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Best Practices on "Best Practices": Legal Education and Beyond

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BEST PRACTICES ON "BEST PRACTICES": LEGAL EDUCATION AND BEYOND

IRA P. ROBBINS*

"Best practices" has become one of the most common research and development techniques in the United States and throughout the international community. Originally employed in industry, the concept sought to identify superior means to achieve a goal through "benchmarking," thereby allowing companies to obtain a competitive advantage in the marketplace. In recent decades, the use of best practices has become widely popularized, and is frequently utilized in the areas of administrative regulation, corporate governance, and academia. As the term has grown in popularity, however, so too has room for its abuse. In many instances, the term has been invoked to claim unsupported superiority in a given field.

This article examines the history behind the emergence of best practices, summarizes the prevailing models of the concept, surveys the worst practices on best practices, and proposes a working definition. It then applies that definition to the Clinical Legal Education Association publication, Best Practices for Legal Education. *While there are contexts in which identifying and applying best practices may be appropriate, the article concludes that using best practices when thinking and writing about legal education is misleading and inappropriate.*

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Every time somebody recommends a doctor, he's always the best. "Oh, is he good?" "Oh, he's the best. This guy's the best." They can't all be the best. There can't be this many bests. Someone's graduating at the bottom of these classes, where are these doctors? Is somewhere, someone saying to their friend, "You should see my doctor, he's the worst. Oh yeah, he's the worst, he's the absolute worst there is. Whatever you've got, it'll be worse after you see him. He's just, he's a butcher. The man's a butcher."?[1]

INTRODUCTION

Best-practices research and implementation are at the forefront of our economic, political, and educational fields, but the theory behind the concept is by no means new. In the late eighteenth and early nineteenth centuries, the Industrial Revolution and the rise of capitalism catalyzed a global metamorphosis in production, technology, and economics. During the next 200 years, innovation, efficiency, and competition fueled the actions of our nation's leaders, who attempted to gain a competitive edge in any arena they could. This trend prompted Frederick Winslow Taylor, often regarded as the father of scientific management and considered one of the first "management consultants,"[2] to write his acclaimed *Principles of Scientific Management* in 1911. Taylor sought to identify successful operations that led to "maximum prosperity."[3] He believed that management should

[1] Seinfeld: The Note (NBC television broadcast Sept. 18, 1991), *available at* http://www.seinfeldscripts.com/TheNote.html.

[2] Cynthia Crossen, *Early Industry Expert Soon Realized a Staff Has Its Own Efficiency*, WALL ST. J., Nov. 6, 2006, at B1.

[3] FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT 9 (1911).

standardize the most efficient practices and eliminate inferior ones.

In recent decades, the term "best practices" has come to represent the principle that Taylor aptly introduced. Taylor also asserted that in any industry there was only one *best* way to do something, and that scientific methodology could identify this best method. Unfortunately, however, much best-practices usage today has strayed from Taylor's original vision.[4] Best practices has become an overused, underdeveloped catchphrase employed by industries and professions to signal an often unsubstantiated superiority in a given field.[5] While the competitive global economy forces companies to strive consistently for optimal results, "the term 'best practices' appears to be a kind of misnomer."[6] In his book discussing how to use data to discern actual best practices, David A.J. Axson observed: "There are too many 'better practices' out there masquerading as 'best practices.' "[7] The use of the best-practices concept has also strayed—incorrectly, in my opinion—into academic disciplines, including legal education.

Part I of this article provides an overview of the reform movement in legal education and discusses the 2007 publication of the Clinical Legal Education Association, *Best Practices for Legal Education*.[8] This Part argues that, however thought-provoking and praiseworthy the recommendations contained in this publication may be, they do not comprise a statement of best practices. Part II of the article traces the development of the concept of best practices in industry and examines several of the prevailing models. Part III highlights the

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[4] In one of the seminal works on English composition, Strunk and White's *The Elements of Style*, the authors devoted an entire chapter to "Words and Expressions Commonly Misused." The authors were concerned with writers using vague generalities, rather than definite statements. WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 39 (4th ed. 2000). While this article does not address rules of style or grammar, it does have a similar goal: to demonstrate how the phrase "best practices" (which has a definite meaning) has been misused as a vague generality.

[5] *See* Michael W. McLaughlin, *The Worst Thing About Best Practices*, MARKETINGPROFS, June 21, 2005, http://www.marketingprofs.com/print.asp?source=/5/mclaughlin5.asp ("[B]est practices can jog our thoughts and maybe even inspire you. But as a tool for guiding strategic initiatives, it's a real loser. One company's best practice can too easily become another company's sunk cost.").

[6] Basu Sharma, *Distinguishing the Best from the Rest*, J. COMP. INT'L MGMT., June 1999, at 3, 4, *available at* http://www.lib.unb.ca/Texts/JCIM/bin/get.cgi?directory=vol2_1/&filename=Sharma.html (advocating that, because best practices is a "moving target" that consistently changes in the competitive market, companies should instead adopt "better practices").

[7] DAVID A.J. AXSON, BEST PRACTICES IN PLANNING AND PERFORMANCE MANAGEMENT: FROM DATA TO DECISIONS 27 (2d ed. 2007).

[8] ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION (2007) [hereinafter BEST PRACTICES FOR LEGAL EDUCATION]. This article does not purport to be a book review. Others more familiar with the literature on the current debates in legal education can do a better job than I can critiquing those features of the book.

critical problems with the use of best practices to show the extent of its overuse. In Part IV, this article deconstructs best practices as a term and formulates a workable definition that can be applied or rejected in different contexts. This Part recognizes that there are situations in which the term best practices is properly adopted and examines specific instances in which the term makes sense. Part V applies the model definition of best practices to the Clinical Legal Education Association publication to show the inadequacies of the concept and concludes that it has no place in the world of legal education.

I. The Reform Movement in Legal Education

A. Background

For as long as legal education has existed in this country, there has been disagreement about how to transform students into lawyers. The traditional legal curriculum was created in the 1870s by Charles William Eliot, President of Harvard University, and Christopher Columbus Langdell, Dean of the Harvard Law School.[9] Eliot and Langdell were influenced by the academic model of existing universities, which focused heavily on scholarship and research.[10] From its inception, legal education has been torn between its roots in the heritage of the modern research university and the historic community of legal practitioners.[11] The modern research university was shaped and eventually dominated by academic intellectuals, who considered themselves not only teachers, but also scholars.[12] Until recently, this emphasis on scholarship, research, and academics had a heavy influence on the organization and operation of law schools. Law schools drifted from the traditional practitioner-directed approach and toward academic instruction presented by scholars.[13] This transition created tension between the academic and practical aspects of legal education, a tension that is still evident today.

Over the last few decades, many legal educators and lawyers have argued for a more practical approach to teaching law students.[14] Com-

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[9] *See* William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law 14 (2007) [hereinafter Carnegie Report].

[10] *Id.*

[11] *See id.* at 4 (citing the "two strands of inheritance" that have formed the "epigenisis" of legal education).

[12] *See id.* ("The American inventors . . . were drawn to a somewhat idealized model of the German university, then at the apex of worldwide influence. Their model was an institution largely shaped by academic intellectuals . . . .").

[13] *See id.* at 5 (noting the "eclipse" of traditional forms of apprenticeship in legal education).

[14] *See id.* at 7 (pointing to the current conflict that exists in law schools, as in other

mon complaints among students, educators, and practitioners have focused on the rigid first-year curriculum, the lack of real-world application, and the seeming disconnect between what is taught in law schools and what lawyers actually do in practice.[15] In response to these complaints, the American Bar Association (ABA) convened a task force in 1992 to study the "gap" that separated the "legal education community from the 'profession.' "[16] The task force authored what is known as the MacCrate Report,[17] which presents a "Statement of Fundamental Lawyering Skills and Professional Values," in an attempt to identify for law schools and the Bar the "skills essential for competent representation."[18] The Report cautions that the skills identified are for "the limited goal of ensuring practice at a minimum level of competency. All schools and the legal profession rightly aspire to assist lawyers to practice not merely capably but excellently. Excellence cannot be promoted by the kind of standardization involved in formulating any particular list of prescriptions and prerequisites."[19]

A decade later, Kent Syverud, then Dean of the Vanderbilt Law School, was among the first educators to use the phrase "Best Practices in Legal Education."[20] Claiming that the unique caste system in legal education has slowed the adoption of best practices in the field,[21] Dean Syverud introduced steps to enhance its development by compiling seven best practices:

> (1) Best practices encourage student-faculty contact, inside and outside class . . . . (2) Best practices encourage cooperation among students . . . . (3) Best practices encourage active learning. . . . (4) Best practices give prompt and frequent feedback. . . . (5) Best practices teach students effective time management in performing

professional schools, about how knowledge and values are to be conveyed to law students).

15 *See* CHRISTEN CIVILETTO CAREY & KRISTEN DAVID ADAMS, THE PRACTICE OF LAW SCHOOL: GETTING IN AND MAKING THE MOST OF YOUR LEGAL EDUCATION 4 (2003) ("[M]any attorneys believe that law school fails to teach the practical skills of being a lawyer—including how to treat clients, hire a secretary, and negotiate a business deal—in other words, how to run a law practice. On some level, that is true.").

16 Am. Bar Ass'n, Sec. of Legal Educ. & Admissions to the Bar, *An Educational Continuum: Report of The Task Force on Law Schools and the Profession: Narrowing the Gap* (1992), *available at* http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html [hereinafter MacCrate Report].

17 *Id.*

18 *Id.* The skills include, for example, "Identifying and Diagnosing the [Legal] Problem; [and] . . . Identifying and Formulating Legal Issues." *Id.*

19 *Id.*

20 *See* Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS'N LEGAL WRITING DIRECTORS 12 (2002).

21 *See id.* at 12, 13-16 (stating that this caste system—tenured and tenure-track faculty; deans; clinical faculty; legal writing faculty; law librarians; adjunct faculty; and staff—"tends to categorize both people and teaching methods in ways that are harmful to the outcomes legal education should care most about").

