

## Law Schools under Siege: The Challenge to Enhance Knowledge, Creativity, and Skill Training

Robert I. Reis

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## **Law Schools under Siege: The Challenge to Enhance Knowledge, Creativity, and Skill Training**

ROBERT I. REIS\*

### ABSTRACT

The Citadel of legal education stands besieged by attacks from students and practitioners alike regarding the lack of defined skill training in contemporary legal education. The belief is that graduates of law schools are not adequately prepared to practice law. This challenge to the model of legal education is not new. Law schools have historically focused on theory using readings and questioning to create the foundation and knowledge base of law and lawyering. That foundation has been shaken by diminished course requirements and an increase in attracting students and faculty by giving them the freedom to choose electives they may desire. At the same time, gaping holes in core knowledge requirements necessary to practice law may result. Students are under increasing financial pressures and uncertain futures. They face a myriad of distractions that affect the learning process and classroom attendance. Students have limited immersion and are barely insulated from the distractions of the world around them. Law school courses can bridge some of these issues if they are configured to engage the students and bring them back to the classroom in both body and spirit, as active participants in the learning experience. Law schools must focus their attention on requiring courses that provide a full and functional knowledge base necessary for all lawyers. They must, in this required course paradigm, include clear skill opportunities in courses, seminars, practicums, clinics, and, as this Article suggests, the newly formed Law School Law Firm, staffed by academic practitioners and requiring participation from all students in the final year. The Law School Law Firm should also provide the possibility of a fourth year of study, with tuition covered by the earnings of the Law Firm, as well as a stipend to qualified students who would earn an LL.M. in Practice and be deemed “certified for practice.” This transition can bridge fluctuations in the market place for employment opportunities and produce “practice ready” graduates. The future of the law, education, and practice is clearly what we make of it today.

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## I. INTRODUCTION AND OVERVIEW

Both the teaching of law and the practice thereof are changing. All things change in time. Sometimes things change “little by little,” almost imperceptively, until they are upon us and become the new reality.<sup>1</sup> It is not until the balance is disturbed, and that which worked once upon a time can no longer be thought valid, that the question arises whether the system is broken—and, if so, how and why? That has been the ever so slow realization of law schools, the academy of education that has produced the lawyers of this country since the middle of the nineteenth century. The increasing number of students that sought their futures as lawyers in society were, for the most part, required to wend their way through law school in preparation for the application of their knowledge to the practice of law or some other

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1. It has been over 50 years since I first stepped inside the hallowed halls of law school and bore witness to the myriad of incremental changes in the content, skills, ethics, and end production of a legal education.

venture that would be benefited by the rigors of analysis, knowledge, or perspectives gained by legal training.

The practice of law, the very foundation of law itself, and the education of students will continue to change at an ever accelerating rate, as influenced by technologies, economies, and societal change. Despite those in power holding tight to their positions of prominence, the relationship of lawyers to the structure of power and governance has been put into question by a foretelling of the time of “technocrats” as fundamental to processes that transcend public and private sectors in function and wealth.

The academies have changed, as the faculties of law schools morph, along with teaching responsibilities, scholarship, and skills that are revised on a periodic basis. Required courses, the backbone of a shared knowledge base and platform for practical skill development of lawyers, have been compromised with the advent of increasing student and faculty desire for electives that satisfy their broad, yet often narrow, interests and areas of focus.

The function of scholarship has changed. It was long ago, when “law review” articles were written by faculty with the purpose and belief that they could make a difference in the profession. The reality is that because of the proliferation of law reviews and articles that are there for the reading, there is a reasonable indication of this form of scholarship suffering a dilution of significance. There are so many law review articles in so many journals that they simply all cannot be read. Even if this quantity of scholarship could be read, they are reduced in import because of the sparse time to ingest, think, and absorb the contents or message.<sup>2</sup> What started as scholarship did not appear to either be read or make much difference in effecting change. That was the early 1970s, and traditional publications have not only exponentially continued to grow but when one adds the number and frequency of raw information digitally available, the impact of writing for scholarly journals is further diminished. If there is a cause to be served by law review publication, the format does not always serve the

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2. See generally Frank Bowman, *An opening musing on legal education*, CONCURRING OPINIONS (May 6, 2012, 5:03 PM), <http://www.concurringopinions.com/archives/2012/05/an-opening-musing-on-legal-education.html>.

There is far too much ‘legal scholarship’ now. Most of it is mediocre or worse. Much of its mediocrity stems from the naivete of inexperienced professorial authors. Even if it were far better than it is, the sheer number of law review articles spewed forth each year means that only the tiniest fraction of them will ever be read by anyone other than their author’s immediate relatives or P&T committee.

*Id.*

intended purpose.<sup>3</sup> Despite this reality, the primary obligation of faculty remains publication and reputation of scholarly excellence.

The question remains, particularly in the rush to rank law schools, as the competition for students and faculty expands, how does one measure the quality and impact of institutional focus on scholarship? One interesting venture highlights the plight of numbers and rankings when it postulates that the measure of scholarship lies in the number of times the work of an author is cited. That premise is the question, not the conclusion. What does a citation tell anyone? Does it inform of the worth of scholarship, reputation, and collective faculty value? And what methodology of citation collection would not further skew the logic of the premise if the count is further obscured by the fact that the count is limited to a less than a complete list of publications, or why one is cited, in approval or disapproval? Nor does this appear to take into consideration that citation numbers are easily manipulated by collusion. These portend the core lessons that one learns of logic and logical fallacies. What ever happened to reading and analysis of the scholarship itself? What ever happened to the worthy substance of legal education?<sup>4</sup>

Students have changing needs and perspectives. Their background, entering skills and learning experiences have evolved from past generations.<sup>5</sup> Their expectations of instruction, knowledge, skills, and

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3. Professor Lawrence Lessig is the master of “the big bang theory” of academic scholarship, which in turn attracts readers to his writings. It is most noticeable in his latest book where he proposed to bypass Congress by calling for a constitutional convention to address representative governance. *See* LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 290-303 (2011).

4. There are many things that are cited and read, and likely a significant number that are not read by those that cite them carefully, if at all. They are cited for a host of reasons; often because the author thinks they support his or her position. *See generally* Gregory C. Sisk et al., *Scholarly Impact of Law School Faculties: Extending the Leiter Rankings to the Top 70* (University of St. Thomas Legal Studies Research Paper No. 10-24, 2010), available at <http://ssrn.com/abstract=1674764>. The premise of this study is subject to serious question and may have a negative impact on the future of law schools. *See also* *Top 70 Law Faculties In Scholarly Impact, 2007-2011*, BRIAN LEITER’S L. SCH. RANKINGS (July 2012), [http://www.leiterrankings.com/new/2012\\_scholarlyimpact.shtml](http://www.leiterrankings.com/new/2012_scholarlyimpact.shtml).

5. An extraordinarily insightful exchange of thought by my colleagues on the faculty ListServ at Buffalo addressed many similar issues of legal education noted by the participants of the 2012 Ohio Northern University Symposium, *Perspectives and Distinctions on the Future of Legal Education*, and this Article. The conversation, however, opined that many of the problems we face with students in law school emanate from limitations in their basic knowledge of American history, governance, writing skills, the arts, and general lacking of a broad liberal arts education. I would assume high school and undergraduate competency and attribute most of the issues we are facing to structure within the law school: required courses, integrated skills in courses and seminars, and more practical course opportunities. This discussion of entering first-year students altered that vision and informs that these problems of basic literacy with first-year law students are significant. We are also reminded that these issues are not necessarily of recent origin having been addressed by remedial requirements in a number of law schools over the years.

opportunities after graduation have changed. Their inability to focus on their studies, based on external interests, has altered their physical and mental presence in school generally, as well as in the classroom. Student need for and expectation of grades have changed, fostered by both external measures of institutional rankings and expectations of grades necessary in the marketplace. Grade point inflation is more or less a fact to be considered for both students and law schools.

