

by Ronald J. Scalise Jr.

Legal Education in the 21st Century: Looking Backwards to the Future

It is said that the ancient Greek philosopher Heraclitus believed that all things were in a constant state of flux and change.¹ So, too, it seems with legal education, which has recently come under criticism for not providing enough skills training in preparation for law practice.² In response, law schools around the country are reevaluating their curricula and increasing students' opportunities for access and exposure to practical skills. While such changes may seem novel, they are not new. Legal education has undergone structural change in the past, and it will, no doubt, do so again in the future. In historical context, the current changes in legal education are viewed as an important and healthy part of the ongoing balancing and rebalancing of the law schools' joint mission to the academy and the bar.

The current balance between law school's academic and practical missions has not always been. In the past, lawyers were predominantly educated by reading the law rather than formally studying it in school. Although law has been studied in universities in continental Europe since the 11th century, the English approach to legal training, from which the United States took its lead, was historically done in the Inns of Court by practicing barristers. As has been observed elsewhere, "[p]rior to the American Revolution, the principle model of legal education in the United States was apprenticeship."³ To become a lawyer in Connecticut during the Revolution, an interested student with a bachelor's degree would have to study for two years with a practicing lawyer, who was paid by the apprentice to take him on.⁴ Most students "learned the law" by copying legal documents and drafting pleadings. Lawyers-to-be "hung around an office, read Blackstone and Coke and miscellany of books, and copied legal documents."⁵ In fact, even after the establishment of "law schools," this method as an entry to the bar was still very much alive and flourishing, as it dominated for more than a century and produced the likes of Jefferson, Hamilton, and Webster.⁶ Critics as prominent as Thomas Jefferson, however, viewed the apprenticeship program as flawed and argued that the services provided by the apprentice far exceeded the value of the instruction.⁷ Moreover, the entirely practical apprenticeship approach suffered from a complete

absence of teaching the theoretical and foundational underpinnings of law. It further depended on a limited supply of available and successful mentors. What was needed was an injection of the academic component of law.

The first law school in the United States, the Litchfield Law School, was not established until 1784.⁸ Even then, the law school environment looked markedly different than it does today. The entire course of study lasted only 14 months, including two four-week vacations, and was originally taught by one man—Judge Tapping Reeve—in the basement of his two-story home.⁹ Examinations occurred on Saturdays and covered the week's lectures. In part, Litchfield's appeal was that it offered a course of law connected with and explained by a system of rational principles.¹⁰ To be successful, however, the new nascent law schools could not neglect the practice. In addition to lectures on various legal topics, students copied legal documents and usually spent time in short-term apprenticeships after completing their formal schooling.¹¹

Even in 1869, a time by which Harvard Law School had been established and in operation for some 50 years, the modern approach to legal education had not yet arrived. Law school was only 18 months long, did not require a college degree, and rarely, if ever, included examinations.¹² Classes became somewhat more theoretical, but the classroom experience was still lacking and occupied largely by mere recitations of passages from textbooks and probing by professors to ensure adequate memorization.¹³

The modern law school approach began in 1870 with the appointments of Christopher Columbus Langdell as dean of the Harvard Law School and Charles Elliot as the president of Harvard University just the year before. Elliot reformed a number of schools within the university and actively supported the hiring of professors at the law school who had little to no background in law practice.¹⁴ Langdell, it is well known, was the chief advocate and driving force in implementing what is commonly known today as the Socratic method as well as being a proponent of the case method—the systems by which students learn the law by reading and critically discussing and dissecting actual cases. His goal was to model American

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legal education on the continental, and more specifically the Germanic, approach and, at the same time, transform the study and practice of law into a legal science.¹⁵ The Germanic approach, while rigorous and successful, has often been criticized as overly “historical, theoretical, and philosophical.”¹⁶ To a lesser extent, American legal education fell prey to that objection as well. Although calls for integrating practical knowledge into legal education are very much en vogue today, even in 1917, John Henry Wigmore asked provocatively, “And why not a legal clinic as well as a medical and surgical clinic?”¹⁷

