Standing on Quicksand: Why Law Students Need New Survival Skills for an Evolving Legal Landscape

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Allen Moye
ABSTRACT

This paper adds another voice and dimension to the ongoing discussions about the direction and evolution of American legal education. Specifically, as that discussion pertains to the lack of lawyering skills training in general and the need to include instruction in information literacy as part of the educational process.

The author provides a brief overview of the history and development of legal education as context to discuss reform and modernization. The application and adaptation of technology in education is generally discussed, with specific mention of the role of libraries, and legal education in particular. Lastly, the author provides some discussion about changes within the legal profession related to technology and its potential future impact on the practice of law.
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Introduction

The idea for this paper came to me as I watched the late Steve Jobs, of APPLE, INC. introduce yet another iteration of his company’s I-Phone\(^1\). Ten years into the 21\(^{st}\) century and nothing illustrates how rapidly our world is changing as a result of technological development, like the ubiquitous “smart phone”\(^2\), of which the I-Phone is the quintessential archetype.

While most disciplines and professions have adapted to new uses of technology, legal education remains one of the last holdouts. Much of what has become standard to legal education pedagogy over the past 140 years has been subject to a growing criticism and calls for a new and different approach. This is particularly true when it comes to teaching practical lawyering skills, which include a working knowledge of the form and function of legal resources. The technology age has considerably altered both aspects of these resources, and undoubtedly more changes will come. These changes require a heightened level of information literacy on the part of today’s law student, a skill that is all too often overlooked, or taken for granted. History teaches us, that the debate over how much or even whether law schools should teach practical skills is not a new one. The reasons to resolve the issue, however, may be more compelling than ever.\(^3\)

\(^{1}\) http://www.newsweek.com/blogs/techtonic-shifts/2010/06/07/biting-into-apple-s-iphone-lead.html

\(^{2}\) Smartphones are mobile phones with advanced computer and connectivity than a standard cell. It originates back to the early 1990’s, when IBM introduced SIMON which combined the features of a mobile phone, a pager, a PDA, and a fax machine.

\(^{3}\) In 2007, Dean Larry Kramer, of Stanford’s Law School compared the state of today’s legal profession to Rome, around 300 A.D. “on the surface all is grand and magnificent, but the foundation is about to collapse” Peter Lattman, Stanford’s Larry Kramer: The State of our Profession is Bad. WALL. St. J. Law Blog, Oct. 22, 2007 (http:// www.law.stanford.edu/news/details/1216)
When it came time to title this piece, it occurred to me that in some ways continuing to use a 19th century model to teach 21st century lawyers is like asking them to stand on quicksand. While often associated with a treacherous death trap from the B-movies of the 1950’s; quicksand does exist. It can also Solicitors be a metaphor to describe unstable or difficult situations, which is an apt depiction of the state of legal education today.

As this paper began to take shape, I became curious about the development and creation of the educational process of lawyers. I developed an interest in the origins of our current system and what may have influenced its development. I also wanted to examine some of the arguments for changing or revising the system, with an eye toward the inclusion of sustainable legal information literacy skills, as part of a new paradigm.

Part one begins with an overview of the evolution and development of legal education, giving deference to our English roots, before focusing on the American model. Historical context for each phase of development is provided, by discussing societal factors that may have been in play at the time. I conclude this section with a review of some of the critiques embodied in the various evaluations from the 20th and early 21st century with some suggestions for revision.

Part two is focused on technology, and I begin by discussing different theories of how technological advancements are integrated into society. I narrow the focus to the use of

4 Quicksand- 1) A bed of loose sand mixed with water forming a soft shifting mass that yields easily to pressure and tends to engulf any object resting on its surface; 2) A place or situation into which entry can be swift and sudden but from which extrication can be difficult or impossible. A bed of loose sand mixed with water forming a soft shifting mass that yields easily to pressure and tends to engulf any object resting on its surface.

http://www.answers.com/topic/quicksand
technology in education and the special role that libraries have in facilitating its use. Compared to legal practice, and other professional disciplines, legal academia has been slow to adapt and use technology.\(^5\) I discuss some of the recent efforts toward change and revision of the past few years. Lastly, I discuss some of the models for adjusting our teaching methods particularly when it comes to lawyering skills, like research and information literacy, so that today’s students, who will be the lawyers of tomorrow, are prepared to practice law in the world in which they will live.

**Creating Lawyers**

*Apprenticeship to Professionalism- Our English roots*

The most likely progenitors to the modern day lawyer would be the Athenian orators of Greece and the advocates of Ancient Rome. A Roman law from the 2\(^{nd}\) century B.C.E. made it illegal for advocates to accept fees for their services. When it was repealed by the Emperor Claudius representation through advocacy became legal and the door was opened for advocates to be paid for their services.\(^6\)

From medieval times to the mid-19\(^{th}\) century, lawyers learned their skills like most other trades, through a system of apprenticeship and informal reading. The disintegrating English feudal system in the 12\(^{th}\) and 13\(^{th}\) century, along with the reforms of King Henry II, led to intricate property issues that required new applications of law. This expanded the professional courts and

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called for more specialized training and knowledge. \(^7\) In 1292, a royal edict from Edward I, calling for the "recruitment of apt and eager students representative of every county in the realm to learn the business of the courts," \(^8\) laid the foundation for what would become a "standard system for educating and training lawyers for the next six hundred years". \(^9\)

As groups of practitioners and students became affiliated with certain gathering places for lecture and discussion, these meeting places became known as the "Inns of Court".\(^{10}\) Functioning much like craftsman’s guilds, the Inns of Court organized themselves into a natural hierarchy. The teachers or masters became known as "benchers" and the students were divided into three broad categories. The more senior students were known as "readers" and had functions similar to a teaching assistant. "Outer Barristers" were less experienced than the readers and primarily participated in moot courts for training. "Inner Barristers" were at the beginning of their education and attended lectures and observed the moot courts. As this system of training and educating lawyers spread throughout England, it "fostered a perception of the profession as a closed society, often compared to a religious sect". \(^{11}\)

As the Inns of Court increased in importance and stature, so did the legal profession. From the late 15\(^{th}\) through mid-17\(^{th}\) century, the Inns attained a status somewhat comparable to the


\(^8\) Id. at 430

\(^9\) Id. at 437

\(^{10}\) Four main hostels in a small area of London near Westminster emerged as the more prominent, Gray’s, Lincoln, Middle Temple and Inner Temple. They still exist as the professional associations to one of which every barrister in England and Wales (and those judges who were formerly barristers) must belong.

\(^{11}\) Stein, *supra* n. 7, at 432
universities at Oxford and Cambridge, not only providing legal training, but also “exposing students to the arts and other intellectual pursuits”.

During this time, an important distinction arose. While the Inns of Court became the preparatory schools for Barristers, two other forms of legal practitioners were without comparable formalized education. Solicitors (initially clerks drafting documents) and Attorneys essentially obtained their education through apprenticeship. These contractual arrangements were crafted much like that of any other trade, and regulated by the same principles. The need for Solicitors increased as the demands of the market led to the establishment of a permanent court of equity known as “Courts of Chancery”.

By the early 18th century the Inns of Court began to experience a period of decline. During this time they were largely perceived as “finishing schools for the sons of the aristocracy and gentry”. Many Barristers were involved with the emerging English Parliamentary System and had little time or interest in teaching. The Solicitors and Attorneys had merged, and a 1729 Act

12 Id.
13 Barristers were lawyers with training and experience in the superior courts, and had access to more research material and had developed greater skills interpreting and applying the law. Some would go "on circuit" with the court acting on behalf of someone else requiring representation. In comparison, Solicitors were essentially based in one location or town, like London. The term "barristers" is used because at one time they were literally "called to the Bar", the barrier symbolizing a separation of the public -- including solicitors and law students -- from those admitted to the well of the Court. They became specialists either in appearing in court, or in the process of using the courts, which would include giving oral or written advice on the strength of a case and the best way to conduct it.
15 In the English legal system, solicitors traditionally dealt with any legal matter apart from conducting proceedings in courts. Minor criminal cases tried in Magistrates' Courts, for example, and small claims civil cases tried in county courts are still almost always handled by Solicitors.
16 Although at one time the term referenced outer barristers at the Inns of Court, "attorneys" were in effect surrogates for anyone required to appear personally at his lord's court, but for some reason was unable to do so. There was no legal education or particular skills required to appear on someone else's behalf.
17 Stein supra n.7, at 433, citing M. M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND (New York: Harcourt, Brace and Co. 1942)
18 Id. at 433
of Parliament reorganized their legal education, formally establishing training by apprenticeship. As a result, the educational process for lawyers in England shifted, with more emphasis on the practical skills, which proved to be more useful in the lower Courts of Equity than the high courts of Common Law.

Although Oxford and Cambridge had offered courses in Canon and Civil law up through mid-18th century, the Common Law was widely deemed unworthy of academic consideration. Sir William Blackstone, a product of the Middle Temple Inns of Court, was the first to try to change this in any significant way. In 1753, he began a series of Common Law lectures at Oxford, and ultimately held the university’s first chair in English law. His multi-volume publication, “Commentaries on the Laws of England” based on his lectures, was praised for a “graceful writing style that clarified some of the more obscure and bewildering Common Law doctrines.” Blackstone’s influence was noted during his lifetime and well after. However, the study of law as an academic pursuit did not take hold in England for another 120 years. In order to keep pace with the growth and influence of the Solicitors, the Inns of Court attempted to revise their standards but were still perceived as little more than an elitist social club.

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19 According to Prof. Michael Stein, 18th century Oxford and Cambridge universities did not prepare men for professions, but more for an academic contemplative life, and as such medicine was of no more interest than law. See, STEIN supra n. 7 at p. 435 n. 26
21 Id. Blackstone’s work is widely seen as influencing many American statesmen and jurists from Alexander Hamilton to U.S. Supreme Court Justice Clarence Thomas, who is known to quote Blackstone for historical reference.
Despite several recommendations for reform, including entrance examinations, creation of a national college of law, and more Common Law courses at the universities, none of these suggestions were fully implemented. By the early 1870’s, although both Oxford and Cambridge had reformed their respective faculty, this did little to attract students to the study of law. The established bar still did not accept a university degree as equivalent to practical experience.

After six hundred years, England found itself with a disjointed and somewhat inefficient system for educating lawyers. The practical application of the law fell largely to the Solicitors, who were at best clerks, limited in their experience to matters of Chancery. Although Barristers were typically without a general academic education, those from wealthier families managed to attend university, as well as one of the Inns. The more prudent also sought out clerkships, before entering practice. This served to narrow the field of competent Barristers, and resulted in a closely in-bred profession.