> tasks. . . . (6) Best practices communicate high expectations to students coupled with assurances that students can indeed meet those expectations. . . . (7) Best practices respect diverse talents and diverse ways of learning. . . .[22]

In 2007, the Carnegie Foundation for the Advancement of Teaching published a study dealing with legal education, entitled *Educating Lawyers: Preparations for the Profession of Law*.[23] The Carnegie Report found the theoretical and practical aspects of legal education complementary and sought to integrate the two within the current law school framework.[24] Researchers, scholars, and former law school deans visited and studied sixteen diverse law schools in the United States and Canada;[25] from these experiences they formulated recommendations for the purposes of improving the education of law students and supporting an ongoing self-study within the "business of legal education."[26] The Carnegie Report outlines six "tasks" that law schools should embrace:

> 1. Developing in students the fundamental knowledge and skill, especially an academic knowledge base and research[;] 2. Providing students with the capacity to engage in complex practice[;] 3. Enabling students to learn to make judgments under conditions of uncertainty[;] 4. Teaching students how to learn from experience[;] 5. Introducing students to the disciplines of creating and participating in a responsible and effective professional community[; and] 6. Forming students able and willing to join an enterprise of public service[.][27]

The Report concluded that these goals would enable legal education to integrate the academic aspect of law school with the needs of the practical side of the legal profession.[28]

B. Best Practices in Legal Education

Based in part on the MacCrate and Carnegie reports, the Clinical Legal Education Association published the book, *Best Practices for*

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[22] *Id.* at 16-17 (emphasis removed).

[23] *See* CARNEGIE REPORT, *supra* note 9.

[24] *See id.* at 12 (stating that the Report seeks to "bring the teaching and learning of legal doctrine into more fruitful dialogue with the pedagogies of practice" in the second and third years of law school); *id*. at 13 (discussing the complementary nature of the theoretical and practical aspects of legal knowledge).

[25] *See id.* at 15 (citing consultation with the Association of American Law Schools, the Law School Admissions Council, and subsequent visits to specific law schools over two academic semesters).

[26] *Id.* at 17.

[27] *Id.* at 22.

[28] *See id.* at 45 ("This is how to draw on the genius of academic life . . . without drifting away from the specific profession's defining focus.").

Legal Education.[29] This book has been called " '[a] Vision and [a] Road Map' to how law schools may most effectively prepare students for the practice of law."[30] The roots of this book can be dated to 1987, when "Justice Rosalie Wahl of the Minnesota Supreme Court and Chair of the ABA Section of Legal Education and Admissions to the Bar[ ] convened a 'National Conference on Professional Skills and Legal Education.' "[31] Professor Roy Stuckey, who was co-chair of that conference and eventually the principal author of the book, stated that the goal of the so-called "Best Practices Project" was "[t]o develop through a dialogue a consensus understanding about the present state of professional skills instruction in American law schools."[32] As summarized by Robert MacCrate, who wrote the Foreword to *Best Practices for Legal Education*:

> [T]he leaders of the Clinical Legal Education Association in 2001 decided to establish a committee of scholars to develop a "Statement of Best Practices for Legal Education" and asked Professor Stuckey to chair that committee. Over the ensuing five years the authors of *Best Practices* have distilled out of the continuing dialogue a consensus of understanding of an alternative vision of all the components of legal education, based on educational research and scholarship: an integrated combination of substantive law, skills, and market knowledge, and embracing the idea that legal education is to prepare law students for the practice of law as members of a client-centered public profession.[33]

Professor Stuckey and the contributing authors[34] set about to accomplish an ambitious task: "In the history of legal education in the United States, there is no record of any concerted effort to consider what new lawyers should know or be able to do on their first day in practice or to design a program of instruction to achieve those goals."[35] In effect, *Best Practices for Legal Education* is an effort to

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[29] *See* BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 8, at 239-40. Building on the Carnegie Report and *Best Practices for Legal Education*, Albany Law School now sponsors the Best Practices for Legal Education Blog, which the editors use as a sounding board for "the most recent innovations and academic experiments accompanying the legal education reform movement." Best Practices for Legal Education Blog, About this Blog, http://bestpracticeslegaled.albanylawblogs.org/about (last visited July 27, 2009).

[30] Debra Moss Curtis, *Teaching Law Office Management: Why Law Students Need to Know the Business of Being a Lawyer*, 71 ALB. L. REV. 201, 213-14 (2008). The words "A Vision and A Road Map" appear immediately below the title on the book's cover, but apparently do not constitute a subtitle, as they do not appear on the book's title page.

[31] BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 8, at vii.

[32] *Id.*

[33] *Id.* at viii.

[34] "This document has the fingerprints of hundreds of people who provided suggestions, sources, and even some drafting." *Id.* at xi.

[35] *Id.* at 3.

improve the skills training of new lawyers, as well as to help "law school graduates to succeed in law practice and to lead satisfied, healthy lives."[36] Laudable goals all!

At many levels, *Best Practices for Legal Education* is an impressive work; indeed, it is an invaluable compendium of thought in legal pedagogy. The authors provide a wealth of information, painstakingly collected and presented, that should furnish productive fodder for discussion in the academy for many years. They write in Chapter One (entitled "Reasons for Developing a Statement of Best Practices"): "A comparison of principles of best practices with the actual practices of a given school will help evaluate the quality of the school's program of instruction and provide guidance for improving it."[37] The authors then divide this discussion of best practices into seven categories, covering a range of issues crucial to legal education: "(1) setting goals, (2) organizing the program of instruction, (3) delivering instruction, generally, (4) conducting experiential courses, (5) employing non-experiential methods of instruction, (6) assessing student learning, and (7) evaluating the success of the program of instruction."[38]

If *Best Practices for Legal Education* is such an ambitious, impressive, and invaluable work, then what's my quarrel? Simply this: Nowhere in this chapter—or, indeed, in the entire book—do the authors define "best practices" or explain its meaning. Rather, by suggesting mostly general, unmeasurable platitudes, the authors appear to employ the term to be all things to all people. For example, in the chapter entitled "Best Practices for Delivering Instruction, Generally," the authors' list of best practices includes: "Know Your Subjects Extremely Well," "Continuously Strive to Improve Your Teaching Skills," and "Create and Maintain Effective and Healthy Teaching and Learning Environments."[39] Within this last category, the authors propose, *inter alia*: "Do No Harm to Students," "Have High Expectations," "Make Students Feel Welcome and Included," "Engage Students and Teachers," and "Take Delight in Teaching."[40] For another example, regarding best practices for simulation-based courses, the authors propose that "[e]ach simulation [should] appropriately balance[ ] detail . . . , complexity, and usefulness."[41] Occasionally the authors recommend ostensibly specific practices, such as: "Maintain a somewhat democratic classroom,"[42] and "Do not talk too much or al-

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[36] *Id.* at 1-2.
[37] *Id.* at 11.
[38] *Id.* at 7.
[39] *See id.* ch. 4.
[40] *See id.*
[41] *Id.* at 186.
[42] *Id*. at 229.

low the discussion to go on too long."[43]

Res ipsa loquitur. Why are these recommendations "best" practices? Who decides? How? To present these ideas as best practices undermines the precision and usefulness that well-founded recommendations might presuppose.

Toward the end of the book, the authors suggest a " 'model' best practices curriculum,"[44] stating: "We do not intend to suggest that this is the only way to design an effective program of instruction."[45] If it is not, then why is it a "best" practices curriculum? The authors add:

> Whether a school chooses to pursue this vision of legal education or a different one, it should plan its program of instruction deliberately to achieve its mission and produce its desired educational outcomes. A variety of approaches should be expected, even among schools with similar missions and goals. Regardless of the particular mission of a school, however, best practices considerations require that there be a vision driven by goals and a coherent program of instruction designed to implement that vision.[46]

Does best practices thus mean little more than "think about what you want to accomplish and then work hard to get there"? Where—precisely—is the "best" part of this practice? In the conclusion, the authors write: "[O]ne may fairly disagree with some of our proposals or conclude that other alternatives would be more effective or viable . . . ."[47] If that is true, then how can the proposals be considered "best" practices?

I have highlighted in this section only a few of the literally hundreds of suggestions, principles, recommendations, and "best practices" presented in this exhaustive 213-page book.[48] Thus, it may appear as if I am merely taking potshots at an otherwise speculative and stimulating study of legal education. To dismiss my comments on this ground, however, would be to misunderstand the direction and import of my critique. The concept of best practices is simply incompatible with legal education. To understand why this is so, in Parts II, III, and IV I provide a brief history of the concept of best practices, discuss its overuse, and develop a template for its application. I then apply that template to *Best Practices for Legal Education*.

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[43] *Id.* at 230.

[44] *Id.* at 275.

[45] *Id*.

[46] *Id.* at 276.

[47] *Id.* at 283.

[48] There is a tremendous amount of detail throughout the book. Are these details part of the recommended best practices? If not, where does the "best" end and the merely "good" or "promising" begin?

II. A Survey of Best Practices Generally

A. Benchmarking

Best practices, as a term, traces its roots to industry and the idea of benchmarking.[49] Benchmarking has been defined as "the continuous process of measuring products, services, and practices against the toughest competitors or those companies recognized as industry leaders."[50] Not to be confused with "industrial espionage," benchmarking entails a company researching other companies in a completely lawful manner in an attempt to dissect competitors' practices, goods, and services, all in an effort to improve its own output.[51]

Xerox is generally considered the first American company to employ benchmarking as a strategy.[52] Once a dominant force in its industry, Xerox found itself on a collision course with extinction in the 1980s.[53] Its Japanese competitors were producing superior products at lower cost.[54] To ensure survival and reinvigorate its success, Xerox reinvented its production and management strategies. Rather than rely on the previous practice of setting goals based on internal measures and analysis, it proceeded to identify and emulate its competitors' most successful manufacturing processes.[55] Using "quality and feature comparisons," Xerox sought to perform at what it determined to be the best level of its competitors.[56] As Xerox soon reemerged as a

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[49] *See* Tessa Brannan et al., *Assisting Best Practice as a Means of Innovation*, 4 Loc. Gov't Stud. 23, 23 (2008) ("The concept of 'Best Practices' originated in the private sector as a tool to 'benchmark' performance against competitors which would thereby stimulate the improvement of the performance of the organization.").

[50] Robert C. Camp, Benchmarking: The Search for Industry Best Practices that Lead to Superior Performance 10 (1989); *see also* Robert J. Boxwell, Benchmarking for Competitive Advantage 17 (1994) (defining benchmarking as "setting goals by using objective, external standards and learning from others—learning how much and perhaps more important learning how").

[51] *See* Jeremy Main, *How to Steal the Best Ideas Around*, Fortune, Oct. 19, 1992, at 102.

[52] *Id.*

[53] *See* Gary Jacobsen & John Hillkirk, Xerox: American Samurai 3, 8 (1986) (recalling that, between 1976 and 1982, Xerox's share of global copier sales had been cut in half, from 82 to 41 percent, and analogizing the company to "a sick old man too proud to see a doctor").

[54] Camp, *supra* note 50, at 6-7; *see also* Main, *supra* note 51, at 102 (reporting that Xerox executives were shocked to find Japanese competitors selling copiers in the United States at prices below Xerox's production costs).

