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## Thoughts on American Legal Education: Past, Present, and Future

Marc D. Falkoff\*

### 【국문초록】

필자는 법전원은 학생들이 졸업후 법조직에 종사하고 성공하기 위하여 필요한 실무교육에 중점을 두는 것을 사명으로 한다는 칼 르웰린과 같은 과거의 위대한 학자가 주장한 바에 전적으로 동의한다. 그러나 르웰린과 마찬가지로, 필자는 法學 아닌 一般大學院 교육전통을 혼합하여 학생들의 內的 領域을 확대하고, 이를 법실무교육의 한 부분으로 하는 것이 우리가 학생들에게 부담하고 있는 負債라고 믿고 있다. 그 질적인 균형점을 찾는 것이 중요한 과제의 하나라 할 수 있다. 우리는 변호사 고용시장의 停滯를 이유로 현재 미국 내에서 제기되고 있는 법전원 및 변호사 수를 감축하자는 논의에 대하여는 동의하지 않는다는 것을 강조하고 싶다. 똑같은 論法이 경제위기 기간에도 나온 바 있다. 한편 이는 유대인과 최근의 이민자들에 의하여 법률시장이 전반적으로 장악되고 있다는 우려가 암묵적으로 이러한 주장의 배경이 되고 있다. 그러나 누구도 “미국에는 너무 많은 변호사”가 있다고 주장할 수 있는 합리적 근거를 댈 수 없다. 현재 형사변호사들은 매일 검사로부터 유죄인부협상을 하도록 강요되고 있는데, 이는 많은 공익변호사들이 합리적으로 사건관리를 할 수 없을 정도로 사건과중으로 압박받고 있기 때문이다. 임차인들은 자신들을 대리할 변호사를 고용할 비용이 없어 거주지에서 쫓겨나고 있는 현실이다. 가정 내 폭력의 피해자들은 자신을 보호할 수 있는 보호영장을 어떻게 집행할 수 있는지 알 수 없어 보호의 범위 밖에서 신음하고 있다. 한마디로 사회 빈민층 미국인들을 도와줄 있는 변호사의 수요는 다른 어느 때보다 많은 현실이며, 그러한 빈민층은 변호사를 선임할 자력이 없다. 만약 주정부가 그러한 빈민층을 위하여 변호사를 선임할 수 있도록 지원하지 않고, 변호사들이 자발적으로 서비스를 제공한다고 보는 것은 비현실적이다. 이러한 문제는 또 다음 기회에 논의할 수 있는 좋은 주제가 될 것이다.

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I am grateful for the invitation to present my thoughts before this distinguished group of academics. I am very pleased to represent Northern Illinois University College of Law here in South Korea, and honored to play my part in the informal academic exchange program we have developed with Chosun University.

I hope that I am worthy of the honor, but fear I cannot do justice to the important topic you have asked me to address. I say this not out of modesty but out of candor. Some of our finest legal thinkers have spoken and written about the state of legal education in the United States. These include twentieth-century luminaries like the iconoclastic scholars Jerome Frank, Karl Llewellyn and Grant Gilmore. And recently many academics have asked how best to educate our students for productive and meaningful careers in the law during a time of rapid transformation in the legal market. In my remarks, I will draw heavily from the insights of my predecessors.

As a professor and administrator at a public law school, I have witnessed first and widespread changes in the legal market for our graduates, and I have observed how that transformation has affected how and what we teach our students. Some of the disruption in the legal market was undoubtedly hastened by the Great Recession. But the truth is that law firms had already turned to computer programs for document review, were increasingly relying on contract lawyers, and had begun outsourcing legal work to India and the Philippines well before the fall of Lehman Brothers in 2008. Moreover,

innovations like Legal Zoom and other do-it-yourself online services had likewise already gained a foothold before the economic crisis hit.

The shifting landscape of the legal economy may have been hastened by the past decade's economic turmoil, but change itself was inevitable. And these changes have forced law schools to consider ways of transforming the delivery of a legal education. The chain of causation is inescapable. As clients have found new ways to get legal services, they have exerted downward pressure on billing, which has created changes in the economics of law practice, which in turn has meant fewer well-paying law jobs. Add to this new reality skyrocketing law school tuition and graduate debt loads, fewer law school applicants, smaller class sizes and less tuition income for law schools, and the need for some degree of rethinking the modern law school is inevitable.<sup>1)</sup>

But, as you can imagine, institutions do not transform themselves easily. Metamorphosis is difficult, even assuming we decide on exactly how it is that we want to change. That said, you will be hard-pressed to find an American legal academic who does not recognize that the old way of doing things of asking students to abide three years of casebook study, podium lecturing and Socratic questioning, with a small dose of experiential learning are no longer, in and of themselves, adequate to provide a meaningful education for tomorrow's lawyers.

