

LAW SCHOOLS AND THE CHANGING FACE OF PRACTICE

BY

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INTRODUCTION

Upon graduating from law school in 1971, and having received what I thought was an excellent education from a top law school, I accepted an offer from a Chicago law firm specializing in antitrust work. On my first day on the job I was handed a set of interrogatories and told to draft objections to them. My reaction, thankfully unvoiced, was “Interrogatories? Objections? What the heck are these?” After three years of law school, I had no idea of how to handle my first task as a lawyer. I had never seen interrogatories before and had no idea what objections could be made or how to draft them. I quickly sought out a more senior associate who explained (in a somewhat condescending manner) what was expected, and I completed the assignment—albeit with a level of quality that probably had the hiring partners shaking their heads in dismay about their latest hiring mistake.

My legal education was virtually identical to what I would have received at any other “elite” law school—or at lower ranked ones for that matter. Curricula of that era were pretty much fungible across the law school spectrum, varying only in the number and type of elective courses a school might offer.¹ The entire subject of discovery had been covered in a day or two in my first-year Civil Procedure class, and if the subject of interrogatories came up, it failed to

¹E. GORDON GEE & DONALD W. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA 13 - 16, 33 - 39 (1975).

make any lasting impression on me. We certainly were not shown any examples, and we were never asked to draft a set or identify any objections they might provoke.

From the perspective of my first boss, my legal education had failed me. Despite a broad and deep curriculum that included dozens of classes, my school offered no “skills” or “lawyering” class for first-year students. There were no classes in the curriculum that would have taught me how to draft and respond to interrogatories. There were also no clinical courses. Indeed, there were only two skills classes of any sort in the curriculum--a trial advocacy class and a seminar on negotiations, both of which were offered for the first time in my senior year. I took both classes. The trial advocacy class attracted over 80 students, meeting only in a large group, and the work consisted of listening to lectures and watching demonstrations. There were few opportunities for the students to perform any of the trial skills being discussed, and those opportunities were limited to a handful of students. The negotiations class, one of the first to be offered in the country, consisted of a series of mock negotiations between the students. Absent from the class was any discussion of bargaining theory, a staple of today’s negotiation class.

Thankfully, legal education has improved in the years since I received my J.D. While it continues to be possible for students to graduate without exposure to more than one lawyering skills course² (thanks to curricula that are largely elective after the first year), law

² Standard 302(a)(4) of The American Bar Association Standards and Rules of Procedure for Approval of Law Schools requires that “A law school shall require that each student receive substantial instruction in: (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession;” Interpretation 302-3 gives meaning to the standard by stating that “[t]o be substantial,” instruction in professional skills must engage each student in skills performances that are assessed by the instructor.” Thus, law students today must take at least one skills course as part of satisfying the requirements for the Juris Doctor degree.

students today have the opportunity at most schools to take a wide variety of skills courses, including clinical courses that permit them to represent actual clients. Virtually every school offers at least one course that requires students to draft and respond to interrogatories. Students emerging from law school today are vastly better prepared to enter the practice of law than I was, and if they choose wisely among the courses offered at their schools, they could easily handle the interrogatories that caused me such a surprise on my first day on the job.

THE PROBLEM

Despite the increase of clinical and skills courses and the law schools' expanded efforts to prepare students better for the practice of law, many problems bedevil legal education. My essay, however, will focus on only one, namely, that law schools continue to be, a "step behind" in preparing students for the practice of law. Legal education today is preparing students for a law practice that is fading away or no longer exists, and is failing to prepare students for the type of practice they will confront upon graduation. The practice of law is continuously moving ahead while the law schools are lagging behind. To trace the source of this problem, I offer a brief, and admittedly selective, history of law school skills training. (Many of these historical elements will be developed further in later sections of this essay.)

For the first 100 years following the invention of the modern American law school in 1870, trials were common occurrences and were generally accepted as a primary method of resolving legal disputes in this country.³ But during this same period of time, U.S. law schools

³ Of course, this is an oversimplification. Trials have never been the primary method of resolving disputes, and the number of trials, both civil and criminal, has been declining for decades. As noted by Professor Lawrence M. Friedman, "[T]he 'trial' was never the norm, never the modal way of resolving issues and solving problems in the

failed to teach the skills of trying cases. In other words, law schools did not offer trial advocacy courses focused on teaching students how to try cases.⁴ Freshly minted lawyers, having just graduated from law school, were unprepared to try cases or to represent clients engaged in litigation. The lucky ones found employment with firms where, through the mentoring of more experienced lawyers, they received “on the job training” and gradually learned the techniques of the courtroom. Less fortunate graduates learned courtroom skills through trial and error gained at the expense of hapless clients.

It was not until the 1970s that, as litigation began to be resolved more frequently at the pretrial stage, the law schools began offering trial advocacy courses focused on teaching courtroom advocacy skills.⁵ But it was also during this period of time that importance of trials as a method of resolving legal disputes began to diminish, and discovery and motion practice became increasingly important. The number of cases resolved by dispositive motions began to

legal system.” Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689 (2004). The number of criminal trials have been declining since 1800 and being replaced by guilty pleas. *Id.* at 691. Trials were also the exception in civil cases with most cases being settled. *Id.* at 693. Nonetheless, it is also clear that the number of trials has decreased dramatically in recent years. “The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002 More startling was the 60 percent decline in the absolute number of trials since the mid 1980s.” Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

⁴ James W. McElhane, *Toward the Effective Teaching of Trial Advocacy*, 29 U. MIAMI L. REV. 198 (1975)(“For many years law schools took a rather indifferent view toward training trial lawyers. Until recently, many schools did not offer trial advocacy courses, or had limited programs of scant educational value. . . .”); Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMP. L. REV. 1 (1993)(“Until the last quarter century, law schools did not set out to teach their students how to do what trial lawyers do—ask questions and make speeches. Traditional educators either rejected or failed to appreciate the idea that courtroom advocacy was a discipline grounded upon an analytical framework of case theory—that it was a subject worthy of curricular commitment.”); Robert H. Jackson, *Training the Trial Lawyer: A Neglected Area of Legal Education*, 3 STAN. L. REV. 48, 55 (“[I]t seems to me that the unsolved problem of legal education is how to equip the law student for work at the bar of the court. . . .”); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 229 n. 8 (1983).

⁵ McElhane, *supra* note 4, at 201.

increase.⁶ This, in turn, increased the importance of discovery, particularly depositions, as litigants focused on developing factual records to support or oppose summary judgment motions.⁷ All but the simplest of cases increasingly needed lawyers who could effectively conduct discovery and handle the nuances of motion practice. The focus of practice had shifted to the pretrial stage while the law schools were producing graduates who were now able to try cases, but few of whom had learned anything about discovery or motion practice.

As trials continued to diminish in importance during the 1980s and 1990s new litigation techniques were gaining traction in the legal profession. These two decades witnessed a rise in the use of alternative dispute resolution (ADR) mechanisms, particularly mediation and arbitration, as they became increasingly common means of terminating litigation.⁸ The law schools were again slow to respond to the changes. At the same time as ADR was rapidly

⁶Much of the shift to resolving litigation through summary judgment motions can be attributed to the U.S. Supreme Court's "summary judgment trilogy"--*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)-- which encouraged lower courts to consider the early termination of litigation through this device. See generally Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 338-39 (2010) ("Prior to the Supreme Court's issuance of the trilogy, lower courts tended to approach summary judgment tentatively. However, shortly after the Court's 1986 opinions, federal courts began utilizing the procedural device aggressively, in a fashion that prompted one scholar to describe it as 'a potential juggernaut.'"); John B. Snyder, *Dispositions Unsettled: What Tax Court Procedure Can Teach Us About Federal Civil Procedure*, 36 OHIO N.U. L. REV. 359, ___ (2010) ("The trilogy elevated summary judgment from 'a disfavored procedural shortcut' to an integral part of the 'just, speedy, and inexpensive determination of every action.'").