[55] Camp, *supra* note 50, at 6-8 (noting that, when a company continuously measures performance against itself, it reinforces a sense of superiority and allows inefficiency to continue, but when measured against outside competition, best industry practices may emerge, which a company can then adopt).

[56] Jacobsen & Hillkirk, *supra* note 53, at 9 (emphasizing that such a strategy helped Xerox uncover not only the cheapest sources for high quality parts, but also the top manufacturing, shipping, and servicing methods).

global leader in the document-creation and reproduction industry, its competitors began to investigate the secret behind the company's resurgence.[57] The industrial idea of best practices was born.

Within industry, best practices are the most successful means to accomplish a benchmarked goal.[58] The creator of this industrial form of best practices and former benchmarking manager at Xerox, Robert Camp, formulated ten steps for benchmarking:

> (1) identify what is to be benchmarked; (2) identify comparative companies; (3) determine data collection method and collect data; (4) determine the current performance "gap"; (5) project future performance levels; (6) communicate benchmark findings and gain acceptance; (7) establish functional goals; (8) develop action plans; (9) implement specific actions and monitor progress; [and] (10) recalibrate benchmarks [then repeat the process].[59]

When Xerox began to apply these steps, it first analyzed its own efficiency.[60] It then chose fourteen similar companies to study, ultimately selecting six that excelled at specific processes.[61] After conducting extensive research, Xerox discovered that it could save money and distribute its products nationwide more efficiently.[62]

In 1982, Thomas Peters and Robert H. Waterman extended Xerox's practical approach in their book, *In Search of Excellence: Lessons from America's Best-Run Companies*, bringing best-practices research and implementation to mainstream American organizations.[63] At a time when other American companies like Xerox were struggling to weather the Japanese onslaught, Peters and Waterman provided a

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[57] *See* DAVID HUSSEY, STRATEGIC MANAGEMENT: FROM THEORY TO IMPLEMENTATION 671 (4th ed. 1998) (detailing how a "cultural revolution within the company" improved profits and customer satisfaction ratings so significantly that Xerox surfaced as a pioneer in corporate management).

[58] CAMP, *supra* note 50, at 12.

[59] *Id.* at 17.

[60] Main, *supra* note 51, at 102.

[61] *Id.* Among the fourteen companies that Xerox studied were Digital Equipment, Hewlett-Packard, and IBM. *Id.* These companies were chosen because they dealt with products similar to Xerox's; the six that were studied in depth were chosen because they "seemed best at order processing." *Id.*

[62] *See* JACOBSEN & HILLKIRK, *supra* note 53, at 9 (explaining how fast product development, strict quality control, technological advancement, and automation allowed Xerox, as well as other American companies following its lead, to counteract Japan's labor-cost advantage).

[63] *See* Sharma, *supra* note 6, at 5 (attributing the development of best-practices research in America to the "classic work," THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES (1982)). *But see* John A. Byrne, *The Real Confessions of Tom Peters*, BUS. WK., Dec. 3, 2001, at 46 (reporting that *In Search of Excellence*, "the ultimate cult business book" of the 1980s, was based on falsified data).

framework for the most successful corporate management.[64] Taking a sample of sixty-two American companies across a wide spectrum of industries, the authors identified eight attributes that they believed embodied the "distinction of the excellence" of America's most innovative entities.[65] After their book sold three-million copies and enjoyed a long stint on bestseller lists, Peters and Waterman had popularized best practices as a means to obtain an edge in competitive industries by emulating the most effective strategies of competitors.

As the number of success stories multiplied and best practices grew in popularity, three leading styles of benchmarking emerged: competitive benchmarking, cooperative benchmarking, and collaborative benchmarking. Competitive benchmarking uses information gathered from competitors to set the benchmark.[66] It means "measuring your functions, processes, activities, products, or services against those of your competitors and improving yours so that they are, ideally, the best-in-class . . . ."[67] Cooperative benchmarking requires that a company wanting to improve an activity contact a best-in-class[68] firm and inquire if it is willing to share knowledge with the benchmarking team.[69] Collaborative benchmarking consists of companies meeting and sharing information about an activity in the hope of improving internal processes based on the information they acquire.[70] Ideally, as more companies implement best practices and participate in cooperative knowledge-sharing, the impact will be felt broadly and spur further innovation.[71] Most large corporations engage in at least one form of benchmarking to formulate best practices.[72]

Although the above three types of benchmarking seem to posit a

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[64] *See* Byrne, *supra* note 63, at 46 ("The book attacked the management-by-the-numbers mindset and sent a positive message that there were many American companies that had got it right.").

[65] *See* PETERS & WATERMAN, *supra* note 63, at 12-15, 19. The eight attributes include: "a bias for action," "close to the customer," "autonomy and entrepreneurship," "productivity through people," "hands-on, value driven," "stick to the knitting," "simple form, lean staff," and "simultaneous loose-tight properties."

[66] BOXWELL, *supra* note 50, at 30. Because most competitors are reluctant to provide assistance, this form of benchmarking proves difficult. *Id.*

[67] *Id.*

[68] *See id.* at 31 n.6 (conceding that, logically, there can only be one "best-in-class," but in this context, best-in-class means "world class, foremost practice, and plain old a lot better than us").

[69] *Id.* at 31.

[70] *Id.*

[71] *See* DAVID A.J. AXSON, BEST PRACTICES IN PLANNING AND MANAGEMENT REPORTING: FROM DATA TO DECISIONS 7 (2003) (highlighting that knowledge-sharing among companies stimulates a continuous "cycle of improvement" that prevails over time, and not just as an isolated improvement).

[72] *See* BOXWELL, *supra* note 50, at 32 (citing such large companies as AT&T, American Airlines, IBM, and Motorola as using benchmarking within their organizations).

single best-practices method, there is a wide range of definitions, standards, and uses across all fields.[73] And, while best-practices methodology has many critics,[74] it is undeniably a common and oft-revered practice among many of today's organizations.[75] Within the fields of administrative regulation and public management, best practices are frequently viewed as a "low-cost method of standardizing administrative practice."[76]

One problem, however, is that agencies and organizations often lack a clear definition of best practices and fail to benchmark for superiority. The Environmental Protection Agency, for example, defines a best practice as one that produces a positive outcome.[77] It collects reports of successful programs that states have implemented and passes them on to other states, encouraging imitation rather than innovation.[78] Similarly, the Department of Housing and Urban Development defines best practices as tools or techniques that exhibit two of the following characteristics: (1) they generate a significant positive impact on those they are intended to serve; (2) they can be replicated in other areas of the country; (3) they demonstrate the effective use of partnerships among government agencies; or (4) they display creativity in addressing a problem, and demonstrate the effective leveraging of resources.[79] Great Britain also uses the term best practices in the area of public management, defining a best practice as "a new practice/policy based on some generally accepted view amongst practitioners of what is a 'state of the art' approach, frequently drawing on what has been put in place and thought to work elsewhere."[80]

As used in the field of professional instruction, a best practice appears to be a starting point, an innovative idea that may lead to a set goal, but not necessarily the means to achieving that goal. In the

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[73] *Compare* STEVEN M. BRAGG, ACCOUNTING BEST PRACTICES 1, 5 (3d ed. 2004) (defining best practices not only as those found through benchmarking studies of best-in-class companies, but also as "any improvement over existing systems"), *with* Sridhar R. Arcot & Valentina G. Bruno, *One Size Does Not Fit All, After All: Evidence from Corporate Governance* 3 (2007), http://ssrn.com/abstract=887947 (explaining that Great Britain's "Code of Best Practice" is merely a guide, which companies can voluntarily adopt, filled with suggestions and principles on how to govern a corporation ethically and legally).

[74] *See, e.g.*, McLaughlin, *supra* note 5 (acknowledging some benefits of best practices, but arguing that it generally "stifles the innovation customers expect from their suppliers").

[75] *See* Sharma, *supra* note 6, at 5-7 (finding that, while business and management practices often come and go as fads, the process of best-practices implementation has endured for decades).

[76] David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 309 (2006).

[77] *See id*.

[78] *See id*. (defining the EPA's role as a "receptacle" from which other states can learn).

[79] *Id.* at 340.

[80] Brannan et al., *supra* note 49, at 24.

area of corporate governance, the term best practices represents suggestions or common-sense recommendations on how a corporation should be managed.[81] Often the suggestions are not supported objectively, but rather are qualitatively advocated by their proponents.[82]

B. A Survey of Best-Practices Models

As the system of benchmarking and the usage of best practices has proliferated in industry, government, and academia, three approaches to best practices have emerged as models: the "industrial" model, the "successful practices" model, and the "qualitative best practices" model. The industrial model uses comparative analysis to determine whether there is a competitive gap between an entity and industry leaders; it then uses benchmarking studies to determine how to eliminate the gap. The successful-practices model, most often used in the context of government agencies, seeks to implement practices that have demonstrated some pattern of success; it does not employ formal benchmarking studies to determine which practices to implement. The qualitative-best-practices approach, often used in corporate governance and professional instruction, focuses on producing a set of goals that an organization should seek to meet; it does not call for a specific set of practices or methods. After providing a more detailed review of these models in this subsection, this article demonstrates that most usages of best-practices methods do not fit neatly into one of the three formulas, but rather incorporate aspects of each.

1. The Industrial Model

The industrial model, which brought the term best practices into the lexicon, involves a comparative analysis to determine whether a competitive gap exists and employs benchmarking studies to correct inferior performance.[83] Through comparisons with industry leaders, investigators analyze raw data and discover gaps in performance.[84] Where a negative gap exists, company officers use superior external operations as their benchmark.[85] The primary focus of this analysis is

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[81] *See* AXSON, *supra* note 7, at 27 ("A best practice should be capable of being adopted by a wide range of organizations but this does not mean that all best practices can or should be applicable to all companies.").

[82] *See id.* (arguing that best practices requires a measurable and objective change, not just a statement declaring it to be such).

[83] *See* CAMP, *supra* note 50, at 121 (defining a competitive gap as a "measure of the difference between the internal organization's performance and that of the best in the industry").

[84] *See id.* (explaining that companies should focus on negative gaps, as opposed to positive gaps or those for which operations are at parity, because they demonstrate areas of inefficient performance and improvement opportunities).