The costs of law school, level of student debt, and distractions have increased. The nature and function of the classroom has been compromised. Student preparation and attendance, as well as their attention while physically present for purposes of class and instruction, are issues all instructors must recognize. This is a two-way proposition of student preparation and expectation, and faculty preparation and expectation. Do the old models continue to work? Does professing continue to work? Is there something more required to effectively balance knowledge with skills and imagination?

As we consider all of these elements, we now understand the increasing frailty of this staid and true system of professional preparation that has held its own through changing times and circumstances for centuries. We are aware that law school can no longer continue to teach and profess as if the system functions as it should. We appreciate full well that there are fundamental issues that need to be addressed based on the changing economies and inability to outsource the finishing process of the legal education to law firms whose clients rightfully will no longer bear the costs of educating young associates.<sup>6</sup> As such, it is these issues of law schools—substance and function, skills and knowledge, purpose and effect—that will bear heavily on the academy,<sup>7</sup> as well as practice, as to the future of law “in society.” How we educate our students for the present and for the future will have to be responsive to issues which have been clearly recognized and addressed in increasing numbers, as illustrated by this Symposium, *Perspectives and Distinctions on the Future of Legal Education*, presented by Ohio Northern University and its participants.<sup>8</sup> This is a much-needed cry for attention.

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6. See David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all> (“Last year, a survey by American Lawyer found that [forty-seven] percent of law firms had a client say, in effect, ‘We don’t want to see the names of first- or second-year associates on our bills.’ Other clients are demanding that law firms charge flat fees.”).

7. Academy more accurately describes the nature and function of legal education than law school. It is a rite of passage and a shadow of the guild legal.

8. The other participants in the Symposium include former Dean Larry Kramer, Dean Patricia White, Dean Gregory Mark, Professor Jerome Organ, and Professor Renee Newman Knake. See gener-

Law schools have become the near ubiquitous subject of writing, discussion, and panels of experts, performing evaluations of law school functionality at the behest of the administration of the university to help determine the future of legal education.<sup>9</sup> These well-intentioned visitations note the costs of education, the diminishing number of jobs in the market place, and the student debt that burdens graduates. The causes, effects, concerns, and observations of a challenged legal education are scenes de faire as they are repeated over and over again.

These are all real concerns, but questions remain: Where does one start? What went wrong? How can the functionality of legal education be resolved for the future? What are tangible and implementable suggestions? These appear to be sparser by omission than one might have otherwise thought. Why the dearth of tangible solutions? Is it because they are likely fundamental to the interests of the administration and the faculty and because they touch the very foundations of the profession and academy itself? Is there an inherent self-interest that must be acknowledged on the part of the institution, the faculty, and the students alike?<sup>10</sup> This is such a time for reflection and this is a topic that requires attention and adaptation to the realities of a world that does not stand still. This is a time that raises questions about the role of lawyers in society, the function they serve, and the burden of trust they bear in light of perceptions regarding the pressures of billable hours (which often present ethical issues). The system is often dysfunctional. The causes and remedies lie at the foundations of legal education. If the system is “broken,” it is clearly the collective task to identify and remedy the academy and the professionals it produces for a sustainable future of the legal order at the core of society.

This Article does not profess to be more than simply a sharing of observations, perspectives, and a few samples incorporated as illustrations of attempts at change in the three discrete sections that follows. The first part is a review of the historical roles played by practitioners and law firms

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ally Jerome M. Organ, 38 OHIO N.U. L. REV. 885 (2012); Renee Newman Knake, 38 OHIO N.U. L. REV. 847 (2012).

9. One of the early calls for attention and comprehensive review was the exhaustive study provided by the *MacCrate Report*. See generally AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) [the MACCRATE REPORT]. See also ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007). The *New York Times* expressed a renewed concern with legal education in a lengthy editorial opinion on the present quandary and future of legal education. See Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 14, 2012, [http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html?\\_r=1&ref=opinion](http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html?_r=1&ref=opinion).

10. Brian Tamanaha presents the dark side of legal education in his book, BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012)—certainly a most provocative title.

as the finishing workshop of skills applied to knowledge. The second part is a snapshot of the education of a lawyer, premised on knowledge which was earlier provided by “reading for the law,” and later adopted as the role of the law school—structured readings, professing, and the acquisition of the range of knowledge upon which skills would be later based. That model has dramatically changed during the last quarter of the twentieth century and even more so during the first decades of the twenty-first. In particular, one should note the disappearance of most required courses and the expansion of electives that has unbalanced legal education and deprived students of a necessary knowledge base. How can we bring skills and crafting back to the classroom? Finally, questions arise concerning student stress, expectations, distraction, technology, and debt—each and all of these have the potential of affecting the educational process. While compulsory attendance, more often than not, brings the physical body of the student to class, the essential preparation and attention of the student often bears witness to the mind and spirit being elsewhere. How do we engage these students and entice them to lift their heads above their computer screens and willingly participate and actively learn?

## II. THE LAW OFFICE AND PROFESSION

The dependent variables highlight the role played by the profession’s finishing touch in educating its own, and at the same time, rely on the academy to supply the knowledge base upon which the finishing skills depend. These skills were likely provided in many schools by adjunct professionals teaching practical courses or the variant of work within professional offices under the tutelage of senior associates and partners. In either instance, the model likely worked because the process and product of the law schools was premised on required courses—a shared experience between those in practice and recent graduates. The academy of law schools produced bodies and minds that practitioners could identify with and rely upon.

The model continued to work until recently, albeit with some deviation during the 1920s and 1930s during the Great Depression, when, as to be expected, few if any jobs were open and those in practice watched their pennies to make ends meet. It is no wonder that during that time law offices were not hiring. It was during such a period that a graduate of a major law school could often only gain entrance to work with a seasoned lawyer by



paying for the privilege to be allowed to practice in his office.<sup>11</sup> One must question whether we are seeing, or are about to witness, a variation on this theme in this current recession. The variation is the seeking of office space, as in the Great Depression, but without the graduates having the skills to make it work. There is a story that notes we are about to see such a return to alliances of mutual conveniences—yet it is coupled with a caveat about current law graduates regarding the lack of knowledge and skills, which was not likely a problem with graduates in the early part of the last century, who had a rich and vibrant education with an endless number of required courses. The story reads as follows:

A verifiable incident which occurred this year in the western New York area serves to illustrate the problem. A recent *magna cum laude* graduate of an upstate law school was unable to find the fairly compensated legal employment his law school had confidently predicted for him. He was, in fact, reduced to accepting a free-rent-for-services offer from a sole practitioner in a tiny neighborhood office.

When his “employer” asked him to prepare a Show Cause Order, the *magna cum laude* graduate responded, “What’s a Show Cause Order?” and he was not joking.

Given some basic instruction by his mentor, this very bright young man was able to learn quickly and accomplish his assignment satisfactorily, and was grateful for the experience.

It is not known by this writer what electives he had selected in his second and third years after completing the curriculum prescribed only in the first year but New York State Civil Practice was clearly not one of them.<sup>12</sup>

The pragmatic reality of open arms and “welcome to the profession” represented, among other things, the affinity and easy truce between law schools and the practicing bar not to compete in the market place for clients. This had been a healthy and stable quid pro quo until the current recession,

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11. There is an often-repeated anecdotal story that my Father-in-Law, after graduating from New York University School of Law in the midst of the Depression, gained entry to work with a seasoned lawyer upon the payment of \$25.00 per month for the privilege.

