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Law Schools and the Changing Face of Practice

Peter Toll Hoffman
Elon University School of Law

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PETER TOLL HOFFMAN

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ABOUT THE AUTHOR: Professor of Law and Director of Skills Programs, Elon University School of Law, 1971; B.S. Michigan State University, 1968; J.D. University of Michigan, 1971.

I. INTRODUCTION

Upon graduating from law school in 1971, and having received what I thought was an excellent education from a top law school, I found that I had no idea how to handle my first task as a lawyer. On my first day at a Chicago law firm specializing in antitrust work, I was handed a set of interrogatories and told to draft objections to them. My reaction, thankfully unvoiced, was, "Interrogatories? Objections? What are those?" I had never seen interrogatories before and had no idea what objections could be made or how to draft them. In order to complete the assignment, I quickly sought out a senior associate who explained (in a somewhat condescending manner) what was expected of me. I completed the assignment, but the quality of my work probably had the hiring partners shaking their heads in dismay about their latest hiring mistake. My legal education had failed me.

Despite a broad and deep curriculum that included dozens of classes, my law school offered no "skills" or "lawyering" classes for first-year students. There were no classes in the curriculum that would have taught me how to draft and respond to interrogatories and no clinical courses. Indeed, there were only two skills classes of any sort in the curriculum—a trial advocacy class and a seminar on negotiations, both of which were offered for the first time my third year. I took both classes. The trial advocacy class attracted over eighty students, meeting only in a large group, and the work consisted of listening to lectures and watching demonstrations. However, the class provided few opportunities for the students to perform any of the trial skills being discussed and those opportunities were limited to only a handful of students. The negotiations class, one of the first to be offered in the country, consisted of a series of mock negotiations between the students. But absent from the class was any discussion of bargaining theory, a staple of today's negotiations classes.

Thankfully, legal education has improved in the years since I received my law degree. While it continues to be possible for students to graduate without exposure to more than one lawyering skills course,[1] (thanks to curricula that are largely elective after the first year), law students today have the opportunity at most schools to take a wide variety of skills courses, including clinical courses that permit them to represent actual clients. Today, a substantial majority of law schools offer at least one course that requires students to draft and respond to interrogatories.[2]

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1. Standard 302(a)(4) of The American Bar Association Standards and Rules of Procedure for Approval of Law Schools requires that "A law school shall require that each student receive substantial instruction in: . . . (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession." ABA Standards and Rules of Procedure for Approval of Law Sch. § 302(a)(4) (2011–2012), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_aba_standards_chapter3.authcheckdam.pdf. Interpretation 302-3 gives meaning to the standard by stating that "[t]o be 'substantial,' instruction in professional skills must engage each student in skills performances that are assessed by the instructor." *Id.* at Interpretation 302-3. Thus, law students today must take at least one skills course as part of satisfying the requirements for the Juris Doctor degree.

2. *See* Am. Bar Ass'n. Sec. of Legal Educ. & Admissions to the Bar, A Survey of Law School Curricula: 1992–2002 34, fig.7 (2004) (100 of the 151 ABA approved law schools offered a pretrial

Students emerging from law school today are vastly better prepared to enter the practice of law than I was. If they choose wisely among the courses offered at their schools, they could easily handle the interrogatories that caused me such surprise on my first day on the job.

Yet, despite the increase of clinical and skills courses and law schools' expanded efforts to prepare students more fully for the practice of law, the law schools continue to be a "step behind" in preparing students for the practice of law. This article argues that legal education today is readying students for a legal practice that is fading away or no longer exists, thus failing to prepare students for the type of practice they will confront upon graduation.

To trace the source of this problem, Part II offers a brief and admittedly selective history of law school skills training. It argues that traditionally law schools were not focused on skills training and that it was not until the 1970s that they began to slowly integrate the teaching of courtroom advocacy skills into their curriculums. Part III discusses the important changes that the law schools have made since the 1970s by developing and growing skills training and clinical legal education programs. Part IV examines the various ways in which the practice of law has changed during this time and explains that developments in legal education have failed to keep pace with a changing legal practice. Part V describes several factors contributing to the inability of the law schools to keep pace with these developments, but also highlights various incentives for improvement. Finally, Part VI concludes the article by arguing what should be done to improve skills training and clinical legal education at law schools in the future.

II. A BRIEF HISTORY OF LAW SCHOOL SKILLS TRAINING

For the first one hundred years following the invention of the modern American law school in 1870, trials were common occurrences and were generally accepted as a primary method of resolving legal disputes in this country.[3] But during this same period of time, U.S. law schools did not offer trial advocacy courses.[4] Freshly minted

advocacy course. A standard part of such a course is the drafting of discovery requests and responses). A number of clinical courses also teach discovery skills.

3. Of course, this is an oversimplification. Trials have never been the primary method of resolving disputes, and the number of trials, both civil and criminal has been declining for decades. As noted by Professor Lawrence M. Friedman, "the 'trial' was never the norm, never the model way of resolving issues and solving problems in the legal system." Lawrence M. Friedman, *The Day Before Trials Vanished,* 1 J. Empirical Legal Stud. 689, 689 (2004). The number of criminal trials has been declining since 1800 and is being replaced by guilty pleas. *Id.* at 691. Trials were also the exception in civil cases with most cases being settled. *Id.* at 693. Nonetheless, it is also clear that the number of trials has decreased dramatically in recent years. "The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002. . . . More startling was the 60 percent decline in the absolute number of trials since the mid 1980s." Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 459 (2004).

4. James W. McElhaney, *Toward the Effective Teaching of Trial Advocacy*, 29 U. Miami L. Rev. 198, 198 (1975) ("For many years law schools took a rather indifferent view toward training trial lawyers. Until recently, many schools did not offer trial advocacy courses, or had limited programs of scant educational

lawyers, having just graduated from law school, were unprepared to try cases or to represent clients in litigation. The lucky ones found employment with firms where, through the mentoring of more experienced lawyers, they received "on-the-job training" and gradually learned the techniques of the courtroom. Less fortunate graduates were forced to learn courtroom skills through trial and error, gaining their experience at the expense of hapless clients.[5]

It was not until the 1970s, when litigation began to be resolved more frequently at the pretrial stage, that law schools began offering courses focused on teaching courtroom advocacy skills.[6] As the importance of trials began to diminish, the number of cases resolved by dispositive motions began to increase.[7] This, in turn,

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value."); Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 Temp. L. Rev. 1, 1 (1993) ("Until the last quarter century, law schools did not set out to teach their students how to do what trial lawyers do—ask questions and make speeches. Traditional educators either rejected or failed to appreciate the idea that courtroom advocacy was a discipline grounded upon an analytical framework of case theory—that it was a subject worthy of curricular commitment."); Robert H. Jackson, *Training the Trial Lawyer: A Neglected Area of Legal Education*, 3 Stan. L. Rev. 48, 55 (1950) ("[I]t seems to me that the unsolved problem of legal education is how to equip the law student for work at the bar of the court. . . ."); Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s 229 n.88 (1983).

5. 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 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.

Karen A. Williams, *Trial Advocacy: The Use of Trial Skills in Non-Trial Experiences*, 29 Stetson L. Rev. 1229, 1229 (2000) (citing Warren E. Burger, *The Future of Legal Education*, *in* Selected Readings in Clinical Education 53 (1973)); *see also* Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227, 229–30 (1973); Gary A. Munneke, *Managing a Law Practice: What You Need to Learn in Law School*, 30 Pace L. Rev. 1207, 1226 (2010) ("If law schools fail to provide management skills training, law firms will be forced to teach young attorneys what they could have been taught before graduation from law school, or worse, these young attorneys may learn by trial and error, at clients' expense."); Jayne W. Barnard & Mark Greenspan, *Incremental Bar Admission: Lessons from the Medical Profession*, 53 J. Legal Educ. 340, 356 (2003) ("In the legal model, only the top graduates receive much intensive postgraduate training. The rest have to learn through trial and error—sometimes egregious error, often at clients' expense.").

6. McElhaney, *supra* note 4, at 201.

7. Much of the shift to resolving litigation through summary judgment motions can be attributed to the U.S. Supreme Court's "summary judgment trilogy." Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). This "summary judgment trilogy" encouraged lower courts to consider the early termination of litigation through this device. *See generally* Natasha T. Martin, *Pretext in Peril*, 75 Mo. L. Rev. 313, 338–39 (2010) ("Prior to the Supreme Court's issuance of the trilogy, lower courts tended to approach summary judgment tentatively. However, shortly after the Court's 1986 opinions, federal courts began utilizing the procedural device aggressively, in a fashion that prompted one scholar to describe it as 'a potential juggernaut.'"); John B. Snyder, III, *Dispositions Unsettled: What Tax Court Procedure Can Teach Us About Federal Civil Procedure*, 36 Ohio N.U. L. Rev. 359, 366 (2010) ("The

increased the importance of discovery and motion practice, particularly deposition skills, as litigants focused on developing factual records to support or oppose summary judgment motions.[8] All but the simplest of cases increasingly needed lawyers who could effectively conduct discovery and handle the nuances of motion practice. The focus of practice had shifted to the pretrial stage, while the law schools were producing graduates who were now able to try cases, but few of whom had learned anything about discovery or motion practice.