⁷ See generally Nicola Faith Sharpe, *Corporate Cooperation Through Cost-Sharing*, 16 MICH. TELECOMM. & TECH. L. REV. 109, 116 (2009) ("The 1960s and early 1970s saw technological changes that led to an increase in discovery volume, burden, and costs, and has since "been characterized by some as a 'litigation explosion.' The widespread use of computers and digital communication has spawned a similar escalation."). But see David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer, & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983) ("While our data are limited to the court records, these findings confirm the conclusion of an earlier study that even in federal courts discovery is used intensively only in a small fraction of civil lawsuits.").

⁸ See Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 282-83; Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 170-89 (2003).

gaining favor with the profession and the courts, the law schools were busily introducing pretrial litigation courses that taught students, among other things, how to conduct discovery and engage in motion practice. Most of these courses, however, were deficient in preparing students to engage effectively in discovery and motion practice. Many provided only a brief exposure to the taking and defending of depositions and bringing and opposing summary judgment motions although these were precisely the tasks that were most likely to confront newly admitted lawyers during their first years of practice.⁹

Mediation and arbitration are today established methods of resolving legal disputes, while the number of trials continues to decline in number and importance. (Only the number of criminal trials is remaining somewhat constant.) Only recently have the law schools responded to the ascendancy of ADR by modifying existing negotiations courses to include a segment on mediation. The schools have also created new offerings on the *law* of ADR and courses for training mediators that can lead to certification under state statutes and court rules. It is interesting to note that while relatively few recent law school graduates are likely to find employment as mediators in their first several years following admission to the bar, many more will find themselves representing clients in mediation venues. Nonetheless, currently only a handful of schools offer courses on mediation advocacy or teach students how to represent a client in mediation. Reflecting past responses, law schools are failing students by not preparing them for the actual ways in which law is being practiced.

⁹ For examples of several excellent pretrial texts and their coverage of depositions and summary judgment motions, see CHARLES H. ROSE III & JAMES M. UNDERWOOD, *FUNDAMENTAL PRETRIAL ADVOCACY, A STRATEGIC GUIDE TO EFFECTIVE LITIGATION* (2008); ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* (7TH ed. 2008); THOMAS A. MAUET, *PRETRIAL* (2008).

What should be evident from this brief sketch of the history of skills training is that the law schools have been, and continue to be, on the trailing edge of preparing students for the practice of law. Students are being prepared for yesterday's practice and are being ill-prepared for the assignments they will face after graduation.

THE CHANGING LAW SCHOOLS

If we could break the time barrier and transport a law student of 1970 into, say, contracts class at a law school of today, what would the student find? In some respects, the student would feel as if nothing had changed.¹⁰ Once recovered from the shock of seeing students using laptops and smart phones in the classroom, the student would probably say that nothing much had changed. The contracts class of today would be remarkably similar to the same class being taught in 1970. The professor of 2010 is likely employing the same combination of Socratic questioning and lecture our student was listening to in 1970; class discussion still centers around the case method of instruction; the assigned text looks familiar, consisting primarily of cases, many of which are the same as in the text our student left behind. Some differences exist, of course. Today's text probably contains additional materials beyond just the cases and it may even include an "interactive" component. Today's professor may have assigned some negotiating and drafting problems in an effort to make the class more relevant to what the students believe they will be doing following graduation, something that was rarely done in 1970. And the classroom teaching techniques probably includes PowerPoint slides

¹⁰ The Provost of Vanderbilt University, a former law professor, has remarked that law schools are resistant to curricular change and that "I know of no other university department [other than Law] that uses the same pedagogic approach that it did 100 years ago, or bases its first year of education on largely the same basic conceptual categories." Nicholas S. Zeppos, *Symposium on the Future of Legal Education*, 60 VAND. L. REV. 325, 328 (2007).

shown on a large video screen. Some classes—most notably the evidence and business transactions classes—may have shifted to a problem or planning approach, but there are few exceptions in the first year to the case method and Socratic questioning. Classes in later years more heavily rely on lecture.¹¹ To a large extent, the doctrinal classes of today are largely being taught using the same pedagogy as the same classes in 1970.¹²

The greatest shock to our time-transported law student would likely come from the clinical and skills classes being taught today. These classes were in their infancy in 1970, and today they have become a vibrant and important part of a law school education.

THE GROWTH OF SKILLS TRAINING

Christopher Columbus Langdell is credited with birthing the modern American law in 1870, the year he became Dean of Harvard Law School. In an era when apprenticeships were the favored pathway for entering the legal profession, and when the law schools relied almost exclusively on the lecture method, Langdell created a new technique for teaching law—the case method—that continues to this day to be the dominant pedagogy for studying law.¹³ But the new teaching method came with a price. With its “scientific” approach to the law and its exclusive focus on appellate court decisions, the case method caused legal education to become divorced of nearly all skills training except legal analysis and legal research and writing.¹⁴ For sure, attention was given to appellate advocacy and to a much lesser extent to

¹¹ Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 368 (2007).

¹² *Id.* at 367-68.

¹³ See STEVENS, *supra*, note 4, at 35 – 42.

¹⁴ For a history of legal writing at Harvard Law School and its incorporation into legal education, see David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Course and the Law School Curriculum*, 52 U. KAN. L. REV. 105 (2003). For a discussion of history of moot court in legal education, see STEVENS, *supra*, note 4, at 127 n. 32.

trial advocacy, but the former was largely an extension of teaching legal analysis and legal research and writing while the latter received little serious attention.¹⁵

Skills training did not depart legal education quietly. By the early 20th century a number of commentators, including the first¹⁶ and second Carnegie Reports¹⁷ on legal education, leading figures in the American Bar Association,¹⁸ and others¹⁹ were calling for the introduction of clinical legal education and skills training into the law school curriculum.²⁰ These early efforts to introduce a more practical aspect to legal education achieved little,²¹ but the middle part of the 20th century generated new pressures on the law schools to offer more skills courses.²² These later efforts met with greater success so that by the time our law student of 40 years ago had matriculated most schools were offering some form of a trial advocacy course. The trial advocacy courses being offered, however, bore scant resemblance to the trial advocacy courses of today. Many of the courses of 1970 were outgrowths of what were called “practice court” where the students were expected to draft and file every document in a case. Very little attention was paid to the advocacy skills that are the focus of today’s trial advocacy course.

It was only with the founding of the National Institute for Trial Advocacy (NITA) in 1971 that skills training that things began to change and trial advocacy became an established part of

¹⁵ See note 4.

¹⁶ JOSEPH REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS, BULLETIN 8 (Carnegie Foundation for the Advancemtn of Teaching 1914)(The Redlich Report).

¹⁷ ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW, BULLETIN 15 (Carnegie Foundation for the Advancemtn of Teaching 1921)(The Reed Report).

¹⁸ STEVENS, *supra*, note 4, at 119-20

¹⁹ William V. Row, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 Ill. L. Rev. 591 (1917).

²⁰ REED, *supra*, note 17; STEVENS, *supra*, note 4, at 129 n. 50.

²¹ McElhaney, *supra*, note 4, at 201.

²² See STEVENS, *supra*, note 4, at 214-15, 227 n. 77 & 78.

the law school curriculum.²³ NITA was the collaborative creation of the American Bar Association Section of Judicial Administration, the American College of Trial Lawyers and the Association of Trial Lawyers of American (now the American Association for Justice). The organization was created to rectify what were perceived to be deficiencies in the courtroom skills of many lawyers.²⁴ NITA started offering CLE trial advocacy programs around the country and for public agencies, Legal Services and similar organizations, and private law firms. Although not immune to criticism,²⁵ NITA's trial advocacy programs were widely praised and were considered a breakthrough in the teaching of advocacy skills. The organization's trial advocacy programs were soon augmented by additional programs focusing on different stages of the litigation process. Today, NITA oversees an ambitious agenda of programs covering negotiations, fact investigation motion practice, deposition practice, appellate practice and a number of other topics.²⁶

The NITA methodology and NITA teaching materials soon penetrated the law schools. The trend gained important impetus in 1976 the Council on Legal Education for Professional Responsibility (CLEPR) provided funding for a group of clinical teachers to attend NITA's three-

²³ <http://www.nita.org/milestones>; Terence F. McCarthy, *The History of the Teaching of Trial Advocacy*, 38 STETSON L. REV. 115, 118-19 (2008).

