

2007

Opportunity Lost: How Law School Disappoints Law Students, The Public, and the Legal Profession

Jason M. Dolin

Capital University Law School

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Dolin, Jason M. (2007) "Opportunity Lost: How Law School Disappoints Law Students, The Public, and the Legal Profession," *California Western Law Review*: Vol. 44 : No. 1 , Article 6.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol44/iss1/6>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

OPPORTUNITY LOST: HOW LAW SCHOOL DISAPPOINTS LAW STUDENTS, THE PUBLIC, AND THE LEGAL PROFESSION

JASON M. DOLIN*

I. THE QUESTIONS

This article answers two questions: 1) How can law schools better prepare students to practice law; and 2) Why do law schools not do this already? This article proposes remedies which many thoughtful and concerned observers of legal education say are obvious and long overdue. This article also argues that the bench and bar are in the best position to initiate change in legal education which is necessary for law schools to produce competent new attorneys.

Since 1998, I have taught a practicum to third year students at Capital University Law School on general practice. In that capacity, I have taught many of the “how to’s” of law practice: how to implement doctrine into the work product of a practicing lawyer; how to draft a will; how to draft and file a complaint; and how to deal with clients, to name a few.

As someone who has one foot in law practice and the other in law academia, I have had the opportunity to observe students who are months or weeks from graduation and fear they are not adequately prepared to practice law. Sadly, but not surprisingly, the steep learning curve they will face after graduation will likely be overwhelming to

* Adjunct Professor of Law, Capital University Law School, Columbus, Ohio. I thank Professors Michael Distelhorst of Capital University Law School, Lawrence Krieger of Florida State University Law School, and Susan Daicoff of Florida Coastal Law School for their review and insights about this article. They are the pathcutters. I thank my wife Lisa, who has heard it all before, but she still keeps listening.

them. Although my students are eager, intelligent, and willing to learn, they know almost nothing about the actual practice of law because they have been taught almost nothing about law as a profession. Most law students have not been exposed to many of the basic skills needed to succeed in practice, such as, how to draft simple transactional documents, how to interview and handle clients, how to deal professionally with colleagues, and how to bill their time. By and large, to the extent that my students know anything about being a practicing lawyer, they have learned it on their own, “on the street.”

II. THE PROBLEM

The current system of legal education is consistent with the way most practicing lawyers were taught and the way that law students have been taught for generations. So then what is the problem with the current system?¹

There are two interconnected problems that emanate from failings in the world of legal education. The first problem is that law schools continue to produce large numbers of lawyers, flooding an already drowning market.² The second problem is that law schools have refused to teach new lawyers how to practice law.³ Individually, the

1. This attitude of “If it was good enough for me, it’s good enough for you,” condemns future generations to the mistakes and inefficiencies of the past and fails to consider changes that have occurred since the time when “it was good enough for me.” While the old adage is catchy, it does nothing to advance improvement. Another way of looking at the old adage might be “if it was ineffective enough for me, it’s ineffective enough for you.”

2. First year law school enrollment at American law schools appears to have been at an all-time high in academic year of 2006-2007, with 48,937 enrolled first year law students. ABA, First Year and Total J.D. Enrollment, <http://www.abanet.org/legaled/statistics/charts/stats%20-%206.pdf> (last visited Sept. 15, 2007). For the academic year of 2005-2006, American law schools awarded 43,883 J.D. or LL.B degrees. ABA, <http://www.abanet.org/legaled/statistics/charts/stats%20-%207.pdf> (last visited Sept. 15, 2007). This total is 1211 more than in 2004-2005, 3859 more than in 2003-2004, and 5008 more than in 2002-2003. *Id.*

3. In 2007, the Clinical Legal Education Association (CLEA) concluded that the “unfortunate reality is that law schools are simply not committed to making their best efforts to prepare all of their students to enter the practice settings that await them. This concern is not a recent development.” ROY STUCKEY ET AL., CLINICAL LEGAL EDUC. ASS’N, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 18 (2007). Law school education, unlike other professional schools which

effects of either problem would be bad enough. Together, however, the effects of these two shortcomings have had a tremendously damaging effect on law students, the legal profession, and most importantly, the public.

A. Langdell's Method Ineffectively Prepares Students to Practice

It is old news that law schools currently do not adequately prepare students to practice law, even at the most minimally competent level. But while law school has not changed, law practice has dramatically changed, and at an ever-quickenning pace.

Today, the legal education that many found adequate in the past is inefficient, inadequate, and costly. Law schools still use teaching methods and casebooks modeled on those developed by Christopher Columbus Langdell⁴ at Harvard Law School in his contracts course in 1870.⁵

emphasize the training of practitioners, evidences its lack of interest in the preparation of legal practitioners by the marginal placement of clinical training in the curriculum.

With some important exceptions, the underdeveloped area of legal pedagogy is clinical training, which typically is not a required part of the curriculum and is taught by instructors who are themselves not regular members of the faculty. Compared with the centrality of supervised practice, with mentoring and feedback, in the education of physicians and nurses or the importance of supervised practice in the preparation of teachers and social workers, the relative marginality of clinical training in law schools is striking.

WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 24 (2007).

4. Christopher Columbus Langdell, once dean of Harvard Law School, "believed that law should be taught, not as a skilled trade, but rather as a science." Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool For Legal Writing Courses?*, 43 CAL. W. L. REV. 267, 270 (2007). As a means to this end, Langdell "introduced the case method of law study, in which students learned the law by reading and discussing cases to extract the scientific legal principles." *Id.* The case method of study, or "Socratic method" involved:

[H]aving a student analyze each of the cases and then asking a series of questions designed to draw out the legal content of the case. Langdell and the students would then work to synthesize and contrast the cases so that, ultimately, the entire area of the law would be made clear.

Id.

5. Bruce A. Kimball, *Christopher Langdell: The Case of an 'Abomination' in*

Current law school pedagogy is stuck in Langdell's 19th century. Except for word processing and the greater speed of electronic research, law school has not changed much since those days.⁶ The teaching methods and casebooks we use today seek to replicate those taught by Langdell. Despite the passage of over 130 years, Langdell's methods remain the dominant teaching modality,⁷ largely unquestioned by those who populate legal academia even though there is no sound pedagogical reason for its pervasive use.⁸ By and large, law teaching has stagnated.⁹

Teaching Practice, THOUGHT & ACTION, Summer 2004, at 23, 24.

6. See SULLIVAN ET AL., *supra* note 3.

7. A survey of law professors in 1994-1995 by Professor Steven I. Friedland sought to find out, amongst other things, the frequency with which the Socratic method was used. Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 1-2 (1996) (concluding the data indicates that the Socratic method is entrenched and dominates legal education). The survey found that the Socratic method, Langdell's signature pedagogical device, was utilized by 97% of professors teaching first year classes, 93% of professors teaching upper level classes, 67% of professors teaching seminars, and 54% of professors teaching skills courses. *Id.* at 27. Of the professors using the Socratic method, 30% used it "most of the time" (defined as between 80 and 100% of the time) and 41% used it "often" (defined as 50 to 79% of the time). *Id.* at 28. Of the remainder, 21% used it "sometimes" (defined as 20 to 49% of the time) and only 5% used it "rarely" (defined as 5 to 19% of the time). *Id.* Morrison Torrey, Professor of Law at DePaul University College of Law writes:

The Socratic Method advocates seem oblivious to, or else attempt to minimize, the negative side of the very attributes they tout. . . . When the pro-Socratic Method team claims it is an "active" method because a student is responding to a series of questions, they either ignore the fact that the remaining eighty-nine students in the class are passive or they optimistically think all students are . . . participating "vicariously." In reality, however, I suspect students are too busy being relieved for not being the immediate victim, desperately hoping they will not be called upon next, to absorb much of the dialogue occurring, much less play along in this "exciting game."

Morrison Torrey, *You Call That Education?*, 19 WIS. WOMEN'S L.J. 93, 103 (2004).

8. See sources cited *supra* note 7. See also *infra* notes 13-15.

9. See Michael Hunter Schwartz, *Teaching Law By Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 360 (2001) ("[L]aw school teaching has changed little in the past 130 years."); Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 519-20 (1991) (asserting that many of the problems of law school teaching are attributable to the case method).

Langdell, at least, had an excuse. He did not have access to the substantial scientific studies of how students learn, as well as the advances in educational psychology, social psychology, and neuroscience.¹⁰ Researchers now have a greater understanding of how the brain works and of the critical interplay between emotion and cognition in learning.¹¹ Researchers now know how students learn and process information,¹² as well as the most effective methods for teaching students of all kinds, including law students.¹³ Those

10. Neuroscience is the study of the nervous system which includes the “brain, the spinal cord, and networks of sensory nerve cells, or neurons, throughout the body.” Society for Neuroscience, *What is Neuroscience?*, <http://www.sfn.org/index.cfm?pagename=whatIsNeuroscience§ion=aboutNeuroscience> (last visited Sept. 15, 2007).

11. James B. Levy, *As a Last Resort, Ask the Students: What They Say Makes Someone an Effective Law Teacher*, 58 ME. L. REV. 49, 51-52 (2006).

Because of recent technological advances that allow neuroscientists to peer into the inner workings of the brain, we now have scientific evidence that confirms the essential role socio-emotional considerations play in all cognitive activity, including learning. More specifically, things such as teacher expectations, support, encouragement, and warmth toward students can have a profound effect on their success in school. Law school teachers, however, have been slow to appreciate the power and importance of these considerations.

Id.

12. *Id.* Different students have different learning styles and different methods of processing information. *See, e.g.*, Jayne Elizabeth Zanglein & Katherine Austin Stalcup, *Te(a)chnology: A Web-Based Instruction in Legal Skills Courses*, 49 J. LEGAL EDUC. 480, 482-92 (1999) (discussing the Learning Style Inventory which sets forth various factors that impact a student’s ability to learn and characterizes students as “global” learners or “analytic” learners).

13. *See* Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Students*, 43 SANTA CLARA L. REV. 1, 117-18 (2002).

