TEACHING THEORY VERSUS PRACTICE: ARE WE TRAINING LAWYERS OR PLUMBERS?

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TABLE OF CONTENTS

INTRODUCTION.................................................................................................................................. 625
I. THE RISE OF THE MODERN AMERICAN LAW SCHOOL AND THE EXCLUSION OF PRACTICAL TRAINING FROM LEGAL EDUCATION...... 628
II. THE REINTRODUCTION OF PRACTICAL LEGAL TRAINING INTO LEGAL EDUCATION.............................................................................. 631
III. THE CURRENT STATE OF PRACTICAL TRAINING AND LEGAL EDUCATION.......................................................................................... 637
IV. WHY TEACH ONLY “THINKING LIKE A LAWYER”?.......................... 643

INTRODUCTION

Since the inception of the modern American law school in 1870, marked by the appointment of Christopher Columbus Langdell as dean of the Harvard Law School, there has been a long-running internecine war within legal education between those who believe the purpose of law school is to train students in the theory of the law and those who believe the focus of legal education should be on preparing students for the practice of law.¹ We now know that the advocates of training students in the theory of the law have won at least a temporary victory. As one commentator described the situation, there is within “legal education[] [a] division of things into the theoretical and the practical: the main tent and the sideshow.”² Although these comments were made in 1987, a quarter of a century ago, what was said then remains largely true today.

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1. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4-12 (2007); ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 4 (1992) [hereinafter “MacCrate Report”] (“The lament of the practicing bar is a steady refrain: 'They can’t draft a contract, they can’t write, they’ve never seen a summons, the professors have never been inside a courtroom.' Law schools offer the traditional responses: ‘We teach them how to think, we’re not trade schools, we’re centers of scholarship and learning, practice is best taught by practitioners.’”).

To the extent the battle is drawn along the lines of theory versus practice, the terms of engagement do not capture the nature of the differences between the two sides. The proponents of training students in the theory of the law are not actually advocating the teaching of theory, but are urging that legal education focus on training students in a method of analysis often labeled “thinking like a lawyer.” While knowing how to think like a lawyer is a valuable skill and essential to the work lawyers do, it is only one skill among many that lawyers utilize in resolving legal problems. There is nothing inherently theoretical about learning to think like a lawyer that would set it off or make it more valuable than the other types of skills lawyers use in resolving their clients’ legal problems. Nor is there any reason that the other skills lawyers use in practice should be thought of as less theoretical than knowledge of thinking like a lawyer.

The advocates of teaching theory have seized the semantic high ground in the discussion by labeling the teaching of lawyering skills as “teaching nuts and bolts” and accusing those who advocate for such courses as wanting to “run a trade school.” In a university-based law school where most of the other academic departments, such as chemistry or physics, pride themselves on engaging in pure knowledge-based research, these labels are serious insults. In an attempt to align themselves with these more respectable disciplines, legal educators advocating a theoretical approach to teaching law are making a claim to rightful membership within the university


4. See, e.g., Ken Gormley, A Response to ‘Dr. No,’ PA. LAW., Jan.-Feb. 2012, at 22, 24 (“Turning first year into a trade school, like a plumber’s workshop filled with pipe-wrenches and toolboxes, without the academic/analytical component would send legal education back to the Dark Ages.”); Ariela J. Gross, Teaching Humanities Softly: Bringing a Critical Approach to the First-Year Contracts Class Through Trial and Error, 3 CAL. L. REV. CIR. 129, 135 (2012) (“We are at a moment in legal education when the pressures of a weak economy are leading to a resurgence of perennial calls for law schools to do a better job in training lawyers for service to corporate America. For many critics of contemporary law schools, this is a convenient moment to accelerate a battle against interdisciplinarity and intellectualism in legal academia, and reassert the law school as primarily a trade school.”); Kevin Noble Maillard, It’s Not a Trade School, N.Y. TIMES, Sept. 13, 2011, http://www.nytimes.com/roomfordebate/ 2011/07/21/the-case-against-law-school/the-right-preparation-for-lawyer-citizens (“Law school is not a trade school . . . [L]aw school should emphasize educated citizenship.”); Leonard J. Long, Resisting Anti-Intellectualism and Promoting Legal Literacy, 34 S. ILL. U. L.J. 1, 24 (2009) (“[The MacCrack Report] has a lot to say to those who embrace law school as a vocational school, a glorified trade school, and who are concerned with improving the pedagogy of law schools as vocational schools. But it will not speak to those law students, law professors, law school administrators, judges, and practicing lawyers who view themselves as part of a republic of ideas, as part of a very long and ongoing conversation about the nature of law and its role in society.”).
community. But to become members of the academic community, it was first necessary to push the adherents of practical training outside the legal education tent and make it a sideshow to the main endeavor of training students to think like lawyers.

But to characterize the dispute as between teaching theory and "nuts and bolts" does little to illuminate the nature of the dispute. Before we can understand the resistance of legal education to preparing law students for the practice of law, it is necessary to understand what is meant by the term "theory." Unfortunately, few who advocate for law schools to concentrate on teaching "legal theory" make clear what they mean by the term.