²⁴ See Warren S. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973-1974); *Qualification for Practice Before the United States Courts in the Second Circuit: Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, 67 F.R.D. 161 (Clare Committee Report); *Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United State*, 83 F.R.D. 215 (1979)(Devitt Committee Report). Although these citations are to materials published *after* the founding of NITA, they are, nonetheless, reflective of the attitude existing before the creation of NITA about the competency of the trial bar.

²⁵ See Edward J. Imwinkelried, *The Educational Philosophy of the Trial Practice Course: Reweaving the Seamless Web*, 23 GA. L. REV. 663 (1989); Steven Lubet, *Advocacy Education: The Case for Structural Knowledge*, 66 NOTRE DAME L. REV. 721 (1991)

²⁶ See the programs listed at <http://www.nita.org>.

week long National Session in Boulder, Colorado.²⁷ Other law school teachers attended NITA programs without the benefit of CLEPR financial support. The law school faculty members who attended the NITA program returned to their home schools as missionaries for the NITA approach and soon started or modified existing law school trial advocacy courses to follow the NITA methodology and to use NITA teaching materials.

The introduction of NITA materials for advocacy training and the “NITA methodology” into the law schools was so rapid and successful that by 1975, four years after NITA’s founding, a number of schools were offering trial advocacy courses that followed the NITA model.²⁸ The trend has continued since then to the point that trial advocacy courses focusing on advocacy skills have now become “a permanent fixture in the law school curriculum.”²⁹ It is now safe to say that every law school in the country offers an advocacy-focused trial advocacy course.

The key to NITA’s success was the development of what has been come to be known as the “NITA methodology.” The methodology consists of participants listening to a lecture on the particular skill being taught, watching a demonstration of the skill and, most importantly, practicing the skill through a series of simulation exercises. Participants in a typical trial advocacy program conduct direct and cross examinations, deliver opening statements and closing arguments, introduce exhibits and impeach witnesses, and culminate with a jury trial before mock jurors. Participant performances are video-recorded and the recordings jointly reviewed by the participant and a NITA faculty member. The NITA methodology is

²⁷ See Wallace J. Mlyneic, *The Intersection of Three Visions—Ken Pye, Bill Pincus, and Bill Greenhalgh—and the Development of Clinical Teaching Fellowships*, 64 TENN. L. REV. 963, 981 (1997); COUNCIL ON LEGAL EDUC. FOR PROF’L RESP., FOURTH BIENNIAL REPORT 92 (1975-1976).;

²⁸ *Id.* at 201.

²⁹ Ohlbaum, *supra*, note 4, at 2-3.

accompanied by the “NITA critiquing system” that follows a set format and is designed to assist the participant by pointing out aspects of the performance that can be improved and pointing out how to do so the next time the participant performs.³⁰

The interchange between NITA and the law schools continues to strengthen with time. Several of the key figures in NITA’s creation were law school faculty members; many law school faculty members taught in NITA programs; a number of NITA’s regional public programs were held at law schools; and NITA was headquartered at Notre Dame Law School for many years. The introduction of NITA-type trial advocacy courses into the law school curriculum was quickly followed by an new wave of course offerings addressing other skills beyond trial advocacy such as appellate advocacy, pretrial litigation, interviewing and counseling, and negotiations. Most of these courses utilized some form of the NITA methodology and were often modeled on existing NITA programs in the same subject areas. The interchange occasionally also went the other way with some NITA programs being based on existing law school courses.

The NITA methodology continues to evolve which, in turn, has caused law school skills courses to change. For example, in recent years the organization has developed a segment for its trial advocacy programs on developing a case theory and a discovery planning session for its deposition programs. These segments have now been incorporated into many law school trial advocacy courses. A similar migration to law school skills courses has occurred with “drills,” a

³⁰ *Id.* at 1.-2; Kenneth S. Broun, *Teaching Advocacy the N.I.T.A. Way*, 63 ABA J. 1220, 1220-23 (1977); Gilda Tuoni, *Two Models for Trial Advocacy Skills Training in Law Schools—A Critique*, 25 LOY. L.A. L. REV. 111, 113 n. 6 (1991); Imwinkelreid, *supra*, note 25, at 668.

teaching technique recently developed by NITA which assists in the teaching of rote skills such as introducing exhibits or refreshing a witness's recollection.³¹

Our law student would have been lucky 40 years ago to come across a trial advocacy course that actually taught the skills needed to try a case. Today, the student would benefit from a wide array of lawyering skills courses using the NITA methodology. Depending on the school, students can now select from courses that taking and defending depositions, motion practice, summary judgment, pretrial litigation, storytelling, jury selection, discovery, pleading, appellate advocacy, counseling, interviewing, and negotiations, and the list goes on. Using variants of the NITA methodology, courses have now been created for transactional lawyering skills courses such as contract drafting, estate planning, business planning, etc. Clearly, the landscape of skills training has been transformed, with much of the credit properly going to NITA for spawning a list of skills course that was unimaginable 40 years ago.

The NITA methodology has also heavily influenced clinical legal education. Clinical teachers frequently teach in NITA programs, many have also attended NITA's Advocacy Teachers Program, a program designed to teach the NITA methodology and critiquing techniques. Many of these same clinical teachers have applied the NITA methodology to the classroom components of their clinical courses by incorporating NITA-type simulation exercises, and use the NITA critiquing method to evaluate their student performances both in preparation for court appearances and in post-mortems of those appearances.

THE GROWTH OF CLINICAL LEGAL EDUCATION

³¹ ROBERT A. STEIN & BEN RUBINOWITZ, COMPENDIUM OF TRIAL ADVOCACY DRILLS (2006).

It was not until 1968 and the creation of the Council on Legal Education for Professional Responsibility (CLEPR) that clinical legal education took hold in the law schools.³² The concept of clinical legal education, however, dates to 1893 when a law club at the University of Pennsylvania established a legal aid dispensary. This was followed by the opening of a legal aid dispensary at the University of Denver in 1904 with a few other law schools creating similar programs in the early part of the 20th Century.³³ But it was not until 1932 that the first clinical course was established by John Bradway at Duke University.³⁴ There were a number of calls for the law schools to create clinical courses, particularly by Jerome Frank and Bradway,³⁵ but the schools were slow to respond.³⁶ It was not until 1947 that the University of Tennessee created the second on-going, in-house clinical program in the country.³⁷ The 1940s and 1950s saw increasing interest in clinical legal education and several articles urged the law schools to create clinical courses. But by 1951 there were only 28 clinics in existence, many of these run by independent legal aid societies rather than the law schools, and only rarely were students awarded credit for participation.³⁸

³² There were several Ford Foundation-funded predecessor institutions to CLEPR that also gave grants to law schools to create clinical programs, but CLEPR's funding and the number of grants given was substantially larger than these predecessors and the grants had a vastly greater effect. See J.D. "Sandy" Ogilvy, *Celebrating Clepr's 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 CLIN.L. REV. 1, 10 - 11 (2009)..

³³ See generally Ogilvy, *supra*, note 32, at 4; STEVENS, *supra*, note 4, at 162-63, 212-14 (1983); William P. Quigley, *Introduction to Clinical teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 466-71 (1995), George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL ED. 162, 168-73 (1974).

³⁴ Ogilvy, *supra*, note 32, at 4; *Law School Timeline*, [HTTP://www.law.duke.edu/history/timeline](http://www.law.duke.edu/history/timeline).

³⁵ Jerome N. Frank, *Why Not A Clinical Lawyer School*, 81 U. PA. L. REV. 907 (1933).

³⁶ See, e.g., John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S. CAL. L. REV. 252 (1929); John S. Bradway, *The Classroom Aspects of Legal Aid Clinic Work*, 8 BROOK. L. REV. 373 (1939); John S. Bradway, *Legal Aid Clinic as a Law School Course*, 3 S. CAL. L. REV. 320 (1929-1930).

³⁷ Ogilvy, *supra*, note 32, at 4.

³⁸ STEVENS, *supra*, note 4, at 215-16 & n.90.

