct. 17, 2011) (citing survey reporting that more than 20% of responding in-house legal departments refuse to pay for the work of first- or second-year attorneys); id. (quoting the general counsel of a company as saying “Training someone on putting together an asset purchase agreement shouldn’t be done on our nickel”); \textit{THOMSON, supra} note \textsuperscript{18} at 18 (“[F]irms are less and less interested in taking on this role . . . . [W]ith annual salaries for new attorneys ballooning in some cities to $150,000 and more, firms tend understandably to be less patient with new associates who need significant training before they are truly useful.”).

15 Carrie Hempel & Carroll Seron, \textit{An Innovative Approach to Legal Education and the Founding of the University of California, Irvine School of Law}, in \textit{The Paradox of Professionalism: Lawyers and the Possibility of Justice}, (Scott L. Cummings, ed.) (Cambridge 2011), available at http://ssrn.com/abstract=1851702 (“For the better part of the twentieth century, there has been an informal division of labor between law schools, which are in the business of credentialing knowledge, and first employers responsible for passing on the skills of day-to-day practice.”).

16 See, e.g., New York State Bar Association, \textit{Report of the Task Force on the Future of the Legal Profession}, \textit{38} (2011) (“Too many law students and recent graduates are not as well prepared for the profession as they might be.”).
\end{footnotesize}
But this latter critique is not a new development; over the past 130 years we have heard from many sources\(^{20}\) that law schools are not truly fulfilling their obligation to prepare students for legal practice.\(^{21}\) This would strike many outside the profession as odd since—as Judge Richard Posner once suggested and as most would assume—the “basic focus” of law schools should be “the training of practicing lawyers.”\(^{22}\) This is far from a truism, in light of the perspective expressed by many that law schools should be primarily scholarly institutions in which the law can be studied and understood as an academic and intellectual pursuit rather than professional schools that provide vocational training.\(^{23}\) To be sure, there is grounded to


\(^{21}\) Long ago, Albert Harno, in his 1953 study on legal education in America, noted the criticisms that were leveled at law schools, which, he wrote, “all can be grouped under one heading, that the schools do not adequately prepare students for the tasks they will have to perform in the practice.” Albert J. Harno, Legal Education in the United States, 137 (1953). See also The Macrame Report, supra note __ at 5 (“Surveys understandably indicate that practicing lawyers believe that their law school training left them deficient in skills that they were forced to acquire after graduation.”); AM. BAR ASSN. SECTION OF LEGAL EDUC. AND ADMIS. TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS, 8 (1979) [hereinafter THE CRAWFORD REPORT] (“Chief Justice Burger and others have spoken, in recent years, of a serious problem of ‘incompetency’ among those lawyers trying cases before the federal courts and among the trial bar generally.”).

\(^{22}\) Richard A. Posner, The Present Situation in Legal Scholarship, 90 Yale L.J. 1113, 1117–19 (1981); see also Erwin Chemerinsky, The Ideal Law School for the 21st Century, 1 U.C. Irvine L. Rev. 1, 20 (2011) (“[L]aw schools exist preeminently for training students to be lawyers . . . .”); Harno, supra note __ at 164 (“The objective of legal education is to produce well-trained and capable lawyers—lawyers who are skilled in legal procedures, who are versatile in the tasks of the law, who have an understanding and a vision of the purposes and mission of the law, and who are guided by a sense of moral responsibility.”).

\(^{23}\) The late Charles E. Clark, Second Circuit Judge, former Yale Law School Dean, and father of the Federal Rules of Civil Procedure was a harsh critic of efforts to involve law schools in vocational training in practical legal skills: I regard the repetitive attempts to coerce law schools into offering so-called practical training as at best curiously naive, and in general at odds with sound concepts of legal education. Such attempts might be dismissed as a comparatively harmless and not unusual professional baiting of the schools except that law deans and professors are acutely attuned to professional criticism and hence may be led to waste their substance in doing what they cannot do effectively and what if they could would not be pedagogically worth while. . . . I shall argue that law school training is now effectively efficient. . . . that there is no real basis for the criticism implicit in this pressure for practical training; that the latter is limited, partial and fragmentary at best; and that the present-day legal education in problem analysis and exposition and in thorough documentation of sources is much more important and valuable, as well as more within the practical competence of the schools.

allow both perspectives; a law school must train lawyers but also can be “a centre of research, criticism, and contribution to the better understanding of the laws” with the goal of improving the law. It is for each school to determine the extent to which it is committed to the latter goal; however, it should be the aim of all to be effective at achieving the former.

Unfortunately, the law school of today is not optimally designed to prepare students for practice. The focus across most of the three years of law school is on teaching legal doctrine, using principally a method of limited effectiveness, with too few students being thoroughly instructed in the practice skills and core competencies needed to be a successful lawyer. These defects have their origins in the innovations of Christopher Columbus Langdell, the late-19th Century Dean of the Harvard Law School who envisioned law as a scientific discipline that should be taught by full-time academics using the case-dialog method more so than a craft to be learned by apprentices studying at the feet of experienced practitioners. Much has changed in law schools since Langdell’s time but to a remarkable degree much is still fundamentally the same. Appreciating both the legal

that training of practitioners is at most a secondary function of law schools. Rather, the primary function is to create and disseminate new knowledge and understanding about law.

Thomas Swan, Report of the Dean, Yale Law School, 1919–1920, 393 (“A university law school has two functions. It aims by the case method of instruction to train its students so that they may become successful practitioners in their chosen profession. It aims also or at least it should aim, though too few schools have recognized this obligation, to aid in improving the law . . . .”); Lon L. Fuller, Preliminary Statement of the Committee on Legal Education of the Harvard Law School, 4 (1947) (noting that the two purposes of training lawyers and promoting understanding and improvement of the law “are so closely related that it is unrewarding to discuss which is primary and which is secondary”).

Cecil A. Wright, The University Law Schools, 2 J. LEGAL EDUC. 409, 412 (1950).

The ABA Standards require that “a law school . . . maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.”

ABA Standards for Approval of Law Schools, Standard 301(a).

The CARNEGIE REPORT, ___.

Critiques of the Socratic case method abound. See, e.g., ROY STUCKEY, et al., BEST PRACTICES IN LEGAL EDUCATION, 99 (2007) (“[T]he Socratic dialogue and case method leaves students confused, teachers often use it poorly, and it contributes to a hostile, competitive classroom environment that is psychologically harmful to a significant percentage of students.”); id. at 97–104 (cataloging criticisms of the Socratic method); Harno, supra note __ at 138–39 (“One of the[] limitations of the case method is the fact that after the first year of law study, there is a distinct lag of interest in the reading of cases on the part of law students. The method by that time has lost much of its sparkle.”). The Socratic case-dialogue method will be discussed in greater detail in Part III.B below.

See, e.g., David E. Van Zandt, Foundational Competencies, 61 RUTGERS L. REV. 1127, 1136 (2009) (“[N]o school has addressed the core competencies that it takes to be an effective lawyer in a variety of organizations over a multi-job career.”). In fact, the practical skills training and experiential learning opportunities that many law schools offer tend to be elective and are taken up in earnest by a minority of law students overall, when compared with the extensive doctrinal instruction all law students receive.

See National Association of Law Placement (NALP), 2010 Survey of Law School Experiential Learning Opportunities and Benefits (2011) (showing 30.2% of survey respondents had participated in at least one legal clinic, 36.2% of respondents had taken part in an externship, and 40% of respondents had taken three or more practice skills courses).

See infra TAN __.
education system to which Langdell was responding, as well as the nature and rationale of Langdell's various reforms is useful in permitting us to think critically about the basic design of law schools today as we consider how that model should change in response to contemporary challenges.

But why should we care? Members of the bar are rightly giving their attention to this issue but there are likely some academics who would scoff at the notion that one should concern oneself with this question or that any real problem exists. Whether there is a problem, no one should seriously doubt. Neither should anyone doubt whether it is for legal academics devote our attention to this matter; maintaining the quality of the legal education system is vital to any effort to improve the law and the administration of justice. Furthermore, in an environment where legal jobs are more difficult to attain and the costs and debt associated with legal education are on the rise, allowing the quality of legal education to erode through indifference is a disservice to the students we serve.

Taking the need for reform of some kind to be necessary, the first step in the reform process should be a thorough consideration of what brought us to this point and why our schools take the approach to legal training that they do. Why is law school designed the way that it is today, as a three-year program led by scholars removed from practice focusing on doctrinal legal instruction? What efforts have already been made to move legal education away from that model and why have those efforts failed at achieving any fundamental alteration of how we deliver legal education? What criticisms have been lodged against legal education in the past and what insights might we gain from them for our time? And what suggestions for reform have been made but ignored that could offer ideas whose time may now be ripe? Below, Part II of this Article will plumb some of the history of legal education in this country, while Part III traverses the long line of critiques that have been leveled at legal education. Part IV explores the state of legal education today, with Part V featuring a discussion of the lessons to be learned from this history for contemporary reform efforts.

31 Of course, there are those who doubt there is a problem. See, e.g., Steven Harper, The Law School Quandary, The Amlaw Daily (Jan. 20, 2012), http://amlawdaily.typepad.com/amlawdaily/2012/01/the-law-school-quandary.html (“If the vast majority of students are happy with the law school experience and changing it won’t improve their job prospects, perhaps the legal academy and its critics should consider focusing attention elsewhere.”).

32 14 REP. AM. BAR ASSN, 301, 320–21 (1891) (“No lesson has been more clearly taught by the history of our science from the beginning than that, wherever the law has been best administered and most truly worthy of its high mission, its votaries have been most careful of the education of students and in the statement of its principles, so that such students could thoroughly master them.”).
II. FROM BLACKSTONE TO LANGDELL

The system of legal education that we have today is the product of an evolutionary process in which subsequent approaches have been the result of efforts to build on and improve what has come before. This means that law school as it exists today is an artifact of its past, with a structure and tradition that is rooted in history more so than being founded on rational design. As a result, although many innovations characterize the modern approach to law school, these adjustments tend to be more superstructure than substitute, supplementing traditional law school education rather than supplanting it.33 As I will argue, however, real and lasting change in legal education requires fundamental rethinking rather than accretive reform. But getting beyond evolution to a revolution in how we educate lawyers requires that we first understand the history that has brought us to where we are. Thus, in this Part and the next we will review the historical development of formal legal education to its present form to understand the “why” behind the current system, to identify some of the roots of its shortcomings, and to inform our current critique with some of the wisdom and insights from the past.

A. Private Reading & Office Apprenticeships

"Why disgust and discourage a young man by telling him he must break into his profession through such a wall as this?"

Pre-Revolutionary lawyers in America imported the English common law and with it the rudiments of the English approach to training aspiring lawyers for practice.35 This consisted of the office apprenticeship, in which an aspirant was assigned the reading of classic common law texts of varying utility,36 and placed “at the desk of some skilful attorney[,] in order to

33 THE CARNEGIE REPORT, supra note ___ at 76 ("[T]oday’s trend is to supplement rather than replace the inherited reliance on this venerable case-dialogue teaching in the first phase of doctrinal instruction.").
34 1 THE WORKS OF DANIEL WEBSTER, BIOGRAPHICAL MEMOIR, 11th ed. xxvii (1858) (reflecting on his legal training as an office apprentice, during which he was tasked with reading obscure commentaries on the English Common Law by Sir Edward Coke).
35 ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES, 27 (1953) ("In America, . . . legal education until well past the middle of the 1800's followed the English pattern.").
36 Joseph Story has commented on this phase of his legal preparation, writing that he was told to read Coke on Littleton during his apprenticeship, which he described as “intricate, crabbed, and obsolete learning.” Joseph Story, Autobiography, in MISCELLANEOUS WRITINGS OF JOSEPH STORY, 1, 19 (1852). Story went on to state, “I took it [Coke on Littleton] up, and after trying it day after day with very little success, I sat myself down and wept bitterly” but that “[w]hen I had completed the reading of this most formidable work, I felt that I breathed a purer air, and that I had acquired a new power.” Id. at 20. Daniel Webster, who similarly was assigned Coke on Littleton as an apprentice, remarked, “A boy of twenty, with no previous knowledge of such subjects, cannot understand Coke. It is folly to set him
initiate them early in all the depths of practice, and render them more dexterous in the mechanical part of business.” Such preparation was sufficient to become an attorney given the weakness of—or even the absence of—regulations setting forth requirements to practice law during late-17th and early 18th Centuries. For example, James Flint, an Indiana attorney, wrote in 1819 “Blackstone's Commentaries are considered the great medium of instruction. The young man who has carefully read these, and who has for a short time written for a practicing attorney, is admitted to the bar.”

The apprenticeship approach to legal education left much to be desired. As Blackstone pointed out in his famous Commentaries in remarking on the office apprenticeship:

[A] lawyer thus educated to the bar, in subservience to attorneys and solicitors, will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him.

To that critique, Blackstone added that the apprenticeship model would fail to yield lawyers who could comprehend “arguments drawn a priori, from the spirit of the laws and the natural foundations of justice,” and would never attract “a gentleman of distinction or learning” to the bar, leaving it “wholly in[] the hands of obscure or illiterate men.” Much later, Roscoe Pound would criticize the apprenticeship model on different grounds: that it was ill-suited for preparing lawyers in an increasingly urbanized and industrialized America. In Pound's view, the growing complexity of the
economic and social structure that came with industrialization “call[ed] for a
deeper and wider training of lawyers than the training in rules of thumb and
in procedure which was afforded by the law office.” As another 20th
Century commentator noted, “That the study of law through mediums of
that sort would produce lawyers of limited knowledge and perspective is
not a subject for wonder.”

Not to say that the office apprenticeship system lacked its advantages. Pound identified the “handing down of professional traditions from lawyer
to lawyer” and “that the law student in his formative days came in contact
immediately with the leaders of the bar” as benefits that were lost with the
passage of the apprenticeship approach to academic instruction:

By daily contact he absorbed from them certain traditions, certain ideals of the
things that are done and are not done by good lawyers, and a certain feeling as
to what was incumbent on him as a member of the profession. We cannot
transmit these things with like efficacy by any system of formal instruction.

Ultimately, however, this approach was not enough, for it focused on
lawyering as a craft with undue attention to the need for lawyers to have a
fuller understanding of the law and the ability to engage in more
sophisticated legal analysis in a society of increasing legal complexity.

B. Professorships in Law

Returning to Blackstone’s time, his proposed solution to the deficits of
apprenticeship training was to make academic instruction in the law a
prerequisite to office-based training. In his words, “The inconveniences
here pointed out [associated with the apprenticeship model] can never be
effectually prevented, but by making academical [sic] education a previous
step to the profession of the common law, and at the same time making the
rudiments of the law a part of academical [sic] education.” The creation of
professorships in law early in the history of our country within universities
was an effort to respond to Blackstone’s suggestion and to his example as a
professor in law at Oxford. The first such professorship was established

43 Pound, supra note ___ at 159.
44 Harno, supra, note ___ at 19–20.
45 Pound, supra note ___ at 160. See also Michael Burrage, From practice to school-based professional education: patterns of conflict and accommodation in England, France, and the United States, in Sheldon Rothblatt and Bjorn Wittrock, eds., The European and American University Since 1800, 142 (Cambridge 1993) (“[P]rofessional schools often displaced or discredited alternative practice-based forms of professional education. There are, therefore, opportunity costs and another side of its history, the side of the losers, of the viable, traditional institutions directly under the control of practising [sic] professionals.”).
46 1 Blackstone Commentaries, ___.
47 Harno, supra note ___ at 23 (“One immediate effect traceable to Blackstone’s influence was the establishment of chairs of law in several American colleges and universities”). Pound, supra note ___ at
in 1779 at William & Mary and filled by George Wythe. Aided greatly by Blackstone’s Commentaries—which taught early American lawyers “the continuity, the unity and the reason of the Common Law”—figures such as St. George Tucker at William & Mary and James Kent at Columbia College taught in the Blackstone tradition and were pioneers in matters of legal scholarship. These professors were expositors and systematizers of the law, who lectured on legal history, on the broad principles that served as the foundation for the law, and on the jurisprudence of the day in various subject areas. Several of these law professorships were established at various American colleges during the late 18th and early 19th Centuries. However, legal education in universities under professors of law was conceived of as “a broad foundation for the further education of prospective lawyers,” not as a substitute for training to become a practicing lawyer. Thus, aspirants to a career as a lawyer remained obliged to pursue an office apprenticeship to be admitted to the bar, establishing a

160 (“One might say with truth, even if somewhat paradoxically, that American legal education begins with Blackstone’s professorship at Oxford.”); Thayer, The Teaching of English Law at Universities, 9 HARV. L. REV. 169, 170 (1895).

48 HARNO, supra note ___ at 23.

49 CHARLES WARREN, A HISTORY OF THE AMERICAN BAR, 177 (1911).

50 HARNO, supra note ___ at 23–26.

51 The conditions attached to the Royall professorship in law at Harvard College required its incumbent to deliver lectures on the theory of law in its most comprehensive sense; the principles and practical operation of the Constitution and Government of the United States . . . ; an explanation of the principles of the Common Law of England, the mode of its introduction into this country, and the sources and reasons of its obligation therein; also the various modifications by usage, judicial decision, and Statute; and, generally, those topics connected with law as a science which will best lead the minds of students to such inquiries and researches as will qualify them to become useful and distinguished supporters of our free system of government, as well as able and honorable advocates of the rights of the citizen. CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA, vol.1, 298 (quoting the Statutes of the Royall Professorship). See also id. at 301 (quoting Isaac Parker as saying that “law is a comprehensive system of human wisdom” and thus a “science . . . worthy to be taught”).

52 Other professorships established during this period include the Royall professorship of law filled in 1815 at Harvard College, the a professorship of law at the College of Philadelphia in 1790, a professorship of law at Yale College in 1801, a professorship of law at the University of Maryland in 1816, and a chair of Law and Politics at the University of Virginia in 1826. HARNO, supra note ___ at 23–24, 37–38.

53 MARIAN CECILIA MCKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL, 59 (Oceana 1986) (“None of these professorships, as the record clearly shows, attempted to offer a complete technical education for law students.”); Pound, supra note ___ at 160 (“But their lectures were not and were not meant to be professional training in law.”).

54 HARNO, supra note ___ at 27 (“The educational route to the practice of law was then, as it was to be for some time yet to come, through office apprenticeships, and those who attended these lectures were not relieved from traveling that route.”); THE REED REPORT, supra note ___ at 45 (“The special obstacle in northern states [to university based legal education], during these early years, was the still prevailing requirement of a period of clerkship.”). Admissions requirements in Virginia at this time are reported to have been weaker than those found in the northern states. See id. at 44 (“In [Virginia] . . . the
distinction between academic legal education in colleges and training for practice in law offices.55

C. The Litchfield Law School

These law professorships did not immediately lead to the development of schools of law within universities as had been hoped.56 Indeed, the first established law school was independent of the university system—the Litchfield Law School in Connecticut—and arose as an expansion from office apprenticeships in the law office of Tapping Reeve.57 This became possible once state bar admissions authorities abandoned efforts to limit the number of apprentices that could study under an attorney at any given time.58 The course of instruction offered by Reeve at Litchfield covered all of Anglo-American private law with no special attention given to the law of any one state or to areas of public law.59 The weekly Saturday examinations were three hours in length and mainly oral, consisting of “a thorough investigation of the principles of each rule [of law], and not merely of such questions as can be answered from memory without any exercise of the judgement [sic] . . . .”60

An alumnus of the school, James Gould, would later become an associate of Reeve and subsequently shared in the lecturing responsibilities at the school.61 He restructured the curriculum to include topics such as Master and Servant, Bailments, and Real Property.62 It is worth noting that
Gould discouraged the reading of cases as the primary means of legal instruction, remarking, “I always dissuade them from reading reports in course, until they have acquired a pretty thorough knowledge of the outline of the science by studying each principal [subject] separately; being fully convinced that reading in the former mode is of little comparative profit in an early stage of legal studies.”

Although the life of this school was only from 1784 to 1833, it had a remarkable record of producing illustrious graduates. Its other legacy was to take legal education some degree beyond the office apprenticeship with a more systematic approach to instruction in law, though still occurring nominally in a law office setting. Other independent schools, though less notable than Litchfield, were in existence during this time as well. In these schools we see the attempt to wed academic education and practical training in one setting—the law office rather than the university. However, this approach was not to last.

D. University Law Schools

Some of the early holders of law professorships in universities were able to achieve the development of entire law schools within their institutions. Chief Justice Isaac Parker, the first holder of the Royall professorship in law at Harvard and the leader of the Massachusetts Supreme Judicial Court, was keen for Harvard to found a graduate school to instruct aspiring lawyers in the law before entering “into the office of a counselor to obtain a knowledge of practice.” Harvard Law School was founded in 1817, adding Asahel Stearns as a professor. Although Yale’s first professor of law, Elizur Goodrich, ended his nine-year tenure in 1810 without founding a law school there, the head of a private law school in New Haven—Judge David Daggett—was appointed to succeed Goodrich in 1826, bringing his

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Bills of Exchange and Promissory notes, Insurance, Charter Parties, Joint Owners of Vessels, Partnership, Stoppage in Transit, Sailor’s Contracts, Powers of Chancery, Criminal Law, Estates upon Condition, Modes of Acquiring Estates, Devises, Title by Deed, and Actions for Injuries to Things Real. See id. at 64.

63 Id. at 184.

64 A compendium of alumni by Samuel H. Fisher reports 28 U.S. Senators, 101 members of Congress, 34 state supreme court justices, 14 governors of states and 10 lieutenant governors, 3 U.S. vice presidents, 3 U.S. Supreme Court Justices, and 6 members of the Cabinet. HARRIS, supra note ___ at 31.

65 THE REED REPORT, supra note ___ at 133 (“The significance of this group of school in our educational development is that they served temporarily to bridge the gap between the students who wished systematized instruction in the law and the colleges that were not yet prepared to give it.”).


67 WARREN, HISTORY OF HARVARD LAW SCHOOL VOL. 1, supra note ___ at 302.

68 WARREN, HISTORY OF HARVARD LAW SCHOOL VOL. 1, supra note ___ at 307.
private law school into the College as Yale Law School.  

Several other universities soon followed and established law schools, but Harno reports that “[t]hese were not distinguished schools” and “not one that was in operation contemporaneously with the Litchfield School enjoyed at that time the favorable reputation of that School.”

More university law schools were founded throughout the Nineteenth Century, bringing the number to 31 by 1870. The schools were not offering the three-year law degree of today but rather offered one- to two-year courses of study consisting of lectures and readings of treatises in the areas of law considered important at the time: constitutional law, American jurisprudence, English common law, equity, pleading, evidence, bailments, insurance, bills and notes, partnerships, domestic relations, conflict of laws, sales, and real property. Liberal education in other topics such as history, philosophy, ethics and the law of nature, while viewed as important in the effort to produce lawyers of professional excellence, was presumed to have been obtained elsewhere. As Harno points out, this presumption was a fallacious one, given that none of the law schools established by 1870 required a college education as a prerequisite to admission.