As trials continued to diminish in importance during the 1980s and 1990s, new litigation techniques were gaining traction in the legal profession. These two decades witnessed a rise in the use of alternative dispute resolution (ADR) mechanisms, particularly mediation and arbitration, which became increasingly common means of terminating litigation.[9] Again, the law schools were slow to respond to these changes. At the same time that ADR was rapidly gaining favor with the profession and the courts, the law schools were busily introducing pre-trial litigation courses that taught students, among other things, how to conduct discovery and engage in motion practice. Most of these courses, however, were deficient in preparing students to engage effectively in pre-trial litigation. Many provided only brief exposure to taking and defending depositions and bringing and opposing summary judgment motions, although these were precisely the tasks newly admitted lawyers were likely to confront during their first years of practice.[10]

Mediation and arbitration are today established methods of resolving legal disputes, while trials continue to decline in number and importance.[11] The law schools have responded to the ascendency of ADR, but that response is largely misdirected and has done little to prepare students for the new world of practice they will be entering upon graduation. While many schools have modified existing negotiation courses to include a segment on mediation, the typical law school

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trilogy elevated summary judgment from 'a disfavored procedural shortcut' to an integral part of the 'just, speedy, and inexpensive determination of every action.'").

8. *See generally* Nicola Faith Sharpe, *Corporate Cooperation Through Cost-Sharing*, 16 Mich. Telecomm. & Tech. L. Rev. 109, 116 (2009) ("The 1960s and early 1970s saw technological changes that led to an increase in discovery volume, burden, and costs, and has since been characterized by some as a litigation explosion. The widespread use of computers and digital communication has spawned a similar escalation.") (internal quotations omitted). *But see* David M. Trubek et al., *The Costs of Ordinary Litigation,* 31 UCLA L. Rev. 72, 89 (1983) ("While our data are limited to the court records, these findings confirm the conclusion of an earlier study that even in federal courts discovery is used intensively only in a small fraction of civil lawsuits.").

9. *See* Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. Disp. Resol. 269, 282–83; Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-shaping Our Legal System*, 108 Penn. St. L. Rev. 165, 170–89 (2003).

10. For examples of several excellent pretrial texts and their coverage of depositions and summary judgment motions, see Roger S. Haydock et al., Fundamentals of Pretrial Litigation (7th ed. 2008); Thomas A. Mauet, Pretrial (2008); Charles H. Rose III & James M. Underwood, Fundamental Pretrial Advocacy: A Strategic Guide to Effective Litigation (2008).

11. *See* Galanter, *supra* note 3.

response has been to create courses on the *law* of ADR. These courses do not, as a general rule, deal with the skills required by mediation or with how to represent clients involved in mediation, but focus instead on how the courts and legislatures treat mediation. Interestingly, a significant number of schools have created courses for training law students to be certified as mediators.[12] In contrast, only a few schools offer courses on mediation advocacy or how to represent clients in mediation. It is interesting to note that relatively few recent law school graduates are likely to find themselves employed as mediators in the first several years following graduation, but many schools have courses preparing them to do just this type of work. In contrast, many graduates will find themselves representing clients involved in mediations, but few schools offer courses on mediation advocacy.

What should be evident from this brief sketch of the history of skills training is that law schools have been, and continue to be, on the trailing edge of preparing students for the practice of law. Unfortunately, today's students are being readied for yesterday's legal practice. Students are being ill-prepared for the assignments they will face after graduation.

III. THE CHANGING LAW SCHOOLS

If we could break the time barrier and transport a 1970s law student into a contracts class at a law school today, the student would find the class to be remarkably similar to its 1970s counterpart. Once recovered from the shock of seeing students using laptops and smart phones in the classroom, the student would probably say that nothing much had changed.[13] The professor of 2011 likely employs the same combination of Socratic questioning and lecture, class discussion still centers around the case method of instruction, and the assigned text looks familiar, consisting primarily of cases, many of which are the same cases our 1970s student read.

Some differences exist, of course. Today's text probably contains additional materials beyond the cases and may even include an "interactive" component.[14]

12. Many states do not require that a mediator be a lawyer, but do require that the mediator have received specialized training in mediation techniques. Thus, law students may qualify as mediators after completing the necessary training. For example, to be certified as a mediator in Texas "a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment." Tex. Civ. Prac. & Rem. Code Ann. § 154.052 (West 2011).

13. The Provost of Vanderbilt University, a former law professor, has remarked that law schools are resistant to curricular change and that "I know of no other university department [other than Law] that uses the same pedagogic approach that it did 100 years ago, or bases its first year of education on largely the same basic conceptual categories." Nicholas S. Zeppos, *2007 Symposium on the Future of Legal Education*, 60 Vand. L. Rev. 325, 328.

14. Interactive casebooks, as described by the West website, are usually in an electronic form and "allow[] students immediate access to the full text of cited cases, statutes, articles, and other materials in the Westlaw database. In addition, the electronic version includes extensive photographs, maps, diagrams, and audio clips that help students understand the case materials." *Sprankling and Coletta's Property: A Contemporary Approach (Interactive Casebook Series)*, West Store, http://west.thomson.com/sprankling-colettas-property-a-contemporary-approach-interactive-casebook-series/146408/40730422/productdetail (last visited Sept. 29, 2011).

Today's professor may assign some negotiating and drafting problems in an effort to make the class more relevant to what he or she believes the students will be doing following graduation, something that was rarely done in 1970. And the classroom teaching techniques probably include PowerPoint slides shown on a large video screen. Some classes—most notably the evidence and business transactions classes—may have shifted to a problem or planning approach,[15] but there are few exceptions in the first year to the case method and Socratic questioning. To a large extent, the doctrinal classes of today are largely taught by using the same pedagogy as the classes in 1970.[16]

The greatest shock to our time-transported law student would likely come from the clinical and skills classes being taught today. These classes were in their infancy in 1970, and today they have become a vibrant and important part of a law school education.

A. The Growth of Skills Training

Christopher Columbus Langdell is credited with birthing the modern American law school in 1870, the year he became dean of Harvard Law School. In an era when apprenticeships were the favored pathway for entering the legal profession, and when law schools relied almost exclusively on the lecture method, Langdell created a new technique for teaching law, the case method, which continues to this day as the dominant pedagogy for studying law.[17] But Langdell's new teaching method came with a price—its "scientific" approach to the law and its exclusive focus on appellate court decisions caused legal education to become divorced of nearly all skills training except legal analysis, research, and writing.[18] Although some attention was given to appellate advocacy and to a much lesser extent to trial advocacy, the former was largely an extension of teaching legal writing while the latter received little serious attention.[19]

But skills training did not depart legal education quietly. By the early twentieth century, a number of commentators, including the first[20] and second Carnegie

15. The problem or problem solving approach asks students to develop solutions to hypothetical problems designed to simulate problems found in the practice of law. Students bring together a variety of lawyering skills as well as knowledge of the applicable law in arriving at a solution to the problems. *See generally* Stephen Nathanson, *Developing Legal Problem-Solving Skills*, 44 J. Legal Educ. 215 (1994).

16. *See* Zeppos, *supra* note 13.

17. *See* Stevens, *supra* note 4, at 35–42.

18. For a history of legal writing at Harvard Law School and its incorporation into legal education, see David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. Kan. L. Rev. 105, 127–36 (2003). For a discussion of the history of moot court in legal education, see Stevens, *supra* note 4, at 127 n.32.

19. *See* Stevens, *supra* note 4.

20. Josef Redlich, The Common Law and the Case Method in American University Law Schools: A Report to the Carnegie Foundation For the Advancement of Teaching, Bulletin 8 (1914) (commonly known as the "Redlich Report").

Reports[21] on legal education, leading figures in the American Bar Association,[22] and others[23] were calling for the introduction of clinical legal education and skills training into the law school curriculum.[24] These early efforts to introduce a more practical aspect to legal education achieved little,[25] but the middle part of the twentieth century generated new pressures on law schools to offer more skills courses.[26] These later efforts were met with greater success so that by the time our law student of forty years ago had matriculated, most law schools were offering some form of a trial advocacy course. These courses, however, bore scant resemblance to the trial advocacy courses of today. Many of the courses of 1970 were outgrowths of what was called "practice court," where the students were expected to draft and file every document in a case. Despite a strong emphasis on legal writing, these courses paid very little attention to the advocacy skills that are the focus of today's trial advocacy course.