The modern clinical legal education movement dates to the creation of the Council on Legal Education for Professional Responsibility in 1968.³⁹ CLEPR, as it was more commonly known, starting in 1969 with nine law schools, used a series of Ford Foundation funded grants to create clinical courses. By the time CLEPR ceased operating in 1980 nearly every law school in the country had a clinical course and many schools had more than one.⁴⁰

Our law student in 1970 may have heard of clinical legal education, but unless the student was attending one of a very few law schools, the opportunity to take a clinical course did not exist. Over the past 40 years, there has been an explosion of clinical courses at nearly every law school in the country. “General” clinical courses, such as a civil or criminal clinic handling a variety of cases, are now commonplace, and there has been a huge increase in the number and types of “specialty” clinics. A few examples of such specialty clinics includes bankruptcy clinics, juvenile clinics, dependency and neglect clinics, HIV clinics, veteran’s clinics, small business clinics, tax clinics and the list goes on. A survey of clinical legal education found that for the 2007-2008 academic year there were 809 distinct in-house, live client clinics covering 34 subject matters with an average of 6.2 clinics per reporting school. Similarly, the survey found 895 distinct field placement programs covering 39 different placement settings with an average of 6.8 field placements per reporting school.⁴¹

³⁹ There were several Ford Foundation-funded predecessor institutions to CLEPR that also gave grants to law schools to create clinical programs, but CLEPR’s funding and the number of grants given was substantially larger than these predecessors and the grants had a vastly greater effect. See Ogilvy,*supra*, note 32, at 10-11.

⁴⁰ Ogilvy, *supra*, note 32, at 15.

⁴¹ DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC. REPORT ON THE 2007 – 2008 SURVEY (2008), <http://www.scale.org/CSCALE.07-08.Survey.Report.pdf>. The Report classifies clinics by 34 subject matters (including “other” and “no clinic”) and found a total of 809 distinct in-house, live client clinics with an average of 6.2 clinics per reporting school. Similarly, the Report classified externship or field placement programs by 39

THE SUCCESS OF CLINICAL LEGAL EDUCATION AND SKILLS TRAINING

Legal education has been revolutionized over the past 40 years by the twin influences of clinical legal education and the NITA methodology. While today's doctrinal curriculum would appear very familiar to our student of 40 years ago, albeit with significant differences in how these courses are now taught, almost all of today's clinical and skills courses did not even exist in 1970. The problem for a student today is not the availability of such courses, but how to choose among the many that are available.

Clinical legal education and skills training have achieved general acceptance as a necessary and important part of legal education. That acceptance is reflected in the American Bar Association Standards and Rules of Procedure for Approval of Law Schools, the standards that apply to all ABA accredited schools. Standard 302 governs a law school's curriculum and requires, among other things, that:

(a) A law school shall require that each student receive substantial instruction in:

(4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession;

and that:

(b) A law school shall offer substantial opportunities for:

(1) Live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;⁴²

placement settings with 895 distinct field placement programs and an average of 6.8 field placements per reporting school. *Id.* at 8-9.

⁴² Interpretation 302-2 gives further meaning to Standard 302(a)(4):

It appears that in the next decade legal education will be placing increasing emphasis on clinical legal education and skills training. The publication in 2007 of the Carnegie Foundation's *EDUCATING LAWYERS*,⁴³ and the Clinical Legal Education Association's (CLEA) *BEST PRACTICES FOR LEGAL EDUCATION*,⁴⁴ have generated a number of conferences and articles on how to further incorporate clinical legal education and skills training into mainstream legal education. Several schools have created faculty committees to discuss implementing changes based on the recommendations made by each of the publications and some schools have already taken action. While it remains to be seen whether these reports will result in permanent and meaningful changes in the law school curriculum, the recent economic downturn is pushing law firms toward hiring practice-ready graduates. As law schools work to satisfy the needs of the law firms, we are likely to see increased numbers of clinical and skills courses.

THE CHANGING PRACTICE OF LAW

As dramatic as the changes in legal education have been over the past 40 years, the changes in the way law is practiced over the same period has been equally dramatic. Admittedly, comparing changes in legal education with changes in the practice of law can be likened to comparing apples to oranges, but there is no gainsaying that the past four decades have brought substantial alterations to the legal landscape and to the legal profession as a

Each law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school. Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are among the area of instruction in professional skills that fulfill Standard 302(a)(4).

⁴³ WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS* (2007).

⁴⁴ ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007).

whole. Moreover, although there is no way of measuring the validity of this assertion, this author believes the overall pace of change is quickening.

Change, of course, is a constant in society as well as in the practice of law. New court decisions and statutory enactments appear regularly; the economy is continuously in flux; new technologies are constantly being heralded while old technologies fade away. All of these changes generate new legal needs and all of them require lawyers to be constantly adding to their catalog of legal knowledge. Our law student of 40 years ago may have heard of such emerging legal fields as environmental law, but other new legal fields, such as cyberlaw, were still years in the future. As these new legal fields assume prominence, other fields recede in importance. For example, space law and atomic energy law were emerging “hot” legal fields 40 years ago, yet almost nothing is heard of them today. Such has always been the nature of law—it evolves and changes as society and technology evolves and changes. As always, legislation is being enacted, court decisions are announced, and administrative rulings are issued, all causing significant alternations in legal doctrine and the ways in which lawyers advise their clients.

There are changes that have a different quality to them. Many changes cause lawyers to add to or modify their knowledge of doctrine, but some changes occurring over the past 40 years have required lawyers to develop new skills. These latter changes reflect more than mere developments in doctrine, but require the creation of new methods for representing clients. A partial catalog of these pivotal changes would certainly include the following:

CHANGES IN HOW DISPUTES ARE RESOLVED

- THE RISE OF ADR - The rise of alternative dispute resolution as a method of resolving disputes, particularly the use of mediation, has required lawyers to conceptualize legal disputes differently than when they were resolved by trial. Instead of appealing to a neutral, passive judge or jury, lawyers in mediation, while using the mediator as an intermediary, must persuade the opposing party to voluntarily resolve a dispute. The increasing use of ADR has required lawyers to develop a different repertoire of skills, mediation advocacy, than are needed for litigating and trying cases.⁴⁵
- THE VANISHING TRIAL - The decline in the number of trials, both jury and bench, is a reality to which the bench and bar are slowly adjusting. Even NITA, created to improve the training of trial lawyers, has recognized the decline:

Years before the economic downturn of 2008-09, the work of the trial lawyer began to change. Except for lawyers in primarily criminal practices, the jury trial and even the bench trial became increasingly rare. Most lawyers in civil practice spend the majority of their time in pre-trial discovery, depositions, motions hearings, negotiations, mediations, and arbitrations. Simply put, there are just not enough jury opportunities to learn trial skills to keep an advocate's skills sharp.⁴⁶

The reasons for the decline are difficult to determine, but likely include the increasing use of alternative dispute resolution techniques such as mediation and arbitration; the willingness of judges to dispose of cases on summary judgment as well as other dispositive motions; and increasingly risk-adverse clients who are much more

⁴⁵ Some of the skills that have been identified as necessary for a successful mediator are displaying friendliness, empathy, respect, caring, integrity, neutrality, trustworthiness, nonjudgmental attitudes, patience, persistence, diplomacy, and the ability to ask good questions. Successful mediators were also candid, used humor to lighten potentially difficult situations, were calm and flexible. Susan Raines, Timothy Hedeem & Ansley Boyd Barton, *Best Practices for Mediation Training and Regulation: Preliminary Findings*, 48 FAM. CT. REV. 541, 542 (2010)

⁴⁶ John Baker, *Letter from the President*, NITA Notes (April 2010)

receptive to settlement in an effort to avoid litigation with its attendant risks and high costs. Whatever the causes, the effects are real.⁴⁷

The decline in the number of trials threatens to render obsolete the skills of the trial lawyer. Many lawyers who in the past would have labeled themselves as trial lawyers now describe themselves as litigators because they have never or only rarely actually tried a case. Deeming themselves “trial lawyers” seems to be an exaggeration of what they actually do. The need to know how to try a case remains important as means of giving “teeth” to a party’s settlement efforts, but that does not mean lawyers will ever get to put their knowledge of advocacy skills into action.

- INCREASING IMPORTANCE OF DEPOSITIONS--The decline in the number of trials has increased the importance of discovery, particularly depositions. It can be argued that depositions have displaced trials as the forum in which factual disputes are resolved.⁴⁸ Of course, there is no judge or jury at a deposition, but the deposition is where a record is made that could ultimately be presented in to the opposing party in a negotiation or mediations or to the judge in a summary judgment motion. While the need for trial advocacy skills is declining, the importance of deposition skills is increasing.