**Breaking Away- Legal Education in America**

Refugees from Western Europe fleeing religious discrimination, if not outright persecution, founded many of the early North American settlements of the 16th and 17th century. Consequently, the Christian Bible figured prominently in the rule of law, since members of the clergy were often community founders and leaders, with a significant presence in the magistracy and courts. This resulted in what was at times an odd mix of secular law, theology and superstition, illustrated by the Salem Witch Trials of the late 17th century. Many of the early

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22 In 1846 the British Parliament commissioned an investigative report, which found the English legal education system to be inferior to that found in most other European countries as well as the United States. See, Stein supra n. 7 p. 436

23 During the 1600’s colonial justice often lacked English technicality and was sometimes based on a general sense of “right derived from the Bible and law of nature”, E. Allan Farnsworth, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE
English settlers were trying to escape British rule and as such they may have been distrustful of things that reminded them of England. That’s not to say that lawyers did not exist during the early American Colonial Period; but having been educated in England, they may have been perceived as emissaries of “the crown” sent to keep the subjects in-line with the English rule of law. As the need for lawyers with colonial loyalties and interests grew, a body of colonial lawyers emerged. Although some wealthy families may have had money to send a son to one of the Inns of Court, the majority was educated as apprentices. The apprentice/ clerking system as it developed in Colonial America, represented a major departure from our English roots. The apprentice generally paid the attorney for the privilege of performing a variety of tasks. Some duties related to the practice of law, others did not. Attempts to regulate the clerkship system were unsuccessful until 1730, when New York’s provincial Supreme Court issued an order mandating a seven-year clerkship. Between 1730 and 1776, a tug of war over admission standards went back and forth between the courts of New York and the New York City Bar. Finally in its’ 1777 constitution, the state granted the power for regulating qualifications, standards and bar admission to the courts.

The American Revolution had a profound effect on the development of the legal profession in America. Pre-revolution, many members of the bar and bench were loyalists. As the revolution turned in favor of the colonists, some loyalist lawyers were compelled to leave the American Colonies, while others seized the opportunity and took political or judicial posts in the new

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24 Peter Hamlim, LEGAL EDUCATION IN COLONIAL NEW YORK (New York, Da Capo Press, 1970) ©1939 provides a thorough history of what he describes as five stages of legal education in colonial New York, which serves as a microcosm for other English speaking settlements during the same era.
25 See, Farnsworth, supra n. 23.
26 Id.
government. Despite being unpopular and all too often associated with English aristocracy, law as a profession was very much needed in Colonial America. Although standards varied, many lawyers emerged as important leaders in their communities. Of the fifty-six signers of the Declaration of Independence, twenty-five were lawyers.\textsuperscript{27} The delegates attending the Constitutional Convention of 1787, included soldiers, educators, merchants, physicians and farmers, but lawyers, at fifty-four percent, represented a majority.\textsuperscript{28}

Once America had won its’ independence, it was no longer connected or bound to English methods and systems. This allowed for the development of what would become a distinctly American approach to educating lawyers. Despite several fits and starts during the late 18\textsuperscript{th} and early 19\textsuperscript{th} century\textsuperscript{29}, there was a decided commitment on the part of the young republic to teach law within the university framework. Between 1790 and 1798, five professorships in law were established at universities and colleges in Rhode Island, New York, Pennsylvania and Kentucky\textsuperscript{30}

These professorships represent some of the earliest attempts to formalize the education and training of lawyers in America. They also indicate an acceptance of the study of the Common Law as being worthy of inclusion in a university program, reflecting a gradual integration of law, as a subject, into the body of American intellectual pursuits.

\textsuperscript{27} Farnsworth, at p. 14.

\textsuperscript{28} Sol Bloom, Questions & Answers Pertaining to the U.S Constitution http://www.archives.gov/exhibits/charters/constitution_q_and_a.html (Last accessed Sept. 7, 2010

\textsuperscript{29} Several obstacles had to be overcome, including a widely accepted unpopularity of lawyers, which may have been based on the fact that all too often much of their practice involved debt collection; in addition to vestiges of anti-British sentiment, and the lack of a distinctly American body of law.

\textsuperscript{30} These included Benjamin Franklin’s College in Philadelphia and Brown’s College in Rhode Island (1790); Kings College (later Columbia University) in 1793; New Jersey’s Princeton in 1795; and University of Transylvania in Lexington, Kentucky in 1798.
As academic programs and courses in law at the universities began to solidify they became more focused on theory than practice and the inconsistencies in the clerking system led to the founding of a series of small private law schools. One of the more successful of these was Litchfield Law School, founded in Litchfield, Connecticut in 1773.\(^{31}\) Widely recognized as the first American law school, its founder, Judge Tapping Reeves attempted to create an American version of the Inns of Court. However, Litchfield was nothing like London, and Colonial America was much too rural and regionalized. However, before closing its doors in 1833, Litchfield attained a notable record of having graduated just over 1000 students, many of whom went on to serve as state governors, U.S. Congressmen, as well as in the U.S. Supreme Court.\(^{32}\)

For the most part, well into the middle of the nineteenth century, the accepted way to prepare for the bar was by “reading law”.\(^{33}\) In some respects this apprenticeship system gave meaning to American egalitarian ideals. Most of us are familiar with the story of those from humble beginnings, such as Abraham Lincoln, who received his legal education as an apprentice and rose to prominence and positions of leadership. The vast majority of people of African descent living in the Western Hemisphere were held in some form of human bondage during this time.\(^{34}\)

\(^{31}\) Founded by Tapping Reeve Litchfield is widely accepted as the first law school in the United States. Reeve who went on to become a Chief Justice of Connecticut’s Supreme Court, also taught Aaron Burr and married Burr’s sister, Sarah.

\(^{32}\) Stein, supra n. 7, at 443

\(^{33}\) This is a reference to what were typically casual apprenticeships, consisting of the performance of routine tasks and access to the attorneys’ collection of books, law related and otherwise.

\(^{34}\) “Free blacks in America were first documented in Northampton County, Virginia in 1662. By 1776, approximately 8 percent of Africans in America were free. In the two decades after the Revolution, many slaveholders in the Chesapeake Bay area freed their slaves. For instance, in Virginia, the number of free blacks increased from a few thousand before the war, to 13,000 by 1790 and 20,000 by 1800. The numbers were more dramatic in Delaware and Maryland, where a higher percentage of slaves were freed, in part because of changing economies that decreased the need for slave labor and immigration by free blacks to Delaware from Maryland and Virginia. By the 1810 census, 75 percent of blacks in Delaware were free, compared to 7.2 percent of the blacks in Virginia. In the South overall, 4 percent of blacks (10 percent in the Upper South), and 75 percent of blacks in the North were free. On the eve of the Civil War, 10 percent of African Americans nationwide, close to half a million people, were
However, there are interesting stories of freed or free-born persons living, learning and contributing to a society that did not necessarily appreciate their efforts at the time. For example, Macon B. Allen and George B. Vashon, were two African Americans trained as lawyers in the mid-19th century. Macon B. Allen (1816-1894) is by most accounts the first African American to be licensed as a lawyer in the United States. He apprenticed under Maine attorney Samuel Fessenden, who petitioned the court on Allen’s behalf to allow him to practice law. Although initially rejected due to lack of citizenship, (Allen was a transplant from Indiana) he requested an examination, which he subsequently took and passed in July 1844. Allen ultimately moved to Boston, Massachusetts where he passed another bar exam and later became the state’s (if not the nation’s) first African-American Justice of the Peace. He went on to have an active legal and political career, in Washington D.C., where he held government posts, and South Carolina, where he was a probate judge during Reconstruction.

George B. Vashon (1824-1878) may actually be more well-known among literary circles as a poet and essayist. He was however, the first African American to be licensed as a lawyer in New York State. Born in Carlisle, Pennsylvania, Vashon graduated from Oberlin College in 1844. He apprenticed and studied under Judge Walter Forward, a prominent Pennsylvania jurist and politician, but was denied admittance to the bar because “colored people were not citizens”. He was admitted to the bar in New York in 1848, before moving to Haiti where he ultimately lived and taught for over two years. He was a well-respected educator, the first African American


35 He was certainly the first African-American attorney licensed in Maine, on July 3, 1844; See also, J. Clay Smith, Jr., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944 93(Univ. of Penn. 1999)

37 He was the first African American to do so., Smith, Jr. supra n. 35, p. 162.
38 Of course, this question was not settled until after the Civil War and the passage of the 14th Amendment. Mr. Vashon was admitted to the Pennsylvania bar posthumously on October 20, 2010. http://www.washingtonpost.com/wp-dyn/content/article/2010/10/20/AR2010102003157_pf.html
39 Supra n. 35, Smith, Jr. p. 162
professor at Howard University, and is credited as one of the founders of its law school. After leaving Howard he taught mathematics and ancient and modern languages at Alcorn University in Mississippi from 1874 until his death in 1878.40

Despite the overt racism and discrimination that these gentlemen and others like them surely faced, the opportunity to study if not practice law, was certainly made more accessible through the apprenticeship system.

Classifying and Categorizing the Common Law

Langdell’s Lasting Imprint

Founded in 1817, Harvard University has the oldest continuously operating law school in the nation.41 Throughout the 19th century, Harvard established itself as a premier university and although many lawyers were still being trained informally as clerks or apprentices,42 the law school was highly regarded as being among the best.

During its growth period, for all intent and purposes, Harvard law became the epicenter of legal academic development and innovation. In this environment, the Common Law was fully embraced as a legitimate course of study in a university setting.

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41 William and Mary in Virginia opened in 1779, but closed at the beginning of the Civil War, and did not reopen for another 60 years. The University of Maryland was founded in 1816, but classes did not begin until 1824. Its operations were also interrupted by the Civil war, but classes resumed in 1865 shortly after the war ended.

42 This was especially true the farther west from the original colonies one traveled, where there were widely varying requirements for bar admission. Professor Stein noted the experience of Illinois state Senator, Stephen Douglas, who left his home state of New York, which required 7 years of study and clerking, who moved to Ohio, which only required one year. Douglas continued on to Illinois; where he discovered that no license was required to appear before a Justice of the Peace and after a few appearances he was able to obtain a license to practice law. Stein supra n. 7 at p. 444
Several well-known Harvard innovations are attributed to Christopher Columbus Langdell, who served as dean from 1870 to 1895. Langdell was the first of Harvard’s deans to emphasize a need for “proficiency in teaching” on the part of his law professors as well as knowledge about the substance of the subject matter. He is most often associated with the introduction of the case law method of study. However debatable it is that Langdell originated the concept, he is primarily responsible for its institutionalization and large-scale adoption. Professor Langdell believed that law should be studied as a science, whereby students could derive the principles of law from close study of original sources in order to develop and sharpen their own analytical abilities. This approach represented a fundamental departure from standard methods of teaching and studying law at the time, and is said to have “radically altered [the course of] legal education in America”.