[85] *Id.* at 122; *see also* McLaughlin, *supra* note 5 (stating that, because many organiza-

to explain why performance gaps exist and to identify areas that require change.[86]

Once industry best practices are defined through benchmarking, companies develop "action plans" to align their current practices with what they deem to be external superior practices.[87] In attempting to close the negative gap, action plans detail the time frame, resources, responsibility, and desired effect of the action.[88] These action plans, as well as company benchmarks, are recalibrated over time to remain current with changing market conditions.[89]

In addition to the industrial model of best practices that has been and is currently being used successfully by large companies[90] and the scientific community,[91] numerous consulting firms also employ a form of the industrial model of best practices as a means to increase corporate clients' business and management efficiency.[92] In his book, *Best Practices in Planning and Performance Management*, David A.J. Axson, former head of Corporate Planning for Bank of America, prescribes a four-step process for best-practices implementation. First, the company must identify an opportunity for improvement.[93] Unlike the strict industrial model, Axson explains that this step can be accomplished through "continuous and systematic" measurement of performance against external *or* internal benchmarks.[94] The subsequent three steps in Axson's process, as well as his recommendation of de-

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tions face similar internal challenges, there is great value in emulating the successful and innovative solutions of competitors).

[86] *See* CAMP, *supra* note 50, at 121-23 ("It will be these *changed* practices that will provide improvement and eventually result in superior performance or a competitive advantage.").

[87] *See id.* at 185 (detailing that action plans must assert specific events to pursue to achieve superior performance).

[88] *Id.* at 227.

[89] *Id.*

[90] *But cf.* Frances X. Frei, *The Four Things a Service Business Must Get Right*, HARV. BUS. REV., Apr. 1, 2008, at 86 (noting that benchmarks used by current companies may misrepresent the threat of a new competitor).

[91] *See Interventional Cryoablation Stops Cancer Cold: Curative Option for Patients With Small Localized Kidney Tumors*, MED. DEVICES & SURGICAL TECH. WK., Mar. 2008, at 722 (describing two studies that established a "one-year benchmark" dealing with the treatment of kidney tumors).

[92] *See, e.g.*, Best Practices, LLC, http://www3.best-in-class.com/ResearchConsulting (last visited July 27, 2009) (describing itself as "a recognized leader in research designed to improve your company's performance by assessing and analyzing the winning practices of leading corporations"); *see also* Main, *supra* note 51, at 102 (commenting that the explosion of interest in benchmarking has produced an entirely new industry of organizations that "spout their own jargon, follow different methodologies, and issue codes of conduct" for best-practices implementation).

[93] AXSON, *supra* note 7, at 31.

[94] *Id.*

tailed action plans, closely mirror the strict industrial model,[95] but the use of internal benchmarking clearly distinguishes his method. Axson's process demonstrates that, while there are certainly three distinct models of best practices, many approaches to best-practices implementation take aspects of each model to arrive at an individualized formula.

2. The Successful-Practices Model

In the administrative regulation context, the successful-practices model seeks only to achieve practices that comply with general regulatory standards.[96] Employed by local, state, and federal governments, these practices are "selected and publicized, but are not mandated, by central administrators."[97] Agencies do not conduct formal benchmarking studies to identify practices that would be tailored specifically to achieve the statutorily desired function; rather, they adopt these practices based solely on some previously documented success.[98] As a result, this interpretation of best practices is consistent with the theory of rational ignorance,[99] in that regulators opt to not acquire information on regulatory alternatives.[100] By means of regulation through horizontal modeling rather than hierarchical direction, "regulators assume that the cost of collecting such information outweighs any anticipated benefits."[101]

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[95] *See id.* (outlining the remaining three steps in his method as "determine whether the opportunity is sufficiently attractive to pursue," investigate the causes of the underperformance, and, finally, implement the change).

[96] Zaring, *supra* note 76, at 309.

[97] *Id.* at 308 (discussing the EPA's best-practices program under the Clean Water Act, noting that, under the Act, "states are not required to adopt any best management practices," and that "[f]or those that do, states, rather than the EPA, are charged with identifying the practices").

[98] *See id.* (explaining that the EPA collects practices that work and that it is up to states to adopt those practices or to formulate their own).

[99] *See* Deborah L. Rhode & Lee D. Ross, *Environmental Values and Behaviors: Strategies to Encourage Public Support for Initiatives to Combat Global Warming*, 26 VA. ENVTL. L.J. 161, 168 (2008) (defining rational ignorance as the "tuning out [of] scientific data that appears uninteresting and irrelevant to immediate concerns").

[100] *See* Zaring, *supra* note 76, at 325 (arguing that, under this form of best practices, agencies will often adopt the first successful practice that comes along, even if it is not necessarily the best regulatory scheme).

[101] *See id.* (citation omitted). "Best practices work through copying. . . . [T]he paradigm is to keep up with the Joneses, instead of doing the Joneses one better." *Id. See also* H. George Frederickson, Reconsidering Best Practices (Dec. 2006), http://people.ku.edu/~gfred/documents/ColumnDecember2006BestPractices.doc ("Horizontal modeling is a form of voluntary copying by one organization of another organization's best practice. The result is a kind of voluntary horizontal harmonization of processes and procedures.").

3. The Qualitative-Best-Practices Model

Another model, which this article terms qualitative best practices, is typically applied in the area of professional instruction and corporate governance. Conceptually different from the industrial and successful-practices models, the qualitative-best-practices model focuses on goals and principles for achieving those goals, rather than on concrete practices.

One problem with simply importing a broad goal, however, is that the "team's thinking immediately focuses on *how* to do the work, rather than first addressing *what* should be done and *why*. If you start with a predetermined solution, it's easy to gloss over more innovative approaches."[102] This is not to say that the suggestions, principles, or guidelines provided are necessarily without merit.[103] But the model's best practices often can be divorced from objective, empirical validation.[104] A guideline or suggestion may lead to the goal, but this model leaves it up to the individual or group to synthesize actual means to achieve that goal.

In 1998, the Committee on Graduate Education for the Association of American Universities issued a report that unwittingly demonstrates the pitfalls of the qualitative-best-practices model. The report sought to determine whether graduate institutions were adequately preparing their students for the careers to which they aspired and to articulate a corrective strategy for institutions doing so ineffectively.[105] Without providing objective data to support its recommendations or even specific practices designed to achieve them, the Committee presented broad, sweeping goals that it dubbed "recommendations for best practices in graduate education."[106] For faculty mentoring, for example, the report recommends that "institutions and departments should clearly affirm the importance of faculty mentor-

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[102] McLaughlin, *supra* note 5.

[103] For instance, it seems like common sense that lawyers representing parents when the interests of children are at stake should "consider the welfare of, and seek to minimize the adverse impact of divorce on, the minor children." William J. Howe & Hugh McIsaac, *Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents when the Interests of Children are at Stake*, 46 FAM. CT. REV. 78, 85 (2008). The suggestion or goal appears completely valid and advisable, but it is just that—an idea, and not a practice.

[104] *See id.* at 84-85 (stating that the American Academy of Matrimonial Lawyer's guidelines for lawyers "reflect the best practices for lawyers representing parents"); *see also* Donald C. Dowling, *Best Practices Tips*, J. COMP. & BENEFITS, Mar.-Apr. 2005, at 4 (presenting tips, yet labeling those tips best practices).

[105] *See* COMM. ON GRADUATE EDUC., REPORT AND RECOMMENDATIONS: ASSOCIATION OF AMERICAN UNIVERSITIES 23-25 (1998) (making recommendations for graduate institutions to adopt in the areas of recruitment and admissions, financial support, curriculum, faculty mentoring, and program evaluation, among others).

[106] *Id.* at 23.

ing through policy guidelines and incentives."[107] While this is a rational goal, it provides no direction on the means for achieving it, leaving the institution to determine and implement practices.

As plainly shown through a summary of these three models and their respective characteristics, significant disparities exist. There are pros and cons associated with any model of best practices, whether they are more like the strict industrial model or closer on the spectrum to the qualitative-best-practices model. Without certain attributes, however, some practices do not merit the appellation "best."

III. Worst Practices on Best Practices

"Best practices seemingly offer clear, crisp, logical and actionable ideas on how to deal with inherently uncertain questions."[108] In reality, however, the concept presents a series of problems relating to creation, implementation, and success. Many of these issues emerge through an examination of the above three models—which demonstrate the lack of goals, standards, and methods that are inherently intertwined with best practices. This section illuminates some of the many problems, or worst practices, of best practices.[109] It concludes with a comparison of how the three models differ on best practices and contains examples of conflicting best practices.

A. No Objective Goals

Stanley Fish, in a piece that criticizes the use of best practices in higher education, describes how many college and university mission statements are "endless and inconclusive," making it hard to adopt best practices.[110] Best practices often dictate how the school should act, but when, as Fish notes, a school tries to adopt the practice of "always prioritizing," it needs to have clear goals in mind.[111] Without clearly stated goals or missions, there is no way that a best practice can lead to success.[112]

Similarly, simply adopting another company's best practice ig-

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[107] *Id.* at 24.

[108] Anand Sanwal, *The Myth of Best Practices*, Munich Personal RePEc Archive, Mar. 5, 2008, at 20, *available at* http://mpra.ub.uni-muenchen.de/8973/1/MPRA_paper_8973.pdf.

[109] By no means is this an exhaustive list. *See, e.g.*, *id.* (noting other problems with best practices, including concerns about how and why they are adopted).

[110] Stanley Fish, *Keep Your Eye on the Small Picture*, Chron. of Higher Educ., Feb. 1, 2002, *available at* http://chronicle.com/jobs/2002/02/2002020101c.htm (last visited July 27, 2009).

[111] *Id.*

[112] *See also* McLaughlin, *supra* note 5 (arguing that applying another company's best practice can lull the company into a false sense of security, and that best practices are often adopted without regard for why they worked for the original company in the first place).

nores "the cultural, process and systems elements that may have existed within that other organization."[113] Even if a company could employ hypothetical best practices, taken from a like-minded company, there is no guarantee that the adoption would be successful. Once a possible best practice is implemented, the company must play a constant "game of catch up" as other companies continue to strive for further excellence.[114]

B. No Objective Standards

Even if someone purports to have the "perfect" best practice, questions about his or her idea emerge: Who says it is best? Why is it best? Can it get better? In short, the best-practices lexicon fails to articulate standards against which best practices can be measured. Stanley Fish recognized this fundamental problem:

> "Best Practices" is itself a practice, an industry focused on itself and equipped with its own internal machinery including a version of the Academy Awards that allows practitioners to recognize and honor one another publicly. . . . I won't be bothered that much when a colleague solemnly invokes "best practices" and then says something incredibly obvious and banal. That is what it is about.[115]

The term encompasses ideas that, while sounding positive, mean little to industry outsiders who cannot evaluate which practice is actually the best to adopt without costly trial and error. With the overwhelming amount of best practices out there,[116] no one is creating an objective standard against which to measure the practices.