It was only with the founding of the National Institute for Trial Advocacy (NITA), in 1971, that things began to change and trial advocacy became an established part of the law school curriculum.[27] NITA was the collaborative 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). The organization was created to rectify what were perceived to be deficiencies in the courtroom skills of many lawyers.[28]

NITA started offering CLE trial advocacy programs around the country for public agencies, Legal Services and similar organizations, and private law firms. Although not immune to criticism,[29] NITA's trial advocacy programs were widely praised and were considered a breakthrough in the teaching of advocacy skills. The organization's trial advocacy programs were soon augmented by additional programs focusing on different stages of the litigation process. Today, NITA oversees an

21. Alfred Zantzinger Reed, Training for the Public Profession of the Law, Bulletin 15 (1921) [hereinafter "Reed Report"].

22. Stevens, *supra* note 4, at 119–20.

23. William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity,* 11 Ill. L. Rev. 591 (1917).

24. Reed Report, *supra* note 21; Stevens, *supra* note 4, at 129 n.50.

25. *See* McElhaney, *supra* note 4, at 201.

26. *See* Stevens, *supra* note 4, at 214–15, 227 nn.77–78.

27. Terence F. MacCarthy, The History of the Teaching of Trial Advocacy (Nov. 15, 2007), *in* 38 Stetson L. Rev. 115, 118–19 (2008).

28. *See, e.g.,* Burger, *Special Skills of Advocacy, supra* note 5; *Qualification 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. 161 (West 1976) (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 (West 1980) (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 attitude existing before the creation of NITA about the competency of the trial bar.

29. *See* Edward J. Imwinkelried, *The Educational Philosophy of the Trial Practice Course: Reweaving the Seamless Web*, 23 Ga. L. Rev. 663 (1989); Steven Lubet, *Advocacy Education: The Case for Structural Knowledge,* 66 Notre Dame L. Rev. 721 (1991).

ambitious agenda of programs covering negotiations, fact investigation, motion practice, deposition practice, appellate practice, and a number of other topics.[30]

The NITA methodology[31] and NITA teaching materials soon penetrated the law schools. The trend gained important impetus in 1976 when the Council on Legal Education for Professional Responsibility (CLEPR) provided funding for a group of clinical teachers to attend NITA's three week-long National Session in Boulder, Colorado.[32] Other law school professors also attended NITA programs without the benefit of CLEPR financial support. Together, these law school faculty members returned to their home schools as NITA missionaries and soon started or modified existing law school trial advocacy courses to follow the NITA methodology and to use NITA teaching materials.

The introduction of NITA materials for advocacy training and the "NITA methodology" into the law schools was so rapid and successful that by 1975, four years after NITA's founding, a number of schools were offering trial advocacy courses that followed the NITA model.[33] The trend has continued since then to the point that trial advocacy courses have now become "a permanent fixture in the law school curriculum."[34] It is now safe to say that every law school in the country offers a course focused on building trial advocacy skills.

The key to NITA's success was the development of what has come to be known as the "NITA methodology." The methodology consists of participants listening to a lecture on the particular skill being taught, watching a demonstration of the skill, and, most importantly, practicing the skill through a series of simulation exercises.[35] Participants in a typical trial advocacy program conduct direct and cross examinations, deliver opening statements and closing arguments, introduce exhibits and impeach witnesses, culminating in a full jury trial before mock jurors. Participant performances are video-recorded and jointly reviewed by the participant and a NITA faculty member. The NITA methodology is accompanied by the "NITA critiquing system," which follows a set format and is designed to assist the participant by pointing out how the performance can be improved.[36]

The interchange between NITA and the law schools continued to strengthen with time. Several of the key figures in NITA's creation were law school faculty members; many law school faculty members taught in NITA programs; a number of

30. *See Programs*, Nat'l Inst. for Trial Advocacy, http://www.nita.org/Shop (last visited Sept. 29, 2011).

31. *See* Imwinkelried, *supra* note 29, at 668.

32. *See* Wallace J. Mlyneic, *The Intersection of Three Visions—Ken Pye, Bill Pincus, and Bill Greenhalgh—and the Development of Clinical Teaching Fellowships*, 64 Tenn. L. Rev. 963, 981 & nn.114–15 (1997).

33. *See* McElhaney, *supra* note 4, at 201.

34. Ohlbaum, *supra* note 4, at 2–3.

35. *See* Gilda Tuoni, *Two Models for Trial Advocacy Skills Training in Law Schools—A Critique*, 25 Loy. L.A. L. Rev. 111, 113–14 (1991).

36. *See* Kenneth S. Broun, *Teaching Advocacy the N.I.T.A. Way*, 63 A.B.A. J. 1220, 1220–23 (1977); Imwinkelried, *supra* note 29, at 668; Tuoni, *supra* note 35, at 113 n.6. *See generally* Ohlbaum, *supra* note 4, at 1–2.

NITA's regional public programs were held at law schools; and NITA was headquartered at Notre Dame Law School for many years. The introduction of NITA-type trial advocacy courses into the law school curriculum was quickly followed by a new wave of course offerings addressing other skills, such as appellate advocacy, pretrial litigation, interviewing and counseling, and negotiations. Most of these courses utilized some form of the NITA methodology and were often modeled on existing NITA programs in the same subject areas.

The NITA methodology continues to evolve which, in turn, has caused law school skills courses to change. For example, in recent years the organization has developed a segment for its trial advocacy programs on developing a case theory and a discovery planning session for its deposition programs. These segments have now been incorporated into many law school trial advocacy courses. A similar migration to law school skills courses has occurred through the use of "drills," a teaching technique recently developed by NITA which assists in the teaching of rote skills such as introducing exhibits or refreshing a witness's recollection.[37]

Forty years ago, a law student would have been lucky to come across a trial advocacy course that actually taught the skills needed to try a case. Today, however, the student would benefit from a wide array of lawyering skills courses using the NITA methodology. Depending on the school, students can now select from courses that teach taking and defending depositions, motion practice, summary judgment, pretrial litigation, storytelling, jury selection, discovery, pleading, appellate advocacy, counseling, interviewing, and negotiations, and the list goes on. Using variants of the NITA methodology, courses have now been created for transactional lawyering skills courses such as contract drafting, estate planning, business planning, etc. Clearly, the landscape of skills training has been transformed, with much of the credit properly going to NITA for spawning a catalog of skills course that was unimaginable forty years ago.

The NITA methodology has also heavily influenced clinical legal education. Clinical teachers frequently teach in NITA programs and many attend NITA's Advocacy Teachers Program, a program designed to train advocacy professors in the use of the NITA methodology and critiquing techniques. Many of the same clinical professors have applied the NITA methodology to the classroom components of their clinical courses by incorporating NITA-type simulation exercises and by using the NITA critiquing method to evaluate student performances.

B. The Growth of Clinical Legal Education

Although the modern clinical movement dates to the creation of the Council on Legal Education for Professional Responsibility in 1968,[38] the concept of clinical legal education dates to 1893 when a law club at the University of Pennsylvania

37. Robert A. Stein & Ben Rubinowitz, Compendium of Trial Advocacy Drills (2006).

38. 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* J.P. "Sandy"

established a legal aid dispensary. This was followed by the opening of a legal aid dispensary at the University of Denver in 1904, with a few other law schools creating similar programs in the early part of the twentieth century.[39] But it was not until 1932 that the first clinical course was established by John Bradway at Duke University School of Law.[40] During this period, there were a number of calls for the law schools to create clinical courses, particularly by Jerome Frank and Bradway,[41] but the schools were slow to respond.[42] It was not until 1947 that the University of Tennessee College of Law created the second ongoing, in-house clinical program in the country.[43] The 1940s and 1950s saw increasing interest in clinical legal education as several articles urged the law schools to create clinical courses. But, by 1951, there were only twenty-eight clinics in existence, many of which were run by independent legal aid societies rather than the law schools. [44] Moreover, only rarely were students awarded credit for participation.[45]

Clinical legal education began to be taken seriously with the creation of CLEPR in 1968.[46] CLEPR used a series of Ford Foundation funded grants to create clinical courses in 1969 at nine law schools. 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.[47]

Our law student of 1970 may have heard of clinical legal education, but the opportunity to take a clinical course did not exist unless the student was attending one of a very few law schools. Over the past forty years, there has been an explosion of clinical courses at nearly every law school in the country. "General" clinical courses, such as civil or criminal clinics, handling a variety of cases, are now commonplace.

Ogilvy, *Celebrating CLEPR's 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 Clinical L. Rev. 1, 10–11 (2009).

