THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

SUSANNAH FURNISH

ABSTRACT

On the historical continuum of legal education, critique of educational models is nothing new. However, although the tradition of questioning the adequacy of preparation that aspiring lawyers receive is well established, the last two decades have seen an increase in the urgency of this dialogue. This Article examines the trajectory of the dialogue on legal pedagogy, as well as the current criticisms leveled against the legal academy. This Article will consider the response of the academy to those criticisms.

* Partner at Furnish and Reed, Attorneys at Law. J.D. Northeastern Law School; B.A. Mount Holyoke College. The author thanks Luke Bierman for his guidance and helpful input throughout the writing process. The author also thanks Patricia Voorhies, Michelle Bolas, and Gerald Slater.
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

I. **Introduction**

In the past two decades, a series of critiques, reviews, and studies have challenged the legal academy to improve legal instruction by placing greater emphasis on professional skills, ethics, and competencies. The irony, of course, is that the prevailing approach to legal education, housed in a university setting and employing the case method in large classes, evolved in the late 1800’s as a reaction to an apprenticeship model focusing on skills, ethics, and competencies. There is no shortage of criticism reflecting this irony,¹ and the reaction from the legal academy has been decidedly academic.²

Recently, new urgency has invigorated discussion of this longstanding irony within the legal profession and academy about the effect and direction of legal education. The goal of this paper is to underscore major turning points in the dialogue on experiential learning in the law school curriculum. This paper serves as both a summary, offering brief synopsis and commentary on major factors in the changing world of legal education, as well as a timeline, presenting this progression chronologically. This summary highlights some milestones in the dialogue regarding experiential learning in legal education; however, it is by no means


² The response of the legal academy to criticism has been largely theoretical. See Todd D. Rakoff & Martha Minow, A Case for Another Case Method, 60 Vand. L. Rev. 597, 597 (2007) (“The plain face is that American legal education...remains remarkably similar to the curriculum invented at the Harvard Law School by Christopher Columbus Langdell over a century and a quarter ago.”).
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

comprehensive. The exclusion of some activity or literature is not intended to dismiss either its importance or contribution.3

II. Apprenticeships, Formal Legal Education, and Early Criticisms of Legal Education Models

Prior to the 1870s, the predominant method to prepare lawyers for practice was training through apprenticeships.4 However, this model of apprenticeships was criticized for several reasons, including that it could not adequately prepare lawyers for the realities of practice.5 By the late 1800s a new and more scientific model of legal instruction was ushered in by Christopher Columbus Langdell, the Dean at Harvard Law School.6 Langdell created a system of legal education that has remained the predominant model used in law schools since his time, including the ubiquitous Case Method, and its companion, the Socratic Method. “According to Langdell and his pupils, the law…should be acquired methodically from the original material of

3 A. Benjamin Spencer has authored a paper entitled The Law School Critique in Historical Perspective. This paper provides excellent and in depth examination of the history of, as well as the criticisms that accompany transitions in, legal education with a depth of analysis and insight that is beyond the scope of this document.
4 Moline, Brian J., Early American Legal Education, 42 Washburn Law Journal 775, 779 (2003). (“In the eighteenth century, little existed in the way of formalized training for the would-be lawyer. There were no collegiate lectures on law before 1780 and no law schools before 1784.”)
5 1 William Blackstone, Commentaries. Book I, Part I, Section I.
6 Charles Warren, History of Harvard Law School and of Early Legal Conditions in America, 361 (1908) (“[Langdell] undertook the task [of Dean], with the conviction ‘that law is not only a science but one of the greatest and noblest of sciences, there is and can be no dispute. That it is a science with which the most vital interests of the public and the State are closely bound up in equally beyond dispute…A Law School which does not profess to endeavor to teach law as a science has no reason for existence.’”) (quoting The Annual Report of Dean Langdell (1880-1881)).
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

all principles and doctrines of the common law…by the individual, purely personal, intellectual
labor on the part of the student.”

Langdell’s innovative methodologies were widely embraced by the legal academy. By
the end of the 19th century, “legal education was available in essentially two forms: the Langdell
model prevailing at the academic law schools that were a part of large universities, and the more
practice-oriented approach available in smaller schools and informal training programs.”