The term theory is used in a wide variety of ways depending on the context in which it is being used. Even within the field of law, theory has a range of meanings. Again to offer a few examples, theory can mean a doctrinal theory explaining a case or series of cases, a school of jurisprudential thought, or a perspective on examining and understanding the law. But, while subject to debate, the term "theory" when used in the context of the debate between teaching theory and practice usually refers to teaching law students to engage in doctrinal analysis or learning to "think like a lawyer." 5

5. Mark Spiegel offers a definition of theory and practice that works well for the purposes of this essay: "By 'theory' we commonly mean a set of general propositions used as an explanation. Theory has to be sufficiently abstract to be relevant to more than just particularized situations. By 'practice' we commonly mean the doing of something." Spiegel, supra note 2, at 580 (footnotes omitted); see also Jean R. Stemlight, Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications, 50 U. MIAMI L. REV. 707, 716-19 (1996). Other authors use the term in varying ways. For example, Judge Harry Edwards appears to use theory to mean non-doctrinal legal analysis. Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 MICH. L. REV. 34, 35 (1992). In contrast, Professor Lawrence Friedman makes the following observation about legal scholarship and theory:

In legal scholarship, "theory" is king. But people who talk about legal "theory" have a strange idea of what "theory" means. In most fields, a theory has to be testable; it is a hypothesis, a prediction, and therefore subject to proof. When legal scholars use the word "theory," they seem to mean (most of the time) something they consider deep, original, and completely untestable. History almost by definition lacks theory. Empirical studies, too, are not theoretical—they are, of course, "merely descriptive."


9. According to Schlegel, Dean Ames was responsible for placing the emphasis on teaching students to think like a lawyer. Id. at 77.
The concept of thinking like a lawyer is ill-defined in the literature, and subject to debate, but it usually means a particular method of thinking or analysis for understanding law. But definitions of what that method consists of vary considerably. Even in the absence of a precise definition of its meaning, much of legal education is concerned with developing in students this important skill, and the law schools are quite successful in inculcating this method of analysis in their students.

I. THE RISE OF THE MODERN AMERICAN LAW SCHOOL AND THE EXCLUSION OF PRACTICAL TRAINING FROM LEGAL EDUCATION

As previously stated, the debate over whether law schools should be teaching the theory or the practice of law dates to the appointment in 1870 of Christopher Columbus Langdell as dean of the Harvard Law School. The rise of the modern law school has been amply documented elsewhere and will not be repeated here other than to note that Dean Langdell introduced the case method of studying law, the hallmark of legal education today. Dean Langdell’s importance to the discussion here is that he and his successor as dean of the Harvard Law School, James Barr Ames, also largely created the divide between theory and practice or at least brought it to the forefront.

10. See generally Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning (2009).


12. Rapoport, supra note 11, at 93.

13. See Sullivan et al., supra note 1. This is not to suggest that thinking like a lawyer is the only knowledge students acquire during their legal education. They also learn doctrinal knowledge, legal literacy, the vocabulary of the law, the structure and values of the legal profession, etc. See generally Judith Welch Wegner, Reframing Legal Education’s “Wicked Problems,” 61 RUTGERS L. REV. 867 (2009).


15. See id. at 38; G. Edward White, The Impact of Legal Science on Tort Law, 1880-1910, 78 COLUM. L. REV. 213, 223 (1978) (“But by 1907 James Barr Ames, Langdell’s successor as Dean at Harvard, maintained that ‘the object of the three years at the law school’ was not ‘knowledge’ but ‘the power of legal reasoning.’ Ames’s statement, a version of which is still articulated by many contemporary law schools (‘our purpose is not to train students to ‘learn the law,’’ but to ‘think like lawyers’”), was remarkable in that its celebration of the ‘power of legal reasoning’ stemmed from a basic reassessment of the means of acquiring knowledge in American higher education. ‘Learning the law’ was not synonymous with assimilating a finite body of information, but rather with mastering a ‘scientific’ methodology.” (footnotes omitted) (quoting James B. Ames, Remarks at the ABA Annual Meeting (Aug. 28, 1907), in 30 A.B.A. REP. 1025 (1907))); Bernard J. Hibbitts, Last Writes? Reassessing the Law Review in the Age of Cyberspace, 71 N.Y.U. L. REV. 615, 626 (1996).
It has only been within the past century that law schools became the primary vehicle for training students for entry into the legal profession.\(^1^6\) The increasing dominance of law schools in training new lawyers brought with it a shift in legal education from focusing on preparing students for the practice of law to concentrating on the teaching of legal theory.\(^1^7\) Although the first American law school, the Litchfield Law School, was founded in 1784, law schools were few in number through much of the nineteenth century and played an insignificant role in the training of lawyers.\(^1^8\) It was not until the latter half of the nineteenth century when a number of colleges and universities added training in law to their course offerings.\(^1^9\) Nonetheless, the vast majority of lawyers continued to be trained for the bar through the apprenticeship system, which inherently focused on preparing students for the practice of law.\(^2^0\) Even those aspiring lawyers who had attended law school, where the instruction consisted mainly of lectures on different aspects of the law, would usually supplement their formal legal education with an apprenticeship.\(^2^1\) Apprenticeships as a method for training for the bar persisted long after 1870 and Langdell’s appointment as dean.\(^2^2\) And other law schools continued to produce graduates using the lecture method, but Langdell created the case method that continues to this day as the dominant pedagogy for studying law.\(^2^3\)

Law school classes up until the time of Dean Langdell and continuing during his tenure as dean were largely taught by practitioners who also taught or by law teachers with extensive practice backgrounds.\(^2^4\) There was ("James Barr Ames . . . was the first of a new breed: the fully academic law professor with minimal practical experience."); W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 8 (1997) ("Langdell has been charged with declaring that . . . neither practicing lawyers nor practical training is needed within law schools."); Thomas A. Mauet & Dominic J. Gianna, *Litigation Training for the Next Century*, LITIG., Winter 2000, at 10, 11 ("When James Barr Ames was hired in 1873, some lawyers opposed his appointment because he had no experience as a practicing lawyer. Thus began the division between ‘academicians’ and ‘practitioners’ and the never-ending debate over whether law schools should (or could) teach ‘theory,’ ‘skills,’ or both.").