Notwithstanding the development of formalized legal education within the university, the office apprenticeship remained the common method of preparing for a career as a lawyer. Indeed, Justice Story—on being inaugurated into the Dane Professorship at Harvard Law School in 1829—confessed, after describing all that would be required to prepare a lawyer for practice, that “[l]ittle, indeed, of what has been sketched out in this discourse, can be attained by any academical instruction during the usual period assigned for the preparatory studies for the bar. . . . What we propose is no more than . . . something to assist the student in the first

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69 WARREN, HISTORY OF THE AMERICAN BAR, supra note __ at 364; HARNO, supra note __ at 38.
70 HARNO, supra note __ at 38.
71 HARNO, supra note __ at 51.
72 CHARLES WARREN, HISTORY OF HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA, VOL. 2, 218 (1908).
73 Story, supra note __ at 529 (“It is by such studies, and such accomplishments, that the means are to be prepared for excellence in the highest order of the profession.”).
74 Story, supra note __ at 536 (“[T]he course of the academical instruction in this University already provided for, the subjects of ethics, natural law, and theology, are assigned to other professors. In the next place, in the elementary education, everywhere passed through before entering upon juridical studies, they are usually taught with sufficient fullness and accuracy.”).
75 HARNO, supra note __ at 51. Harvard Law School did not require a previous college degree as a prerequisite to admission until 1894, when it announced such a requirement for the class that would enter in 1896. Id. at 82.
76 HARNO, supra note __ at 39, 52; Lawrence M. Friedman, A History of American Law 241 (3d Ed. 2005) (noting that by the 1840s, “For most people, the path to practice still went through a clerkship at a lawyer's office”).
steps of his studies. . . .”77 This reflected the continuing sense that academic legal instruction was only preparatory for and supplemental to apprenticeship learning of the legal craft in law offices.78 Further, such limited training was sufficient preparation for the small-scale, local practices that were typical of the profession at the time.79

The advances in the formalization of legal education described above were not accompanied by similar advances in the standards for bar admission. To the contrary, as university-based law school education enhanced the intellectual abilities of aspirants to law office apprenticeships, bar admissions standards languished and waned under the influence of Jacksonian democratic ideology.80 Under this philosophy, screening mechanisms and educational prerequisites were distrusted as obstacles that made law practice accessible only to elites.81 The practicing bar thus remained hostile to formal legal education, declining to refine bar admissions requirements to include such education as a prerequisite to being licensed to practice.82 This is a skepticism that endured until the late 19th Century, when the ABA first adopted a resolution calling for each State to require three years of study in law school before applying to sit for the bar examination.83 Still, in the early 20th Century one finds bar examinations that bore little connection to the lessons from law school or the needed abilities of a practicing attorney.84

Thus, from the time of Blackstone through the establishment of university law schools, we can see that formalized legal education was focused on instruction in the English common law and modern American

77 Joseph Story, The Value and Importance of Legal Studies, in MISCELLANEOUS WRITINGS OF JOSEPH STORY, 503, 532 (1852).
78 Burrage, supra note __ at 152 (“American universities . . . provided law lectures merely as a part of a liberal education as part of the education of a gentleman.”)
79 See Harry J. Lambeth, Practicing Law in 1878, 64 ABA JOURNAL 1015–23 (1978) (“Imagine a business world of virtually no telephones. . . . No typewriters. . . . No automobiles. . . . No uniform organized system for legal research. . . . Instead it was a world of circuit-riding lawyers and store-front, walk-up law offices with brass spitoons, pot-bellied stoves, and overhead gaslights. . . .”).
80 Jacksonian philosophy also impacted the process by which judges were selected, leading many states to move toward an elected rather than appointed judiciary. See Larry C. Berkson, Judicial Selection in the United States: A Special Report, 64 JUDICATURE 176, 176 (1980) (“People resented the fact that property owners controlled the judiciary. They were determined to end this privilege of the upper class and to ensure the popular sovereignty we describe as Jacksonian Democracy.”).
81 HARNO, supra note __ at 39.
82 HARNO, supra note __ at 40, 78–79.
83 20 REP. AM. BAR ASS’N, 31–33 (1897). The language of the adopted resolution was as follows: Resolved, That the American Bar Association approves the lengthening of the course of instruction in law schools to a period of three years, and that it expresses the hope that as soon as practicable a rule may be adopted in each State which will require candidates for admission to the bar to study law for three years before applying for admission.
Id. at 31.
84 I. Maurice Wormser, The Results of a Comparative Study of the Examination Questions Framed by State Boards of Bar Examiners, 24 YALE L.J. 34 (1914).
legal doctrine as a foundation for subsequent training in practical skills after law school under the tutelage of practicing attorneys. No effort was made to attend to the preparatory education students needed before taking up legal studies in universities, nor was any effort made at the university level to train students in practical legal skills. Academic legal instruction was not developed or designed to serve as a substitute for apprenticeship training in the practical skills of legal practice. Rather, it was a response to the sentiment reflected by Blackstone that an office apprenticeship by itself was not enough. In this context, academic legal education and subsequent practical training through apprenticeships were necessary partners in the effort to prepare well-qualified lawyers for practice. It makes sense, then, that with the background understanding that academic and practical training worked in tandem, academic legal education gave no attention to practical skills, focusing purely on instruction in legal principles and doctrines. What remained to be refined was the method to be used for such instruction and the character of those who would be principally called to deliver such instruction.

E. Langdell and the Modern American Law School

“...I entered upon the duties of my present position...with a settled conviction that law could only be taught or learned effectively by means of cases in some form.”

Christopher Columbus Langdell, who became the Dane Professor and Dean at the Harvard Law School in 1870, was a pivotal figure in the history of legal education in this country. During his time at Harvard Law School, he ushered in several innovations that characterize the modern American law school today.

The Case Method. The most well-known and enduring innovation Langdell introduced was the instruction of students in legal doctrine through the study of written opinions in decided judicial cases—the case method. Up to this point, the method of legal instruction in law schools was a combination of the lecture method and the text method, meaning students read texts that related and summarized particular bodies of law and professors lectured on that material in class. As Theodore W. Dwight, Dean of the Columbia College Law School in New York explained the

86 WARREN, HISTORY OF HARVARD LAW SCHOOL, supra note ___ at 359–60. Warren described Langdell as “a young man of no legal reputation...a man of no national fame, and a lawyer who had substantially no court practice.” Id. at 360.
87 JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS, 7–8, 12 (Carnegie Foundation 1914).
method, “The student is assigned daily a certain portion of an approved
text-book for his reading prior to listening to expositions of the subject
involved. . . . [H]e is asked questions upon the topic . . . . Pertinent
illustrations are resorted to . . . .”

Such an approach did not jibe with Langdell’s view of the law; he firmly
believed that law was an inductive science and that the best preparation for
a career as a lawyer was to study and master its fundamental principles, not
through second-hand accounts but right from the source:

Law, considered as a science, consists of certain principles or doctrines. To
have such a mastery of these as to be able to apply them with constant facility
and certainty to the ever-tangled skein of human affairs, is what constitutes a
true lawyer; and hence to acquire that mastery should be the business of every
earnest student of law. Each of these doctrines has arrived at its present state
by slow degrees . . . in many cases through centuries. This growth is to be
traced in the main through a series of cases; and much the shortest and best, if
not the only way of mastering doctrine effectually is by studying the cases in
which it is embodied.

In these remarks, one can see two important strains of thought that would
have a tremendous impact on the development of law school education.
First, Langdell’s understanding of what it means to be a lawyer—reflected
in his comment that “mastery” of “certain principles or doctrines . . . is
what constitutes a true lawyer”—gives rise to his view that the best
preparation for practice was to study legal rules (principles and doctrines)
rather than learning the skills of legal practice—law as mere “handicraft.”

Second, Langdell’s understanding of the law—that it was a science whose
study would be most effective when focused on examining the sources of
legal principles and doctrines—leads to his determination that reported
cases must be studied rather than summary expositions of the law
contained in texts and treatises. In other words, Langdell believed that law
was a form of natural science in that it consisted of a coherent system of
rules derived from general principles that could only be discerned through
the study of observable phenomena—the judicial opinions in which the

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88 Theodore W. Dwight, Columbia College Law School, New York, 1 THE GREEN BAG 141, 145 (1889).
89 CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, vii (1871),
reprinted as a special edition, 1983.
90 WARREN, HISTORY OF HARVARD LAW SCHOOL, supra note ___ at 374.
91 REDLICH, supra note ___ at 15. See also WARREN, HISTORY OF HARVARD LAW SCHOOL, supra note ___
at 423 (“The Case System then proceeds on the theory that law is a science and as a science should
be studied in the original sources, and that the original sources are the adjudged cases, and not the
opinions of text writers based on the adjudged cases.”); WILLIAM A. KEENER, A SELECTION OF CASES
ON THE LAW OF QUASI CONTRACTS, Preface (1888) (“[T]he student must look upon law as a science
consisting of a body of principles to be found in the adjudged cases, the cases being to him what the
specimen is to the geologist.”), quoted in WARREN, HISTORY OF HARVARD LAW SCHOOL, supra note ___
at 421.
principles were manifested. These views of the law and of lawyering supported and furthered the move away from practitioner-based apprenticeship in favor of formal instruction by full-time legal scholars.

The Cloistered Law Professor. Indeed, the conversion of the professoriate into cloistered academics rather than experienced practitioners was Langdell’s next innovation. With law school being characterized by a curriculum focused on doctrinal study, Langdell remarked that “[w]hat qualifies a person, therefore, to teach law is not experience in the work of a lawyer’s office, not experience in dealing with men, not experience in the trial or argument of causes—not experience, in short, in using law, but experience in learning law . . . .” As a result, Langdell took the bold step in the fall of 1873 of hiring an Assistant Professor who had only graduated from law school two years prior and whose experience was limited to serving as an instructor in French, German, and history at Harvard College—James Barr Ames. Prior to that time, Harvard’s law professors had been drawn primarily from the practicing bar. However, as Harvard President Eliot explained, the idea of hiring young, inexperienced persons to teach law was borrowed from the law schools of Continental Europe: “Those schools have selected young men of mark who have shown a genius for law and a desire for the life of a teacher, and . . . made them Professors, at an age so early that the whole vigor of their youth and prime could be thrown into teaching and authorship.” President Eliot went on to predict, quite presciently, that this innovation would take hold and fundamentally change the legal academic profession:

Professor Langdell early advocated the appointment, as teachers of law, of young men who had had no experience whatever in the active profession. . . . Now that experiment . . . has not only been extended in our own Law School with perfect success but it has been adopted by various other law schools throughout the country. . . . In due course . . . there will be produced in this country a body of men learned in the law who have never been on the bench or at the Bar, but who nevertheless hold position of great weight and influence as teachers of law, as expounders, systematizers and historians. This, I venture to

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93 See THE CARNEGIE REPORT, supra note ___ at 5 (“[L]egal positivists . . . viewed the law as . . . a set of rules and techniques rather than a craft of interpretation and adaptation . . . . All this spelled the eclipse of traditional forms of practitioner-directed apprenticeship by academic instruction given by scholar-teachers.”).
95 WARREN, HISTORY OF HARVARD LAW SCHOOL, supra note ___ at 388.
96 Id. at 388–89.
predict, is one of the most far-reaching changes in the organization of the profession that has ever been made in our country.97

Eliot rejected the analogy to medical school training, in which practitioners are acknowledged to be the best instructors of clinical training, by insisting—as did Langdell—that “law is to be learned almost exclusively from the books in which its principles and precedents are recorded, digested, and explained,” and thus “[t]he law library, and not the court or the law office, is the real analogue of the hospital.”98 With this vision was born the career legal professoriate, purely academic in character and divorced from the practicing bar.

The Socratic Method. A critical companion to the case method was another Langdellian innovation: the instructional approach used to discuss the cases with students in class known as the Socratic method. Langdell conducted his own courses using this method, having a student analyze the facts and the law in each case, followed by a series of questions designed to reveal the legal principles to be found therein.99 In addition to learning legal doctrine, Langdell’s disciples and subsequent adherents have rightly noted that the case-dialogue method was also designed to train students to develop the analytical abilities of a lawyer: “The student is challenged to reconcile discrepancies, to explain conflicts, to pick up the tangled threads of thought where they are left by the decisions and put them in order.”100

By employing the dialogue approach to the exploration of cases, the idea was that the case method would not only facilitate the scientific discovery of legal principles from their sources, but it also would contribute to the development of students’ ability to engage in legal reasoning, analysis, and synthesis.101

The case-dialogue method of instruction was seen as an application of the scientific method to the study of law at a time when American colleges were moving away from a classical approach to higher education toward methods reflected in the modern study of science.102 Langdell recognized

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97 Id. at 389.
98 Id. at 392.
99 REDLICH, supra note __ at 12 (“Teacher and pupils then . . . work together unremittingly to extract from the single cases and from the combination or contrasting of cases their entire legal content, so that in the end those principles of that particular branch of the law which control the entire mass of related cases are made clear.”).
100 HARNON. See also WARREN, HISTORY OF HARVARD LAW SCHOOL, supra note __ at 421 (“The student is required to analyze each case, discriminate between the relevant and irrelevant, between the actual and possible grounds of decision. And after having thus discussed a case, he is prepared and required to deal with it in its relation to other cases.”).
101 Keener, supra note __ (“By this method the student’s reasoning powers are constantly developed, and while he is gaining the power of legal analysis and synthesis, he is also gaining the other object of legal education, namely, knowledge of what the law actually is.”).
102 REDLICH, supra note __ at 16.
this trend and the need to conform the study of law to it to retain its place within the university: “If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices it.”

Langdell’s contemporary, Harvard Law School Professor William Keener, was more explicit in drawing the connection when he wrote, “[I]t is only by regarding law as a science that one can justify its being taught in a University.”

Other Reforms. Langdell was also responsible for several other major reforms that transformed university-based legal education to the model we know today. In 1871, the course of study at the Harvard Law School was extended from 18 months to two years, a change prompted by the realization that the case method required a longer period of time to be successful than 18 months could allow. Strict examinations were introduced as prerequisites to proceeding to the next year of study and to receiving the degree. These changes, along with the introduction of the case method, were initially controversial among the practicing bar, leading to a decline in enrollments compared with the previous decade.

In 1875 an admissions examination was instituted and required of all applicants beginning in 1877 who lacked prior collegiate education. Finally, for the 1877–78 academic year, Langdell extended the course of study to three years. Rather than result in a reduction of enrollment, however, these latter two changes were followed by an increase in both the size and quality of the law school’s student body.

Spreading the Langdellian Model. By the early part of the 20th Century, formalized university-based legal education was well established and highly developed compared with the system of legal education in other common law countries. These law schools were increasingly Langdellian; although Langdell ended his tenure as Dean of the Harvard Law School in 1895, this case method approach to legal education was continued by his successor,

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104 William A. Keener, Methods of Legal Education, 1 YALE L.J. 139, 144 (1892).
106 Id. at 380, 397.
107 Id. at 382, 386.
108 Id. at 394–95, 399.
109 Id. at 399.
110 Id. at 400.
111 Josef Redlich, The Common Law and the Case Method in American University Law Schools, 5–6 (Carnegie Foundation 1914) (“[T]he existing American system of legal education has hardly a rival worth mentioning in the entire great jurisdiction of the English common law. Neither in England itself, nor in the great English colonies, has systematic instruction in law achieved a development so intensive and at the same time so comprehensive as in the United States.”). Redlich also reports that in 1914 there were more than 150 American law schools, with over 20,000 students. Id. at 7.
James Barr Ames.\textsuperscript{112} When William Keener—who had been a Harvard professor under Langdell—joined Columbia’s faculty in 1890, he brought the case method with him.\textsuperscript{113} By 1906, the Langdell method had spread to law schools at Chicago, Northwestern, Cincinnati, Stanford, Wisconsin, Hastings, and Tulane—among others.\textsuperscript{114} Yale had been an early holdout, preferring a method of instruction that involved lectures and recitations.\textsuperscript{115} However, by 1913 the Langdell method dominated the classes in all three years at Yale; in 1916 a Harvard Law School graduate—Thomas Swan—was appointed as Yale’s dean.\textsuperscript{116} While much of this expansion was due to the direct transmission of the method by Harvard professors and graduates who were its adherents, this “Harvardization” of American law schools was also motivated by the desire of prestige: “[O]nce elite law schools had decided to approve of the system, those aspiring to be considered elite rapidly followed.”\textsuperscript{117} No doubt the financial benefits of the method were an attraction as well; because it could be used with classes of large size, larger (tuition-paying) student bodies could be supported with relatively few professors.\textsuperscript{118} Regardless of the reasons, the Langdellian model of legal education ultimately took hold and spread through law schools across the nation.\textsuperscript{119}

It is worth noting that the rise of the Langdellian law school coincided with—and was doubtless aided by—the rise of the organized bar. Up through 1870, law practice varied greatly across the country but was largely characterized by practitioners who were not formally organized as a group

\textsuperscript{112} Comments of James Barr Ames, in 31 REP. AM. BAR ASS’N 1025 (1907) (“[W]e believe that men who are trained, by examining the opinions of the greatest judges . . . are in a better position to know what legal reasoning is and are more likely to possess the power of solving legal problems . . . .”).

\textsuperscript{113} See STEVENS, supra note ___ at 60. Stevens reports that other faculty members, including Theodore Dwight, opposed the case method and resigned beginning in 1891. See id. This defection gave birth to The New York Law School. Id. at 75 n.21.

\textsuperscript{114} Id. at 60–61, 64 (“[B]y 1907, that number [of schools that had accepted the case method] had risen to over thirty.”).

\textsuperscript{115} FREDERICK C. HICKS, YALE LAW SCHOOL, 1869–1894, 28–35 (1937).

\textsuperscript{116} See STEVENS, supra note ___ at 62.

\textsuperscript{117} Id. at 63.

\textsuperscript{118} Id. (“The vast success of Langdell’s method enabled the establishment of the large-size class . . . . Any educational program or innovation that allowed one man to teach even more students was not unwelcome to university administrators. The ‘Harvard method of instruction’ meant that law schools could be self-supporting.”).

\textsuperscript{119} The model of University-based legal education did not catch on, however, in England. The University of London repeatedly tried to wrest the legal education of barristers from the Inns of Court during the late 19\textsuperscript{th} and early 20\textsuperscript{th} Centuries, to no avail. Burrage, supra note ___ at 145 (noting that between 1884 and 1904 the University of London “made four proposals to establish a school of law jointly with the Inns” but that “the Inns remained unconvincing and rejected all proposals”). This resistance of the practicing bar to formalized, university-based legal education held up until the mid 20\textsuperscript{th} Century. See id. at 145–46. There was more success in moving the education of English solicitors into the University in the first half of the 20\textsuperscript{th} Century, but that ended with a severance between the universities and the solicitors’ professional association, the Law Society, in 1952 when all solicitors-in-training were withdrawn from the universities. See id. at 147.
with clear standards for preparation and admission. Local bar groups began organizing in cities such as New York and Chicago during the 1870s; in 1878, the American Bar Association (ABA) was founded for a mixture of reasons, including improving legal education and standards for admission to the bar. As the 20th Century arrived and progressed, the rise of corporations, administrative law, and business and banking regulation certainly made the practice of law more complex, changes that certainly challenged the traditional informal approach of reading for the bar. It is in this context that formalized legal education and the ABA’s push for the same must, at least in part, be understood.

III. OVER A CENTURY OF CRITIQUE AND REFORM

“Our law schools, as usually conducted, offer nothing. Most of them do not, in their plan of study, seem ever to recognize the need.”

ABA Committee on Legal Education, 1890

Although the Langdellian model of legal education became dominant and widely accepted in the early part of the 20th Century, it was not without its contemporary critics. Indeed, since the advent of the Langdellian law school, there has been a steady stream of critiques of legal education, each of which have had varying degrees of success in encouraging legal education reform. Sadly, however, when one canvases the various assessments of formal legal education over the past 130 years it is remarkable how consistent the criticisms are and how persistent the Langdellian model has been in the face of these critiques.

A. Early ABA Reports

An early appraisal of the American law schools at the time of Langdell came from the ABA’s Committee on Legal Education and Admission to the Bar in 1879:

But it is difficult to deny that there are American law schools not deserving of commendation. Institutions where the course is unjustifiably limited and circumscribed; where the term of study is evidently too brief for useful

121 Id. at 286.
122 James W. Hurst, The Growth of American Law: The Law Makers (Little, Brown & Co. 1950) (“Before [the 1870s] lawyers could educate one another to a large extent . . . Before then the intricate web of administrative regulation had not been woven. After the ’70s the printed sources of the law became a flood . . . and the reach of government vastly expanded.”).
purposes; where students continue to be invited, when they are unfit by reason
of deficient education and want of contact with liberal studies, to wrestle with
the difficulties of the law; where, in a way unworthy of the cause of legal
learning, a spirit of competition to attract greater numbers than are to be found
in other establishments, is allowed to obtain control; where examinations,
which are such only in name, take the place of a searching scrutiny of the
student’s acquirements; where there is no connection with any influence, except
that of a faculty insufficient to meet the demands of a progressive time; where
there are no exercises sufficiently serious to try and develop the abilities the
student may have; and where degrees are thrown away on the undeserving and
the ignorant.\footnote{124}

Although this critique was contemporaneous with Langdell’s reforms at
Harvard, they cannot truly be said to reflect on Langdell’s Harvard because
at that point in time, Langdell’s model had yet to spread to other law
schools.\footnote{125} Thus, the law schools being critiqued were largely those of the
kind that preceded Langdell, including the kind that Harvard had been prior
to the implementation of his reforms. Indeed, one can view Langdell’s
reforms as responsive in substance to many of the charges of the 1879
report: Langdell lengthened the period of study from 18 months to three
years, he implemented an undergraduate education requirement for
admitted law students, he strengthened the examinations used to determine
students’ qualifications to advance and obtain the degree, and he sought to
strengthen the faculty by moving towards full-time academics rather than
practitioners who had less time to dedicate to the job of teaching law
students.\footnote{126}

Apparently, however—in the eyes of the ABA Committee on Legal
Education—little had changed in law schools generally by 1890, when it
identified the defects of law schools as including the “constant temptation
to attract more students and to graduate a large class by allowing all to get
through who can ‘cram up’ for a not very rigid examination, which tests
nothing but a mere recollection of the written letter of the law.”\footnote{127} The
Committee went on to observe that “all [law schools] suffer from the want
of a proper standard of true legal education, a definite plan of the entire
course . . . .”\footnote{128} In its most damning critique, the ABA committee summed
up its observations with the following analysis:

The defects of the present method may be summed up, we think, in one very
familiar antithesis: they do not educate, they only instruct. They aim only to

\footnotesize{\begin{itemize}
\item \footnote{124}{2 REP. AM. BAR ASS’N 209, 217 (1879). It should also be noted that the Committee was critical of
the failure of law schools to give instruction in Roman Civil Law, the law of nations, admiralty and
maritime law, and comparative jurisprudence. \textit{Id.} at 220–28.}
\item \footnote{125}{See \textit{STEVENS}, supra note \_\_ at 60–64.}
\item \footnote{126}{See \textit{supra TAN} \_\_.}
\item \footnote{127}{13 REP. AM. BAR ASS’N 329 (1890).}
\item \footnote{128}{\textit{Id.} at 330.}
\end{itemize}}
heap up in the student’s mind a great mass of legal “points”—rules, definitions, etc.—but they do not fashion these into a system, nor even do they give him the faculty of constructing for himself such a system. The mutual influences of different rules, the construction of legal relations and institutions, the processes by which the law is constantly developing and assuming new phases, are neglected, or, rather, positively ignored. He is supplied with an abundance of crude material, but not taught to use it. In office study, the daily participation in actual business gave the student at least some empiric training. He learned to use his acquisitions as an apprentice learns to use the tools of his trade . . . The process was a rude and imperfect one, very uncertain in its results and exceedingly wasteful of time and labor, but—for two or three centuries it has been the way in which English and American lawyers have been instituted, and it will not, perhaps cannot, be abandoned without something better is [sic] offered in its place. Our law schools, as usually conducted, offer nothing. Most of them do not, in their plan of study, seem ever to recognize the need. It is fortunate for them and for their pupils alike that the training thus omitted may be supplied in the early years of practice, at least to a very considerable extent.\textsuperscript{129}

We see in this critique charges that could be leveled against law school education today. An instruction in legal “rules” dominates; a comprehensive legal education that synthesizes different areas of the law, teaches how to establish and maintain legal relationships or entities, and studies the processes—legislative, administrative, collaborative, and judicial—by which the law and legal relations are shaped are still “neglected” or “ignored” by law schools today. The charge that the student “is supplied with an abundance of crude material, but not taught to use it” is as true today as it was then at those schools that do not require extensive practical skills training or experience before graduation. Indeed, it can still be said of some law faculty that they do not “seem ever to recognize the need” to offer training that approximates what students miss by not going through an apprenticeship experience. The key difference between now and then is that the saving grace for the Committee—“that the training thus omitted may be supplied in the early years of practice”—no longer accurately characterizes the opportunities facing most law school graduates today, given the increasing unwillingness of legal employers to foot the costs of basic training for new lawyers and the reality that many law graduates do not obtain work with employers who have the time, ability, or resources to support such training.