In many ways the adaptation of a scientific methodology to the study of law was consistent with how people in the 19th century were beginning to make sense of the world around them. Science and scientific methodology were becoming very popular and more accepted. Collecting, analyzing, and classifying materials, in order to deduce certain laws or rules to explain an inherent order to the world, was considered a rational model for the study of just about all forms of phenomena. According to Langdell, applying this paradigm to teach the doctrines and

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43 Charles Warren, *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA.* (New York, 1908)
44 Interestingly, Langdell himself had no prior teaching experience, and there was some doubt he would be confirmed, the announcement of his appointment being met with “curiosity and astonishment” *see* Russell Weaver, *Langdell’s Legacy Living with the Case Method,* 36 Vill. L. Rev. 517, 521 n. 8 (1991).
45 There is some evidence that Langdell was not the originator, nor the first to use this method. A Connecticut judge, Zephaniah Swift is reported to have published an evidence treatise with cases as early as 1810; and Professor John N. Pomeroy of New York University is said to have held classes consisting of reading cases and participating in class discussions. *Id.* n. 10
47 Weaver, *supra* n. 44 p. 522
48 Theories of natural selection and evolution were replacing theology to explain man’s existence and the application of scientific methods to social phenomena was on the horizon.
principles of the Common Law made perfect sense. Although he had detractors and critics, many of whom were still at odds with the concept of teaching law in a university setting to begin with, Langdell and his “scientific approach” prevailed. Within 20 years of his leaving Harvard’s deanship, a majority of the country’s law schools had made the case law method the standard.

Although Langdell’s notions may have seemed revolutionary or radical, in some respect, his theories may have been more practical, than initially thought. The standard approach in scientific examination is to posit a theory, then subject it to experiments to either prove or disprove viability. The most natural correlation to the law would have the doctrine or principle represent the theory, and case law represent the experiment to test the truth of that particular doctrine. In pure science, a theory is found to be true based on a repeated result from the same or closely simulated circumstances. The more often the results are repeated, the sounder the theory. However, it has been suggested that for Langdell it was the other way around. He made it clear that the number of cases or “experiments” were not relevant to prove the soundness of a legal principle. The cases were simply illustrations of deeper principles, and did not prove or disprove the principle, but rather embodied it. The students’ task was to master the doctrine through studying “selected” case law that best exemplified a principle in action.

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49 Langdell believed that the “law as a science consists of certain principles or doctrines [and] mastery as to be able to apply them with constant facility and certainty to the [range] of human affairs, is what constitutes a true lawyer”. See, Patterson, supra n. 46 at 197 n. 3.

50 “Langdells’ method was not well-received, criticism came from colleagues, students and members of the bar” See, Weaver supra n. 44 at 533-34

51 “[L]aw school belongs in a modern university no more than fencing or dance.” Id. at 529 n. 29 citing T. Veblen, The Higher Learning in America 211 (1918).

52 Patterson, supra n. 46, at 199

53 Id. at n. 16

54 Langdell thought it unnecessary to review all or even most of the cases on a given subject. “[s]tudents should only review sound or good decisions as selected by their professors” see, Weaver, supra n. 43 at 531.
Langdell’s suggested classification of case law under a few general principles represented an “organizational structure of legal knowledge”, which served as the framework for what would ultimately become West’s National Reporter System and the ALI-Restatements. This classification of the Common Law, represented by cases is the core of the Langdellian methodology. The cases are illustrations of the rules in play at any given time, but the principles found in the structure remain the same.

Langdell’s approach required that the instructor identify, select and edit those cases where the holdings best illustrated the principles of a given area of law. This helped redefine instructors’ role and created a need for the modern day casebook. This in turn, laid the foundation for a whole new era in American legal publishing.

Another major beneficiary of Langdell’s tenure and new teaching methods was the library. With the support of Harvard’s president, Charles Eliot, Langdell increased spending on printed materials and hired the first full-time permanent law librarian. Langdell felt the library to be an indispensable “laboratory” for the study of law and that printed books were the ultimate source of all legal knowledge. When Langdell took over, Harvard had a respectable collection, consisting of approximately ten thousand volumes. Over the next 30-35 years the collection grew

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55 Patterson, *supra* n. 46 p. 201
56 “Following the publication of Langdell’s casebook, there was a flood of casebooks edited by American law professors. Many were self-published, which led to a proliferation of titles. At least 171 casebooks were produced prior to 1908, 65 of these were written by Harvard professors”. See, Matthew T. Bodie, *The Future if the Casebook: An Argument for an Open Source Approach*, 57 J. Legal Edu., No. 1 (March 2007) p.10, 12
57 James Whittier was officially hired in January of 1870, at $500.00 per year, but he was replaced the following September, by William Everett at twice the salary; see, Warren, *supra* n. 43, at 483.
58 *Id.* at 488, “The Library to us is like the laboratory to the chemist or physicist, or the museum to the naturalist”
59 Weaver , *supra* n. 44 at 530
to over 100,000 volumes due in large part to the skill of the librarians, and the “pains-taking
and laborious interest” of Dean Langdell himself. Langdell’s views on the importance of the
library were well documented. He wrote in one of his early annual reports that ... “without the
Library the school would lose its most important characteristic and indeed its identity.” Support
for the library was quite tangible as evidenced by the increase in funding both Eliot and Langdell
were willing to put into building up the collection and facilities.

**West’s World- A Distinctly American Legal Landscape**

Around the same time that Dean Langdell began making such significant changes at Harvard, a
young entrepreneur, named John B. West, started a small publishing and book selling company
in Minnesota. About 20 or 21 years old at the time, West only had an 8th grade education. As a
tenager, he and his family had moved from Boston, Massachusetts, to St. Paul, Minnesota. He
had taken a few odd jobs before he began working as a traveling salesman for the Merrill Book
Store. His position with Merrill took him to border towns along the Mississippi river, where he
encountered frontier lawyers who complained about not having access to much needed case
reports. West recognized the opportunity and decided to concentrate his business on servicing

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60 Warren *supra* n. 43 at 489-It should be noted a large part of this increase in volume count was due to Langdell’s push for multiple volumes of the same set of reports. This became the norm for most academic law libraries for the next hundred years.

61 *Id.*, at 487

62 “Spending had gone down during the Civil War, and Langdell needed to make some improvements. He spent $2000 during his first year for library related expenses, where as the previous ten years averaged about $80.00 per year”. *Warren supra* n. 43 at 483


64 *Id.*, at 5.
the members of the bar in the Minnesota region. In 1876, West and his brother Horatio, began publishing “The Syllabi”, a small weekly pamphlet designed to provide a more consistent way to learn about new cases from the Minnesota courts.

Although West was not the only commercial legal publisher at this time, he quickly became one of the most successful. Although neither of the West brothers was trained in the law (Horatio was an accountant) they recognized the value in providing timely and accurate information to their lawyer customers. They also understood the need to be comprehensive. Shortly after launching the Northwestern Reporter, which initially covered the Supreme Court of Minnesota, they added cases from courts in Iowa, Michigan, Nebraska and Wisconsin. Within ten years, cases from every state would be included as part of their National Reporter System.

As if the sheer volume of cases that the system made available were not enough, West began adding features to enhance and better facilitate research. He understood that our Common Law system was based on precedent, which meant that it was very important for lawyers to find previously decided cases on a particular point of law within the jurisdiction in question. West

65 He created a line of legal forms, reprinted hard-to-find treatise and an index to the Minnesota Statutes; and translated the state’s rules of practice into Swedish, Jarvis supra n. 63 , citing William W. Marvin, WEST PUBLISHING COMPANY: ORIGIN, GROWTH , LEADERSHIP 24, 28, 29 (1969).

66 One of the factors that contributed to West’s early success was the issuing of the “advance sheets (individual court opinions) instead of waiting to publish a complete volume. See, Susan Brenner, Of Publication and Precedence: An inquiry into the Ethnomethodology of Case Reporting in the American Legal System, 39 DePaul L. Rev. 461, 495 (1989-90).

67 The National Reporter System is composed of 7 geographical regions; North Western, Pacific, North Eastern, Atlantic, South Western and South Eastern. It helped to organize a chaotic, patchwork quilt of court opinions from various states with different publishing schedules and formats. Many of the state courts took months, if not years to publish opinions, and even then they were often full of errors and misspellings. West’s Reporters provided uniformity, consistency and quality control.

68 The West’s brothers were criticized for their efforts, opening up a quantity versus quality debate. Should publishers publish all cases, leaving it to the reader to determine the relative importance, or was it a better service to filter and print only selected cases? West defended his philosophy in an article published in A Symposium of Law Publishers, 23 AM. L. Rev. 396, 407 (1889), writing: “No policy of insurance is so satisfactory to the insured as the blanket policy: and that is what we issue for the lawyer, seeking insurance against the loss of his case, through ignorance of the law as set forth in the decisions of the highest court.” See, Jarvis, supra n. 63, p. 9 n. 61
hired attorneys as editors to begin writing case summaries and “headnotes” adding legal terms that were not used in the original court decision. These editorial enhancements laid the groundwork for West’s American Digest Classification Scheme, an ambitious and highly successful plan for indexing all reported American case law.

The success of the West brothers had a profound effect on the development of American jurisprudence, and in turn the process of legal education. The country’s westward expansion created new legal jurisdictions; which in turn fueled the growth of case law. However, the reporting system in place prior to West Publishing could not have supported the inevitable explosion of case reports. Case reporting was slow and cumbersome, and official state reports were expensive to produce. Until West changed the dynamics commercial publishers were selective, choosing to reproduce only some of the cases from a particular jurisdiction. This practice had a potentially negative impact, when it came to questions of fair dispensation of the law. An opinion was of little use, if it was unavailable beyond the clerk’s office of the court where it was decided. The need for access to the cases created a commodity, essential to the practice of law. Lawyers wanted and needed timely and accurate reporting. West established a practice of publishing every decision to which they had access, regardless of whether it appeared in an official report. Not only did this make more cases available, but also it helped to diminish the perception that only cases appearing in the “official” reports had precedential value. Consequently, this practice hastened the decline of the official state reports. It also created a

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69 The use of headnotes in some of the nominative reporters goes back to 1855, but West began using them on a much wider scale.

70 In the 19th century American legal publishers were selective and subjective in their efforts typically reporting cases on the basis of probable usefulness or that they felt were illustrative of established legal principles.
sustainable marketing structure for West to recycle cases into specialized and separately priced collections.

The proliferation of cases as the country expanded created a need for more consistent and comprehensive case reporting. The adoption of Langdell’s case law method to teaching law was expanded beyond Harvard to other law schools; creating an ever increasing need for more casebooks. As the 19th century industrial age gave way to the modern era of the 20th century, the education of lawyers in America had become firmly established and heavily influenced by the theories of Langdell and the entrepreneurship of the West brothers.