Before I broach today's challenges and explain what we are doing at Northern Illinois to meet those challenges, I want to look backwards toward the origins of modern legal education.

## **I . Langdell and the Origins of Contemporary American Legal Education**

The United States has always needed lawyers, and lawyers have always

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1) See Nancy Rappaport, Rethinking U.S. Legal Education: No More Same Old, Same Old, 45 Conn. L. Rev. 1409, 1413-14 (2013).

needed training. But from the early days of the Republic through much of the nineteenth century, an aspiring lawyer typically learned his trade not by attending law school, but rather by reading law which meant apprenticing himself to a practicing lawyer.<sup>2)</sup> To be sure, some universities offered a smattering of law course seven in the early nineteenth century, and by the middle of the century, a relative handful of universities including Harvard, Yale and Columbia had established schools of law. But few aspiring lawyers began their careers by pursuing a formal education, and law itself had tenuous standing as a discipline worthy of study and teaching in the university. Lawyering was understood to be a practical skill, and preparing for practice meant gaining a technical education. The best way to do that was by simply doing law.

A great shift came about in the 1870s at Harvard Law School, when Dean Christopher Columbus Langdell sought to put the study of law on the same footing as other academic disciplines in the university. His one great idea (as Professor Grant Gilmore mockingly described it) was that law was a science. Law, according to Langdell, was comprised of a small set of finite, consistent principles that were rooted in nature and natural law. Common law judges, in drafting their legal opinions over the centuries, had done a better or worse job of articulating fundamental legal doctrine. It was the role of the scholar to separate the wheat from the chaff, through a methodical and logical analysis of those legal opinions to uncover true, unchanging doctrine. Accordingly, for Langdell, the library is the proper workshop of [law] professors and students alike; it is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologist, the botanical

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2) Professor Stephen R. Alton has explained that in the early nineteenth century a prospective lawyer in fact had several options open to him. These included choosing from among a small number of courses offered in the few colleges already formed in the United States, attending one of the few non-university-affiliated private law schools, engaging in private self-study of law, clerking in a court clerk's office, pursuing legal studies in England, or by far the most commonsensical an apprenticeship. Stephen R. Alton, *Roll Over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 Okla. City L. Rev. 339, 342-43 (2010).

garden to the botanists.<sup>3)</sup>

It may seem absurd to think of law literally as a branch of natural science, and it did not take long before the Langdellian approach was critiqued and its premises undermined. But there can be no dispute that the pedagogic reforms that Langdell instituted in light of his theory took root and have shaped legal education to the present day. Among the innovations springing from his conception of law as science was the casebook method, which had students read through a selection of edited appellate opinions in order to derive the legal principles captured in them. For Langdellians, this was the critical skill that a student needed in order to learn to think like a lawyer. A corollary reform was the use of the Socratic method with the professor peppering the law student with a series of increasingly nuanced questions about rules and doctrine, designed to sharpen his critical thinking skills. Other Langdellian innovations included assessment by high stakes final examination, and the formalization of legal education as postgraduate and three years in length.

Before I discuss the subsequent history and critiques of Langdell's method, I want to pause to consider its implications. By putting the study of law on equal footing with other university disciplines, Langdell reconceptualized the practice of law from a craft to a science. As such, he believed a student should receive an enhanced liberal education from the university, rather than vocational training in a set of practical skills. As Langdell himself asserted, If law be not a science, a university will [best] consult its own dignity in declining to teach it, for otherwise it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices.<sup>4)</sup> (Many years later, sociologist Thorstein Veblen would suggest that law schools in fact had no more place in the university than schools of fencing or dancing, since training for proficiency in some gainful occupation has no connection with the higher learning.<sup>5)</sup>)

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3) Christopher Columbus Langdell, *Harvard Celebration Speeches*, 3 *Law Quarterly Rev.* 123, 124 (1887).

