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## “PRACTICE READY GRADUATES”: A MILLENNIALIST FANTASY

*Robert J. Condlin*

### I. INTRODUCTION

The sky is falling on legal education, say the pundits,<sup>1</sup> and preparing “practice ready” graduates is one of the best strategies for surviving the fallout.<sup>2</sup> This is not a new prediction or a new recom-

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Professor of Law, University of Maryland Carey School of Law. My grateful appreciation to Andrew Blair-Stanek, Maxwell Chibundu, Chris Condlin, Steve Ellmann, Don Gifford, James Grimmelman, Michelle Harner, Alan Hornstein, Renee Hutchins, Susan Krinsky, Sue McCarty, Leslie Meltzer Henry, Frank Pasquale, Garrett Power, Bill Reynolds, Rohith Srinivas, Max Stearns, Charlie Sullivan, Greg Young, and participants in a University of Maryland Carey School of Law faculty workshop, all of whom made very helpful suggestions.

<sup>1</sup> These pundits congregate at the so-called “scamblogs” (i.e., law school is a scam), which have popped up online over the last few years. For a representative collection, see David Lat et al., *Scamblogs*, ABOVE THE LAW, <http://abovethelaw.com/tag/scamblogs/> (last visited Nov. 5, 2014). One might think of them as a law school version of “Doomsday Preppers” (perhaps Doomsday Preppies would be more accurate), preparing for the coming Armageddon in their own small part of the world. Not everyone is a Chicken Little, of course, some see the present turmoil as leading to a better world. See, e.g., Benjamin H. Barton, *A Glass Half Full Look at the Changes in the American Legal Market*, 38 INT’L REV. L. & ECON. 29, 29 (2014) (“The American legal profession finds itself in the midst of dizzying changes . . . [that] [t]he main commentators . . . have largely presented . . . as disastrous. This [e]ssay argues that . . . [the changes] will prove beneficial overall.”); *id.* at 30-31 (describing the benefits to society, law students, and law schools of the coming changes).

<sup>2</sup> See, e.g., Symposium, *The Way to Carnegie: Practice, Practice—Pedagogy, Social Justice, and Cost in Experiential Legal Education*, 32 B.C. J.L. & SOC. JUST. 215, 221 (2012) (symposium on the effectiveness of clinical education for preparing lawyers to be “practice ready”); William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 462 (2013) (“Creating more ‘practice ready’ graduates will help some law schools more effectively place their graduates in the finite—and likely shrinking—market for traditional entry level legal jobs. Yet, this strategy cannot work for all schools.”); News Release, New York State Bar Ass’n, New York State Bar Resolution Calls for “Practice Ready Lawyers,” (Aug. 9, 2011), <http://www.nysba.org/CustomTemplates/Content.aspx?id=6383> (“Law schools and other legal education providers should be encouraged to develop ‘practice ready lawyers . . .

mentation for survival. It is a millennialist<sup>3</sup> version of the argument for clinical legal education that dominated discussion in the law schools in the 1960s and 1970s.<sup>4</sup> The circumstances are different now, of course, as are the people calling for reform. For many, doing well has replaced doing good as the principal goal, and private, fee-for-service practitioners have replaced neighborhood legal services lawyers as the principal people leading the charge. But the two movements are alike in one fundamental respect: both view skills instruction<sup>5</sup> as legal education's primary purpose. Everything else is a

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.’ ”). Professor Henderson is skeptical that the “practice ready” strategy is enough to cope with the present troubles. Henderson, *supra*, at 501 (“ ‘Practice-Ready’ is Not Enough. Despite the rebukes often received from the practicing bar, for most law schools an emphasis on “practice-ready” skills will be insufficient to cope with the structural changes occurring within the legal industry.”) (emphasis added).