**Legal Education Under Review - A Chronology of Criticism**

The educational model used to train doctors is naturally influenced and impacted by developments in science and technology. Similarly, individuals learning the world of business and enterprise are inclined to adapt newer and more efficient methods of instruction. However, despite an evolving legal landscape, and some attempts at innovation, the process of educating and training lawyers by the case law method has essentially remained unchanged since the late 1800’s.71

In 1910, Abraham Flexner produced a report, which helped to establish the modern model of clinical experience and internships used in medical training72. A few years later the Carnegie Foundation commissioned a similar assessment of legal education. The *Redlich* report,

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72 Abraham Flexner, Medical Education in the United States and Canada: A Report to the Carnegie Foundation for the Advancement of Teaching (1910).
published in 1914\textsuperscript{73} was the first in a series of studies issued throughout the 20\textsuperscript{th} century assessing the effectiveness of educating American lawyers. While these early studies tended to endorse the case law method championed by Harvard’s famed Dean Langdell\textsuperscript{74}, the need to increase the opportunity for more practical experience was consistently noted.\textsuperscript{75}

By the early 1920’s legal education had evolved into two basic models. Langdell’s model was pretty standard in law schools that were part of large academic universities; while independent schools and training programs employed a more practice-oriented approach. In 1921, Carnegie commissioned another report, known as the Reed report, which recommended that the academic schools increase their offering for practical skills training\textsuperscript{76}. However, Reed also suggested, that both educational methods continue. This set into motion a series of events that polarized leadership within the American Bar Association, which sought to endorse one standardized method of legal instruction. The academics’ case law driven model prevailed\textsuperscript{77}, and over the next 50 years or so, the alternate more skills focused training began to fade.

It wasn’t until the late 1970’s that the legal profession embarked upon another period of self-assessment, particularly focusing on how well law schools were preparing students for the practice of law. The Cramton report\textsuperscript{78}, issued in 1979, echoed some of what had been reported half a century earlier by the Reed report; that law schools needed to do more to provide

\textsuperscript{73} See, Josef Redlich, The Common Law and the Case Method in American University Law Schools: A Report to the Carnegie Foundation for the Advancement of Teaching, Bulletin No.8 (1914).

\textsuperscript{74} Warren supra, n. 43

\textsuperscript{75} Redlich, supra n. 73 Redlich pointed out the strong need to use the case method in a more “holistic and practical way.

\textsuperscript{76} Alfred Z. Reed, Training for the public profession of the law: historical development and principal contemporary problems of legal education in the United States : with some account of conditions in England and Canada ( New York: Carnegie Foundation for the Advancement of Teaching (1921).

\textsuperscript{77} See generally, Harno, supra, n.71

\textsuperscript{78} ABA TASK FORCE ON LAWYER COMPETENCY, REPORT AND RECOMMENDATIONS: THE ROLE OF LAW SCHOOLS (1979)hereinafter, “Cramton Report”
“fundamental skills critical to lawyer competence”. Acknowledging a growing diversity within the legal profession, the report contained quite a few pointed recommendations for improving the quality of the legal education experience; most of which focused on the need to teach more practice oriented skills. The social climate supported using the law to establish and protect civil rights. This ushered in a period marked by an increase in clinical programs\(^\text{79}\), but the teaching methods and standard format of most law schools remained unchanged.

In 1992, the American Bar Association’s Legal Education Committee appointed a task force to look at legal education and professional development. Chaired by prominent New York Lawyer, Robert MacCrate, the final report\(^\text{80}\), which bore his name, urged law schools to focus more on fundamental lawyering skills, such as problem solving, legal analysis and research, counseling and negotiation. In addition, the *MacCrate* report suggested that the educational process should include teaching fundamental values of the profession, including the importance of “competent representation, promoting justice and improving the profession”\(^\text{81}\). Although the *MacCrate* report engendered much debate and discussion, there was little to no real implementation of its recommendations.

Early into the 21\(^\text{st}\) century more critique and criticism of the state of legal education arose. The Carnegie Foundation commissioned a series of studies reviewing the educational process of several professions, including law. William Sullivan, a senior scholar at Carnegie, known for his research in comparing and contrasting educational methods across professional disciplines,

\(^{79}\text{See, infra note 82}\)


\(^{81}\text{Id.}\)
authored the final report. Sullivan and his team’s findings were based on a two-year study of
legal education involving intensive fieldwork at a cross section of 16 law schools during the
1999-2000 academic years. Their analysis included praise for what they saw as strengths of the
process; and criticism of its weaknesses. The report’s summary identified the following five key
observations about the legal education process.

First, law schools proven method for the rapid socialization of new students was perceived
positively. It was noted that within a few short months of beginning law school ” students had
developed new capacities for understanding legal processes, for seeing both sides of legal
arguments, for sifting through facts and precedents in search of the more plausible account, for
using precise language, and for understanding the applications and conflicts of legal rules. “ * * * 82
Irrespective of the students’ background or previous educational experience, the deep,
consistent emersion soon has them “thinking like a lawyer”.

Second, heavy reliance on a single teaching methodology, namely the case-dialogue approach,
brought mixed reviews. While other professional fields often utilize a variety of teaching forms
and employ a more prolonged socialization process; legal pedagogy was found to be remarkably
uniform. With few exceptions, the first-year curriculum is largely standardized, and includes an
established and highly competitive grading system. The primary goal is developing analytic
thinking. Students are taught to categorize and discuss events and circumstances involving and
affecting human beings in mostly abstract and generalized terms. This emphasis on analysis has
a profound effect in shaping a legal frame of mind. Students begin to understand the law as a

82 WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, LEE S. SHULMAN, EDUCATING LAWYERS:
formal, rational and necessary system; with long accepted doctrines and rules that may differ from a layperson’s sense of fairness and justice.

Third, despite the strengths of the case-dialogue method of teaching, in terms of developing a legal frame of mind, there are unintended consequences. Students learn to “make a case” by redefining situations of actual or potential conflict into opportunities to advance a client’s cause through legal argument or negotiation. However, developing the ability to somehow connect these conclusions to real situations and people all too often remains outside the case-dialogue method. Some instructors may address social implications, matters of justice and ethical considerations, but these issues are almost always treated as peripheral. With such matters falling beyond the precise and orderly “legal landscape”, the not so subtle message for students is that these are secondary to what really matters for success in law school—and in legal practice. The study suggests that students are “warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analysis”. 83

Fourth, the study found that student assessment is too limited and underdeveloped. Basically, the study revealed that the primary method used in law school to assess and evaluate student competence has developed largely as “summative” and is used to filter and sort students based on what has been learned up to a particular point in time. While conceding that summative assessments are useful tools for determining a basic level of competence, the study suggests law students may benefit from the use of more “formative” assessment tools that occur while content is being taught and should continue throughout the period of learning. This method of assessment supports students in learning, rather than ranking, sorting and filtering them.

83 Id., Summary at p. 7
Lastly, although law schools have done more in the last fifty years to provide students with more contextual experience, more choice and greater connection with other disciplines within the university; efforts to improve have been more piecemeal than comprehensive. Very few schools have attempted to address these inadequacies on a systematic basis. Specifically, the relatively subordinate place of practical legal skills, such as dealing with clients and ethical-social development in many law schools, is an indication of legal education’s approach to addressing problems and framing remedies. The study suggests that one of the biggest obstacles is that the courses focusing on developing these skills are largely seen as additives to the basic curriculum, and might be better received if they were more integrated.

Winds of Change and Outside Influences

In response to the tide of criticism of what some perceive to be inadequacies in the American legal education system, there have been some efforts at reform. In 2010, Harvard’s dean, Martha Minnow, noted that over the past 70 years, legal scholarship and what it means to “think like a lawyer” has become intertwined with a multitude of disciplines, such as economics, decision analysis, psychology, organizational behavior, and history. While lawyers are more aware of and reference other disciplines, Dean Minnow points out “there is no systematic conception of the storehouse of knowledge every lawyer should have”.  

Since the mid-1970’s, there has been a noticeable rise in law school clinical programs. Clinical experience helps students put theory into practice, similar to what takes place in a teaching

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84 Martha Minnow, Legal Education: Past, Present and Future (Speech given at Harvard Law School- April 5, 2010) 
hospital. Clinical experiences have also “elevated awareness of and focused attention on poverty, racial and gender bias, and issues related to access to justice”.

Initially addressing representation of individuals in local courts and agencies, clinics over time have branched out. Many now include federal and international litigation, legislative development, negotiation and mediation, transactions and entrepreneurship. While there is considerable investment of resources, this is usually considered time and money well spent. The work of staff attorneys, faculty, and students in clinical settings often provide a very real connection to the community and affirms and promotes the justice mission of law schools.

A number of factors have directly or indirectly influenced the process of legal education, in recent years. Some relate more generally to legal practice than legal education, however, each topic is significant to the ongoing discussion about revision or change in the process of educating lawyers.

1. **Ranking and Reputation**

In the early 1990’s U.S. News and World Report began ranking all ABA accredited law schools. The ranking scheme combines opinion surveys on reputation with analyses of varying facts and statistics, presumably associated with quality. The magazine has created a much-anticipated annual survey that has become hard to ignore or discredit. Despite the fact that the legal academy has consistently agreed that it is deeply flawed and should not be taken

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85 Id.

87 U.S. News & World Report is a monthly news magazine based in New York City. Its ranking scheme is not limited to law schools, but they also cover colleges, graduate programs, hospitals and high schools.
seriously; the U.S. News rankings continue to capture the attention of the entire legal community.

This obsession encourages irrational and sometimes irresponsible behavior. For example, forty percent of the ranking is based on reputational surveys sent to deans, faculty members, judges and lawyers. In order to increase the visibility of their programs and various activities to these constituents, many schools have invested an inordinate amount of resources to produce a flood of glossy promotional materials. This practice may divert much needed resources that could be spent on something more academically enriching. Schools with smaller budgets and/or limited resources may not be able to compete in this area, and some very good schools with good solid programs may be ranked lower.