12. Philip H. Magner, Jr., Letter to the Editor, 51 B. ASS’N OF ERIE CNTY BULL. 9, 2, 8 (May 2012), available at <http://www.baec.affiniscape.com/associations/10677/files/May%20for%20web.pdf>.

when there became clear indications from the law offices and the marketplace that attorneys are under pressure from clients regarding payment of new associate billable hours.<sup>13</sup> The market that condoned or supported this no longer exists, creating a pressing need for replacement and/or repair. Some have characterized this as a divergence of interest, as if this represents choice and is a matter of discretion. Law firms are simply holding true to their working model, which responds to the needs of their clients and the economies of law practice.

The system currently reflects that clients are fighting back, and in this weak economy, demanding an accounting, which affects the passing off of the finishing school function of lawyers through the transitional period of “associates” in law firms being paid for that learning experience by clients. Clients no longer want to pay for that future.<sup>14</sup>

This is not necessarily divergence. The goals and objectives of the bar and the law school remain the same. This is a changing model that responds to the pressures put upon those that bore the burden of the finishing touches of the educational process of making more lawyers. These are responses in the real world that highlight the deficiencies of the academy in externalizing the production of a finished product.

### III. THE STUDY OF LAW, LAW SCHOOLS, THEORY, KNOWLEDGE AND PRACTICE: A RECOGNIZABLE CONTINUUM

The early history of “reading for the law,” followed by learning the skills of practice, demonstrates an easy and recognizable continuum surviving through the current model of the American Law School. Reading for the law and then serving as an apprentice, or simply being mentored, as in the time of Jefferson, reflect the twin elements of knowledge gained from readings, practical application, and skills-supervised practice.

The premise of reading for the law, primarily as an academic discipline, dates back to the first law schools in Europe where teachings were about law foundations, theory, and function. These date back at least to non-

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13. See Segal, *supra* note 6.

14. See generally Heather Timmons, *Legal Outsourcing Firms Creating Jobs for American Lawyers*, N.Y. TIMES, June 2, 2011, <http://www.nytimes.com/2011/06/03/business/03reverse.html?pagewanted=all>; Allison Shields, *Outsourcing Blogs and Social Media*, LAWYERIST (Apr. 29, 2011), <http://lawyerist.com/intangible-benefits-of-law-firm-outsourcing/outourcing>; Debra Cassens Welss, *Are NY Law Firms Outsourcing Legal Work to India? One Admits It, One Denies It*, A.B.A. J. (Aug. 9, 2010, 6:00 AM), [http://www.abajournal.com/news/article/are\\_ny\\_law\\_firms\\_outsourcing\\_legal\\_work\\_to\\_india\\_one\\_admits\\_it\\_one\\_denies\\_it/](http://www.abajournal.com/news/article/are_ny_law_firms_outsourcing_legal_work_to_india_one_admits_it_one_denies_it/). In a probing conversation with a Chicago attorney, he acknowledged that his firm outsources basic research to recent graduates. He further indicated that some work that clients insisted be outsourced outside the country had to be repeated at the expense of the client.

professional academic programs, such as in Vienna, where the degree of bachelor of laws was awarded as a field of study:

An Act of the University of Vienna of 1389 gives orders for the precedence to be observed in processions. The banner of the university is to be carried first, then are to come Bachelors of Arts, then Bachelors of Medicine, followed by Bachelors of Law, the Bachelors of Theology, then Masters of Arts, Doctors of Medicine, Doctors of Law, and Doctors of Theology, Nobles walking with the Doctors.<sup>15</sup>

The model of law as a primarily academic venture was later modified in Europe where, after an undergraduate education in law, one could continue to receive professional training for the purpose of practice. Oxford University, for example, has several undergraduate programs that stand independent of one becoming a lawyer.<sup>16</sup> One can still have a major in undergraduate studies in Europe that leads to the award of a B.A. in Jurisprudence.<sup>17</sup> The three-year undergraduate law course leads to a B.A. degree in Jurisprudence, while the four-year law course lead to a B.A. degree in Law, with Law Studies further permitted throughout Europe.<sup>18</sup>

Litchfield, Connecticut in 1784, was the site of the first law school with an apprentice system in the United States that focused on professional training.<sup>19</sup> However, it is likely that its curriculum consisted primarily of readings with some practical applications. In 1777, Yale University first introduced law as an undergraduate course or program, and then later as a professional school.<sup>20</sup> This served as the predecessor of a professional law school as we now understand the nature and function of the study of law.<sup>21</sup> The template for the modern American law school for professional education is attributed to Harvard University in the 1870s:<sup>22</sup>

The modern American law school took shape in the 1870s at Harvard. It was a product of the movement for professionalization

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15. *Origin of the Bachelor's, Master's, and Doctorate*, ACAD. APPAREL, <http://www.academicapparel.com/caps/History-Academic-Degrees.html> (last visited June 18, 2012).

16. *See Frequently Asked Questions*, OXFORD L., <http://www.law.ox.ac.uk/undergraduate/admitfaqs.php> (last visited June 18, 2012).

17. *See id.*

18. *Id.*

19. 5 *DICTIONARY OF AMERICAN HISTORY* 55-56 (Stanley I. Kutler ed., 3d ed. 2003) [hereinafter *DICTIONARY OF AMERICAN HISTORY*].

20. *Id.*

21. *Id.* at 56.

22. *Id.*

both within the university and within the legal profession. Harvard had established its first chaired professorship in law in 1816 and its law school followed the Litchfield model during the 1840s . . . . Charles Elliot became president of Harvard in 1869 . . . . [and] he hired Christopher Columbus Langdell Christopher Columbus LangdellChristopher Columbus LangdellChristopher Columbus Langdell as Harvard's dean in 1875.<sup>23</sup>

This series of developments changed the course of legal education.

Harvard has since served as the contemporary model of legal education based on the Socratic method of questions and more questions serving as a building block of study and critical thinking based on lectures and assigned readings.<sup>24</sup> The common element of these forms of teaching was, and remains, *professing*—essentially the reading aloud of and about the law—supplemented by *delving* and questioning.<sup>25</sup> The standard test of success has been memorization and application to recognizable fact patterns and issues.<sup>26</sup> Neither of these models is necessarily one of skill, but rather the honing of the intellect and memorization of a knowledge base upon which skills could later be developed.

The courses that were to comprise the knowledge base were prescribed by the faculty and required of all students. Courses were selected by faculty based on their understanding, appreciation, and judgment of what was needed as a common knowledge base of law, regardless of specialization or *forte* thereafter. Electives—courses students select based on their interests—were primarily allowed late in the second year, and often, only in the third year. What this assured was a common knowledge base of courses thought important by the faculty. It also served as a common denominator between those in practice and recent graduates of law schools.

Many, if not most, schools taught by full-time faculty through the late fifties were populated by professors who likely became teachers after a period of practice or clerkship.<sup>27</sup> This fact distinguishes the present professorial profession where it now appears that many, if not most, of those who ultimately become law professors have little, if any, practice and come to teaching through advanced studies and degrees in law based on scholarship. It was rare for schools to combine full-time faculty that has mixed practical experience with a heavy concentration of practicing lawyers

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23. *Id.*

24. See DICTIONARY OF AMERICAN HISTORY, *supra* note 19, at 56-57.

25. See *id.* at 57.

26. See *id.*

27. See *id.* at 58.

as adjuncts teaching substance and skills. The State University of New York at Buffalo School of Law was one noted for this model in the 1960s, when it was a private law school, and thereafter as a public law school until it moved to a suburban campus.<sup>28</sup> This practice once again continues with a high level of interaction with select skilled adjuncts and an ongoing review of substance and skill delivery by a designated committee of full-time faculty to ensure appropriate doctrinal and skill coverage.