<sup>3</sup> It is common today to identify millennialism with a date (*e.g.*, the year 2000), a length of time (a thousand years), or a generation (those born in the 1980s), but in scholarly discourse the term refers to a system of thought based on the “belief that at some point in the future *the world that we live in will be radically transformed* into one of perfection—of peace, justice, fellowship and plenty.” See RICHARD LANDES, HEAVEN ON EARTH: THE VARIETIES OF THE MILLENNIAL EXPERIENCE 20 (2011) (emphasis in original). The key tropes in millennialist thinking, whether secular or religious, are “apocalyptic scenarios filled with . . . outrageous hopes and fears and paranoid conspiracy thinking.” *Id.* at xii. Blog commentary on the demise of legal education has all of these tropes.

<sup>4</sup> Debates about the law school curriculum go back to the late nineteenth and early twentieth centuries and the iconic figures of Christopher Columbus Langdell, Josef Redlich, and Alfred Reed. See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 51-64, 112-23 (1983). Practice instruction entered the picture in the 1930s, *see, e.g.*, John S. Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. CHI. L. REV. 469 (1934); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); George K. Gardner, *Why Not a Clinical Lawyer School?—Some Reflections*, 82 U. PA. L. REV. 785 (1934); Karl N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935), and hit its high water mark in the “clinical education” movement of the 1960s and 1970s, when a coalition of former neighborhood legal services lawyers, segments of the Bar, and the Ford Foundation (through the Council on Legal Education for Professional Responsibility), urged law schools to become more “relevant” by making “skills training” rather than “thinking like a lawyer,” their central objective. See Robert J. Condlin, *The Moral Failure of Clinical Legal Education*, in THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS 317, 332-36 (David Luban ed., 1985) (describing the origins of clinical legal education); John M. Lande, *Reforming Legal Education to Prepare Law Students Optimally for Real-World Practice*, 2013 J. DISP. RESOL. 1, 4 (2013) (describing “a history of more than a century of criticism and recommendations for reform” of legal education). Clinical education had non-skill dimensions as well, *see infra* note 99, but they gradually diminished in importance as clinical programs tried to appeal to a broader market. That private practitioners lawyers would wage a similar campaign fifty years later would have astonished those early clinicians. I know, I was one of them.

<sup>5</sup> Once synonyms, “skills instruction” and “clinical education” now have slightly different meanings. Skills courses teach about lawyer interpersonal practice tasks (*e.g.*, interviewing, counseling, and negotiation), usually using hypothetical, self-contained, and substantively

frolic and detour, and a fatal frolic and detour in hard times such as the present.<sup>6</sup>

Most would agree that the United States legal system has both a labor market and a student debt problem.<sup>7</sup> The legal labor market was overbuilt and has retrenched.<sup>8</sup> It also is shrinking in the face of increased competition from non-law firm service providers,<sup>9</sup> changes in technology,<sup>10</sup> and downward pressure on fees from clients.<sup>11</sup> As a

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disembodied exercises, problems, and drills. Clinical courses also teach about interpersonal practice tasks, but in the context of actual client representation where, of necessity, they also teach about substantive law, professional values, interpersonal relationships, institutional and organizational arrangements, and the like. Substantive law and practice skills are interrelated, of course, since skills operate famously in the “shadow of the law.” Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>6</sup> Arguments of this sort proliferate during difficult economic times and diminish during prosperous ones. Karl Llewellyn’s Depression era change in views about the importance of practice instruction is a good example. See Anders Walker, *Bramble Bush Revisited: Karl Llewellyn, the Great Depression, and the First Law School Crisis, 1929-1939*, J. LEGAL EDUC. (forthcoming 2014), draft at 20-26, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2325022](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325022) (during the Depression “Llewellyn blasted legal education for failing ‘to equip’ students ‘for the practice of law,’ ” suggesting that it needed to provide “sounder technical training,” only to revert to his original interdisciplinary, academic perspective when prosperity returned).

<sup>7</sup> See AM. BAR ASS’N, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION: WORKING PAPER 1 (Aug. 1, 2013) (The “complex system of tuition, discounting, and loans” used to fund legal education “drive[s] up [both] tuition and debt . . . [and is] in need of serious re-engineering.”).