In a recent UK publication, *Mapping Best Practice in Clinical Legal Education*, Professors Richard Grimes and Hugh Brayne sought to compile best practices in clinical education in British law schools.[117] Instead of producing a template that schools could follow when developing clinical programs, the study articulates several potential models

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[113] Sanwal, *supra* note 108; *see also Best Practice: Adapt Best Practice to Suit Own Needs*, EMP. BENEFITS (UK), Feb. 8, 2008, at S8, *available at* http://www.employeebenefits.co.uk/item/3836. In human-resources management, best-practices ideas emerge to try to create the best benefit schemes for employees. These practices, however, "vary wildly according to sector" and seek dissimilar goals. Factors including "existing culture, employee relations, size and sector" contribute to companies' ambitions, and no two companies are alike. *Id.*

[114] *See* Sanwal, *supra* note 108 (describing the not-infrequent situation in which the copied companies continue to improve, while the copying companies adopt yesterday's best practices).

[115] Fish, *supra* note 110.

[116] A simple Google search for "best practices" reveals more than thirty-eight-million links.

[117] RICHARD GRIMES & HUGH BRAYNE, U.K. CTR. FOR LEGAL EDUC., MAPPING BEST PRACTICE IN CLINICAL LEGAL EDUCATION (2004), http://www.ukcle.ac.uk/research/projects/clinic.html.

for schools to adopt.[118] However, just looking at published works, interviewing related participants, and visiting five law schools[119] does not lend itself either to creating or to implementing so-called best practices, especially when the schools may have different aspirations for their programs.[120]

C. No Methodology

A basic survey of best-practices literature reveals practices that not only lack objective standards and goals, but also fail to reveal any methodology or research that might have led the author to claim something as a best practice.[121] In an online article on time management, commentator Rodger Constandse claims that best practices evolve from areas of natural law, paradigms, and knowledge of the field.[122] The author offers no empirical data to show how having the correct tools or a particular skill set affects managing time.[123] Other literature spans fields including forecasting market conditions,[124] advertising,[125] and law-firm practices.[126] In each instance, the author claims a set of ideas as best practices without showing how or why he or she reached that conclusion. Even if an industry provides method-

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[118] *Id.* at 8. The models articulated were: "in-house advice and representation services," "outreach services run by the institution but based in an external setting," "placements in organizations external to the institutions," and "legal literacy programmes focusing on awareness of rights and responsibilities." *Id.* at 6.

[119] *Id.* at 8.

[120] *Cf.* TimeThoughts.com, Time Management Best Practices, http://www.timethoughts.com/timemanagement/DefiningBestPractices.htm (last visited July 27, 2009) (defining best practices as those that "can be used to produce good results and have been proven to work for thousands of people"). The web site does not seek to compare different practices to show how to be more efficient; it simply posits a few ways in which someone can better manage his or her time. *Id.*

[121] *See* Sam Overman & Kathy J. Boyd, *Best Practice Research and Postbureaucratic Reform*, 4 J. PUB. ADMIN. RES. & THEORY 67, 67-68, 76-77 (1994). "Best Practices research (BPR) is the newest version of the method of inductive practice-to-principles research. BPR is different from most of its predecessors insofar as the observations seem more selective and less direct and the principles more prescriptive and less constrained." *Id.* at 68. This best-practices model used in public management has been described as "a process of 'groping along' " and criticized as creating "the delusion of learning from experience," while having "a bias toward very short-term experience." *Id.*

[122] TimeThoughts.com, *supra* note 120.

[123] *Id*.

[124] *Worst Practices in Forecasting: Sometimes the Pursuit of "Best in Class" is a Losing Proposition*, INDUS. WK., Feb. 1, 2008, *available at* 2008 WLNR 3688953.

[125] *See Revival of the Fittest: Resurrecting a Dormant, Dying or Dead Brand*, PR NEWS, June 16, 2008, *available at* 2008 WLNR 11366615 (arguing that best practices in advertisement can lead to old brands becoming profitable again, but not providing any methodology to support conclusions other than presenting a few examples from industry).

[126] *See* Jeff Coburn, *Practice Management Partner's Report for Law Firm Owners*, 8 INST. MGMT. & ADMIN. 8 (2008) (articulating ways in which practice groups fail when firms employ worst practices).

ology to support its best practice, there is no guarantee that it is accurately measuring progress.[127]

A group of professors and practitioners compiling a list of ways to do a certain task, without any study of the effectiveness of the methods, does not constitute sufficient research to create something that can properly be called a best practice.[128] For example, the "Code of Best Practices in Fair Use for Online Video," published through the Center for Social Media at American University, seeks to inform readers about copyright law and creating popular video.[129] The document presents six best practices, focused on "common situations that come up for online video makers."[130] The report contains only a short, vague paragraph explaining how the best practices were identified, stating that the document was created by a "distinguished panel of experts" and was "informed by research into current personal and nonprofessional video practices."[131] Without establishing any baseline principles for how they developed their best practices, these experts fail to support their best-practices conclusions.[132]

The qualitative-best-practices model does not always present practices or means to achieve a goal. Rather, it recommends principles that may serve as suggestions, at worst, or guidelines, at best, but without objectively measurable verification.[133]

D. Conflicting, Confusing, or Wrong Best Practices

Sometimes best practices are so poorly designed, researched, or implemented that they soon become worst practices. Stanley Fish recounts:

> [I]n Enron's heyday . . . many companies looked to it as a model and no doubt considered its practices to be best. The fact that everyone now rejects and abjures these practices . . . is hardly consoling once you realize that this may be the fate of any practice currently

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127 *See* Sanwal, *supra* note 108, at 5 ("All too often, organizations move forward to adopt a best practice without knowing its value and the measurable end result and so they unknowingly mistake activity for progress.").

128 *See* CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO 1 (2008), *available at* http://www.wcl.american.edu/pijip/go/bestpractices (stating that the document was created by "[a] distinguished panel of experts" who were "informed by research").

129 *Id*.

130 *Id.* at 5-9.

131 *Id.* at 1.

132 The Code even refers to itself as a guide to acceptable practices that the experts found and with which they agree. *Id.*; *see also Worst Practices in Forecasting*, *supra* note 124 ("The most fundamental worst practice . . . is to assume things work without bothering to measure them. This can occur when purported 'best practices' are implemented without solid evidence that they are even a 'good' practice.").

133 Dowling, *supra* note 104, at 4.

wearing the honorific "best."[134]

Even within the models of best practices, disagreement exists over how to achieve best practices. Defining best practices as "successful practices" conflicts with the industrial model, which was created because many people in the business world thought industries should experiment more than they did. The model used prior to benchmarking, the "rational model" on which businesses based managerial decision-making, was found to be overly cautious and, therefore, to stifle progress.[135] Yet these successful practices are good only at achieving harmonization across governmental agencies and fail to explore the best means for achieving a specified goal.[136] Successful practices allow organizations to become complacent; they provide no incentive for innovation or to search for excellence in implementing directives.[137]

James Kerr wrote his book, *The Best Practices Enterprise*, in order to "quiet the noise that fills the air about advanced business strategy and management practices."[138] What Kerr actually did was posit his own corporate model for companies to achieve best practices. He looked around the country to find businesses, governments, or organizations that have had some success in a given area and attempted to fit these examples into a best-practices framework suitable for imitation.[139] Instead of quieting the noise, however, *The Best Practices Enterprise* amplifies the problems with best-practices formulations. It appears that Kerr considers only the examples of how companies were able to succeed and attempts to demonstrate how his model would have achieved similar results.[140] His discussion does not present a

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134 Fish, *supra* note 110; *see also* Shann Turnbull, *Case Study on the Irrelevance of Best Practices in Corporate Governance* 2 (2007), http://ssrn.com/abstract=966431 (noting that the Australian Stock Exchange's best practices for corporate governance failed to prevent or detect foreign-exchange fraud amounting to more than $350 million that occurred at the National Australian Bank).

135 *See* PETERS & WATERMAN, *supra* note 63, at 46-47 (explaining that the old rational model of decision-making fostered a narrow view and forced companies to make one big bet instead of carrying out ongoing experiments and fostering new ideas).

136 Zaring, *supra* note 76, at 339-40.

137 The industrial model in no way guarantees that a company will discover the absolute best means for achieving a goal. Nevertheless, by performing benchmarking studies, companies constantly seek to improve, and implement those newly discovered best practices. The successful-practices model, on the other hand, seeks adequate methods to achieve a goal and then de facto forecloses further inquiry.

138 JAMES M. KERR, THE BEST PRACTICES ENTERPRISE: A GUIDE TO ACHIEVING SUSTAINABLE WORLD-CLASS PERFORMANCE xv (2006).

139 Among the examples Kerr discusses are: Takeout Taxi using a "customized service approach" to bring people the food they want; the City of San Diego creating a diversity model to prepare for a growing workforce; and Wells Fargo adapting computer technology to enhance customer options. *Id.* at 4, 7, 71.

140 In his "Best Practices Business in Action" sections, Kerr tries to squeeze into his model what companies like Merrill Lynch and Dunkin' Donuts have done. He takes the

clear, consistent path to follow; instead it is an amalgamation of various war stories, thrown together only to sell a particular model (or a particular book).

IV. A Model Definition and Viable Template for Best Practices

In far too many instances, authors fail to define the term best practices and leave it to the reader to glean the meaning from the context.[141] To reify the term best practices and bring logical consistency to its application across fields, this Part presents a model definition. The ideal definition should track the words composing the term, even if only with dictionary definitions. "Best" is defined as "excelling or surpassing all others of its kind . . . according to some standard."[142] "Practice" is defined as an "actual performance or application of knowledge . . . ."[143] Thus, the term should be defined as *those actions that surpass all others in pursuit of a goal or purpose according to some objectively measurable standard*.[144] This definition can serve as the basis for a template to determine whether a purported best practice is in fact a best practice.

The template requires the presence of three conditions in order to label any action or actions best practice. First, as with benchmarking, those who attempt to discover or define a best practice must agree on the goal that the practice is intended to achieve. While this may seem obvious, in many instances the label "best practices" is applied even when those who apply the label cannot agree on the goal. To formulate best practices the goal must be *known*, not debated. It is not possible to achieve a goal in a manner "surpassing all others" when the goal itself is disputed.

Second, the model definition requires that, at any given time, there is *only one way* to accomplish the goal that in relation to all

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good plans that companies have employed and extrapolates tiny portions to compare with his ideas. By labeling them best practices, Kerr asserts a superiority in his model that is probably unfounded in the corporate world. *See id.* at 6, 62.