⁴⁷ Lisa Blomgren Bingham, Tina Nabatchi, Jeffrey M. Senger & Michael Scott Jackman, *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DIP. RESOL. 225 (2009); Margo Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. DISPUTE RESOL. 35; Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329 (2005); Galanter, *supra*, note 3; Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004).

⁴⁸ Kyle A. Lansberry & J. Robert Turnipseed, *Deposition Preparation and Defense for the Young Lawyer*, 24 AM. J. TRIAL ADVOC. 357 (2000) (“With the increasing utilization of alternative dispute resolution processes, depositions have in many ways become a substitute for trial.”); A. Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets*, 12 GEO. J. LEGAL ETHICS 1, 4 (1998) (“Depositions are a dress rehearsal—and due to high settlement rates [are] often a substitute—for trial.”); Joe W. Redden, Jr., *What’s Happening in the Law: Surveying the New Developments*, 61 DEF. COUNS. J. 326, 343 (1994).

NEW TECHNOLOGIES

- **INCREASED USE OF CASE MANAGEMENT SOFTWARE** - New technologies have altered the way litigation is managed. The use of case management technology--computer programs designed to catalog and access discovery, recorded billed time, track witnesses, create timelines, as well as perform many other tasks—was, like the personal computer itself, unheard of 40 years ago. The creation of a variety of case management software programs has altered how litigation is now managed.⁴⁹ Consider, for instance, the abstracting of depositions. Forty years ago new associates were frequently required to abstract or summarize deposition testimony so that particular questions and answers could be easily found if, for instance, it was necessary to impeach a witness at trial with their deposition testimony. Today, of course, depositions are rarely abstracted. It is now possible to type search terms into a computer and quickly locate all references in a deposition to the answers containing those terms. Lawyers today must be familiar with the capabilities of case management software if they are to conduct litigation efficiently and economically.
- **VIDEO DEPOSITIONS.** Video-recorded depositions have become the norm in many areas of the country. Videoed deposition testimony is more persuasive and understandable than the traditional method of reading a deposition transcript. As such, excerpts from video depositions are being routinely presented to judges and juries during opening statements, in impeaching witnesses, and as substitute testimony for absent witnesses.

⁴⁹ See, e.g., Helen Gunnarsson, *Does Your Practice Need Practice Management Software*, 98 ILL. B.J. 352 (2010).

But video depositions require a different form of witness preparation than is used for stenographic depositions and different techniques of taking and defending the deposition.⁵⁰

- REAL TIME DEPOSITIONS - Real time depositions are another recent innovation. It is now possible for the parties at a deposition to watch their computer screens as the lawyers' questions and the witness's answers appear simultaneously with the court reporter's transcription of them. While not used in every deposition, it is an important aid where the exact wording of questions and answers is critical to the deposition record.⁵¹
- E-DISCOVERY - E-Discovery and the need to review e-mails as an integral part of the litigation process was unheard of in 1970. As far as lawyers and the general public were concerned, E-mail then was the subject of science fiction. E-mails today, given their wide use as a means of communicating, are recognized as potential source of invaluable evidence, especially in commercial litigation. A new industry of e-discovery has been created in response to the expense and difficulty of obtaining e-mail communications and responding to those requests.⁵²
- COURTROOM TECHNOLOGY - Technology has also changed the way in which evidence is presented during trial. Many courtrooms today are equipped with a full array of

⁵⁰ See, e.g., DAVID M. MALONE, PETER T. HOFFMAN & ANTHONY J. BOCCHINO, *THE EFFECTIVE DEPOSITION, TECHNIQUES AND STRATEGIES THAT WORK* ch. 18 (3rd ed. 2006),

⁵¹ Victor D. Vital & Lawrence D. Brown, *Examining & Defending Deponents Under the Texas & Federal Rules of Procedure: Making and Defending Against Objections and Privilege Assertions and Dealing with Objectional Questions, Conduct and Refusals to Answer*, 28 *THE ADVOC. (Texas)* 26, 32 ("An attorney utilizing real-time technology during a deposition has the advantage of viewing a question and an answer on the screen, enabling the attorney to assess, "on the spot," whether helpful testimony will be admissible at trial.").

⁵² It is impossible to catalog the thousands of articles and treatises treating the subject of e-discovery. A quick review of Westlaw using the search term "e-discovery" will provide you with a lifetime of reading pleasure.

technologies for presenting evidence, including document cameras and PowerPoint capabilities. Using the new technology effectively requires different skills than previously when an exhibit at trial was often passed from juror to juror.⁵³

- FOCUS GROUPS - New understandings of what persuades judges and jurors has transformed litigation in ways that could not be imagined by our law student of 40 years ago.⁵⁴ The use of focus groups, for example, is now frequently used to create and test the persuasiveness of case theories and themes. While focus groups are often conducted by jury consultants, lawyers may also do so. Regardless of who conducts them, litigators today must know to effectively utilize the output of focus groups.⁵⁵
- CHANGES IN POPULAR CULTURE - There is a widespread belief among jury consultants and trial lawyers that television and the web have greatly influenced, and perhaps permanently altered, how younger jurors receive and process information. Many believe, for instance, that the average attention span of younger jurors is significantly less than that of previous generations. This, in turn, has caused trial lawyers to develop new techniques for presenting evidence and arguing cases.⁵⁶

In my opinion, there has not been a comparable time in the modern history of the legal profession when so many changes of such a magnitude have affected the practice of law.

⁵³ See, e.g., Frederic I. Lederer, *WIRED What We Have Learned About Courtroom Technology*, 24 Winter CRIM. JUST. 18 (2010).

⁵⁴ Teresa Rosado, Knowledge is Power, *Online Jury Research Delivers Affordable, Valuable Results*, 29 No. 4 LEGAL MGMT. 80 (2010)(professional jury research started in the 1970s).

⁵⁵ See, e.g., James R. Ronca, *Hone Your Case with Focus Groups*, 41 MAY TRIAL 82 (2005).

⁵⁶ See, e.g., Lisa Brennan, Pitching the Gen-X Jury: As Jurors Get Younger, Law Schools are Thinking More Like MTV, NAT'L L.J., June 7, 2004, at 1, 1.

These changes have altered the very fabric of the legal profession, and they have made a new set of lawyering skills necessary for the successful practice of law.

There is no question that a student today who chooses to take advantage of the available clinical and lawyering skills will graduate from law school much better prepared for the practice of law than was possible 40 years ago. But, regardless of the courses taken, today's law school graduate will not possess many of the important skills needed to practice law successfully. While there has been a major shift in the law school curriculum to include clinical and skills courses, those courses do not reflect the more recent ways in which the practice of law has been altered in the past 40 years.

WHY LAW SCHOOLS FAIL TO KEEP PACE WITH PRACTICE

Let me begin with a caveat. Much of the following discussion cannot be supported by citations to published empirical studies, and only occasionally will reference be made to anecdotal evidence found in journals and law reviews. Much of what is offered here is based on impressions formed over nearly 40 years of law teaching while on the faculties of three law schools, as a visitor to several other schools, and as a participant in countless discussions while attending conferences and meetings. I recognize that my views are open to dispute and countervailing anecdotal evidence. I also recognize that law faculties are not homogenous bodies, but consist of individuals with differing backgrounds and experiences and with conflicting values and views. I am convinced, however, that my views are correct when accurate when they are viewed as general propositions rather than as immutable rules. With this caveat in mind, let me begin.

A primary source of the disconnect between law schools and the practicing bar can be traced to the case method of teaching law.⁵⁷ The case method rested on the premise that the study of law was a scientific endeavor where legal principles are derived from the study of appellate opinions.⁵⁸ Such an approach to the study of law did not require the insights of practice nor did it require any discussion about how lawyers go about solving client problems. The legal profession's discomfort with a purely academic approach to training students for the practice of law, led to frequent criticism that continues to this day.⁵⁹ Many of these criticisms were contained in a series of reports and studies by the Carnegie Foundation for the Advancement of Teaching while others came from the American Bar Association, the Association of American Law Schools and the Clinical Legal Education Association.⁶⁰

Every report and study calling for greater practicality in the training of law students by increasing the number of clinical and skills courses has generated resistance from the law schools. This is not to say that all law faculties at all times have rejected the idea of infusing into the law school curriculum a greater degree of preparing students for the practice of law. Otherwise, we would not have witnessed the progress that has been accomplished to date. But there appears to be a predictable cycle that occurs in response to the issuance of each new

⁵⁷ STEVENS, *supra*, note 4, at 38.