39. *See generally* Stevens, *supra* note 4, at 162–63, 212–14; George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. Legal Educ. 162, 168–73 (1974); Ogilvy, *supra* note 38, at 4; William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 Akron L. Rev. 463, 466–71 (1995).

40. Ogilvy, *supra* note 38, at 4; *Law School Timeline*, Duke Law, http://www.law.duke.edu/history/timeline (last visited Sept. 29, 2011).

41. *See* Jerome Frank, *Why Not A Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907, 917–18 (1933).

42. *See, e.g.*, John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S. Cal. L. Rev. 252, 274, 276 (1929); John S. Bradway, *The Classroom Aspects of Legal Aid Clinic Work*, 8 Brook. L. Rev. 373, 396 (1939); John S. Bradway, *Legal Aid Clinic as a Law School Course*, 3 S. Cal. L. Rev. 320, 320–21 (1930).

43. Ogilvy, *supra* note 38, at 4.

44. Stevens, *supra* note 4, at 215–16, 229 n.90.

45. *Id*. at 216.

46. 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 38, at 10–11.

47. *Id*. at 15.

There has also been a huge increase in the number and types of "specialty" clinics, including, for example, clinics handling matters in bankruptcy, juvenile rights, dependency and neglect, HIV cases, small business transactions, tax, and the list continues. A survey of clinical legal education found that for the 2007–2008 academic year there were 809 distinct in-house, live client clinics covering thirty-four subject matters with an average of 6.2 clinics per reporting school.[48] Similarly, the survey found 895 distinct field placement programs covering thirty-nine different placement settings with an average of 6.8 field placements per reporting school.[49]

C. The Success of Clinical Legal Education and Skills Training

Legal education has been revolutionized over the past forty years by the twin influences of clinical legal education and the NITA methodology. While today's doctrinal curriculum would appear very familiar to a student of forty years ago, albeit with significant differences in how these courses are now taught, almost all of today's clinical and skills courses did not even exist in 1970. The problem for a student today is not the availability of such courses, but how to choose among the many that are offered.

Clinical legal education and skills training have achieved general acceptance as a necessary and important part of legal education. That acceptance is reflected in the American Bar Association Standards and Rules of Procedure for Approval of Law Schools, the standards that apply to all ABA accredited schools. Standard 302, which governs a law school's curriculum, requires, among other things, that:

> (a) A law school shall require that each student receive substantial instruction in:
>
> (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
>
> (b) A law school shall offer substantial opportunities for:
>
> (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence.[50]

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48. David A. Santacroce & Robert R. Kuehn, Center For the Study of Applied Legal Education: Report on the 2007–2008 Survey 8 (2008), http://www.csale.org/CSCALE.07–08.Survey.Report.pdf. The Report classifies clinics by thirty-four subject matters (including "other" and "no clinic"). *Id.* at 8–9.

49. *Id.* at 9.

50. ABA Standards and Rules of Procedure for Approval of Law Sch. § 302 (2011–2012). http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_

It appears that in the next decade legal education will place increasing emphasis on clinical legal education and skills training. The 2007 publication of the Carnegie Foundation's *Educating Lawyers*[51] and the Clinical Legal Education Association's (CLEA) *Best Practices for Legal Education*[52] has generated a number of conferences and articles on how to further incorporate clinical legal education and skills training into mainstream legal education. Meanwhile, several schools have created faculty committees to discuss implementing changes based on these recommendations and some schools have already taken action. While it remains to be seen whether these reports will result in permanent and meaningful changes in the law school curriculum, the recent economic downturn is pushing law firms toward hiring practice-ready graduates. As law schools work to satisfy the needs of the law firms, we are likely to see increasing numbers of clinical and skills courses.

IV. THE CHANGING PRACTICE OF LAW

As dramatic as the changes in legal education have been over the past forty years, the changes in the way law is practiced over the same period have been equally dramatic. Admittedly, comparing changes in legal education with changes in the practice of law can be likened to comparing apples to oranges, but there is no debate that the past four decades have brought substantial alterations to the legal landscape and to the legal profession as a whole. Moreover, this author believes the overall pace of the changing legal practice is quickening.[53]

Change, of course, is a constant in society as well as in the practice of law. New court decisions and statutory enactments appear regularly, the economy is continuously in flux, and new technologies are constantly being heralded while old technologies fade away. All of these changes generate new legal needs and all of them require

aba_standards_chapter3.authcheckdam.pdf. Interpretation 302-2 gives further meaning to Standard 302(a)(4):

> Each law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school. Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are among the area of instruction in professional skills that fulfill Standard 302(a)(4).

Id. at Interpretation 302-2.

51. William m. Sullivan et al., educating lawyers (2007) [hereinafter "Carnegie Report"].

52. Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Road Map (2007) [hereinafter "Best Practices"], law.sc.edu/faculty/stuckey/best_practices/best_practices-cover.pdf.

53. Although there is no way of measuring the validity of this assertion, I believe the overall pace of changes in the practice of law is quickening. The increased pace can be traced to rapid technological changes in the practice of law and the effects of the current economic slowdown. These forces have resulted in substantial changes in the way law is being practiced. For example, economic pressures from clients resisting the high billing rates of the elite law firms and "Big Law" have caused law firms to become more efficient and cost conscious in the delivery of legal services while technological changes have contributed to the increasing efficiencies in the way law is practiced.

lawyers to be constantly adding to their catalog of legal knowledge. Forty years ago, law students may have heard of such emerging legal fields as environmental law, but other new legal fields, such as cyber law, were still years in the future. As these new legal fields assume prominence, other fields recede in importance. For example, space law and atomic energy law were emerging "hot" legal fields forty years ago, yet almost nothing is heard of them today. Such has always been the nature of law—it evolves and changes with society and technology. As always, new legislation is being enacted, court decisions are announced, and administrative rulings are issued, all causing significant alternations in legal doctrine and the ways in which lawyers must advise their clients.

Many changes cause lawyers to add to or modify their knowledge of doctrine, but some changes occurring over the past forty years have also required lawyers to develop new skills. These latter changes reflect more than mere developments in doctrine, but require the creation of new methods for representing clients. A partial catalog of these pivotal changes includes the following:

A. Changes in How Disputes are Resolved

The Rise of ADR: The rise of alternative dispute resolution as a method of resolving disputes, particularly the use of mediation, has required lawyers to conceptualize legal disputes differently then when they were resolved by trial. Instead of appealing to a neutral, passive judge or jury, lawyers in mediation must persuade the opposing party to voluntarily resolve a dispute while using the mediator as an intermediary. The increasing use of ADR has required lawyers to develop a different repertoire of skills, mediation advocacy, than are needed for litigating and trying cases.[54]

The Vanishing Trial: The decline in the number of trials, both jury and bench, is a reality to which the bench and bar are slowly adjusting. Even NITA, created to improve the training of trial lawyers, has recognized the decline, stating:

> Years before the economic downturn of 2008–09, the work of the trial lawyer began to change. Except for lawyers in primarily criminal practices, the jury trial and even the bench trial became increasingly rare. Most lawyers in civil practice spend the majority of their time in pre-trial discovery, depositions, motions hearings, negotiations, mediations, and arbitrations. Simply put, there are just not enough jury opportunities to learn trial skills to keep an advocate's skills sharp.[55]

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54. Some of the skills that have been identified as necessary for a successful mediator are displaying friendliness, empathy, respect, caring, integrity, neutrality, trustworthiness, nonjudgmental attitudes, patience, persistence, diplomacy, and the ability to ask good questions. Successful mediators were also candid, used humor to lighten potentially difficult situations, were calm and flexible. Susan Raines et al., *Best Practices for Mediation Training and Regulation: Preliminary Findings,* 48 Fam. Ct. Rev. 541, 542 (2010).

55. John Baker, *Letter from the President*, NITA Notes (Apr. 2010), http://archive.constantcontact.com/fs086/1101948188932/archive/1103284312333.html.

The reasons for the decline are difficult to determine, but they likely include the increasing use of alternative dispute resolution techniques such as mediation and arbitration, the willingness of judges to dispose of cases on summary judgment as well as other dispositive motions, and increasingly risk-adverse clients who wish to avoid the high costs and risks of going to trial through the use of a settlement. Whatever the causes, the effects are real.[56] The decline in the number of trials threatens to render obsolete the skills of the trial lawyer. Many lawyers who in the past would have labeled themselves "trial lawyers" now describe themselves as "litigators" because they have never tried, or only rarely try, cases. Deeming themselves "trial lawyers" seems to be an exaggeration of what they actually do. Although, knowing how to try a case remains an important skill for giving "teeth" to a client's settlement efforts, these lawyers may still never get to put their skills into action in an actual trial.