141 *See*, *e.g.*, *Best Practices for Credit Card Acceptance*, 33 Mont. Law. 23, 23 (Oct. 2007) (listing best practices that will enable a lawyer to abide by his or her ethical duties when accepting credit cards as payment for services rendered, but failing to define the term best practices); *see also* Conference, *Assisting Law Students with Disabilities in the 21st Century: Best Practices*, 15 Am. U. J. Gender Soc. Pol'y & L. 785, 791-816 (2006) (explaining, in a panel discussion entitled "Best Practices," different approaches to assisting disabled students, but not elaborating on what best practices entail or how they are defined).

142 Webster's Third New International Dictionary 208 (3d ed. 1986).

143 *Id.* at 1780.

144 *See* Overman & Boyd, *supra* note 121, at 67, 71 (describing the word best as relating to the pragmatic ideal of "one best way").

others is superior. A practice or practices may succeed in accomplishing a goal as exemplified in the area of administrative regulation, but these practices are only successful practices, not best practices.[145] Best implies surpassing *all* others based on a measurable standard, not merely succeeding in an endeavor.[146]

Third, as part and parcel of the second condition, best practices must be *objectively verifiable* in relation to all other current or previous practices. This condition suggests that one interested in formulating best practices could look to the process of benchmarking to arrive at a best practice.[147] Thus, benchmarking is incorporated into the template for the purpose of evaluating whether a practice is in fact a best practice. It is not enough just to confer best-practice status on a subjectively preferred method.

Assuming that all three conditions are present, one seeking best practices could discover those "model best practices" by performing a benchmarking study similar to Camp's approach.[148] One must look internally and externally to the same and similar products to discover a process that holds superiority over all others.[149] One must then collect data and determine which entity achieves the sought after goal *most* effectively—what Camp terms the "industry leader."[150] In addition, one must analyze the data and determine the performance gap—the difference between an entity's current actions and the industry leader's superior actions.[151] Finally, one must set goals for implementing those newly discovered superior actions and formulate actual plans for implementation.[152] If the plan recommends actions that achieve the benchmark, then and only then can those actions implemented by the plan be correctly labeled "best practices."[153]

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145 *See supra* Part II.B.2 (explaining the elements of the successful-practices model of best practices).

146 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 142, at 208.

147 *See generally* CAMP, *supra* note 50, at 17 (listing and explaining the steps required for benchmarking). Camp defines benchmarking as "the search for industry best practices that lead to superior performance." *Id.* at 12.

148 *See supra* text accompanying note 59 (listing the ten steps one must perform when seeking to discover an industry benchmark).

149 *See supra* Part II.A (describing the three main forms of benchmarking: competitive benchmarking, cooperative benchmarking, and collaborative benchmarking).

150 *See* CAMP, *supra* note 50, at 6 (listing steps two and three of the benchmarking process as identifying comparative companies, and determining data-collection methods and collecting data).

151 *See id.* (listing step four in the benchmarking process as determining the "present performance gap").

152 *See id.* (listing step seven as establishing "functional goals," and step eight as developing "action plans").

153 This article more stringently applies Camp's idea of best practices, *see supra* note 147; thus, best practices lead not only to superior performance, but also to the *best possible* performance.

Through the use of benchmarking, the various concepts of best practices become evident. Camp's original, objective model of best practices—the industrial model—provides a rational guide to discovering "model best practices."[154] Companies have successfully formulated best practices using the process of benchmarking for nearly three decades.[155]

Based on the model definition, best practices has been applied accurately in two areas in which companies seek to make internal improvements: when a company adopts practices used by an industry leader in the same field and when a company adopts practices that are common among many industries. In these situations, the criteria required by the model definition are met because there is a clear, definable, agreed-upon goal; there is one most effective way to achieve that goal;[156] and the best means to achieve that goal can be objectively verified through the benchmarking process.[157]

Best practices can also apply effectively when a company is entering an industry and seeks to adopt or emulate proven practices. The goals that are sought must be the same as those of the company whose best practices are being emulated. When two companies are in the same industry, a goal of both companies will be to succeed economically in that field.[158] By having the same goal as industry leaders in the field, emerging companies can use best practices to improve their businesses.[159]

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154 *See supra* notes 142-44 and accompanying text (discussing the general definitions of the words "best" and "practices," and combining the two definitions, asserting that the term best practices should apply to those actions that surpass all others in pursuit of some goal or purpose). Camp's definition may be the more appropriate model to use for discovering "model best practices," because it sought out the most effective practices within a given area, as opposed to other versions of best practices in the industrial model that only sought incremental improvement. *See supra* Part III. Merely benchmarking might yield an instant best practice, if at all possible, but the spectrum is constantly shifting. *See supra* notes 134-37 and accompanying text.

155 *See* CAMP, *supra* note 50, at 6 (stating that Xerox began benchmarking in 1979); *see also* Marianne Ward, *Re-Estimating Growth and Convergence for Developed Economies, 1870-1990*, 61 J. ECON. HIST. 489, 489 (2001) (examining discrepancies between long-range estimates of gross domestic product and benchmarked estimates of GDP); *cf.* Steven R. Matsunaga & Chul W. Park, *The Effect of Missing a Quarterly Earnings Benchmark on the CEO's Annual Bonus*, 76 ACCT. REV. 313, 313 (2001) (analyzing the possible correlation between missing an internally formulated performance benchmark and a corresponding decrease in CEO compensation).

156 BOXWELL, *supra* note 50, at 31 n.6.

157 *See* CAMP, *supra* note 50, at 121 (explaining that benchmarking comparisons reveal gaps in performance that allow for company improvements).

158 *See id.* at 6 (finding that two steps for effective benchmarking are identifying good companies for comparison and accurately collecting data by determining effective data-collection methods).

159 Xerox, Online Fact Book, http://www.xerox.com (follow "Investor Relations" hyperlink, then follow "Company Facts, History and Highlights" hyperlink) (last visited July 27,

For a best practice to have value, it must be adaptable by a broad range of organizations, even if those organizations all exist within the same industry. Therefore, a best practice cannot come as a result of a unique capability of a company.[160] While best practices are easier to identify when they apply to a variety of industries, there are certain practices that are uniquely beneficial to certain industries. In the automotive industry, for example, a best practice that many industry leaders follow is to include engineers from supply companies in the design process in order to avoid re-designing a car further into the process if the available parts cannot complete the design.[161] However, if one company achieves a higher level of performance than others based on a unique attribute, that performance is not necessarily indicative of a best practice.[162] A best practice must be adaptable by other companies that do not possess unique skills in an industry, such as "internal innovation, proprietary knowledge, or some other driver of competitive advantage."[163] That company's practices, while efficient, are also unique; attempting to copy those practices would be ineffective for those companies that do not have the same capabilities.

One example of an organization's effective use of best practices of leaders in its own field is Baylor College of Medicine. The college wanted to achieve more equal purchasing power with other medical colleges.[164] Baylor found that vendors who sold drugs to doctors and members of the research department were selling medications at different prices to different people and groups.[165] Among Baylor's overall goals were to become more cost-effective and to save money—presumably goals that other medical colleges share. An independent benchmarking company performed a study to determine what practices industry leaders used in order to save money on purchasing drugs.[166] That study found that the most effective means to minimize drug-purchasing costs was to have the doctors and research departments cede their purchasing power to a general purchasing department. That department would then establish long-term contracts and set costs for the medicine for all doctors.[167] The study also found that

2009); *see also* Exxon Mobil, Guiding Principles, http://www.exxonmobil.com/corporate/about_operations_sbc_principles.aspx (last visited July 27, 2009).

160 AXSON, *supra* note 71, at 27.

161 *Id.*

162 *Id.*

163 *Id.*

164 APQC, *Baylor College of Medicine: An Ounce of Prevention*, Apr. 22, 2008, http://www.apqc.org/PDF/osbc/Success_Stories/OSBC_Baylor_case%20study.pdf.

165 AXSON, *supra* note 71, at 27.

166 APQC, Custom Benchmarking, http://www.apqc.org/portal/apqc/site/?path=/services/custombenchmarking/index.html (last visited July 27, 2009).

167 APQC, *supra* note 164.

developing an online purchasing system was the most effective means for reducing supply-chain costs.[168] By developing an "e-catalog" of available drugs that were priced based on the negotiated contracts, medicinal orders did not have to be reviewed by the purchasing department, and the transactions could be completed more effectively.[169] The study further allowed Baylor to determine if its turnaround time from order to receipt of the medicine, as well as its purchase prices, were comparable to others in their field.[170]

In the Baylor case study, the term best practices met the criteria of the model definition. Baylor's goals were the same as those of other medical colleges and the other schools' means of achieving those goals could be determined by objective measures; thus, Baylor was able to rely on best practices to become a more cost-efficient institution. Moreover, the goal had an objective standard—and was not an abstract idea, such as "to provide the best possible medical education." Therefore, best practices could be used in this instance to implement productive change.

Because there are proven, effective practices that organizations can adopt when they share the goals of other organizations within a given field, there are some examples of practices that can be described as the best. Generally this is not true in legal education, however, in which the goals of different institutions vary. What one school may consider a good or best practice may be viewed in a markedly different light at another school.

V. Application of the Model to Legal Education

As this article has discussed, three preconditions must be present for one to identify best practices in a given area: (1) those attempting to discover or define a best practice must agree on the goal that the practice is intended to achieve; (2) at any given time there must be only one way to accomplish the goal that in relation to all others is superior; and (3) whatever practice is proclaimed as a best practice must be objectively verifiable in relation to all other current or previous practices. As an example of the incorrect application of the term best practices, this Part applies the model template to the Clinical Legal Education Association's book, *Best Practices for Legal Education*.[171] By doing so, this Part concludes that the authors use the term inappropriately and that, properly understood, the concept is inapplicable to the field of legal education as a whole.

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168 *Id.*
169 *Id.*
170 *Id.*
171 Best Practices for Legal Education, *supra* note 8.

A. No Common Goal

Legal education is different from the industry examples provided earlier in this article. Goals for legal education vary among, and even within, institutions. Some educators believe, for example, that the primary goal is to prepare students for their first day in practice.[172] Others believe that the goal is "to teach the student to 'think like a lawyer.' "[173] Christopher Columbus Langdell, arguably the originator of formal legal education, believed that students should learn to "think like a judge."[174] Still others believe that these approaches should be integrated into one cohesive whole.[175]

The first goal focuses on teaching the practical aspects of law, while the second emphasizes teaching the law as a conceptual paradigm that students can apply to any situation. These are only two obvious examples of how different legal education can be when approached with varying goals in mind. In fact, when incoming law students ask what they will learn, it can be difficult to explain what exactly a law school does.[176] Although most law schools have similar first-year curriculums, the way in which each law school approaches legal education can vary greatly. Law schools diverge considerably "with regard to everything from student life to the school's theory of legal education. As a result, the educational experience is not the same from school to school."[177] Add to this the fact that there are 200 law schools approved by the ABA,[178] and it becomes obvious that the chances for the existence of one agreed-upon goal for legal education are slim to none.[179]

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172 *Id.* at 74-76.