⁵⁸ *Id.* at ch. 4.

⁵⁹ *See, e.g.*, STEVENS, *supra*, note 4, at 212-216, 238-241, 277-78.

⁶⁰ *See, e.g.*, REED, *supra*, note 17; PAUL D. CARRINGTON, ASS'N AM. L. SCHS., TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW: 1971, PART ONE, SECTION II (1971); SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS (1979)(commonly referred to as the "Cramton Report," after Roger Cramton, the chair of the task force); SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992)(The MacCrate Report)(hereinafter "MacCrate"); SULLIVAN, *supra*, note 43.

study or report urging the greater incorporation of clinical and lawyering skills courses into the curriculum.

First, the appearance of a new study or report initially generates favorable comment from those in the law school community who support the recommended changes. Articles analyzing and discussing the study or report begin appearing in such publications as the *JOURNAL OF LEGAL EDUCATION*. Then the inevitable backlash follows in which opponents of the recommended changes come forth with opposing arguments, and another set of articles appear suggesting why the changes are neither feasible nor desirable. Nonetheless, some incremental progress is made in response to the study or report before the law school community ultimately loses interest in the discussion and shifts its attention to other issues. But at many schools the issuance of a new study or report fails to have any discernable impact. At these schools, the majority of faculty members do not read the new study or report, the study or report is not placed on the agenda for discussion at a faculty meeting, and the school's curriculum committee does not consider how the study or report will impact that school's curriculum. It remains to be seen whether the latest of these studies, the most recent Carnegie Report,⁶¹ will suffer a similar fate.

BARRIERS TO IMPROVEMENT

Faculty Inertia

I believe the greatest impediment to curricular innovation at most law schools is faculty inertia. Most law school faculty members simply do not have much interest in changing the

⁶¹ SULLIVAN, *supra*, note 43.

methods by which law schools train their students, and are generally resistant to proposals for change. There are several reasons for this.

Most law professors practiced law only briefly, if at all, before joining a law school faculty. There are many career paths leading to a law school teaching position, but extensive practice experience is rarely among them.⁶² Instead, the more typical path is a judicial clerkship following graduation followed perhaps by several years with an elite law firm where most of the assignments involved legal research and brief writing. Some, however, skipped any practice experience and went directly from a judicial clerkship into law teaching. The faculty members who did go into practice rarely practiced long enough to have assumed client responsibilities or to have met a client. The fact that they chose to seek out a teaching position after such a brief period in practice is indicative of a lack of interest in the practice of law, what most lawyers do for a living.⁶³

Another path into law teaching followed by increasing numbers of faculty members is to earn a doctorate in another field before obtaining a law degree.⁶⁴ What often attracted the members of this group to law teaching is the higher salaries paid by the law schools in comparison to the compensation level in their original discipline. Not unsurprisingly, many of these faculty members consider their primary academic interest to be their original discipline as their primary academic interest with law only incidentally informing their teaching and

⁶² I have heard experienced and well-regarded faculty members argue that candidates with more than a few years of practice experience should be rejected for employment as their practice experience demonstrates a lack of commitment to scholarship.

⁶³ See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Alex M. Johnson, *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991).

⁶⁴ Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2202 – 03 (1993).

scholarship. It is unrealistic to expect the members of this group to have an interest in preparing students for a profession in which they were never a participant.

The failure of most law school faculty members to have a meaningful or extensive practice experience manifests itself not only in a lack of interest in the practice of law, but also in a disdain for lawyers who do engage in practicing law. The practice of law is viewed as an inferior calling and not worthy of serious consideration by many of those who have been admitted to the ranks of law teaching. Practicing law is considered to be grubby and messy, and lawyers are thought of as avaricious and perhaps a bit unethical.

The result of these attitudes is a belief by many faculty members that the primary role of the law schools is to focus on the brightest students and prepare them for a life of teaching law or a career at the elite law firms. Those law students who do not have the academic wherewithal to qualify for these positions are largely ignored. While law schools and legal education serve several objectives, it should be beyond controversy that the primary goal of a legal education is to prepare students for the practice of law. Standard 301(a) of the ABA Accreditation makes this clear: "A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession."⁶⁵ It is why the students, whose tuition in large measure supports the law

⁶⁵ Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n., 2009-2010 Standards and Rules of Procedure for Approval of Law Schools <http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf>.

school, have chosen to attend law school. They expect to be prepared to practice law upon graduation.⁶⁶

Unfortunately, there are few incentives for faculty members to focus on better preparing law students for the practice of law. Merit raises are rarely awarded for being an outstanding teacher, or for successfully training law students to be competent practitioners. Similarly, curricular innovations or improvements only occasionally receive praise from colleagues or rewards or recognition from the dean. Instead, the generally recognized coin of the realm in law schools is scholarship. Publications are what bring recognition, increased pay and promotions.

Curricular improvements often bring more work with them. Creating new classes and modifying the way existing classes are taught requires time and effort, the same is true of selecting, perhaps even creating, and incorporating new teaching materials, and the addition to a class of exercises and simulations requires time to select or create the exercises and simulation and to administer and perhaps grade them. Certainly, there are a number of faculty members who take great pride in their teaching and gain psychic rewards from better preparing their students. But there is also a large body of law school teachers who balance the gains of curricular improvement against the prospects of an increased work load and decide that it would be better to continue doing what they have always done by teaching the same classes in the same manner as before.

⁶⁶ STUCKEY, *supra*, note 23, at 16-18.

In addition to individual recognition, most law professors also crave the status that comes from a high placement in the U.S. News & World Report rankings. The rankings not only confer status within the academic pecking order, but also strongly influence perspective applicants in their decisions as to what schools to apply and affect alumni support and donations. The tension in the faculty lounge heightens as the date for the announcement of each year's rankings approaches. A rise in the rankings becomes a moment for jubilation while a fall provokes consternation. A precipitous fall may cause a dean to be forced out of the deanship. Discussions in the faculty lounge preceding and following the announcement frequently concern what can be done to influence or change a school's rank. In contrast, there are rarely discussions at most law school about how to improve the training of law students for the practice of law. This is a topic of little or no interest and is considered by many faculty members to be largely irrelevant to the law school's mission. Unfortunately, the rankings do not contain a direct measure of how well a school has performed in preparing students for the practice of law.⁶⁷

Cost

There are other impediments to curricular reform. Cost, in an era of tight budgets, is certainly one. Clinical courses are expensive (although not terribly so when compared to small

⁶⁷ At best, the Assessment Score by Lawyers/Judges might be considered a crude surrogate for the quality of a school's graduates, but many other factors are likely to be inherent in this measure. There is much mystery surrounding who is selected to receive a ballot from U.S. News & World Report. The magazine reports that ballots are sent to "legal professionals *including* the hiring partners of law firms, state attorneys general, and selected federal and state judges." Robert J. Morse, *The Law School Rankings Methodology* (April 15, 2010)(emphasis added). No information is given about what other individuals receive ballots in addition to those listed and there is nothing about the geographic distribution of the recipients. There are several "Specialty Rankings" that are more directly correlated to a law school's preparation of its students for the practice of law, i.e. Clinical, Legal Writing, Trial Advocacy. It is interesting to note that there is little correlation between a school's ranking in one of these specialty categories and the school's overall ranking.

classes and seminars). While the cost of skills courses is relatively low because they are usually taught by adjunct faculty, in the aggregate they can be a burden on an already strapped law school budget. At most schools, full-time faculty members cannot be easily assigned to teach skills courses because of their lack of practice experience.⁶⁸ As was discussed previously, few had practiced law in any meaningful sense before entering law teaching, and they were not employed by the law schools for their proficiency in practicing law.⁶⁹ In short, they do not have the necessary competence in practicing law to be able to teach such courses. Because most full-time faculty members cannot teach skills courses, the use of adjuncts to do so usually will not free the time of any full-time faculty members to teach other needed courses. Instead, the skills courses are additions to the existing curriculum, and the cost of adjuncts to teach them become added expenses for the budget to bear.