Studies demonstrate that barriers to learning have more to do with whether the [teaching] methodology is teacher or student oriented. . . . Teacher-centered pedagogy impedes success in the classroom Teacher-centered learning requires all students to adjust their diverse learning styles to fit the professor’s teaching style. This does not take into account that different students learn differently.

Id. *See also* Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213, 215-16 (1998) (discussing the significant improvement upon student performance when students were taught and learned utilizing their respective “learning styles” as opposed to a one-size-fits-all

advances happened years after Langdell implemented his methods. Further, Langdell did not have the benefit of 130 years of experience in the legal profession. Although Langdell made pioneering advancements in legal education based on the information available to him at the time, today's legal educators have not been nearly as proactive as Langdell. For reasons discussed below, legal educators have refused to acknowledge the 130 years of learning about learning.¹⁴ While other graduate and professional schools have long since adopted more modern teaching methods, including mandatory clinical or field training, law school has made little, if any, progress since Langdell's day.

The Socratic-Casebook method through which law students are taught is not only pedagogically ineffective, but is downright damaging to their mental and emotional health.¹⁵ Substantial evidence,

teaching strategy); Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1, 47 (1995) (“[E]arlier studies suggest that lawyers attribute *much* more of their skills education to work experience than to law school in general and more to summer and part-time work than to law school clinical and simulation courses.”); Ursula H. Weigold, *The Attorney-Client Privilege as an Obstacle to the Professional and Ethical Development of Law Students*, 33 PEPP. L. REV. 677, 678 (2006) (“[I]n most American law schools, students may graduate having very little practice or experience in many of the skills that lawyers must possess to represent clients competently and ethically.”).

14. See Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASS'N LEGAL WRITING DIRECTORS 73, 76-77 (2004) (“Law schools have seemingly eschewed learning theories in developing their curricula. This is surprising in light of the central mission of the legal academy—to provide students with the necessary knowledge to competently enter the legal profession.”). See also Lila A. Coleburn & Julia C. Spring, *Socrates Unbound: Developmental Perspectives on the Law School Experience*, 24 LAW & PSYCHOL. REV. 5, 23 (2000); Jay M. Feinman & Marc Feldman, *Achieving Excellence: Mastery Learning in Legal Education*, 35 J. LEGAL EDUC. 528, 529 (1985) (“Law professors have long believed that educational theorists, professors of education or educational psychology, are either charlatans or primitives. That belief is arrogant and anti-intellectual.”); Marie Stefanini Newman, *Not the Evil TWEN: How Online Course Management Software Supports Non-Linear Learning in Law Schools*, 5 J. HIGH TECH. L. 183 (2005) (asserting that law professors have been resistant to embrace new teaching strategies); Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23 (2000) [hereinafter Rhode, *Legal Education*].

15. See G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225 (1986); Levy, *supra* note 11, at 54 (“Much has been written

gathered through a number of studies, indicates this damage carries over into the student's future law practice.¹⁶ The results of these studies have been widely known for years. Challenging the pedagogy of the status quo, they have also been widely disregarded in legal academia.¹⁷ Yet, while law school remains mired in the past, law practice today is more complex, more competitive, and more stressful than ever before.¹⁸ In a consumer oriented world, consumers of legal

about how stressful the law school experience is for students and, in particular, how stressful they find the Socratic method.”); Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261 (2004).

16. See Friedland, *supra* note 7. See also Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 79 (2002) (“Unfortunately psychological distress, dissatisfaction, and substance abuse that begin in law school follow many graduates into practice.”); Rhode, *Legal Education*, *supra* note 14, at 36 (“Although the psychological profile of entering law school students matches that of the general public, an estimated twenty to forty percent leave with some psychological dysfunction including depression, substance abuse, and various stress related disorders.”).

17. See Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753 (2004).

Most law professors are not familiar with the ever-increasing literature documenting the extreme levels of mental illness and substance abuse that develop among law students while in law school Many of those who are familiar with this body of work either do not believe that it is true or else attribute it to causes outside of law school and therefore, beyond our control.

Id. at 764-66. See also James J. Alfini & Joseph N. Van Vooren, *Is There a Solution to the Problem of Lawyer Stress?: The Law School Perspective*, 10 J.L. & HEALTH 61, 66 (1995-1996) (“[I]t may seem surprising that the legal academy has given so little attention to such an enormous problem in the legal profession. It becomes less surprising, however, when one considers how little attention law schools give to the current structure and operating realities of the legal profession itself.”); Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 112 (2002) (“In the day-to-day business of legal education there is remarkably little evidence that we are aware of the unhealthy-unhappy-law-student (lawyer) problem.”).

18. There appears to be widespread agreement that the practice of law is becoming increasingly stressful. See, e.g., Michael H. Hoeflich, *Legal Ethics and Depression*, 74 J. KAN. B.J. 33, 35 (2005) (“Increasingly, the ‘law business’ has become more competitive and far more stressful. Standards of civility have dropped. Collaborative work among lawyers has become more difficult. Hours worked,

services are demanding greater services at lower price points than ever before.¹⁹ A premium has been placed on speed and efficiency in the delivery of legal services.²⁰ It is a world and a practice alien to the one that Langdell knew.

B. The Glut of Lawyers in the Legal Market

Driving a lot of the change in the world of law practice has been the glut of lawyers in the legal market—a glut fostered and even encouraged by the American Bar Association (ABA) and by law schools. According to the American Bar Foundation, in 1951 there was one lawyer for every 695 Americans.²¹ In 2000, there was one

particularly among young lawyers, have increased.”); William E. Livingston, *De-stressing the Profession*, 81 MICH. B.J. 24, 26 (2002) (“Work overload, competition, dealing with difficult people, and time pressures are stressors found in many professions. Unique to law, however, are the legal role conflicts, an adversarial system of justice, and certain areas of practice with a more pronounced level of conflict.”).

19. See Austin Sarat, *Enactments of Professionalism: A Study of Judges’ and Lawyers’ Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 829 (1998) ([C]ost-benefit thinking leads to great cost-cutting pressures, to the point that they often feel that the client is unwilling to pay for sufficient preparation.”); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 900 (1999) [hereinafter Schiltz, *On Being a Happy*] (“Clients insist on getting good work at low hourly rates. They also insist that lawyers minimize the amount of time that they devote to each file to hold down costs.”).

20. One candidate for the Presidency of the Texas State Bar Association summed up the increasing stresses felt by practitioners due to advances in technology as follows:

Though technological advances have brought much good to our firm, these innovations have in many ways made our individual lives more stressful. Many clients have come to expect 24-hour-a-day access to their lawyers because of cell phones and email. Also, because of instant access they seem to want an instant answer. . . . Lawyers who cannot strike a good balance between their work life and their personal life tend to burn out.

State Bar of Texas Election: President-elect Candidates Discuss the Issues, 67 TEX. B.J. 268, 271-72 (2004) (quoting President-elect candidate Eduardo Rodriguez).

21. Clara N. Carson & Barbara A. Curran, *Growth and Gender Diversity: A Statistical Profile of the Legal Profession in 2000*, RESEARCHING L., Winter 2005, at 1.

lawyer for every 264 Americans.²² At this rate, by 2050 there will be one lawyer for every 100 Americans. It is safe to say that the supply of lawyers long ago outstripped the demand for their services.²³ There are simply too many lawyers and too many law schools in the United States. Given the oversupply of lawyers, if law schools were at all sensitive to market forces, they would be shutting their doors, or at least reducing their student headcount.²⁴ Instead, new law schools continue to open each year. Since 1970, fifty-one new law schools have been approved by the ABA.²⁵ In 2006 alone, the ABA granted full approval to three law schools and provisional approval to two others.²⁶

22. *Id.*

23. Some have argued that there is not an oversupply of lawyers but, rather, a misdistribution; that there are substantial unmet legal needs especially amongst the economically disadvantaged. For example, Deborah L. Rhode, a Professor at Stanford Law, has written that the “vast majority of legal needs among low income households are unmet, and many middle income families are priced out of the market for attorney’s assistance.” Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 992 (1999) [hereinafter Rhode, *Too Much Law*].

24. However, owing to the peculiar marketplace for legal education, law schools have largely been insulated from the harshness of the marketplace. See John Mixon & Gordon Otto, *Continuous Quality Improvement, Law, and Legal Education*, 43 EMORY L. J. 393, 443 (1994) (“[M]any law schools are immune from market forces. National law schools’ status ensures an abundant supply of applicants who can afford the price of admission. Many regional schools are publicly supported, so tax dollars continue to flow, regardless of whether students, graduates, the profession, or taxpayers are satisfied.”); see also Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465 (2004). Matasar states that the law school market is protected by the following factors:

(1) educational cost is highly leveraged, with students borrowing most of the cost of their education; (2) lenders have been willing to lend to any credit-worthy student; (3) lenders have not been risk averse because substantial portions of students’ loans are federally guaranteed; (4) lawyer salaries have been ample to support the debt service that students accumulate in law school; and (5) students have been able to rely on family resources to support them where loans fall short.

Id. at 474-75.

25. ABA, ABA Approved Law Schools, <http://www.abanet.org/legaled/approvedlawschools/year.html> (last visited May 25, 2007).

26. In 2006, the Council of the Section of Legal Education and Admissions to the Bar (“the Council”) granted full approval to Barry University and Florida International University. Provisional approval was granted to Charleston School of

The overabundance of lawyers is not without consequence. It has hurt the practice and, more importantly, it has hurt the public. This glut of lawyers has made competition for clients greater than it has ever been.²⁷ While the overabundance of lawyers may have the short term consumer benefit of depressing legal fees,²⁸ there is more to competent lawyering than cost. The low cost provider is not always the competent provider.²⁹ The oversupply of lawyers has caused vicious and underhanded competition for clients. When there are too many lawyers and not enough clients, there is a greater temptation for attorneys to over promise and, once the client has been landed, to overbill.³⁰ Stories of bill padding are common.³¹ Lack of business can

Law, Faulkner University, LaVerne College, and Liberty University. See ABA, Legal Education and Admissions to the Bar, <http://www.abanet.org/legaled/> (last visited May 25, 2007).