\(^{16}\) *See* STEVENS, supra note 14, at 181 n.6. Of the 643 applicants to the New York bar in 1922, only nine had not attended law school at all, but three of these had attended college. *Id.*

\(^{17}\) *See id.* at 21-22.

\(^{18}\) *See id.* at 3-4.

\(^{19}\) *See id.* at 21.

\(^{20}\) *Id.* at 96. By the 1890s, "[t]he typical lawyer, . . . in almost any state, might begin practice on his own without any institutional training, perhaps without even a high school diploma, and often with no or only minimal office training." *Id.*

\(^{21}\) *Id.* at 25.

\(^{22}\) *Id.* at 24.

\(^{23}\) *Id.* at 35-42.

\(^{24}\) *Id.* at 38 ("Until Ames’ appointment (and the practice, in general, continued after it) law professors had been either practitioners taking a few hours away from the office
no divide at this time between theory and practice because law faculties were firmly rooted in both camps. This, however, was soon to change.

Charles William Eliot, president of Harvard University at the time of Langdell’s appointment as dean, predicted:

“In due course . . . there will be produced in this country a body of men learned in the law, who have never been on the bench or at the bar, but who nevertheless hold positions of great weight and influence as teachers of the law . . . . This, I venture to predict, is one of the most far-reaching changes in the organization of the profession that has ever been made in our country.”

This view was shared by Dean Langdell who stated “‘[w]hat qualifies a person, therefore, to teach law, is not experience in the work of a lawyer’s office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law.’” The first step in this direction came with the appointment of Ames, with his very limited practice experience, as an assistant professor at the Harvard Law School. Robert Stevens, the noted historian of American legal education, noted that Ames’s “appointment created, for the first time, a division in the legal profession between the ‘academics’ and the ‘practitioners.’”

The exclusion of practitioners from legal education and the shifting of the law school curriculum from teaching students how to practice law to one relying almost exclusively on the case method of instruction did not occur without protest. As Professor Blewett Lee of the Northwestern Law School and a former student under Dean Langdell at the Harvard Law School, noted:

It is odd if our profession is the only one in which students cannot have a practical training before they enter upon their life-work. The medical student can have clinical instruction and hospital practice. The clergyman, ere the Seminary doors close behind him, can inflict his maiden efforts on his fellows; or on the weaker flocks of the faithful. The civil engineer has already had a goodly share of field work before he leaves the technological halls. But in this year of grace, most law students still go forth upon a long suffering public having only read books and disputed over them. The evil of this condition cannot be remedied by any half measures, or cheap devices or cheap men. To give practical instruction in law work will require immense intellectual labor, and the finest quality of teaching—but let us not say it is impossible because we have never done it, or even because we cannot do it. I will even go so far as to admit that the difficulty of teaching the theory of the law may

27. *Id.*
Teaching Theory Versus Practice

be child’s play compared to that of teaching its actual application to human affairs.28

Despite the protests, legal education, with the rise in the late nineteenth and early twentieth centuries of the university-affiliated law school and the case method of studying law, became divorced of nearly all practical training except for legal research and writing.29 Attention was given to appellate advocacy, and to a much lesser extent trial advocacy, but the former was largely an extension of teaching legal analysis and legal research and writing while the latter received little serious attention.30 But by the end of the nineteenth century and the beginning of the twentieth century there were increasing calls for the reintroduction of practical training into legal education. Even such a noted scholar as John Henry Wigmore, then dean of Northwestern Law School, urged the introduction of clinical legal education into the law school curriculum.31 This was despite the fact that Wigmore, along with Nathan Abbott, had introduced the case method of studying law at Northwestern.32 Nonetheless, these early efforts to reintroduce practical training into the law school curriculum achieved little success.33

II. THE REINTRODUCTION OF PRACTICAL LEGAL TRAINING INTO LEGAL EDUCATION

The goal of training law students for the practice of law was never completely vanquished from legal education, and today it is mounting what appears to be a sustained counterattack on the law schools’ nearly exclusive focus on teaching the theory of the law. The reemergence of practical training in law schools can be traced to the influence of two separate organizations—the National Institute for Trial Advocacy (NITA) and the Council on Legal Education for Professional Responsibility (CLEPR).

The middle part of the twentieth century generated renewed calls on law schools to offer more practical courses,34 but these calls took on increased urgency when several prominent judges began voicing complaints

28. BLEWETT LEE, TEACHING PRACTICE IN LAW SCHOOLS: A PAPER READ BY PROFESSOR BLEWETT LEE, OF NORTHWESTERN UNIVERSITY, BEFORE THE SECTION OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION 507, 513 (1896) (emphasis omitted).
30. For a discussion of history of moot court in legal education, see STEVENS, supra note 14, at 127 n.32.
32. STEVENS, supra note 14, at 60, 69 n.54.
33. Id. at 119-22.
34. Id. at 214-15, 227 nn.77-78.
about the quality of advocacy in the nation's courts. The most influential of the critics was Chief Justice Warren E. Burger who authored several articles critiquing legal education and the trial bar. These criticisms led to the formation of the National Institute for Trial Advocacy in 1971, a joint creation of the American Bar Association Section of Judicial Administration, the American College of Trial Lawyers, and the Association of Trial Lawyers of America (now the American Association for Justice). NITA began offering trial advocacy CLE programs around the country and to law firms, governmental agencies, and legal services organizations. Although there were several critical voices, NITA's advocacy programs were widely praised and were considered a breakthrough in the teaching of advocacy skills.