Thus, the coincidence of the practicing bar and the law school being cast as “ties that bind,” is premised, in no small part, on the common knowledge base of “reading for the law” as the foundation for skill development. This included a mutual appreciation of the nature and function of a stable set of required courses. The intuitive and anecdotal model of teaching—to share a solid knowledge base upon which to build skills of application and the necessary link for a first-year associate to be useful and yet nurtured and integrated into the practice of law—worked for generations of law students and practitioners.<sup>29</sup>

This paradigm remained intact, albeit diminished by curriculum changes and fewer required courses, until the decades just before the end of the twentieth century.<sup>30</sup> With each change, the “ties that bind” the profession and the law school were somewhat weakened, as was the body of knowledge of the graduate from law school. What factors lead to this change in legal education? Law schools were seen as an easy path to a profession and transferable skills to other business and entrepreneurial ventures. Some have attributed this to opening the profession to minorities, including Catholics and Jews;<sup>31</sup> however that continued to be a question for

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28. See Magner, Jr., *supra* note 12, at 2, 8; *University at Buffalo Overview*, THE ST. U. OF N.Y. AT BUFF., <http://www.facilities-buffalo.org/Departments/fpd/CampusInfo/HistoryofUB/overview> (last visited June 18, 2012); *JD Program*, THE ST. U. OF N.Y. AT BUFF. L. SCH., [http://law.buffalo.edu/Academic\\_Programs\\_And\\_Research/default.asp?firstlevel=0&filename=jd\\_program](http://law.buffalo.edu/Academic_Programs_And_Research/default.asp?firstlevel=0&filename=jd_program) (last visited June 18, 2012).

29. One anecdote of mine seems to capture the essence of this bond: “The Leather Note Book.” Upon graduation an elder gentlemen not known to me personally, but a friend of my father, had just retired from the practice of law. He insisted on meeting me and at our meeting he first congratulated me on graduation, welcomed me to the bar and handed me a well-worn leather pocket sized book which was packed with citations chucked full of useful motions in court appearances. He recounted it was his most valued and indispensable tool and wanted me to have it as my welcome to the profession. Almost fifty years later, I still have and cherish this “gift,” albeit it has never been called upon for service in decades that have passed. The lesson of the little book was later driven home again when visiting my father-in-law’s law offices years later only to find two volumes relating to New York Law on his desk, which he professed were the basis of what he needed at hand to serve his clients.

30. See *DICTIONARY OF AMERICAN HISTORY*, *supra* note 19, at 56.

31. *Id.* at 58 (“There were also very few blacks or other racial minorities. However, Jewish and Catholic males began to be admitted in larger numbers during the 1920s and 1930s.”).

some period thereafter.<sup>32</sup> The complexity and ubiquity of legal issues affecting the fabric of life fostered the growth of the legal profession, law offices, and the fee structures that promised wealth as a lawyer. The increase in the number of law schools was caused by the increase in the number of students and faculty. Students saw law school as a path to a secure a future, which generated the expansion of the number of schools and the hiring of faculty to staff these institutions. The ripple effect on legal education was quickly apparent. First, competition among students generated a movement away from required courses at the disdain of prior generations who longed for “electives” in areas of contemporary interests. Law schools that had prescribed courses for the first two years or more, yielded to the demand of students for diminishing the number and breadth of required courses, as well as giving them choices as early as the second semester of their first year and in greater numbers in the second and third years of law school.

This change in curricula nourished the need of new faculty to teach in areas in which they had academic and scholarly interests, rather than teaching in areas of the law that served the knowledge base of prior legal education.<sup>33</sup> The movement away from practical skill in the expanding law school environment was further necessitated, if not legitimized, by the fact that promotion and tenure decisions in most law schools were based on faculty scholarship and publication, leading to recognition of the faculty member as nationally recognized expert in his or her field of specialization. The emphasis on scholarship diminished the requirement, if there ever was such, of prior practice experience for the teaching of skill-based courses and has, of late, reduced the number of courses available to students because of reduced teaching loads for faculty at many institutions competing to attract young scholars and teachers.<sup>34</sup>

Just how many law schools are there now and how does the current number compare to that of the middle of the last century? There are 202 ABA approved law schools as of October 2012.<sup>35</sup> In 1960, there were

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32. See Arthur J. Paone & Robert Ira Reis, *Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers*, 40 S. CAL. L. REV. 615, 616-17 (1967).

33. In the early 1960s, a new law school faculty member taught what needed to be taught—those courses that the low person on the totem pole drew as a straw. It might be several years before they would be assigned a course they really “wanted” to teach. Likewise, competition for law professors had not reached the present elevated state until the end of the century. Starting salaries for young assistant professors in the mid-sixties were significantly less than that they would earn in practice.

34. See generally DICTIONARY OF AMERICAN HISTORY, *supra* note 19, at 58.

35. *ABA-Approved Law Schools*, A.B.A., [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html) (last visited Oct. 14, 2012); Daniel Luzer, *Too Many Law Schools?*, WASH. MONTHLY BLOG (Jan. 8, 2010, 2:07 PM), [http://www.washingtonmonthly.com/college\\_guide/blog/too\\_many\\_law\\_schools.php](http://www.washingtonmonthly.com/college_guide/blog/too_many_law_schools.php).

approximately 133 ABA approved law schools, an increase of slightly over fifty percent through the end of the century.<sup>36</sup> In the next forty years there was over fifty percent increase.<sup>37</sup> One might seriously question whether there are simply too many law schools.<sup>38</sup>

Is this history of legal education significant? Does it accurately reflect the causes of current disconnects between the study of law and the practice skills and knowledge that are exasperated by the economic issues of the time? Are there elements that can be addressed in rectifying deficiencies in the knowledge base, in the cultivation of practical skills and thought processes for aspiring law students, and in providing graduates with value to the profession and clients? And will these changes help redress the waning focus of law students that often undermine their attention and the benefits of the educational process?

#### IV. CULTIVATING SKILLS AND IMAGINATION IN THE CLASSROOM: ENGAGING AND RECAPTURING STUDENT INTEREST AND ATTENTION

At the onset of this section, we should distinguish a focus on skill training from issues which concern engaging our students and bringing their attention back to the classroom. While students will be engaged by the understanding that they are being taught useful skills, there is still the remaining issue of how to fully capture their interest, imagination, and creativity. It is this emersion in the lessons of problem solving that opens the door to enable development of the skills of the profession.

The fact that nearly fifty percent of law faculty members have never spent a day in practice as an attorney is a significant reflection on their experience and possibly their ability to teach practical skills.<sup>39</sup> What may be even more significant is the answer to the question of how many professors on law faculties have taken any course of study in the skills of

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36. *ABA-Approved Law Schools by Year*, A.B.A., [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/by\\_year\\_approved.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html) (last visited June 18, 2012).

37. *Id.*

38. *See, e.g.*, Matt Leichter, *Dead by Dawn: Law Schools & Law Students per Capita (1960s-2010)*, THE L. SCH. TUITION BUBBLE (Apr. 27, 2011), <http://lawschooltuitionbubble.wordpress.com/2011/04/27/dead-by-dawn-law-schools-law-students-per-capita-1960s-2010/> (this an excellent article on the statistical growth of law schools from the late 1950s and demographics per population number).

39. *See* Segal, *supra* note 6:

The essential how-tos of daily practice are a subject that many in the faculty know nothing about—by design. One 2010 study of hiring at top-tier law schools since 2000 found that the median amount of practical experience was one year, and that nearly half of faculty members had never practiced law for a single day.