Another area subject to distortion by U.S. News, and the schools themselves, is the LSAT score. The average LSAT score of every school’s entering student has become a critical factor in the rankings analysis. As a result, some law schools began giving greater weight to the LSAT than the Law School Admission Council itself recommended. This practice can be a disadvantage to applicants with high GPA’s, but less than outstanding LSAT scores. To discourage this practice, the official reporting of a school’s LSAT was changed and schools now report only the 75th and 25th percentile numbers. In response, the publishers of U.S. News decided to average the two

89 Id.
90 While LSAT scores serve a useful purpose in the admission process, they do not measure, nor are they intended to measure, all the elements important to success at individual institutions. LSAT scores must be examined in relation to the total range of information available about a prospective law student. Cautionary Policies Concerning LSAT Scores and Related Policies http://www.lsac.org/LSACResources/Publications/PDFs/CautionaryPolicies.pdf (Last accessed 02/08/2013)
numbers reported to create its own proprietary median number,\textsuperscript{91} disregarding the likelihood that in some cases the school’s actual median might be different. The end result is a perception that U.S. News ranking analysis induces schools to overemphasize LSAT scores in their admissions decisions. Reducing the size of the entering class, or shifting marginal entrants to part-time programs are some strategies schools have used to improve their LSAT showings. However, even these efforts to mitigate the rankings were thwarted when U.S. News recently began including part-time entrants within their calculations.\textsuperscript{92}

Another potentially distorted data point used in the U.S. News analysis concerns the rate of student employment at graduation. Unlike most of the other data collected, this information is not subject to verification through external ABA or other published consumer information reports. A fact that makes the information reported subject to manipulation, exaggeration and creative accounting\textsuperscript{93}. While these strategies may be questionable, most schools feel as if they have no choice in the matter. Even if they would rather not participate, they feel they must protect themselves by providing the requested data. In addition, when a school has not responded to U.S. News’ request for information, the editors have either estimated the missing data based on past responses, or list the school as RNP for “Rank Not Published” indicating that the school is below the cut-off for inclusion, which in itself is an indirect ranking.\textsuperscript{94}

\textsuperscript{91} \url{http://www.usnews.com/articles/education/best-law-schools/2010/04/15/the-law-school-rankings-methodology.html} (Last accessed 02/08/2013)


\textsuperscript{93} “Including treating students temporarily employed in non-legal jobs as fully employed as lawyers, or by hiring all of their own students who are unemployed at graduation as temporary employees of the school “ Hines, \textit{supra} note 85, \textit{but see}, U.S. News to reform its disclosure of surveyed employment information (\url{http://www.usnews.com/blogs/college-rankings-blog/2010/12/16/us-news-pledges-to-publish-more-law-school-employment-data.html#7527523}) (Last accessed 12/10/10)

Some deans have refused to complete the survey and have called upon others to do the same. There has also been consistent pressure for several years, from the legal education establishment imploring U.S. News to publish a more limited list of 25 or 50, instead of trying to rank every accredited American law school. None of these efforts have done much to change the methods of the editors or diminish the influence of what may be questionable, information published in the U.S. News rankings.

2. Legal Ethics and Pro Bono Work

After the Watergate scandal of the early 1970’s, there was increasing public demand for greater emphasis on legal ethics in law school. In response, the ABA ultimately amended its accreditation standards to mandate courses in ethics. In a few schools today, mandatory pro bono requirements are enforced; in other schools volunteer pro bono work is strongly encouraged and rewarded, but most schools still maintain a more liberal attitude toward pro bono for students and faculty. Former AALS president, Deborah Rhode investigated the effects of these varying approaches in stimulating pro bono representation by young lawyers. Her research resulted in a series of articles that were compiled into a text, “Pro Bono in Principle and Practice” in 2005. Professor Rhode suggests that “workplace incentives and a personal sense of moral obligation to

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95 “Florida Law School Dean Boycotts 'U.S. News' Rankings Survey”
96 The Watergate scandal was a political scandal in the 1970’s resulting from a break-in to the Democratic National Committee headquarters at the Watergate office complex in Washington, D.C. Effects of the scandal ultimately led to the resignation of the President of the United States, Richard Nixon, on August 9, 1974, the first and so far only resignation of any U.S President. It also resulted in the indictment, trial, conviction and incarceration of several Nixon administration officials. (http://en.wikipedia.org/wiki/Watergate_scandal) Last accessed 11/22/2010
97 Columbia being one http://www.law.columbia.edu/center_program/public_interest/Pro_Bono/gen_info
help others” are better indicators of actual pro bono work than the type of law school program graduates may have experienced. Her findings appear to support the premise that a students’ personal commitment to provide pro bono services when they enter practice is not significantly influenced by requiring or exhorting students to provide pro bono services while in law school. Providing an opportunity to develop an appropriate sense of professional obligation is an important element of a quality legal education. The greater question is how best to pair those opportunities with pro bono legal services for those in need.

3. Growth in Interdisciplinary Teaching and Research

As noted earlier, law schools have seen a significant growth in interdisciplinary teaching and research. While traditional legal academics with advanced training in other disciplines were not that common 25-30 years ago, today virtually every law school faculty includes members with both JD’s and advanced degrees in law-related disciplines. While it is noteworthy that in 2004 there were over 800 full-time law faculty members in law schools around the country who held a doctorate along with a JD, a growing number of academics without law degrees also hold full or joint appointments on law faculties. A logical explanation for this shift in interest and focus, certainly for those law schools that are part of a multi-disciplined university, is most likely due to university-wide initiatives promoting interdisciplinary collaboration. In addition to making law schools more receptive to the added value scholars trained in a non-law discipline bring to law teaching and scholarship, this development also attracts talented students wishing to pursue dual degrees, some of whom decide to teach in law. Another contributing factor is the oversaturation on the general academic market of Ph.D’s. in the social sciences and humanities,

99 Minnow, supra n. 84
100 See Hine supra ,n, 86
in the 1980s and 1990s. Unable to find employment in their chosen discipline, many of these young academics went to law school, entering the academy after a few years of practice. This reservoir of knowledge undoubtedly influenced the expansion of many law schools’ curricula to include the addition of courses dealing with a variety of timely social issues.  

4. Lawyering Skills Training

Throughout the 1980’s law schools began to show a commitment to provide formal training in a wide range of legal practice skills. Many schools had already developed successful in-house legal clinics as well as partnerships with their local communities. Simulated practice settings were another technique being explored and debated. For the practicing bar these efforts were not enough, and law schools were pushed to do even more to ensure graduates with higher levels of practical skills. This pressure gained focus and momentum with the publication of the MacCrate Report in 1992, which suggested that legal training is an educational continuum, involving specific responsibilities on the part of both law schools and the practicing profession. Initially much of the legal academia resisted or ignored the recommendations of MacCrate. However, after a decade of considering them and confronting continued pressure from the bar to implement them, by 2002 most law schools had made curricula changes, reflecting MacCrate’s influence. An ABA report on curriculum changes between 1992 and 2002 noted that skills and simulation course opportunities had increased during the survey decade, with nearly a third of

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101 Many schools began adding courses to the curriculum covering subject areas such as the environment, health care, intellectual property, immigration, national security, international affairs, etc., where exploring the intersection between law and other disciplines naturally generated a need for law teachers with multi-disciplinary backgrounds.

102 MacCrate supra, n. 79

law school respondents requiring some form of skills, clinical or simulation course for graduation; and an incremental increase in Pro bono service requirements with 10 percent of law school respondents requiring on average 26.5 hours of pro bono service hours to graduate.\footnote{Id., see p. 6} One notable curricular development in this area is the enormous growth in the availability of “field placement” opportunities that allow students to perform legal work for credit in public interest firms or government offices. Opportunities for students to gain practical professional experience outside of the law school classroom became so popular in the 1990s that an elaborate set of new accreditation standards became necessary to assure the academic integrity of the enterprise.\footnote{See, 2009-2010 ABA Standards for Approval of Law Schools- Standard 305-Study Outside of the Classroom (http://www.abanet.org/legaled/standards/2009-2010 StandardsWebContent/Chapter3.pdf)} While these placement programs present special opportunities and unique challenges for maintaining educational quality, the American Bar Association standards generally succeed in balancing the benefits from an enriching professional experience with the need for qualified supervision and a substantial educational component.

5. **Professionalization of Legal Research and Writing Instruction**

One direct consequence of the push for more skills training in legal education has been the professionalization of legal research and writing. Over the years, most law schools have experimented with a variety of approaches to teaching basic legal research and writing skills. Some programs assigned full-time faculty to teach small sections of First-year courses, while others used short-term teaching fellows, or their own 3rd-year students as research and writing instructors. Another approach delegated research instruction to their library staff and hired practicing lawyers from the local community as adjuncts to provide legal writing instruction.
Varying permutations of these models have been employed at most law schools, and no doubt vestiges of each persist throughout the academy today. However, there has been a noteworthy change with the rise of professional legal research and writing instructors as the foremost choice of law schools for the delivery of this form of instruction. The number of professional Legal Research and Writing Instructors (LRWs) has grown exponentially since the mid 1980’s, successfully attaining faculty status and tenure-track eligibility in most institutions. LRWs have a national organization, a citation manual and journal, a section within AALS, and have become a significant lobbying force within the legal academy.

6. The Digital Revolution and the Shrinking Globe

Legal pads, pencils, a typewriter, telephone and maybe a secretary/assistant were the standard tools and resources for the average attorney, for most of the 20th century. These have largely been supplanted by an ever-expanding list of electronic and digital devices from IPAD’s and notebooks, to tablets and Smart-phones. In the typical law firm today, virtually everyone has a personal computer or laptop, with printer, scanner and FAX capabilities, and access to a mountain of marvelous software, providing instantaneous access to a staggering amount of data from all around the world. Advances in technology have produced virtually instant communication across the globe and faster, more affordable travel. These and other developments have expanded international trade and created greater opportunities for lawyers.

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106 Association of Legal Writing Directors (ALWD) is a non-profit professional association of directors of legal reasoning, research, writing, analysis, and advocacy programs from law schools throughout the United States, Canada and Australia. ALWD has more than 200 members representing more than 150 law schools. (http://www.alwd.org/about.html) (Last visited 02/08/2013)

107 Legal Communication & Rhetoric: JALWD is a publication of the Association of Legal Writing Directors. Its mission is to advance the study of professional legal writing and lawyering and to become an active resource and a forum for conversation between the legal practitioner and the legal writing scholar. (http://www.alwd.org/LC&R/about.html)
with an interest in the legal aspects of international economic developments and evolving multi-jurisdictional practice. Many U.S. law firms maintain an overseas presence and a substantial number of lawyers represent both domestic and foreign clients in a variety of transnational transactions. Legal gatherings and academic conferences devote a significant number of educational and informational segments to the pervasiveness of transnational legal issues, the implications of the continued globalization of law practice, or some current issue in international law.

In his book, “The World Is Flat, 3.0”, New York Times columnist and Pulitzer Prize winning author, Tom Friedman suggests that the digital and electronic revolution has “flattened the earth,” leveling the economic playing field in ways that help individuals and small firms to compete globally. Freidman theorizes that everything has become so interconnected that companies need to depend on a whole suite of service distributors and information from various places across the globe. Friedman’s thesis is certainly supported by some of the dramatic changes that have occurred in law practice and legal education in the past quarter century. While the substantive content of the law has expanded rapidly, the true benchmark of these changes is found in the increased capacity to find, process, analyze and apply legal information. Traditional print based law firm libraries are largely being supplanted by virtual libraries consisting of gigantic and ever evolving digital databases. The focus has shifted away from ownership of material to access to information.

109 With expansion in global trade and commerce, legal practice is not immune to competition from other countries, and in fact there is a growing trend outsource basic legal research and document preparation to lower-wage earning lawyers in English speaking India. Leonard Bierman and Michael Hitt, THE GLOBALIZATION OF LEGAL PRACTICE IN THE INTERNET AGE, 14 Ind. L. Global Legal Studies 29 (2007).
Like many other disciplines the classroom experience has been augmented by numerous electronic innovations. Instruction in research methods has changed dramatically, and the ease of communication between students and teachers through email and instant messaging has created new opportunities for expanding the learning experience beyond the classroom. Faculty scholarship has also been altered in significant ways, the most obvious being the “virtual” global stage on which scholarly exchanges about legal issues now routinely occur, the implications of vast databases for conventional and empirical research, the ease with which manuscripts can be prepared and edited, and electronic publication modes that make it possible to share early drafts of papers with colleagues around the globe and receive rapid feedback.