35. See Qualifications for Practice Before the United States Courts in the Second Circuit: Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, 67 F.R.D. 159 (1975) (commonly known as the “Clare Committee Report”); Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States, 83 F.R.D. 215 (1979) (commonly known as the “Devitt Committee Report”). Although these citations are to materials published after the founding of NITA, they are nonetheless reflective of the attitudes existing before the creation of NITA about the competency of the trial bar.

36. The Chief Justice of the United States Supreme Court noted that:

The shortcoming of today’s law graduate lies not in a deficient knowledge of law but that he has little, if any, training in dealing with facts or people—the stuff of which cases are really made. It is a rare graduate, for example, who knows how to ask questions—simple, single questions, one at a time, in order to develop facts in evidence either in interviewing a witness or examining him in a courtroom. And a lawyer who cannot do that cannot perform properly—in or out of court.


40. See Imwinkelried, supra note 39, at 668 (1989) (“In his letter announcing an October 1989 Conference on the Teaching of Advocacy Skills, Professor Stephan Landsman, the past Chair of the American Association of Law Schools Litigation Section, credits NITA with the development of the simulation technique. He adds that ‘some variant of the simulation approach pioneered by NITA is today used in virtually every law school in the country.’ Professor Landsman writes that the NITA methodology has brought about a ‘revolution’ in law school trial practice teaching.” (footnotes omitted) (quoting Letter from Stephan Landsman to Edward Imwinkelried (May 19, 1988) (on file with the Georgia Law Review))); Jeff
The NITA methodology and NITA teaching materials were soon adopted by many law schools with the effect of revolutionizing the teaching of trial advocacy. Trial advocacy had become a staple of legal education before the introduction of the NITA methodology, but these earlier courses had little resemblance to today's trial advocacy courses and were mainly exercises in the rote drafting of pleadings and other litigation related documents. The NITA methodology put an emphasis on using simulations to teach students how to present and argue evidence to a judge or jury, in short, on advocacy rather than on the drafting of documents.

The NITA methodology and NITA teaching materials soon penetrated into the law schools, in part because in 1976 the Council on Legal Education for Professional Responsibility provided funding for a group of clinical teachers to attend NITA's three-week long National Session in Boulder, Colorado. These clinical teachers were instrumental in bringing back to their law schools what they had learned about teaching advocacy skills and started or modified existing law school trial advocacy courses to follow the NITA methodology and to use NITA teaching materials. The result was that by 1975, a number of law schools were offering trial advocacy courses that followed the NITA model. The trend has continued since then to the point that trial advocacy courses using simulation methods and focusing on advocacy skills have now become "a permanent fixture in the law school curriculum." Nearly every law school in the country, if not all, now offers a simulation-based, advocacy-focused trial advocacy course.

The second major impetus behind the reintroduction of practical training into the law schools was the creation in 1968 of the Council on Legal Education for Professional Responsibility (CLEPR), as it is often referred to.
to, lies directly or indirectly behind the creation of nearly every law school clinical education program being taught today. Even though CLEPR ceased to exist in 1978, its existence has had a lasting effect on legal education as evidenced by the over 800 in-house, live-client clinics and nearly 900 externship or field-placement programs now in existence.\textsuperscript{48}

The first clinical program in the country was created in 1893 when a law club at the University of Pennsylvania established a legal aid dispensary.\textsuperscript{49} Nonetheless, clinical legal education was initially very slow in gaining acceptance with only a few clinics being established until the 1930s.\textsuperscript{50} Professor John Bradway established the first clinical course for credit (rather than an extracurricular or non-credit activity) in 1932 when he created the Duke Legal Aid Clinic.\textsuperscript{51} Despite Bradway's proselytizing in a series of law review articles for the creation of law school clinics and his being joined by Jerome Frank, a noted figure in the legal realism movement who wrote a seminal article on clinical legal education published in the University of Pennsylvania Law Review,\textsuperscript{52} the growth of clinical programs as part of the law school curriculum remained slow.\textsuperscript{53} It was not until 1947 that the University of Tennessee created the second on-going, in-house clinical program in the country.\textsuperscript{54} The 1940s and 1950s saw a growing interest in clinical


\textsuperscript{52} Jerome Frank, \textit{Why Not a Clinical Lawyer-School?}, 81 U. PA. L. REV. 907 (1933).

\textsuperscript{53} See generally John S. Bradway, \textit{The Beginning of the Legal Clinic of the University of Southern California}, 2 S. CAL. L. REV. 252 (1929); John S. Bradway, \textit{The Classroom Aspects of Legal Aid Clinic Work}, 8 BROOK. L. REV. 373 (1939); John S. Bradway, \textit{Legal Aid Clinic as a Law School Course}, 3 S. CAL. L. REV. 320 (1930).

\textsuperscript{54} Ogilvy, supra note 49, at 4.
Teaching Theory Versus Practice

legal education and several articles appeared supporting the concept. Still, by 1951 there were only 28 clinics in existence, many of these run by independent legal aid societies rather than the law schools, and only rarely were students awarded credit for participation.