27. See Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1030 (2004) (“Today, lawyers in private practice, ranging from solo practitioners to partners in large, elite urban law firms, are all endeavoring one way or another to peddle usually fungible services (with rare exceptions) into a saturated, highly competitive market for a shrinking client base.”); Schiltz, *On Being a Happy*, *supra* note 19, at 899-900 (“As the number of lawyers has soared, competition for clients has become ferocious.”); Matthew S. Winings, *The Power of Law Firm Partnership: Why Dominant Rainmakers Will Impede the Immediate, Widespread Implementation of an Autocratic Management Structure*, 55 DRAKE L. REV. 165, 177 (2006) (“Over the past few decades, the number of lawyers has grown dramatically. Consequently, there is greater competition for clients.”).

28. *But see* Deborah L. Rhode, *The Profession and Its Discontents*, 61 OHIO ST. L.J. 1335, 1339 (2000) [hereinafter Rhode, *The Profession*] (stating that the increasing competitive pressures in law practice can produce positive effects, such as reducing prices and promoting efficiency).

29. As with all areas of commerce, there will always be a cheaper purveyor of goods or services. Unfortunately, there is nothing in law or commerce that requires that cheaper equals better. Similarly, there is nothing that mandates that more costly equals better. Given the subtleties of the attorney-client relationship and the high level of skill required for the rendering of many legal services, selecting a lawyer on price alone is often a mistake.

30. William H. Rehnquist, Chief Justice, Dedicatory Address, *The Legal Profession Today*, 62 IND. L.J. 151, 155 (1987).

31. See Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 922 (1996) (explaining that “[p]adding time records is a genuine professional plague, one not confined to a few firms or even a few lawyers within most firms. It is a silent epidemic: the realization of what has occurred is so unwelcome that it is largely ignored.”); Joseph E. La Rue, *Redeeming the Lawyer’s Time: A Proposal for a Shift in How Attorneys Think About—And Utilize—Time*, 20 NOTRE DAME J.L.

encourage lawyers on the margin to file frivolous lawsuits, built on little evidence, in the hope of a fast settlement. Further, in a too-competitive market, lawyers are tempted to handle cases that are beyond their competence or outside their area of expertise. The results can be disastrous and the clients pay the price.³²

The overheated competition for clients has often fostered a win-at-any-cost mentality for fear of losing the client. We hear, too often, of scorched earth litigation and Rambo-like tactics.³³ There has been a loss of civility, independence, and professionalism in practice.³⁴ A

ETHICS & PUB. POL'Y 473, 478 (2006) (“[L]ying to clients about their bills [by lawyers] has become so widespread it is now said to have reached epidemic proportions. This has caused even the most ethically-minded associates to feel that they must lie, or else place themselves at a competitive disadvantage when bonuses and raises are determined.”); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 665 (1990) (reporting that lawyers use “pervasive deception relating to client billing, some examples involving large amounts of money. These include stories of padding bills, billing two clients for the same time, doing unnecessary work to run the meter, and failing to disclose the basis of the bill.”).

32. E.g., Roger C. Cramton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 FORDHAM L. REV. 1599, 1602 (2002) (“Numerous studies show that plaintiffs’ lawyers in civil cases and underpaid defense counsel in criminal cases often sacrifice their clients’ interests in favor of quick settlements or guilty pleas that maximize the lawyer’s effort/earnings calculus.”).

33. Krista Riddick Rogers, Comment, *Promoting a Paradigm of Collaboration in an Adversarial Legal System: An Integrated Problem Solving Perspective for Shifting Prevailing Attitudes from Competition to Cooperation Within the Legal Profession*, 6 BARRY L. REV. 137, 137 (asserting that lawyers’ adversarial mindset contributes to the legal profession crisis because the “prevailing attitude of ‘anything to get ahead’ or ‘winning at all costs’ often manifests itself in intense competition for clients as well as gamesmanship-type tactics and overly aggressive unprofessional behavior often exercised under the guise of ‘zealously representing a client.’”).

34. Charles I. Nelson & Justin L. Garrett, II, *Beyond Mere Ethics*, 67 ALA. LAW. 180, 180 (2006) (stating that there have been a number of reasons assigned to the decline in professionalism “including the unique stresses of modern society, pressures to increase billable hours, increased competition for clients as lawyer advertising became legal, scorched-earth litigation tactics, and a prevailing attitude that winning is everything.”). See David A. Kessler, *Professional Asphyxiation: Why the Legal Profession is Gasping for Breath*, 10 GEO. J. LEGAL ETHICS 455, 483 (1997) (“[I]t is often the case that the lawyer subjugates her own sense of morality for that of the client’s, and thereby loses a degree of autonomy enjoyed by previous generations of members of the legal profession.”). See also Robert W. Gordon,

2004 survey conducted for the State Bar of California found that two-thirds of the attorneys surveyed believed that lawyers “compromise their professionalism as a result of economic pressures.”³⁵ Is it just coincidence that the increased loss of civility and professionalism coincides with the explosive growth of law schools? While one cannot blame the loss of professionalism entirely on the glut of lawyers, it is certainly a large contributing factor.³⁶ The glut has turned lawyering almost entirely into a business, with an attendant loss of professional values that once made lawyering a great and justifiably proud profession.

The result of all this is that law practice today is faster, more competitive, and more pressurized than ever before. Lawyers today face pressures and challenges unknown by those who practiced as recently as twenty or thirty years ago. Lawyers, many new, but some old, struggle to survive in such a marketplace. The temptation to cut ethical corners increases as it becomes more difficult to make a living. According to former Chief Justice William H. Rehnquist, “[t]he greater the pressure of maximization of income, the more likely some sort of ethical difficulties will be encountered”³⁷

C. Law Schools Make Money

Why then, given the glut of lawyers, do new law schools continue to open and existing law schools continue to graduate new lawyers? The answer, of course, is that by and large law schools make money.

Money! Power! Ambition Gone Awry!, LEGAL AFF., Mar.-Apr. 2006, at 26, 32 (“The last thing most lawyers wanted to advertise [in the 1980s] was their superior scruples as monitors of client conduct. They did not wish to present themselves as proponents of legal reforms that their clients might not welcome.”).

35. Nancy McCarthy, *Pessimism for the Future: Given a Second Chance, Half of the State’s Attorneys Would Not Become Lawyers*, CAL. B.J., Nov. 1994, at 1, available at <http://www.calbar.ca.gov/calbar/pdfs/members/1994-Futures-CBJ.pdf> (explaining that California attorneys are pessimistic about their profession, and half say that if they had another chance, they would not have become lawyers).

36. See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1344-45 nn.16-17 (1997) (explaining that law has become a “business” rather than a profession because of a heightened emphasis on money, and that attorneys and clients both feel less loyalty to law firms).

37. Rehnquist, *supra* note 30, at 155.

Law schools and their affiliated universities have benefited handsomely from the increased number of those who desire law degrees, and they continue to mint graduates in large numbers.³⁸ Whereas many, if not most, graduate programs are money losers for their universities, law schools are moneymakers and profit centers.³⁹ Law school tuition is high. There is relatively little tuition discounting, and relatively little outright scholarship assistance. From 1985 to 2005, public law schools' annual tuition and fees have increased from a median of \$1792 to a median of \$13,107, while private law schools' annual tuition and fees have increased from a median of \$7385 to a median of \$30,670.⁴⁰ According to the ABA:

Since the early 1970's, there has been a steep and persistent rise in the costs of legal education and in the tuition law schools charge students. From 1992 to 2002, the cost of living in the United States has risen 28%, while the cost of tuition for public law schools has risen 134% for residents and 100% for non-residents, while private law school tuition has increased 76%.⁴¹

Simply stated, law schools are university cash cows, contributing dollars to the university's bottom line.⁴² Langdell's method endures because, although his pedagogy no longer makes sense, his system makes money. As David Franklin, a legal commentator and former clerk to Supreme Court Justice Ruth Bader Ginsberg wrote:

Langdell's genius, it turns out, lay in devising a system in which one professor could keep a hundred or more students awake and paying attention for an entire hour without the aid of teaching assistants. Law schools . . . are profit centers. . . . Overhead costs are low, financial aid is the exception rather than the rule. . . . The

38. See *supra* note 3 and accompanying text.

39. See *infra* notes 42-43 and accompanying text.

40. See ABA, Law School Tuition, <http://www.abanet.org/legaled/statistics/charts/stats%20-%205.pdf> (last visited Sept. 15, 2007).

41. ABA COMM'N ON LOAN REPAYMENT & FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 10 (2003) [hereinafter COMM'N ON LOAN REPAYMENT & FORGIVENESS], available at <http://www.abanet.org/legalservices/downloads/lrap/lrapfinalreport.pdf>.

42. David Franklin, *Trials of Socrates*, SLATE, July 31, 1997, <http://www.slate.com/id/3133/>.

Socratic method allows law schools to maintain a high student-to-teacher (tuition-to-salary) ratio.⁴³

Cash starved universities are only too happy to take the funds generated by law schools and use them for their general purposes.⁴⁴

43. *Id.*; see also ROBERT STEVENS, LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 63 (1983) (“The vast success of Langdell’s method enabled the establishment of large-size class. Although numbers fluctuated, Langdell in general managed Harvard with one professor for every seventy-five students; the case method combined with the Socratic method enabled classes to expand to the size of the largest lecture hall.”); Benjamin et al., *supra* note 15, at 250 (citing Roger C. Cramton, *The Current State of Law Curriculum*, 32 J. LEGAL EDUC. 321, 333 (1982)); Steven K. Berenson, *Institutional Professionalism for Lawyers: Realizing the Virtues of Civic Professionalism*, 109 W. VA. L. REV. 67, 83 (2006) (reviewing WILLIAM M. SULLIVAN, WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA (2005)); Andrew Hacker, *The Shame of Professional Schools*, 32 J. LEGAL EDUC. 278, 278 (1982).