In the year following this report, the Committee again issued a report highly critical of the program of legal education at most law schools, this time focusing on the schools’ emphasis on rules over principles and on rote memorization rather than reflection and analytical thinking:

\textsuperscript{129} \textit{Id.}
The only method of teaching that deserves entire reprobation is that which encourages or even permits the student to make the entire course a mere exercise of memory, without reflection or judgment not beginning with the fundamental notions or principles by which all his reasoning is to be conducted in actual practice, but laying up rule after rule, decision after decision, as if they were to constitute the fund of knowledge upon which he had only to draw during his after life.

Absurd as this method is to anyone who knows the daily work of an active practitioner, there is a fatal tendency toward it in much of the school routine . . . . No amount of text-book learning, no familiarity even with the cases will avail him, if he cannot reason from one set of facts to another by the use of the exact terms in which the law sums up its principles.\(^{130}\)

This would appear to be a more direct attack on the Langdellian case method,\(^ {131}\) though the larger point of the 1891 and 1890 critiques was the over-emphasis of doctrine at the expense of conveying fundamental and enduring legal principles, an understanding of the larger system formed by the law and the reason underlying it, and the ability to use such knowledge in practice.

Another common thread running through each of these critiques was the insufficiency of the modes of assessment, which simply required the memorization and regurgitation of rules. Not surprisingly, bar examination questions of the early Twentieth Century—not long after these ABA appraisals of law schools—were similarly narrow in their approach to assessment, posing such questions as “How must a partnership exist?” and “Name the twelve maxims of Equity.”\(^ {132}\) Today, law schools remain focused on doctrinal instruction and summative assessments that test substantive knowledge and analytical abilities rather than the full range of skills needed by the active practitioner. Bar exams similarly remain oriented primarily towards doctrinal knowledge and analytical ability rather than practical competence.\(^ {133}\)


\(^ {131}\) Such direct attacks continued in the 1892 report of the Committee, in which it faulted the case method for focusing on disputes rather than settled doctrines, training a student to be a “gladiator” more so than a counselor who can “advise a client when he is safe from litigation.” Report of the Committee on Legal Education, 15 Rep. Am. Bar Ass’n 317, 341 (1892).

\(^ {132}\) Maurice Wormser, The Results of a Comparative Study of the Examination Questions Framed By State Boards of Bar Examiners, 24 Yale L.J. 34, 34 (1914) (“What kind of nonsense, what order of foolishness is it, that impels us lawyers to agree that the vital necessity for the law-student is his acquisition of the power of logical analysis and thoughtful discrimination in handling legal propositions, and at the same time, leads us to furnish many a bar examination paper calculated to test little more than his memory . . . .?”). See also Gordon Hickey, After 100 Years, Bar Examiners Still Protecting the Public, 60 Virginia Lawyer 18, 18 (Feb. 2012) (reporting questions from the first Virginia bar exam, including “What is a freehold estate?” and “What is the distinction between a vested and a contingent remainder?”).

\(^ {133}\) See, e.g., The Virginia Board of Bar Examiners, Rules—Section 1: Examinations, available at http://www.vbbe.state.va.us/pdf/VBBERules.pdf (noting that each examination consists of two parts,
Through the remainder of the 19th Century and into the early 20th Century, the Committee on Legal Education continued to monitor and recommend improvements to legal education. By 1912, the Committee’s view of law school education had become more favorable, highlighting what it viewed as several advances in legal education that had occurred up to that time:

1. The recognition of the superiority of the law school over the office preparation for the Bar.

2. The recognition of a definite period of legal study upon the completion of which, and not before, the applicant can apply for admission to the Bar.

3. The lengthening of the law school course of study to three years.

4. The changed method of law instruction which has substituted in so many of the law schools of the country the study of law through cases, either as an exclusive system, or in combination with the use of text-books, in lieu of the old system of lectures, or of lectures and text-books.

5. The development of a class of law teachers who are withdrawn from law practice, and whose vocation it is to teach law.\(^{134}\)

Here we see the lauding of the case method of instruction as well as an approval of a full-time professoriate removed from the practice of law.\(^{135}\)

Not wanting to rest on these laurels, however, the Committee, in 1913, asked the Carnegie Foundation for the Advancement of Teaching to undertake an investigation of legal education in the United States, one that would be similar to the Foundation’s Flexner Report on medical education\(^ {136}\) that devised and recommended major changes to medical training that were adopted and characterize medical education today.\(^ {137}\) The Carnegie Foundation obliged, and the products of that request were the 1914 Redlich Report and the 1921 Reed Report.

\(^{134}\) Report of the Committee on Legal Education and Admission to the Bar, 35 ABA REP. 595, 602–604 (1912).

\(^{135}\) It should be noted that this statement did not reflect an endorsement of a law professoriate wholly lacking in any practice experience. To the contrary, the Committee expressly indicated that “[i]t is desirable that law teachers, while withdrawn from practice, should have had actual experience at the Bar.” Id. at 604.


\(^{137}\) MOLLY COOK, ET AL., EDUCATING PHYSICIANS: A CALL FOR REFORM OF MEDICAL SCHOOL AND RESIDENCY, 1 (Carnegie Foundation for the Advancement of Teaching 2010).
B. The Redlich and Reed Reports on Legal Education

For nearly a century, The Carnegie Foundation for the Advancement of Teaching has studied legal education and issued various reports and bulletins on the topic. The first of these, a report on the case method in American law schools, was published in 1914.\(^{138}\) This topic was chosen because of the controversy surrounding the method; although legal instruction at Harvard Law School had come to be characterized by the case-dialogue method under Langdell, the law professoriate and the practicing bar was not universally convinced of its efficacy.\(^{139}\) The Carnegie Foundation sought to shed light on this debate by enlisting a law professor from Austria—Josef Redlich—to visit American law schools and study the method from an impartial point of view.\(^{140}\)

After spending two months visiting ten law schools—four of which did not employ the case method—he generally concluded that the case method was meritorious, with a few caveats. Redlich quibbled with Langdell’s claim that law was an inductive science for which the study of cases as original sources was well suited by pointing out that scientific inquiry is certainly not limited to inductive methods\(^{141}\) and that legal reasoning in any given case is actually deductive rather than inductive:

> The judge who, in the individual case, decides according to the common law, applies . . . to the state of facts then before him, one of these already existing norms . . . and pronounces . . . only the rule or norm applicable to the specific case. His intellectual activity in this is, therefore, essentially deductive; for by deduction we mean the application of an already existing general rule to the particular case.\(^{142}\)

Redlich also distinguished legal science from the physical sciences by noting that the law does not consist of naturally observable facts, but rather of the products of human will directed at ordering and guiding human behavior, making law more of an “intellectual science” or “normative science.”\(^{143}\) That said, Redlich did find that the case method was valuable in that it exposed students to mastery both of the content of the law and of the

\(^{138}\) [REDLICH, supra note ___].

\(^{139}\) [REDLICH, supra note ___ at v–vi. See also WARREN, HISTORY OF HARVARD LAW SCHOOL, supra note ___ at ___].

\(^{140}\) [REDLICH, supra note ___ at vi.]

\(^{141}\) [REDLICH, supra note ___ at 55 ("Prominent though experimental and inductive methods are in the sciences which serve physical research, we press a generalization much too far when we make of the inductive method the sole criterion of scientific intellectual activity.").]

\(^{142}\) [REDLICH, supra note ___ at 56.]

\(^{143}\) [REDLICH, supra note ___ at 56 ("The science of law does not work, then, with physical facts, but with the products of the human will, which has been directed to the ordering and guidance of the individual and social life of humanity. . . . "[L]egal science cannot deal with law in the sense of the physical investigator, but on with law in the sense of definite norms, willed by men, and intended to guide and limit the business of men.").]
analytical methods lawyers must employ to make use of the law as practicing attorneys.\textsuperscript{144} Redlich’s general endorsement of the method was coupled with a caveat and a critique. The caveat was that the case method was appropriate for the study of Anglo-American law because such law—at that time—was largely unwritten, common law.\textsuperscript{145} With common law being case law, studying cases made sense, compared with the task of the judge in civil law countries of finding the applicable rules and statutes that govern the facts at hand.\textsuperscript{146} Although the common law may have been prevalent during Langdell’s time in the late 19th Century, in the 21st Century other sources of law—constitutional, statutory, regulatory, and negotiated—dominate the legal landscape, making it relevant to wonder whether the common law-based case method legitimately retains its purchase.\textsuperscript{147} Redlich’s critique of the method was as follows:

\begin{quote}
It is characteristic of the case method that where it has thoroughly established itself, legal education has assumed the form of instruction almost exclusively through analysis of separate cases. The result of this is that the students never obtain a general picture of the law as a whole . . . .\textsuperscript{148}
\end{quote}

His prescription for remedying this defect was to create an introductory law school course:

\begin{quote}
[In American university law schools the students ought to be given an introductory lecture course, which should present, so to speak, ‘Institutes’ of the common law. Every department into which the American law is divided, whether as common law or equity, employs certain common elementary ideas and fundamental legal concepts which the student ought to be made to understand before he is introduced into the difficult analysis of cases.\textsuperscript{149}
\end{quote}

This is sound advice even for today, given the fact that pre-legal education does not offer such an overview.\textsuperscript{150} Pre-legal education is not formally

\begin{itemize}
\item \textsuperscript{144} REDLICH, supra note ___ at 59 (“[O]n the ground that it is that method of instruction which is entirely suited to the established character of the common law, to independent intellectual assimilation of positive law from its sources, and to the highest development of the ability to think logically and systematically—on these grounds the case method must indeed be recognized as the scientific method of investigation and instruction in the common law.”).
\item \textsuperscript{145} REDLICH, supra note ___ at 35 (“[T]he fundamental reason for this success [of the case method] is to be found in the present condition of American law, and within this especially in the unshaken authority of the common law.”).
\item \textsuperscript{146} REDLICH, supra note ___ at 36–37 (“To the Englishman and the American . . . the law appears rather as the single case of law . . . conducted by the regular judge, and depending only upon his ‘finding the law.’ The task of the European judge is to find which of the rules and principles of law that are contained in the system of law governs the state of facts in question.”).
\item \textsuperscript{147} See Rubin, supra note ___ at 619.
\item \textsuperscript{148} REDLICH, supra note ___ at 41.
\item \textsuperscript{149} REDLICH, supra note ___ at 42.
\item \textsuperscript{150} See HARNO, supra note ___ at 127 (“Many of the problems of legal education owe their being to deficiencies in the pre-legal period.”).
\end{itemize}
connected with law school training in any way,\textsuperscript{151} meaning that students learn little about the legal profession and law school before deciding to become a lawyer,\textsuperscript{152} and are not guaranteed to have had any training or learning preparatory for the study of law.\textsuperscript{153} Indeed, American law schools typically offer a course of the kind proposed by Redlich to their foreign LL.M. students only,\textsuperscript{154} presumably under the assumption that American law students pursuing a J.D. would not benefit from this type of overview.

The Carnegie Foundation followed up the Redlich report with a more comprehensive report on legal education authored by Alfred Zantzinger Reed and published in 1921.\textsuperscript{155} Right from the outset, the tenor of the Reed report was less laudatory of law schools, as it began by bluntly proclaiming, “Our contemporary American system of legal education . . . is generally recognized to be defective in many respects.”\textsuperscript{156} As Reed traced the

\textsuperscript{151} See ABA Section of Legal Education and Admissions to the Bar, Preparing for Law School, http://www.americanbar.org/groups/legal_education/resources/pre_law.html (“The ABA does not recommend any undergraduate majors or group of courses to prepare for a legal education. Students are admitted to law school from almost every academic discipline.”).

\textsuperscript{152} THE MACRATÉ REPORT, supra note \textsuperscript{1} at 228 (“Prospective law students generally are not knowledgeable about the profession.”).

\textsuperscript{153} Arthur T. Vanderbilt, A Report on Prelaw Education, 25 N.Y.U. L. REV. 199, 209–10 (1950): It is no secret that our law school authorities generally are far from satisfied with the intellectual attainments of their incoming students . . . . To be specific, no instructor in any class in any law school can make a reference to Plato or Aristotle, to the Bible or Shakespeare, to the Federalist or even the Constitution itself with any real assurance that he will be understood . . . . Now even an allusion by a law school instructor to Adam Smith or Karl Marx is as likely as not to be lost, notwithstanding the preoccupation of our age with problems of economics.

\textsuperscript{154} See, e.g., Fordham University School of Law, LL.M. Program, Introduction to the U.S. Legal System, available at http://law.fordham.edu/llm-program/20391.htm (“Welcome to the Introduction to the U.S. Legal System course. As you know, this course is required for all students who do not hold a degree from a U.S. law school.”); Penn State Dickenson School of Law, Course Descriptions, Introduction to the United States Legal System, available at http://law.psu.edu/academics/jd/course_descriptions (“[T]his course introduces the United States court system, the role of the Constitution in the United States legal system, and other foundation[all] materials in United States law. The goal is to introduce students to distinctive aspects and/or fundamental principles in U.S. law. Enrollment in this course is limited to LL.M. candidates.”).

\textsuperscript{155} See THE REED REPORT, supra note ___. Reed published a further report on legal education funded by the Carnegie Foundation in 1928, ALFRED ZANTZINGER REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA (The Carnegie Foundation for the Advancement of Teaching 1928) (hereinafter REED II).

\textsuperscript{156} THE REED REPORT, supra note __ at 3.
movement of legal education from the office to the school, he lamented the concomitant loss of practical training:

[W]e are in a fair way of losing entirely the practical training secured under a practitioner, that was once assumed to be the only logical means of preparing students in Anglo-American law. Even its remnants are not usually regarded by the law schools as worth preserving, now that they have virtually preempted the entire field of legal education. Moot courts . . . and “practice courses” are among the devices by which they conceal from themselves and others the necessarily theoretical character of their instruction.  

This neglect of the practical was, for Reed, was unconscionable: “[T]he failure of modern American law school to make any adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly.”

Reed’s concern over the absence of practical training came in the context of a declining presence of law office apprenticeship training as supplementary to formal academic legal training. As early as the late 19th Century, the ABA was urging that law school should be accepted as a substitute for law office training rather than its mere predicate. By 1895, law school study and clerkship training had come to be regarded as interchangeable, rather than indispensable in legal education, though no state bar admissions authorities were requiring law school at that time. And by Reed’s time, four states were requiring formal legal education at law school, with almost all of the remaining jurisdictions making law school and law office training alternatives to one another. In a context in which apprenticeship training had become optional, it is little wonder that Reed found fault with law school’s failure to attend to practical instruction.

Another major strain of Reed’s critique was of what he referred to as “the theory of a unitary bar, whose attainments are to be tested by uniform examinations.” This theory held that rather than having different kinds of lawyers who were differently qualified to handle different matters, our political philosophy abjured distinctions and ranks among lawyers, resulting in the “American ‘attorney and counselor-at-law,’ privileged to practice all branches of his profession in all courts equally.” The unitary bar theory,
in Reed’s view, obscured the real distinctions between the law schools, mainly the divide between the full-time national law schools and the local law or part-time law schools, which “differ[ed] vastly from one another in type of law studied, in methods of instruction, and in the amount of actual work represented by their degree.”164 The problem here was that the unitary ideal forced each type of law school to try to compete with the other, to the detriment of each: “Coming, however, into direct competition with one another under the accepted dogma of a unitary bar, each affects injuriously the other’s development.”165 Further, the notion of a unitary bar was at odds with the needs of the increasingly pluralistic society that was 1920s America.166

In Reed’s estimation, the three types of emerging law schools—full-time national, full-time local, and part-time evening—represented different approaches to legal education that should be encouraged and strengthened rather than homogenized or suppressed:

Each has seen clearly that if all American lawyers were educated in accordance with the other’s plans, we should be in a bad way. . . . If [some] thought . . . had been expended upon the problem of dividing the bar along lines that can be justified . . . we should hardly have been in so bad a situation as we are now, when the schools are. . . . wrangling for possession of a field too large for any of them to cover in its entirety. The scholarly law school dean properly seeks to build up a “nursery for judges” that will make American law what American law ought to be. The practitioner bar examiner, with his satellite schools, properly seeks to prepare students for the immediate practice of the law as it is. The night school authorities, finally, see most clearly that the interests not only of the individual but of the community demand that participation in the making and administration of the law shall be kept accessible to Lincoln’s plain people. All these are worthy ideals. Taken together, they roughly embrace the service that the public expects from its law schools as a whole. But no single institution, pursuing its special aim, can attain both the others as well.167

By permitting this differentiation to thrive, Reed estimated that schools would be able to focus on what they each did best, producing graduates

164 THE REED REPORT, supra note ___ at 63.
165 THE REED REPORT, supra note ___ at 64. Reed posited that “the night schools are damaged by the obligation placed upon them to cover the same curriculum as the day schools,” Id. at 57. The full-time schools “are so fearful of losing students to [the night schools], that they hesitate to raise their own entrance requirements to the level that they really believe in. Id. at 58. Bar examiners, eager not to favor graduates of one type of school over the other, “are obliged to limit the scope of their enquiries to those elements that any law school, offering the standardized curriculum, must provide—something that even the more poorly trained of the night school students can pass, at least with the aid of special coaching . . . .” Id. at 59.
166 See STEVENS, supra note ___ at 113.
167 THE REED REPORT, supra note ___ at 417–18.
who were well-suited for the kind of lawyering that was the focus of their respective schools.\textsuperscript{168}

The ABA Section of Legal Education and Admissions to the Bar, which in 1919 superseded the abolished Committee on Legal Education and Admissions to the Bar,\textsuperscript{169} received an early draft of the Reed report in 1920 and did not like what it saw.\textsuperscript{170} It promptly formed a special committee chaired by Elihu Root, which met in March and May of 1921 and was tasked with developing its own recommendations for improving legal education. Regarding Reed’s suggestion that the diversity in types of law schools should be encouraged, the Root report stated as follows:

Turning first, then, to a consideration of what a lawyer’s training should be, we meet the suggestion that there must be different kinds of training to produce different kinds of lawyers.

With this position we do not agree. In spite of the diversity of human relations with respect to which the work of lawyers is done, the intellectual requisites are in all cases substantially the same.\textsuperscript{171}

The Root committee’s view was that differentiating among law schools meant tolerating law schools of lesser quality: “Nor can there be tolerated a recognized distinction between good and poor legal education. There should be no distinction . . . . [W]e cannot favor the continuation of a class of incompetent practitioners.”\textsuperscript{172} Uniformity was to be preferred, which the special committee went about pursuing by recommending that all bar applicants be required to have graduated from law school complying with prescribed standards, that they be required to have completed at least two years of study in college, and that the course of full-time study of law be three years.\textsuperscript{173}

The Root committee acknowledged the need for afternoon and evening law schools to accommodate the student who had to work to support himself and his family; however, it rejected the idea that such schools should be operated with what it viewed as lower educational standards.\textsuperscript{174} Finally, the Root committee recommended that “a law school shall not be

\begin{footnotes}
\textsuperscript{168} THE REED REPORT, supra note ___ at 417–18 (“[T]he independent development of each type of law school will naturally result in a considerable variation in the kind of professional work for which its products are especially fitted.”).

\textsuperscript{169} 42 REP. AM. BAR ASSN. 88–89, 121–131 (1919).

\textsuperscript{170} STEVENS, supra note ___ at 116.

\textsuperscript{171} Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the ABA, 44 ABA REP. 679, 681 (1912).

\textsuperscript{172} Id. at 681–682.

\textsuperscript{173} Id. at 683–685.

\textsuperscript{174} Id. at 683 (“But in recognizing the necessity for afternoon and evening schools we do not recognize the propriety of permitting such schools to operate with low educational standards. . . . On the contrary, the democratic necessity for afternoon and evening schools compels a lifting of these schools to the highest standards which they can be expected to reach.”).
\end{footnotes}
deemed competent to educate students for the bar unless it provides an adequate library available for their use” and that a school "have among its teachers a sufficient number giving their entire time to the school." These requirements, of course, would prove to be more burdensome to night schools and local, practice-connected schools that might lack sufficient funds to maintain a complete law library and whose instructors were principally practitioners who devoted most of their time to law practice during the day. These requirements all meant the homogenization of law schools around standards that tilted in favor of the national, full-time law schools, to the detriment of night schools and other alternative types of law schools that might have otherwise been able to develop, the latter being schools that non-elites and working class individuals were more likely to be able to attend.

One can hardly quarrel with the notion that there should not be law schools that expressly aspire to lower educational standards or knowingly produce a class of incompetent practitioners. But that is a straw man, as such was not the proposition furthered by Reed in his report. Rather, the idea was that the variation among types of law schools should be recognized in a way that permits each to focus on their respective strengths in service of various segments of the public and bar. Reed did not know what such a regime would look like in its particulars, but it is likely that he would endorse moves from some quarters today to get the ABA to amend its approval standards to allow creative flexibility among the law schools; that is, efforts such as those that relax the tenure requirement in favor of alternative means of giving faculty security of position might permit some

178 See id. at 419:

The more scholarly institutions may in time be glad to lighten their own burden by throwing upon schools of other types responsibility for certain portions of this broad field. Conveyancing, probate practice, criminal law and trial work are examples of topics that seem particularly appropriate for the relatively superficial schools. All this is mere guesswork, however. It is not even certain that a rigorous functional division of the bar will ever develop. The dividing line between the different types of lawyers may be determined by the economic status of the client rather than by the nature of the professional service rendered. The general principle of a differentiated profession is something that we already have, and could not abolish if we would. The particular principle of a functionally divided bar is something that we may or may not be able eventually to introduce, as one means for making the general principle work better.

179 See ABA Standards Review Committee, Standards and Interpretations on Faculty—Terms & Conditions (July 10, 2011 Discussion Draft) (presenting two alternative proposals that relax or eliminate the requirement of faculty tenure). See also Mark Hansen, ABA Committee Considers Changes in Terms and Conditions of Law School Employment Policies, ABA JOURNAL (Jul. 11, 2011), available at
schools, for example, to build a faculty of practitioners who practice during the day and teach only at night.\textsuperscript{180} Relaxing other standards—such as the full-time faculty and library requirements or the limitations on distance education\textsuperscript{181}—might similarly free law schools to deliver an education sufficient to serve a different segment of the bar than might a graduate of a national full-time law school.