The modern clinical legal education movement dates to 1969 when CLEPR awarded grants to nine law schools, using Ford Foundation funds, to create clinical law programs. By the time CLEPR ceased operating in 1980, nearly every law school in the country had a clinical course and many schools had more than one. The expansion of clinical legal education has continued unabated since then, resulting in an explosion of clinical courses at nearly every law school in the country.

The expansion of clinical legal education and lawyering skills courses has been further hastened by a series of reports emanating from the Carnegie Foundation, the American Bar Association, the Association of American Law Schools, and independent sources urging the greater inclusion in the law school curriculum of courses designed to prepare students for the practice of law. Legal education has been revolutionized over the past fifty years by the influences of reports, organizations, and commentators calling for the reintroduction of courses into the law school curriculum focused on preparing students for the practice of law. These, in turn, have generated a

55. See, e.g., Jerome Frank, Both Ends Against the Middle, 100 U. Pa. L. Rev. 20 (1951); Robert H. Jackson, Training the Trial Lawyer: A Neglected Area of Legal Education, 3 Stan. L. Rev. 48 (1950); Comment, The "New Frontier" of Legal Aid—A Texas Survey, 28 Tex. L. Rev. 695 (1950) (listing those Texas law schools that are operating or participate in operating legal clinics); Jerome Frank, A Plea for Lawyer-Schools, 56 Yale L.J. 1303 (1947); John S. Bradway, Legal Aid Clinic Instruction at Duke University (1944).

56. Stevens, supra note 14, at 215-16, 229 n.90.

57. There were several Ford Foundation-funded predecessor institutions to CLEPR that also gave grants to law schools to create clinical programs, but CLEPR's funding and the number of grants given was substantially larger than these predecessors and the grants had a vastly greater effect. See Ogilvy, supra note 49, at 10-11.

58. Id. at 15.

59. See generally Alfred Zantzinger Reed, Training for the Public Profession of the Law: Bulletin Number Fifteen (1921); Sullivan et al., supra note 1.

60. See generally ABA Section of Legal Educ. & Admissions to the Bar, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools (1979) (commonly referred to as the "Cramton Report" after the chairman of the task force); MacCrate Report, supra note 1 (commonly referred to as the "MacCrate Report" after the chairman of the task force).


host of conferences on the topic. Law schools have created committees and task forces on how to accomplish the recommendations generated by the various reports, and many law school faculties have restructured their curriculums to varying degrees to incorporate a greater focus on preparing their graduates for the practice of law. It is safe to say that practical training has now become an accepted part of the law school curriculum, and it appears that there will be continued growth in the coming years.

As I have discussed elsewhere, the meteoric rise of clinical legal education programs and lawyering skills courses is comparable to the rapid spread of the case method of legal instruction in the first forty years following its introduction at Harvard Law School. The general acceptance of the reintroduction of practical training into the law school curriculum is demonstrated most vividly by the incorporation into the American Bar Association Accreditations Standards of requirements that every law school require “substantial instruction” in lawyering skills.

If the trend continues, and there is every reason to expect that it will, clinical legal education programs and lawyering skills courses will continue...
to increase in importance and will comprise a growing percentage of the
courses a typical law school graduate will have taken before entering the
legal profession.

III. THE CURRENT STATE OF PRACTICAL TRAINING AND LEGAL
EDUCATION

While it is true that lawyering skills and clinical legal education pro-
grams—courses designed to prepare students for the practice of law—have
increased dramatically in the last forty years and have become an estab-
lished part of the law school curriculum, this does not mean that law schools
have shifted their primary focus from training students in the theory of the
law to practical training. In fact, it can be convincingly argued that legal
education has become increasingly fixated on teaching the theory of the law
while at the same time the number of courses devoted to preparing students
for the practice of law is increasing. Preparing students for the practice of
law still remains very much of an afterthought within most law schools,
except to the extent that training students to think like a lawyer is the equiv-
alent of preparing them for practice. The vast majority of law school courses
are still primarily theoretical or doctrinal in nature and, if anything, the em-
phasis on the theoretical is becoming more pronounced. This conclusion
becomes manifest upon examining the composition of law school faculties.

There is no question that most law school deans and many faculty
members have learned to mouth the correct platitudes about the increasing
importance of training students or the practice of law, but often these deans
are only giving lip service to the idea of changing the focus of legal educa-
tion. What appears to the casual observer as a major change, a pivot point,
in legal education is nothing more than a passing attention to clinical legal
education programs and lawyering skills courses, but with continuing em-
phasis being placed on the traditional model of training students.

There is no question that some law schools have made dramatic cur-
ricular changes in recent years and continue to make further changes, but
many have not. Admittedly, the Carnegie Report has produced discussions
in faculty meetings and lounges about modifying the law school curriculum.
Similarly, the current economic situation has also caused many bloggers and

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66. The Dean of the Wyoming Law School, Steve Easton, has observed that:
[L]aw schools seem to be realizing that they must do more than teach the "thinking
like a lawyer" theory that has been their staple for a century and a half. Today there
are increasing calls for law schools to teach the skills that future lawyers will use in
their practices. I chose the phrase "seem to be" in the previous paragraph intention-
ally. To be frank, it seems that many law schools are giving lip service to the con-
cept of teaching skills, without putting forth much more than window dressing ef-
folt toward this important mission.

legal commentators to opine that the law schools must do a better job of preparing their students for practice if they are going to obtain employment after graduation. But while there is much talk, these discussions less frequently translate into major changes at the curricular level or in the composition of the faculty. Very little has changed in the ultimate focus of most law schools. And, as would be expected, much of the reaction from law school faculty members has been in support of the present status quo and against change.