44. See Philip J. Closius, *The Incredible Shrinking Law School*, 31 U. TOL. L. REV. 581, 584 (2000) (“In many academic settings, universities have utilized the law school as a ‘cash cow,’ with ‘excess’ law income being used to fund other programs at the University.”); Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 J. LEGAL EDUC. 471, 495 (2004) (“The economic profitability of law schools seems likely to induce universities to maintain them.”); Matasar, *supra* note 24, at 482 (“Universities come to appreciate that many law students will pay without regard to price; they urge (and even may require) prices to rise.”); Lawrence Ponoroff, *Law School/Central University Relations. Sleeping with the Enemy*, 34 U. TOL. L. REV. 147, 147 (2002) (“There is a pervasive attitude among law faculty that . . . the central university is robbing the law school blind.”); Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1655 (1993) (“Relative to most other departments in a university, law schools are awash in tuition income and in gifts from wealthy alums.”); Schwartz, *supra* note 9, at 361 (“Law schools traditionally do well economically in large part because, unlike most graduate school classes . . . range in size from 50 to 120 students.”); Randall T. Shepard, *From Students to Lawyers: Joint Ventures in Legal Learning for the Academy, Bench, and Bar*, 31 IND. L. REV. 445, 448-49 (1998) (“Until quite recently, for example, George Washington University siphoned off forty percent of its law school’s revenue.”); George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2106 (1998) (“[V]iewing the professional school as a cash cow, the university might require that the professional school make payments to the university that far exceed the university’s overhead Some universities treat their law schools in this manner, using revenue from law school students and alumni to subsidize the university’s other programs.”); James P. White, *Legal Education in the Era of Change: Law School Autonomy*, 1987 DUKE L. J. 292, 304 n.46 (1987) (“[M]any still complain

Indeed, the universities have every incentive to keep the law school classes large and the funds from these larger classes flowing. Law schools, in turn, while sometimes complaining about forking over the money,⁴⁵ nonetheless enjoy the prestige and power in their respective university communities that comes from the profit they generate and the funds they supply to the larger university, or main campus.

Regrettably, there is little evidence that the escalating cost of law school education will diminish. The continued increase in tuition has had a damaging financial effect on law students. According to the 2003 Final Report of the ABA Commission on Loan Repayment and Forgiveness, “[t]he typical law student today graduates with debts of around \$80,000.”⁴⁶ The continued increase in tuition has a damaging financial effect on law students. Not only does this debt have negative consequences for students, but society suffers as well. The ABA found that “law school debt prevented 66% of student respondents from considering a public interest or government job.”⁴⁷ Thus, the crushing burden of law school debt drives graduates away from lower paying public service jobs into higher paying, but less altruistic jobs. While law schools charge high tuitions and spin off excess profits to their universities, law students sink further into debt, and the poorest segments of society suffer from the lack of attorneys able to address a range of social ills.

Having flooded the market with lawyers, many of whom are burdened with high five figure law school debts, one would think, or one would hope, that law schools would do everything they could to prepare these students to make a living. Unfortunately, law schools have done little to prepare students for the dramatic changes they will face in practice when the tuition bill comes due. Of course, law schools would have to revamp their curriculum to successfully prepare students for the challenges of practice, by instituting changes like mandatory supervised internships or meaningful clinical training. Nonetheless, professor-supervised internships and clinical training

that the parent university siphons off too much of the [law school’s] excess profits”); William A. Wines, *Lawyer Proliferation and the Social Responsibility Model*, 39 J. LEGAL EDUC. 231, 237 (1989).

45. See *supra* note 44 and accompanying text.

46. COMM’N ON LOAN REPAYMENT & FORGIVENESS, *supra* note 41, at 14.

47. *Id.* at 9.

require lower student-to-professor ratios⁴⁸ and are less profitable than the Langdellian economic model of mass production in large lecture halls.⁴⁹

Lawyers in our society are given considerable power and special privileges to handle the sensitive and important matters of a sometimes vulnerable public. That is why the state demands that lawyers be licensed as well as regulated. However, the same cannot be said for academics. The legal profession and the law schools that produce lawyers exist to serve the needs of the public, not to serve as profit centers for affiliated universities, or make the *U.S. News*' top ten.⁵⁰ Profitability and accolades are all asides and if they occur along the way to our mission, so much the better. But it is not why the legal profession and law schools exist. Law schools exist to train men and women to become practicing lawyers who serve the legal needs of the law consuming public.⁵¹

48. See Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 21 (2000) (arguing that the higher expense of clinical legal education is associated with lower student to faculty ratios and a "more intensive, and presumably better, learning environments for students."); see also Dionne L. Koller, *Legal Writing and Academic Support: Timing is Everything*, 53 CLEV. ST. L. REV. 51, 60 (2005-2006) (arguing that larger student to faculty ratios in law school further increase the difficulty of teaching effectively and providing meaningful academic support). See generally *America's Best Graduate Programs 2008*, U.S.NEWS, http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/about/index_brief.php.

49. Franklin, *supra* note 42.

50. Compare Alfred L. Brophy, *The Emerging Importance of Law Review Rankings for Law School Rankings, 2003-2007*, 78 U. COLO. L. REV. 35, 37 (2007) ("There is increasing evidence that law schools have bent their practices of admission, expenditures, hiring, and even their modes of reporting to the ABA in response to the *U.S. News* rankings."), with Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 82 (2007) ("A high ranking in the *U.S. News and World Report* has numerous beneficial effects for a law school. . . . [I]t helps with alumni contributions, . . . gives students a feeling that they are attending a superior school, and allows the school to attract new students of higher caliber.").

51. Samuel H. Pillsbury, *Learning from Journalism*, 3 OHIO ST. J. CRIM. L. 543, 550 (2006) ("To state the obvious, the basic mission of the American law school is to educate for the practice of law. Law schools exist to form new lawyers.").

One can understand why universities are happy to accept the spin-off dollars that result from mass production legal education. What is less understandable, however, is the complicity of law schools with this bottom-line system at the expense of their students, the public, and the profession. This may all be the result of a game of internal university politics in the fight for resources, but if it is, it is clear that the law schools, and the profession and public they are supposed to represent, are losing that battle.⁵²

Law schools have always called themselves the gatekeepers to the legal profession.⁵³ They should act as gatekeepers, not toll collectors.

D. Ineffective Pedagogy

Worse still, is that the gatekeepers—law schools—are flooding the market with lawyers who are incompetent to practice. If law schools are flooding the market, let them at least flood it with new lawyers who know what they are doing. Unfortunately, that is not the case.

Practitioners and judges know what it takes to build a good lawyer. Although the skills necessary to be a competent attorney have been known for generations, fourteen years ago the ABA's blue ribbon MacCrate Commission (MacCrate) made the requirements as clear as black and white.⁵⁴ Students leave law school virtually in the

52. Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 193 (1991) ("Law professors are both the gatekeepers and the molders of the profession."); Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 56 (2003) ("The vast majority of state bar associations require that prospective lawyers earn a law school degree in order to be eligible for state bar admission. . . . Through the admissions process, law schools select who will ultimately be eligible to sit for the bar examination."). The standards used in approving law schools is "founded primarily on the fact that law schools are the gateway to the legal profession." STANDARDS FOR APPROVAL OF LAW SCHOOLS, Preamble (2007), available at <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Preamble.pdf>.

53. See sources cited *supra* note 52.

54. See Marilyn V. Yarbrough, Closing Remarks, *Legal Education at the Threshold of the New Millennium*, 15 ST. JOHN'S J. LEGAL COMMENT 349, 349 (2001) ("The [ABA's] MacCrate Commission was headed by Robert MacCrate from Sullivan & Cromwell a number of years ago and it was composed of judges, legal educators, practicing attorneys and we were charged with developing a continuum of

dark about how to practice law. The ABA, which accredits law schools, does not require that law students take a clinic or practicum, participate in an internship, or have any hands-on client experience in order to graduate.⁵⁵ It should come as no surprise that the ABA committees that set law school standards are dominated by those who have succeeded and are comfortable in the current system: law school deans and professors.⁵⁶ Further, there is a very real question as to whether the accreditation process effectively monitors the quality or type of teaching in law school.⁵⁷

Legal education is an outlier in the world of professional education. It is virtually alone among professional education in its durable refusal to require practical training prior to licensure. One can hardly think of a profession today that does not require some form of clinical or supervised training prior to licensure.⁵⁸ In California, New York, and Ohio the following professions require their practitioners to

legal education that was actually pre-law through the end of a legal career.”).

55. While, on the one hand, the ABA requires all law schools to *offer* clinical and other hands on training opportunities to its students, on the other, it does not require all students to *enroll* in any of these practical courses. See STANDARDS FOR APPROVAL OF LAW SCHOOLS § 302 at 19-21 (2007), available at <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf>. Indeed, the Interpretations of Standard 302 make clear that “[a] law school need not accommodate every student requesting enrollment in a particular professional skills program.” § 302-4 interpretation at 21. Further, “[t]he offering of live-client or real-life experiences may be accomplished through clinics or field placements. A law school need not offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client or other real-life practice experience.” § 302-5 interpretation at 21.

56. Roy Stuckey, *Why Johnny Can't Practice Law—And What We Can Do About It*, B. EXAMINER, May 2003, at 32, 41 n.8 (“As long as legal educators control the accreditation process, it will not be an effective tool for ensuring adequate preparation to enter the legal profession.”).