The challenge would be on the licensing side; state licensing authorities would be responsible for determining whether graduates of all law schools were prepared to practice, something most bar exams as structured at the time largely failed to do.\textsuperscript{182} Beyond making bar exams a better judge of practice-readiness and legal competence,\textsuperscript{183} one could imagine a differentiated bar with various levels of licensure. Such a system would not have to mimic the barrister-solicitor distinction of England\textsuperscript{184} precisely, but that model at least could be an example of where to start the thought process. Alternatively, phased licensure could be considered, with probationary or apprenticeship periods preceding full admission, as is currently the approach in Canada.\textsuperscript{185} Whatever the specifics might be, revising the ABA standards in a way that permits flexibility while ensuring that basic levels of quality are maintained—in tandem with improved state bar admissions standards—seems to be the ideal that Reed was endorsing.

\textsuperscript{180} See, e.g., Birmingham School of Law, http://www.bsol.com/ (describing a non-ABA-accredited school taught by practicing lawyers and judges whose graduates may sit for the Alabama bar exam).

\textsuperscript{181} Current ABA Standards limit the credit that students may receive through distance education to 4 hours in any term and 12 hours overall. ABA Standard 306. The Standards Review Committee is considering revising this standard, but only to permit 15 hours total of distance education to count towards the J.D. degree. Currently, there is one completely online law school, The Concord School of Law, which is ineligible for ABA approval due to Standard 306. However, one of its graduates did successfully petition the Massachusetts Supreme Judicial Court for permission to sit for that state's bar exam, which he passed. See Kristina Horton Flaherty, Court Win for Online Law School Grad, CALIFORNIA BARRISTERS JOURNAL (January 2009) at http://archive.calbar.ca.gov/Archive.aspx?articleId=94802&categoryId=94651&month=1&year=2009.

\textsuperscript{182} Cf. THE REED REPORT, supra note ___ at 59 (“The actual situation is that neither the tests of the state nor those of the law schools serve to prevent incompetents from flooding the profession.”).

\textsuperscript{183} See, e.g., ALI-ABA Continuing Professional Education & The Association of Continuing Legal Education, Equipping our Lawyers: The Final Report of the Critical Issues Summit, Recommendation 5 (2010), available at https://www.equippingourlawyers.org/documents/final_report.pdf ("Regulatory authorities should consider restructuring one-time bar examinations into phased examinations over time, linked in part to attainment of legal practice skills, with some parts of the examination occurring as early as in the law school years.").

\textsuperscript{184} See MARY ANN GLENDON, MICHAEL WALLACE GORDON & CHRISTOPHER OSAKWE, COMPARATIVE LEGAL TRADITIONS 546–49 (2d ed., West 1994) (describing the distinction between English barristers and solicitors).

\textsuperscript{185} See The Law Society of Upper Canada, Articling Program: What You Need to Know at http://www.lsuc.on.ca/ArticlingNeedstoKnowInfo/.
and would seem to be a way to free law schools to pursue their respective strengths without having to devote resources toward compliance with standards that do not truly speak to their core mission and the segment of the bar they serve.

But this was not to be; the Section rebuffed the Reed Report’s recommendation to permit the development of fundamentally different types of law schools in favor of a unitary set of standards that required all law schools to aspire toward and satisfy its vision of what was required to make a law school educationally sound.186 There was notable opposition to the standards proposed by the Section; Dean Edward T. Lee of the John Marshall Law School of Chicago argued:

The effect of the adoption of the recommendations would be to place the control of legal education through the country in the hands of the deans of a few large day law schools who have the fate of law teachers in their hands. It would close the profession of the law to all save the leisure class of youth with means sufficient to obtain college and law school training . . . .187

Nonetheless, the ABA approved the Section’s recommendations at its 1921 meeting188 and they were subsequently approved by a Conference of Bar Association Delegates held in Washington, D.C. in 1922.189

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186 See 44 ABA REP. 679, 683 (1921):
To require a law-school education without setting standards for the law schools would be worse than useless. Any man or group of men professing to teach law to students may be said to be conducting a law school, no matter how inferior may be the abilities of the students, the nature of the instruction or the physical facilities of the plant. . . . We, therefore, propose not only that a law school education shall be required, but that such education must be obtained in a school complying with certain prescribed standards.

See also 46 REP. AM. BAR ASS’N 678 (1923) (“The Council has come to the conclusion that a school, to be in the approved list, must comply as to all of its students. Some schools or some institutions conduct classes both for full time and part time students. Some of these have arranged to comply with the standards of the American Bar Association or announced that they will in the near future comply with such standards as to their full time students, but have not arranged to so comply as to their part time students. The Council has concluded that such schools cannot be placed on the approved list.”).

187 44 REP. AM. BAR ASS’N 668 (1921).
189 45 REP. AM. BAR ASS’N 482–84, 584 (1922).
C. Twentieth Century Critiques & Reforms

"Is it not plain that, without giving up entirely the case-book system or the growing and valuable alliance with the so-called social sciences, the law schools should once more get in intimate contact with what clients need and with what courts and lawyers actually do?"

Jerome Frank, 1933

The ABA’s determination to impose its unitary vision of law schools based on the Langdell model—three years of full-time study (or its equivalent if part-time), centered around large physical libraries, and taught by full-time faculty members removed from the practice of law—was a victory for the full-time national law schools that furthered the Harvardization of legal education. It was not long, however, before another major threat to the Langdellian approach to the study of law in the first half of the 20th Century reared its head. This challenge came from what came to be referred to as the legal Realists, who challenged “the Langdellian notion of the law as an exact science, based on the objectivity of black-letter rules.” Instead, the Realists posited that the operation of the law in the real world was less coherent and objective than Langdell’s scientific vision of the law suggested. With law as a value-laden process more so than a neutral and consistent body of enduring principles, Langdell’s belief in cases as the vehicle for learning legal doctrine, and in the mastery of doctrine and principles as the route to becoming a good lawyer, became subject to doubt.

In 1933, Jerome Frank reflected the Realists’ view in his withering critique of the Langdellian case method:

Ostensibly, the students were to study cases. But they did not and they do not study cases. They do not even study the printed records of cases (although that would be little enough), let alone cases as living processes. Their attention is restricted to judicial opinions. But an opinion is not a decision. A decision is a specific judgment, or order or decree entered after a trial of a specific lawsuit between specific litigants. There are a multitude of factors which induce a jury to return a verdict, or a judge to enter a decree. Of those numerous factors, but few are

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191 See THE REED REPORT, supra note ___ at 410 (“The path indicated by Harvard . . . has been followed by all the schools. Their main activities are devoted to instruction in the relatively narrow . . . field of the judge-made technical law.”); id. at 411–12 (describing innovations in legal education emanating from Harvard that took hold, including the focus on “national” law, introduction of the case method, and imposition of the requirement of preliminary college training before entering law school). For a fuller account of the standardization movement by the ABA and the AALS, see STEVENS, supra note ___ at 205–213.
192 STEVENS, supra note ___ at 156.
193 Id.
set forth in judicial opinions. And those factors, not expressed in the opinions, frequently are the most important in the real causal explanation of the decisions.\textsuperscript{194}

From the Realist perspective, the law in books—particularly books limited to reports of appellate opinions—was not the sum total of what constituted the law nor even the best source for understanding law or legal practice.\textsuperscript{195} Frank argued for the study of complete case files—not simply appellate opinions—and for study of the work of lawyers in practice and the work of the courts:

\begin{quote}
[T]he study of cases . . . should be based to a very marked extent on reading and analysis of complete records of cases—beginning with the filing of the first papers, through the trial in the trial court and to and through the upper courts. Six months properly spent on one or two elaborate court records, including the briefs (and supplemented by reading of text-books as well as upper court opinions) will teach a student more than two years spent on going through twenty of the case-books now in use.\textsuperscript{196}
\end{quote}

Karl Llewellyn, during his time at Columbia Law School, raised similar points, suggesting the case approach used in business schools as a way of improving on the Langdellian case method.\textsuperscript{197}

Another Realist critique was of the abstract focus and dearth of practical training that characterized law schools. Fred Rodell of Yale found fault with the focus on abstractions rather than on practical legal problem-solving when he wrote, “Thus, law school courses, since they are cut out of the pseudo-science of Law, inevitably focus on generalities and abstractions rather than on the solution of specific problems.”\textsuperscript{198} In 1928, Alfred Reed of the Carnegie Foundation commented on the need for more practical instruction in his second report on legal education in which he faulted the law schools for their failure to provide students with practical experience:

\begin{quote}
[A]ll activities of the school are necessarily conducted under artificial conditions. The hurly-burly of actual practice is systemized for the student in a manner that it never is when an authentic client begins to tell him his woes.
\end{quote}

\textsuperscript{194} Frank, \textit{Why Not a Clinical Lawyer-School?}, supra note \_, at 910 (emphasis in original).

\textsuperscript{195} See Jerome Frank, \textit{What Constitutes a Good Legal Education}, 19 AM. BAR ASS'N J. 723, 726 (1933): “The law student should learn, while in school, the art of legal practice. And to that end, the law schools should boldly, not slyly and evasively, repudiate the false dogmas of Langdell. They must decide not to exclude, as did Langdell—but to include—the methods of learning by work in the lawyer's office and attendance at the proceedings of courts of justice . . . They must repudiate the absurd notion that the heart of a law school is its library.”

\textsuperscript{196} Frank, \textit{Why Not a Clinical Lawyer-School?}, supra note \_, at 916 (emphasis in original).

\textsuperscript{197} Karl Llewellyn, \textit{The Current Crisis in Legal Education}, 1 J. LEGAL EDUC. 211, 215 (1948–1949) (“Consider, for example, the possibility of building up our so-called cases beyond the judicial opinion into something resembling the completeness of the cases gathered for the Harvard Business School.”). For an exposure to the Harvard Business School case method, see \textit{The Case Method at HBS}, Harvard Business School, at http://www.hbs.edu/teaching/inside-hbs/.

\textsuperscript{198} Fred Rodell, \textit{Woe Unto You, Lawyers!} (1939).
This systemization is indispensable as a means of ensuring him adequate resources of information and of developed reasoning power upon which to draw. But there still remains the task of marshalling these resources, of focusing his scattered acquisitions upon the unlabeled and multifarious collection of facts and aims with which he will be called upon to deal. Skilled ability to do this is what distinguishes the lawyer from the legal scholar, the expert practitioner from the man who knows, or who is qualified to ascertain, the law. 199

Reed favored further experimentation with legal clinics associated with law schools as a way of ameliorating this condition. 200 Jerome Frank suggested the same only a few years later. 201

These points were well taken; however, they did not lead to a wholesale overhaul of legal education away from the Langdellian model. Instead, law schools responded by supplementing their curricula with practice courses in the form of legal clinics. 202 By 1951, there were 28 clinics maintained by law schools, independent legal aid societies, or public defender offices. 203 The movement grew stronger over the next two decades, resulting in clinical programs at nearly half of the law schools in the country by the early 1970s. 204

Although the rise of clinical legal education was a major innovation in how law schools prepared their students for practice, very little change in the law school program had occurred overall. 205 Indeed, criticism of the legal profession persisted in the 1970s, a critique that extended to law schools as the near exclusive route to practice. 206 As the second and third years of law school had become largely elective and focused on courses not necessarily oriented towards practice, bar admissions authorities began considering imposing practice course requirements as prerequisites to admission. 207 In 1971, the AALS issued the report of its Curriculum Study

199 REED II, supra note ___ at 215.
200 Id. at 216–221.
201 Frank, Why Not a Clinical Lawyer-School?, supra note ___ at 917 (“Suppose, however, that there were in each law school a legal clinic or dispensary.”).
202 STEVENS, supra, note ___ at 214–15. Other reforms were implemented during the post World War II period as well, including the introduction of elective courses, seminar courses, introductory law courses, writing programs, small group discussions, reduced class sizes, and the like. See STEVENS, supra, note ___ at 211–14.
203 Id.
204 Id. at 216.
205 STEVENS, supra, note ___ at 232 (“[B]y the mid-1960s . . . [there had been much talk of change, but little change had occurred.”). Readers should consult Steven’s book on the history of legal education for a much more complete account of what transpired in legal education during this time period.
206 See STEVENS, supra, note ___ at 232–38.
207 See STEVENS, supra, note ___ at 238–39 (discussing the Second Circuit’s proposal to require that applicants have taken evidence, civil procedure, criminal procedure, professional responsibility, and trial advocacy); id. at 239–40 (discussing efforts of other jurisdictions to impose law school course prerequisites to bar admission).
Project—known as the “Carrington Report”—which called for a curriculum that emphasized practice-oriented courses in the first year. A 1972 report sponsored by the Carnegie Commission on Higher Education noted the encouraging expansion in clinical legal education but cautioned that proper supervision and instruction were required to make real life experiences edifying and educationally sound and doubted whether clinical education ultimately could be “the solution” to the host of ills that plagued legal education given its costs.

In 1979, the ABA entered the dialogue by publishing the report of its Task Force on Lawyer Competency entitled “The Role of Law Schools,” in which it observed, “Law schools, have not . . . undertaken to provide such comprehensive training that individuals emerge upon graduation as fully competent ready-to-practice lawyers.” The Task Force then emphasized the need for improvement in the following areas:

(a) developing some of the fundamental skills underemphasized by traditional legal education; (b) shaping attitudes, values, and work habits critical to the individual’s ability to translate knowledge and relevant skills into adequate professional performance; and (c) providing integrated learning experiences focused on particular fields of lawyer practice, including but not limited to trial practice.

Toward that end, the Task Force recommended that law schools provide instruction in fundamental skills critical to lawyer competence: effective writing, oral communication skills, fact gathering, interviewing, counseling, and negotiation skills. It went on to recommend the teaching of these fundamental lawyer skills in small classes, that schedules be adjusted to “provide the opportunity for periods of intensive instruction in fundamental lawyer skills,” that law schools encourage more cooperative law student work, and that “law schools should make more extensive instructional use of experienced and able lawyers and judges.” Also noteworthy was its recommendation that law schools “develop and use more comprehensive methods of measuring law student performance than the typical end-of-the-term examination” and that “[s]tudents should be given detailed critiques of their performance.” Finally, with respect to


209 PACKER & EHRLICH, supra note ___ at 42–43, 46.

210 THE CARRINGTON REPORT, supra note ___ at 11.

211 THE CARRINGTON REPORT, supra note ___ at 14.

212 Id. at 3.

213 Id.

214 Id.
the academic program, the Task Force urged law schools to “seek to achieve greater coherence in their curriculum,” noting that “the three-year program should build in a structured way.”\(^{215}\) Notwithstanding these recommendations, when a proposal to require that law schools offer practical skills instruction as a condition of accreditation was presented to the ABA by the Council of the Section on Legal Education, the ABA softened the proposal by limiting it to an interpretative paragraph calling for skills training rather than an approval standard mandating such training.\(^{216}\)

More than a decade later, legal education still was perceived as inadequately preparing students for practice, as little had changed in how law schools educated their students.\(^{217}\) The ABA spoke to this concern in a 1992 report known as the MacCrate Report.\(^{218}\) The MacCrate Report outlined a series of skills and values that were deemed to be essential for competent representation, and then recommended that law schools offer courses that effectively instruct students in those areas.\(^{219}\) The fundamental lawyering skills outlined included problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, knowledge of litigation and ADR procedures, law practice management, and the ability to recognize and resolve ethical dilemmas.\(^{220}\) The four values suggested by the report were the provision of competent representation, striving to promote justice, fairness, and morality, striving to improve the profession, and professional self-development.\(^{221}\) The report also explored the state of skills instruction in law schools at the time, finding that a majority of law graduates had only one or no professional skills courses beyond basic legal research and writing courses or moot court experiences. The report found that clinical programs were generally available to only 30 percent of law students at schools where such courses were offered, with skills training courses occupying only nine percent of the total instructional time at law schools.\(^{222}\)

An important perspective offered by the MacCrate Report was the importance of the entire legal educational continuum—pre-law, law school, bar admissions, and continuing legal education—and it addressed the need

\(^{215}\) Id.

\(^{216}\) Id. at 140–41.

\(^{217}\) Id. at 330–34. The report identified three characteristics of effective lawyering skills teaching: the “development of concepts and theories underlying the skills and values being taught; opportunity for students to perform lawyering tasks with appropriate feedback and self-evaluation; reflective evaluation of the students’ performance by a qualified assessor.” Id. at 331.

\(^{218}\) THE MACCRAE REPORT, supra note ___

\(^{219}\) THE CARNEGIE REPORT, supra note ___ at 93 (“[T]hese efforts failed to change the standard pattern of law school education.”).

\(^{220}\) Id. at 331.

\(^{221}\) Id. at 138–40.

\(^{222}\) Id. at 240–41.
for improvements to occur at each stage. Ultimately, the report concluded
that greater attention should be paid to “the linkage between the several
phases of lawyers’ education” if the gaps in professional legal education are
to be filled.223 Although the report spawned some efforts to increase skills
instruction in law schools, such training has remained peripheral to legal
education224 and no grand effort to coordinate the various phases of legal
education has materialized.

D. Contemporary Critiques

In 2007 a group of researchers compiled a report entitled Best Practices for
Legal Education that began by echoing the MacCrate Report’s charge that
multiple stages along the legal education continuum had substantial room
for improvement.225 Specifically, the report noted that law graduates “are
not sufficiently competent to provide legal services to clients or even to
perform the work expected of them in large firms” and that survey after
survey has reported a decline in lawyer professionalism.226 However, the
true focus of Best Practices was on how law schools could better design and
deliver a curriculum that prepared students for practice. As the MacCrate
Report had done a decade before, Best Practices spoke of the need for skills
and values training by calling for “context-based education” as the means
for giving students the problem-solving opportunities they need to become
competent and effective legal practitioners.227 The report also dug into
what is wrong with traditional law school teaching and assessment methods,
proposing the use of a diversity of approaches that are connected with
developing competent and thoughtful practitioners.228 Overall, the report’s
core concern was that law schools should recognize the broad array of skills
and attributes that successful lawyers need to have beyond legal knowledge
and analytical ability and incorporate courses and methods that attend to
those competencies.

Following closely on the heels of the Best Practices report in 2007 was
another major critique of legal education, a report of the Carnegie
Foundation entitled Educating Lawyers: Preparation for the Profession of Law.229
The report was the product of a two-year study that included an extensive
literature review, consultation with the AALS and the Law School

223  Id. at 320–21. The report proposed the creation of a national institute to attend to this
coordination. Id.
224  THE CARNEGIE REPORT, supra note ___ at 94.
225  STUCKEY et al., supra note ___ at 11–36.
226  Id. at 26–27.
227  Id. at 141.
228  Id. at 207–261.
229  THE CARNEGIE REPORT, supra note __.
Admissions Council, and site visits to a representative sample of 16 American and Canadian law schools, including public and private schools, more selective and less selective schools, freestanding schools, and schools that served certain ethnic minority groups. A central premise of the Carnegie Report is that the education of professionals is a complex and unique enterprise that cannot simply focus on the transmission of expert knowledge, but must also focus on instilling the specialized skills, standards, judgment, and values that define practice in a profession. The challenge for professional education is to weave the various components of professional training into a whole that attends to the interests of educators, practitioners, and the public to be served by the profession.

According to the 2007 Carnegie study, this has been the singular challenge of legal education, as its modern linkage with the research university has stood in tension with the historical connection between the community of practitioners and young legal apprentices. The university connection has made legal education predominately academic in character, focusing on teaching and studying law as a science, “put[ting] a premium on formal knowledge, abstracted from context.” This positivist orientation—which, as we have seen, characterized the views of Langdell—led to a view that the traditions of practice—such as craft, judgment, and professional responsibility—were too subjective and uncritical, a perspective that “undermined the academic legitimacy of practical knowledge” and “spelled the eclipse of traditional forms of practitioner-directed apprenticeship by academic instruction given by scholar-teachers.”

The triumph of the academy in legal education has resulted in a focus on training in legal knowledge and legal analysis rather than on learning to practice. Complete professional education, however, must be defined by “three apprenticeships” that the Carnegie Report authors describe: the cognitive apprenticeship focused on expert knowledge and modes of thinking; the apprenticeship of practice, which trains students in “the forms of expert practice shared by competent practitioners”; and the apprenticeship of identity and purpose, which “introduces students to the purposes and attitudes that are guided by the values for which the

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230 THE CARNEGIE REPORT, supra note __ at 15.
231 THE CARNEGIE REPORT, supra note __ at 3–4.
232 THE CARNEGIE REPORT, supra note __ at 4.
233 See supra TAN __.
234 THE CARNEGIE REPORT, supra note __ at 4–5.
235 THE CARNEGIE REPORT, supra note __ at 6–7 (“In its quest for academic respectability, legal education would come to emphasize legal knowledge and reasoning at the expense of attention to practice skills, while the relations of legal activity to morality and public responsibility received even less direct attention in the curriculum.”).
professional community is responsible.”

To be successful in their goal of educating lawyers, law schools must “initiate learners into all three apprenticeships.”

Unfortunately, law schools focus heavily on the cognitive apprenticeship; “For many students, neither practical skills nor reflection on professional responsibility figure significantly in their legal education. The academic setting clearly tilts the balance toward the cognitive and intellectual.”

The Carnegie Report contrasts this tilt in legal education with the laboratory experience that characterizes engineering education and the extensive clinical work that is the hallmark of medical education.

The academic focus of professional legal education has resulted in a shift in teaching methods, away from “apprenticeship, with its intimate pedagogy of modeling and coaching, toward reliance on the methods of academic instruction, with its emphasis on classroom teaching and learning.”

Further, the Carnegie Report notes that the “signature pedagogy” of law school—the Socratic case-dialogue method—leads to two major weaknesses of typical law school education: “[T]he casual attention that most law schools give to teaching students how to use legal thinking in the complexity of actual law practice” and “law schools’ failure to complement the focus on skill in legal analysis with effective support for developing the ethical and social dimensions of the profession.”

These weaknesses “prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner” and leave students with an underdeveloped sense of professional judgment and responsibility.