*Id.*

teaching? Very few, but just how many understand the process of teaching and learning to optimize the student experience? How many law schools require faculty to attend instruction provided by the university on new technologies for teaching, models for teaching, and measures for determining success in teaching other than memorization? We teach as we were taught, we profess, and maybe excel in those elements of communication—but is that really teaching? The current issues we are all faced with arise from the backlash of law firms and clients, the lament of graduating students who recognize their limited skill enhanced by education and the reality of law schools having to modify the model of restoring the coincidence of both the knowledge base of graduating law students with the profession, and internalizing the obligation of meaningful skill training inside the law school as a significant part of the curriculum. These elements form the basis of the next section of this discourse—the integrating of practical training into the curriculum and, equally as important, bringing the student back to the classroom, in mind, body, and spirit.

We have limited means of testing teaching effectiveness. Issue spotting and the application of rules to known facts test a narrow range of skills that real-world practitioners and their clients inform us are not necessarily the skills at issue. Imagination is taking things that appear on the surface unrelated and “cross fertilizing” to deal more effectively with new and differing objectives. The goal is teaching effectiveness. Of course, the issue is both the end objective and the notion of what is effective. This can be made more complex by the realization that there can be several means and ends that could work equally as well. One can give students credit for reaching any one of these ends, or by evaluating the interim thought process as the means applied, or both. What has been tested is problem solving by imagination, not by rote memory.

It may be that this is a failure made evident in the present disconnect of law students from the classroom and learning experience. Students are heard to lament their lack of practical skills in the process of putting their knowledge to work for the law firm or the client. There are times in the past that faculty may have taken comfort in professing, remaining confident that they could depend on the student to absorb and adapt.<sup>40</sup> We must come to grips and question the effectiveness of the model of teaching we were taught and assume that the curiosity, ingenuity, hard work, and intelligence of the students will bridge the gap. We may have been satisfied with giving

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40. This had often been a thought when one teaches methodically through the casebook, but the knowledge thought imparted does not necessarily translate to skills and practical understanding of problem solving.



students cases, doctrines, examples, and testing their memory and ability to spot and respond to “issues.” But fortunately for the future, many have now come late to the table to realize that model no longer works the magic it did for generations before. The cliché, “better late than never,” applies appropriately. The onus is on law professors to teach not only doctrine, but also, to provide examples and applications in a meaningful way that communicates with students.

There are clearly pressures distracting the current student body, such as the unprecedented levels of student debt that affect most law students. There are many students that are working outside the classroom to make ends meet. And there are the ever-increasing distractions of current technologies and networking. How do we engage and recapture our students? How do we get law students back to the classroom, not just physically, but mentally and emotionally active in the lesson and learning process? We are all aware that many students may be physically in the classroom, but absent in thought, or connected elsewhere through the Internet or cell phones. Attendance does not tell us whether the student is there. Compulsory attendance, seating charts, and calling on students helps—lest they be considered unprepared and embarrassed—but, as teachers, not simply law professors, we need to devise mechanisms to do more to engage the students, to make them want to participate, and to give them intermediate stakes in the outcome of the subject matter that make them argue, defend, analyze, and use their imaginations. We must value knowledge by providing a secure method to encourage originality. A student that tries can never be wrong for trying. The end product will be confidence and experience in thinking beyond precedent and reaching the desired end result. In some ways, the law does not encourage this. The stability of the system is on certainty and certainty rests on knowing outcomes. A confidence in originality and risk can be a meaningful platform for skills in training.

In summary, these are just three of the more obvious issues and factors that altered the nature and function of legal education: First, the lack of skill-oriented courses and seminars in law school focusing on training as a priority in the classroom. Second, the reliance on external entities to complete the students’ practical education exacerbates this problem, particularly in light of current economic conditions. Third, the pressures of work, debt, technology, and related distractions affect the students’ focus, concentration, and studies. For the record, these issues of external interferences with the attention of students are not unique to law schools. This is a concern of teachers beginning with elementary school. There are multitudes of distractions, limitations on concentration, attention, and

interest due to the seductive nature of new and emerging technologies. Today, children under the age of two-years-old know how to use computers and the iPad, which dazzles and defies logic. They can read books (words and pictures) and actively participate in educational and other ventures for fun and learning. The current generation of law students are skilled, albeit maybe not as transparently as this latest generation—they surf, search, communicate, socialize, shop, and many are addicted to staying connected. While all of us would like to believe computers in the classroom are for note-taking and follow-through on questions asked, the reality sometimes is that the screen hides the truth and even identity of the student. This characterization of any number of students defines both their physical attendance and often divided attention. One secretary, standing in the back of a classroom last year, made the observation that the young student in the next to last row just bought two pairs of shoes and a dress. So the question goes, how do we get the students back to the class, with body and mind engaged? In the typical lecture class, how many students are “all there”? The skill-based course appears to get more attention than the lecture simply because the students know they will be using the materials from class in subsequent exercises. But the question appears a little more fundamental and at the heart of how we teach. Young teachers have a leg up in this matter. When they offer examples, they generationally do so in a manner the students can identify with—it means something to them. A lesson learned from watching young colleagues say “make it meaningful to the students” and see if it makes a difference. The redrafting and redefining of the objectives of a simple course, used as an example below, was just that and the result was somewhat surprising. What follows are very simple examples of attempts at engaging that may be helpful to others in devising their own course materials.

*A. Example One: Attempt at Capture—Copyright Spring 2012*

The students are told that the class is arranged around a series of issues and problems involving copyright that affect most, if not all, of them directly. There was nothing esoteric, each represented facts and factors that the students could identify with. There were no obscure algorithms or claimed copyrights in anything other than that which the students could consider impacting themselves, one way or another. In fact, each of them may be liable, deprived, encumbered, or simply have something taken away before they even realized that they might have benefited by its presence or use. A non-traditional casebook was prepared for the course. The main difference between a traditional casebook and these materials was that after the initial introduction, the students were referred to several cases that would help

with their analysis and resolution of the problems for each class, but they were not limited to thumbing through and looking at other sections. Each class started with the students identifying the copyright issues, the relevant rules, the provisions of the Copyright Act, and cases that have considered the issues in this or other contexts.

The first two classes set the stage, with the following two fact patterns at the heart of copyright, which the students could easily identify, master the rules, and ground themselves in a routine of questioning, imagining and “lawyering.” The first class involved the following innocent incidence: “Who would not want a picture of a typical tour bus and the royal residence in London?” What then is wrong with the “picture” of an English court ruling that the first image is copyrighted and exclusive to the copyright holder, albeit not identical, nor copied from the copyrighted photograph?<sup>41</sup>



This case reviewed the very basics of copyright protection, authorship, fixed in a tangible medium, the requirements of copying, and the negation that copyright can protect an idea. The class vigorously distinguished the apparent English courts standard for copyright protection from that under the Copyright Act as enacted by Congress. It was a simple step in basic lawyering skills and in preparing their analysis, approaches, and resolutions.

The second class raised the following issue all students took to heart when asked to confront this question: “What do you mean I am liable for downloads of copyrighted material from my computer on an unprotected Internet connection? I am an innocent law student!” Internet users who fail to “secure” their computer’s or even their wireless router’s Internet access should be liable under a negligence theory for damages to others using such access cause by unauthorized downloading, according to a the first amended

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41. See Mike Masnick, *UK Court Says You Can Copyright The Basic Idea Of A Photograph*, TECHDIRT (Jan. 27, 2012, 8:25 AM), <http://www.techdirt.com/articles/20120126/10515817552/uk-court-says-you-can-copyright-an-idea>.

complaint filed in the United States District Court for the District of Massachusetts.<sup>42</sup>

Students, in picturing themselves at risk with the possible outcome of this case, were initially livid and frightened that they stood accused. Later, there were some that recognized the responsibilities of the Internet user to the copyright holder and adamant that their intellectual property rights were warranted due protection from the legal system. Two cases involving secondary liability were noted for them to review in the materials, one on music file sharing and another on images. The resource casebook prepared for the seminar contained additional materials and some questions they could use as a resource for any further research or questions they might think appropriate to pursue. The students argued the basics of copyright, of the Internet, and of reasonable protections, in what amounted to a stream of creative thinking and shock that using the Internet in law school on the law school network could subject them to liability. Of course, they distinguished that from Starbucks or the airport, for example.