57. See John S. Elson, *Why and How the Practicing Bar Must Rescue American Legal Education from the Misguided Priorities of American Legal Academia*, 64 TENN. L. REV. 1135, 1142 (1997) [hereinafter Elson, *Why and How*]. Elson, who served on the ABA's Accreditation Committee stated that “after eighteen ABA/AALS site inspection visits and two years on the ABA Accreditation Committee, I can say with some assurance that the ABA/AALS inspections give no more than a pretense of systematically reviewing the effectiveness of teaching that actually goes on in the classroom.” *Id.*

58. See Borthwick & Schau, *supra* note 52, at 193 (“Law, unlike other professions, requires no formal apprenticeship.”).

have either clinical training or apprenticeship practice prior to being admitted to licensure: social workers,⁵⁹ medical doctors,⁶⁰ accountants,⁶¹ marriage and family therapists,⁶² and licensed

59. Compare CAL. BUS. & PROF. CODE § 4996.2(c) (West 2003) (“Each applicant shall furnish evidence satisfactory to the board that he or she . . . (c) [h]as had two years of supervised post-master’s degree experience.”), with N.Y. EDUC. LAW § 7704(2)(c) (McKinney 2001) (stating that to qualify for a license as a “licensed master social worker,” an applicant must “have at least three years full-time supervised post-graduate clinical social work experience”), and OHIO ADMIN. CODE 4757:19-01(C)(1)(e) (West 2004) (“Not less than four hundred clock hours of supervised practicum and/or field experience, with a primary focus on social intervention coordinated by a an individual with an advanced degree in social work.”).

60. Compare CAL. BUS. & PROF. CODE § 2089.5(d) (West 2003) (stating that of the seventy-two weeks of clinical instruction required for a medical license “54 weeks shall be performed in a hospital”), with N.Y. EDUC. LAW § 6528(a)(3) (McKinney 2001) (stating the applicant must have completed “one academic year of supervised clinical training under the direction of such medical school”), and OFFICE OF THE PROFESSIONS, N.Y. STATE EDUC. DEPT. § 60.3, (2007) (stating that for issuance of a license to practice medicine, an applicant shall have completed at least one year of postgraduate hospital training), and OHIO ADMIN. CODE 4731.291 (West 2004).

61. Compare CAL. BUS. & PROF. CODE § 5083(a) (West 2003) (stating that three or four years of experience are required, depending on the applicant’s educational qualifications), with N.Y. EDUC. LAW § 7404(1)(3) (McKinney 2001) (stating that a certified public accountant applicant must “have experience satisfactory to the board and in accordance with the commissioner’s regulations”), and OFFICE OF THE PROFESSIONS, N.Y. STATE EDUC. DEPT. (REGULATIONS OF THE COMMISSIONER OF EDUCATION) § 70.2 (2007) (stating that to qualify for a license as a certified public accountant, one or two years of experience are required, depending on the applicant’s educational qualifications), and OHIO REV. CODE ANN. § 4701.06(D)(2)(a) (West 2004) (stating that in order to sit for the CPA exam, the candidate who otherwise meets the educational degree requirements must have “one year of experience satisfactory to the board in any of the following: (i) A public accounting firm; (ii) Government; (iii) Business; (iv) Academia.”).

62. Compare CAL. BUS. & PROF. CODE § 4980.40(b) (West 2004) (stating that applicants shall possess a doctor’s or master’s degree from a program that includes a supervised practicum with “a minimum of 150 hours of face-to-face experience counseling individuals, couples, families, or groups.”), with N.Y. EDUC. LAW § 4403(3)(c) (McKinney 2001) (stating that to qualify for a license as a “licensed mental health counselor,” an applicant shall complete a minimum of three thousand hours of post-master’s supervised experience relevant to the practice of mental health counseling”), and OHIO REV. CODE ANN. § 4757.30(A)(5) (West 2004) (stating that applicants must have “[c]ompleted a practicum that includes at least three hundred hours of client contact”).

embalmers.⁶³ It may provide cold comfort to the deceased, literally, that their embalmer is required to have more practical training prior to licensure than the attorney that drafted their estate plan.

Why are we given this special, virtually exclusive, privilege among the professions to obtain a license to practice without being required to know a thing about practice? Are we that much smarter, that much more intuitive, that much better than every other profession? Have we been blessed with attributes that are not to be found in those who practice other professions? One can excuse a cynic for believing that if lawyers did not control the court system and historically dominate the legislature that the current state of affairs would never be allowed to exist. As this article will discuss later, this system continues to exist because those in legal academia have effectively blocked change.

It is bad enough that law schools do not train their students to practice. What is worse is that the education that law schools *do* provide—the traditional Socratic-Casebook method—is inefficient, ineffective, and pedagogically unsound. We know through numerous studies, that the traditional and widely used Socratic teaching method is not only ineffective, but also damaging to the emotional well-being of law students.⁶⁴ Studies going back to at least 1986 have consistently shown that the emotional damage caused by law school education does not end with graduation, but carries over into practice.⁶⁵ This, of course, has very negative ramifications for the delivery of client services.

63. Compare CAL. BUS. & PROF. CODE § 7643 (West 2003) (“In order to qualify for a license as an embalmer, the applicant shall . . . (d) Have completed at least two years of apprenticeship . . . and while so apprenticed shall have assisted in embalming not fewer than 100 human remains”), with N.Y. PUB. HEALTH LAW § 3423(3) (McKinney 2001) (“The department shall issue an undertaker or embalmer license to those who, upon payment of a fee of ten dollars, qualify in accordance with the provisions of this section, and who pass (an) examination.”), and N.Y. PUB. HEALTH LAW § 3421(4)(c) (McKinney 2001) (stating that an applicant for a license to practice funeral directing must serve a one year period as a registered resident), and OHIO REV. CODE ANN. § 4717.05(A)(6) (West 2004) (stating that the applicant must have “completed at least one year of apprenticeship under an embalmer licensed in this state and has assisted that person in embalming at least twenty-five dead human bodies”).

64. See Benjamin et al., *supra* note 15.

65. *Id.*

Legal practice is a very unhappy and emotionally unhealthy profession. There are many studies and much anecdotal evidence exposing lawyer unhappiness in the practice and the psychological, emotional, and substance abuse problems faced by attorneys.⁶⁶ Lawyers experience depression and other emotional maladies at rates between five and fifteen times higher than the general population.⁶⁷ The rate of attorney substance abuse and suicide is exceptionally high as well.⁶⁸ The difference between lawyer mental health and that of the public starts in law school.⁶⁹ Most law professors are unaware of these findings.⁷⁰ Those who are aware of them tend to discount them as inaccurate or stemming from other causes.⁷¹

If the manner in which law school educates its students has not contributed to the high rates of depression and substance abuse, then at a minimum, law school has profoundly failed to address these persistent problems. Yet, although these findings are widely accepted, and have never seriously been refuted, they are also widely ignored within the legal academy.⁷² Over the generations, law schools have consistently neglected the best science on learning and educational psychology, choosing instead to stick with the traditional, yet outdated, Langdell methodology.⁷³ Would this neglect of the best science and practices be allowed to persist in medicine, engineering, architecture, or any other learned profession? If we knew that public school education was causing emotional damage to students, would

66. See Schiltz, *On Being a Happy*, *supra* note 19, at 874-81.

67. *Id.*

68. *Id.*

69. Sheldon & Krieger, *supra* note 15, at 262.

70. See Schurwerk, *supra* note 17.

71. Most law professors are unaware of the documented levels of mental illness and substance abuse developing among current law students. *Id.* at 764-65. Studies show that students suffer “from one or more of clinical levels of depression, alcohol abuse, or cocaine abuse rising from 8-9% prior to matriculation to 27% after one semester, 34% after two semesters, and 40% after three years, and persisting after students pass the bar and begin practicing law.” *Id.*

72. See *id.* at 764-66.

73. “[T]here’s very little innovation at the core of legal education. We’re still playing Christopher Columbus Langdell’s song—not his song of innovation in legal education, but the monotonous refrain of education in the form of Socratic classes and case law.” Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law School*, 81 IND. L.J. 359, 366 (2006).

we let that situation persist? Why then, does it persist in legal education?

The dogged refusal to update curricula and make law school more relevant to the profession of law lies at the doorstep of law faculty, who are quite happy with the way things are and who are reluctant to change. In discussing roadblocks to change in the law school curriculum, Roger Cramton, a pre-eminent legal scholar and former Dean of Cornell Law School discussed the attitude of law faculty to changes in curriculum as follows:

[W]e are jealous of our prerogatives, comfortable with the way things are, and intensely conservative about matters as central to our selfhood as what and how we teach. Moreover, our special strengths and weaknesses are perpetuated by the hiring process, which tends to filter out people who do not have the same accomplishments and interests, have not attended the same schools and shared the same experiences. We are threatened by discussions of values, by messy human emotions, by personal involvement with students or clients, and we place these matters out of bounds for classroom discussion. We are tied to familiar teaching materials and methods⁷⁴

One law professor, questioned about the lack of change in the world of legal education, had the following to say: “The present structure of law school is very congenial to us [the faculty]. . . . We’re not indifferent to the fact that our students are bored, but that to one side, law school works pretty well for us.”⁷⁵ Professor Robert

74. Roger C. Cramton, *The Current State of Law Curriculum*, 32 J. LEGAL EDUC. 321, 333-34 (1982); see also Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547 (1993) [hereinafter Rhode, *Missing Questions*] (arguing that Stanford’s faculty has created a structure that maximizes faculty autonomy and “keeps messiness at bay”).

The questions I want to ask are typically missing from the day-to-day curricular decisions at most law schools. Are we as educators effectively equipping students to address the needs of clients as clients perceive them? Are we strengthening commitments to ethical decisionmaking and public service? Are we serving faculty interests at the expense of others in the way we structure the educational experience?
Id. at 1548.

75. Rhode, *Missing Questions*, *supra* note 74, at 1549 (quoting David Margolick, *The Trouble with American Law Schools*, N.Y. TIMES, May 22, 1983, at

Schuwert of the University of Houston Law Center perhaps said it most succinctly: “Law schools are run primarily for the benefit of law professors—not for the benefit of law students, not for the benefit of the legal community, and most certainly not for the benefit of the public at large.”⁷⁶

But while the professorate may be quite happy with the academic slant in law school, students are not.⁷⁷ Students come to law school to be trained as lawyers, not as academics.⁷⁸ On a personal level, I

21.