4) *Id.*

The premises of Langdell's great idea were undermined in short order. First, with the rise of the social sciences in the American university system in the latter part of the nineteenth century, it quickly became obsolete to think of law as a branch of natural science. With the establishment of economics, political science, sociology, and related disciplines, law seemed better characterized as essentially sociological.<sup>6)</sup> This reconceptualization was in accord with the proto-legal realism of Oliver Wendell Holmes, Jr., who mocked Langdell's conception of the common law as an eternal brooding omnipresence in the sky,<sup>7)</sup> instead suggesting that law was just the conventional creation of men exercising governmental power to bring about their policy preferences.<sup>8)</sup> Langdell's ideas also predated passage of the Interstate Commerce Act in 1887 and the creation of the first regulatory agencies in the United States. Langdell's conception of law as primarily all about common law quickly became anachronistic in light of the rise of the administrative state.<sup>9)</sup>

## II. Legal Realism and the Rise of Skills Training

Because few members of the legal academy would today describe themselves as Thomists that is, adherents to the natural-law philosophy propounded by Thomas Aquinas it may seem strange that Langdellian pedagogy retains to this day a tight grip on how law schools educate our students. Why do we still teach out of casebooks filled with appellate court opinions? Why do we subject

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5) Thorstein Veblen, *The Higher Learning in America: A Memorandum on the Conduct of Universities by Business Men* 191, 211 (1954), quoted in David R. Barnhizer, *The Purposes and Methods of American Legal Education*, 36 *J. Legal Prof.* 1, 14 (2011).

6) Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About it*, 60 *Vand. L. Rev.* 609, 636 (2007).

7) *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

8) See generally Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457 (1897).

9) Rubin, *supra* note 7, at 636.

our students to Socratic questioning in the classroom? And why do we assess their performance almost exclusively with high stakes final examinations?

The answer to these questions is twofold. First, we still utilize the Langdellian pedagogy because we think it works, albeit not for the reasons proposed by Langdell. Second, today we do more than teach out of casebooks, and have increasingly supplemented our students' legal education with exactly the kind of skills and practice training that Langdell decried.

I will not spend long defending our continued use of the casebook method and Socratic questioning, which remain widespread even though there is no shortage of academics who have attacked them on principle, claiming, for instance, that we are trapped in a pedagogic fossil.<sup>10)</sup> Many educators, myself included, continue to believe in the importance of cultivating traditional lawyer skills, which have been described by Mari J. Matsuda as including case analysis and argument from analogy, statutory interpretation, and advocacy with precision and anticipation of counterarguments.<sup>11)</sup> All of these skills are fostered by casebook learning and some form of Socratic dialogue. Likewise, though the idea of law school as being designed to help students think like a lawyer is often derided, many academics believe their own law school experience (casebook instruction included) helped bring rationality and clarity to their previously muddled habits of thought. There are probably no pure Langdellians in the academy today, but it seems clear that some form of casebook and Socratic pedagogy will remain a significant component to traditional legal education for the foreseeable future.

More interesting has been the question of how best to supplement the Langdellian-infused pedagogy. By the 1930s and 1940s, some prominent legal academics had begun to call for radical reform in legal education. Law schools had become the premier way to train the elite lawyers who would go on to staff the law firms that had grown to serve America's burgeoning corporations.<sup>12)</sup> But

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10) *Id.* at 612.

11) Mari J. Matsuda, *Admit That the Waters Around You Have Grown: Change and Legal Education*, 89 *Indiana L.J.* 1381, 1393 (2014); see also Alton, *supra* note 3, at 351.

12) Alton, *supra* note 3, at 349.



legal realists like Jerome Frank believed the abstracted scientific education they were receiving from poring over appellate decisions was leaving students unprepared for the messy reality of the practice of law.<sup>13)</sup> Students lacked training in practical skills and, at least according to Frank, the cure was to institute some kind of clinical instruction.<sup>14)</sup> Another legal realist, Karl Llewellyn, excoriated the legal training on offer at elite schools like Harvard, Yale and Columbia, writing that it blinds, it stumbles, it conveyor-belts, it wastes, it mutilates, and it empties.<sup>15)</sup>

Llewellyn advocated for a law school curriculum that treated law as both a practical skill and a liberal art. He thus offered some praise for the German model of legal education, which had students study law in the classroom for three years, followed by three years of rotating apprenticeships.<sup>16)</sup> But he also wrote,

The truth is that the best practical training a University can give to any lawyer who is not by choice or unendowment doomed to be a huckster or shysterthe best practical training, along with the best human training, is the study of law, within the professional school itself as a liberal art.<sup>17)</sup>

Llewellyn's thoughts were very much in line with the progressive educational vision of the American pragmatist philosopher John Dewey, who advocated for experiential learning, active learning (for example, involving students in curriculum

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13) Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 *Ind. L. Rev.* 735, 73839 (2011).