Following the lead set by Harvard in the 19th century, American law schools transformed legal education into the modern model

rules that would allow law students to practice law under certain circumstances.²³ Calls for reform, however, did not stop, and, in fact, took on new saliency and what seemed to be increasing frequency. In the early 1980s, the observed the deficiencies in relying exclusively on the traditional case method.²⁴ In 1992, the argued for increased attention to practical skills in law schools.²⁵ A similar call in the form of the *Best Practices for Legal Education* by Roy Stuckey and others was made in 2002.²⁶ In 2007, the Carnegie Foundation published *Educating Lawyers*, which argued for, among other things, better use of the second and third years in the form of more clinical opportunities and “capstone” courses.²⁷ Even more recently, in 2011 and 2013, the bar associations of New York



of the three-year program with regular examinations. In doing so, they elevated the quality of instruction and helped further develop the law into a learned discipline and profession. At the same time, however, training in practical skills began to decline. To quote one historian, “[t]he professors were hierarchically organized as full-time scholars. Even students participated as junior scientists; those with distinction ... edited and published notes and comments in ... scholarly” law journals.¹⁸ The success of the new law school model, however, was evident from the numbers. In 1870, 1,650 law students attended 31 law schools.¹⁹ By 1900, the numbers skyrocketed to 12,500 students at 102 law schools.²⁰

Despite the model’s early critics, the calls for more practical legal training did not firmly take hold until the 1960s.²¹ Influenced in part by movements for social reform and access to justice, law schools began developing legal clinics that would not only address social welfare problems but also provide necessary practical training for law students.²² By the end of 1970, 30 states had created special

and California joined the chorus, calling for increased attention to practical skills.²⁸

Law schools have heard the call for change and are responding. Today, legal education looks very different than it did in 1770s, the 1870s, or even the 1970s. In fact, few law school classrooms today resemble even the model so popular in the mid-20th century. Rather, class discussion dominates the typical law school class, and Langedellian “case books” now contain far more than just cases. Doctrine, statutes, regulations, journal selections, and even excerpts from material outside the field of law are not uncommon.²⁹ Moreover, skills training is and has been on the rise for decades. As of 2010, almost all schools offered courses in trial advocacy, and more than three-fourths offer courses in alternative dispute resolution, appellate advocacy, mediation, and transactional skills.³⁰ In fact, in two American Bar Association (ABA) surveys—one in 2002 and another in 2010—pinpoint alternative dispute resolution as one of the three largest growth areas in course offerings across

law schools.³¹ Live-client clinics are now standard, and most law schools, on average, offer three different clinics, with some offering significantly more.³² Ninety-six percent of schools responding to a 2010 ABA survey indicated they offered at least one externship opportunity, and 90 percent offered at least one drafting course.³³ Finally, all law schools require substantial instruction in legal writing in the first year, and “at least one additional writing experience after the first year.”³⁴

Without doubt, these changes have been important responses to the demand for the teaching of more practical skills. Law schools, however, could not do it alone. The practicing bar has played a crucial role in elevating the quantity and quality of practical training received by young lawyers. High-quality and dedicated adjunct professors are essential to the success and teaching of practical skills. Moreover, law firms have historically also taken on a mentoring role for new associates after graduation. However, they now face increasing pressure from clients who refuse to pay for the “training” of first-year associates.³⁵ Beginning in 2004, the supply of law firm jobs began to decline.³⁶ By 2009, there were twice as many applicants who passed the bar exam as there were available legal jobs.³⁷ This shortage has only highlighted the need for adequate skills training, as more than ever, new lawyers are entering law practice on their own with little to no post-graduation training or mentoring.

In light of these recent challenges, law schools again have begun to respond to the changing demands of the market place and the changing needs of their students. Law schools that have taken up the call to innovate and readjust have not gone unnoticed. In 2008, Washington and Lee decided to transform its entire third-year of law school to “practice-based simulations, real client experiences, and advanced explorations into legal ethics and professionalism.”³⁸ In place of elective courses in specific areas of specialization or interest, the third-year experience at Washington and Lee provides students with access to simulation opportunities, clinic experience, and externship opportunities.

My own alma mater, Tulane Law School, has similarly taken a leading role in this endeavor and engaged upon a multitiered approach to integrating skills in the curriculum. First, Tulane inaugurated a Skills Bootcamp program designed to help bridge the divide from school to practice. The Bootcamp focuses entirely on practical skills and training. Between the fall and spring semesters, students—typically in their third year—attend a week-long, all-day program where they work in small groups with seasoned lawyers to draft motions, interview clients, and “do a deal.” The week culminates with arguing the motion in court or submitting a binder to “close a deal.” Recently, Tulane also hired an assistant dean for experiential learning to coordinate the experiential and clinical offerings and to assist in the development of third-year capstone courses. Tulane has vigorously expanded its externship program and now allows students to earn academic credit for working anywhere in the world, provided the work occurs under the close supervision of a seasoned attorney and in close connection with faculty members to assure appropriate academic work in conjunction with the practice.