THE LEAD OF THE ELITE LAW SCHOOLS

There are other forces causing law school deans and faculties to resist curricular changes. Foremost among these is the curious phenomenon of lower-ranked schools following the curricular lead of the elite law schools, especially that of Harvard Law School. Law school faculty members at law schools considered less than elite will report that one of the most compelling arguments in opposition to some proposal for curricular change that can be made in a faculty meeting is that “Harvard doesn’t do it that way.” Such an attitude, while perhaps

⁶⁸ Grossman, *supra*, note 33, at 182-83.

⁶⁹ Langdell reportedly stated that “What qualifies a person, therefore, to teach law, is not experience in the work of a lawyer’s office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law.” STEVENS, *supra*, note 4, at 38 (citing JOEL SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF THE HARVARD LAW SCHOOL* 7 (1978)); *See also* Grossman, *supra*, note 33, at 164 (citing J.W. HURST, *GROWTH OF AMERICAN LAW* 263 (1950)).

understandable, results in a stifling at lower ranked schools of curricular innovation and independent change. But when Harvard does institute a change, lower ranked schools will usually quickly follow with similar changes to their own curricula.

INCENTIVES FOR IMPROVEMENT

There are, of course, many law school faculty members who fully embrace their task of preparing students for the practice of law. These faculty members actively pursue improvements to their own classes and lobby for curricular changes that will improve the ability of the school's graduates to enter the legal profession as competent practitioners. Sadly, at most schools these individuals are a minority within a larger faculty body that remains largely uninterested in the topic.

Change, when it occurs, appears to stem from two sources: 1) A dean or a body of interested faculty members who have taken an interest in improving the school's curriculum, or 2) Action from sources external to the law schools. Deans and interested faculty members have a variety of motivations for improving their schools' curricula. The psychic pride that comes from teaching in a respected law school and producing graduates who are regarded as competent is important to many. But there are also other pressures for improving the education law schools provide.

Law School Differentiation

Law schools are in competition to attract the best and brightest students, which is a difficult task in the highly competitive market of legal education. The task is made more

difficult because most law schools today are largely indistinguishable from the schools against which they compete. Course offerings are remarkably similar; facilities may differ some, but not significantly; and tuition is likely to be similar to that of competitor schools of similar *U.S. News & World Report* rank. Thus, law schools are always seeking ways to differentiate themselves from their competitors, something that will give the school a competitive edge in the effort to attract the best possible students. One method of doing so is by giving substance to the claim that the school has a unique or innovative curriculum.

Having a unique or different curriculum, however, is not enough. The uniqueness or differences must somehow contribute to the value prospective students will gain from attending the school. And, of course, the two areas that are of most value to prospective students are better preparation for the practice of law and improved employment prospects upon graduation. Some schools believe that better preparation for the practice of law can be best achieved by increasing the quality and quantity of clinical and skills courses, thereby differentiating a school from its competition while adding to the value students receive.

The growing influence of the *U.S. News & World Report* rankings has contributed to this need for law schools to differentiate themselves from their competitors. Many prospective students base their application decisions on a school's rank. And often miniscule differences in a school's score causes a substantial rise or fall in the rankings. The two components given the heaviest weight in calculating a school's score and resulting rank are the scores for *Peer Assessment* and for *Lawyers/Judges Assessment*.⁷⁰ Schools that can publicize major curricular improvements hope to differentiate the school in the perceptions of those who have a vote in

⁷⁰ Respectively, 25 % and 15 % of the total score. See Morse, *supra*, note 67.

the rankings. Similarly, *Placement Success* is another factor receiving significant weight in calculating a school's ranking.⁷¹ Any curricular improvement that can improve the employment prospects of a school's students will have a beneficial effect on the rankings.

The rankings also exert countervailing pressures. As stated before, there is remarkable uniformity between schools in their curricular offerings. A school seeking to maintain or advance its place in the rankings may be averse to tampering with its curriculum when that curriculum is similar or identical to those at more highly ranked schools. Curricular changes can also potentially generate unfavorable publicity and cause a fall in the rankings if perceived as diminishing academic rigor.

Improving Employment Prospects

Improved employment prospects for a law school's graduates is a source of pride for a dean and faculty. It is also likely to attract additional and better qualified applicants, and will, as noted above, have a beneficial effect on a school's *U.S. News & World Report* ranking. But most importantly, curricular innovations that result in a school's graduates being more practice-ready, especially in comparison to the graduates of competitor schools, should cause increased hiring (except by the elite law firms).

Most elite law firms do not value competency to practice when making employment decisions. These firms are unlikely to be putting any of their newer associates in situations where competency to practice law is of importance. Instead, newer associates will be primarily

⁷¹ Placement success is 20 % of the total score. Employment at graduation is weighted at .04 and employment nine months after graduation is weighted at .14. See *Id.*

engaged in legal research and writing. It will be only after several years of close supervision by more senior members of the firm that an associate will be given responsibilities such as interviewing clients and witnesses, preparing witnesses to testify, taking and defending depositions, structuring buy-sell agreements, etc. The “extended apprenticeship,” in which the practicing bar assumed responsibility for training new lawyers and turning them into competent practitioners, has historically been the justification relied upon by law schools for failing for many years to provide skills training. While the extended apprenticeship model never applied to newly admitted lawyers going into solo practice or joining smaller law firms, it continues to be followed by the elite law firms. These firms are not looking to the law schools to produce competent practitioners, but to supply the firms with graduates who are certified to be intelligent.⁷² The firms will provide the training necessary to turn the graduates into competent practitioners.

While the effectiveness of the extended apprenticeship model has eroded in recent years, largely because of economic and client pressures, it still remains largely intact. But outside the ranks of the elite firms, the ability of new associates to begin billing clients without a lengthy apprenticeship within the firm is very attractive to prospective employers and is now gaining the attention of the elite law firms who are struggling with a difficult economy. A law school’s ability to provide lawyers who possess the necessary skills to practice law should enhance the employment prospects of its graduates.

⁷² This certification of intelligence is provided through two methods—the ranking of the law school and the student’s class rank and law review participation.

External Sources of Change

Curricular changes resulting from actions by external sources occurs because of changes in the ABA's Accreditation Standards and changes by state supreme courts and bar examiners to the requirements for admission to a state's bar. The law schools enjoy a near-monopoly on legal education and on admission to the bar. Beginning in 1881, the American Bar Association initiated a campaign lasting over the next century urging the states to require law school attendance as a prerequisite to admission to the bar.⁷³ Today, all but a handful of states require an applicant for admission to the bar to have graduated from a three-year law school program or its part-time equivalent. The 1920's also brought ABA accreditation of law schools, and today the vast majority of the states have adopted requirements that limit admission to the bar to graduates of ABA accredited law schools. As noted by the *MacCrate Report*,

A major accomplishment of the ABA, born of its relationship with the law schools, was to wrest legal education from the local control of the practicing profession during the early years of the 20th century and to place it increasingly in the law schools. When state-wide admissions standards were first prescribed by newly established boards of law examiners in the late 19th century, it was common to require at least one year of law school preceded by two years in either a law office or a law school, but the growing sentiment among legal educators, supported by the organized bar, led to the call for requiring that the entire three years be spent in law school, which ultimately became the rule.⁷⁴

Having gained near-monopoly control over legal education and, in turn, admission to the bar, the law schools have fiercely (and thus far, largely successfully) resisted any efforts by others--including the ABA and the state supreme courts and legislatures that granted the monopoly--to exert any influence over law school curricula. It is strangely paradoxical that

⁷³ STEVENS, *supra*, note 4, at Chap. 4, at 51 – 72 (1983).

⁷⁴ Macrate, *supra*, note 60, at 108.

those determining the content of legal education are often those who have the least exposure to and awareness of the educational needs of the practicing bar. But it is from this monopoly position that the law schools are able to control their own curricula and to resist pressures for curricular reform.