<sup>8</sup> Bernard A. Burk, *What’s New about the New Normal: The Evolving Market for New Lawyers in the 21<sup>st</sup> Century*, 41 FLA. ST. U. L. REV. 541, 541 (2014) (“[T]he market for new lawyers overall, will remain depressed below pre-recession levels well after demand recovers . . . .”); Chris Johnson, *The Am Law 200’s Haves and Have-Not*, AM. LAW. (June 10, 2013), <http://www.americanlawyer.com/id=1202600856100> (describing how \$2.4 billion was wiped from the Am Law 200’s collective top lines in 2009—the first fall in overall revenue since the *American Lawyer* started tracking law firm financials more than two decades ago).

<sup>9</sup> See Barton, *supra* note 1, at 32-34 (describing the role of “disruptive technologies” in increasing the pressure from “above, below and the side” on the market for legal services, using *LegalZoom* as an example), and at 35 (changing market conditions will have the same effect on small firm lawyers that “*Turbotax* has had on the accounting profession.”) (emphasis added). But see Robin Sparkman, *Don’t Bury Big Law Just Yet*, AMLAW DAILY (July 24, 2013), [http://www.americanlawyer.com/PubArticleALD.jsp?id=1202612266779&Dont\\_Bury\\_Big\\_Law\\_Just\\_Yet](http://www.americanlawyer.com/PubArticleALD.jsp?id=1202612266779&Dont_Bury_Big_Law_Just_Yet) (“The [hundred] biggest law firms, ranked by their gross revenue, continued to post revenue and profit gains even as the U.S. economy sputtered.”).

<sup>10</sup> See James G. Leipold, *The New Entry-Level Legal Employment Market*, BAR EXAMINER, June 2013, at 7, available at [http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2013/820213Leipold.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2013/820213Leipold.pdf) (describing “the impact of technology” on the legal industry).

<sup>11</sup> Press Release, Association of Corporate Counsel, More Corporate Law Departments

consequence, there are fewer jobs for law graduates to fill, and fewer law graduates with jobs mean fewer graduates able to repay their student loans.<sup>12</sup> These conditions are beginning to have an effect on the size and cost of legal education and probably will continue to do so into the foreseeable future.<sup>13</sup> But it does not follow that they should have a corresponding effect on the structure and content of that education as well.

Law schools cannot revive the labor market, or improve the employment prospects of their graduates, by providing a different type of education. Placing students in jobs is principally a function of a school's academic reputation, not its curriculum,<sup>14</sup> and the legal

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Turn to Legal Support Services to Reduce Excessive Fees (June 19, 2013), <http://www.acc.com/aboutacc/newsroom/pressreleases/acc-value-champions-2013.cfm> (“General counsel are restructuring the balance of projects they outsource versus those they maintain in-house, pursuing long-term partnerships with choice law firms and looking at new ways to share costs in multi-party litigation . . . .”). See also Leipold, *supra* note 10, at 11 (“[C]hange is the result of . . . downward pressure on rates by corporate clients.”).

<sup>12</sup> At the present time law student default rates on student loans are lower than the default rates of students in all other forms of postsecondary education and have been for twenty years. See Michael Simkovic, *Repetitive (and avoidable) mistakes*, BRIAN LEITER'S LAW SCH. REPORTS (July 28, 2013, 8:53 AM), <http://leiterlawschool.typepad.com/leiter/2013/07/repetitive-and-avoidable-mistakes.html> (describing student loan default rates). That may change. See also Ronit Dinovitzer, Bryant G. Garth, & Joyce S. Sterling, *Buyers' Remorse? An Empirical Assessment of the Desirability of a Lawyer Career*, 63 J. LEGAL EDUC. 211 (2013) (reporting on the first two waves of data from the American Bar Foundation after the J.D. project, describing the effect of law school debt on job choice and career satisfaction).