If law schools are in fact placing greater emphasis than in years past on practical training and preparing students for the practice of law, one would expect this to be reflected in the law school faculty hiring practices. Just as the hiring of Ames reflected the shift at Harvard Law School to the case method of instruction, faculty hiring is a bell weather of the future direction of legal education. We can and should expect that a change in the direction of legal education will be first signaled by a change in the types of new faculty members being hired, but the tentative evidence is that credentials of most law school new hires have remained unchanged.


69. A confirmation that law school hiring remains unchanged is found at Law School Reports where Brian Leiter lists law school lateral hires as of May 22, 2012. Brian Leiter, Lateral Hires with Tenure Since August 2011, BRIAN LEITER'S LAW SCHOOL REPORTS (Jul 30, 2012), http://leiterlawschool.typepad.com/leiter/2012/07/lateral-hires-with-tenure-since-august.html. All of the reported lateral hires were in traditional academic subjects with none listed for any clinical or skills areas. Id. Another confirmation is found at PrawfsBlawg’s report on entry level hiring as of May 24, 2012, where of the 142 new hires at 96 different law schools, 14 reported they will be teaching clinic, 2-complex litigation, 2-trial advocacy, 1-appellate advocacy, 1-civil litigation, 1-dispute resolution, and 1-international civil litigation. Spring Self-Reported Entry Level Hiring Report 2012: Data Summary, PRAWFSBLAWG (May 24, 2012), http://prawfsblawg.blogspot.com/prawfsblawg/entry-level-hiring-report/. It is impossible to determine whether those listing other subject matters will be teaching these subjects from a practical or theoretical perspective. One possible recent change is that the number of years between receiving the J.D. degree and being hired to teach in a law school appears to be lengthening. Of the 142 new hires, 12 graduated between 2008 and 2012, 86 between 2003 and 2007, 36 between 1993 and 2002, and 7 before 1993. Id. A possible reason for the increasing length of time between the J.D. degree and being hired to teach in a law school may be the time taken to pursue another degree, clerkship or fellowship. Of the 142 new hires, 97 had a fellowship, 63 had advanced degrees, and
What would the new faculty hires look like at a school that had decided to switch its focus to training students for the practice of law? And how would that faculty look in comparison to a faculty at a school that continued to adhere to training students in the theory of the law? Several obvious differences come to mind.

The new faculty hires would have experience in practicing law. It is difficult to imagine a law school training students for the practice of law unless the faculty members providing that training had significant experience practicing law. Law schools placing greater emphasis on training students to practice law should be expected to seek new faculty members with the requisite practice experience. Practical experience was rarely listed as one of the qualifications required for the traditional law school teaching positions posted in the AALS Placement Bulletin for the 2011-2012 academic year. Nonetheless, there were several exceptions in addition to those postings for clinical and lawyering skills positions where a requirement of practice experience was the norm. But even for the handful of traditional academic positions where practice experience was listed as a qualification, none of the postings said the experience was required, but only that it would be looked upon favorably. The postings for traditional academic positions infrequently listed practice experience as a consideration that would be considered in hiring.

While there is little more than anecdotal evidence, discussions with faculty members at a wide range of schools confirm it is generally accepted that a potential faculty candidate’s extensive practice experience is considered by many law schools to be a negative factor in hiring new faculty. Too much practice experience, a highly subjective standard that varies from school to school, is believed to reflect a lack of commitment by the candidate to scholarly production. 81 had a clerkship while several had more than one of these. Id. Only 12 of the new hires did not have any of these. Id. I have not been able to locate anything other than anecdotal evidence of the length of time in past years between receiving a J.D. degree and initial hiring, but the strong impression is that it was shorter than the current length of time.

70. See generally Brent E. Newton, Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy, 62 S.C. L. REV. 105 (2010).


72. See id.

73. See id.

Another indicator of law schools' lack of interest in the hiring of faculty with extensive practice experience is the increasing tendency at many schools to hire candidates with dual degrees, usually a Doctor of Philosophy degree along with a Juris Doctor degree. Many J.D.-Ph.D. credentialed faculty members acquired their two degrees by first obtaining a Ph.D. degree in their primary area of interest and later obtaining a law degree. Many, if not most, Ph.D.-J.D. faculty members have never practiced law beyond a possible judicial clerkship nor do they have any interest in practice. Their primary interest is in their non-law original field of study. The result has been a proliferation of "Law and ______" courses at many schools where the law is grafted onto the subject matter in which the faculty member obtained a Ph.D.

There are many benefits to legal education provided by the interdisciplinary interests of the Ph.D.-J.D. faculty members, and the quality and depth of law students' knowledge of the law and its relationship to other subject matters is greatly enhanced by the addition of the many "Law and ______" courses to the curriculum. But it should also be noted that the hiring of Ph.D.-J.D. faculty members, who usually lack extensive practice experience, ensures that most law school faculties remain ill-prepared to teach lawyering skills courses or courses that are designed to prepare students for the practice of law.

The faculty would be specifically hired to teach clinical legal education and lawyering skills course. The AALS Placement Bulletin listing of openings often specify one or more subject matters the school is seeking to

Author has heard many faculty members at a wide range of law schools state just that in more casual settings. A typical statement of this sort was made by a colleague at a school where the Author once taught that the school would never consider hiring anyone with more than five or so years of practice experience. The school's hiring record indicates that this policy continues to be followed.