As the semester evolved, the cases and issues were kept current and relevant to the students. They also became increasingly more substantial and complex, which required the students to use their imaginations and research techniques on the Internet and in the casebook. They responded by using their skills to creatively identify, formulate, and resolve issues. Attendance was up and participation was animated, indicating both mind and body were present and accounted for. This raises questions concerning how we cover cases, how we encourage imaginative thinking, and how we can measure the creativity necessary to fulfill professional obligations. Student response to the semester was serious, almost universal, and appreciated.

This was a copyright class, and the approach was relatively simplistic with regard to finding materials the students believed would affect them. But the basic premise of engaging the students by finding facts, cases, and issues that they can identify with, or are affected by, does make a difference. News, hot off the press, concerning the subject matter of the course also seems to make a difference because they want to know how they will be affected, and that is meaningful in the educational process.

Later in the semester, as the students adapted and increased their role playing, another exercise in a totally different context involved the A/B factor set forth in *Wired Magazine* relating to Google's attempts at decision

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42. First Amended Complaint, Liberty Media Holdings, LLC v. John Does, No. 11-cv-10802-WGY (D. Mass. filed Jan. 6, 2011), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2012-01-23-Liberty%20Media%20First%20Amended%20Complaint.pdf>.

making by testing reactions to A, and then B, and sometimes C to see the affect in marketing.<sup>43</sup> The questions put to the students were whether the use of the A/B model might affect the issue of originality and authorship if the resultant use was premised on the results of the test, and how this might affect their perceptions and approaches to contracts, negotiations, conflict resolution, counseling, trial preparation, interrogatories, motions, and so forth. The question was also posed as to whether this would, if considered a viable tool, affect their responsibility to counsel their client. Interesting and lively discussion followed, indicating once again, that students simply need the right challenges of the time and that the professing of yesterday requires further thought in the twenty-first century.<sup>44</sup>

*B. Example Two: An Early Venture to Encourage a Culture of Skill Training in the Law School—Integration of a Real Estate Sale and Closing into the Classroom*

There were several notable attempts to bring skill training back to the classroom at the University at Buffalo School of Law, as likely was the case in other institutions. The first faculty-wide notation of the problem of skill training in Buffalo was set forth as a challenge to the faculty by Dean Thomas Hedrick in the late 1970s. Dean Hedrick sensed the change in teaching emphasis away from skills to doctrine and policy and expressed a concern that the students needed basic “lawyering” skills to ready them for practice. This was the inception of at least one course designed to implement the so-called “Buffalo Model” of four decades ago. The context selected was a second-year property course in real estate transactions, a conveyance of a residential dwelling. The challenge set forth was to change the nature of the class to not simply teach the rules but to provide an opportunity for the student to complete the representation of a client in the sale of the existing home and the purchase of another. The cases and notes for the course covered the ordinary collection of legal materials: marketing, contracting, financing, title search, issues of encumbrances, contractual promises, escrows, dates of performance, deed forms, delivery of the deed, liens, and related issues were to be included for consideration. The students were given notes by the senior partner identifying the house to be sold by the clients. This would then lead to the engagement of a real estate broker

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43. See Brian Christian, *The A/B Test: Inside the Technology That's Changing the Rules of Business*, WIRED 20.05, May 2012, at 176-83, available at [http://www.wired.com/business/2012/04/ff\\_abtesting/](http://www.wired.com/business/2012/04/ff_abtesting/).

44. Skills are the edge in securing a job and the practice of law. See generally Sarah Dunn Davis, *Extending Legal Education through Skills Training*, MS. JD (Oct. 18, 2009, 5:21 PM), <http://ms-jd.org/extending-legal-education-through-skills-training/>.

in a multiple listing context. The clients would also be looking for a new home. This involved their use of a broker as well. The students would have to identify and answer client concerns about both their obligations under the sales-broker engagement and their obligations, if any, to the broker they used while looking for a new house. When they found a house on which they decided to make an offer, the students had to review the offer and ensure that the contract contained all concerns of the client, including, but not limited to financing, dates of performance, and other concerns the client might have. If a form was used, they had to explain the contents of the form to the client. If further provisions (a rider) were necessary, they would have to draft the same and provide a memorandum of what and why they drafted the rider. While most lawyers do not do the financing for the client, where there is a contingent on financing clause, the lawyer should know prevailing rates and may well be consulted to make suggestions to the client or review a mortgage commitment for interest, term, amortization, and penalties. If you do not know prevailing rates, as one example of practice sense in many jurisdictions, the purchaser may stipulate in the “subject to financing provision” of the contract of purchase an interest rate that is slightly below the market rate as an escape mechanism should they desire not to complete the transaction. The project included, among other matters, a memorandum reflecting their counsel to their client. From the financing aspects to the closing, students were required to deal with deed forms, title issues, lien issues, if any, title insurance, and the actual closing of the purchase and sales transactions. The project was distributed the second or third week of the semester after a brief introduction to the materials, and due on a certain date at the end of the semester. Success was measured by whether they could close both transactions. Usually, there was at least one bump in the road, such as damage to the house discovered before closing, or a minor title discrepancy, or other issue that they needed to resolve. All this was to be recounted in a memorandum explaining the issues, choices, resolutions, and so forth.

What makes the project different, and perhaps a little more interesting as part of the learning process, is the practical notation that the students could work with any one member of the class, but the final project memorandum was required to be their own work product. Partner selection is a skill. They were required to name their partner in the project and they were on their honor regarding the memorandum. Likewise, they could ask anyone in the real world for help. Why would this be a factor in the assignment? Because learning who and how to ask for help or clarification is a critical skill in the practice of law and we never stop learning or seeking clarification or assistance in the real world. The students found the building department, located a banker or mortgage broker, and spoke with title

insurers or attorneys. In a number of instances, students even sought help from their parents who were faculty at the law school. They had to document these inquiries. From the beginning, the students bought into the project, played out their roles, and produced voluminous memoranda and closing documents.

This skills class has been offered for almost thirty years and often has closed out. Why? In part, it is because the practicing bar remains helpful when students seek them out for assistance. Likely, the local bar helps because many had gone through this exercise themselves. The students fairly consistently recount the value of the course; some even say it put food on the table when they first went into practice. The comments from colleagues whose children asked them for help often bordered on humorous, such as “Whew, I really worked hard on the closing project with my daughter/son and I learned something”—this always came with a smile. Clearly, this is a model that can work in many contexts and satisfies our teaching instincts for knowledge and skill development. If there is any drawback, it is a modest recognition that the course becomes labor intensive in the evaluation of student performance, but this is soon forgotten, until the next time. The suggestion is thus of using skill courses and seminars that fit within the existing paradigm of the curricula. Almost any course could be adapted and recast to integrate modest skill learning involving traditional subject matter.<sup>45</sup> As alluded to before, the hope is that this change would also serve the purpose of capturing the students’ attention, particularly if the sense their stake in the outcome.<sup>46</sup>

*C. Example Three: A Clinical Venture in Skill Training that Bettered the Community, the Lives of the Inhabitants and Provided a “Real” Education in Practice and Benevolence*

A second innovation in skill training came from Dean of the University at Buffalo School of Law, Nils Olsen, a skilled practitioner and clinician. His venture in skill-based education went beyond the familiar benefit of clinical programs and law school exercises to become a model of unconventional thinking and practice. It has been noted of Dean Olson that one of his

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45. During the past two years, Dean Makau Mutua has revitalized the commitment to skills training as a primary objective of legal education. The committee charged with academic policy and review at the Buffalo Law School, in response to comments from the bar, was committed to identifying classes that were already “skill” courses, as well as encouraging faculty to move forward and adapt other courses to that end. This is a modest but significant step in the right direction.