<sup>13</sup> See Barton, *supra* note 1, at 35 (describing the consequences for law schools of the recent crash in legal markets); Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, WALL ST. J., July 15, 2013, <http://online.wsj.com/article/SB10001424127887323664204578607810292433272.html> (describing how law schools with a dwindling applicant pool are accepting fewer students and making up for lost tuition dollars by “offering buyouts and early-retirement packages to senior, tenured professors and canceling contracts with lower-level instructors”); Dan Filler, *University of Iowa Approves Steep Law Tuition Cut*, THE FACULTY LOUNGE (Dec. 5, 2013), <http://www.thefacultylounge.org/2013/12/university-of-iowa-approves-steep-law-tuition-cut.html> (describing how some law schools are reducing tuition “to bring the 1L class size back up”).

<sup>14</sup> Firms will assume, as they should, that the most highly regarded schools will have the ablest students and that the ablest students will be the quickest studies. There will be individual exceptions to these rules of thumb, of course, and better training can narrow the differences among schools to some extent, but smart money bets on talent and probabilities, not training, anomalies, or vignettes. Not everyone agrees. See Neil J. Dilloff, *Law School Training: Bridging the Gap between Legal Education and the Practice of Law*, 24 STAN. L. & POL'Y REV. 425, 427-28 (2013) (“[T]hose law schools that are able to turn out ‘finished’ work-ready graduates will move to the head of the pack, and their graduates will have a leg-up in this uncertain job market.”); Neil Hamilton, *Law-Firm Competency Models and Student Professional Success: Building on a Foundation of Professional Formation/Professionalism 3* (Univ. of St. Thomas School of Law Legal Studies Research Paper

labor market will rebound only after the market as a whole has rebounded (and perhaps not then). Law school curricular reform is not an economic stimulant and trying to use it for that purpose will destroy something that works in a futile attempt to revive something that does not. Legal education's principal purposes should be (and always have been) to develop an intellectual understanding of law and legal institutions and the way they work, as well as the critical thinking skills that underlie law practice tasks generally. Becoming proficient at practice tasks is the work of work, so to speak, the result of performing the tasks over and over again, on a daily basis, under the guidance of mentors, as part of the process of being socialized into the profession. Legal education, like most higher education, helps one avoid becoming a captive of socialization more than it socializes,<sup>15</sup> and to adapt received wisdom to changing beliefs and circumstances more than internalize wisdom in its present form.

The labor market and student debt problems have been discussed extensively at both the breezy and sophisticated levels and I

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No. 13-22, Dec. 2013), available at <http://papers.ssrn.com/abstract=2271410> (“A law student who understands legal employer competency models can differentiate him or herself from other graduates by . . . [developing] specific competencies beyond just knowledge of doctrinal law, legal analysis, and some written and oral communication skills.”). Comparative advantage arguments of this sort have the self-cancelling quality characteristic of many well-known bargaining nostrums (e.g., “never make the first offer”). See Robert J. Condlin, *Bargaining Without Law*, 56 N.Y.L. SCH. L. REV. 281, 310 n.83 (2011-2012). If everyone followed them they would not work. For example, if preparing practice-ready graduates gives a law school a comparative advantage in the employment market eventually every law school will adopt the strategy, and that will destroy its advantage. The strategy works, in other words, only if a few schools use it; but every school will use it if it works. See Henderson, *supra* note 2, at 242 (“Creating more ‘practice ready’ graduates will help some law schools more effectively place their graduates in the finite—and likely shrinking—market for traditional entry level legal jobs. Yet, this strategy cannot work for all schools.”). There also is considerable empirical evidence that the strategy does not work. See *infra* note 30.