14) Jerome Frank, *A Plea for Lawyer-Schools*, 56 *Yale L.J.* 1303, 1315 (1947); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 *U. Penn. L. Rev.* 907 (1933).

15) Karl Llewellyn, *On What's Wrong with So-Called Legal Education*, 35 *Colum. L. Rev.* 651, 65253 (1935).

16) *Id.* at 657. Llewellyn nonetheless faulted the tendency of the German system to focus apprenticeships on judges' chambers. *Id.*

17) Karl N. Llewellyn, *The Study of Law as a Liberal Art*, in *Jurisprudence: Realism in Theory and Practice* 375, 376 (1962), quoted in Francis J. Mootz III, *Introduction: Symposium on the State and Future of Legal Education*, 45 *McGeorge L. Rev.* 1, 3 (2013).

design), situated or real-world learning, interdisciplinary learning, and collaborative learning.<sup>18)</sup> Interestingly, Dewey was invited by Dean Harlan Fiske Stone to teach for a year at Columbia Law School, where Llewellyn was a law professor, in the 1920s. The Columbia Law School experiment in progressive, practice-infused legal education was a failure, however, in large part because there was no faculty buy-in for implementing the kinds of reform of the Langdellian method advocated by Dewey and Llewellyn.<sup>19)</sup>

In fact, the call for practical training and clinical legal education went largely unheeded for decades. But in the 1970s, 1980s and 1990s, clinics established themselves in American law schools, providing law students with the experience of representing real clients under the supervision of a practicing lawyer. As a new century dawned, law schools like mineled by Presidential Teaching Professor David Taylorbegan developing sophisticated skills training and simulation courses to help prepare students for the real work of being a lawyer upon graduation.

### III. The Present State of Legal Education

In this part, I want to give you a sense of what the typical American law school looks like today. In the next part I will offer my views of the structural challenges we face. In the final part of my talk, I will discuss some of the current proposals for reforming American legal education that are being debated, and my thoughts about what kind of changes are possible.

What are American law schools doing today? In large part, we are doing as Langdell proposed a century and a half ago. We offer a heavy diet of doctrinal courses, many of which are taught in the iconic manner with a professor engaging in question-and-answer dialogue with students who have prepared

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18) John Dewey, *Democracy and Education* (1916).

19) Sara K. Rankin, *Tired of Talking: A Call of Clear Strategies for Legal Education Reform: Moving Beyond the Discussion of Good Ideas to the Real Transformation of Law Schools*, 10 *Seattle J. for Soc. Justice* 11, 3133 (2011).

for class by reading a series of judicial appellate opinions. In my opinion, there are many justifications for not abandoning this approach.

The first is simply that we think the casebook method works. To be more precise, it does some of the work that we think is necessary in training lawyers. Stated broadly, the United States is a common-law country, and judges decide cases not just by reference to statutes and constitutional provisions, but also by engaging in a dialogue with earlier judicial opinions in an effort to maintain consistent and rational legal doctrine. Competence in the skills that casebook training promotes learning how to deconstruct an opinion, derive its holding, critique its assumptions, analogize its holding to new situations, and distinguish its holding from others remains one of the key learning outcomes for law students. In large part, what it means for a student to think like a lawyer is achieved through this type of instruction.

Second, casebook instruction remains a significant part of the law school experience because such instruction remains an efficient way to prepare our students to take and pass the bar exam—the licensing exam that stands as the gatekeeper to a career as a practicing lawyer. Lecture and Socratic courses allow for efficient information transfer from professors to students. For better or worse, in order to pass the bar exam, students must be familiar with a broad range of areas of law. Because students seem increasingly unable to master the volume of material tested on the bar in private courses during the six to eight weeks immediately after graduation and before the administration of the bar exam, law schools increasingly insist that students take more bar courses to prepare them for the exam.