Increasing Importance of Depositions: The decline in the number of trials has increased the importance of discovery, particularly depositions. Several legal scholars now argue that depositions have displaced trials as the forum in which factual disputes are resolved.[57] Of course, there is no judge or jury at a deposition, but the deposition is where critical facts are recorded that could ultimately be presented to the opposing party in a negotiation or mediation or to the judge in a summary judgment motion. While the need for trial advocacy skills is declining, the importance of deposition skills is increasing.

B. New Technologies

Increased Use of Case Management Software: New technologies have altered the way litigation is managed. The use of case management technology—computer programs designed to catalog and access discovery, record time billed, track witnesses, create timelines, as well as perform many other tasks—was, like the personal computer itself, unheard of forty years ago. The creation of a variety of case management software programs has altered how litigation is managed.[58] Consider, for instance, the abstracting of depositions. Forty years ago, new associates were

56. *See* Lisa Blomgren Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 Ohio St. J. on Disp. Resol. 225 (2009); Margo Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. Disp. Resol. 35; Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 Stan. L. Rev. 1329 (2005); Galanter, *supra* note 3; Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591 (2004).

57. Kyle A. Lansberry & J. Robert Turnipseed, *Deposition Preparation and Defense for the Young Lawyer,* 24 Am. J. Trial Advoc. 357 (2000) ("With the increasing utilization of alternative dispute resolution processes, depositions have in many ways become a substitute for trial."); A. Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets,* 12 Geo. J. Legal Ethics 1, 4 (1998) ("Depositions are a dress rehearsal—and due to high settlement rates are often a substitute—for trial."); Joe W. Redden, Jr., *What's Happening in the Law: Surveying the New Developments,* 61 Def. Couns. J. 326, 343 (1994).

58. *See, e.g.*, Helen W. Gunnarsson, *Does Your Practice Need Practice Management Software?*, 98 Ill. B.J. 352 (2010).

frequently required to abstract or summarize deposition testimony so that particular questions and answers could be easily found if, for instance, it was necessary to impeach a witness at trial with their deposition testimony. Today, however, depositions are rarely abstracted. It is now possible to type search terms into a computer and quickly locate all references in a deposition to the answers containing those terms. Lawyers today must be familiar with the capabilities of case management software if they are to conduct litigation efficiently and economically.

Video Depositions: Video-recorded depositions have become the normal practice in many areas of the country, largely because they are more persuasive to, and understandable by, judges and juries than the traditional method of reading a deposition transcript. As such, excerpts from video depositions are being routinely presented to judges and juries during opening statements, in impeaching witnesses, and as substitute testimony for absent witnesses. But video depositions require a different form of witness preparation than is used for stenographic depositions and different techniques of taking and defending the deposition.[59]

Real-Time Depositions: Real time depositions are another recent innovation. It is now possible for the parties at a deposition to watch their computer screens as the lawyers' questions and the witness's answers appear simultaneously with the court reporter's transcription. While not used in every deposition, real-time deposition is an important aid where the exact wording of questions and answers is critical to the deposition record.[60]

E-Discovery: E-Discovery and the need to review e-mails as an integral part of the litigation process was unheard of in 1970. As far as lawyers and the general public were concerned, e-mail then was the subject of science fiction. E-mails today, however, given their wide use as a means of communicating, are recognized as a potential source of invaluable evidence, especially in commercial litigation. A new

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59. *See* David M. Malone et al., The Effective Deposition: Techniques and Strategies That Work 304–06 (rev. 3d ed. 2007). An illustration of the differences between the two types of depositions—stenographic and video—concerns how a witness is prepared to answer questions at the deposition. Witnesses are typically prepared for a stenographic deposition by being instructed to "[l]isten to the question and answer only the question being asked." This instruction is often accompanied by asking if the witness has the time. When the witness answers with whatever the time is, e.g., 2:15, the witness is told that the correct answer is "yes" or "no" since the question did not ask what time it is, but only whether the witness had the time. This is an effective instruction for a stenographic deposition, but a witness who follows the instruction in a video deposition will come across as being uncooperative and a "jerk." This is not the way the sponsor of the witness wishes to have the witness perceived by a judge or jury. Thus, witnesses for video depositions are told to give complete explanations in response to questions. The preparation of witnesses for video depositions differ in many other ways from preparation for a stenographic deposition, including how long to pause before answering the question, making eye contact with the camera, the effect of distracting mannerisms, displaying anger and other emotions, etc.

60. Victor D. Vital & Lawrence D. Brown, *Examining & Defending Deponents Under the Texas & Federal Rules of Procedure: Making and Defending Against Objections and Privilege Assertions and Dealing with Objectionable Questions, Conduct and Refusals to Answer,* 28 Advoc. 26, 32 (2004) ("An attorney utilizing real-time technology during a deposition has the advantage of viewing a question and an answer on the screen, enabling the attorney to assess, 'on the spot,' whether helpful testimony will be admissible at trial.").

industry of e-discovery has been created in response to the expense and difficulty of obtaining e-mail communications and responding to those requests.[61]

Courtroom Technology: Technology has also changed the way in which evidence is presented during trial. Many courtrooms today are equipped with a full array of technologies for presenting evidence, including document cameras and PowerPoint capabilities. Using the new technology effectively requires different skills than previously when an exhibit at trial was often passed from juror to juror.[62]

Focus Groups: New understandings of what persuades judges and jurors have transformed litigation in ways that could not be imagined by our 1970s law student.[63] Focus groups, for example, are now frequently used to create and test the persuasiveness of case theories and themes. While jury consultants often conduct focus groups, lawyers may also do so. Regardless of who conducts the study, litigators today must know how to utilize effectively the output of focus groups.[64]

Changes in Popular Culture: There is a widespread belief among jury consultants and trial lawyers that television and the web have greatly influenced, and perhaps permanently altered, how younger jurors receive and process information. Many believe, for instance, that the average attention span of younger jurors is significantly less than that of previous generations. This, in turn, has caused trial lawyers to develop new techniques for presenting evidence and arguing cases.[65]

In my opinion, there has not been a comparable time in the modern history of the legal profession when so many changes of such magnitude have affected the practice of law. These changes have altered the very fabric of the legal profession and they have made a new set of lawyering skills necessary for the successful practice of law.

There is no question that a student today who chooses to take advantage of the available clinical and lawyering skills courses will graduate from law school much better prepared for the practice of law than was possible forty years ago. But regardless of the courses taken, today's law school graduate will not possess many of the important skills needed to practice law successfully. Although there has been a major shift in the law school curriculum to include clinical and skills courses, these courses do not adequately reflect the more recent ways in which the practice of law has been altered.

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61. It is impossible to catalog the thousands of articles and treatises treating the subject of e-discovery. A quick review of Westlaw using the search term "e-discovery" will provide you with a lifetime of reading pleasure.

62. *See, e.g.*, Fredric I. Ledrer, *WIRED: What We've Learned About Courtroom Technology*, 24 Crim. Just. 18, 19–21 (2010).

63. Teresa Rosado, *Knowledge is Power: Online Jury Research Delivers Affordable, Valuable Results*, Legal Mgmt., July–Aug. 2010, at 80, http://www.alanet.org/publications/issue/julaug10/LM-JulAug10-BigIdeas.pdf ("Professional jury research started in the 1970s.").

64. *See, e.g.*, James R. Ronca, *Hone Your Case with Focus Groups*, Trial, May 1, 2005, at 82.

65. *See, e.g.*, Lisa Brennan, *Pitching the Gen-X Jury: As Jurors Get Younger, Law Schools are Thinking More Like MTV*, NLJ.com, (June 7, 2004), http://quest.law.com/Search/Search.do?Ntt=pitching+the+Gen-X+jury&Nty=1&N=8357&site=nlj&Ntk=SI_All&cx=0&sortVar=1.

V. WHY LAW SCHOOLS FAIL TO KEEP PACE WITH PRACTICE

This section begins with the caveat that much of the following discussion cannot be supported by citations to published empirical studies. Only occasionally will reference be made to anecdotal evidence found in journals and law reviews. Much of what is offered here is based on impressions formed by over forty years of legal teaching while on the faculty of four law schools, as a visiting professor to several other schools, and as a participant in countless discussions while attending conferences and meetings. I recognize that my views are open to dispute and countervailing anecdotal evidence. I also recognize that law faculties are not homogenous bodies, but consist of individuals with differing backgrounds and experiences and with conflicting values and views. I am convinced, however, that my views are correct when they are viewed as general propositions rather than as immutable rules. With this caveat in mind, let me begin.