46. For a somewhat different but thoughtful way of approaching practical skill training in the context of Property, *see generally* COLLEEN E. MEDILL, DEVELOPING PROFESSIONAL SKILLS: PROPERTY (2012).

innovations was creating an affordable housing clinic that actually constructed housing:

One of Olsen's proudest accomplishments is the introduction of a clinical affordable housing program, which has enabled students and faculty to create about \$160 million worth of affordable housing in Western New York.

"Early on we tried to depart from the traditional clinical education program that grew out of Legal Aid . . . . So, rather than going to housing court and representing individuals in an effort to keep them in substandard housing, for the last 23 years we've created new or rehabilitated housing."

The program "is much more complex but is much more relevant to traditional offerings in tax, real estate and finance and also, socially, it's a very different approach. It's an approach that, in my opinion, makes more sense."<sup>47</sup>

Participating in a program that has educational value and makes a contribution of the sort noted above is not only a learning experience in the normative sense, but one of the value of what can be accomplished as a lawyer acting in the public interest. Dean Olsen went on in comments to note that the course was not only useful in the academic sense, "but also reflective of the reality of the marketplace" where there is an expectation of new associates making contributions quickly.<sup>48</sup>

Skill training involves pressing the curves of student imagination. It needs to become tactile and produce feedback in the process of learning that will be meaningful to the students. Skill training requires that thinking beyond precedent (which in the opinion of some, often serves as cliché and a substitute for thinking) be cultivated. Students must certainly know cases and how to relate fact situations to existing and future rules—that is the imperative of this fast evolving world. We are stuck in a rut nonetheless. Theory is relatively easy, but it often defies the feedback necessary for the application of skills to real-time problem solving and thus suffers the academic disorder of questionable function. Nonetheless, we rightfully

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47. Tara E. Buck, *It's Family First for University at Buffalo School of Law Dean Nils Olsen*, RED ORBIT (May 25, 2007), [http://www.redorbit.com/news/education/946401/its\\_family\\_first\\_for\\_university\\_at\\_buffalo\\_school\\_of\\_law/](http://www.redorbit.com/news/education/946401/its_family_first_for_university_at_buffalo_school_of_law/).

48. *Id.* Recall as well, the plight of the honors graduate that did not know what a show cause order was. See *Magner, Jr.*, *supra* note 12, at 8.



value theory, policy, rules, precedent, and academic probing. The intellectual side of law school is a foundation and necessary. In recent decades, we have learned to value clinical and practice paradigms and have even convinced tenure reviewers that a good brief, trial memorandum, contract, or other creative “functional” writing evidences scholarship. The clinicians at The State University of New York at Buffalo School of Law, because of the efforts of the two noted deans, are tenure-track and their scholarship is evidenced by their scholarly writings and documents produced as the tools of the practitioner.

The suggestion of required clinic participation should be an easy transition in light of the plight facing legal education. The value of clinic participation and supervision is no longer seriously questioned in proven educational value. Making participation a requirement does not alter that fact, although, it does slightly change the edge of those that believe in the academic supremacy of a legal education and resist the notion of a “trade” or “practice” oriented commitment.

#### V. THE LAW SCHOOL LAW FIRM: A NECESSARY STEP IN ENHANCED EDUCATIONAL OPPORTUNITY?

Traditionally, law schools have avoided the integration or formation of a “law firm” under the umbrella of the institution. The most notable exception lies in the formation and acceptance of clinic programs. Some institutions have programs in specialty areas and related affiliations, such as in technology transfer, patent prosecution, or the like. The ability to add at least one semester course as a clinical requirement is there for the asking in most law schools. The next step, however, is the possible creation of a Law School Law Firm,<sup>49</sup> or Law School Practice, and requirement of at least one semester of participation in the final year of law school. The requirement of participation in the practice firm addresses not only the need, but also the vacuum left by the wounded model of historically outsourcing this unspoken and significant element of the education of students to private law firms, particularly in light of the current economic downturn. It redresses the fact this part of the legal education of new professionals should not have been abdicated in the first place.

The model is premised on the formation of a Law School Law Firm, staffed by faculty and lawyers who work for, or have a working relationship

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49. This issue has become more popular in recent times. See, e.g., Gyi Tsakalakis, *The Law School Firm*, LAWYERIST (Aug. 29, 2011), <http://lawyerist.com/law-school-firm>. See also Bradley T. Borden & Robert J. Rhee Brooklyn, *The Law School Firm*, 63 S.C. L. REV. 1, 2 (2011).

with, the law school.<sup>50</sup> There are notable familiar examples of university-related practice groups in other professional programs within the university. Certainly, there are working models in faculty clinics, such as dentistry, where students get supervised diagnostic and skill experience working under the tutelage of faculty.<sup>51</sup> Additionally, medical schools offer teaching hospitals, residences, and internships where students gain experience.<sup>52</sup> There are models of collaboration between teaching and practice in the sciences, such as pharmacology and architecture and environmental design in university institutions both for practice-based skills and the protection of intellectual property rights. In the technology area, there are institutions that work to identify the intellectual achievements and property of faculty and students and provide “incubation” on or off campus for inventors, authors, trademark holders, and so forth. In the case of patents, students participate in externships or internships under faculty supervision in drafting patents and patent applications. The incubation idea is to allow perfection of the working model, assess market and manufacturing readiness, and investigate acquisition of venture capital. Guided student participation is not only encouraged, but is a highly sought after educational opportunity.<sup>53</sup> There is no reason that these clinical models cannot be carried over to a Law School Law Firm that provides students in their third year with practice opportunity that will develop skills, making them that much more prepared to move from law school to being “practice ready.”

The Law School Law Firm would also provide the possibility of a fourth year of law school devoted to practice. In this economy, that would serve many functions. For example, fees generated in paying client relationships could be used to offset or pay for the entire LL.M. or whatever degree or certificate is awarded for the year. It could be used to provide a

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50. The caveat here is that many faculties are not admitted to practice, nor want to practice, in the jurisdiction in which they teach.

51. See Allan J. Formicola, D.D.S. et al., *Evolution of Dental School Clinics as Patient Care Delivery Centers*, 72 J. OF DENTAL EDUC. 110 (Supp. II, Feb. 2008), available at [http://www.jdentaled.org/content/72/2\\_suppl/110.full.pdf+html](http://www.jdentaled.org/content/72/2_suppl/110.full.pdf+html).

52. “To remedy the crippling problem of underemployed young lawyers, law schools should become more like medical schools, complete with legal residency programs that teach practical skills, according to a new report from the Massachusetts Bar Association.” Lisa van der Pool, *Report: Law school should be more like medical school*, BOSTON BUS. J., May 18, 2012, <http://www.bizjournals.com/boston/news/2012/05/18/report-law-school-should-be-more-like.html>. The report was conducted by the Massachusetts Bar Association. Report of the Task Force on Law, The Economy and Underemployment: Beginning the Conversation, MASS. B. ASS’N (May 17, 2012), available at <http://www.massbar.org/media/1246788/beginning%20the%20conversation.pdf>.