173 Wayne S. Hyatt, *A Lawyer's Lament: Law Schools and the* Profession *of Law*, 60 VAND. L. REV. 385, 390 (2007).

174 *See* CARNEGIE REPORT, *supra* note 9, at 11 (stating that Langdell "invented a method that enabled students to analyze and research judicial decision making, thereby learning to 'think like a judge' ").

175 *See id.* at 13.

176 *See* CAREY & ADAMS, *supra* note 15, at 10 ("Having explored, at some length, what law school is *not*, it becomes apparent that defining what law school actually *is* can be a much more difficult task."); *see also* CARNEGIE REPORT, *supra* note 9, at 44 ("Lawyers fill a bewildering variety of roles in American society. . . . The very diversity among law jobs has long been a matter of heated dispute within the profession.").

177 *See* CAREY & ADAMS, *supra* note 15, at 10 ("A law school in the midst of a major university in a 'college town' may have a very active student culture. Another, in the middle of a major city and with a large part-time student population, may tend to attract students who are less interested in campus life because of their own outside interests and priorities.").

178 *See* Am. Bar Ass'n, Sec. of Legal Educ. & Admissions to the Bar, ABA-Approved Law Schools, http://www.abanet.org/legaled/approvedlawschools/approved.html (reporting as of June 2008) (last visited July 27, 2009).

179 Somewhat more than half of these U.S. law schools (119) are private. *See* Am. Bar Ass'n, Sec. of Legal Educ. & Admissions to the Bar, Private Law Schools, http://

Not only are there diverse goals among law schools, but the goals of individual law students or distinct groups of law students (e.g., full-time vs. part-time students) vary as well. While many students come to law school to learn the skills necessary to obtain a position at a large law firm, other students have no desire even to take the bar exam or become practicing attorneys.[180] Because of this, students approach their own legal education from different directions and experience law school in ways that may be diametrically opposed from those of their peers. Many legal educators acknowledge that they are attempting to offer a legal education that will cater to a wide variety of wants and needs, as well as to diverse student populations.[181]

Most law schools actually encourage this type of diversity. A survey of the stated missions of various law schools reveals disparate views of the goals of legal education. Yale Law School, for example, states as its two historical goals: staying "small and humane" in order to "resist the pressures that were emerging in university law schools elsewhere toward large enrollments and impersonal faculty-student relations"; and being "interdisciplinary in its approach to teaching the law."[182] Yale's historical mission statement also includes moving "away from the preoccupation with private law that then typified American legal education, and toward serious engagement with public and international law."[183] Stanford Law School's mission, on the other hand, suggests a different general focus: "[D]edication to the highest standards of excellence in legal scholarship and to the training of lawyers equipped diligently, imaginatively, and honorably to serve their clients and the public; to lead our profession; and to help solve the problems of our nation and our world."[184]

Not only do missions differ among law schools, but *Best Practices for Legal Education* concedes that most law schools actually have

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www.abanet.org/legaled/approvedlawschools/private.html (reporting as of June 2008) (last visited July 27, 2009). In the 2007-2008 academic year, ABA-approved schools enrolled more than 150,000 students, with 49,000 in the first year. *See* Am. Bar Ass'n, Sec. of Legal Educ. & Admissions to the Bar, Enrollment and Degrees Awarded, 1963-2008, http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf (last visited July 27, 2009).

180 CARNEGIE REPORT, *supra* note 9, at 44 (stating that, while a majority of young lawyers begin their career in firms, sixteen percent enter government service, ten percent go to work directly for businesses, and two percent either do not practice law in any form or enter academia).

181 CAREY & ADAMS, *supra* note 15, at 10 ("[S]tudents experience law school differently. Each student has his or her own motives for applying to law school, . . . and students will have widely varied prior educational and work experiences.").

182 Yale Law School, History of YLS, http://www.law.yale.edu/about/historyofyls.asp (last visited July 27, 2009).

183 *Id.*

184 History of Stanford Law School, http://www.law.stanford.edu/school/history (last visited July 27, 2009).

multiple missions.[185] To formulate best practices in the true sense, however, the goal must be known, not debated. It is impossible to achieve a goal in a manner surpassing all others when the goal itself is in dispute or in flux.

Best Practices for Legal Education lists both preparing students for the bar examination and preparing law students for practice as areas in which law schools need to improve.[186] The authors then state that, while they recognize that "[l]aw schools serve a number of important functions,"[187] the only one with which the book concerns itself is the preparation of new lawyers for practice.[188] The authors continue to state other goals for law schools, including improving access to justice for low-income individuals,[189] teaching students to conduct themselves more professionally,[190] and attending to the well-being of students emotionally and psychologically.[191] These numerous goals are merely the starting point from which the book offers a multitude of techniques for improving legal education. The book's goals are mostly vague generalities, however, lacking the definite, agreed-upon goals that best practices are intended to achieve.[192] Indeed, the authors acknowledge the shortcoming of efforts to describe desired outcomes:

> While it is easy to conclude that legal educators should seek to achieve outcomes, it is difficult to determine how best to describe desirable outcomes. We are convinced, however, that it is essential for legal educators in the United States to make the effort to describe the desired outcomes of legal education, even if our initial efforts are imperfect.[193]

With this uncertainty, it is impossible to achieve a goal in a manner surpassing all others.[194]

B. No One Way to Reach the Common Goal

The second requirement for determining a best practice in a given area is that, at any given time, there must be only one way to achieve the agreed-upon goal that is clearly superior to all others. This precondition is equally absent from *Best Practices for Legal Education*; in-

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185 BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 8, at 39.
186 *Id.* at 15-18.
187 *Id.* at 16.
188 *Id.*
189 *Id.* at 24-26.
190 *Id.* at 27-29.
191 *Id.* at 29-36. The authors present several pages of summary of various law professors' and entities' lists and descriptions of desirable outcomes. *See id.* at 50-53.
192 *See, e.g.*, *supra* text accompanying notes 38-47.
193 BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 8, at 50.
194 *See supra* notes 145-47 and accompanying text.

deed, it may be unattainable, given the nature of legal education in general. At times, the book even contradicts itself regarding the means of providing the best possible legal education. The authors state, for example, that "most law schools' programs of instruction lack coherence, coordination, or focus toward the goal of preparing students for law practice."[195] Thus, the authors argue, law school curricula should be more structured. Yet in the next chapter the authors state that "[l]aw schools and teachers . . . should . . . give students as much choice as possible within the constraints of providing effective educational experiences . . . ."[196] But the book does not define "effective educational experiences."[197] These two competing principles help illuminate the fact that there is no consensus regarding the means to accomplish the goals of legal education. *Best Practices for Legal Education* states that law schools should give students as much autonomy as possible;[198] it also states that law schools should encourage collaboration among students and professors.[199] While these goals are not necessarily contradictory, the authors do not explain how, if at all, they are to be integrated.

Furthermore, law schools are rife with disagreement about methodology, as illustrated throughout *Best Practices for Legal Education*. Although one possible goal of legal education is to teach students how to "think like a lawyer," there is disagreement on how—precisely—a lawyer is supposed to think.[200] The classic discord that permeates this topic is rooted in the question of whether the casebook method, traditionally employed in all first-year and many upper-class courses, should still be the preferred method of teaching students the law.[201] *Best Practices for Legal Education* argues that case dialogue is overused, but offers no single agreed-upon alternative.[202]

The debate over how best to teach students to grasp legal concepts is a symptom of the contest between the practical and academic

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195 BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 8, at 95.

196 *Id.* at 114.

197 *See id.*

198 *Id.* at 113-14.

199 *Id.* at 119-20 (stating that, since lawyers work cooperatively, schools should encourage cooperative law student work).

200 *See* Laurel Currie Oates, *Did Harvard Get It Right?*, 59 MERCER L. REV. 675, 676 (2008) (arguing that the casebook method is the best method, because the "primary goal of law schools is not to teach students the law but to teach them to 'think like lawyers' ").

201 *See also* CARNEGIE REPORT, *supra* note 9, at 47 (noting that "the legal-case method . . . has dominated the first year of most legal education through much of the past century"). *See generally* Oates, *supra* note 200.

202 *See* BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 8, at 213; *see also* CARNEGIE REPORT, *supra* note 9, at 131-41 (encouraging law teachers to eschew reliance on socratic dialogue and the case method).

corners of legal education.[203] Law schools have frequently been sites of conflict about "how knowledge and values are to be understood and related in the academic preparation of lawyers."[204] Law schools are typically located at the junction between academic and practitioner interests and tend to find it difficult to balance the two interests to the satisfaction of all involved.[205] This debate came to a head during the 1960s and 1970s, when law schools began to develop and expand a focus on social concerns.[206] While the attention to social purpose was manifested in the creation of clinical legal education, an emphasis on faculty scholarship and research also reemerged as a backlash to the new focus on the practical side of legal education.[207] Today's law schools have only seen this debate over methodology grow, with the creation of integrated first-year curriculums,[208] legal writing skills programs,[209] and new first-year elective courses.

Best Practices for Legal Education augments this confusion by stating that the traditional case-method technique should continue to be used,[210] but adding that clinical legal education's emphasis should be greatly increased,[211] along with "simulation-based courses" such as "Interviewing," "Counseling," and "Trial Practice."[212] While the book outlines many interesting and potentially valuable ways in which legal education could be improved, or at least varied, these suggestions are formulated as "best practices" (for simulation-based courses) within "larger best practices" (for experiential courses) that would eventually accomplish the diverse goals discussed above (also conveniently labeled "best practices"). This aggrandizing, nesting-doll technique for addressing best practices further illustrates the inappropriate use of

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203 *See generally* CAREY & ADAMS, *supra* note 15.

204 *See id.* at 7.

205 *Id.*

206 *Id.*

207 *Id.*

208 *See id.* at 185 (stating that interdisciplinary study is a popular concept at law schools today).

209 *See id.* at 375 ("[L]egal-research-and-writing programs vary greatly. In some schools, the program lasts a single semester[, while in] other schools, the program may last up to two years . . . .").