Periodically, the ABA has disturbed this monopoly by imposing requirements for increasing the number of clinical and skills courses and for improving the faculty status of those who teach clinical courses. While these changes are frequently aided and abetted by forces within the law schools that are supportive of such changes, the changes often occur despite opposition by coalitions of law school deans and the objections of the Association of American Law Schools.

Less frequently, courts or boards of bar examiners have imposed requirements for admission to the bar of that state or for admission to practice before courts that have the effect of dictating to the law schools what courses must be offered. These efforts are largely unsuccessful. One example of this occurred in 1973 when the Indiana State Board of Law Examiners adopted a rule requiring bar applicants to have completed 14 specified courses for 54 credit hours.⁷⁵ While none of the required courses could be described as clinical or involving

⁷⁵ The required courses and credits were:

CONFLICT OF LAWS	2 credit-semester hours
CONSTITUTIONAL AND ADMINISTRATIVE LAW	6 credit-semester hours
CONTRACTS AND EQUITY	6 credit-semester hours
CRIMINAL LAW AND PROCEDURE	4 credit-semester hours
EVIDENCE	4 credit-semester hours
FEDERAL TAXATION	4 credit-semester hours
LEGAL BIBLIOGRAPHY	2 credit-semester hours
LEGAL ETHICS	2 credit-semester hours
NEGOTIABLE INSTRUMENTS, SALES AND SECURED TRANSACTIONS	4 credit-semester hours
PARTNERSHIP, AGENCY AND CORPORATIONS	4 credit-semester hours

lawyering skills, the rule reflects an effort by external forces to exert control over the law school curriculum. Similar efforts were attempted in South Carolina.⁷⁶ A proposal to require lawyers seeking admission to practice before the federal courts to have completed certain courses was ultimately rejected.⁷⁷

Financial

Much of CLEPR's success in bringing out the expansion of clinical legal education is attributable to its strategic use of grants to induce the elite law schools to create clinical programs. The grants were usually of three year's duration and were structured to decline in amount over the life of the grant. Thus, the grantee had assumed a large portion of the cost of the new clinical program by the time the grant ended. And by initially focusing on the elite law schools, CLEPR could be confident that the lower ranked law schools would follow their lead. Unfortunately, there are few available funding sources today for improving law school curricula.

Progress is Occurring

The speed at which clinical and skills course have received acceptance within legal education has roughly equaled the rapidity with which the case method became the accepted mode of law school instruction. The use of the case method began in 1870 with the

PLEADING AND PRACTICE (Rules of Procedure)	4 credit-semester hours
REAL AND PERSONAL PROPERTY	4 credit-semester hours
TORTS	4 credit-semester hours
WILLS, TRUSTS AND FUTURE INTERESTS	4 credit-semester hours

Rule 13, Educational Requirements for Admission to Examination, 34 W.A.Ind.C., Appex. Ct. R. (Civ.), as amended Dec. 18, 1973. This requirement was abolished by amendment in 1975.

⁷⁶ STEVENS, *supra*, note 4, at 239-40

⁷⁷ See Clare and Devitt Committee Reports, *supra*, note 24.

appointment of Langdell as Dean at Harvard Law School.⁷⁸ By 1902 only 12 of the 92 law schools in the country were using this method of instruction.⁷⁹ The number had risen to over 30 by 1907,⁸⁰ but it had to wait until 1921, 51 years after Langdell's appointment, before it could be said "there [can] be no question that the [case] system was the inevitable accoutrement of the majority of American law schools."⁸¹ In contrast, It has taken only 42 years since the founding of CLEPR for every law school in the country to have at least one clinical course, and only 39 years since NITA was created for every school to have a trial advocacy course.

The spread of the case method and the inclusion of clinical and skills courses within the curriculum are not directly comparable for a variety of reasons. Nonetheless, the slow acceptance of clinical and skills courses as part of legal education does not appear so disheartening when measured against legal education's initially reluctant acceptance of the case method.

WHAT SHOULD BE DONE?

To return to the question originally posed, why have clinical and skills courses failed to keep current with changes in the practice of law? One obvious answer is lack of knowledge of those changes. A second reason is a lack of time and interest on the part of law school faculties to incorporate knowledge of those changes into the clinical and skills curriculum.

⁷⁸ Cases were used for instruction prior to Langdell's appointment, but it was with his assuming the deanship at Harvard that the use of the case method first assumed importance as a pedagogy.

⁷⁹ STEVENS, *supra*, note 4, at 64.

⁸⁰ *Id.*

⁸¹ *Id.* at 123.

It is understandable that faculty members teaching doctrinal courses in the traditional curriculum may be unaware of the changes occurring in practice. These faculty members often have neither the interest nor the experience in practice to be a source for keeping the clinical and skills courses current. It may also be largely futile to look to the group within the law schools who have an interest in the practice of law—full-time clinical and skills teachers—for information about recent changes. Although these teachers are interested in the practice of law—this is what they do—they may not be conversant with what changes have occurred. These teachers often enter law teaching from a legal services or public defender background, practices that historically have been underfunded. Many changes in the practice of law occur in cases with substantial financial stakes and involve lawyers who have the resources to initiate or respond to those changes. Lawyers in legal services and the public defender’s offices usually, for reasons of funding, do not have access to the latest technology, and the cases with which they are most typically involved tend to be routine and without substantial financial stakes. Most clinical programs also tend to work on more routine legal matters. Many clinics use some form of case management software, but otherwise do not have access to advanced technologies.

In contrast, adjunct faculty in their full-time positions may be working regularly with complicated and sophisticated legal issues while utilizing the most advanced technology in doing so. But their part-time faculty status makes it unlikely that they have the interest or ability to bring this knowledge into the law school skills courses they are teaching. It requires time and effort to plan or modify courses, something part-time adjunct faculty rarely has

available. The need to focus on their practices keeps adjuncts from becoming forces for change within the law schools.

In fact, at many schools the adjuncts are not involved in designing their own courses, but instead are given commercially available syllabi and teaching materials or use materials prepared by full-time faculty members who teach in the same areas. There are exceptions, of course. At those schools with established reputations for excellence in skills training, particularly trial advocacy, there are usually several full-time faculty members teaching within the skills curriculum. These full-time teachers are usually engaged in an on-going effort to keep their courses current and up to date with what is occurring in the practice of law. But these schools are the exception.

Schools with small clinical and skills curricula should be able to keep current with what is occurring in practice. Publications, such as the *National Law Journal* and the *American Lawyer*, routinely report on such changes. These schools can also form advisory groups composed of leading practitioners that can provide the clinical and skills programs with this information. Finally, the authors of some (but hardly all) clinical and skills texts incorporate these changes into their materials. The information is available if someone at the school is willing to access it and to incorporate the information into the syllabi and teaching materials used in the clinical and skills courses.

The decision as to what changes to incorporate raises problems that are sometimes difficult to resolve. It is not necessary to teach every change that appears. Some are only fleeting and will not have a lasting effect on how law is practiced. For example, summary jury

trials received a tremendous amount of attention at one time, but never became ensconced in the practice of law in any meaningful way. As with most new things, it is wise not to be the first, but to wait and see if the change is likely to be permanent. Similarly, law schools need to be teaching general techniques, not the techniques of the moment. The more specific a school is in teaching how to use a particular technique, the more likely that what is taught will be antiquated or superseded by the time the students graduate and enter into practice. To illustrate, the more detailed a school is in teaching students how to plead a claim under *Twombly*⁸² and *Iqbal*,⁸³ an area of the law still very much in flux, the more likely that information will be shortly outdated. But law schools would be doing their students a disservice if they ignore the changes in pleading standards and failed to teach anything about this area of the law.

In conclusion, the law schools have made remarkable progress in incorporating clinical and skills courses into the curriculum, and it is likely that more progress will be made in the near future. Legal education has shifted away from the sterile, lifeless science of the law envisioned by Langdell and appears to be taking seriously its obligation to prepare students for the practice of law. The problem is that the clinical and skills courses have failed to adapt to the many changes occurring in the practice of law. It should not be difficult for us, as legal educators, to remedy this problem, but it requires us to be aware of the existence of the problem and to take steps to bring our courses into the present to reflect how law is actually being practiced.

⁸² 550 U.S. 544 (2007).

⁸³ 129 S.Ct. 1937 (2009).