Much like the disintegrating feudal system of 12th century England, or the transition from an agricultural based economy to an industrial one in 19th century America; these developments have set the stage, for monumental changes in the legal profession and the education of lawyers.
A New World Order- Wired-Digitized-Connected

Adopting Technology

At its core, technology refers to a practical application of knowledge or set of skills to improve or innovate. Simply stated, “technology” is a manifestation of innovation. Humans have a natural inclination to innovate, which has allowed us to mold and shape the environment to suit our changing needs. Harnessing or converting natural resources such as fire, to provide heat, light the dark, and prepare food; and the development of the wheel for transportation, are examples of early human innovation. Although we recognize that the purpose of innovation is to improve upon something, because it involves change, it is quite often met with resistance, or at least a healthy dose of skepticism about what that change may bring. Sociologists and scientists have studied the manner in which innovations are received and ultimately integrated into society, and developed several theories of explanation.

Diffusion of innovation is a theory that offers an explanation for how new ideas are spread and adopted. First developed in the early 1950s using research in rural sociology, it was popularized by sociologist and educator, Everett Rogers, best known for expanding its application and coining the phrase “early adopters”. Rogers suggested “diffusion is the process by which an innovation is communicated through certain channels over time among members of a social

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110 “People decide more conservatively when a decision depends on an elusive hypothesis than when it depends on an estimate of the parameters of a standard process. [I]t is reasonable to assume that people[are motivated to] avoid risk if possible” Irwin Bernhardt and Kenneth Mackenzie, Some Problems in using Diffusion Models for New Products, Management Science, Vol. 19, No. 2, Application Series (Oct., 1972), pp. 187-200.

system. This communication process is spans five distinct stages: awareness, persuasion, decision, implementation, and finally adoption. During communication, subjective perceptions of the innovation tend to have the greatest influence on diffusion. Finally, the social systems in play will determine diffusion, norms on diffusion, roles of opinion leaders and change agents, innovation decisions, and consequences.

Rogers’ theory proposed that adopters of any new innovation or idea could be categorized into the following groups; “Innovators” which account for the smallest percentage at 2.5; next are the “Early Adopters” at 13.5 percent; both the “early” and “late” majority are in the middle with approximately 34 percent each, and finally “Laggards” account for the final 16 percent. These categories, based on standard deviations from the mean of the normal curve, provide a common language for innovation researchers. Each adopter's willingness and ability to adopt an innovation depends on their awareness, interest, evaluation, trial, and adoption. People can fall into different categories for different innovations—a farmer might be an early adopter of mechanical innovations, but a late majority adopter of other inventions like the IPod. In the broadest sense, studies of diffusion have provided an empirical and quantitative basis for developing rigorous approaches to social change, and an assessment of world economic and political development.

[112] Id.
[113] Id.
A specific application of this theory to technology innovations is found in “Crossing the Chasm” by Geoffrey A. Moore, a widely read and often quoted book from the business and marketing sector. Accepting Rogers’ diffusion model as the foundation upon which many business plans are based, Moore describes a “Technology Adoption Life Cycle” as a smooth bell curve of potential high-tech customers, patterned after the five sub-groups (innovators to laggards) identified by Rogers. This cycle influenced the way that companies created and designed marketing strategies to follow the curve, from left to right, working through each successive group of potential users or customers. Moore reassessed this model to account for what he called cracks or gaps between each phase of the cycle. The largest gap or “chasm” was found between the Early Adopters and the Early Majority. The gap represents a different focus and level of expectation between the two groups. Early Adopters tend to be the visionaries or risk takers within an industry, and although they may be an easier sell; they tend to be harder to please. The Early Majority consists of pragmatists who are more concerned with long-term implications such as customer service and support for products, workable interfaces, and reliability. Those in this group tend to talk more amongst themselves than with “visionaries” to the left on the curve, who may be seen as impulsive and disruptive. Many technologies initially get pulled into the market by enthusiastic visionaries, but may fail to be more widely adopted by the pragmatic majority. Moore suggests that this is due to the “chasm” not being accounted for in the marketing strategy. A technology cannot be marketed to the early majority of pragmatists in the same way that it is marketed to the early adopting visionaries, since there is no real line of communication between these groups. In order to have a greater chance at success, entrepreneurs are advised to come up with strategies that will help bridge that gap.

Although there are exceptions, when it comes to adapting and making use of technology those in the legal academy have traditionally fallen more into the category of late majority or laggards. This however, is subject to a generational shift, as the old guard fades and a younger generation begins to arrive, with a different set of experiences and expectations.

1. Students, teachers and technology

In a 2005 report submitted to the U.S. Congress, Rod Paige addressed the need to prepare America’s students to compete in an increasingly technology-driven world economy. Prepared by the Office of Educational Technology as a requirement of the “No Child Left Behind Act” the report acknowledged that America’s schools were far behind other areas of society in taking advantage of the advancements in technology, and that what was needed was a fresh approach to education, incorporating and using technology, where appropriate. Secretary Paige noted, “too often, schools have simply applied technology to existing ways of teaching and learning, with marginal results in student achievement and the educational community was “playing catch-up”.

Many tech-savvy high school students were described as being so far ahead of their teachers that it created a frustrating “digital disconnect” between them. “Technology”, the report went on to say, “presents an opportunity for students to be engaged as active learners and participants in making decisions affecting their own educational future”. The report included a warning that “those schools which failed to adapt to

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118 Supra ,n. 116
119 Id.
the technology needs of its students risked becoming increasingly irrelevant to the educational mission.” 120 The editors noted some of the more promising new approaches to education identified were being developed outside of the traditional educational system, through e-learning and virtual classrooms, particularly in rural areas, that may have difficulty recruiting and retaining good teachers, or offering a diverse array of courses.121

Reforms within the system are expected to be influenced by the “enthusiasm of a generation of students weaned on the marvels of technology”122 Technology-literate middle and high school students of today hold great potential to create new student-teacher partnerships leading to major changes in teaching, learning and managing the educational experience.

2. The Millennial Generation

Today’s high school and college aged young people live in a world where it is assumed that they can create, contribute and generally interact with what they are learning.123 This age group encompasses part of what has become known as the “Millennial Generation”,124 and it is more

120 Id.

121 An example of how these ideas are put into practice was featured in an Oct. 2010 posting on the Department of Educations’ Blog. Secretary of Education Arne Duncan observed students in an anatomy class in rural North Dakota, where through the use of satellite television an instructor taught students in five schools at once. Employed as a means to overcome distance and increase access to quality instruction, video technology makes the program and courses available to communities that previously did not have access. It enables the different classrooms to see and hear in real time, and students can interact with the teacher and each other. This particular program helps address the shortage of science teachers in the region. This distance learning classroom is one of many innovative approaches rural schools are using to boost learning and accelerate achievement. ( http://www.ed.gov/blog/2010/10/new-salem-nd-secretary-of-education-arne-duncan-travelled-to-north-dakota-today-to-see-first-hand-how-technology-can-transform-education/ )

122 Supra n. 115, at p. 10

123 David I.C. Thomson, LAW SCHOOL 2.0-LEGAL EDUCATION FOR A DIGITAL AGE, p. 13 (Matthew-Bender/Lexis, 2009)

124 This term is used to describe individuals born roughly after 1980. Millennials, A Portrait of Generation Next-Confident, Connected Open to Change- Pew Research Center (February 2010) p. 4
media saturated and technology savvy, than any generation before. A 2010 Pew Research Center study\textsuperscript{125} found the Millennial generation to be more racially and ethnically diverse than older generations, and to have been exposed to a wider variety of different ethnic groups. This exposure has significantly influenced the Millennials’ views on a variety of social issues, such as interracial dating\textsuperscript{126}.

The study describes Millennials as being on track to become the most educated generation in American history. It noted that among 18 to 24 year olds a record thirty-nine percent (39\%) were enrolled in graduate schools, colleges or community colleges in 2008, a trend driven largely by the demands of a modern knowledge-based economy, but most likely accelerated in recent years by the millions of 20-30 year olds unable to find steady employment\textsuperscript{127}.

The participants reported having fewer intergenerational disagreements than older adults say they had while growing up. In addition, hard times have kept a significant number of adult Millennials in their parent’s home much longer than previous generations. About one-in-eight Millennials (ages 22 and older) say they’ve “moved back to a parent’s home because of the recession.”\textsuperscript{128}


\textsuperscript{126} Ninety-three percent of Millennials had no problem with blacks and whites dating, compared to 86\% of Gen Xers and and 83\% of Boomers. Among the members the Silent generation, just 68 \% percent were supportive of blacks and whites dating. \textit{id.} at p. 78

\textsuperscript{127} \textit{id.} at p. 10

\textsuperscript{128} \textit{id.} at p. 40
For Millennials, technology is the norm, not the exception. They are history’s first “constantly connected” generation. Steeped in digital technology and social media, they are rarely without their multi-tasking hand-held gadgets. Although most in this age group are digital natives, meaning that they were born into a technology driven and connected world; they still may not know how to use the tools well or appropriately.129

More than eighty percent say they sleep with a cell phone powered on, by the bed, poised to receive or send texts, instant messages or emails; make phone calls, download music, news, videos, games and wake-up jingles. Nearly two-thirds admitted to texting while driving. 130

Self-expression is very important to Millennials. They desire creative freedom, and embrace multiple modes of self-expression. Three-quarters have social networking profiles. One-in-five have posted a video of themselves online. Nearly four-in-ten have a tattoo (about half of whom have two to five and 18% have six or more; 70% say their tattoos are hidden beneath clothing). Nearly one-in-four have a piercing in some place other than an earlobe – about six times as many older adults who’ve done this.131

The report concludes the those young people currently making the passage into adulthood at the start of a new millennium – have begun to forge their own generational identity, marked by confidence, allowing for self-expression, upbeat liberal attitudes, and an openness to change.

129 Thomson Supra, n. 123 p. 28
130 Id. at p. 25
131 Id. at p. 57
3. Collaboration and Hyper-texting

An important paradigm shift in education pedagogy over the past 30 years has influenced the way that many high school and college age students are being taught. Known as the learning centered or learning focused approach, it is a method that encourages discovery and construction of knowledge, as opposed to the more traditional linear, cumulative, teacher centered approach.\(^\text{132}\) Instead of the teacher transferring knowledge to the students, the focus is on developing each student’s competencies and talents in ways that allows all participants (the teacher too) in the class to learn from one another.\(^\text{133}\) This reinforces the collaborative nature of the learning experience, encouraging student-teacher contact, cooperation and active learning\(^\text{134}\).