<sup>15</sup> It helps one avoid becoming another President Robbins. See RANDALL JARRELL, PICTURES FROM AN INSTITUTION 11 (2010) (“President Robbins was so well adjusted to his environment that sometimes you could not tell which was the environment and which was President Robbins.”). Not everyone thinks this is a bad thing. See Dilloff, *supra* note 14, at 438 (describing the importance of being a “can do” instead of “can’t do” lawyer in responding to client requests), and at 441 (describing the importance of being “virtually integrated into the client’s business”). Professor Hamilton describes becoming one with the client as a “client-identified competency” that law schools and students should develop to differentiate themselves from other schools and other students. See Hamilton, *supra* note 14, at 19. The “practice-ready” graduates proposal has some of the same properties as this client-identification view, in the sense that it asks law schools to treat law firms as clients and identify completely with firm needs.

will not revisit those discussions here.<sup>16</sup> Instead, I will focus on the popular “practice ready” graduates proposal and explain why it is a bad idea.<sup>17</sup> The proposal has been accepted uncritically in many quarters and this is surprising, since it is largely unintelligible in its own right, and even if intelligible, irrelevant to the present troubles. There are as many different types of practice, for example, as there are levels of readiness for it, and proponents of the proposal do not explain which of these various possibilities (and combinations of possibilities), they have in mind. If the “practice ready” concept had a single meaning, on the other hand, schools still could not act on it since proficiency<sup>18</sup> at practice (or any expert skill) is based on dispositions (i.e., habits informed by reflection), and dispositions take longer than a school semester to develop. If by some sleight of hand, or divine intervention, these obstacles could be overcome, still nothing would change, since the cause of the present troubles is a lack of jobs, not a lack of graduates, and producing more graduates (of any kind) will have no effect on the supply of jobs.<sup>19</sup> Like a lot of blog commentary, the “practice ready” proposal is more slogan than idea.

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<sup>16</sup> For a sophisticated discussion of whether law school is a good investment, see the Simkovic-Tamanaha debate described in *infra* note 26. For a discussion of the student debt problem, see Philip G. Schrag, FAILING LAW SCHOOLS—*Brian Tamanaha’s Misguided Missile*, 26 GEO. J. LEGAL ETHICS 387 (2013), and Brian Z. Tamanaha, *The Problems with Income Based Repayment, and the Charge of Elitism: Responses to Schrag and Chambliss*, 26 GEO. J. LEGAL ETHICS 521 (2013).

<sup>17</sup> Professors Konefsky and Sullivan reach a similar conclusion but for a slightly different reason. See Alfred S. Konefsky & Barry Sullivan, Commentary: *There’s More to the Law Than ‘Practice-Ready,’* CHRON. HIGHER EDUC., Oct. 23, 2011, at A30 (“Law graduates must be practice-ready, not simply in the sense of being ready for the first stage of practice, but by being equipped for a lifetime of professional growth and service under conditions of challenge and uncertainty . . . . [They must] pay attention to the work of anthropologists . . . psychologists, and sociologists . . . because their insights are useful—even indispensable—in understanding and solving legal problems in our complex and rapidly changing world.”).

<sup>18</sup> See Dilloff, *supra* note 14, at 430 (describing the obligation of “the nation’s law schools to enhance the level of legal maturity and proficiency of their graduates”).

<sup>19</sup> There would be no agitation for “practice ready” graduates if high-paying legal jobs were still plentiful, just as there was no such agitation before the 2008 recession. The animating force behind the “practice ready” proposal is a depressed labor market, not inadequate legal education. Legal education is the focus of the present discussion largely because it is an easy target and, as Professor Leiter explains, unemployed law graduates need to find “someone to blame in order to anaesthetize their pain.” Brian Leiter, *American Law Schools and the Psychology of Cyber-Hysteria*, HUFFINGTON POST (Dec. 31, 2013, 11:56 AM), [http://www.huffingtonpost.com/brian-leiter/law-schools-cyber-hysteria\\_b\\_4517107.html](http://www.huffingtonpost.com/brian-leiter/law-schools-cyber-hysteria_b_4517107.html).

As for bloggers, their agitation seems traceable to a disappointment with their place in the great chain of being. They seem to have expected greater things. Some also still may be mad about their grades.

Perhaps that is why it is so popular.