Third, the case method as practiced in law schools has already evolved significantly from what Langdell was doing at the end of the nineteenth century. Casebooks are no longer mere compendia of selected and edited judicial opinions. Rather, they now feature a variety of other sources, including not only statutes and constitutional provisions, but also excerpts from sociological, economic, and philosophical sources. The method has, to be sure, come unmoored from its theoretical underpinnings. No longer are professor and student engaged in a search for true doctrine. Rather, the rise of the social

sciences and the influence of the Legal Realists has led to a casebook method that interrogates judicial choices and encourages students to critique the law from the outside.

We are also doing much more in our law schools today. Although progressive and practical legal education failed to gain a foothold at Columbia and other law schools in the first half of the twentieth century, the rise of clinics from the 1970s on has been steady and profound. Today there are probably no law schools in the United States that do not offer a robust clinical program, in which students learn the law primarily through practical, real-world engagement with clients. Whether we should be enhancing clinical opportunities, and how we might do so, is a question I address again briefly in the last part of my talk.

In addition, we provide students with externship opportunities, encouraging them to work for lawyers or judges in law offices or judicial chambers in exchange for course credit rather than money. And we offer simulation courses and moot court opportunities, which allow students the chance to hone practical legal skills in a safe setting where mistakes can be tolerated more easily than in real-world situations where a client's wealth or liberty are on the line. Finally, law schools are increasingly focusing attention on improving our students' writing skills, since they are increasingly arriving unable to communicate in a manner adequate for a legal professional.

Doctrinal classes. Writing classes. Clinics, externships, and skills classes. At base, this is what a typical law school curriculum has looked like for the past decade and longer. This basic structure is unlikely to change, for some of the reasons already discussed. The key question for us today is whether there is anything we can do within the boundaries of this structure that will help better prepare our students for success in the legal marketplace.

The answer is clearly yes. Much can be done. But to determine how to reform our legal pedagogy, we need to address more forthrightly the nature of the challenges presently facing American law schools.

## IV. Some of the Challenges We Face

A first challenge, as I noted earlier, has been the downward pressure on the legal employment market. Particularly since the Great Recession hit in 2008, but starting well before then, good-paying jobs for law school graduates have seen a rapid decline. The tight labor market for lawyers has also come at a time of strained state budgets, which means that even at public law schools tuitions have been rising at a startling rate. The rise in tuition costs has unsurprisingly led to a tremendous increase in the amount of debt with which law students are graduating. Across the nation, tuition and costs for law school frequently top \$200,000 for three years, and the average debt for law graduates (exclusive of the debt incurred for as undergraduates) has been about \$120,000 in recent years.

All of this means that students are no longer sanguine about their prospects for gaining meaningful legal employment upon graduation from law school. In fact, annual applications to law school have fallen nearly 50% nationwide since 2010. The ordinary predictors of success in law school the applicant's undergraduate grade point average and Law School Admissions Test scores have declined across the applicant pool. This reality has left all but the most elite law schools in the United States with a Hobson's choice. The law schools could continue to accept applicants in the same numbers as years past, thereby keeping tuition income steady but significantly lower the quality of the incoming class as well as lowering the likelihood that their graduates pass the bar exam in adequate numbers. Or the law schools could hold the line on student qualifications, in which case they will surely accept far fewer students and lose the tuition money necessary to allow the school to function. In fact, schools have typically adopted some combination of lowered class size and reduced applicant qualifications. In practice, this means that schools have fewer financial resources and more responsibilities for providing remedial education for their matriculants.

A second challenge facing law schools is the changing nature of the legal marketplace itself. Leave aside for the moment the fact that, at least in the

short term, there are fewer available legal positions that will support a recent law school graduate who is saddled with debt. The reality is that the nature of legal jobs is changing in a variety of ways, and the on-the-job training that law firms have historically provided for new graduates has largely disappeared.

I have already briefly noted some of the ways in which the legal market is changing. For example, software advances now allow computer programs to engage in document review more efficiently and cheaply than junior lawyers. This technological advance is of course welcomed by law firm clients, and relieves busy lawyers of some of the tedium that attends a lawyer's job early in her career. But this technology also makes some lawyer positions redundant. Likewise, the use of short-term contract attorneys and the outsourcing of similar tasks to lawyers in other countries, including particularly India, offers economies to clients but contributes to the pinch in law employment in the United States.