Most Millennials have encountered this educational model at some point, if not for the majority of their academic lives. This would indicate a high probability for their exposure to and comfort level with non-traditional learning environments. The growth and expansion of the Internet and its use as an educational and social networking tool has also played an important role in shaping this generation’s expectations and the development of their skills. The World Wide Web is framed as an infinite number of non-linear connections between related types of knowledge. Known as “hypertext”, it is designed to “support discovery and construction of knowledge by the user through the interlinking of related documents”.\(^\text{135}\) On paper, text has a predetermined beginning, middle and end, where readers focus for a sustained period on the author’s design or

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\(^{133}\) Id. at p. 341

\(^{134}\) Id. at p. 343, see also, Thomson, *supra* n. 123, p. 30

\(^{135}\) Thomson, *supra* n. 123, p. 30
vision. On the Internet, readers skate through cyberspace at will, in effect, composing their own beginning, middle and end.

Many young people are quite used to this method of learning and have developed a “hypertextual” way of thinking. They are not as troubled as their parents or older siblings by reading that is not linear, or compartmentalized.\textsuperscript{136} While some argue that this process damages the ability to concentrate and contemplate", \textsuperscript{137} others see it as a “way to spark interest in young people who might not read at all”.\textsuperscript{138}

**Technology in Libraries**

The invention of the Guttenberg printing press in 1440\textsuperscript{139} is largely credited with advancing literacy among the masses and fostering a rapid growth in the production of printed documents. Until the application of computer technology in the mid 1900’s, it remained the single most important technological advancement affecting libraries.\textsuperscript{140}

Traditional 20th century libraries consisted of a physical space containing books, serials (journals, magazines & newspapers) maps, posters, etc., primarily in paper and supplemented with microform. Today, digital knowledge/content is being added to library collections at accelerating rates, with the traditional model giving way to several modern variations. For


\textsuperscript{137} “People searching for information online do not read in the traditional sense; rather they are browsing through titles, abstracts and content pages looking for quick wins” Peter M. Tiersma, PARCHMENT, PAPER AND PIXELS: LAW AND THE TECHNOLOGIES OF COMMUNICATION (Univ. of Chicago Press)(2010) pp. 4-5

\textsuperscript{138} Motoko, supra n.136

\textsuperscript{139} Prior to the Guttenberg press, written materials were scarce and expensive. The printing press made relatively cheap and identical copies of a text widely accessible. Id. at p.3 , see also http://inventors.about.com/od/gstartinventors/a/Gutenberg.htm (Last accessed 02/13/2013).

\textsuperscript{140} Changes and development in technologies of storing, distributing and communicating information have impacted the key nature of written text, and consequently the form and function of libraries.
example, a physical facility that has little or no paper or microform-based materials, but provides local access to digital collections, is considered a “digital” library. A website with a digital collection that is accessible anywhere in the world is a “virtual digital” library. Actually, most libraries are more “hybrid”, meaning that they have both digital and non-digital content. While a library can localize its digital assets by providing on-site only access, those digital assets are inherently independent of the library’s physical assets and location.

Increasingly, libraries are balancing questions of searchability, electronic transfer, and accessibility by simultaneous users; against low production, distribution and copying costs. The options represent a range of extraordinary, and sometimes disruptive, game changing characteristics. If an existing technology can clearly improve the educational experience of students, library administrators are encouraged to find a way to provide it, especially if the library’s current spending on equipment, materials or services is significantly lower in value.

In rapidly changing times, priorities are constantly reviewed and resources potentially reallocated. Libraries face a growing problem trying to keep pace with valuable new innovations, while avoiding those that will not last long enough to justify the investment of time or resources. Change is not to be taken lightly. Libraries have a fiduciary responsibility to the larger educational or community organization they support. Academic libraries in particular, are under pressure to help prepare students for a “modern world immersed in technology,” but must

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141 A hybrid library is a physical facility with both paper and microform based material, as well as digital assets, where access can be either local, via Internet or both” Ted Webb, THE HYBRID LIBRARY (UDSA Press, 2009) p. 5
142 Id. at p. 15
143 A recent example would be the Lazar Disc, which was very popular in Japan, but never reached nearly the same level of popularity in the North America. (http://www.homemediamagazine.com/news/laserdisc-officially-dead-14333) (Last accessed 02/11/13).
144 Webb, supra, n. 141. at p. 18
prioritize their investments in this area to avoid products or services that do not add value to the library for students, faculty and researchers.

**Technology and the Practice of law**

As noted previously, Guttenberg’s Press proved to be a monumental advancement for civilization. It fostered revolutionary movements in the arts and sciences, religion and literacy.\textsuperscript{145} The written word as a means of human communication helped to distinguish societies from one another. Memorializing thought, word or deed, by “placing meaningful marks on stone, wax, parchment or paper establishes custom from law”\textsuperscript{146}, and a literate society promotes important political and legal institutions. Law being a predominately a textual enterprise, technologies affecting the written word will naturally have an impact. With Guttenberg’s invention, important legal documents (statutes, judicial opinions, wills and deeds) could now be created and distributed in larger numbers than ever before. In addition, the words themselves assumed greater significance, because it was “no longer a handwritten copy, but rather a certified exact reproduction”\textsuperscript{147}.

It is quite possible that writing and the nature of text in general is undergoing another revolutionary change. Whether this change is beneficial or detrimental depends on to whom the question is asked. On one hand, electronic media distributes information nearly instantaneously and more broadly, users interact differently, images become more prominent, and the information is infinitely more malleable and open to interpretation. On the other hand,

\begin{itemize}
\item \textsuperscript{145} Tiersma, *Supra*, n. 137 p. 3
\item \textsuperscript{146} This is based on the concept of “textualization” that a belief or tradition reduced to written text, becomes more authoritative. *Id.*
\item \textsuperscript{147} *Id.*
\end{itemize}
electronic media is not as stable, fixed or tangible as traditional writing or printing, and the lines distinguishing different types of media have become blurred.  

The form and function of legal texts has been thrown an interesting curve as a result of recent technological developments and applications. Beyond what is typically available through Westlaw and Lexis, online databases (many of them free) have begun to include more and more judicial opinions. Similar to John B. West’s push to publish as many decisions as possible, the result is a massive and seemingly endless amount of case law available to lawyers. The only way to effectively access these cases is with an electronic search engine. Although improving, they are still limited to searching by strings of text and cannot (as of yet) search for legal concepts or principles. Consequently, the digitization of judicial opinions has the potential to make the Common Law more textual, but at the same time, less conceptual.

Consequences of these developments on the system of precedent, and the way that lawyers research and access the law have already begun. In a 2007 study of Chicago area law firms, more than 66% of those responding indicated that they use online sources first, with only 13.8% reported using print first.

Additionally, there have been several important developments within and outside of the legal profession over the past 40-50 years that have impacted the practice of law. Dramatic growth

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149 In November 2009, Google began adding court opinions HTTP://NEWSBREAKS.INFOTODAY.COM/NEWSBREAKS/JUDICIAL-OPINIONS-NOW-AVAILABLE-IN-GOOGLE-SCHOLAR-58031.ASP
and global expansion of American business\textsuperscript{151} along with increasingly more complex regulatory activity, has dictated a need for more specialty-trained lawyers\textsuperscript{152}. Whether it relates to the manufacture, distribution, or point of sale, nearly every product offered for sale in the United States (and most other industrialized nations) is impacted by regulatory policy or control. \textsuperscript{153}

In order to remain competitive and profitable, the business world has relied upon computers and technology, not just for automation of existing functions, but for optimization and future expansion as well. Along the way, as companies have willingly merged, lost a bid for hostile takeover, or expanded outside of the United States into international territory, lawyers have navigated, negotiated and helped to re-define the law to meet the needs of a business world in perpetual motion.

Although there has been steady growth in the use of technology in business and other sectors of the professional world, lawyers as a whole have been slower to adapt much for their own direct use. It has been suggested that this is due in part to the conservative nature of most lawyers, and their distrust of the “new”.\textsuperscript{154} Also, while the written word has always been an important and indispensible tool of lawyers, the actual writing was not usually done by lawyers, but rather left to an assistant or secretary. Despite having resisted and lagged behind in the adoption of

\textsuperscript{151} U.S. Gross National Product figures (GNP) which provides a measurement of economic growth, were estimated to be 14.265 trillion in 2009 (http://www.federalreserve.gov/Releases/Z1/Current/annuals/a2005-2009.pdf)

\textsuperscript{152} With a few exceptions generalist lawyers, like the general practitioner in medicine is a rare find.

\textsuperscript{153} Thomson, supra, n. 123 p. 42

\textsuperscript{154} Lawyers are not typically early adopters, and may often prefer to wait for the “bugs of a new technology to be worked out”
technology; recent studies suggest that lawyers are finally becoming as fully wired and connected as other professionals.\textsuperscript{155}

**Online Research**

While there has been a decline in print based research over the past few years, it is not completely obsolete. In the ABA 2010 Legal Technology survey, a small number of respondents maintain a strong commitment to researching in print. When asked where they go first when starting a research project, the majority (80\%) of respondents clearly favored online services (46\% opted for free and 34\% for fee based services) a respectable number (15\%) report starting with print materials. Half of all respondents say they use print materials regularly for legal research, and 35\% report occasional use. Only 1\% of respondents report that they never use print materials (compared with 2\% in the 2009 and 2008 surveys).\textsuperscript{156}

These figures change depending on the category of the legal resource. Print is preferred when researching legal treatises and other secondary materials (29\%), legal forms, law reviews and legal periodicals (19\%), state legislation/statutes (12\%), and legal news (10\%).\textsuperscript{157}

A related aspect is the increase in Internet citations used in judicial opinions.\textsuperscript{158} In a 2001 article on federal appellate judges’ use of and reliance on material found on the Internet, the authors’

\textsuperscript{155} In the ABA’s 2010 Legal Technology Survey Report, 76\% of respondents report using Smartphones, up from 64\% in 2009. More specifically using smartphones to conduct legal research away from the office was slightly up, at 56\%, (compared with 50\% in 2009) and those using laptops is 88\% (compared with 90\% in 2009) Thirty-five percent of respondents report regularly conducting legal research at home, compared with 29\% in the 2009 survey. The use of remote access software was reported by 73\% of respondents, up from 63\% in 2009. Seventeen percent of respondents indicated that their firms maintain a presence in an online community or social network such as Facebook, LinkedIn, LawLink, or Legal OnRamp, compared with 12\% in the 2009 survey and 4\% in the 2008 survey.\textsuperscript{156} \textit{id.}

\textsuperscript{157} \textit{id.}
research indicated a steady increase over the 5 year period, from 1996-2001. U.S. Supreme Court Justice Souter was noted as the first to cite an internet source in a federal appellate court opinion in 1996 and by end of 2001, there were 109 cases containing 176 separate citations to sites on the Internet. Over the full 5 years of the study, the federal appellate courts issued a total of 236 opinions, citing 361 distinct Internet sources.

More recently, based on the proliferation of legal and non-legal material available on the Internet being cited by judges, it has been suggested that “...[A] lawyer who fails to use the internet, particularly when researching administrative issues, is likely to miss key sources that a judge would expect to see cited. Particularly in the context of administrative practice, failure to research on the internet could easily fall below the standard for competent research.”