Similarly, Arizona State Law School has planned to set up a nonprofit law firm on campus that will attempt to address the legal needs of the underserved population by charging clients reduced fees from those generally provided in the legal market.³⁹ It anticipates employing 30 of its graduates as practicing lawyers who would

work under a supervising lawyer, thus providing a practical training and mentorship relationship giving new lawyers more opportunities to handle clients and cases.

These law schools are not alone in their varying responses to the current cries for reform. What they all have in common, however, is a partnership between the legal academy and the practicing bar. The Washington and Lee simulations involve, as its website describes, “a creative mix of traditional law faculty, new ‘professors of practice,’ and adjunct faculty drawn from the bench and bar.”⁴⁰ In 2013, Tulane’s Bootcamp relied upon the selfless dedication of more than 100 practitioners and judges from across the country who volunteered time to collaborate with a full-time member of the law faculty in teaching students essential on-the-ground practical skills. The teaching law firm model set to launch this summer by Arizona State will employ recent graduates under the supervision of “experienced supervising attorneys whose connections to the legal community run deep, and who are dedicated to training new lawyers.”⁴¹

Thus, a thorough legal education has always required a marriage between academic and practical skills. The historical balance has sometimes been uneasy and uneven—at times emphasizing practical skills at the expense of academic learning and at other times focusing on the theoretical aspect of law to the exclusion of skills training. Although glib news stories mock legal scholarship and suggest that its production is at the cost of practical training,⁴² neither the academic side nor the practical side can be ignored. Rather, the current challenge presents an opportunity for law schools to better integrate practical skills, which have long been present, with the already existing academic elements that have made law schools so historically strong. Despite all the uncertainty surrounding the current law school environment, what is certain is that these changes will not be the last. Perhaps, like Heraclitus, we should embrace the state of flux and realize that, to be successful, any structural change in legal education will require, as it historically has, the cooperation and participation of both law schools and the practicing bar. ☉

Endnotes

¹Bertrand Russell, *A HISTORY OF WESTERN PHILOSOPHY* 38-47 (1945).

²Karen Sloan, *What If Law Schools Opened Their Own Law Firms*, NAT. L.J., Aug. 17, 2011.

³M.H. Hoeflich, *Plus Ça Change, Plus C'est la Même Chose: The Integration of Theory and Practice in Legal Education* (1993), in 2 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES* 862-863 (Steve Sheppard ed. 1999).

⁴Joshua Kendall, *THE FORGOTTEN FOUNDING FATHER: NOAH WEBSTER'S OBSESSION AND THE CREATION OF AN AMERICAN CULTURE* 62 (2010).

⁵Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 318 (2d ed. 1985).

⁶Hoeflich, *supra* note 3, at 862-863.

⁷*See, e.g.*, Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, WASH. U. L. Q. 597, 604 (1981); Morris L. Cohen, *Thomas Jefferson Recommends a Course of Law Study* (1971), in 1 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES* 171-72 (Steve Sheppard ed. 1999).

⁸*See* Advertisement of the Litchfield Law School (1828), in 1 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES* 181-82 (Steve Sheppard ed. 1999). (Somewhat unsurprisingly, Thomas Jefferson was influential in the creation of the first chair of law at

an American school, which was established in at William and Mary.) See Friedman, *supra* note 5, at 320; McManis, *supra* note 7, at 609.

⁹Kendall, *supra* note 4, at 66.

¹⁰McManis, *supra* note 7, at 618.

¹¹David Clark, LEGAL EDUCATION AND THE LEGAL PROFESSION, IN INTRODUCTION TO THE LAW OF THE UNITED STATES 14 (D. Clark & T. Ansay, eds. 2002); McManis, *supra* note 7, at 618.

¹²Clark, *supra* note 11, at 14.

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.* at 15.

¹⁶Jutta Brunée, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 J. LEG. ED. 399, 414 (1992).

¹⁷John H. Wigmore, *The Legal Clinic* (1917), in THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 876-879 (Steve Sheppard ed. 1999).

¹⁸Clark, *supra* note 11, at 15.

¹⁹*Id.*

²⁰*Id.* at 15.

²¹*Id.* at 21.

²²*Id.*

²³George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 175 (1974).