Although there have been successful efforts in recent decades to expand practice-oriented education and apprenticeship learning methods in law schools, these experiences tend to be disconnected from the main

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237 THE CARNEGIE REPORT, supra note __ at 28.
238 THE CARNEGIE REPORT, supra note __ at 28.
239 THE CARNEGIE REPORT, supra note __ at 79.
240 Although engineering education does include lab work, the Carnegie Foundation—in a separate report—has critiqued engineering programs for how labs are poorly designed and integrated into a curriculum that remains dominated by formal knowledge and analysis. SHERI D. SHEPPARD, ET AL., EDUCATING ENGINEERS: DESIGNING FOR THE FUTURE OF THE FIELD, 16, 74 (Carnegie Foundation for the Advancement of Teaching 2009).
241 THE CARNEGIE REPORT, supra note __ at 79–81. Clinical clerkships in medical education are a legacy of the Flexner Report, a product of the Carnegie Foundation. MOLLY COOK, ET AL., EDUCATING PHYSICIANS: A CALL FOR REFORM OF MEDICAL SCHOOL AND RESIDENCY, 13, 82 (Carnegie Foundation for the Advancement of Teaching 2010) (“The third year [of medical school], dedicated to patient care and investigation of clinical problems presented by hospitalized patients, is a legacy of the Flexnerian reforms . . . .”).
242 THE CARNEGIE REPORT, supra note __ at 25.
243 THE CARNEGIE REPORT, supra note __ at 188.
244 THE CARNEGIE REPORT, supra note __ at 188.
245 THE CARNEGIE REPORT, supra note __ at 188; see also id. at 140 (“Insofar as law schools choose not to place ethical-social values within the inner circle . . . . legal education may inadvertently contribute to the demoralization of the legal profession and its loss of a moral compass . . . .”).
curriculum, meaning that the three-critical elements of legal professionalism—“conceptual knowledge, skill and moral discernment”\textsuperscript{246}—remain artificially distinct and thus are insufficiently transmitted to novice professionals:

\textquote{The threefold movement between law as doctrine and precedent (the focus of the case-dialogue classroom) to attention to performance skills (the aim of the apprenticeship of practice) and then to responsible engagement with solving clients’ legal problems—a back-and-forth cycle of action and reflection—also characterizes most legal practice. The separation of these phases into distinct areas of the curriculum, or as separate apprenticeships, is always an artificial “decomposition” of practice. The pedagogical cycle is not completed unless these segregated domains are reconnected.\textsuperscript{247}}

Ultimately, it is these deficits—insufficient education in the skills and values of professional legal practice, an over-use of the academic case-dialogue method of instruction, and the poor integration of practical and professionalism instruction into the dominant cognitive curriculum—that are contemporary legal education’s greatest weaknesses.

Recent studies and practitioner surveys reflect the sense that the Langdellian law school is insufficiently connected with the realities of modern practice. The \textit{After the JD} survey reports only moderate satisfaction with the level of practice preparedness that law graduates received in law school:

When [survey respondents were] asked to reflect on their legal education, however, most were not especially enthusiastic about the specific role of their law schools in the transition to practice. On the question of whether law school prepared them well for their legal careers, the median response is exactly in the middle (neither agree nor disagree). Respondents tended to agree—but not strongly—with the proposition that law school teaching is too theoretical and unconcerned with real-life practice. They also evinced a desire for more practical training in their assessment of the most helpful law school courses. Both clinical and legal writing courses received higher ratings than more conventional law school offerings. Most helpful in the transition to practice, however, was experience working during law school summers and during the year.\textsuperscript{248}

Respondents to the \textit{Law School Survey of Student Engagement} (LSSSE Survey) corroborate these findings, showing that “[f]orty percent of law students

\textsuperscript{246} \textit{The Carnegie Report}, supra note ___ at 12.
\textsuperscript{247} \textit{The Carnegie Report}, supra note ___ at 124.
\textsuperscript{248} \textit{NALP Foundation for Law Career Research and Education} \\
\textit{After the JD: First Results of a National Study of Legal Careers} 79 (2004).
felt that their legal education had so far contributed only some or very little to their acquisition of job- or work-related knowledge and skills."\textsuperscript{249}

Respondents to the LSSSE Survey also indicated that the Carnegie Report's assessment regarding the insufficient professionalism and ethical training in law schools has some validity: "[O]nly half of students reported that law school prepared them well . . . to deal with ethical dilemmas that may arise as part of law practice."\textsuperscript{250} Further, survey results showed that clinical participation and pro bono work was correlated with a higher degree of preparation in the areas of "understanding the needs of future clients, working cooperatively with colleagues as part of a legal team, serving the public good through their profession, and understanding professional values that will serve them in their legal careers."\textsuperscript{251} With only a third of law students engaging in clinical work during law school,\textsuperscript{252} these lessons are not being fully diffused across all matriculants. Recent surveys of corporate general counsels confirm the unsatisfactory state of lawyer professionalism; a majority of those surveyed reported being dissatisfied with outside counsel because of a failure to keep the client adequately informed, non-responsiveness to client interests, making decisions without client authorization, and the failure to give clear advice.\textsuperscript{253}

We see, then, that the critique of legal education has a long pedigree, traversing the 20\textsuperscript{th} Century and enduring through the present day. Indeed, the nature of the critique has been remarkably consistent, focusing on the poor connection between traditional legal education and legal practice.


\textsuperscript{250} Law School Survey of Student Engagement, 2010 Annual Survey Results, \textit{Student Engagement in Law School: In Class and Beyond}, 8 (2010).

\textsuperscript{251} Id.

\textsuperscript{252} See National Association of Law Placement (NALP), \textit{2010 Survey of Law School Experiential Learning Opportunities and Benefits} (2011) (showing 30.2\% of survey respondents had participated in at least one legal clinic).

IV. THE CURRENT STATE OF LEGAL EDUCATION

“[T]he [law] schools . . . must be brought into a closer sympathy and contact with the profession than is now to be found . . . It is unjust to students, and a fraud on the public, to recommend them as practitioners until they reach some creditable degree at least of skill and knowledge.”

American Bar Association Committee on Legal Education and Admission to the Bar Report, 1879

Has contemporary legal education moved beyond this history? Although still fundamentally consonant with the Langdellian model, law schools have reformed in many ways since Langdell’s time. Professors have varied their teaching methods in ways that build on or depart from the case method. Law schools have pursued and implemented many of the reforms suggested in the reports reviewed above, offering basic legal research and writing training in the first year, requiring upper-level extensive writing experiences in line with the current ABA Standards, and ensuring that students have some opportunity to experience small class sizes and group work with other students. The relevance of other disciplines to the study of law has been recognized and incorporated into the curriculum through the introduction of interdisciplinary subjects or the infusion of such learning into traditional law courses. The clinical legal training movement has successfully imported live-client practice experiences into the law

254 2 REP. AM. BAR ASS’N 209, 219 (1879).
255 See, e.g., Harvard Law School, First-Year Legal Research and Writing Program, http://www.law.harvard.edu/academics/degrees/jd/fylrwp/ (“The First-Year Legal Research and Writing Program (LRW) is a series of sequenced, interrelated exercises introducing students to the way lawyers analyze and frame legal positions in both litigative and transactional settings, conduct legal research, and present their work in writing and in oral argument.”).
256 See, e.g., NYU School of Law, Writing Requirement, http://www.law.nyu.edu/academicservices/degreerequirements/jdprogram/writingrequirements/index.htm (“In order to graduate, a student must produce an original analytic paper of substantial length (ordinarily at least 10,000 words in length and undergoes a comment and draft process) under the supervision of a faculty member.”); Columbia Law School, JD Writing Requirement, http://www.law.columbia.edu/academics/Registrar/writing (describing the details of their JD writing requirement).
257 See ABA Standard 302(a)(3) (requiring “at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year”).
258 The Cramton Report noted that some upper level class sizes are small “simply because they furnish instruction relevant to a less heavily chosen career alternative or are less frequently elected for other reasons” and added that “[t]he instruction can be, but typically is not, significantly different in nature and method from that furnished in large classes. Cramton Report, supra note ___ at 23.
260 See, e.g., Northwestern University School of Law, First-Year Curriculum, available at http://www.law.northwestern.edu/academics/jd/1lplan.html (describing “the graduation requirement that every student take at least one course offering an interdisciplinary perspective on law and the legal system”).
affording students the opportunity to opt for such an experience. And, increasingly, law schools are offering practical skills training courses that teach students the skills they will need to have to practice law. Indeed, curricular reform is the order of the day, as schools rush to outdo each other in adjusting their programs in various ways to improve their ability to produce practice-capable graduates.

Although these contemporary reforms are appropriate moves in the right direction that will yield results on the margins, to this point they have not resulted in a wholesale change in the practice-readiness of American law school graduates, a failing reflected and explored in the 2007 Carnegie Report and other recent studies. Indeed, the numerous shortcomings of the American model of legal education have been documented extensively:

- Law school does not routinely provide training in many of the practice skill areas—such as drafting, counseling, planning, client development, management—needed to be a successful practitioner;
- only a tiny percentage of law schools require clinical training and the majority of students graduate with no clinical experience; its primary pedagogical approach (the case-dialogue method) is ineffective and demoralizing; its main approach to assessment remains the final essay exam, which

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261 See, e.g., NYU School of Law, Clinics—Lawyering and Learning in the New World, http://www.law.nyu.edu/academics/clinics/index.htm (describing its clinical program supported by 14 clinical faculty and 30 clinics).

262 Harvard Law School has recently expanded its clinical courses and faculty. See Elana Kagan, The Harvard Law School Revisited, 11 GREEN BAG 2D 475, 478 (2008) (“Over the past five years, we’ve hired eight new clinical faculty members, and the number of students enrolling in clinical work has more than doubled.”). Washington & Lee University School of Law is an example of a school that has broadly embraced extensive experiential learning as a requirement for all of its students. See WASHINGTON AND LEE SCHOOL OF LAW, Washington and Lee School of Law Announces Dramatic Third Year Reform, http://www.law.wlu.edu/news/storydetail.asp?id=376 (Mar 10, 2008). Northeastern University School of Law requires its students to work full time in live client settings in alternate quarters during the second and third years of law school. See Northeastern University School of Law, Cooperative Legal Education Program, http://www.northeastern.edu/law/co-op/.


264 STUCKEY et al., supra note ___ at ___.

265 Sonsteng et al., supra, note ___ at 337; John M. Burman, Oral Examinations as a Method of Evaluating Law Students, 51 J. LEGAL EDUC. 130, 132 (2001) (“[T]he required curriculum at many, if not most, American law schools virtually ignores at least half of the fundamental skills every lawyer should have.”).

266 See National Association of Law Placement (NALP), 2010 Survey of Law School Experiential Learning Opportunities and Benefits (2011) (showing 30.2% of survey respondents had participated in at least one legal clinic, 36.2% of respondents had taken part in an externship, and 40% of respondents had taken three or more practice skills courses).


268 Alan A. Stone, Legal Education on the Couch, 85 HARV. L. REV. 392, 407 (1971) (“Socratic teaching has been attacked as infantilizing, demeaning, dehumanizing, sadistic, a tactic for promoting hostility and competition among students, self-serving, and destructive of positive ideological values.”).
reflects little about the professional competency of students and comes too late to allow self-improvement; faculty incentives promote scholarship over the needs of students; many professors (particularly the more recent ones) have little or even no experience practicing law and lack membership in the bar; and law school costs so much that most graduates have mammoth, mortgage-like debts that limit their economically viable options after graduating. This is no way to produce competent legal professionals. A closer look as some of the pillars of law school education—its curriculum, its pedagogy, its assessment methods, and its faculty—reveal that what’s past is not only prologue, but it is largely our present, a fact that is problematic given the death of the apprenticeship and the dramatic changes in the law and legal practice since the time of Langdell.

A. The Curriculum

Contemporary law school curricula are dominated by legal doctrine, as was the case during the 19th Century. Currently, law school is typically a

269 Sonsteng, et al., supra note __ at 347 (“The traditional assessment system creates an illusion of higher achievement when there may actually be a deficiency in actual lawyering skills. Professors routinely observe students excel in written exams, but then watch as they struggle with interviewing and counseling clients.”).

270 Id. at 337–38 (“[T]he traditional law school model does not provide regular or relevant performance feedback, so students have little opportunity to improve.”).


272 A review of the faculty profiles at the more “elite” law schools reveal faculty members that have doctoral degrees in another discipline but no practice experience whatsoever, which cannot put such faculty in a strong position to train their students in the skills needed for practice. A 2003 study based on AALS data revealed that for those law professors hired between 1996 and 2000, of those with any practice experience (86.6% of the hires), the average number of years of experience was 3.7. Richard E. Redding, Where Did You Go to Law School? Gatekeeping for the Professoriate and its Implications for Legal Education, 53 J. LEGAL EDUC. 594, 601 (2003). See also Harry T. Edwards, A New Vision for the Legal Profession, 72 N.Y.U. L. REV. 567, 571 (1997) (“[A] number of young lawyers flee the ‘rat race’ after only a short stay. Often, very bright young lawyers seek to move from law practice to law teaching as quickly as possible, with little practical knowledge or professional experience. This creates a conundrum whereby many of these smart young people who escape to academia have nothing good to say about practice, though they are the ‘teachers’ of the next generation of the legal profession.”); Ann Juergens, Using the MacCrate Report to Strengthen Law-Client Clinics, 1 CLINICAL L. REV. 411, 412–13 (1994) (“[A]n excellent academic record at an ‘elite’ law school, law review, clerkship for an appellate judge, perhaps a few years at a big law firm, but relatively little first-hand knowledge of dealing with clients, transactions, the courtroom, real-life conflict and problem solving.”).


three-year program (when pursued full-time) that offers roughly the same basic set of first-year doctrinal courses—featuring traditional common law subjects—and legal research and writing instruction, followed by electives that offer doctrinal, skills, or professional/clinical instruction at the election of the student, culminating with a major writing requirement of some kind. Students generally are not required to take particular courses beyond the first year—professional responsibility or “PR” being a typical exception—nor is their course load typically organized around tracks or concentrations, though many schools do offer the option of pursuing courses within a specified area of focus. Although experiential learning is becoming something that many law schools are requiring students to have

275 Northwestern offers an exception with its two-year Accelerated J.D. Program. See Northwestern University School of Law, Accelerated JD, http://www.law.northwestern.edu/academics/ajd/. The University of Dayton School of Law offers a two-year option as well. See University of Dayton School of Law, Two-Year Juris Doctor Program, available at http://www.udayton.edu/learn/law/juris_doctor_two_year_option.php. Part-time programs tend to run four years. See, e.g., __.

276 Virtually every American law school requires the following courses in the first year of study: contracts, torts, property, criminal law, and civil procedure. SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, AM. BAR ASSN., A SURVEY OF LAW SCHOOL CURRICULA 25 (2004). Law schools vary in the courses they require in the first year beyond this basic diet, with many requiring additional doctrinal courses like constitutional law, administrative law, or transnational law, and some requiring practically-oriented courses focusing on lawyering or problem solving skills. See, e.g., Harvard Law School, Problem Solving Workshop, available at www.law.harvard.edu/registrar/winter-term/problem-solving-workshop.html.

277 The common law focus of the first-year curriculum is an inheritance from Langdell, who believed that the common law was the core feature of the American legal system, representing a coherent set of enduring principles that transcended politics and provided a rational guide for human behavior. Edward Rubin, What’s Wrong with Langdell’s Method and What to Do About It, 60 VAND. L. REV. 609, 624, 626 (2007).

278 The writing requirement is in part a product of a requirement imposed by the ABA for accreditation. See ABA Standard 302(a)(3) (requiring “at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year”).

279 See, e.g., Northwestern University School of Law, Second and Third Year Curriculum, available at http://www.law.northwestern.edu/academics/jd/2l_3lplan.html (“After first year, your educational plan is largely in your hands as there is only one mandatory class. You must take Legal Ethics, but all other courses are elective.”); Stanford Law School, The Program—Courses—Overview, available at http://www.law.stanford.edu/program/courses/ (“During the second and third year of law school students are encouraged to follow an academic curriculum customized to their individual interests.”).

280 The ABA Standards impose a requirement of giving students some legal ethics or professionalism training. ABA Standard 302(a)(5), Interpretation 302-9 (“The substantial instruction in the history, structure, values, rules, and responsibilities of the legal profession and its members required by Standard 302(a)(5) includes instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association.”).

281 Many schools offer the opportunity to pursue a concentration, which may or may not lead to a certification to that effect. See, e.g., Harvard Law School, Programs of Study, http://www.law.harvard.edu/academics/degrees/jd/pos/index.html (“To guide you in pursuing deepening knowledge and progression as you move through the three years of law school and to create a tool for better coordination and collaboration between faculty members, the faculty has developed ‘programs of study.’ Students do not sign up for any program; nor should any student feel compelled to adhere to one.”). However, the author is unaware of any school that requires all of its students to organize their courses around a substantive concentration.
at least one encounter with, 282 few schools require extensive practical skills and clinical training. 283 Under this traditional approach the primary focus within the law school curriculum is on doctrinal courses and the transmission of substantive knowledge, with experiential or clinical courses aimed at transmitting practice skills being elective offerings 284 mostly taught by a separate group of faculty members (clinical or adjunct professors) with different titles and status. 285

This focus on academic instruction is a legacy of the importation of legal education into the traditional university and the desire of early reformers such as Langdell and Harvard’s President Eliot, 286 and later the ABA and the Association of American Law Schools 287 to raise the standards and status of legal education from its apprenticeship roots. 288

282 For example, Gonzaga University School of Law imposes what they call an “Experiential Learning Requirement,” which they describe as “a capstone experience” completed through a clinical course or an externship. See Gonzaga University School of Law, Curriculum, http://www.law.gonzaga.edu/Academic-Program/curriculum/default.asp. See also, e.g., NYU School of Law, The Lawyering Program, http://www.law.nyu.edu/academics/lawyeringprogram/index.htm (“Lawyering introduces first-year students to the skills and the theory of the law in use through two semesters of simulated exercises in legal problem solving”); University of California, Irvine School of Law, Clinics, http://www.law.uci.edu/clinics/index.html (“Prior to graduation, each student will complete at least one semester of clinical education . . . .”). Data from a 2004 ABA report indicate that at that time, only 29 percent of law schools responding to a survey required some form of skills, clinical, or simulation course for graduation. Section of Legal Education and Admission to the Bar, Am. Bar Ass’n, A Survey of Law School Curricula 20 (2004).

283 Exceptions, of course, do exist and were mentioned previously, supra at note 236 (discussing experiential learning opportunities at Washington & Lee and Northeastern). Gonzaga University School of Law provides more practical skills training than is typical by supplementing its basic first-year legal research and writing courses with a “Litigation Skills & Professionalism Lab” (the life of a case) in the fall and a “Transactional Skills & Professionalism Lab” (the life of a commercial transaction) in the spring. Gonzaga University School of Law, Course Descriptions and Frequency, http://www.law.gonzaga.edu/Academic-Program/curriculum/Course-Descriptions/default.asp#LLM.

284 The Carnegie Report, supra note __ at 87 ("These lawyering courses cover a wide range, from research and legal writing in the first year, through trial advocacy and practice negotiation to clinical experience with actual clients. Typically, these are elective courses, optional for students.").

285 Id. at 87–88 (T)hey are most often taught by faculty other than those teaching the so-called substantive or doctrinal courses of the curriculum—a faculty that is not typically tenured and that has lower academic status.").

286 See supra TAN __. President Eliot once remarked that “law is to be learned almost exclusively from the books in which its principles and precedents are recorded, digested, and explained,” not from “the court or the law office.” Warren, History of Harvard Law School, supra note __ at 391–92.

287 See infra TAN; The Carnegie Report, supra note __ at 93:

Today’s standard model—the three-year curriculum, an emphasis on analytical training through the case-dialogue method, and work on a law review journal . . . was promoted by the American Bar Association and the Association of American Law Schools as a way to raise standards, in order to protect the public and, not incidentally, to enhance the status of the profession. See also 1 Blackstone Commentaries, __ ("The inconveniences [of an exclusively apprenticeship-based legal education] can never be effectually prevented, but by making educational a previous step to the profession of the common law. . . .")

288 The Carnegie Report, supra note __ at 7 ("In its quest for academic respectability, legal education would come to emphasize legal knowledge and reasoning at the expense of attention to practice skills, while the relations of legal activity to morality and public responsibility received even less direct attention in the curriculum.").
One consequence of this doctrinal approach is that the study of law is conceptualized as the study of legal rules—a Langdellian innovation—rather than a broader study of legal practice involving the study of legal regulation as a social phenomenon and training in the full array of methods and techniques that legal practitioners must be able to employ. Another consequence of this academic, doctrinal dominance is that law faculties built to deliver such curricula tend not to consist of experienced practitioners but rather career academics focused on legal scholarship.

However, as the 2007 Carnegie Report and other reports and commentators have emphasized, substantive legal knowledge—although a critical element of professional training—is not the sole or principal component of learning to be a practicing lawyer, nor is it realistic to expect that law school can impart the sum total of substantive knowledge needed for practice. To the contrary, there are several related but distinct levels of training that are necessary to becoming a competent legal professional: the acquisition of foundational knowledge and analytical abilities, the development of certain practical skills, and the formation of the professional values and judgment that define legal practice. The traditional law school curriculum does not reflect the relative importance of each of these levels of learning, as it focuses the lion’s share of attention on doctrinal instruction. Fixing that imbalance does not mean that law school should be entirely handed over to “vocational” or skills training, the reflexive critique seemingly lodged at any effort to make legal education more relevant to legal practice. Rather, it means that the current relationship between doctrinal, practical, and professional instruction must

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289 See supra TAN __. See also John Henry Schlegel, Walt Was Right, 51 J. LEGAL EDUC. 599, 600 (2001) (“Were Langdell to reflect on modern casebooks . . . he would recognize] that the essential substance of these newfangled books was the same as in his first casebook, the one on contracts—the patient explication of legal doctrine, the rule of law as the law of rules.”).

290 See Rubin, supra note __ at 640 (“Social science has taught us to regard law as a social practice. . . . While law . . . may be understood as definitive statements by authoritative sources, legal practice is the total set of behaviors that are prevalent among those trained professionals.”).


292 LLEWELLYN, THE BRAMBLE BUSH, supra note ____ at 98 (“No, the nature of our system of multiple jurisdictions, the accidental constellation of our statutes, the inductive concrete method of our case materials—these make the learning of our law entire, AS INFORMATION, hopeless.”); Frank, WHAT CONSTITUTES A GOOD LEGAL EDUCATION, supra note ___ at 726 (“Of course it is impossible in three years, or indeed in thirty-three years, to give or take courses in all the subjects into which the subject we call ‘law’ can be subdivided.”).

293 THE CARNEGIE REPORT, supra, note __ at 27; Lon L. Fuller, WHAT LAW SCHOOLS CAN CONTRIBUTE TO THE MAKING OF LAWYERS, 1 J. LEGAL EDUC. 190, 193 (1948–1949).

294 Lon L. Fuller, WHAT LAW SCHOOLS CAN CONTRIBUTE TO THE MAKING OF LAWYERS, 1 J. LEGAL EDUC. 190, 191 (1948–1949) (“As soon as an attempt is made to employ the skills-and-techniques conception as the exclusive standard for organizing legal education, the whole educational process is disoriented and cheapened.”); 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ___ (“If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distrust and bewilder him.”).
become more integrated and balanced: Skills-based and practice-centered instruction and training should be a more substantial part of the law school experience, with substantive knowledge instruction serving as the foundation for and compliment to practical professional education. Further, to facilitate the transition from student to practitioner, doctrinal instruction must move more quickly into being taught in context from the operational perspective, rather than more abstractly through the prism of judicial opinions and the case method. Finally, students must have more opportunities to collaborate in team settings and to work on solving problems that blend legal and other issues in a single setting. Many law schools seem to be making moves in these directions, though how thorough and effective these changes will be at each school remains to be seen.

B. The “Signature Pedagogy” of Law School

“It is obvious that man could hardly devise a more wasteful method of imparting information about subject matter than the case-class.”

Karl Llewellyn, The Current Crisis in Legal Education

Although the case-dialogue method has been criticized and modified in many ways over the years, it retains its basic hold as the fundamental framework for teaching law students legal doctrine and analysis to this day. Indeed, notwithstanding the myriad changes in the legal profession

295 Kristen Holmquist refers to this as “applied learning opportunities.” Kristen Holmquist, Challenging Carnegie, 61 J. LEGAL EDUC. 353, 357 (2012).