The Dilemma of E-discovery

Discovery has always played a very important role in the litigation process. It is during this initial stage that information is gathered and the merits of a case are established. From the information exchanged, the parties may reach a settlement, avoiding an expensive and time consuming trial. There is always the potential for abuse, through delay and unwarranted requests but, the system relies on both parties to act in good faith, in order to preserve the integrity of a process.

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158 For an interesting article on the increase in citations to Wikipedia entries by American courts (well over 400 as of 2009) See, Lee F. Peoples, The Citation of Wikipedia in Judicial Opinions, 12 YALE J.L. & TECH. 1 (2009).


160 Id., at 428

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The federal judiciary has had an electronic case management and filing system since 2001, and federal and local discovery rules have long broadly defined “documents” to include contemporary electronic media, such as videotape, x-rays, etc. With an estimated 99 percent of the worlds’ information being generated electronically over the past decade, this application has constantly been reinterpreted. Due to the staggering pace that electronic information has grown (both in terms of quantity and kind), litigants now have nearly limitless access to infinite amounts of information. After many conferences, committee reports and debates, the Federal Rules of Civil Procedure were amended in December 2006, to address some of the concerns about how best to accommodate the expanding array of electronic media as part of the discovery process.

The changes were meant to simplify the process, clarify parties’ responsibilities, and reduce costs. However, in some instances the rules have proven to be vague and prone to inconsistent application, exposing attorneys to sanctions for litigation misconduct. They have not


163 “The quantity of electronic information is growing exponentially, with some reports showing that new stored information increases about 30% annually” ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES (INST. FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYS.-UNIV. OF DENVER 2008)


165 Qualcomm Inc. v. Broadcom Corp., 539 F. Supp. 2d 1214 (S.D. Cal. 2007) In a patent infringement action, the court found for the defendants on the merits and following trial entered an order detailing the plaintiff’s actions to obstruct discovery and instructing 14 plaintiff counsel to show cause why they should not be sanctioned and face professional discipline. Characterizing plaintiffs counsels’ actions as “gross litigation misconduct,” the court detailed “constant stonewalling, concealment, and repeated misrepresentations,” including the withholding of over 200,000 pages of relevant emails and electronic documents.
necessarily reduced costs either, with some estimates of a midsize case generating up to 500 gigabytes (GB) of potentially relevant data; which to review and process can cost $3.5 million.\footnote{\textit{E-Discovery, Supra n. 163}}

In addition, e-discovery rules are based on the presumption that organizations and businesses are prepared for e-discovery, while many are not. The untested state of the law and low levels of e-discovery readiness create an unstable environment, where parties are trying to deal with e-discovery issues and spending a great deal of money in the process.

While the issue of what is, or is not, discoverable has not changed, the knowledge and skill set needed to answer these questions has. In order to better prepare law students for the world in which they will practice, more needs to be done to inform and educate them about the evolving technology driven aspects of practicing law.

\textit{Legal Process Outsourcing}

Another development associated with the increase in electronic media as part of the litigation process, is the rise in outsourcing of legal support. Advances in technology along with rising costs associated with more traditional methods of support, has created a ripe environment for the adaptation of this practice to legal support. Known as LPO (Legal Process Outsourcing) it generally refers to obtaining legal support services from an outside law firm or legal support group. These companies and various groups have been around since 2000/2001, traditionally offering services in the areas of document review, legal research and writing, drafting of pleadings and briefs, and patent services outsourcing. Many operate out of India, or the
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Philippines like other outsourced businesses, due to the relatively low overhead cost and the workers' ability to speak and understand English.

Legal outsourcing is projected to grow in scope and breadth over the next few years. Two recent mergers in the legal industry support these projections. In November 2010, Thomson Reuters, global media and information-services conglomerate, acquired Pangea3, a legal-process outsourcing firm with most of its lawyers in India. A month earlier, Axiom Global Inc., which provides lawyers-for-hire to big corporations, bought LawyerLink, a Chicago based LPO, which started as a temp agency in 2005, but quickly began providing document-review services, as well. LawyerLink, Pangea3 and other LPO’s have been around for a number of years, but their business models have garnered attention as a result of the recession because of their ability to reduce the costs of basic legal tasks. According to the company’s founder, Lawyer Link is able to manage discovery less expensively than law firms, by using technology and quality-control processes borrowed from manufacturers to make document review more productive and with fewer errors. Although not considered major deals in the industry, these transactions do reflect how alternatives to the traditional law firm are becoming increasingly attractive to buyers of legal services in the post-financial-meltdown era.

167 “[P]rofessional outsourcing generally grew from being a $260 million industry in 2001 to a $3.05 billion industry in 2007. It was projected to reach $11.2 billion by 2011” More legal legwork gets outsourced to India (USA Today, Oct. 14, 2008).

168 “The 2011 Altman Weil Law Firms in Transition Survey, which polled managing partners and chairs at 805 US firms having 50 or more lawyers, found that eight per cent of large US firms used LPO in 2010 and 11 per cent expected to do so in 2011” Mark Ross, Legal Process Outsourcing: has it reached a tipping point? (Outsource May 9, 2012)(http://www.outsourcemagazine.co.uk/articles/item/4500-legal-process-outsourcing-has-it-reached-a-tipping-point)

As a result of the growing importance of technology, LPO vendors will continue using technology as a key selling point. Technology platforms will be used to offer diversified services and as a means for vendors to further align themselves with their client organizations.

**Technology and Legal Education**

Although some small steps have been made toward integrating technology into the legal education curriculum, using laptops and TWEN (The West Education Network) are not enough to be sure that law schools are graduating smart and capable users of technology. With advances in online technologies, virtual classroom experiences are no longer cost prohibitive. I am not suggesting distance learning exclusively (although I do believe it is just a matter of time), but providing a more flexible schedule, combining virtual class time with actual class time, might facilitate a more creative learning environment. Wikis, blogs and podcasts are potentially powerful learning tools for collaboration and illustration that can and should be adapted to the law classroom. We now have an entire group of students who see technology as integral to their learning experience, and a vehicle for creative expression and self-determination. That is not to say that we should promote technology for technology’s sake, but neither should we avoid it, simply because we are uncomfortable with how to make the best use of it. Quite often the students can figure that out if we provide them the opportunity and encouragement to do so.

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170 A recent ABA Task Force on the Future of Legal Education has taken note of many of these changes noting among other recommendations “Law schools should make use of technology in to innovate and improve pedagogy”

[http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html](http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html) (last visited 02/20/2013)
One of the more interesting and innovative approaches is a project called “Law without Walls.” Based at University of Miami School of Law, LWOW is a collaborative academic model that brings together students and faculty from different schools, and practitioners and entrepreneurs from around the world to explore innovation in legal education and practice. Participating students and faculty meet once a week in a virtual group setting. They are paired up to conduct investigative research on a pre-assigned topic to identify a problem in legal education or practice. Over the course of the semester, the paired students develop a “Project of Worth” that offers creative solutions to the identified issue. The students are assigned an academic mentor and a practitioner mentor, and will have access to an entrepreneur advisory board, and a subject expert board to ensure that the projects are practical, realistic, and desired.

171 (http://www.lawwithoutwalls.org/) (Last visited 02/20/2013)

172 In addition to Miami, students and faculty from Fordham Law, Harvard Law, Miami Law, New York Law School, Peking University School of Transnational Law, and University College London Faculty of Laws are participating in the pilot project.


Sample projects from the past two years include:

• Virtual Legal Education: Can Law Schools Span the Distance? Project of Worth: Designed an all-encompassing, powerful piece of software that puts together a number of the very best features of software products often used in online education to create a one-stop-shop software solution for law schools looking to do virtual education right.

• Women in the Law: Is the Glass Ceiling Cracked, Smashed, or Unbreakable? Project of Worth: Designed a smartphone app specifically for female lawyers that connects users with other female lawyers to form an online community while also offering a variety of services, functions, and resources.
Information Literacy for a Digital Generation

One often stated goal of legal education is to teach students to “think like a lawyer” which essentially means to think critically. Another implicit goal is to teach them how to “learn like a lawyer” which essentially means how to find the law or conduct research. Unfortunately, more emphasis is placed on the former than the latter, which leaves many recent graduates at a decided disadvantage. Learning how to conduct efficient and effective research should be a skill infused throughout the entire legal education process, not limited to a First-Year skills course, as is often the case.

Today, law students need an opportunity to develop literacy skills in two distinct but related areas. The first is “information literacy”, which is the ability to identify the following; what information is needed; how the information is organized; the best sources of information for a given need; how to locate those sources; how to critically evaluate the sources; and how to share that information. This process is generic enough to apply across disciplines, and is essentially format neutral. It is the foundation for formulating a research strategy.174 The second area is “digital literacy” and it deals more with students developing a working understanding of and ability to use technology. “Digital literacy” can be subdivided into the following 3 types of literacy skill sets; “functional literacy”, knowing how technology works; “critical literacy” knowing how the technology affects what is being studied, and “rhetorical literacy” knowing how to use the technology to create something.175

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It is important to recognize when a teachable moment may present an opportunity to intersect the two forms of literacy. For example, a discussion on how the information is organized may be reinforced by talking about the functionality of the technology behind the organization. This will help in providing the “direct, repeated and integrated contact” that students need to develop a “keen and judicious sense of the technological world around them”\textsuperscript{176}.

**Conclusion**

American legal education as an enterprise has evolved slowly over the past couple hundred years. Understanding the evolution of how lawyers were educated and influenced by the social climate and technological developments of the time helps to put our current status in perspective. The world changes and people adapt (some more slowly than others). What is different is how rapidly our world is changing. This is particularly true when it comes to communication and information; air and light for the legally trained mind. While the telephone and television are considered fairly modern technological advancements in communication; it took decades for them to become commonplace household items. Compare these to the Ipod and Smartphone, which in 10 years have become fairly ubiquitous.

Technology is only considered “good” if it somehow improves, or makes our lives easier or more productive. Technology has come to play a more prominent role in most academic environments, and quite often one of the first places to use or incorporate it, is the library. Information is the library’s stock and trade, and more and more it is a commodity that is taking a digital form. Understanding the “hybrid” nature of most collections, particularly in academic law libraries can

\textsuperscript{176} Id.
be an important step toward incorporating technology where appropriate, in the legal education arena. Consider that critical thinking skills can be enhanced when combined with techniques for developing informational literacy. We should look for the opportunity to cross reference form with function, in substantive courses as well as skills training. Young people are inundated with technology, but that does not mean that they know how to use it effectively or efficiently. Librarians are great resources for developing assessments and evaluations of technology as part of the discussions in substantive course, which can add an illuminating dimension to what may appear to be abstract concepts.

The world of legal information is morphing, and many of our assumptions about what the law is, how it is found and even applied, is likely to be challenged. It’s like walking on solid ground one minute and the next, slowly sinking in quicksand. As many are coming to realize, we can only survive this transformation if we are willing to change as well.