76. See Schuwert, *supra* note 17, at 761. See Torrey, *supra* note 7, at 105-06, for a discussion of the resistance of the professorate to change. See also Elson, *Why and How*, *supra* note 57, at 1135 (“[S]ignificant reform in legal education will not come from the voluntary efforts of the leadership of either the law schools or the ABA Section of Legal Education.”); Henderson, *supra* note 52, at 72 (“Law schools’ practices are based on tradition, not on a regular assessment and reassessment of the needs of the public, students, and the legal profession. That these practices persist is largely due to a combination of institutional inertia and financial disincentives for change.”). The failure to adequately train students also raises ethical issues because “[l]aw schools have a moral and ethical obligation to society—and, to an even greater degree, to their students—to adequately prepare the students to succeed as professionals. Ultimate success for law students is measured by the ability to competently practice the legal profession.” Trujillo, *supra* note 50, at 70.

77. See Lasso, *supra* note 13, at 16 (stating that if the measure of law school success is “law student satisfaction, [then] legal education also is surely failing. Law students across the country complain that their legal education leaves much to be desired”). The author adds a footnote that “[a]lthough mostly anecdotal, there is significant evidence that most law students are not satisfied with the quality of their legal education.” *Id.* at 16 n.62. See also Mitchell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 J. LEGAL WRITING INST. 329, 356 (2005) (“Many students are dissatisfied with the skill set they are taking with them from law school into the legal marketplace and feel that they are not prepared to tackle much of what will be thrown at them by their employers after graduation.”). See Posting of Peter Lattman to Law Blog, <http://blogs.wsj.com/law/2007/06/08/are-law-students-emotional-wrecks/> (June 8, 2007, 17:30 EST), for a response to a recent *Wall Street Journal* article about recently published research by Kennon Sheldon and Lawrence Krieger concerning the negative effects of legal education on law students.

78. See Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 876-77 (1985) [hereinafter Feinman & Feldman, *Pedagogy and Politics*].

The primary function of law schools is to train novice lawyers—yet there is widespread agreement that they do not do this job very well. . . . [O]nly by constructing a new consciousness of law, lawyering, and learning can law schools perform their most basic task: the training of competent

frequently hear from my students about the irrelevance of what they learn, especially in the third year. Many express a deep desire for more practical skills such as how to handle clients, how to draft basic transactional documents, and how to operate a law office. A number of them have expressed to me the sentiment that they have spent \$90,000 for nothing.

Why then, is the professorate reluctant to change and incorporate greater skills training in the curriculum? There are a number of reasons. First, in general, any kind of significant change is frequently perceived as uncomfortable and like many of us, law professors resist it. Secondly, and more specifically, law professors are primarily academics, not practitioners. This is the residue of the Langdellian system. By and large, they have spent very little and sometimes no time practicing law prior to teaching. Many of them do not like practice, or are unfamiliar or uncomfortable with it.⁷⁹ A 1991 study showed that more than 20% of law professors had no practice experience at all prior to teaching. Overall, the length of practice prior to teaching averaged 4.3 years.⁸⁰ A full 37% of the law professors at the seven highest ranked schools had no practice experience prior to teaching.⁸¹ If anything, the anecdotal evidence indicates that recent hires have less practical experience than those hired years ago. Thus, the average length of practice today is even less than the 4.3 years indicated in that 1991 survey. Many law professors continue to go from elite schools to judicial clerkships, and then directly to teaching,

lawyers.

Id.

79. See Kevin H. Smith, *How to Become a Law Professor Without Really Trying: A Critical, Heuristic, Deconstructionist, and Hermeneutical Exploration of Avoiding the Drudgery Associated with Actually Working as an Attorney*, 47 U. KAN. L. REV. 139, 140 (1998) (“A recent trend for dissatisfied attorneys, particularly younger attorneys, is to seek employment in legal education.”).

80. Borthwick & Schau, *supra* note 52, at 217. The study concluded that “the vast majority of professors teaching law have had very little experience practicing law.” *Id.* at 219.

81. *Id.* See also Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 J. LEGAL EDUC. 480, 489 (stating that law faculty “know very little about the actual practice of law . . .”).

or from elite schools to elite firms as low level associates, to teaching.⁸²

Practicing attorneys and judges know that the practice of law, even at the small firm level, involves a nuanced and complex set of skills that take many years to acquire and refine. Those who have practiced less than five years are just beginning to develop their lawyering capabilities and have much to learn. Of those first five years of practice, much of it is spent performing legal research, far from the flesh and blood issues faced by practicing lawyers.⁸³ With all due respect to our law professors, their limited practice experience means that when they exhort their students to “think like a lawyer,” very few of them have practiced long enough to know first hand how practicing lawyers think.⁸⁴ As such, it is very difficult for academic lawyers to impart through first hand knowledge the mores and practices of the

82. Almost one-third of all law professors received their law degree from one of only five schools (Harvard, Yale, Columbia, Chicago, and Michigan). Borthwick & Schau, *supra* note 52, at 226-27. Inasmuch as the faculty at the top schools have a much higher proportion of faculty with no practice prior to teaching (37% vs. 20%), and inasmuch as these top schools produce a disproportionately high number of law professors, “the effects or biases, if any, that flow from professors with little practical experience are presumably passed on at a disproportionate rate.” *Id.* at 219-20. According to one commentator, “for many faculty members the road to teaching has been short and narrow: a brilliant record in an Ivy League law school, a clerkship for a distinguished judge or a judge of a distinguished court, and then straight to the classroom.” Judith T. Younger, *Legal Education: An Illusion*, 75 MINN. L. REV. 1037, 1041 (1990).

83. Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 758 (1998) [hereinafter Schiltz, *Legal Ethics in Decline*].

Most lawyers practice in law firms, and the first few years in a law firm rarely give an attorney a realistic impression of the practice of law. A young practitioner’s first few years are heavy on legal research and writing, and light on precisely those things that make up the professional life of most lawyers: counseling, negotiation, client contact, trials, firm management To gain a real understanding of the practice of law, one must do it for more than a few years.

Id.

84. Nancy L. Schultz, *How Do Lawyers Really Think*, 42 J. LEGAL EDUC. 57, 57 (1992) (“Few [law faculty] seem to recognize that we cannot really teach students how lawyers think without teaching them at the same time what lawyers do. Thinking like a lawyer is a much richer and more intricate process than collecting and manipulating doctrine.”).

profession about which they teach.⁸⁵ Law schools pursue the very laudable goal of having a diverse student body on the theory that diversity brings a variety of perspectives that enhance learning. Unfortunately, most law schools do not pursue a faculty that is *diverse in practical experience*, preferring instead to consistently hire those with little experience in practice. Just as a non-diverse student body diminishes the educational experience in law school, so too does a faculty that is not diverse in practice experience.

Third, law schools are primarily academic institutions.⁸⁶ Decisions on promotion and tenure are primarily dictated by academic output, usually meaning the production of law review articles.⁸⁷ Law schools recruit and reward faculty members for research, not teaching. There is little, if anything, to be gained by a faculty member who seeks pedagogical reform.⁸⁸ Indeed, a non-tenured faculty member seeking to rock the pedagogical boat may be putting his or her academic career at risk. Given the rewards of research and the career risks of promoting teaching reform from within the academy, it is not surprising that most law faculty spend most of their time and energy on research instead of training the next generation of the profession.

Finally, law professors have good reason to be happy with the status quo. Teaching at a law school is a coveted job. Once tenured, law professors have secure jobs, are well compensated,⁸⁹ and hold

85. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992).

86. See Levy, *supra* note 11, at 61 (“[S]cholarship, rather than teaching, has paramount importance at most [law] schools.”).

87. See Schuwerk, *supra* note 17, at 762-63; see also Ron M. Aizen, Note, *Four Ways to Better 1L Assessments*, 54 DUKE L.J. 765, 770 (2004) (“[T]he ‘publish-or-perish’ mentality that pervades the contemporary legal academy may discourage the use of other, more time-consuming assessment methods.”); Schwartz, *supra* note 9, at 360 (“Most law schools hire law teachers based on their record or potential for creating scholarship. Publication is heavily weighted in tenure decisions.”).

88. See Rhode, *Missing Questions*, *supra* note 74, at 1549 (“Yet even those faculty who are most committed to teaching rarely storm the barricades seeking pedagogical reform. Few academics have anything to gain by underscoring problems that their colleagues find discomfiting to acknowledge, let alone to address.”). See also Schiltz, *Legal Ethics in Decline*, *supra* note 83, at 754-56.

89. According to a study conducted by the Ohio Bar Association, median lawyer income for full time lawyers in Ohio in 2003 was \$85,000. OHIO STATE BAR ASS’N, 2004 ECONOMICS OF LAW PRACTICE IN OHIO SURVEY 10 (2004), *available at*

positions of status within both the legal world and society in general. As stated by Nancy Rapoport:

There's no question that life for a tenured professor at a research university has to be one of the all-time best deals in the world: as long as the university can afford to keep running . . . the freedom that the professor has is unparalleled. No boss can dictate to the professor what her field of research should be; most of the time, the professor teaches in areas that complement her research interests; and the service components of the job are often interesting Even another of the all-time great jobs . . . federal judge . . . pales in comparison. The lifetime tenure is the same, but the cases before the judge somewhat dictate the issues that the judge gets to consider⁹⁰

<http://downloads.ohiohar.org/products/2004EconOhioSurvey.pdf>. The Bureau of Labor Statistics states that median lawyer income in the United States is \$94,930. Bureau of Labor Statistics, Lawyers, <http://www.bls.gov/oco/ocos053.htm#earnings> (last visited May 26, 2007). Typical salaries for tenured law professors varied. However, of those schools that reported their professor's compensation, typical *median* professor salaries (in the Midwest, for example) from 2005 to 2006 ranged from a low of \$110,032 at some schools to a high of \$164,774 at others, with the vast majority of the median salaries in the \$120,000s and \$130,000s. 2005-06 *SALT Salary Survey*, SALT EQUALIZER, Mar. 2006, at 2.