53. The State University of New York at Buffalo has a near campus facility for technology transfer: University of Buffalo’s Office of Science, Technology Transfer and Economic Outreach (“STOR”). *About STOR*, THE ST. U. OF N.Y. AT BUFF., <http://www.research.buffalo.edu/stor/about.cfm> (last visited June 18, 2012).

modest income to the fourth-year students. It could be used to make the graduate “practice ready” and much more desirable and justifiable to a private law firm. The Firm could be either on or adjacent to the university, or even located in an area near the courts. The historic invisible barrier has been to prevent competition between the law schools and those in practice. The quid pro quo was that the practitioners performed this function after students graduated. The reality is that some marginal business will be taken away (if permitted by the bar) from the practitioners, but the objective, justifiable need is arguably there. There may be restrictions on whether this can be incorporated within the law school itself because of both staffing and physical location. However, there are many models and degrees of relationships that could exist and are likely, in one modified form or another, to materialize in the future. Practice of some sort needs to be brought in house and owned by the academy. This will, of course, require more that faculties be brought on board or encouraged to focus on developing models of practice and use of knowledge as skills. This may well be a change already underway in the culture of law schools based on clinic programs and evolving tenure requirements. All of the above should also be considered in the context of existing and changing ABA requirements. Likewise, requirements for admission to the state bar should be considered, such as recently announced in New York State provisions, which require fifty hours of pro bono work as a prerequisite to admission to the bar.<sup>54</sup>

New York will soon become the first state in the nation to require pro bono service with Chief Judge Jonathan Lippman’s recent decision to mandate fifty hours of pro bono work as part of admission to the bar. This is a step in the right direction that can significantly enhance the legal profession.

....

The pro bono requirement will also benefit the attorney and all future clients because it will provide much needed practical experience in legal education. Professionals ranging from surgeons to construction workers receive significant practical training, but as Stanford Law School Dean Larry Kramer explained, “Law is the only profession that gives people licenses to perform services for

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54. Jimmy Dahroug, *New York State’s ProBono Requirement a Step in the Right Direction*, WASH. TIMES, May 11, 2012, <http://communities.washingtontimes.com/neighborhood/politics-policy/2012/may/11/new-york-states-pro-bono-requirement-step-right-di/>.

others that doesn't require serious, supervised clinical education." Indeed, top law schools including Stanford have come to recognize the need for experiential training to better prepare attorneys beyond the theory of the classroom. A pro bono requirement helps fill this critical need for practical training.<sup>55</sup>

There is always the counter perspective which has its own set of issues and sense of legitimacy that decries change as burdensome,<sup>56</sup> or, in some sense, confiscatory of a right.<sup>57</sup>

This would appear, despite detractions, a proper fit within a Law School Law Firm practice group. This external force may be just the impetus to focus on the future and necessary changes in both perspective and the culture of the academy.

#### VI. THE FUTURE MODEL OF LAW SCHOOLS: ADAPTATION, INNOVATION AND REMEDIATION—NOT A CONCLUSION, BUT A STOPPING POINT ALONG THE WAY

The first question of many may be whether the practice aspects of the law school of the twenty-first century detract from the theoretical? Why should it? The difference may lie in the mystique of theory and scholarship that supplanted the practical during the past century, but we have enough experience to balance these goals and objectives as symbiotic and not rivalries. It might be a little easier for the participants in the educational process to achieve a balance and respect for the skills of the practical, as

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55. *Id.*

56. For example:

While I applaud lawyers who work for the public good, whether paid or unpaid, Chief Judge Jonathan Lippman's requirement for 50 hours of unpaid legal work as a quid pro quo for admission to the New York State bar in, as you say, "these hard financial times" strikes this old-time lawyer as insensitive and ivory tower thinking, to say the least.

Law school graduates today face a more hostile economy, fewer prospects of full-time, paid legal employment and a higher debt burden than at any other time in memory. Take the seemingly imminent demise of the enormous Dewey & LeBoeuf as an example of another lost legal employment opportunity.

As a practical matter, how do new lawyers even find these volunteer opportunities? And really, how well do you suppose inexperienced new lawyers help the indigent? All parties deserve much better.

Judith Szokol, Letter to the Editor, *Pro Bono for New Lawyers?*, N.Y. TIMES, May 2, 2012, <http://www.nytimes.com/2012/05/11/opinion/pro-bono-for-new-lawyers.html>.

57. See Susan Cartier Liebel, *NY's New Lawyer Mandatory Pro Bono is Indentured Servitude*, SOLO PRACTICE U. (May 2, 2012), <http://solopracticeuniversity.com/2012/05/02/nys-new-lawyer-mandatory-pro-bono-is-indentured-servitude/>.

well as the theoretical, in the context of resolving the current educational issues; yet old perceptions do not disappear overnight. However the end result will be an educational experience that translates into students that can practice law with some level of facility and responsibility better and more quickly than in past models of externalizing the broadened range of practice skills to those who are responsible to their clients and must adhere to the limitations of a viable business model, the practice of law, and the wellbeing of their clients. Many of these noted concerns have become scenes de faire; yet despite the lament, it is only of late that the underlying anguish has become increasingly evident.

Faculty must identify and expand required courses. Faculty cannot be absolved of the responsibility for meaningful and functional aspects of education, student needs, and the public expectations. Required courses should include all the basics of a twenty-first century society that includes Property, Torts, Civil Procedure, Criminal Law, Constitutional Law, and then on to Environmental Law, a survey course in Intellectual Property, Taxation and the full list of necessary elements that make a skilled professional.

The education of lawyers has changed in many ways, but should always retain the character of the profession that involves counsel, fiduciary obligation, and competency to create and craft to serve the client's needs. Building a professional we call a lawyer requires the educator have knowledge of the tools necessary to create the elements required and the means of measuring, finishing, and testing the product before it is put out to the market. The universal calling today is to produce student-lawyers that have "skills." What those skills are depend on who you are talking with at the moment. There are surface skills, such as researching or writing. There are skills of reason and imagination to adapt the ingredients of past models and utilize them to serve new needs or alter outcomes, as required by ever-changing contexts. These reflect the creative thought processes that are required of lawyers as craft persons, innovators, and problem solvers in society.

All these skills require, in the first instance, a solid foundation of "knowledge." Law professors have been eminently successful at creating that knowledge base. The profession of professors is to profess, much the same as they were taught. The skills of lawyering include, among other facets, that of appearing in court or preparing documents or agreements that one believes may someday be the object of a judicial proceeding. One interesting statistic, nearly fifty percent of the current teaching faculty in

law schools have never practiced or likely spent a day in court.<sup>58</sup> The question is whether that singular factor affects their ability to “profess” at the highest level? As was previously noted, there are other questions that are not asked, which may have an even more profound impact on the product of the legal academy: How many law professors have any training in education and teaching? How many schools require law professors to take classes involving teaching skills? The fact that we perpetuate a model that worked for the better part of a century, does not mean that we cannot adapt and improve on that model to meet the changing needs of society and the needs of the profession and those who rely on the products of the academy to identify, craft, and resolve issues so they do not become problems; and if at some point problems arise, secure for the parties appropriate resolution.

What effective legal education requires is a solid foundation in the tools and materials of the profession, both knowledge and learned skills that lead to the ability of identifying and using the full range of practice elements for the client in an expeditious and ethical manner that reflects the trust of the individual and society.

So here we are; the world around us is changing and the question is whether we are the remnants of Jurassic times or ready to meet the needs of today’s challenges? The most logical path to take is to identify the initial factors that have impacted those elements that worked in the past, but are today put in question by society, law firms, clients, students, and clearly now the bar<sup>59</sup> and the academy of legal teaching. The sheer number of external symposium and law review articles, soon to appear on the horizon, dramatically evidence the internal concerns of faculties and the increasing involvement of the universities, which house law schools and support both the integral intellectual and professional goals and objectives of legal education.

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58. See *supra* note 40 and accompanying text.

59. See *supra* note 53 and accompanying text.