Although the Langdell model of legal education continues to be the predominant methodology
for legal instruction, it has been critiqued almost since its inception as insufficiently practical,
divorced from the realities of real life practice. The current trends toward a more experiential
approach to legal education find their roots in these longstanding critiques of Langdell’s models
and approaches.

III. Where Are We Now?: Modern Movements and Critiques of Legal Education

---

7 The Redlich Report, supra note 1 at 12 (“The intellectual labor, namely, of disentangling the facts and the leading
train of thought from the report of each decided case is to be performed by the students, quite independently, even
although carried on to a certain extent under the guidance of the teacher...”).
9 13 Rep. Am. Bar Ass’n 329, 330 (1890) (“The defects of the present method may be summed up, we think, in one
very familiar antitheses: they do not educate, they only instruct.); THE REDLICH REPORT, supra note 1 at 41 (“It
is characteristic of the case method that where it has thoroughly established itself, legal education has assumed the
form of instruction almost exclusively through analysis of separate cases. The result of this is that the students never
obtain a general picture of the law as a whole, not even a picture which includes only its main features.”); THE
REED REPORT, supra note 1 at 48 (“The general character of the preparation [for legal practice] has been
profoundly modified by this shift from office to school. The tradition that a law school education is all-sufficient has
survived the partial expulsion of active practitioners from its staff. Furthermore, a law school, even when run by
practitioners, cannot as a matter of fact duplicate the work of an office engaged in actual practice. Thus we are in a
fair way of losing entirely the practical training secured under a practitioner, that was once assumed to be the only
logical means of preparing students in the Anglo-American Law”);
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

The historical context of the transition from apprenticeship models to classroom models of legal education, as well as the early criticisms of those models, underscores the concept that critiquing the current legal education model is nothing new. Ironically, the arguments that were used to challenge the apprenticeship model—for example, that the economic and social structures of the day required “deeper and wider training of lawyers than the training in rules of thumb and in procedure…”10—are echoed by today’s critics and this time applied to the classroom model. Interestingly, the innovations finding their ways into law school curricula, such as broader use of an array of experiential learning integrated with more traditional courses, are inspired by the original apprenticeship models. However, the broader narrative of the modern critique of legal education indicates that the current dialogue is not so much about innovative curriculum reform as it is a return to the basics of how to prepare lawyers to serve clients. Essentially, everything old is new again, but in this case with a twist.

A. The Clinical Movement

One of the earliest responses to the Langdellian formal legal education model was ushered in by legal Realists in the form of practice-based courses.11 These early courses reflected the Realists’ perspective that Langdellian methods of legal education did not reflect the reality of practice in the real world.12 These early courses predominantly took the form of providing students with the opportunity to work directly with clients, and rarely followed a predetermined

12 Id. See also Jerome Frank, Why Not a Clinical Lawyer-School?, 81 U. Penn. L. Rev. 907, 913 (1933).
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

A set of guidelines. These early clinics had gained a small toe-hold by the middle of the 20th century. However, this nascent movement, predicated on teaching students that good practice could be informed by theory, experienced a period of development with the social unrest and civil disobedience that accompanied the Civil Rights Era. Students agitated for the ability to practice while still in law school to serve communities and populations in need of legal services. Over half of law schools in the United States reported having a clinical program available to students by 1973. However, until the late 1980s, there was no uniform understanding of the definition or purpose of clinical legal understanding, and no uniform model of implementation. This changed with the Report of the Committee on the Future of the In-House Clinic, that stated:

Clinical education is first and foremost a method of teaching. Among the principal aspects of that method are these features: students are confronted with problem situations of the sort that lawyers confront in practice; the students deal with the problems in role; the students are required to interact with others in attempts to identify and solve the problems; and, perhaps most critically, the student performance is subjected to intensive critical review.

The creation of a uniform language around the goals and aims of clinical legal models provided clinical legal education a permanent place in law schools, albeit with continuing challenges over status, funding, program and pedagogy.