²⁴American Bar Association, SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS (1979).

²⁵American Bar Association, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (July 1992) [hereinafter ABA Report].

²⁶Roy Stuckey et al., BEST PRACTICES FOR LEGAL EDUCATION (2002).

²⁷William M. Sullivan et al., EDUCATING LAWYERS: PREPARATION FOR

THE PROFESSION OF LAW (2007).

²⁸NYSBA Report on the Task Force of the Future of the Legal Profession, April 2, 2011; California Bar Association, Task Force on Admissions and Regulation Reform, Working Group Drafting Proposals for Discussion: Phase 1 (Version 2/12/13).

²⁹Clark, *supra* note 11, at 25.

³⁰ABA Report, *supra* note 25, at 75.

³¹*Id.* at 73.

³²*Id.* at 76 (indicating at least one law school offers eleven different in-house clinics and another offers fourteen off-site clinics).

³³*Id.* at 77.

³⁴2012-2013 ABA Standards and Rules of Procedure for Approval of Law Schools, Standard 302 (a)(3).

³⁵Sherry Karabin, *Law Firms Prepare Their New Associates*, CHICAGO LAWYER, September 1, 2012; Joe Palazzolo, *First-Year Associates: Are They Worth It?*, WALL ST. J. L. BLOG, Sept. 17, 2011.

³⁶Lincoln Caplan, *An Existential Crisis for Law Schools*, SUNDAY OBSERVER, July 14, 2012.

³⁷*Id.*

³⁸*Prepared for the Profession: Washington and Lee University School of Law Brochure*, [law.wlu.edu/deptimages/career%20planning/3L%20\(2\).pdf](http://law.wlu.edu/deptimages/career%20planning/3L%20(2).pdf)

³⁹Ethan Bronnier, *To Place Graduates, Law Schools are Opening Firms*, N.Y. TIMES, March 7, 2013, as corrected March 9, 2013.

⁴⁰*The Third Year in Detail*, WASHINGTON AND LEE SCHOOL OF LAW, law.wlu.edu/thirdyear/page.asp?pageid=651.

⁴¹*College of Law to Launch Teaching Law Firm in Summer 2013*, SANDRA DAY O'CONNOR COLLEGE OF LAW, www.law.asu.edu/News/CollegeofLawNews.aspx?NewsId=4416.

⁴²David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011.

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them with the foundations they need to do the above. This does not require overhauling the core of the legal education system, which has worked pretty well for more than a century. First-year law students will always need a solid grounding in what the law was and is—lawyers need domain knowledge just as much as doctors and accountants do. While a cliché, law school should teach you to “think like a lawyer”—who wants to hire a lawyer who can’t think like one? But thinking like a lawyer is not the same today as it was 100, or even 25, years ago. Law schools must challenge students to think about the legal future. How will climate change influence property law? How will liability law respond to robotics and human bioengineering? How will energy regulation law need to change to accommodate a renewable energy future? How can lawyers draw from nonlegal disciplines such as scenario planning and change forecasting to focus on the social, economic, technological, and environmental forces of the future that will put pressure on law to change and will open up new legal opportunities? How can lawyers use the emerging law + tech tools to enhance service to clients? How can lawyers reconceive the way they deliver legal services? At Vanderbilt Law School, for example, we have launched a new upper-level elective called Law Practice in 2050 to put students in the position of asking and answering questions like these.

New lawyers looking ahead to a career of 30 to 40 years must

anticipate the possibility of sea changes in their chosen fields as climate change, globalization, technological advancements, demographic shifts, and other forces put stress on existing legal doctrine and demand new institutions and new legal tools. The most successful lawyers participate in these processes and take anticipatory steps to adapt rather than simply watch them happen and react. My objective as a legal educator is to help my students think this way, so they are prepared for the big reinvention. Are you prepared? ☉

Endnotes

¹For examples of how climate change adaptation will demand new legal doctrines and regulatory responses, see *The Law of Adaptation to Climate Change: U.S. and International Aspects* (Michael B. Gerrard and Katerina Fischer Kuh, eds., ABA Press, 2012).

²See Cravath, Swain and Moore, LLP, *The System's History*, www.cravath.com/systemshistory.

³See Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (2010)

⁴For a contemporary's account of Langdell's transformation of legal education, see Charles W. Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518 (1920).

⁵This is a theme of Richard Susskind's more recent book, *Tomorrow's Lawyers: An Introduction to Your Future* (2013).