90. Rapoport, *supra* note 73, at 363.

The professor works when he feels like it; and if, on any given afternoon, he decides to go to the ball game, he merely closes his office and walks away No one will object, and the odds are a hundred to one that no one will even know he is gone. He is not even required to work on anything that he finds uninteresting or boring or too difficult; and if he encounters some horrible rat's nest of the law . . . he is not compelled to stay up struggling with it for four consecutive nights with a wet towel around his head, as is his brother in practice. He can just let it alone, in the serene confidence that [some other professor] will some day work it all out and put it in a book.

William L. Prosser, *Lighthouse No Good*, 1 J. LEGAL EDUC. 257, 260-61 (1948). See also R. Michael Cassidy, *Why I Teach (A Prescription for the Post-Tenure Blues)*, 55 J. LEGAL EDUC. 381, 381 (2005) (relating a recently tenured law professor's observation that "[w]ith job security in an intellectually challenging, fairly well-paying profession (coupled with relatively high social status and a large amount of autonomy), it is unlikely that many of us [law professors] will ever give up teaching to do something else"); Donald J. Weidner, *The Crises of Legal Education: A Wake-Up Call for Faculty*, 47 J. LEGAL EDUC. 92, 103 (1997) (describing the job of law professor as "surely one of the greatest jobs in the world").

Why on earth would anyone rock *that* boat? Regrettably, when it comes to examining legal education and what is good for law students and the public, legal educators by and large do not think like lawyers at all. That is, they do not think like people who objectively analyze a problem, break it down into its component parts, and seek a rational and effective solution. Instead, they think like people who are protecting their turf.⁹¹ Despite the obvious shortcomings of the current system, it has its comforts, at least if you are on the professor's side of the podium, and no one in legal academia is penalized for going along with the status quo.⁹²

91. Regrettably, this attitude by many of those in legal academia is nothing new. As stated by Robert L. Stevens, then Professor of Law at Yale Law School, in 1973: "Scholars who would seldom be caught with their footnotes down substitute assumptions for evidence when they write about legal education. . . . Equally disturbing is the 'unscientific' participation of many scholars in the debate over legal education." Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 553-54 (1973). See also Feinman & Feldman, *Pedagogy and Politics*, *supra* note 78, at 875 ("That most legal educators are anti-intellectual about their primary professional concern is neither surprising nor accidental. . . . [T]he attitude of unreflectiveness is an important part of the defense of the status quo."); Peter V. Letsou, *The Future of Legal Education: Some Reflections on Law School Specialty Tracks*, 50 CASE W. RES. L. REV. 457, 460-61 (1999) ("[L]aw school faculties generally take a conservative approach to any significant change in the law school curriculum. This is because curricular reform can often impose substantial and certain costs on a law faculty, while offering only limited and speculative benefits.").

92. James J. Alfini, now Dean of the South Texas College of Law in Houston, and Joseph N. Van Vooren lament the "lack of knowledge and attention" that the legal academy pays to the legal profession. James J. Alfini & Joseph N. Van Vooren, *Commentary, Is There a Solution to the Problem of Lawyer Stress? The Law School Perspective*, 10 J.L. & HEALTH 61, 67 (1996). In talking about changes in law practice, particularly those that relate to the increasing levels of stress in law practice, they state:

Law professors regularly hear from their law school classmates how much the profession has changed (for the worse), and from recent law school graduates how much they dislike the bottom-line orientation of their law firms. However, we tend to simply shrug our shoulders and go about our business of educating the next crop of law firm associates. The changes in the legal profession merely make us more content in the knowledge that our decision to forego the monetary benefits of legal practice and enter the more comfortable and satisfying world of teaching the law has been confirmed.

Id.

In this environment, it is extremely unlikely that meaningful change will come from within the academy. Since the 1930s, critics including Karl Llewellyn, the father and co-author of the Uniform Commercial Code, and Jerome Frank, Second Circuit court judge, have brought trenchant critiques offering practical solutions to foster better lawyer training in law school.⁹³ These critiques have gone largely unheeded in legal academia.⁹⁴ In recognition of this reality, John Elson, a clinical professor at Northwestern University Law School and a former member of the ABA's Law School Accreditation Committee, has said that:

[S]ignificant reform in legal education will not come from the voluntary efforts of the leadership of either the law schools or the ABA Section of Legal Education. It will only happen if the leadership of the legal profession . . . use their considerable authority to compel law schools to change.⁹⁵

The practicing bar and the judiciary must take the lead to create meaningful change in legal education. The academy cannot be relied upon to fix a system that works all too well for the professorate, but not very well for anyone else. For too long, the bench and bar have been uninvolved in addressing the shortcomings of legal education. Practitioners have been intimidated by the professorate, assuming that they know better than practitioners the best way to educate practicing lawyers. However, they do not. In an article published in 2000 entitled *Letter to a Young Law Student*, Professor Corinne Cooper of the University of Missouri Kansas City Law School discusses law school's "ugly little secret." She writes:

93. Karl N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935); see also Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947).

94. See Elson, *Why and How*, *supra* note 57, at 1135.

Anyone who reviews the extensive literature on law schools' duty to prepare students for practice must be struck by how the same critiques and responses have been repeated over the last seventy-five years. It has become something of a ritual attack and counter-attack, where the verbal shots of the attackers always seem to fall on deaf ears.

Id.

95. *Id.*

There is one other thing that I hesitate to mention, but it is a fact of law school life. Your professors are not trained to be educators. We got here mostly by being good law students, not because we have any background in higher education theory. This is true of most of graduate school, but it is even worse for law professors, because very few of us go through the traditional doctoral level educational system where one apprentices under a professor who may actually know something about education.⁹⁶

Having neither a solid grounding in educational theory nor in law practice, the professorate has little experience in either. The average law school professor was trained as neither an educator nor as an experienced practitioner. They were hired to teach primarily because they were outstanding law students.⁹⁷ Despite all of their other attributes, in general they know little of practice, receive insufficient feedback as to whether their training is effective, and do not have sufficient personal knowledge in either education or law practice to draw upon in their teaching. It is hard to imagine a less rational system to train new attorneys.

III. REMEDIES

So the question remains: how to make it better? Recently, there have been signs of hope for an improved and more practice-based brand of legal education. In January 2007, the Carnegie Foundation published its long awaited study on legal education.⁹⁸ The Foundation's report echoes the need for the changes that many thoughtful and conscientious observers have been seeking for years. After an extensive survey and review of many law schools, the Foundation concluded that while law school provides its students with important analytical tools, substantial changes are called for, including

96. Corinne Cooper, *Letter to a Young Law Student*, 35 TULSA L.J. 275, 278 (2000). See also David Lander, *Part Time, But Fully Loaded*, 14 BUS. L. TODAY, July-Aug. 2005, at 45, 47 ("One of the most striking things about law school education is that full-time law school teachers receive virtually no training in how students learn.").

97. See Lander, *supra* note 96, at 45, 47.

98. See generally SULLIVAN ET AL., *supra* note 3.

a curriculum that integrates practical with doctrinal training and a movement towards the medical school training model.⁹⁹

In early 2007, the Clinical Legal Education Association (CLEA) published a multi-year comprehensive study of the existing and best practices in legal education.¹⁰⁰ The study found “the unfortunate reality is that law schools are simply not committed to making their best efforts to prepare all of their students to enter the practice settings that await them”¹⁰¹ and urged, amongst other things, that legal education would better serve the public if it included a mandatory period of supervised practice before full bar admission.¹⁰²

Further, Harvard Law School recently announced that it is revamping its first year law curriculum to include a greater practical skills component.¹⁰³ Included in this new curriculum is a required problem solving course that crosses substantive lines where students, in teams or individually, address fact-intensive problems as they arise in the world and are required to generate solutions.¹⁰⁴

Finally, in November 2006, Stanford Law School announced changes to the second and third year curricula that combine the study of other disciplines with team-oriented, problem-solving techniques and expanded clinical training. According to Stanford, this change “is being driven by the new demands on modern lawyers, which are fundamentally different from those present when the law school curriculum was formed.”¹⁰⁵ Among the other innovations in the

99. *Id.* at 58-59. The authors state that:

[L]earning the law is an ensemble experience, its achievement a holistic effect. From the point of view of student learning, the apprenticeships of cognition, performance, and identity are not freestanding. Each contributes to a whole and takes part of its character from the relationship it has with the others . . . we believe legal education requires not simply more additions but a truly integrative approach in order to provide students with a broad-based yet coherent beginning for their legal careers.

Id.

100. See generally STUCKEY ET AL., *supra* note 3.

101. *Id.* at 18.

102. *Id.* at 13.

103. See *HLS Faculty Unanimously Approves First-year Curricular Reform*, HARVARD LAW SCHOOL, Oct. 6, 2006, http://www.law.harvard.edu/news/2006/10/06_curriculum.php (last visited May 26, 2007).

104. *Id.*

105. See A “3D” JD: *Stanford Law School Announces New Model for Legal*

Stanford curriculum is “a ‘clinical rotation’ where students take only a clinic during a particular quarter—with no competing exams or classes. This approach mirrors the way that medical students have been trained as doctors for the past century.”¹⁰⁶

Harvard’s and Stanford’s additional focus on legal skills are promising signs, but are only small steps towards a solution. There have been promising signs in the past that have made little headway due to delay-and-stall tactics by the academy.¹⁰⁷ Given the history of delay, avoidance, and denial in the academy, we have little confidence that Harvard’s and Stanford’s initiatives will advance beyond their nascent stages or even be taken seriously.¹⁰⁸ In particular, pressure is needed from outside the academy, for if the history of legal education has taught us anything, it is that change is almost always resisted.¹⁰⁹ If

Education, STANFORD LAW SCHOOL, Nov. 28, 2006, <http://www.law.stanford.edu/news/pr/47/> (last visited May 26, 2007) [hereinafter “3D” JD].