A primary source of the disconnect between law schools and the practicing bar can be traced to the case method of teaching law,[66] which rested on the premise that the study of law was a scientific endeavor where legal principles are derived from the study of appellate opinions.[67] Such an approach to the study of law did not require the insights of practice nor did it require any discussion about how lawyers actually go about solving client problems. This purely academic approach to training students for the practice of law immediately caused discomfort among legal practitioners and led to frequent criticism that continues to this day.[68] Many of these criticisms are contained in a series of reports and studies by the Carnegie Foundation for the Advancement of Teaching while others came from the American Bar Association, the Association of American Law Schools, and the Clinical Legal Education Association.[69]

Unfortunately, every report and study calling for greater practicality in the training of law students by increasing the number of clinical and skills courses has generated resistance from the law schools. This is not to say that all law faculties at all times have rejected the idea of infusing into the law school curriculum a greater degree of preparing students for the practice of law. Otherwise, we would never have witnessed the progress that has been accomplished to date. But there appears to be a predictable cycle that occurs in response to the issuance of each new study or report urging the greater incorporation of clinical and lawyering skills courses into the curriculum.

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66. *See* Stevens, *supra* note 4, at 38.

67. *See id.* at ch. 4.

68. *See, e.g.*, *id.* at 212–16, 238–41, 277–78.

69. *See, e.g.*, Paul D. Carrington, *Training for the Public Profession of the Law: 1971*, Ass'n of Am. Law Schs. pt. 1, § 2, *reprinted in* Herbet L. Packer & Thomas Ehrlich, New Directions in Legal Education 93 (1972); Reed Report, *supra* note 21; Carnegie Report, *supra* note 51; Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum: Report of The Task Force on Law Schools and the Profession (1992) [hereinafter "MacCrate Report"] (named for the chairman of the task force); Am.Bar Ass'n. Sec. Legal Educ. & Admissions to the Bar, Report and Recommendation of the Task Force on Lawyer Competency: The Role of the Law Schools (1979) [hereinafter "Cramton Report"] (named for the chairman of the task force).

First, the appearance of a new study or report initially generates favorable comment from those in the law school community who support the recommended changes. Articles analyzing and discussing the study or report begin appearing in such publications as the *Journal of Legal Education*. Next, an inevitable backlash follows in which opponents of the recommended changes come forth with opposing arguments, and another set of articles appears suggesting why the changes are neither feasible nor desirable. Nonetheless, some incremental progress is made in response to the initial study or report before the law school community ultimately loses interest in the discussion and shifts its attention to other issues.

But at many schools, the issuance of a new study or report fails to have any discernable impact. At these schools, the majority of faculty members do not read the new study or report, the study or report is not placed on the agenda for discussion at a faculty meeting, and the school's curriculum committee does not consider how the study or report will impact that school's curriculum. It remains to be seen whether the latest of these important studies, the most recent Carnegie Report,[70] will suffer a similar fate.

A. Barriers to Improvement

1. Faculty Inertia

The greatest impediment to curricular innovation at most law schools is faculty inertia.[71] Most law school faculty members simply do not have much interest in changing the methods by which law schools train their students and are generally resistant to proposals for change for several reasons.

Most law professors practiced law only briefly, if at all, before joining a law school faculty. While there are many career paths leading to a law school teaching position, extensive practice experience is rarely among them.[72] Instead, the more typical career path is a judicial clerkship following graduation, followed perhaps by several years with an elite law firm where most of the assignments involve legal research and brief writing. Rarely would these faculty members have practiced long enough to have assumed client responsibilities or interactions. Other faculty members, however, may have skipped any practice experience and went directly from a judicial clerkship into teaching law. In both instances, the fact that these faculty members chose to seek out a teaching position after such a brief period in practice is often indicative of a lack of interest in the practice of law, what most lawyers do for a living.[73]

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70. Carnegie Report, *supra* note 51.

71. *See* Steven C. Bennett, *When Will Law School Change?*, 89 Neb. L. Rev. 87, 104 (2010).

72. I have heard experienced and well-regarded faculty members argue that candidates with more than a few years of practice experience should be rejected for employment as their practice experience demonstrates a lack of commitment to scholarship.

73. *See generally* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992) (proposing that professors are academics rather than practitioners); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. Cal. L. Rev. 1231 (1991) (also proposing that professors are academics rather than practitioners).

Another path into law teaching followed by increasing numbers of faculty members is to earn a doctorate degree in another field before obtaining a law degree.[74] What often attracts the members of this group to law teaching is the higher salaries paid by the law schools in comparison to the compensation level in their original discipline. Not unsurprisingly, many of these faculty members consider their primary academic interest to be their original discipline with law only incidentally informing their teaching and original scholarship. Given these circumstances, it is unrealistic to expect the members of this group to have an interest in preparing students for a profession in which they were never participants themselves.

The failure of most law school faculty members to have meaningful or extensive practice experience manifests itself not only in a lack of interest in teaching the practice of law, but also in a disdain for practicing lawyers. The practice of law is viewed as an inferior calling and not worthy of serious consideration by many of those who have been admitted to the ranks of law teaching. Practicing law is considered to be grubby and messy, and lawyers are thought of as avaricious and perhaps, a bit unethical. The result of these attitudes is a belief by many faculty members that the primary role of the law schools is to focus on the brightest students and prepare them for a life of teaching law or a career at one of the elite law firms. Meanwhile, those law students who do not have the academic wherewithal to qualify for these positions are largely ignored.

While law schools and legal education serve several objectives, it should be beyond controversy that the primary goal of a legal education is to prepare students for the practice of law. Standard 301(a) of the ABA Accreditation makes this clear by stating, "A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession."[75] After all, the students, whose tuition in large measure supports the law school, have chosen to attend law school because they expect to be prepared to practice law upon graduation.[76]

Unfortunately, there are few incentives for faculty members to focus on better preparing law students for the practice of law. Merit raises are rarely awarded for being an outstanding teacher or for successfully training law students to become competent practitioners. Similarly, curricular innovations or improvements only occasionally receive praise from colleagues or rewards or recognition from the dean. Instead, the generally recognized coin of the realm in law schools is publishing legal scholarship, which brings recognition, increased pay, and promotions.

Conversely, curricular improvements often bring more work with them. Creating new classes and modifying the way existing classes are taught requires time and effort; the same is true of selecting, perhaps even creating, and incorporating new

74. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 Mich. L. Rev. 2191, 2202–03 (1993).

75. ABA Standards and Rules of Procedure for Approval of Law Sch. § 301(a) (2011–2012), http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf.

76. *See* Best Practices, *supra* note 52, at 16–18.

teaching materials. The addition of exercises and simulations requires time to select or create the exercises and simulation and to administer and grade them. Certainly, there are a number of faculty members who take great pride in their teaching and gain personal fulfillment from better preparing their students. But there are also many law school professors who balance the gains of curricular improvement against the prospects of an increased workload and decide that it would be better to continue teaching the same classes in the same manner as before.

In addition to individual recognition, most law professors also crave the status that comes from a high placement in the *U.S. News & World Report* rankings. The rankings not only confer status within the academic pecking order, but also strongly influence prospective applicants in their decisions as to what schools they will apply. The rankings also affect alumni support and donations. The tension in the faculty lounge heightens as the date for the announcement of each year's rankings approaches. A rise in the rankings becomes a moment for jubilation while a fall provokes consternation. Moreover, a precipitous fall may cause a dean to be forced out of the deanship. Discussions in the faculty lounge preceding and following the announcement frequently concern what can be done to increase a school's rank. In contrast, there are rarely discussions at most law schools about how to improve the training of law students for the practice of law. This is a topic of little or no interest and is considered by many faculty members to be largely irrelevant to the law school's mission. Unfortunately, the rankings do not contain a direct measure of how well a school has performed in preparing students for the practice of law.[77]

2. Cost

Cost, in an era of tight budgets, is certainly another impediment to curricular reform. Clinical courses are expensive (although not terribly so when compared to small classes and seminars). While the cost of skills courses is relatively low because adjunct faculty usually teach them, in the aggregate, they can be a burden on an already strapped law school budget. At most schools, full-time faculty members cannot be easily assigned to teach skills courses because of their lack of practice

77. At best, the Assessment Score by Lawyers/Judges might be considered a crude surrogate for the quality of a school's graduates, but many other factors are likely to be inherent in this measure. There is much mystery surrounding who is selected to receive a ballot from *U.S. News & World Report*. The magazine reports that ballots are sent to "legal professionals *including* the hiring partners of law firms, state attorneys general, and selected federal and state judges." Robert J. Morse & Sam Flanigan, *The Law School Rankings Methodology*, U.S. News.com, (Mar. 14, 2011), http://www.usnews.com/education/best-graduate-schools/articles/2011/03/14/law-school-rankings-methodology-2012 (emphasis added). No information is given about what other individuals receive ballots in addition to those listed and there is nothing about the geographic distribution of the recipients. There are several "Specialty Rankings" that are more directly correlated to a law school's preparation of its students for the practice of law, i.e. clinical, legal writing, and trial advocacy. It is interesting to note that there is little correlation between a school's ranking in one of these specialty categories and the school's overall ranking.

experience[78] and they were never employed by the law schools to do so.[79] In short, they do not have the necessary competence in practicing law to be able to teach such courses. Because most full-time faculty members lack the practical competence to teach skills courses, the use of adjunct professors to do so usually will not free the time of any full-time faculty members to teach other needed courses. Instead, the skills courses are *additions to* the existing curriculum.