Different types of technological advances have impacted the legal job market not just for medium- and large-sized law firms, but also for small-firm and solo practitioners who could, until the recent past, hope to earn a living by assisting non-corporate clients do things like draft trusts documents, wills, or simple contracts. The wealth of free information on the Internet has itself led potential consumers of law services to forego the hassle and expense of retaining a lawyer.<sup>20)</sup> Internet technologies like LegalZoom and Nolo Press offer a more sophisticated self-help option for individuals in need of legal services.<sup>21)</sup>

The very idea of the law firm, too, is under assault by Internet technology. We have seen the rise of virtual law firms, where associates often have no physical office. We have seen the creation of freemium companies like Rocket Lawyer, Avvo, and Law Pivot, which offer free legal advice online by participating lawyers, who then seek to parlay their interactions with advice seekers into paying work.<sup>22)</sup> And, more problematic, we have seen a growth in

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20) See Jon M. Garon, *Legal Education in Disruption: The Headwinds and Tailwinds of Technology*, 45 *Conn. L. Rev.* 1165, 1167 (2013).

21) *Id.* at 1174.

settlement mills, whose business model relies less on lawyer expertise than on high volume, low cost, aggressive advertising, and paralegal work.<sup>23)</sup>

But it is the third challenge that I want to focus on for the remainder of my talk, because it directly implicates how and what we teach our students, rather than just impacting the availability of jobs for our law graduates. One of the important effects of the changing economics of law firms large and small is that firms are no longer willing or able to provide the kind of on-the-job training that novice lawyers in the United States have heretofore routinely received in their first years in practice. With the advent of law schools as the primary institution preparing aspiring lawyers for practice, and the concomitant decline and eventual disappearance of legal apprenticeships, novice lawyers required sustained training in their areas of practice upon taking a new position. To some degree this kind of training was and remains inevitable. It is impossible to teach students the nuts and bolts of every area of law that they could possibly enter. Students graduate to take positions as criminal prosecutors and defenders, as compliance officers, as big-firm transactional lawyers, as human rights advocates, as judicial clerks, and so on. By necessity, legal training must be broad enough to prepare students for any area of law they might enter.

It is thus unreasonable for the legal community to demand that law schools produce practice ready lawyers, which is something we often hear even though we are not sure precisely what it means.<sup>24)</sup> Is a practice-ready law-school graduate someone who can draft articles of incorporation, a civil complaint, or interrogatories without any assistance? Someone who can stand before a criminal court judge on her first day on the job and argue on behalf of his client? Someone who can draft a will without any models?

That said, we law school professors and administrators are not oblivious to

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22) *Id.* at 118183.

23) *Id.* at 1184.

24) See, e.g., Illinois State Bar Association, Report and Recommendations of the Special Committee on the Impact of Current Law School Curriculum on the Future of the Practice of Law in Illinois 8 (2016) (describing need for practice ready lawyers without defining what is meant by the phrase).

the fact that the legal community sees deficits in our students' education. It is therefore incumbent upon us to constantly reassess the value we are providing for our students and seek to improve the quality of the educational experience they receive from us. In the last part of my talk, to which I now turn, I will discuss some of the proposals that we at Northern Illinois and other academics are considering as we move deeper into the twenty-first century.

## V. The Future(s) of Legal Education

I profess no special insights into how legal education will be transformed in the future. But I can report to you both the nature of the conversations that my colleagues and I are engaged in right now, and some of the many provocative recommendations for modifying pedagogy that have been offered by academics in recent years.

To begin, I must acknowledge several influential monographs that have advocated, to various degrees, a restructuring of legal education to deemphasize the teaching of doctrine and to focus instead on honing law students' practice skills. In what is known after its principal author as the McCrate Report, the American Bar Association in 1992 suggested ten fundamental lawyering skills necessary to develop in students to narrow the gap between law school and legal practice, including problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.<sup>25)</sup> These recommendations engendered discussion but only modest reforms in the law schools, leading to another report from the Carnegie Foundation in 2007 (not long after I began teaching full time). The Carnegie Report acknowledged the

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25) American Bar Association, *Legal Education and Professional Development: An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 13840 (1992) [McCrate Report].



hybrid nature of the law school as institutions for practical training and for scholarly productivity, but called faculties to task for emphasizing scholarship over the practical training of students.<sup>26)</sup> Issued at the same time as the Carnegie Report was another monograph prepared by clinical law faculty, usually referred to as the Stuckey Report (after its author), which likewise decried the lack of meaningful skills training in law schools, offered a host of suggestions, and further commented on the lack of professionalism that novice lawyers reportedly displayed in practice.<sup>27)</sup> These latter two reports in particular have gotten some traction in the law schools.