75. See Newton, supra note 70, at 136 & n.140.
76. See Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript, 91 MICH. L. REV. 2191, 2203 (1993). The report of entry level hiring cited in Spring Self-Reported Entry Level Hiring Report 2012: Data Summary, supra note 69, was displayed in a different format in earlier years than it is today—the earlier version reported for each individual any advanced degrees received and the years the J.D. and any advanced degrees were awarded. I randomly selected the 2006 report on initial hiring and tabulated the number of recipients of advanced degrees and whether those advanced degrees were received before or after the date the J.D. degree was received. Of the 2006 new hires, 28 received advanced degrees before receiving their J.D. degree, 25 received the advanced degree in the same year or after the J.D. degree, and for three of the new hires it was impossible to determine the date of the advanced degree.
77. This observation is based on nearly 40 years of observing the hiring practices at my own and other law schools. See generally id. at 130-32.
Most postings listed traditional academic courses, the obvious exception being clinical legal education positions. Only occasionally did a posting list both traditional academic courses along with what would be considered one or more skills courses.

Faculty members teaching lawyering skills courses would have pay and job security comparable to faculty members teaching traditional courses. At many law schools, clinical and legal skills teachers are accorded inferior faculty status and often lower compensation than traditional law school teachers. For example, at many law schools, clinical and legal skills teachers are not eligible to receive traditional tenure, but at best will be confined to a more limited clinical tenure or a long term contract. Many schools do not permit clinical and lawyering skills teachers to vote at faculty meetings or only grant limited voting rights. Committee membership may be restricted as well as eligibility for appointment to a chair. Compensation also is often much less than given to traditional faculty members. The lower pay and limited tenure is often coupled with offices located apart from those of traditional faculty members, many times in the basement or in less attractive areas of the law school. Clinical and lawyering skills positions usually require a far greater commitment of time and energy than that required of the traditional faculty. If nothing else, law schools are very hierarchical institutions and that hierarchical structure is frequently mirrored in the treatment of clinical and lawyering skills faculty.

These differences cause clinical and legal skills teaching positions to be less attractive to potential candidates than traditional faculty positions. Not surprisingly, most candidates, when given the choice, prefer traditional tenure-track positions over clinical or legal skills positions. Market forces

79. See Faculty Positions, supra note 71, at 1.
80. See id. Many clinical and lawyering skills teachers are hired specifically for these positions, but the hiring school usually intends this to be a restriction on the person being hired—they will not be permitted to teach any courses in fields other than clinical or lawyering skills. A second restriction is the type of tenure, if any, the person being hired will be permitted to receive in the future. In other words, many clinical and lawyering skills teachers are not permitted to teach courses outside these fields and are only eligible for clinical tenure or a long term contract.
81. See id. Postings of openings for such positions as director of a program on lawyering skills also occurred, but such postings are a small minority of the total number of postings. See id.
83. See id. at 356-57.
84. See id. at 374, 376.
85. See id. at 377.
86. See id. at 395-96.
87. It is generally recognized that clinical teachers have heavier workloads and are paid less than traditional faculty members. See Bryan L. Adamson et al., The Status of Clini-
also cause fewer clinical and lawyering skills faculty to have law review or Order of the Coif in their backgrounds.88

A law school with a serious interest in changing the focus of legal education from theory to the practice of law would be expected to make clinical and legal skills positions more—not less—attractive than traditional faculty positions. If the school was now concentrating on producing graduates who are ready for the practice of law, it would want teachers who are at least as well qualified as its traditional faculty members. Many law schools now hire clinical and lawyering skills teachers on tenure-track lines, but the majority of schools still provide inferior employment terms.

One could devise other tests to determine whether a given law school is merely giving lip service to its public pronouncements that it is dedicated to preparing students for the practice of law or whether it is in fact acting in a way inconsistent with those statements. For example, when the curriculum committee or faculty are considering adopting new courses, what percentage of those courses could be considered as focusing on preparing students for practice versus what percentage are doctrinal or jurisprudential in nature? Applying such tests across all law schools would be a time consuming endeavor and not necessary given the more readily applied tests described above. The point is that while many law schools have learned the right words to mouth, a much smaller percentage are acting consistently with their purported dedication to preparing students for practice. To a large extent, as noted by Professor Alex M. Johnson, "professors who once trained prospective lawyers have, at elite law schools, become true academicians, highly specialized and almost exclusively engaged in pure, as opposed to practical, research."89 Practical training continues to be relegated to the sta-

88. Common prerequisites for a traditional teaching position are law review membership and Order of the Coif. See FAR Advice, Unclouking Law School Hiring: A Recruit's Guide to the AALS Faculty Recruitment Conference, ASS'N AM. L. SCHS., http://www.aals.org/frs/jle.php (last visited May 25, 2012) (“What do we look for? What lines are crucial? Although they disclaim uniformity, recruiters tend to follow patterns. A sweep of law school, class rank, honors, and law review seems to be a dominant pattern.”). Given that traditional faculty members generally are paid more and have less demanding workloads than clinical and skills faculty, a candidate with the qualifications for both positions is more likely to accept the traditional teaching position. See Barnhizer, supra note 87 at 53; Nina W. Tarr, In Support of a Unitary Tenure System for Law Faculty: An Essay, 30 WM. MITCHELL L. REV. 57, N.17 (2003).