3. Adjunct Faculty

Even though adjunct faculty have the relevant experience to teach skills courses as a result of their full-time work on complicated and sophisticated legal issues, their part-time faculty status makes it unlikely that they have the interest or ability to bring this knowledge into their law school skills courses. It requires time and effort to plan or modify courses, something part-time adjunct faculty rarely have available. The need to focus on their practices keeps adjuncts from becoming forces for change within the law schools. In fact, at many schools the adjuncts are not involved in designing their own courses, but instead are given commercially available syllabi and teaching materials or use materials prepared by full-time faculty members who usually lack the relevant practice experience.

There are, however, some exceptions to this scenario. At those schools with established reputations for excellence in skills training, particularly trial advocacy, there are usually several full-time faculty members teaching within the skills curriculum. These full-time teachers are usually engaged in an ongoing effort to keep their courses current and up-to-date with what is occurring in the practice of law. But again, these schools are the exceptions.

4. The Lead of the Elite Law Schools

The curious phenomenon of lower-ranked schools following the curricular lead of the elite law schools, especially that of Harvard Law School, is another force causing law school deans and faculties to resist curricular changes. Law school faculty members at schools considered less elite report that one of the most compelling arguments in opposition to proposals for curricular change is that "Harvard doesn't do it that way." Such an attitude, while perhaps understandable, stifles curricular innovation and independent change at lower ranked schools. But when Harvard does institute a change, lower ranked schools will usually quickly follow with similar changes to their own curricula. An example of this phenomenon is provided by President William Pincus's CLEPR strategy in awarding its first grants to fund the

78. Grossman, *supra* note 39, at 182–83.

79. Langdell reportedly stated that "[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." Stevens, *supra* note 4, at 38 (citing Joel Seligman, The High Citadel: The Influence of the Harvard Law School 7 (1978)); *see also* Grossman, *supra,* note 39, at 164 (citing J.W. Hurst, Growth of American Law 263 (1950)).

creation of law school clinical law programs:[80] "[Pincus] recognized that schools like Harvard and Yale commanded respect in legal education, so he sought to fund programs at these institutions, believing that if Harvard and Yale had clinics, the other lesser-ranked schools would be more willing to consider creating clinics as well."[81]

B. Incentives for Improvement

There are, of course, many law school faculty members who fully embrace their task of preparing students for the practice of law. These faculty members actively pursue improvements to their own classes and lobby for curricular changes that will improve the ability of the school's graduates to enter the legal profession as competent practitioners. Sadly, at most schools, these individuals are a minority within a larger faculty body that remains largely uninterested in curricular reform.

Change, when it occurs, appears to stem from two sources: i) a dean or a body of interested faculty members who have taken an interest in improving the school's curriculum, or ii) action from sources external to the law schools. Deans and interested faculty members have a variety of motivations for improving their law schools' curricula. The personal pride that comes from teaching in a respected law school and producing graduates who are regarded as competent is important to many, but there are also other pressures for improving the education law schools provide.

1. Law School Differentiation

Law schools are in competition to attract the best and brightest students, which is a difficult task in the highly competitive market of legal education. The task is made more difficult because most law schools today are largely indistinguishable from the schools against which they compete. Course offerings are remarkably similar; facilities may differ some, but not significantly; and tuition is likely to be similar to that of competitor schools of similar *U.S. News & World Report* rank. Thus, law schools are always seeking ways to differentiate themselves from their competitors to give the school a competitive edge in the effort to attract the best possible students. A unique or innovative curriculum is one method of differentiating a school.

Having a unique or different curriculum, however, is not enough. The uniqueness must somehow contribute to the value prospective students will gain from attending that particular law school. And, of course, the two areas that are of most value to prospective students are better preparation for the practice of law and improved employment prospects upon graduation. Fortunately, some schools believe that better preparation for the practice of law can be best achieved by increasing the quality and quantity of clinical and skills courses, thereby differentiating a school from its competition while also increasing the value of student education.

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80. *See* Ogilvy, *supra* note 38.

81. *Id.* at 15.

Many prospective students base their application decisions on a school's rank and often miniscule differences in a school's score causes a substantial rise or fall in the rankings. The two components given the heaviest weight in calculating a school's score and resulting rank are the scores for *Peer Assessment* and for *Lawyers/Judges Assessment*.[82] Schools that can publicize major curricular improvements hope to differentiate their schools in the perceptions of those who have a vote in the rankings. Similarly, *Placement Success* is another factor receiving significant weight in calculating a school's ranking.[83] Any curricular improvement that can improve the employment prospects of a school's students will have a beneficial effect on the rankings.

But the rankings also exert countervailing pressures. As stated before, there is remarkable uniformity between schools in their curricular offerings. A school seeking to maintain or advance its place in the rankings may be averse to tampering with its curriculum when that curriculum is similar or identical to those at more highly ranked schools. Another risk is that curricular changes can potentially generate unfavorable publicity and cause a fall in the rankings if perceived as diminishing academic rigor.

2. Improving Employment Prospects

The number and quality of applications to a law school is directly linked to the employment prospects for the school's graduates. Employment statistics are also a component in the *U.S. News and World Report* rankings; the greater the percentage of employed graduates, the higher a school's ranking. These two factors provide law schools with strong incentives to produce graduates who are attractive to prospective employers. Providing "practice-ready" graduates is one obvious way schools can enhance the employment prospects of their students, especially in comparison to the graduates of competitor schools. The ability of new associates to begin billing without a lengthy apprenticeship within the firm is very attractive to prospective employers.[84]

The one group of employers that does not appear to place a high value on practice-readiness is elite law firms or what is known as "big law." Most elite law firms do not value competency to practice when making employment decisions, but instead focus on hiring graduates with stellar law school academic records. For these firms, a graduate's law school grade point average and law review record are considered more valuable attributes than any ability to draft buy-sell agreements or to take or defend a deposition.

This low regard by elite law firms for practice skills is understandable given how the new graduates are likely to be assigned work. These firms usually assign new

82. *See* Morse & Flanigan, *supra,* note 77 (noting that Peer Assessment is 25% and that Assessment by Lawyers/Judges is 15% of the total score).

83. *See id.* (noting that placement success is 20% of the total score, employment at graduation is weighted at 4%, and employment nine months after graduation is weighted at 14%).

84. *See* Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83 Ind. L.J. 791, 818, 821 (2008).

associates to legal research and writing tasks and gradually move them through more complex work such as preparing responses to motions for summary judgment. New associates are unlikely to be put in situations where competency to practice law is of importance. It will only be after several years of close supervision by senior members of the firm that an associate will be given responsibilities such as interviewing clients and witnesses, preparing witnesses to testify, taking and defending depositions, structuring buy-sell agreements, etc.

The elite law firms follow an "extended apprenticeship" model in which the firm assumes responsibility for training its new associates and turning them into competent practitioners.[85] The prevalence of this model has historically been the justification relied upon by law schools for failing for many years to provide skills training to their students. The assumption was that the law firms would provide such training after the students had entered the legal profession. While the model never applied to newly admitted lawyers going into solo practice or joining smaller law firms, it remains largely viable today among the elite law firms. These firms are not looking to the law schools to produce competent practitioners, but to supply the firms with graduates who are certified to be intelligent and skilled at legal reasoning.

Most law schools do not send a large percentage of their graduates to the elite law firms, but instead place them in smaller firms or in solo practice. For these smaller firms, the ability of new associates to begin billing clients without a lengthy training period is very attractive.

3. External Sources of Change

Changes in law school curricula may also occur because of external forces, namely the ABA's Accreditation Standards. The ABA Accreditation Standards have been amended in recent years to require the law schools to include clinical and skills courses among their course offerings, and to require students to take at least one skills course before graduating.[86] These changes have brought a significant shift in focus from

85. *See* Marc Galanter & Thomas Paley, Tournament of Lawyers: The Transformation of the Big Law Firm 2 (1991).