Of late academics have been pushing for the broad reforms advocated by the McCrate, Carnegie, and Stuckey reports, but have focused particular attention on challenges raised by technology and the shrinking legal employment market.<sup>28)</sup> Some of the more interesting ideas include the following:

First, we should rethink the one size fits all law school.<sup>29)</sup> Legal education across the United States is remarkably uniform, with law schools drawing their faculty from the graduates of a stunningly small number of elite law schools, often with little experience in the actual practice of law. Teaching loads vary little, and scholarly productivity is universally required of law professors across the nation. Students too are taught largely in the same manner, even though the jobs that graduates of the Harvard or Columbia law schools will likely take are dissimilar to the public service and small firm jobs that graduates of other law schools will likely accept to begin their practice. Perhaps some institutions should embrace the role of a teaching or technocratic

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26) William M. Sullivan et al., *Educating Lawyers: Preparation for the profession of Law*, 45 (2007) [Carnegie Report].

27) Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Road Map*, 15 (2007) [Stuckey Report].

28) Carrie Menkel-Meadow has observed that in recent years we have been bombarded with news and scholarly articles about the crisis in legal education. Carrie Menkel-Meadow, *Crisis in Legal Education or the Other Things Law Students Should be Learning and Doing*, 45 *McGeorge L. Rev.* 133, 133 (2013).

29) See, e.g., Carasik, *supra* note 14, at 770; American Bar Association Task force on the Future of Legal Education, *Report and Recommendations* 23 (2014).

school, and leave to the professoriate of elite law schools the responsibility for producing legal scholarship.

Second, we should truly embrace the recommendations of the McCrate, Carnegie, and Stuckey Reports, and make greater efforts to enhance our students' experiential learning opportunities, including expanding and mandating that students participate in a clinic or externship as a prerequisite for graduating.<sup>30)</sup> In a contracting job market practical skills are more necessary than ever for new law graduates. If clients of law firms have become more savvy and are no longer willing to subsidize the apprenticeships of new lawyers, then law schools will have to do their best to make their students more practice ready. Of course, as I mentioned earlier, it remains unclear whether we can agree about what it means for a graduate to be practice ready. While we are unlikely to reach real consensus on that question, it is incumbent upon law schools, in my opinion, to reach out into the legal communities that will be absorbing our graduates and find out precisely what skills and knowledge legal employers want from new lawyers. That said, we must acknowledge that skills training and particularly clinical training is very expensive,<sup>31)</sup> and state law schools in particular are dramatically underfunded.

Third, we should continue deemphasizing Socratic teaching, high-stakes examinations, and similar summative assessment methods for our students. Although many of us believe there is significant value in having students engage in public oral exchange with a professor about the nuances of legal doctrine, the practice is widely known to inspire anxiety in students. It should not remain the default method of educating our students across all doctrinal courses. Likewise, grading that depends on a single examination after a semester of study needlessly makes students miserable. Moreover, by relying

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30) See, e.g., Erwin Chemerinsky, *Rethinking Legal Education*, 43 *Harv. Civ. Rights-Civ. Liberties L. Rev.* 595, 595-96 (2008).

31) Katherine Kruse, *Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice*, 45 *McGeorge L. Rev.* 8, 36 (2014). Among the less expensive proposals she advocates in this vein are offering online modules and short courses for legal topics that are taught on the bar, as well as jettisoning the use of casebooks for upper level classes. *Id.*

on summative assessments we lose the opportunity to learn, while we are teaching, what our students do and do not understand about our lessons. In a related vein, we should consider introducing courses into the curriculum that promote self-reflection and mindfulness in our students, as one of my colleagues, Professor Laurel Rigertas, has recently done.<sup>32)</sup>

Fourth, we should prepare our students to be problem solvers and to go out into the world to seek to enhance social justice. Professor Carrie Menkel-Meadow has, to my mind, made a strong argument that the talk we hear in the United States that too many lawyers being produced by law schools is overblown. It is not that there are too many lawyers, or too many law school seats, or even that there are not enough jobs, she explains, it is that those who are trained by studying law could study different things and practice or work with more appropriate knowledge bases and skills sets.<sup>33)</sup> Her suggestion is that we figure out ways to train our students to build institutions to help solve social problems. Among the training that would be necessary to include in the legal curriculum are problem-solving strategies, economics, organizational development, psychology, decision-making, human resource management.<sup>34)</sup>