Teaching Theory Versus Practice

IV. WHY TEACH ONLY “THINKING LIKE A LAWYER”?

Thinking like a lawyer or doctrinal analysis, a method of case analysis and thinking about the law, is an important tool for lawyers, but it is only one in a long catalog of skills lawyers use in practice. Why then is it given such supremacy in legal education? The vast majority of the curriculum at most law schools focuses on doctrine. And the method for teaching doctrine, at least in the first year curriculum, is to engage the students in Socratic dialogue with the objective of teaching them the methods of case analysis associated with the law.91 Certainly there is nothing inherent in the teaching of a method of analysis that makes it more intellectual or academic than teaching other skills lawyers use in practice. Doctrine and analytical reasoning may be taught at the level of memorized rules that are then regurgitated on exams. The same can be said for practical application and lawyering skills.92 Both doctrinal and lawyering skills classes may also be taught at advanced and highly sophisticated levels.

There is no question that doctrinal analysis or thinking like a lawyer is an essential skill that every lawyer uses in representing clients, but it is hardly the only skill lawyers use.93 As demonstrated by the MacCrate Report,94 lawyers utilize a wide range of skills in representing clients and in resolving legal problems. As cataloged by the Report, lawyers use “two analytical skills that are conceptual foundations for virtually all aspects of


91. Most classes after the first year are taught by lecture.

92. Literally thousands of law students through the years have passed law school examinations by purchasing and memorizing study guides such as Gilbert’s or Emanuel’s or by relying on canned summaries of the class. While memorizing the rules contained in these, the guides and summaries rarely attempt to develop a deeper understanding of the principles underlying the rules. The same may be said of practical application and lawyering skills courses, although there are unlikely to be any study guides or canned summaries for most practical and skills courses. While the memorizing and reciting of rules is often sufficient to obtain a passing grade in doctrinal courses, most lawyering skills courses are based on assessments of a student’s performance of a task involving the skill involved. An example would be the negotiation of a dispute in a negotiation class. Memorization alone is usually not sufficient to achieve a passing grade when assessment is by performance.

93. See Rapoport, supra note 11, at 102 (“No practicing lawyer would consider the skill of thinking like a lawyer enough.”).

legal practice: problem solving ... and legal analysis." The Report then lists "five skills that are essential throughout a wide range of kinds of legal practice: legal research ... , factual investigation ... , communication ... , counseling ... , and negotiation." The Report "next focuses upon the skills required to employ, or to advise a client about, the options of litigation and alternative dispute resolution." The Report then concludes its list of skills with "administrative skills necessary to organize and manage legal work effectively" and "recognizing and resolving ethical dilemmas." The Report also lists five values essential to lawyering effectiveness. The entire list is a comprehensive catalog of the many skills used in the representation of clients.

Although listing the skills differently than MacCrate, Bryant Garth and Joanne Martin conducted an extensive survey of the skills lawyers use in practice. Not surprisingly, legal reasoning ranked close to the top of the list of skills lawyers used in practice. But there were a number of other skills lawyers also considered important and believed they could have been, but were not, taught in law school.

To label a practical approach to teaching law or skills training as non-theoretical or not being theory-based is to demonstrate a profound misunderstanding of what is encompassed by skills training. All of the skills lawyers use in practice that are the subject of law school clinical legal education and lawyering skills courses have strong theoretical scaffolding underlying their use. Detailing the theory underlying each of the lawyering skills courses would extend the length of this essay to an unmanageable length. So, let me use just one skill—negotiation—as an illustration of the depth of the theory involved.

95. Id. at 135, 141-57.
96. Id. at 135, 157-90.
97. Id. at 135, 191-99.
98. Id. at 135.
99. Id. at 135-36.
100. Id. at 138-221.
102. Id. at 503 ("[L]egal reasoning ranks very close to the top in importance for both urban and rural lawyers. The most important source is the general law school curriculum, and hiring partners expect the skill to be brought to practice. Partners rank this skill as first in importance even for promotion to partnership, and this is probably the one skill, coupled with some knowledge of substantive and procedural law, that the law school hierarchy of schools and grades measures and screens for practice. Legal reasoning counts as an important skill that ought to be taught and learned for the practice of law, and obviously knowledge of substantive and procedural law is also important and 'legal,' as is the ability to do legal research.").
103. Id. at 500.
There are a large number of books and articles on negotiation which are nothing but a collection of tips and tricks to be used in bargaining with an opponent. But there is also a large body of empirical and analytical research on bringing economics and psychology to bear on nearly every aspect of the negotiation process.\textsuperscript{104} The number of articles, studies, and books almost defies cataloging. Anyone doubting the existence of a theoretical basis for the study of negotiation merely has to consult nearly any issue of the \textit{Negotiation Journal}. Interestingly, much of the most important research on negotiation is emanating from sources outside the law schools, namely business, economics, psychology, and political science departments.

Let me be clear that I am not arguing that learning to think like a lawyer is unimportant or should be discounted as an essential skill inherent in practicing law. Nor am I arguing that thinking like a lawyer should not be taught by law schools. It is at the core of preparing students to be lawyers. Any law school that turned graduates into the market without inculcating students with this important skill would be judged a failure and would soon cease doing business. Nor should legal education ignore the broader and arguably more important questions of the law as they relate to society and the law’s impact on nearly every aspect of human interaction. Instead, the contention of this essay is that, while practical training has been reintroduced into law schools, there is still much work to be done before it is accepted as equal in importance to the teaching of doctrinal analysis and thinking like a lawyer.

\textsuperscript{104}. A search of Westlaw reveals 6,755 articles with the term \textit{negotiation}, \textit{negotiating}, or \textit{negotiate} in the title. The search does not account for legal treatises and texts on negotiations nor does it capture the many negotiation articles, journals, and texts in the fields of business, economics, psychology, and communications. In short, the literature about negotiations is staggering.