106. *Id.*

107. As some observers have noted, some of these initiatives died “on that immovable rock of opposition—the deans of American law schools.” Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 236 (1991). The authors, who taught or conducted research at UCLA’s law school, conducted a multi-law school survey of 1100 third year law students. The authors indicate that their article, showing the survey results, was intended to, “shed . . . some empirical light on long-standing debates about the success of legal education and, in particular, the third-year experience of law students.” *Id.*

108. See generally ABA, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992), available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

109. See Elson, *Why and How*, *supra* note 57. Indeed, given the peculiar dynamics of the law faculty-law dean relationship, it is extremely unlikely that change will be championed by either law faculties or law deans. See, e.g., Howard O. Hunter, *Thoughts on Being a Dean*, 31 U. TOL. L. REV. 641, 642 (2000) (“Faculties naturally tend to resist change in pedagogy and curriculum. Law teachers have substantial investments in their current courses and are accustomed to doing things in certain ways.”). Law faculties are resistant to change and unlikely to initiate it on their own, while law deans are unlikely to initiate changes that risk alienating the already change-resistant faculty. ABA regulations regarding law school accreditation insure that the faculty will have substantial input into the dean’s appointment or reappointment, further insuring the institutional disincentives for a dean to institute substantial changes that cut against the desires of the faculty. See STANDARDS FOR APPROVAL OF LAW SCHOOLS § 206(d) (2007), available at [http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%](http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%206.pdf)

consistent pressure to change is not sustained on the academy, these initiatives will die a neglected death.

In addition to the changes suggested by Carnegie, the CLEA, Harvard, and Stanford, I offer three suggested starting points.

A. *Medical School Model for Third Year*

The third year of law school is a waste of time and needs to be radically restructured. After two years of pedagogical abuse, third year students have had enough. The evidence, both empirical and anecdotal, is that many of them have mentally checked out and when they do physically attend their classes they are bored and unprepared.¹¹⁰ The students resent having to suffer one more year of classes and the professors resent the students who, no longer fearful of flunking out, show up unprepared and uninterested.¹¹¹ According to Stanford Law School Dean Larry Kramer:

Talk to any lawyer or law school graduate and they will tell you they were increasingly disengaged in their second and third years . . . because the second and third year curriculum is for the most part repeating what they did in their first year and adds little of intellectual and professional value. They learn more doctrine, which is certainly valuable, but in a way that is inefficient and progressively less useful. The upper years, as presently configured,

202.pdf.

110. Gulati et al., *supra* note 107, at 244-45. This lack of interest by second and third year law students is nothing new. In 1941, Karl Llewellyn, who was then teaching at Columbia Law School, said, "it is safe to state that the 'second-year drop-off' of interest continues, and that the 'third-year restlessness' is still with us, both of them on an impressive and disheartening scale." Karl N. Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV. L. REV. 775, 778 (1941). To curb this "drop-off," a reconfiguration of the second and third years of law school is recommended.

Legal education may have a problem of diminishing returns—one that a better integration of cognitive apprenticeship with the practical and professional could help to prevent. On the curricular level, this need for integration points towards a reconfigured third year (and probably some reconfiguration of the second year as well), marked by pedagogies of practice and professionalism that enable students to shift from the role of students to that of apprentice professionals.

SULLIVAN ET AL., *supra* note 3, at 77.

111. See Gulati, et al., *supra* note 107, at 244-46.

are a lost opportunity to teach today's lawyers things they need to know. Lawyers need to be educated more broadly—with courses beyond the traditional law school curriculum—if they are to serve their clients and society well.¹¹²

Law schools do not have resources to waste and should not be wasting students' limited resources. The existing reality is that the third year of law school is, at best, a massive underutilization and, at worst, a frivolous waste of time, energy, and money that could be used for more practical training. The third year should be based on the medical school model of higher clinical and practical concentrations. Thoughtful educators, and now the Carnegie Foundation, have advocated that practical and doctrinal training be integrated throughout the curriculum and that skills training be elevated to a position of greater parity with doctrinal classes.¹¹³ It should be a source of embarrassment to the legal teaching establishment that despite overwhelming evidence showing the need for change, legal educators have not embraced reform.

B. Greater Balance Between Scholarship and Clinical Training

In order to create a greater balance between scholarship and practical training, law school resources and faculty incentives should be redirected in part from scholarship to teaching and, in particular, to clinical and practical teaching. Promotion and tenure of law professors is almost entirely dependent upon successful publication in law reviews.¹¹⁴ It is well known that legal scholarship has become increasingly theoretical and removed from the concerns of practitioners and of little influence with the bench or bar. Roger C.

112. See "3D" JD, *supra* note 105.

113. See SULLIVAN ET AL., *supra* note 3.

114. Arthur Austin, *The Reliability of Citation Counts in Judgments on Promotion, Tenure, and Status*, 35 ARIZ. L. REV. 829, 829 (1993) ("Scholarship is the door to promotion, tenure, and salary increases."); John S. Elson, *The Case Against Legal-Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343, 354 (1989) ("The importance of scholarship to the careers of law teachers is difficult to overestimate. Hiring, promotion, pay, collegial recognition, societal prominence, and intellectual satisfaction is mainly a function of the production of scholarship.").

Cramton, former president of the American Association of Law Schools, claims that the scholarly legal writings:

[A]re not as directly applicable to the problems practitioners face, and because they frequently employ a scholarly jargon and theoretical framework that practitioners do not understand, they are of much less utility to the bench and bar and that [a]s American law schools become more abstract, theoretical, and academic, the role of student-edited reviews diminishes along with close ties to the world of practice.¹¹⁵

Once written and used for promotion or tenure, these scholarly articles are almost always ignored.¹¹⁶ In addition, because these articles are not peer reviewed, the quality of the scholarship is sometimes suspect and has come under increasing scrutiny.¹¹⁷ Judge Harry Edwards, of the District of Columbia Circuit Court of Appeals has written that “judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy.”¹¹⁸ Judge Richard Posner of the Seventh Circuit Court of Appeals has written: “How good is this scholarship?”

115. Roger C. Cramton, *“The Most Remarkable Institution”*: *The American Law Review*, 36 J. LEGAL EDUC. 1, 10 (1986). See also Judith S. Kaye, *One Judge’s View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 319 (1989) (“Prominent law reviews are increasingly dedicated to abstract, theoretical subjects . . . and less and less to practice and professional issues, and to the grist of the state court dockets.”).

116. See MARY ANN GLENDON, *A NATION UNDER LAWYERS* 205 (1994) (“Anyone who samples the contents of recent law journals, however, might be forgiven for suspecting that many articles will be read by no one at all, other than the writer’s promotion and tenure committee.”).

117. See Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1234-35 (2006).

Law reviews are student-run publications. Thousands of manuscripts are submitted to the articles editors but they are not peer-reviewed by scholars and experts. Instead, the articles editors look through submitted articles and choose what to print. . . . Articles editors, talented and bright as they are, cannot provide a professional, expert read of a manuscript. . . . Editorial policy is often driven by a desire to publish articles for “their distinctiveness rather than their scholarly soundness.”

Id. (citing Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 376 (2000)).

118. Edwards, *supra* note 85, at 35.

Some of it is good, but much of it is embarrassingly bad, and the overall impression is of enormous variance.”¹¹⁹ And Judge Laurence Silberman, of the District of Columbia Circuit Court of Appeals has characterized the writings contained in law reviews as “dominated by [the] rather exotic offerings of increasingly out-of-touch faculty members”¹²⁰

When was the last time that a legal practitioner, when faced with a thorny legal problem, trotted off to the law library to research an answer in a law review article? That huge investment of time and energy in researching and drafting scholarly articles with little impact can be more effectively utilized for the betterment of a larger audience, law students and the public. Scholarship, of course, has an important place in law school and always should. What I suggest, however, is that a sizable portion of professor-hours now spent on scholarship with little impact, be reallocated to the training of law students in practicums, clinics, and other hands-on programs which have a much larger impact. Such change would need to come incrementally and will require some changes to who law schools hire and how law is taught. It will also necessitate the broadening of the education of many current law professors to include an understanding of the practice of law. The hours put into the production of law review articles with little impact represent a huge underutilized resource of time and energy that can be turned into beneficial practical training.

C. Limit the Reliance on the Overused Socratic-Casebook Method

Move away from the Socratic-Casebook method after the first year. It is a highly inefficient way to learn the law. If there is too much law to learn, as professors always complain, then we need to move to a teaching method that can teach more law in less time. Socratic-Casebook is not that method. After the terror of the first year has abated, students are bored with the Socratic give and take, even if it is well conducted. If our law students have not gotten skills of case analysis after a full year of it, then odds are that two more years of it will not matter. The relatively high failure rate when recent law graduates take the bar exam only highlights the inefficiencies of the

119. Posner, *supra* note 44, at 1655.

120. *United States v. \$639,558*, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring).

current teaching methodologies.¹²¹ Let us get on with the business of teaching students the law in a comprehensive and efficient manner. The Socratic-Casebook method is not it.

IV. CONCLUSION

The American justice system is premised upon a search for the truth. A good legal education should aim to produce lawyers who seek and have the tools to discover truth. Historically, as a profession, attorneys have not shied away from the truth. Nor have attorneys shied away from the hard corrective work that is sometimes necessitated by advancements in the law and changes in society at large. This quest for truth and progress has been one of the ennobling features of the legal profession.

But it is now time, and long past due, to face the truth about legal education and, more importantly, to do something about it. The current system of legal education is not producing competent lawyers because it is out of date and only held in place by a self-perpetuating, entrenched professorate. A plethora of studies and educational research shows that legal educators have the knowledge and the means to build a better, more competent lawyer. The entire bench, bar, and academia have the ability to do a much better job. The more important question for the future of legal education and our profession is: does the profession have the will to change?

121. Data compiled by the National Council of Bar Examiners shows that for the ten year period from 1997 through 2006, the average bar passage rate for first time bar takers was 76.1%. *See 2006 Statistics*, B. EXAMINER, May, 2007, at 6, 17, available at http://www.ncbex.org/uploads/user_docrepos/BEMayStatsWeb.pdf. During the same period the average overall passage rate for all bar exam takers (first time and repeaters) was 65.5%. *Id.*