13 An Oral History, supra note 10 (“[Jerome Frank] didn’t see it as skills training, at all, he thought it was legal education, so skills training is a word that was invented much later. He never thought it was about learning to draft contracts or draft motions, he thought it was about the relationship between lawyers and clients, and the role that lawyers could have in society, for good or ill.” Steve Wizner speaking on Jerome Frank and Yale Law Schools Jerome N. Frank Clinic); Quintin Johnstone, Law School Clinics, 3 J. Legal Educ. 535 (1951).
15 Id.
16 Id; Charles E. Ares, Legal Education and the Problem of the Poor, 17 J. Legal Educ. 307, 310 (1965).
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

B. The MacCrate Report

By the 1990s, creative pedagogies reflecting new theories of learning were incorporated into legal education. For example, the law clinic movement, with its roots in the activism of the 1960s, was well established, if not universally accepted, as an alternative pedagogy in the legal academy by the 1990s. Also surfacing at this time was some dissatisfaction with the capabilities of law graduates. Thus the organized bar undertook a substantial review of legal education. The Report of the Task Force on Law Schools and the Profession20 marked a watershed in the dialogue regarding legal education models.

As discussed above, critiques of the Langdell approach to legal education existed almost from the time of its inception. The MacCrate Report, undertaken by the ABA Section of Legal Education and Admission to the Bar, was the beginning of the current explosion of counter-critiques of legal education models. The MacCrate Report describes an almost organic process wherein a lawyer becomes competent during their legal education and their legal practice, stating: “The skills and values of the competent lawyer are developed along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer’s professional career.”21 Despite finding that there is no “gap” between the legal academy and law practitioners,22 the MacCrate Report nevertheless highlights practice-oriented instruction and recommends practice-oriented instructions during law school, and beyond. The report suggests that “apprenticeships” and

20 THE MACCRATE REPORT, supra note 1.
21 Id at 3.
22 Id at 8.
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

practice-oriented initiatives, including clinics, externships, simulated court and interviews, and part-time employment (apprenticeships), be added to the law school curriculum.23 Despite these findings and recommendations, the ABA did not adjust its accreditation standards to reflect that students should take these kinds of courses.

The MacCrate Report emphasizes the importance of a “transition” or “bridge the gap” program for new lawyers in the years following law school. Indeed, the report points out, “some form of transition education program – commonly referred to as ‘bridge-the-gap program’ and directed to new law graduates – can be found in most states.”24 Additionally, the MacCrate Report encourages the expansion of clinical aspects of legal education, signaling that practice-oriented education has an important place in legal education models. While the MacCrate Report fails to answer the specific question of exactly when and how competence is determined, it did spark concern and interest around legal education.

C. The Carnegie Report

In 2007, the Carnegie Foundation for the Advancement of Teaching conducted a comparative study of 16 law schools in US and Canada, producing the report, Educating Lawyers: Preparation for the Profession of Law.25 The Carnegie Report finds that the focus in classrooms on the case method taught students to “think like a lawyer,” but does not teach students to think about the social and ethical consequences.26 Essentially, the report concludes

---

23 Id at 289-290.
24 Id.
25 THE CARNEGIE REPORT, supra note 1.
26 Id at 188.
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

that students were unprepared for the reality of practice, echoing the Carnegie Foundation’s reports and recommendations a century earlier in the Redlich Report and the Reed Report.

The Carnegie Report went on with recommendations for amending legal education to prepare students for practice. The report suggests an “integrated approach” to legal education that “addresses the problem of the larger curriculum, particularly what should happen in third year. In most schools curriculum lacks clear shape or purpose.”27 The report proposes that each law student should experience three “apprenticeships:” 1) The Cognitive Apprenticeship—the student participates in the traditional learning model in order to “think like a lawyer;” 2) The Skills Apprenticeship—the student learns to “do like a lawyer;” and 3) The Professional Formation Apprenticeship—the student forms “professional identity and purpose.”28 Each apprenticeship must be integrated with the others: “Each aspect of the legal apprenticeship—the cognitive, the practical, and the ethical-social—takes on part of its character from the kind of relationship it has with the others.”29 These apprenticeships work together to create a more practice-oriented legal education, and are essential to the framework recommended by the Carnegie Report.

The Carnegie Report provoked widespread reaction in the legal profession and academy. Coming as it did upon the eve of the greatest economic disruption in a century and amid the transformative effects of the technological and information revolutions, the Carnegie Report encouraged a wide array of introspection. A variety of activity intending to examine and asses, and perhaps even change, legal education and the profession proceeded.

27 Id at 194.
28 Id at 28.
29 Id at 191.
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

D. Best Practices for Legal Education

In the same year as the Carnegie Report the Clinical Legal Education Association issued Best Practices for Legal Education. This study was direct about the failure of law schools, stating that “[t]here is a compelling need to change legal education in the United States in significant ways” and that this was demonstrated by the fact that “most law school graduates lack minimum competencies required to provide effective and responsible legal services.”