296 See STUCKEY et al., supra note ___ at 109 (“Students cannot become effective legal problem solvers unless they have opportunities to engage in problem-solving activities in hypothetical or real legal contexts.”).

297 See, e.g., Stanford Law School Advances New Model for Legal Education, http://www.sacbee.com/2012/02/13/4259974/stanford-law-school-advances-new.html (announcing that Stanford Law School is “transforming its traditional law degree into a multi-dimensional JD, which combines the study of other disciplines with team-oriented, problem-solving techniques together with expanded clinical training that enables students to represent clients and litigate cases while in law school”).


299 See, e.g., ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL (Oxford 2007); STUCKEY et al., supra note __; REDLICH, supra note ___; THE CARNEGIE REPORT, supra note ___ at 56–59 (describing the case-dialogue method as insufficiently connected with practical context and ethical values).

300 THE CARNEGIE REPORT, supra note ___ at 50 (“Law schools use case-dialogue teaching almost exclusively in the first phase of doctrinal instruction.”); MERTZ, supra note ___ at 42 (describing the Socratic method of teaching as the “discourse for which law school is famous”). Edward Rubin has written that the case method has reached venerated status, making any critiques a threat to an esteemed tradition:

Continuing on for another seventy years or so, [the Langdellian model] has ceased to be viewed as a particular approach to legal education— as last generation’s innovation—and has become a venerable institution that gains gravity and prestige from its antiquity. As such, this approach has the
and in our understanding of how people learn, the contemporary law school remains remarkably Langdellian in its design as a three-year system in which doctrinal legal knowledge and legal analytical abilities are transmitted to students mostly via a traditional or modified case-dialogue approach, supplemented with optional or mandatory experiential learning components. It must be acknowledged, however, that most professors vary from a pure Socratic method in their doctrinal courses, and that the method has virtually no place in experiential courses. Thus, it would simply be inaccurate to characterize all of law school education as merely a sequence of ineffectual classically Socratic experiences. That said, it is true that traditional doctrinal courses—which do in fact dominate the curriculum at virtually all law schools—tend to involve the study of doctrine through the lens of cases and casebooks—even in statutory courses—and that professors typically use a mix of lecture and Socratic questioning as the principal means of covering the material in their courses throughout law school.

remarkable capacity to make suggested changes seem jejune and to reduce reform initiatives to quixotic ventures that can be dismissed with knowing guffaws from its wiser, more experienced supporters.

Rubin, supra note __ at 613.

Todd D. Rakoff & Martha Minow, A Case for Another Case Method, 60 Vand L. Rev. 597, 597 (2007) (“The plain fact is that American legal education, and especially its formative first year, remains remarkably similar to the curriculum invented at the Harvard Law School by Christopher Columbus Langdell over a century and a quarter ago.”).

See Rubin, supra note __ at 610 (“[T]he basic educational approach that law schools use remains essentially unchanged from the one that C.C. Langdell introduced at Harvard in the years following the Civil War.”).

The Carnegie Report, supra note __ at ___.

Mertz, supra note __ at 142 (indicating that “pure” Socratic teaching was encountered in only one class within the study); id. at 142–169 (describing variations of the Socratic teaching style as “pure” or “traditional,” “modified,” a mixed method of “dialogue, lecture, and conversation,” and a “dialogic” lecture method).

The Carnegie Report, supra note __ at 59 (“[C]ase-dialogue teaching is seldom explicitly connected with clinical teaching.”).

The Carnegie Report, supra note __ at 55 (“The legal texts that form the basis for the case-dialogue method are found in a unique invention of legal pedagogy—the case book.”). The material used in a typical doctrinal law school course is some variant of a casebook—a text collecting edited cases organized by topic and supplemented with notes and questions—rather than a legal treatise or traditional textbook of the kind found in other disciplines such as biology, history, or accounting. The inclusion of such “materials” (notes, questions, article excerpts, etc.) in modern casebooks is what distinguishes them from the very first casebook, which was developed by Langdell himself and solely consisted of cases organized by the legal principles to which they related. See Christopher C. Langdell, A Selection of Cases on the Law of Contracts (1871).

While there may be strengths to the case-dialogue method, there are several shortcomings worth noting here. It is often said that the virtue of the case method is the training it can impart in the skills of legal reasoning and analysis—“thinking like a lawyer”—that are critical components of professional development. These are skills that every law student must acquire if they are to become fluent in the language of the law, jurisprudence, and the art of using cases to derive and develop legal principles. However, the ability of the case-dialogue method to transmit analytical skills effectively has never been demonstrated. Indeed, Elizabeth Mertz in her seminal study of the case method, The Language of Law School, describes studies of teaching methods that fail to show any connection between the method used and the ability of students to engage in effective legal analysis. Additionally, the type of thinking promoted by the method is limited to certain kinds of legal analysis, neglecting some of the basic problem solving skills that today’s practitioners need to develop solutions to their clients’ problems.

Another weakness of the case-dialogue method as currently employed in law schools is that whatever benefits might accrue from the method are difficult to achieve among large groups of students. When the method is to teach, by the same method, a number of elective courses in legal doctrine.”); Mertz, supra note __ at 144–169 (finding, among the classrooms contained in the study, that most professors used variations of the Socratic method the blended questioning about cases with discussion and lecture).

See, e.g., THE CARNEGIE REPORT, supra note __ at 53 (describing the “deep structure” of the case-dialogue pedagogy as “the teaching of legal reasoning”); id. at 54 (indicating that the “dispositions and attitudes” modeled by the case-dialogue pedagogy are “habits of legal thinking” such as distancing from extraneous detail to focus on points of legal argument); THE CRAMTON REPORT, supra note __ at 13 (“The traditional ‘Socratic method’ of legal instruction continues to be used in first year law classes as an extremely effective technique for developing analytical skills.”); Llewellyn, The Bramble Bush, supra note __ at (“The first year... aims, in the old phrase, to get you to ‘thinking like a lawyer.’”). But see Edward Rubin, What’s Wrong with Langdell’s Method and What to Do About It, 60 Vand. L. Rev. 609, 610–11 (2007) (“What one sometimes hears is that the current law school curriculum teaches students to ‘think like lawyers.’ Any systematic demonstration that such an outdated approach to legal education develops skills that are central to the very different world of modern legal practice would be interesting to see, but no such demonstration has been offered.”).

See, e.g., Frank, supra note __ at 910 (“[N]o sane person will deny that a knowledge of those rules and principles, of how to ‘distinguish’ cases, and of how to make an argument as to the true ratio decidendi of an opinion, is part of the indispensable equipment of the future lawyer.”).

See Mertz, supra note __ at 28 (“[C]ontrolled experiments in which first-year classes were divided into separate groups, some taught Socratically and others not, resulted in generally similar performances.” (citing Edward Kimball & Larry Farmer, Comparative Results of Teaching Evidence Three Ways, 30 J. LEGAL EDUC. 196, 196–212 (1979); Willard Lorentson, Concentrating on a Single Jurisdiction to Teach Criminal Law: An Experiment, 20 J. LEGAL EDUC. 361, 361–65 (1968))).

Kagan, The Harvard Law School Revisited, supra note __ at 477 (“While the case method does a great job teaching students a certain type of legal reasoning, it fails to equip them fully to serve as active problem solvers, able to engage a range of resources and strategies to come up with creative solutions.”).
used in the context of large classes—which is typical\textsuperscript{315}—it tends to focus attention on a discussion between a few students and the professor. Although the students involved may benefit to some extent, the method is less effective in instilling legal analytical skills vicariously to observers not involved in the discussion.\textsuperscript{316} creating diminishing returns as the class grows in size.\textsuperscript{317} Relatively, large classes conducted under the Socratic method involve sizeable audiences of peer onlookers, potentially contributing to the stress and anxiety of students expected to respond to the professor’s questioning\textsuperscript{318} and creating an intimidating environment that may be more discouraging to women\textsuperscript{319} and students of color.\textsuperscript{320} These dual challenges surrounding the use of the method in large groups indicate that law schools take what theoretically may be a sound pedagogical approach and dilute it, suggesting that moving the Socratic case dialogue out of the large classroom

\textsuperscript{315} Mertz, supra note __ at 190 (“Although many law schools are now experimenting with smaller first-year classes, it is still common to find the bulk of a first-year student’s time spent in larger classes of seventy to one hundred students.”); id. at 184 (identifying patterns in her study linking “increased class participation and classroom presence with traditional insiders . . . ; that is, white male students tend to predominate.”); id. at 177 (“Use of recitation (the closest analogue to Socratic dialogue), with its intensely public potential for evaluation of responses (both by teachers and peers), tends to encourage the formation of entrenched, segregated groups.” (citing STEVEN BOSSERT, TASKS AND SOCIAL RELATIONS IN CLASSROOMS: A STUDY OF INSTRUCTIONAL ORGANIZATION AND ITS CONSEQUENCES (Cambridge University Press 1979))).

\textsuperscript{316} Stuckey et al., supra note __ at 165 (“Inevitably, many students have not participated in the dialogue; some, overwhelmed by the relief that they were not the one called on, have not even listened attentively.”) (citation omitted); Michael Hunter Schwarz, Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching, 38 SAN DIEGO L. REV. 347, 351 (2001) (“Law teaching requires students to learn vicariously.”).

\textsuperscript{317} id. at 99 (“The potential value of the Socratic dialogue and case method is diminished, however, because we use it in large classroom settings . . . .”)

\textsuperscript{318} See Jennifer Jolly-Ryan, The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities Out of the Stigma Straitjacket, 79 UMKC L. REV. 123, 144 (2010) (“Due to the nature of a legal education, such as stress, competition, and longstanding traditions including the Socratic Method and grading policies, depression and anxiety may develop.”); Lawrence Silver, Comment, Anxiety and the First Semester of Law School, 1968 WIS. L. REV. 1201, 1203–05 (describing the anxiety inducing effects of the Socratic method).

\textsuperscript{319} Mertz, supra note __ at 190 (“Our data tend to confirm the findings of previous studies . . . that male law students generally participate at greater rates than females.”); Lani Guinier, Michelle Fine & Jane Balin, Becoming Gentlemen: Women, Law School, and Institutional Change 49 (Beacon Press 1997) (“The pedagogical structure of the first year—large classes, often constrained by limits on student participation, fierce competition, a mandatory grading curve, and few women faculty—produces alienation and a gender-stratified hierarchy.”).

\textsuperscript{320} Carole J. Buckner, Realizing Grutter v. Bollinger’s “Compelling Educational Benefits of Diversity”—Transforming Apertualistic Rhetoric into Experience, 72 UMKC L. REV. 877, 911 (2004) (“The academic achievement of African American students improves when teachers use cooperative rather than competitive learning strategies . . . .” (citation omitted)); id. at 905 (“Hispanic students do not like to be singled out; they function more effectively working in groups to achieve a common goal and are receptive and susceptible to thoughts and attitudes expressed by others. Encouragement, group work and establishing a sense of “belonging” all help to create a positive learning experience for Hispanic students. These learning preferences describe the direct antithesis of the typical law school environment, and explain the dysfunction and disparate achievement of Hispanic students.” (citations omitted))).
into a much smaller setting with only a handful of students might be a structural alteration that would allow the approach to bear its fullest fruit.

Next, the case-dialogue method is an inefficient means of transmitting substantive information and is limited in its ability to impart the full range of competencies that students need to become successful legal professionals.\(^\text{321}\) There have been many advances in learning theory and pedagogy since Langdell’s time with which the case-dialog method is out of step.\(^\text{322}\) Yet the Langdellian case-dialog method—a relic of a bygone era—persists.\(^\text{323}\) Insights from learning theory reveal that teaching focused mainly on purely abstract concepts divorced from their context—something that fairly characterizes the case method—is less effective than teaching that recognizes that we experience information in many different ways and at different levels of abstraction. Edgar Dale visualized these various levels of encountering information with his Cone of Experience, which depicted “a range of experience from firsthand action to observation (iconic experiences) on to symbolic communication.”\(^\text{325}\) For example, one can understand what a knot is directly by tying the knot (referred to by Dale as an “enactive” experience), visually by simply seeing a picture of a knot (an “iconic” experience), or abstractly by simply hearing or seeing the word “knot” or a verbal description of the phenomenon (a “symbolic” experience).\(^\text{326}\) Learning often moves from direct experience or iconic experience toward abstractions as words or symbols whose meaning we come to understand,\(^\text{327}\) although this is not always the case.\(^\text{328}\) However,

\(^\text{321}\) THE CARNEGIE REPORT, supra note ___ at 58–59 (“[L]earning the law is an ensemble experience. . . . [T]he apprenticeships of cognition, performance, and identity are not freestanding. . . . Because case-dialogue teaching is seldom explicitly connected with clinical teaching, few law schools achieve the full impact that an integrated ensemble could provide.”).

\(^\text{322}\) Michael Hunter Schwartz, Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching, 38 SAN DIEGO L. REV. 347, 383 (2001) (“All three learning theories discussed—behaviorism, cognitivism, and constructivism—are relevant to law school instruction, yet, for the most part, the legal academy has ignored these theories. Together, the theories suggest that instruction should cause students both to build their skills from base levels to the highest levels, and to move from simple knowledge of information to the creative problem-solving contemplated by the constructivist model.”).

\(^\text{323}\) See Rubin, supra note ___ at 611 (“Langdell’s design for legal education, although innovative in its own time and on its own terms, is more closely connected to modes of thought that prevailed in the Renaissance, the Middle Ages, and ancient Greece and Rome than to our current ways of thinking.”).

\(^\text{324}\) MERTZ, supra note ___ at 26 (“Despite a number of arguably successful attacks on the substantive underpinnings of Langdell’s approach, the method itself appears to have outlasted its theoretical rationale.”).

\(^\text{325}\) EDGAR DALE, AUDIOVISUAL METHODS IN TEACHING 110 (1969). The levels of the Cone, from bottom to the top, are Direct Purposeful Experiences, Contrived Experiences, Dramatized Experiences, Demonstrations, Study Trips, Exhibits, Educational Television, Motion Pictures, Recordings, Radio, & Still pictures, Visual Symbols, and Verbal Symbols. Id. at 107.

\(^\text{326}\) Id. at 108. Dale borrows these terms from JEROME S. BRUNER, TOWARD A THEORY OF INSTRUCTION, 10–11 (Harvard University 1966).

\(^\text{327}\) Id at 108-09.
when learning consists solely of abstractions untethered from lower-order experience, problems can arise:

Difficulties arise when abstractions have inadequate foundations. If a learner has had too little enactive or iconic experience in acquiring a particular summarizing idea, the word or formula will probably have no real meaning for him. Because a verbal symbol does not resemble anything the [student] can do or see, he may have difficulty in relating it to his own experience. If a symbol is to stand for something, it must stand on something—a firm foundation of relevant experience.\textsuperscript{329}

This is not to say that enactive or iconic experiences must always precede abstract learning;\textsuperscript{330} rather, abstract learning can be enhanced by direct or visual experiences that can concretize and deepen the understanding of the abstract concept at issue.\textsuperscript{331}

The application of Dale's insights to legal education are clear: Law school learning exclusively rooted in symbolic, abstract experience is less likely to be effective in giving students the depth of understanding requisite for moving towards proficient legal practice. Further, to the extent that legal learning is exclusively at the abstract level, it becomes difficult for students to synthesize learning from different areas or to operationalize concepts for practical application and the resolution of real-world legal problems.\textsuperscript{332} To be clear, this is not an argument that the best learning occurs at the lower, more direct experience levels of Dale's Cone, nor is it the often misattributed notion that we remember more of the things that we learn from direct experience.\textsuperscript{333} Rather, the claim is that different types

\textsuperscript{328} Id. at 128 ("Does the Cone device mean that all teaching and learning must move systematically from base to pinnacle? Emphatically no . . . . We continually shuttle back and forth among various kinds of experiences.").
\textsuperscript{329} Id. at 109 (emphasis in original).
\textsuperscript{330} Id. at 128–29 ("In our teaching, then, we do not always begin with direct experience at the base of the Cone. Rather, we begin with the kind of experience that is most appropriate to the needs and abilities of a particular learner in a particular learning situation. Then, of course, we vary this experience with many other types of learning activities.").
\textsuperscript{331} Id. at 132 ("Even the most advanced student, therefore, can deepen his understanding of concepts . . . by participating in experiences all along [the] Cone.").
\textsuperscript{332} Id. at 134: "A teacher may move students so swiftly to the symbolic level of thought, and with so little preparation, that their concepts will lack deep roots in direct experience. These rootless experiences will not have the generative power to produce additional concepts and will not enable the learner to deal with the new situations that he faces.

\textsuperscript{333} Many have misappropriated Dale's Cone of Experience to present a revised pyramidal image that depicts the levels of experience with indications of the percent of information retained when learned through each approach. See Instructional Technology Services, Minnesota State University Moorhead, Learning Objectives, http://www.mnstate.edu/instrtech/SCModules/LearningObjectives/index.html (last visited July 22, 2011). Dale himself never attributed such percentages of retention to his Cone nor did he support the implication that experiential learning was necessarily superior to more abstract learning. See Dale, supra note ___ at 128–130; see also Michael Molenda, Cone of Experience, in A. KOVALCHEW & K. DAWSON, EDs, EDUCATIONAL TECHNOLOGY: AN ENCYCLOPEDIA, 164 (Santa Barbara, CA, 2003)
of learning experiences are possible and that legal teaching needs to make an intelligent use of a mix of these experiences to give students the level of understanding needed for effective learning and translation into practical application.\footnote{334}

These deficits of the case-dialogue method become harder to tolerate once students have acquired the legal analytical skills that the method is designed to impart.\footnote{335} Indeed, there may be declining benefits associated with a continued employment of the case-dialogue method throughout the second and third years of law school.\footnote{336} Thus, once this point has passed, and basic foundational legal principles have been explored using the method in the first year, the pedagogy should shift toward alternative methods that help students acquire knowledge and skills in the manner and contexts that will be required of them as legal practitioners.\footnote{337} In other words, a thorough understanding of legal principles and the ability to “think like a lawyer” needs to become the foundation for the next step in professional development—developing the ability to handle complex problems of clients in a skilled and professional manner.

\footnote{334} (discussing the misappropriation of Dale’s Cone of Experience) (“At some point someone conflated Dale’s Cone of Experience with a spurious chart that purported to show what percentage of information people remember under different learning conditions.”). This misrepresentation of Dale’s Cone was unfortunately featured in a recent article on legal education reform. \textit{See} John O. Sonsteng \textit{et al., A Legal Education Renaissance: A Practical Approach for the Twenty-First Century}, 34 WM. MITCHELL L. REV. 303, 309 (2007) (attributing to Dale the idea that “the least effective methods of instruction include reading text and listening to lectures,” notions that Dale himself expressly disavowed in the very work cited by Sonsteng).

\footnote{335} STUCKEY \textit{et al.}, \textit{supra} note \_\_ at 132 (“Law teachers need to be multi-modal in our teaching and reduce our reliance on the Socratic dialogue and case method. There are many tools for teaching students than one finds in the typical law school classroom.”).  

\footnote{336} Jerome Frank estimated that students could be taught the dialectical method of legal analysis imparted by the case-dialogue method within six months, after which time other more effective methods of instruction should be used. Frank, \textit{supra} note \_\_ at 726 (“Intelligent men can learn that dialectical technique in about six months. . . . Teach them the dialectic devices as applied to one or two fields and they will have no trouble applying them to other fields. But in the law schools, much of the three years is squandered in applying that technique over and over again to a variety of subject matters. . . .”). \textsc{The Carnegie Report}, \textit{supra} note \_\_ at 77 (speaking of the “diminishing returns” problem in legal education characterized by the “drop-off in interest and effort in classroom learning as students move through law school”).

\footnote{337} \textsc{See}, e.g., \textsc{STUCKEY} \textit{et al.}, \textit{supra} note \_\_ at 140 (“Unfortunately, many law teachers continue to rely exclusively on the Socratic dialogue and case method, not just in the first year, but also in the second and third year courses long after students become competent in case analysis and ‘thinking like a lawyer.’ This contributes to student boredom and loss of interest in learning.”). This is not a new observation; Harvard students in 1935 complained that after the first year, the benefits of the case method dramatically reduced. \textit{Stevens, supra} note \_\_ at 161. \textit{See also Stevens, supra} note \_\_ at 246 (“In the early 1970s, there was extensive evidence that outside those working on law review there was a dramatic falloff in energy levels and work at the end of the first year, if not in the first semester.”).

\footnote{337} \textsc{The Carnegie Report}, \textit{supra} note \_\_ at 82 (“Practice requires not the distanced stance of the observer and critic but an engagement with situations.”).
Finally, the case-dialogue method presents the law through the lens of (mostly appellate) litigation, and does so in a highly formalized and acontextual manner that skews students' perspective away from the realities and complexities of raw facts, clients, and professional responsibility. The “thinking like a lawyer” modeled by the case-dialogue method often strips disputes from their context and emphasizes formal and procedural issues over other moral or personal factors that might bear on reaching a more complete appraisal of the justice of an outcome. Further, by being rooted in court decisions, the law is learned as the product of conflict, as a battle among adversaries that yields legal pronouncements and interpretations. But law today is not developed simply or even largely through litigation but through legislation, regulation, and negotiated agreements. These aspects of law are underappreciated in the existing curriculum, as even the bodies of law that emanate from these latter sources are studied through the eyes of court decisions interpreting them.

In the mid-20th Century, a faculty committee at Harvard Law School described some of the benefits of the case method when it wrote:

The problems most naturally raised by reading a series of appellate cases are:
Were these cases “rightly” decided? Are they consistent with one another? Can a pattern of decision be discerned that will reconcile them, even though their language is in conflict? On the basis of these decisions, how would this

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338 This term is not used here to suggest that the universe of critiques of the case-dialogue method have been exhausted here. Quite to the contrary, extensive critiques of the method abound. Elizabeth Mertz’s work helpfully summarizes the most pertinent of these and offers an extensive argument in favor of her own critique. See MERTZ, supra note __. One of her most incisive observations is that “thinking like a lawyer” is not a superior mode of analysis but rather is a kind of analysis that preferences certain bases for authority, modes of understanding, sources of knowledge, and types of arguments over others for culturally driven reasons:

The phrase “thinking like a lawyer” is often used in a way that ... characterizes lawyers as possessors of an overarching and superior analytic ability rather than as experts in one profession’s specialized way of processing relevant information. Like all professional epistemologies (and accompanying discourses), legal thought is socially and institutionally grounded in specific practices and power relationships. It asks some kinds of questions while neglecting others and makes sharp demands for proof in some places where elsewhere it accepts unproven assumptions. The first-year classroom is a key location for examining the shift to this particular professional language.

Id. at 98–99. See also id. at 132 (“In converting virtually every possible event or conflict into a shared rhetoric, legal language generates an appearance of neutrality that belies its often deeply skewed institutional workings.”).

339 See THE CARNegie REPORT, supra note __ at 54 (“[S]tudents tend to think of legally relevant facts as they are presented in the appellate opinions that they typically read for class discussion. . . . As a first encounter with legal facts, this can give the misleading impression that facts are typically easy to 'discover,' rather than resulting from complex processes of interpretation that are shaped by pressures of litigation.”); MERTZ, supra note __ at 95 (“[P]rofessors are conveying a linguistic ideology centered on the crucial structuring role of layers of authority, discernable in the text. Emotion, morality, and social context are semiotically peripheralized in this process.”).