Fifth, we should teach more of our students about the business of law and how to manage a legal practice. Although graduates from elite schools are unlikely to hang out a shingle as a solo practitioner or to join a small firm, it is not at all uncommon for graduates from regional state schools to begin practicing on their own or in a small firm immediately upon graduation. How one goes about opening banks accounts, maintaining escrow accounts, reading a balance sheet, and purchasing malpractice insurance, among a hundred other things, are mysteries to many of our graduates. But we must also assure that our graduates are tech savvy and understand how to practice law in an environment that is highly networked and specialized, and where competitors

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32) See also Carasik, *supra* note 14, at 780.

33) Menkel-Meadow, *supra* note 29, at 134.

34) *Id.* at 146; see also Beverly Petersen Jennison, *Beyond Langdell: Innovating in Legal Education*, 62 *Catholic U. L. Rev.* 643, 672 (2013) (advocating for the adoption of a problem-solving curriculum).

are increasingly offering unbundled legal services to potential clients.<sup>35)</sup>

Sixth, we should continue to teach students to think like a lawyer and to cultivate liberal habits of mind. Personally, I believe it is important to embrace the idea of law school as a provider of an advanced liberal education for our students. We do not train our students to be problem solvers just by asking them to practice skills like brief writing or interviewing techniques, or by literally solving problem sets in class. We really teach them to be problem solvers by broadening their horizons and introducing them to new ideas from economics and sociology, or even from literature. One scholar has suggested every lawyer should be taught to read a balance sheet, should be able to converse in a language other than English, and should memorize at least one poem by heart.<sup>36)</sup> While the list is designedly quirky, I am sympathetic to her motivations.

## VI. Conclusion

I want to conclude by again thanking you for inviting me to speak with you. I also want to emphasize some bottom line points for me. First, I agree with past greats like Karl Llewellyn that it is the duty of law schools to provide our students with a practical education that prepares them to enter the profession and succeed. But like Llewellyn, I believe that cultivating the mind in the tradition of a liberal-arts graduate school is part of the necessary practical training we owe our students. Finding the right balance is our chief challenge. I also want to emphasize that I do not agree with the call, heard recently in the United States, to reduce the number of law schools and law school graduates, due to a glut of lawyers in the legal employment market. This same type of rhetoric appeared during the Great Depression, and was motivated at least implicitly by fears that Jews and other recent immigrants were gaining too strong a foothold in the legal market.<sup>37)</sup>

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35) See Garon, *supra* note 21, at 1182.

36) Matsuda, *supra* note 12, at 1397.

No one could reasonably claim that we have too many lawyers in the United States. Far from it. Every day criminal defendants are coerced into accepting plea deals from prosecutors because their public-defender lawyer is burdened with a caseload exponentially too large for her to manage responsibly. Tenants are evicted because they lack the resources to hire a lawyer to help them. Victims of domestic abuse are left unprotected because they are unable to figure out how to get protective orders enforced. In a word, the need for lawyers to serve underprivileged Americans has never been more profound, but the poor cannot afford lawyers.<sup>38)</sup> But unless state governments undertake the obligation to pay for lawyers for the impoverished, it is unrealistic to expect lawyers to be able to help.

But that is a topic for another time.

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37) See Bryant C. Garth, Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education, 24 *Stanford L. & Policy Rev.* 503, 504 (2103).

38) See, e.g., Mary Lu Bilek et al., Twenty years After the McCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar, and Judiciary, 6 (2013).

【Abstract】

Thoughts on American Legal Education:  
Past, Present, and Future

Marc D. Falkoff\*

In this piece, Dean Marc D. Falk off recounts the history of modern legal education in the United States in order to better understand the nature of the challenges that law schools currently face and to assess the wisdom of proposed reforms of the American legal education system. He notes in particular the historical tension between law as a practical or technical endeavor and law as an academic discipline worthy of a place in the university. American academics have never fully accustomed themselves to the hybrid nature of law and legal education, with the result that they have failed to provide their students with an ideal balance of practical training and an advanced liberal arts education. Making particular reference to structural changes in law firms and the legal employment market, Dean Falkoff proposes a half-dozen reforms for contemporary law schools.

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