Best Practices goes on to outline the “Components of a ‘Model’ Best Practices Curriculum”: “The primary goal of legal education should be to develop competence, that is, the ability to resolve legal problems effectively, and responsibly.” The Best Practices report encouraged law schools to create goals, and then assess how they are doing at achieving these goals. Moreover, law schools were tasked with teaching students to:

- “[W]ork with clients to identify their objectives, identify and evaluate the merits and risks of their options, and advise on solutions;
- progress civil and criminal matters towards resolution using a range of techniques and approaches;
- draft agreements and other documentation to enable actions and transactions to be completed; and
- plan and implement strategies to progress cases and transactions expeditiously and with propriety.”

30 ROY STUCKEY ET. AL., BEST PRACTICES FOR LEGAL EDUCATION (2007).
31 Id at 2.
32 Id at 8.
33 Id at 59.
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

The best practices outlined in the report underscore the preference for an experiential learning model focused on preparing students for practice. Best Practices is currently being revised and expanded.


The main focus in the study by Professors Shultz and Zedek entitled *Identification, Development, and Validation of Predictors for Successful Lawyering* is to examine the “limits and downsides of current admission practices.” The focus on law school admissions practices underscores the competencies that current admissions tests predict with an “over-emphasis on academic and cognitive competencies.” The Shultz-Zedeck Report addresses the importance of “tools that can reliably identify, assess and predict proto-competencies for professional effectiveness.” The Schultz-Zedek approach begins with the focus on professional competency prior to admission, underscoring that professional competency can be determined in prospective students and should not be limited to academic ability. The main thrust of this research is that the LSAT model of admissions testing is inadequate, and that testing for academic potential is an important threshold for determining capability of one important aspect of legal education.

However, the Shultz-Zedek report emphasizes the reality that law students entering practice are not prepared for the realities of practice, nor are all of them capable of learning because of they may not have the competency to do so. By advocating an approach that tests

---


35 *Id* at 15.

36 *Id* at 13.

37 *Id* at 15.
aspiring law students for identifiable and measurable attributes such as empathy, the Shultz-Zedeck Report advocates for cultivating lawyers who are capable of doing more than just understand the academic aspects of law school. Moreover, articulating the importance of skills beyond theory and doctrine, the entire academy can help students to develop the potential displayed into effective professional skills that are profoundly necessary to the practice of law. The 26 competencies identified by Shultz-Zedeck remain an important contribution to the development of alternative or integrated pedagogies in law school.

F. Future Ed Conferences (2010-2011)

Beginning in 2010, New York Law School and Harvard Law School co-hosted a three-part year-long conference titled Future Ed: New Business Models for U.S. and Global Legal Education Conference (“Future Ed Conference”). The stated goal of this extended program was “to come up with operational alternatives to the traditional law school business model and to identify concrete steps for the implementation of new designs.”

The first part of the conference, FutureEd 1, invited educators, employers, and regulators to “identify problems, innovations, and constraints, and to organize working groups to develop designs and strategies for implementation.” At FutureEd 2, the working groups reconvened to present proposals and “discuss the evolution and future of legal education.” Finally, of the 30 proposals presented at FutureEd 2, the best were selected, refined, and presented at FutureEd 3.

This year-long conference created an opportunity for dialogue and innovative proposals. The result was a wealth of information and ideas. Proposals range from models to address
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

business plans, to implementation of experiential curriculum. These proposals predominately address the “gap” between the academy and legal practice. The Future Ed conference has yet to issue a capstone piece summarizing outcomes, and it remains to be seen what the end result of the refined proposals will be. The lack of a capstone project reflects the primary challenge in the dialogue on experiential learning: While there is no lack of study of the problems with legal education models, there has been a marked lack in consensus surrounding solutions and implementation.