210 BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 8, at 211-13.

211 *See id.* at 153 (describing ways in which clinical education can be added to the legal curriculum as early as in the first semester of law school); *see also id.* at 165-79, *passim* (discussing "experiential education").

212 *Id.* at 179-80. Interestingly, while the book generally supports simulation-based courses, the authors are also mildly critical of them. Because "students may conduct only one simulated client interview before moving on to another skill . . . [s]tudents in such courses do not develop proficiency." *Id.* at 182. This recognition alone highlights the lack of agreed-upon goals among the proponents of a best-practices approach in legal education, and, consequently, its inappropriateness.

the term and its application to the context of legal education.[213]

C. Results of Best Practices Are Not Objectively Verifiable

Finally, legal education cannot be endowed with a set of best practices because those practices cannot be objectively verified in relation to all other current or previous practices in the field. This final precondition is arguably the most important of the three because of the very nature of best *qua* superior to all others. Thus, the authors of *Best Practices for Legal Education* use the term inaccurately. One of the goals of the book is to ensure that students meet the "desired level of proficiency at various stages of a student's law school career or upon graduation."[214] This goal and the book's recommendations will not produce *best* practices. Rather, they will produce (at best) practices that provide students with the means to become minimally proficient in the skills necessary to practice law, assuming that those skills are agreed upon by legal educators. Only those schools that teach students to perform a given skill or task in the best possible manner would reflect best practices in legal education.

Verifying which law schools have in fact achieved the goal of teaching students to perform a given skill in the best possible manner is in itself a highly debatable and difficult task. One controversial method of judging the quality of a law school in recent decades has been the annual survey conducted by *U.S. News and World Report*.[215] Within the U.S. News rankings, forty percent of the total score comes from the "Quality Assessment" measure, which is derived from questionnaires sent to law school deans and professors, lawyers, and judges.[216] Law schools routinely engage in not-so-subtle campaigns to influence the outcome of the surveys, from sending out glossy

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[213] I am reminded of Winston Churchill's comment about Russia in a 1939 radio broadcast: "It is a riddle wrapped in a mystery inside an enigma[.]" *See* Churchill College Cambridge Archives, http://www.chu.cam.ac.uk/archives/gallery/Russia/CHAR_09_138_46.php (last visited July 27, 2009).

[214] BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 8, at 178.

[215] *See* Jon M. Garon, *Take Back the Night: Why an Association of Regional Law Schools Will Return Core Values to Legal Education and Provide an Alternative to Tiered Rankings*, 38 U. TOL. L. REV. 517, 522 (2007) (noting that the U.S. News survey is the most highly recognized external force on legal education); *see also* Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 403 (1998) (noting that, in 1997, 150 law school deans signed a letter criticizing the survey).

[216] *See America's Best Graduate Schools: The Top Law Schools*, U.S. NEWS & WORLD REP., May 2009, at 75. Within the category of "Quality Assessment," 25% comes from law school voters ("Peer Assessment Score") and 15% comes from legal professionals ("Assessment Score by Lawyers/Judges"). *See* Robert Morse & Sam Flanigan, *Law School Rankings Methodology*, Apr. 22, 2009, http://www.usnews.com/articles/education/best-law-schools/2009/04/22/law-school-rankings-methodology.html?s_cid=related-links:TOP.

brochures, which have come to be known among legal educators as "law porn,"[217] to enticing students to apply to their schools, thus skewing factors that are favorable to their rankings.[218] These unseemly efforts lead many in legal education to discredit the rankings as being based on the "emphasis of reputation,"[219] and having "little to do with the quality of education."[220]

Another attempted method of determining the success or failure of law schools came from the Law School Survey of Student Engagement, conducted in 2005 by the Center for Postsecondary Research.[221] This national survey, however, determined only that law students were satisfied with their experience during law school in general, and failed to address whether students were more or less satisfied with their legal education depending on the law school they attended.[222] Furthermore, a 2004 study by the National Association for Law Placement Foundation for Law Career and Research and Education, along with the American Bar Foundation, reached a seemingly contradictory conclusion. The study determined that, overall, law students were not satisfied with the way in which their legal education had prepared them for practice.[223]

The legal academy's internal debate epitomizes the point that objectively determining the quality of a legal education obtained at a particular law school in comparison with other law schools is a chimerical goal.[224] As a field, legal education is incapable of having any set of objectively verifiable best practices, because the nature of measuring quality among law schools and within legal education is inherently subjective and, therefore, open to extreme (and perhaps desirable)

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217 *See* Posting of Jason Solomon to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2008/10/and-the-winner.html (Oct. 15, 2008) (entitled "And the Winner of the Best "Law Porn" Award Is . . . ," describing a recent ad campaign from UCLA Law School as "law porn"); *see also* Posting of Daniel J. Solove to Concurring Opinions, http://www.concurringopinions.com/archives/2007/10/the_law_porn_bl.html (Oct. 20, 2008) (describing the existence and proliferation of "law porn").

218 *See* Posting of Elie Mytal to Above the Law, http://abovethelaw.com/2008/10/us_news_rankings_compromised.php (Oct. 16, 2008) (citing Alabama Law School's recent policy of offering prospective students $20 worth of iTunes cash to apply to the school).

219 Garon, *supra* note 215, at 522.

220 *Id.* at 522-23.

221 *See* CARNEGIE REPORT, *supra* note 9, at 76.

222 *See id.* (noting that the data gathered in this survey failed to determine which aspects of law school produced the results). An overview of the survey is available at http://lssse.iub.edu/html/lssse_2005_overview.cfm.

223 *See id.* (noting that *After the JD* concluded that students were "not especially enthusiastic" about the role their law schools played in the transition to practice).

224 *See* Korobkin, *supra* note 215, at 415 ("[N]o one has the foggiest idea how to judge objectively the quality of legal education across law schools. Consequently, any effort to 'improve' ranking systems by focusing on measures of quality almost certainly is not worth the candle.").

disagreement.[225] Thus, the use of the term "best practices" when discussing legal education is an unsubstantiated indication of superiority, a prime example of possibly good or better practices masquerading as best practices.[226] Competitive benchmarking in a corporate or industrial setting determines best practices by looking to the most successful companies and emulating their techniques.[227] Because many legal educators believe that the most commonly recognized method of comparing law schools is unfair and there has yet to emerge a viable alternative to that method, legal education lacks this fundamental aspect of benchmarking.

Successful benchmarking depends on having an objectively verifiable, agreed-upon industry standard. Legal education cannot meet this final precondition for determining a best practice. If the authors of *Best Practices for Legal Education* could propose as a best practice that "teacher[s] use[ ] assessments to measure outcomes that are reasonably possible to assess validly, reliably, and fairly,"[228] surely they should have employed the same protocols for their own report.

Conclusion

When used properly, the term "best practices" denotes those actions that surpass all others in pursuit of an agreed-upon goal or purpose according to some objectively measurable standard. The term carries with it an implicit seal of approval. When the term is used improperly, however, it allows assertions that are grounded in little objective proof to be perceived as infallible truth. The term then has no value. It is "obvious and banal,"[229] a jactation of superlative excel-

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225 *See generally* Garon, *supra* note 215, at 522.

226 *See supra* text accompanying note 7.

227 *See supra* Part II.A.

228 *See* Best Practices for Legal Education, *supra* note 8, at 253.

229 *See supra* text accompanying note 115. Professor Stuckey acknowledges Professor Fish's criticism and responds as follows:

> We concede that many of the best practices described in this document are banal and obvious. But that is the problem. Although they seem obvious, most law schools do not employ the best practices for educating lawyers. Thus, with due deference to Fish's opinion that discussions of best practices should be banned from polite conversation, we believe there is value in describing best practices for legal education and encouraging debate about them.

Best Practices for Legal Education, *supra* note 8, at 11. I do not disagree about the value of such a debate. With due deference to Professor Stuckey's opinion, however, I think he misses Professor Fish's point. Fish does not deride intelligent discussion and debate about reform in higher education. Rather, he condemns, as I do, the notion that educators know or can know what is best *qua* best. Thus, for Professor Stuckey to write that "most law schools do not employ the best practices for educating lawyers" is to presume knowledge that he does not—and one cannot—have.

lence that simply does not exist. It is "a follower's disease,"[230] enabling authors and organizations to ride on the coattails of a concept that was created to serve a different function.

The best-practices concept thus has no place in legal education (and, presumably, in many other educational fields). Efforts to employ it fail all three parts of the paradigm: there is no one agreed-upon goal; there is more than one way to accomplish the various goals; and recommended practices are not objectively verifiable in relation to all other current or previous practices. Even the MacCrate Report and the Carnegie Report eschewed the hubris of asserted best practices in legal education. The former emphasized that "[e]xcellence cannot be promoted by the kind of standardization involved in formulating any particular list of prescriptions and prerequisites";[231] the latter recognized "the sometimes conflicting purposes and approaches in legal education," and stressed the need "to study the[ ] issues, to experiment, and to learn from the results."[232]

My sense is that Professor Stuckey might not disagree that *Best Practices for Legal Education* does not measure up to the requisites of best practices. Indeed, he discerningly writes:

> It is no easy task to consider how to improve legal education even if all concerned agree that there is a need for improvement. Generations of debate have not resolved the relative merits of a liberal, general education versus a technical, professional orientation for the practice of law. Nor will we ever be able to reach universal agreement about the specific knowledge, skills, and values that law schools should teach if for no other reason than the vastly diverse practice settings in which our graduates work.[233]

If this is correct, then why become entangled in the concept of best practices at all? Why aim to persuade the reader that the principles suggested are in fact best practices without either defining the term or acknowledging that the principles fail to satisfy all aspects of the model (or even a dictionary definition of the word "best"[234])? Or do the authors merely adopt a faddish but inappropriate term to convey their otherwise thought-provoking propositions?

I am not averse to sensible recommendations for reform. I am concerned, however, when scholars and others attempt to oversell their hypotheses, assumptions, and biases. Classify proposals for what they are—e.g., ideas, innovations, experiments, improvements. Characterize proposals fairly—e.g., plausible, feasible, operable, viable,

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230 Sanwal, *supra* note 108, at 1.
231 MacCrate Report, *supra* note 16.
232 CARNEGIE REPORT, *supra* note 9, at 184 (discussing assessment).
233 BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 8, at 4.
234 *See supra* text accompanying note 142.

creative, promising. But—for the sake of accuracy, for the sake of respect for colleagues in the academy, for the sake of accepting and justly acknowledging the limits of one's arguments—please do not call them best practices. To do so diminishes the value of identifying a practice as *the best*. If there is one best practice in legal education, it is to avoid the term entirely.