340 THE CARNegie REPORT, supra note __ at 52 (describing an ethos “that emphasizes the formal, procedural aspects of legal reasoning as the central focus, making other aspects of cases peripheral or ancillary”).
hypothetical case be decided? All of these inquiries are eminently worthwhile, and afford a useful training for the lawyer.\textsuperscript{341}

This view is sound; the study of cases can be a worthy vehicle for learning about the law and legal analysis. However, the case method as practiced focuses on appellate opinions of judges, which do not reflect the sum total of what factored into the how particular cases were litigated or decided,\textsuperscript{342} including considerations of basic justice and fairness.\textsuperscript{343} Omitted is any consideration of the underlying record, including documents, evidence, pleadings, trial transcripts, trial court rulings, and the like, or the raw client narratives and other facts that faced the practitioner at the pre-litigation, problem-solving phase of the representation,\textsuperscript{344} in favor of a retrospective view that stymies the development of the “legal imagination”\textsuperscript{345} needed to develop solutions to legal problems prospectively.\textsuperscript{346} A true case method, as Jerome Frank recognized long ago, would entail a study of the entire “case” rather than the edited and refined representation of a dispute one finds in appellate opinions.\textsuperscript{347} Such an approach would permit students to assess how facts, legal doctrine, and other factors such as arguments raised, questions asked, and strategic decisions made all combined to yield a given result in one case versus another, as well as permitting them to think about how they would use the facts and the law to shape an alternate approach to the matter that might have led it down a different path entirely. Additional alternative approaches to teaching the law have been richly covered by other critics including those detailed in the 2007 \textit{Best Practices} report\textsuperscript{348} as

\textsuperscript{341} Fuller \textit{et al.}, \textit{Preliminary Statement}, supra note \_ at 40.

\textsuperscript{342} Fuller \textit{et al.}, \textit{Preliminary Statement}, supra note \_ at 35–36: In general American legal education with its emphasis on the appellate phase of litigation trains the lawyer in testing the validity of a position already taken, not in the problem of deciding what position to take or what course to follow. . . . Because law school instruction is largely based on appellate decisions, its focus is inevitably upon this last phase of a controversy, and the student receives little direct training in the choices that have to be made before this final phase is reached.

\textsuperscript{343} \textit{The MacCrater Report}, supra note \_ at 236 (“Too often, the Socratic method of teaching emphasizes qualities that have little to do with justice, fairness, and morality in daily practice. Students too easily gain the impression that wit, sharp responses, and dazzling performance are more important that the personal moral values that lawyers must possess and that the profession must espouse.”)

\textsuperscript{344} Fuller \textit{et al.}, \textit{Preliminary Statement}, at 41 (“The rapid exchange of intellectual repartee that has characterized some of the best case-method instruction in the past may be excellent training for the appellate advocate, but it hardly furnishes the appropriate atmosphere for a discussion of the soundest solution for a practical problem of legal planning.”).

\textsuperscript{345} Rakoff & Minow, supra, note \_ at 602 (describing “legal imagination” as “the ability to generate the multiple characterizations, multiple versions, multiple pathways, and multiple solutions, to which [students] could apply their very well honed analytic skills”).

\textsuperscript{346} \textit{Id.} at 600 (“By taking a retrospective view of facts already found and procedures already used by a court, the appellate decision does little to orient students to the reality of unfolding problems with facts still to be enacted, client conduct still to take place, and procedural settings still to be chosen and framed.”).

\textsuperscript{347} Frank, \textit{Why Not a Clinical Lawyer-School?}, supra note \_ at 916.

\textsuperscript{348} \textit{BEST PRACTICES}, supra note \_ at 105–234 (suggesting the use of multiple methods of instruction, including context-based instruction, to teach law school courses).
well as in work such as *Teaching Law by Design* by Professors Schwartz, Sparrow, and Hess. However, these alternatives have not permeated the law school culture, where the legacy of the Langdellian case-dialogue method retains its sway.

C. *Assessment in Law School*

“*Our machinery for checking our results [of our teaching] with you [the students] would set an intelligent ass to braying.*”

Karl Llewellyn, *The Bramble Bush*

Karl Llewellyn, who in the above quote in no uncertain terms said that law schools put the “ass” in “assessment,” recognized over sixty years ago that the traditional method of assessing student performance in law school was an ineffective means of measuring student learning. More specifically, there was and still is a gap between the professed learning objectives of many law school classes—teaching students to think like lawyers and to master certain legal doctrines—and the dominant method of measuring students’ attainment of that learning—the final essay exam, which tests more so what a student knows rather than what a student can do. Recall that the Carnegie Report emphasized the multiple apprenticeships of professional legal education—the cognitive, the practical, and the professional/ethical. Becoming a competent practitioner requires training in all three areas, though—as has been discussed—law school is disproportionately oriented towards the cognitive. Thus, the single final essay exam is typically drafted in a manner that requires students to display their mastery of legal concepts and doctrines learned during the semester.

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352 David P. Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. LEGAL EDUC. 479, 480 (1984) (“There is, then, a serious dissonance between our higher aspirations as teachers and our examination and grading practices. We aspire to teach mental habits that transcend substantive law but we do not try very hard to find out how well we are succeeding.”).

353 The Carnegie Report, supra note ___ at 28.
through the analysis of various hypothetical problems drafted by the professor. These exams will either put the student in the role of a judge who must resolve a particular legal question, as an advocate who must argue in support of a particular position or decide on a course of action, or sometimes in the role of a policymaker who must decide how the law should be designed to deal with a given situation. Such questions test the students’ understanding of the law and their ability to engage in proper and rigorous legal analysis.

That said, the limitations of this type of assessment are twofold. First, it is purely summative, in that it comes at the end of a course and attempts to measure learning after the course has been completed. In most courses, formative assessments—which measure student learning along the way—are underutilized or neglected entirely. But formative assessment is an important component of the learning process, as students need to have the opportunity to measure their understanding—or lack thereof—at a point in time when they still have the opportunity to make corrections and improvements. Better to learn early on that one’s understanding of a concept or doctrine is confused so that the lessons of the remainder of the semester can build on a solid foundation of understanding rather than simply cumulating atop confusion and uncertainty. Formative assessment is critical to coaching and guiding students through their exploration of a topic, taking care to notice when a lesson has not been fully learned and prodding them in the right direction as they proceed through the course. Thus, law school courses should have multiple assessment exercises along the way—graded or ungraded—that permit the instructor to determine student learning levels and give feedback that will permit the student to adapt and improve.

Second, while typical essay exams do, to some extent, engage the analytical abilities needed of a judge or an advocate arguing a legal point, such skills are not the sole or principal skills required of most competent practitioners. In the litigation context, practitioners often begin with an unfiltered narrative from a client, which must be distilled into a coherent set of facts that can then be translated into potential legal claims. As an attorney proceeds with or responds to a claim, legal doctrine is not the only determinant of how the case should be litigated or of how issues that arise should be resolved. There are ethical and strategic considerations as well as intangible factors such as the profile of the parties and the judge, the nature of the claims, what happens to be at stake in the case, the relevance of issues in this case to other cases, or other larger policy concerns. All of

354 Recall that unlike most law school courses today, legal instruction at the Litchfield Law School in the early 19th Century included regular examinations every Saturday. See supra TAN 46.
355 THE CARNEGIE REPORT, supra note ___ at ___.
these factors, and more, must be taken into account as an attorney decides what actions to take and what arguments to make. Engaging in this process certainly requires a good grasp of the relevant and applicable legal doctrine. But sensitivity to the full range of pertinent factors that bear on legal strategy and judicial decision-making takes practical experience and the development of sound professional judgment. Traditional doctrinal courses and their associated final exams tend to abstract all of these things out of legal problems, isolating doctrinal (and perhaps policy) analysis as the key to how any given issue is resolved. That is an unrealistic picture of most legal practice that hardly suffices to prepare a student for actual practice.

Compounding the deficiencies of summative assessments in law school is the accompanying system of grading that characterizes most law school programs. A student’s grade in a course is typically determined by his or her performance on a single final exam (perhaps with some credit or demerit for class participation), and that grade is constrained by grade normalization policies: Law schools enforce a grade distribution around a predetermined course mean (the curve). The forced distribution converts grading from an evaluation of the students’ achievement to a system of ranking among course peers. The set mean—typically a B+ or 3.3 at most law elite schools—determines the label used to signal an average performance, divorcing traditional A through F letter grades from their essentialist identities (that is, A is excellent, B is good, C is average, D is below average, and F is a failure) and creating an alternative, discordant world in which high letter grades are used to give a faux sense of achievement that would be absent were the traditional labels for excellent, average, and below average used. This is quintessential grade inflation. Indeed, the forced mean all but guarantees that the grades for all students will hover around the upper echelon; actual failures will be rare or nonexistent, even if a student’s performance in truth reflects a failure to demonstrate proficiency with reference to the desired learning objectives for the course.

What are the problems with such an approach to grading? The principal problem is that what starts off as a poor assessment of the knowledge, skills, and values that an attorney must have to perform

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356 MERTZ, supra note ___ at ___.


359 When there is a forced B+ mean, giving failing grades or D grades create such a drag on the course mean that more top grades have to be given to more people, weakening the distinction between top performers and above average or mediocre performers.
competently in any given situation becomes not even that; in reality the assessment is one of relative merit, not of learning or achievement. That is, in a B+ curve grading system, an A- does not represent any particular level of competence or understanding but rather is a mere indication that the student outperformed her average peers but was not among the very top performers in the class. Indeed, such a student may have been deficient in many respects in her performance on the exam, but so long as most students were even more deficient, she is able to earn the label given to those who moderately outperform, an A-. This grade tells an observer nothing about the student’s mastery or competence in a given topical area, a fact that is dissonant with our essentialist notions of the level of quality that an A- label represents. The result is that legal educators—and prospective employers—lack any true measure of the learning or capabilities of their students.

Proper assessment is about evaluating a student’s attainment of specified learning objectives. It involves the setting of clear goals regarding what students are supposed to learn and know how to do after completing a course followed by the administration of an instrument that measures their performance against those stated objectives. For example, in a civil procedure course a learning objective might be that a student is able to determine whether a federal court would have subject matter jurisdiction over various claims that are asserted in an action. The assessment tool could describe the nature of certain claims asserted by a set of fictitious parties and ask for an analysis of each claim, or the exam might ask a student to take a certain factual situation and make a determination of where to assert the claims and how to respond to any ensuing jurisdictional challenges. If the student were able to engage in that analysis or make those determinations correctly, the student would be entitled to be judged proficient in that area, having achieved the learning objective. A standard would have to be set for what level of success the student must achieve to warrant a conclusion that they were proficient in the area—perhaps based on a certain percentage of correct responses or, if the assessment instrument is more oriented toward performance, there might need to be a

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360 Are there good reasons to measure relative merit from an institutional perspective? If there is a system of rewards the distribution of which depends on relative merit, the answer is yes. However, facilitating a reward system—whether it be for the allocation of law journal positions or of jobs after graduation—should not yield a grading system that completely supplants a rationalized and appropriate system of assessment, the proper purpose of which is to measure achievement of learning objectives and teaching outcomes, not mere class standing.

361 See STUCKEY ET AL., supra note ___ at 237 ("The scaled grading system allows law schools to sort students for legal employers, but it impedes learning, community building, and moral development.").

362 See STUCKEY ET AL., supra note ___ at 235 ("The main purpose of assessments in educational institutions is to discover if students have achieved the learning outcomes of the course studied." (citation omitted)).
more qualitative standard for proficiency. With each topic or subject matter, professors would have to make \textit{ex ante} determinations of what a minimum acceptable level of performance would be in any given situation; after such line-drawing, the instructor’s task would be to determine whether that level was achieved or not.

Ultimately, then, what we know about proper assessment—that it must be focused on measuring performance against clear learning objectives—points towards the development of a series of such objectives within each course, the development of formative and summative assessment measures that permit students to demonstrate their attainment of those goals, and the use of something approaching a binary or three-level \textsuperscript{363} pass-fail system that reflects achievement rather than relative merit, \textsuperscript{364} where failure is a real possibility for substandard performances.\textsuperscript{365} Rather than a single final essay exam, doctrinal courses should be characterized by a series of opportunities for formative assessment—graded or ungraded—consummated by a summative evaluation designed to mirror more closely what will be

\textsuperscript{363} The Appalachian School of Law uses a pass-fail system that consists of the designations of “Proficient,” “Not Proficient,” and “Fail.” Clinton W. Shinn, Lessening Stress of the 1L Year: Implementing an Alternative to Traditional Grading, 41 TOLEDO L. REV. 355, 368 (2010). The problem with that approach is that the “Not Proficient” category is treated as a passing grade, even though the student is only marginally competent. Further, this category is hardly a grade that will put the student in good stead with prospective employers. I would thus label not proficient performers as failures; it distinguishing among passers is desired “proficient” and “highly proficient” categories might better serve the students.

\textsuperscript{364} There are risks to moving to a pass-fail system—particularly for non-elite law schools—which include the muddled signals employers receive about students’ ability without grades. One possibility if a school is committed to using letter grades as a proxy for the pass-fail categories would be to simplify the grading system by having only A, B+, and B- grades to reflect exemplary, proficient, and marginal performances, reserving a C for failures. But it is also critical that there are ways beyond grades that students are able to demonstrate their value to prospective employers, such as with portfolios that include work done by the student and more meaningful faculty evaluations and recommendations. Of course, evaluating such qualitative materials will take more effort and commitment on the part of employers who may be accustomed to relying on grades as simple proxies for merit.

\textsuperscript{365} For this system to be meaningful, a failing or “not proficient” grade would have to be real, meaning that professors were willing and able to assign that grade to students whose performance fell short of a predetermined level of sufficiency. Although other disciplines such as medicine exhibit less hesitation in awarding failing grades to students, law schools are institutionally averse to failures, which is likely for at least three reasons.

First, it may be that an “F” grade is seen as deserved only for a complete lack of knowledge or competence—scoring near zero percent correct if you will—rather than as being appropriate for poor performances that include instances of lucidity—let us say a 60\% or 50\% performance.

Second, because of the forced mean, if an “F” grade is given to a student, many very high grades must be given to offset the downward pull such a grade has on the class average. For example, in a class of 10 students, it would be mathematically impossible to give more than one student an F grade if the required mean were B+ or a 3.33; even if 8 students were given A grades, giving the remaining two students F grades would result in a mean of 3.2 \((8 \times 4.0 + 2 \times 0)/10 = 3.2\).

Finally, failures mean that courses must be repeated, a consequence that law schools are not designed to accommodate in large numbers. Further, were students to regularly be subjected to failing grades across courses, they would have to leave the law school. Such attrition, were it to be of a significant number of students, would not be consistent with the business model of most law schools, which rely on maintaining a certain level of enrollment to support their budgets.
expected of a student once he enters practice and confronts such situations.\footnote{A revision to the ABA Standards recently under consideration would require law schools to “apply a variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students.” ABA Standards Review Committee, Standards and Interpretations on Program of Legal Education, Proposed Standard 304 (July 10, 2011 Discussion Draft), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july2011meeting/20110621_ch_3_program_of_education_redlined_to_standards.authcheckdam.pdf.} That means that not only is analytical ability and facility with doctrine assessed, but also students’ ability to gather, interpret, and present facts or to assess a situation to determine what action should be taken to achieve a particular goal for one’s client. Quizzes, problems, and other meaningful assignments along the way will help the professor gauge students’ understanding and progress throughout the term.\footnote{For a fuller discussion of more effective assessment methods in legal education, see TEACHING LAW BY DESIGN, supra note \textsuperscript{__} at 135–63; BEST PRACTICES, supra note \textsuperscript{__} at 233–63.}

Although achievement-based assessment and grading is preferred, enforced means are an important tool for equalizing grades across courses taught by different professors who may have varying views of what level of performance deserves a given grade. A similar problem could arise under a pass-fail system, where different professors reach different judgments about what level of performance is necessary to demonstrate proficiency in a topical area. However, enforcing a mean across all courses is not the solution to this problem because of the impact such means have on moving assessment away from being an evaluation of achievement against learning goals towards a system that signals relative merit. A more appropriate solution would be to have learning objectives and determinations of proficiency levels centrally or collectively determined.\footnote{A proposed revision of ABA Standard 302 currently under consideration takes this approach. See ABA Standards Review Committee, Standards and Interpretations on Program of Legal Education, Proposed Standard 302 (July 10, 2011 Discussion Draft), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july2011meeting/20110621_ch_3_program_of_education_redlined_to_standards.authcheckdam.pdf.} That is, a law school would—either through a group of professors\footnote{If this would not be the province of any existing law faculty committee, perhaps a new “assessment” or “institutional standards” committee could be established.} who teach the same subjects or collaboratively among relevant professors and administrators—be responsible for setting and/or scrutinizing the learning objectives identified by professors and for setting or approving of the standards for proficiency and distinctiveness applied to all assessment instruments, rather than leaving such determinations solely to the discretion of the individual professor. The professor would certainly be the originator of these standards and should have a say in their ultimate form. However, there must be collective agreement across the faculty regarding these matters to ensure that a performance that earns a “pass” in one course would not earn...
a “fail” in another course. As setting such standards for achievement is an inherently subjective process, doing so collectively across different types of courses will be challenging. But such an approach is superior to the blunt instrument of an enforced curve because it makes assessment and grading a measure of substantive versus relative achievement, something that is much more meaningful and the true mark quality assessment in education.

Finally, it must be acknowledged that forced means also are a bulwark against substandard professor instruction, which might result in many students being deficient in their knowledge in part due to the failures of the professor. If a modified pass-fail or simplified letter-grade system is pursued, professors would have to use more formative assessments with feedback to make sure that their students were learning and progressing along the way. They would also need to make sure that the final assessment is properly calibrated to measure what was successfully taught and learned during the course. That said, there would be no guarantee that student performance would collectively rise to the proficient level. Under such circumstances, the professor’s teaching abilities would have to be evaluated but so too would the content and pace educational program being delivered to the students to make sure that it is commensurate with their aptitude to learn.

D. Law School Faculty

“How can we expect law students to become competent practitioners if the core of full-time law faculties, notwithstanding its scholarly prowess, does not itself possess even the basic skills required to practice the type of law about which it teaches and writes?”

As we have seen, Langdell introduced the idea that full-time academics of little or no experience were to be preferred when staffing a law school faculty. More or less true to this vision, contemporary law school faculties are dominated by tenured and tenure-track professors who are less experienced practitioners than they are highly credentialed legal scholars. Traditional doctrinal law faculty currently maintain an obligation to

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370 Within a particular subject, one could imagine the possibility of having school-wide, standardized exams for the basic required courses that are graded by a common rubric. This would make grade normalization more rational across different sections. However, such an approach would require each professor to cover the same material in the same courses, which would impinge on individual professors’ freedom to select areas of emphasis.

contribute in the areas of teaching, scholarship, and service, carrying a typical teaching load of three to four courses per year and being expected to produce scholarly publications on a regular basis. In return, this category of professors is highly compensated in an effort to attract the most highly credentialed and most capable scholars to a school. Why is hiring expensive, inexperienced high-quality legal scholars important to the modern American law school? As the Carnegie Report explains, “Within academic circles, legitimacy and respectability accrued to whatever could be assimilated to the model of formal, science-like discourse. . . .” Since the coin of that realm is productivity in scholarship and research, it is not surprising that law schools have increasingly emphasized this dimension of their

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372 See, e.g., Lewis & Clark College, Appointment Policy and Procedures and Promotion and Tenure Reviews: Lewis & Clark Law School, http://legacy.lclark.edu/org/handbook/3-6-5.html (“To receive tenure, a faculty member must demonstrate excellence in teaching, scholarship, and service . . .”).

373 In 2006 Jennifer Collins at Wake Forest posted a request regarding teaching loads at law schools, to which there have been multiple comments suggesting loads in the three to four course range, also articulated in credit hours per year as anywhere from 9 to 12 credit hours. See Jennifer Collins, Teaching Loads, Concurring Opinions (Dec. 11, 2006), available at http://www.concurringopinions.com/archives/2006/12/teaching_loads.html. Information on teaching loads from 2005 is available at Gordon Smith, Law Professor Teaching Loads, The Conflmerator, http://www.theconglomerate.org/2005/04/law_professor_t.html.

374 See, e.g., University of Richmond, Faculty Handbook, Appendix: The T.C. Williams School of Law Personnel Policies and Procedures, Standards and Procedures for Reappointment, Promotion, and Tenure, available at http://facultyhandbook.richmond.edu/Ch_VI/law.html#tenure (“As part of the application for promotion from Associate Professor to Professor and for the award of tenure, the applicant must submit at least four published scholarly works of high quality.”).

375 The Chronicle of Higher Education reports that for the 2010–2011 school year law professor salaries were the highest of all disciplines, varying positively 59.5% above the average Full Professor or English Language and Literature, compared with a 50.9% figure for business school professors and 41.2% for economics professors, the next two highest paid disciplines. Faculty Salaries Vary by Institution Type, Disciplines, THE CHRONICLE OF HIGHER EDUCATION (Apr. 11, 2011), available at http://chronicle.com/article/Faculty-Salaries-Vary-by/127073. Although information about salaries at private law schools is difficult to obtain, salary information for several public law schools is available online. Salaries at these schools vary widely, from $90,000 to over $300,000. See, e.g., Paul L. Caron, Public Law School Faculty Salaries, TaxProf Blog (Aug. 19, 2011) available at http://taxprof.typepad.com/taxprof_blog/2011/08/public-law.html. Dean Erwin Chemerinsky noted that when he was being recruited to become the Dean of the newly created University of California, Irvine School of Law, he initially rejected the proposed salaries for the Dean and the faculty, explaining as follows:

[T]heir proposed dean’s salary was about half of what I was earning as a professor at Duke Law School, and that their top faculty salaries were about at the level of entry-level faculty hires. I was clear that I would not be interested in the position if that were the level of funding. I was candid that the law school could not be very good on the proposed budget. Chemerinsky, supra note 2, at 1. Chemerinsky was ultimately hired at a salary of $350,000. See Committee on Compensation, Appointment Salary for Erwin Chemerinsky as Dean—Donald Bren School of Law, Irvine Campus, available at http://www.universityofcalifornia.edu/news/compensation/chemerinsky0907.pdf. Faculty salaries at U.C. Irvine School of Law were reported as ranging from $131,200 to $199,300 in 2009, with summer research grants amounting to one-ninth of one’s salary. University of California, Irvine, Office of Academic Personnel, Academic Salary Scales (Oct. 1, 2009), available at http://www.ap.uci.edu/salary/CurrentScales/prof-Law.pdf and http://www.ap.uci.edu/salary/CurrentScales/prof-Law-Ninth.pdf.
faculties’ work and identity.”

Certainly, hiring in this manner is instrumental to achieving a mission oriented toward producing legal scholarship, which many if not most law schools embrace. More cynically but no less verily, the U.S. News & World Report ranking system, with its heavy emphasis on peer reputation, makes it critical that law schools attract a faculty regarded as productive of high quality scholarship if they wish to maintain or enhance their position in these standings.