G. AALS Seattle Conference (2011)

The Association of American Law Schools convened the Conference of the Future of Law School Curriculum in 2011. The stated goal of the conference was to provide ideas that participants could take back and use as the basis for change within their own curriculum at their own schools. The Conference Brochure stated:

Forces from outside and inside the academy have generated a powerful impetus for legal educators to reconsider the law school curriculum. Outside the academy, changes in the legal profession driven by the economy, technology, and the law, are unsettling long-held views about the types of intellectual tools and skills our graduates require. We can no longer comfortably assume that students will receive apprenticeships in practice or that their professional endeavors will be confined to a single legal system and culture.38

Like the FutureEd Conferences, the outcomes of the AALS Conference of the Future of Law School Curriculum are not yet fully realized. The exchange of ideas has certainly fostered communication about the inadequacies of current legal teaching methods. However, tangible

THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

results are still difficult to identify, in spite of the attempt to generate concrete recommendations. Like the Future Ed Conferences, the AALS Conference has not produced a capstone project, again indicating the slow progress from examination to analysis to consensus to implementation.

H. Educating Tomorrow’s Lawyers

Educating Tomorrow’s Lawyers is an Initiative of the Institute for the Advancement of the American Legal System at the University of Denver. This initiative is focused on providing and implementing the research of the Carnegie Report and “the work of law schools and professors committed to legal education reform to align legal education with the needs of evolving profession by providing a supported platform for shared learning, experimentation, ongoing measurement and collective implementation.” ETL showcases curriculum and other activities that reflect the apprenticeships as identified in the Carnegie Report. ETL supports a consortium of over 20 law schools that have been accepted into the program.

I. Popular Media

The popular press has picked up and reported on the “gap” between the legal academy and the legal profession.39 Sources such as the New York Times, The Wall Street Journal, and The Chronicle of Higher Education have all used the current dilemma of the disconnect between legal education and legal practice as the basis for articles. These news forums have published an abundance of articles addressing a range of topics concerning legal education, but most focus on perceived problems and solutions.39 Even without focusing on any particular news outlet or

39 See e.g. David Segal, What They Don’t Teach Law Students: Lawyering, N.Y. Times (Nov. 19, 2011).
article, it is clear that the press has publicized current challenges facing legal education. [See also Tamaraba book]

J. Alliance for Experiential Education in Law

Northeastern University School of Law, itself an innovator in legal education through its 45 year old curriculum requiring four full time, quarter long cooperative placements in practice settings, convened a group of forward looking legal educators committed to experiential learning. This Alliance now includes over 70 law schools and is developing through collaborative and inclusive processes a variety of helpful programs, guides and toolkits to encourage transformative approaches in legal education built around a flexible conception of experiential learning. Organizing a symposium on experiential education in law, the Alliance intends influential activities and assistance to effect change reflecting consensus about the future direction of legal education that equates and integrates doctrine, analysis, skills, ethics and professionalism.

IV. Conclusion

There are several viewpoints in the discussion regarding experiential learning in the academy. Each viewpoint reflects those that came before, and affects those that follow. Although many have contributed meaningfully to the dialogue on experiential learning, not each can be recognized explicitly in this summary but all have had an effect on the current status of legal education. Although the discussion of how best to prepare lawyers to practice law is as old as the practice itself, there is growing attention, and indeed, urgency, paid to these issues over the past twenty years in particular. The milestones discussed in this summary demonstrate the
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

changing nature of the discussion regarding experiential learning. It is noteworthy that legal education is not the only aspect of higher education that has experienced or is experiencing heavy critique of current models, and legal education certainly is not alone in the challenges it faces. Indeed, some academic disciplines like computer science must reinvent itself regularly as technology outpaces curriculum development.

The “gap” between the academy and practitioners articulated in the MacCrate Report has generated several responses. Although these responses recognize the importance of skills based and professional based competencies, the legal academy has not embedded them by wholesale introduction into the law school curriculum, despite the growing acknowledgment of their importance.

As this summary suggests, there is no shortage of diagnoses for what ails the current approaches of legal professional preparation, although consensus and implementation are more limited. As several of those who have examined the current legal education system have recommended, a modern day revitalization of apprenticeships accomplished through integrated learning and teaching techniques may form the bedrock of implementation. A question also remains as to how to create true collaboration between the legal profession and the legal academy that results in shared responsibility for professional development and identity. Strikingly, a question also remains as to how to take the study and analysis of the current shortcomings of legal education and use that to effect a transformation to more effective professional preparation. It is the purpose of this summary to underscore that these questions—questions asked by the academy and the practitioners since the apprentice model was de
THE PROGRESSION OF LEGAL EDUCATION MODELS: EVERYTHING OLD IS NEW AGAIN...

rigueur—must be addressed, and that the time has come to move from study to consensus to implementation.