86. ABA Standards & Rules of Procedure for Approval of Law Sch., Standard 302 (2011–2012). ABA Accreditation Standard 302 and the accompanying interpretations provide that:

> (a) A law school shall require that each student receive substantial instruction in:
>
> (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
>
> (b) A law school shall offer substantial opportunities for:
>
> (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;
>
> *Interpretation 302-2*
> *Each law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school. Trial and appellate advocacy,*

what had been a nearly exclusive emphasis on theoretical and doctrinal courses to one including courses designed to prepare students for the practice of law.

The ABA could amend the Accreditation Standards to require even greater emphasis by the law schools on preparing graduates for the practice of law, but resistance to its doing so would be great. Law schools, by virtue of their near-monopoly control of legal education and admission to the bar, have been largely immune to external pressures to modify the law school curriculum. Beginning in 1881, the American Bar Association initiated a campaign lasting over the next century urging the states to require law school attendance as a prerequisite to admission to the bar. [87] Today, all but a handful of states require an applicant for admission to the bar to have graduated from a three-year law school program or its part-time equivalent.

The 1920s also brought ABA accreditation of law schools, and today the vast majority of states have adopted requirements that limit admission to the bar to graduates of ABA accredited law schools. As noted by the MacCrate Report,

> A major accomplishment of the ABA, born of its relationship with the law schools, was to wrest legal education from the local control of the practicing profession during the early years of the 20th century and to place it increasingly in the law schools. When state-wide admissions standards were first prescribed by newly established boards of law examiners in the late 19th century, it was common to require at least one year of law school preceded by two years in either a law office or a law school, but the growing sentiment among legal

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alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are among the areas of instruction in professional skills that fulfill Standard 302 (a)(4).

Interpretation 302-3
A school may satisfy the requirement for substantial instruction in professional skills in various ways, including, for example, requiring students to take one or more courses having substantial professional skills components. To be "substantial," instruction in professional skills must engage each student in skills performances that are assessed by the instructor.

Interpretation 302-4
A law school need not accommodate every student requesting enrollment in a particular professional skills course.

Interpretation 302-5
The offering of live-client or real-life experiences may be accomplished through clinics or field placements. A law school need not offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client or other real-life practice experience.

Interpretation 302-6
A law school should involve members of the bench and bar in the instruction required by Standard 302(a)(5).

Id.

87. Stevens, *supra* note 4, at 92–111.

> educators, supported by the organized bar, led to the call for requiring that the entire three years be spent in law school, which ultimately became the rule.[88]

Having gained near-monopoly control over legal education and, in turn, admission to the bar, the law schools have fiercely (and thus far, largely successfully) resisted any efforts by others—including the ABA and the state supreme courts and legislatures that granted the monopoly—to exert any influence over law school curricula. It is strangely paradoxical that those determining the content of legal education—the law schools—are often those who have least exposure to and awareness of the educational needs of the practicing bar. But it is from this monopoly position that the law schools are largely able to control their own curricula and to resist pressures for curricular reform.

While the amendments to the ABA Accreditation Standards requiring increased emphasis on skills training are frequently aided and abetted by forces within the law schools that are supportive of such changes, there has been almost uniform opposition to every amendment by coalitions of law school deans and the objections of the Association of American Law Schools.

4. Financial

As already discussed, cost is a significant barrier to improvement, but grants and other sources of external funding have the potential to offset financial constraints. For example, much of CLEPR's success in expanding clinical legal education was attributable to its strategic use of grants to induce the elite law schools to create clinical programs. By utilizing three-year grants in which funding declined in amount over the life of the grants, CLEPR obtained initial buy-in from the law schools. However, it also ensured sustainability of the new clinical programs because the schools had assumed a large portion of their costs by the time the grant ended. And by initially focusing on the elite law schools, CLEPR could be confident that the lower ranked law schools would follow their lead. Although CLEPR's success is a powerful example of grant effectiveness, unfortunately, there are few available funding sources today for improving law school curricula.

5. Progress is Occurring

The speed at which clinical and skills courses have received acceptance within legal education has roughly equaled the rapidity with which the case method became the accepted mode of law school instruction. This provides at least some support that clinical and skills courses are increasingly being viewed as fundamental to a proper legal education and are becoming ingrained in the legal curriculum.[89]

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88. MacCrate Report, *supra* note 69, at 108.

89. The spread of the case method and the inclusion of clinical and skills courses within the curriculum are not directly comparable for a variety of reasons. Nonetheless, the slow acceptance of clinical and skills courses as part of legal education does not appear so disheartening when measured against legal education's initially reluctant acceptance of the case method.

The use of the case method began in 1870 with the appointment of Langdell as Dean at Harvard Law School.[90] By 1902, only twelve of the ninety-two law schools in the country were using this method of instruction.[91] The number had risen to over thirty by 1907,[92] but it was not until 1921, fifty-one years after Langdell's appointment, before it could be said "there [can] be no question that the [case] system was the inevitable accoutrement of the majority of American law schools."[93] In contrast, it has taken only forty-three years since the founding of CLEPR for every law school in the country to have at least one clinical course, and only forty years since NITA was created for every school to have a trial advocacy course.[94]

VI. WHAT SHOULD BE DONE?

As already discussed, clinical and skills courses have failed to keep current with changes in the practice of law because of a lack of knowledge about those changes and a lack of time and interest on the part of law school faculties to incorporate any knowledge of those changes into the clinical and skills curriculum.

But there are ways in which schools with clinical and skills curricula can keep current with what is occurring in practice. First, publications, such as the *National Law Journal* and the *American Lawyer*, routinely report on such changes and should be utilized by the law schools to keep themselves informed of fundamental changes in practice. Second, the law schools should also form advisory groups composed of leading practitioners who can provide the clinical and skills programs with this information.

Finally, the authors of some (but hardly all) clinical and skills texts incorporate these changes into their materials. The information is available if someone at the school is willing to access and incorporate it into their syllabi and teaching materials. The decision as to what changes to incorporate raises problems that are sometimes difficult to resolve. It is not necessary to teach every change that appears. Some changes are only fleeting and will not have a lasting effect on how law is practiced. For example, summary jury trials received a tremendous amount of attention at one time, but never became ensconced in the practice of law in any meaningful way.

As with most new things, it is wise not to be the first, but to wait and see if the change is likely to be permanent. Law schools need to be teaching general techniques, not the techniques of the moment. The more specific a school is in teaching a particular technique, the more likely that technique will be antiquated or superseded by the time the students enter into practice. To illustrate, the more detailed a school

90. Cases were used for instruction prior to Langdell's appointment, but it was with his assuming the deanship at Harvard that the use of the case method first assumed importance as a pedagogy.

91. Stevens, *supra* note 4, at 64.

92. *Id.*

93. *Id.* at 123.

94. *See supra* notes 27, 38.

is in teaching students how to plead a claim under *Twombly*[95] and *Iqbal*,[96] an area of the law still very much in flux, the more likely it is that the information will be shortly outdated. But law schools would be doing their students a disservice if they ignored the changes in pleading standards and failed to teach anything about this area of the law. Law schools must carefully sail between the Scylla of teaching only abstract theory and the Charybdis of detailed solutions to specific problems.[97] Legal education must be general enough so that students can apply what they learn to a variety of new and different problems as they arise in practice. Education that is too general and abstract or too specific and detailed will ill-equip them for doing so. The answer is to teach general skills and basic principles that are transferable to new situations.

In conclusion, the law schools have made remarkable progress in incorporating clinical and skills courses into the curriculum, and it is likely that more progress will be made in the near future. Legal education has shifted away from the sterile, lifeless science of the law envisioned by Langdell and appears to be taking seriously its obligation to prepare students for the practice of law. Today's problem is that the clinical and skills courses are failing to adapt to the many changes occurring in the practice of law. It should not be difficult for us, as legal educators, to remedy this problem, but it requires us to be aware of the existence of the problem and to take the necessary steps to bring our courses into the present to reflect how law is actually being practiced.

95. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

96. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). The *Twombly* and *Iqbal* decisions announced a new and substantially higher pleading standard under the Federal Rules of Civil Procedure by requiring that a complaint allege "enough facts to state a claim that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. *See generally* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 2 (2010) (discussing the "basic values underlying [the pleading standard under *Twombly* and *Iqbal*] and its importance in promoting broad citizen access to our federal courts . . ."). The lower courts continue to grapple with the implications of *Twombly* and *Iqbal* and it is likely that the Supreme Court will need to speak again on the subject before the exact contours of the two cases are known.

97. Those familiar with Homer's *Odyssey* will recognize this as a reference to the sea monsters on the opposite shores of the narrow waters traversed by Odysseus on his journey home. The reference today refers to being caught between two dangers or unpleasant alternatives. Brewer's Dictionary of Phrase & Fable 131, 248 (Camilla Rockwood, et al., eds., Chambers Harrap 18th ed. 2009) (1895).