Are law faculties—as currently constituted—up to the task of delivering the balanced, integrated curriculum suggested by the 2007 Carnegie Report? Unfortunately, there are two main problems with relying on traditional law professors of this mold to deliver a revised curriculum. First, as just mentioned, traditional doctrinal professors are not typically hired for their practice experience, of which they tend to have little or none. Rather, 

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776 THE CARNEGIE REPORT, supra note __ at 6–7.
777 See, e.g., University of Chicago School of Law, Mission of the Law School, http://www.law.uchicago.edu/school/mission (“Since its founding in 1902, a major component of the University of Chicago Law School’s mission has been to develop and disseminate knowledge through scholarly research that critically analyzes the development of the law and related disciplines.”); University of St. Thomas School of Law, Our Mission, http://www.stthomas.edu/law/about/mission/default.html (“The law school will undertake to expand knowledge about law and society and participate in the improvement of legal institutions and other organizations through recruitment and development of a faculty of outstanding teachers and scholars, sponsorship of academic lectures and interdisciplinary research activity, and establishment of a strong law library collection and staff.”).
780 See Richard E. Redding, Where Did You Go to Law School? Gatekeeping for the Professoriate and its Implications for Legal Education, 53 J. LEGAL EDUC. 594, 601 (2003) (showing that for those law professors hired between 1996 and 2000, of those with any practice experience (86.6% of the hires), the average number of years of experience was 3.7). A 1991 study found that all law professors at that time had an average of 4.3 years of practice experience, with the experience of hires at law schools ranked in the top 25 being only 1.4 years. See Robert J. Bonthwick & Jordan R. Schau, Note, Gatekeepers of the Profession: An Empirical Profile of the Nation’s Law Professors, 25 U. MICH. J.L. REFORM 191, 218 (1991). One commentator’s informal study of law professors hired between 2000 and 2009 revealed an average of 1.79 years at U.S. News & World Report-ranked tier 1 schools but 7 years at tier four schools. See Newton, supra note __ at 130.
781 See Newton, supra note __ at 130 (“45.6% of entry-level tenure-track professors hired by [tier 1] schools since 2000 had no prior practical experience.”) (emphasis in original); Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 MICH. L. REV. 34, 37 (1992) (“The situation is even worse now. . . . because now we see law professors hired from graduate schools, wholly lacking in legal experience or training. . . .”). It is not unusual for elite law schools to hire law professors with no practice experience, although such hires tend to have doctorates in another field in addition to their law degrees. Indeed, Northwestern University School of Law touts having the highest percentage of Ph.D.-trained full-time faculty members (47%) of all American law schools. Northwestern University School of Law, Faculty Research & Achievement. Available at http://www.law.northwestern.edu/faculty/.
law professors are hired mostly based on their academic credentials and their promise as legal scholars. A corps of instructors thusly qualified is not ideally suited for delivering a curriculum of expanded practical experiential learning, and arguably is not optimal for practice-oriented doctrinal instruction, meaning that adjuncts or differently-viewed clinical faculty have to pick up the slack. Second, traditional law faculty members are expensive from the perspective of the law school, as their salaries account for a large share of a law school’s budget and tend to be impervious to dramatic reductions. Transforming law school to a system that involves much greater skills training and a decrease in courses taught through the large-class Socratic case-dialogue method would require much smaller faculty-student ratios, a proposition that would be quite expensive if the hiring of additional traditional faculty were the means undertaken to achieve that goal.

How, then, can law school faculties hope to offer an improved curriculum? Some schools might favor relying on the heavy use of adjunct professors for practice-oriented courses, given the meager wages generally

382 Columbia Law School advises its students interested in an academic career as a law professor as follows:

[C]Getting excellent grades at a distinguished law school, being a law review member or (preferably) officer, and having a prestigious clerkship after graduation have been the most important factors [that make one a good candidate for a teaching job], especially at the top schools. In recent years, however, scholarly achievement—not just potential—is increasingly required. . . . Most law faculties still value candidates who have practiced law, so a few years of experience . . . can be useful.


383 See Newton, supra note ___ at 147 (“Because practical skills . . . are honed by significant practical experience, it is highly unlikely that most tenure-track professors—particularly the new breed of interdisciplinary theorists—could effectively teach such a course.”).

384 See THE CARNEGIE REPORT, supra note ___ at 196 (“Both doctrinal and practical courses are likely to be most effective if faculty who teach them have some significant experience with the complementary area.”).

385 See Jack Crittenden, *How Legal Education Is Changing, Albeit Slowly*, THE NATIONAL JURIST (Jan. 12, 2012), http://www.nationaljurist.com/content/how-legal-education-changing-albeit-slowly (quoting Dean Jim Chen of the University of Louisville Brandeis School of Law as saying “the single biggest cost in legal education is ourselves. When will salaries go down and tenure be abolished?”).

386 See, e.g. John Rabton, UNLV ‘president presents cuts, says they are “a tragic loss and a giant step backward for Nevada.”’ LAS VEGAS SUN (Mar. 8, 2011). Available at http://media.lasvegassun.com/media/pdfs/blogs/documents/2011/03/08/UNLV_Budget_Cut_Overview.xls (sharing a spreadsheet showing that out of over $47.5 million in budget cuts, zero was to be cut from law school salaries). UNLV’s law school intended to cover these budget cuts with tuition increases instead of faculty cuts. See University of Nevada, Board of Regents Briefing Paper (June 16–17 2011). Available at http://www.scs.nevada.edu/tasks/sites/Nshe/assets/File/BoardOfRegents_Agendas/11/june/main/BOR-10.pdf (requesting 19.5% and 4.5% increases to resident and nonresident law student tuition, respectively). See also Erwin Chemerinsky, *Invest in Higher Education*, Los Angeles Times (Dec. 27, 2010). Available at http://articles.latimes.com/2010/dec/27/opinion/la-oe-chemerinsky-uc-tuition-20101221 (resisting executive and faculty salary freezes by writing that “[p]laying significantly less than other schools will mean that the best faculty will leave and those with other choices will not come. The quality of teaching and research will steadily decrease and the university will spiral downward, as it will then be ever harder to attract excellent students and faculty.”).
paid to such instructors.\textsuperscript{387} This is a sub-optimal solution, however, because adjuncts are typically unable to give the time and attention necessary to provide high quality experiential instruction to students compared with properly qualified full-time instructors dedicated to such courses.\textsuperscript{388} Further, the ABA Standards strongly discourage the use of adjuncts in the first year curriculum and provide that “full-time faculty shall teach the major portion of the law school’s curriculum,”\textsuperscript{389} while also requiring that full-time law school employees must be the supervisors of all clinics.\textsuperscript{390} That said, adjuncts can and must have some role in delivering experiential learning given the reality of limited resources; the perfect (using all full-time faculty) should not be made the enemy of the good (using adjuncts) and the ABA standards should be revised to permit a greater role for part-time faculty or adjunct instructors. Another possibility would be to expand the ranks of clinical faculty in proportion to the rest of the faculty. Their salaries typically are lower than traditional doctrinal faculty,\textsuperscript{391} but their reach in terms of numbers of students is more limited given the small size that clinics must be to be effective.

Ultimately, schools interested in moving their curriculum in a more practice-oriented direction will have to give serious thought to revising their hiring patterns to identify experienced practitioners who have the potential to be great classroom teachers.\textsuperscript{392} Although scholarly potential could remain a factor, exalting that above the ability to deliver practice-relevant training and experiences to students would not be sensible if this type of


\textsuperscript{388} This differential flows largely from the fact that adjuncts will have other full-time employment that will not necessarily accommodate the need to dedicate large amounts of time to supervising law students and they are not physically located at the law school where they would be more readily accessible to their students. Adjuncts may also be less experienced in teaching than full-time faculty and thus may do a poorer job, although this is hardly necessarily so as full-time faculty are not necessarily outstanding classroom teachers guided by the latest research on effective pedagogy nor may they be qualified to guide students through simulations of practice scenarios they have not themselves experienced.

\textsuperscript{389} ABA Standards for Approval of Law Schools, Standard 403(a).

\textsuperscript{390} ABA Standards for Approval of Law Schools, Standard 304, Interpretation 304-3(e).

\textsuperscript{391} For example, the highest paid clinical faculty person at the University of North Carolina, Chapel Hill School of law had a salary of $101,000 in 2011, lower than the $110,500 salary paid to several Assistant Professors. \textit{See The Collegiate Times, University of North Carolina, Chapel Hill Public Salaries, available at http://www.collegiatetimes.com/databases/salaries/university-of-north-carolina-chapel-hill-2010?dept=Law.}

\textsuperscript{392} A 1980 report of the ABA Special Committee for a Study of Legal Education recommended that “the law school recruitment process for full-time faculty increasingly look to the practicing segment of the profession for its potential faculty members . . . .” \textit{AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION, LAW SCHOOLS AND PROFESSIONAL EDUCATION 105 (1980).}
The law school critique were the goal. To be clear, this is not a goal all law schools may want to embrace; law schools should be free to pursue a variety of missions, including serving as a preeminent center of scholarly research on the law. But for those schools wishing to emphasize a mission of preparing students for practice, hiring differently—meaning a shift toward more experienced lawyers—will have to be part of the equation.393

V. The Next Century in Legal Education

What have we learned? The four pillars of law school education—its curriculum, its pedagogy, its mode of assessment, and its faculty—all have roots in the Langdellian reforms of the late 19th Century. The justification for the design of the Langdellian law school—that law is a science best learned from studying “original sources” at the feet of masters of learning rather than masters of practice—has been called into question ever since that time, but the basic model has endured. Its resilience seems to be linked to a variety of factors: The consonance of the Langdellian approach with faculty backgrounds and aspirations makes it fairly self-perpetuating; the economics of the approach have been heretofore unquestionably superior to more effective alternatives; students and employers have historically been unresponsive to law school curricular reform as they continue to prioritize school prestige— not the quality of training—in making enrollment and hiring decisions;395 and the deficiencies of the approach were less

393 Jerome Frank made a similar proposal to expand practice-experienced faculty many years ago. See Frank, Why Not a Clinical Lawyer-School?, supra note __ at 914 (“A considerable proportion of law teachers in any law school should be men with not less than five to ten years of varied experience in the actual practice of law.”).

394 NALP Foundation for Law Career Research and Education & the American Bar Foundation, After the JD: First Results of a National Study of Legal Careers 79 (2004) (reporting survey results that “indicated that two credentials are crucial to finding the first job after law school: the reputation of the school and law school grades”). See also Karen Sloan, Elite Firms Seem to Have Lost Their Appetites, THE NATIONAL LAW JOURNAL (Feb. 27, 2012), at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202543428334&slreturn=1 (“The most prestigious law schools still dominate when it comes to placing graduates.”); Matt Leichter, Clever Plans to Reform Legal Education Won’t Make Legal Services Any Cheaper, AmLaw Daily (Jan. 30, 2012) http://amlawdaily.typepad.com/amlawdaily/2012/01/clever-plans-to-reform-legal-education-wont-make-legal-services-any-cheaper.html (“Why aren’t California’s more price-sensitive firms hiring graduates directly from the People’s College of Law in Los Angeles rather than from UCLA? . . . Firms could do this, but instead, they prefer ABA grads from highly regarded law schools.”).

395 See, e.g., THE MACCRAE REPORT, supra note __ at 6–7 (“[F]ew employers appear interested in whether students have enrolled in [skills] courses or how they perform in them.”); id. at 7 n.2 (“The American Bar Foundation survey of hiring partners found . . . that this selection of particular courses has little or no impact on hiring decisions.”). This stubborn fact, that legal employers complain about the quality of legal education but do not alter their hiring patterns in response to law school reforms, is a major contributor to the complacency among many legal academics, particularly at elite schools. This commitment to credentials—law school ranking and class ranking—as the determiners of hiring decisions means that doing a better job of training lawyers for practice receives little reward, at least in the short term. As a result, there is less incentive to pursue such reforms, at least among top-tier
consequential in a world in which the bar understood and fulfilled its duty to complete the training of lawyers during their first couple years of practice.

Unfortunately, the fraying of the foundation for the justification and perpetuation of the Langdellian approach is not likely to usher in fundamental change with ease. Law faculty benefit from the current structure of the course delivery system and may be loathe to take on work that will compromise time for other pursuits or impose burdens without increasing compensation. Further, the profile of current law faculty—having been educated under the Langdellian system and having had little to no practice experience—renders them less sympathetic to the urge toward practice-relevance and less competent to devise and deliver a program with such an orientation. This point was apparent to Jerome Frank, who long ago lamented that inexperienced teachers learned only in the law in books—the so-called “book lawyer” or “library-law teacher”—controlled law schools and thus could thwart the reform process:

Unfortunately, attempted reform of legal pedagogy is frequently in the hands of the “library-law” teacher. With the best will in the world, such a teacher often finds it almost impossible to warp over the old so-called case-system so as to adapt it to the needs of the future practicing lawyer. For, as above noted, that system is centered in books. So long as teachers who know nothing except what they learned from books under the old case-system are in control of a law school, the actualities of the lawyer’s life are likely in that school to be considered peripheral and as of secondary importance.

Perhaps focusing on the “law in books” was appropriate in a time when students would go on to learn the “law in action” during the first years of practice; academic legal education was originally meant to precede and supplement law office training, not supplant it. Because that tandem schools, particularly to the extent they raise the cost of legal education or place cherished school rankings at risk. That said, the competition for students among such schools is fierce, particularly in an environment of declining LSAT takers, and to the extent that curricular and other reforms can attract more and better students to one’s school, that is an advantage that an increasing number of elite schools may begin to pursue over time.


See John Lande & Jean R. Sternlight, The Potential Contribution of ADR in an Integrated Curriculum: Preparing Law Students for Real World Lawyering, 25 OHIO ST. J. ON DISP. RESOL. 247, 274 (2009) (“[M]any law faculty members tend to have ‘conservative’ attitudes about reform. Law professors often value tradition. It is not unusual for faculty to believe that the law school curriculum worked well for them when they were law students and that it should work well for current law students as well.”).

Frank, Why Not a Clinical Lawyer-School?, supra note ___ at 915.
relationship between the two spheres has shifted—from formal, to informal, to optional, to nonexistent—law schools must reform the Langdellian model to fill the void.

What should that reform look like? I have sketched out some thoughts above—that schools should give some consideration to expanding practical skills training, diversifying pedagogical methods, developing more meaningful assessment techniques, and considering the benefit that more experienced practitioners could bring to a law school faculty—but these and other ideas require much more thorough treatment than I have given them here and will have to await future work. Further, beyond law school there are other improvements that need to be made in the areas of pre-law education, bar admissions standards, and continuing legal education while in practice.

But our concern here has been the Langdellian model of law school education. If that model is fundamentally broken—a question that will likely remain the subject of great debate—then only fundamental change will do, rather than the incremental change we have seen over the past 130 years.
years. Fundamental change means rethinking our categorization of doctrinal subjects and commitment to them as the dominant component of training for legal practice.\footnote{For example, should we continue to teach Contracts, Property, Torts, Criminal Law, and Civil Procedure in the first year or should we be teaching American Legal System, Introduction to the Common Law, Transactional Law, Business Law Concepts, American Public Law, Transnational Law, Constitutional Rights, and Civil Litigation?} It means acknowledging what other disciplines seem to know about how people learn and giving in to the need to bring that knowledge into our own classrooms.\footnote{For example, having students learn by doing, in context, more so than learning by reading and hearing alone.} It means going beyond traditional classroom dynamics and physical libraries to approaches that leverage technology to deliver content while focusing face time on meaningful discussions and problem solving.\footnote{See generally THOMSON, supra note __ (discussing how technology can be leveraged to improve legal education); Robert Talbert, Thoughts on the Culture of an Inverted Classroom, THE CHRONICLE OF HIGHER EDUCATION (Mary 25, 2011) (discussing “inverted classrooms,” in which lectures are offered online and classroom time is used for discussion, working on problems, and helping individual students).} It means making the effort to evaluate students against learning objectives in a way that measures and supports their growth and development. It means opening our minds to the notion that using experienced lawyers to educate novice lawyers-in-training is not some radical proposition, but an approach that bears a greater promise of inculcating students with the tools they need for practice. It means freeing law schools to focus on their respective missions and areas of strength, rather than playing to a unitary, Harvard-based model of legal education.\footnote{This was one of the key observations of Alfred Reed in his 1921 Carnegie Foundation report on law school. See THE REED REPORT, supra note __ at 417–18. Of course, to realize this end, some reform would have to take place in the U.S. News & World Report ranking system, which ranks all law schools along a single scale. Perhaps moving toward the approach U.S. News takes with undergraduate rankings—dividing them National Universities, National Liberal Arts Colleges, Regional Universities, and Regional Colleges—would be something that could be tried for law schools. Unfortunately, no law school is likely to embrace the label “Regional Law School” or “Local Teaching Law School.”} And it means that legal employers—who complain incessantly about the quality of legal education—will have to start putting their jobs where their mouths are and hire based more on the quality of training received than on one’s class rank and school prestige and reclaim some responsibility for the continuing education of their new hires.\footnote{A promising area for future research would be to examine the hiring patterns of employers across and within law schools over time to see if there has been any migration towards job applicants with more extensive practical training; if not, the question of what they truly value versus what they say they value—arises.}

\begin{itemize}
\item \footnote{Something else employers could consider would be to hire new associates at dramatically reduced pay and offer them extensive practical training experiences, akin to the apprenticeship model used in other countries such as Canada (“articling”) and England (“pupilages” for barristers). Some American law firms have experimented with this approach, although the model has not become widespread. See Elie Mystal, Howrey First Years to $100K, http://abovethelaw.com/2009/06/howrey-first-years-to-100k/ (June 22, 2009) (“[Howrey] is moving to more of an apprenticeship model. New Howrey associates will receive an emphasis on training and take a significant reduction in salary.”); Elie Mystal, Salary Cut Watch: Drinker Biddle Cuts Salaries AND Rates, http://abovethelaw.com/2009/05/salary-cut-watch-}\
\end{itemize}
Many readers will want a bit more specific advice regarding legal education reform than I have given here. I will thus offer some reforms that a law school wanting to do a better job of preparing its students to become practitioners could undertake:

• Modernize the first year to include an introductory overview of the legal system and the legal profession, as well as subjects more pertinent to contemporary legal practice such as transnational law and administrative law;

• Impose a live-client experience requirement, having all students participate in either a clinical course or an externship;

• Extend legal research and writing education into the second year, featuring more extensive simulation training focused on certain areas such as litigation and transactional skills;

• Redesign the content of traditional courses away from an emphasis on cases toward more source material and practice documents, while redesigning the delivery of courses around more group work and problem-solving exercises in the lawyer role during class meetings;

• Hire full-time, part-time, and adjunct faculty who can bring more extensive and contemporary practice experience to bear on the design and delivery of the curriculum;

• Develop capstone courses that enable third-year law students to synthesize their learning across courses and apply it in practice settings.

These are not steps that all law schools must take. Rather, these are simply some possibilities that some schools could consider; there are surely other ways to improve the ability of legal education to prepare students and schools should be free to pursue them. Further, while the above reforms may be worthwhile improvements, work remains to be done that can demonstrate their efficacy in better preparing students for practice, at least sufficiently to justify the cost and potential disruption that might accompany some of these efforts.

Unfortunately, several external constraints facing law schools make fundamental reforms difficult to embrace: ABA standards limit the ability to use active practitioners as part-time faculty, require the commitment of

[Drinker Biddle] will enroll its hires in a new training program that will provide courses on taking depositions, writing briefs, and meeting client needs."

Howrey was dissolved on March 15, 2011, See http://www.howrey.com/ ("Effective March 15, 2011, the partners of Howrey LLP voted to dissolve the law firm."). Drinker Biddle carries on with its program. See First Year Associate Development Program, http://www.drinkerbiddle.com/careers/first_year/.
extensive resources to physical libraries, and limit the amount of distance education that students can apply toward their degrees; the U.S. News rankings lump all schools into a unitary system that rewards things like expenditures per student, faculty scholarship and prestige, and LSAT scores rather than qualities that relate more directly to a school’s ability to prepare its students for practice; and bar exams continue to focus almost exclusively on substantive knowledge rather than practice competency, a focus that law schools must mirror to some extent if their graduates are to be able to pass the bar. Hopefully over time these and other external factors will evolve in ways that facilitate the more effective legal education that reformers have been urging for the past century.

VI. CONCLUSION

Traditional legal education remains bound up with many of the fundamental attributes designed by Langdell at Harvard Law School more than a century ago. It is a decidedly academic, or cognitive model of legal education—centered on legal doctrine and case law—with varying degrees of elective opportunities to attain practical and professional competence. To be truly effective, however, professional legal education must give more attention to transmitting the skills and values that are essential compliments to doctrinal instruction. Mastering the cognitive, practical, and ethical dimensions of legal practice are what professional legal education must be about; focusing largely on the law in books cannot do the job. Perhaps the late (and great) Derrick Bell said it best when he wrote the following:

By . . . giving priority to “learning by doing” simulations, students mimic the kind of process that an attorney, researching an unfamiliar area of law, might utilize to investigate prior decisions. In practice, lawyers are called to research and to write; to comprehend legal arguments; to guess at the probable effect of and interaction between judicial, statutory, legal and policy arguments in court; to argue, persuade and debate; to work cooperatively with colleagues; and for some, to judge those arguments and decide cases and issues of law. This is as true in the practice of constitutional law as in any other. Once their research skills are in place, most students are aware that they have the capacity to learn, relatively quickly, whatever they need or want to know regarding any legal question.410

This full range of abilities gained through experiential learning is what law schools should strive to deliver if their goal is to produce competent

attorneys. Students need to learn how to “work like a lawyer,” not just how to “think like a lawyer.”

This has been understood by many since the time of Langdell, as evidenced by the continual criticism emanating from the ABA, the Carnegie Foundation, and legal commentators since the late 19th Century. What makes change possible now is that the unprecedented confluence of disintermediation in the legal profession, the stagnation of incomes in the legal job market, a bubble in law school tuition and attendant student borrowing, and the prospect of a decline in law school applications and enrollments that will require all but perhaps the most elite and secure law schools to innovate or die. I have no doubt that many law professors will react to these admonitions much as most law professors have reacted to previous efforts to improve legal education—with denial or sighs of impossibility or indifference—given the many obstacles to reform.

I t may require bold leadership from deans to make the case for a new vision of legal education and an insistence on the adoption of certain measures, perhaps as a condition of their taking on or continuing to serve in the dean role. Certainly, there may be faculties that take the lead in responding to the need for significant change. However we get there, it is clear that we need to get beyond the Langdellian model toward a truly 21st Century program of professional legal education that prepares graduates for practice; the time is ripe for getting there if we can all collectively muster the will to take the first steps.

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411 David E. Van Zandt, Foundational Competencies, 61 Rutgers L. Rev. 1127, 1133–34 (2009) (“The excellent legal analysis and advocacy skills that are the hallmark of law school programs must remain an essential element of legal education, but today’s law students also need a much more sophisticated understanding of what it means to work as well as think like lawyers in their multi-job careers.”).

412 See SUSSKIND, supra note ___ at 6 (“Lawyers, like the rest of humanity, face the threat of disintermediation (broadly, being cut out of some supply chain) by advanced systems . . . .”).

413 Michael Hunter Schwartz, Teaching Law By Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching, 38 San Diego L. Rev. 347, 360 (2001) (“The legal academy’s policies regarding law school hiring, promotion, and tenure practices, law school textbooks, law school accreditation practice, and law school economics have created an environment in which change is very unlikely to occur.”).

414 Brian Tamanaha has suggested just such an approach in his “Dean’s Vision” speech, in which he announces pay cuts and increased course loads as norms that would characterize his deanship if hired. Brian Tamanaha, My “Dean’s Vision” Speech, Balkinization, (Nov. 16, 2010), http://balkin.blogspot.com/2010/11/my-deans-vision-speech.html.