## II. THE ARGUMENT FOR PRACTICE READY GRADUATES

Prevailing wisdom has it that legal education has drifted into uncharted waters, its instruments have failed, and it is in danger of sinking. All of this happened quickly, as a consequence of upheavals in the economy at large, and came as a surprise to most in the field. First came the recession and the concomitant flight of wealth from the economy, then a decrease in economic activity that wealth had fueled, then a corresponding loss of law firm business that economic activity had supported, followed by law firm reductions in staff to compensate for the loss of that business, and ultimately by fewer jobs for newly minted law school graduates in the now downsized law firms.<sup>20</sup> All the while, law schools proceeded as if it were business as usual, admitting the same number of students, charging the same prices, and turning out the same number of graduates. It did not take long for supply to outstrip demand and for student debt to outstrip ability to pay.<sup>21</sup>

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<sup>20</sup> Some see this as a good thing. See Barton, *supra* note 1, at 30-31 (“America as a whole will be significantly better off if we spend less on legal services . . . . A reallocation of human resources away from law will also be beneficial to society as a whole, the legal profession, and [law] students themselves. Society benefits because too many bright young people have been going to law school, rather than potentially choosing societally more beneficial work.”).

<sup>21</sup> Many people have told this story, from different perspectives and with different emphases. A representative sample includes: STEVEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* (2013); BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); Barton, *supra* note 1; Stephen F. Diamond, *The Future of the American Law School or, How the ‘Crits’ Led Brian Tamanaha Astray and His Failing Law School Fails* (Santa Clara U. Legal Studies Res. Paper No. 3-13, Jan. 2013), available at <http://ssrn.com/abstract=2207749>; Henderson, *supra* note 3; Glenn Harlan Reynolds, *Small Is the New Biglaw: Some Thoughts on Technology, Economics, and the Practice of Law*, 38 HOFSTRA L. REV. 1 (2009); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749. Professors Simkovic and McIntyre’s analysis of the economic value of a law degree added a level of empirical and technical sophistication to the discussion that had been missing in some of the earlier analyses. See Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree* (HLS Program on the Legal Profession Res. Paper No. 2013-6, Apr. 13, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2250585](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585). For a summary of reactions to the Simkovic & McIntyre article and the authors’ responses, see Michael Simkovic, *The Economic Value of a Law Degree: Week 1 Summary*, BRIAN LEITER’S LAW SCH. REPORTS (July 21, 2013, 10:06 AM), <http://leiterlawschool.typepad.com/leiter/2013/07/the-economic-value-of-law-degree-week-1-summary.html>; Michael Simkovic, *The Economic Value of a Law Degree: Correcting Misconceptions*, BRIAN LEITER’S LAW SCH. REPORTS (Aug. 1, 2013, 5:35 AM), <http://leiterlawschool.typepad.com/leiter/2013/08/the-economic-value-of-a-law-7>



At first, this all seemed like a minor hiccup in an economic system characterized by boom and bust cycles. But over time it became clear that a market correction of historic proportions and unknown duration was underway,<sup>22</sup> and many bloggers started to describe the changed conditions as the “new normal.”<sup>23</sup> Lending institutions continued to insist that student educational loans be paid on time, however, and soon some law graduates without jobs could not do this.<sup>24</sup> Many of these graduates had thought of law school as more like a Treasury Bill than a junk bond, and had not considered what they would do if the investment did not work out.<sup>25</sup> When remunerative work did not follow automatically from schooling, therefore, they began to scream.<sup>26</sup>

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degree-correcting-misconceptions.html.

<sup>22</sup> Hildebrandt Consulting LLC & Citi Private Bank, 2013 CLIENT ADVISORY 1 (2013), available at <http://online.wsj.com/public/resources/documents/CitiHildebrandt2013ClientAdvisory.pdf> (“[W]e think it is time to let go of any lingering notion that the [legal] industry will revert to the boom years before the Great Recession anytime soon.”).

<sup>23</sup> This term became popular after Mohamed A. El-Erian, the CEO of Pacific Investment Management Company (PIMCO), used it in the 2010 Per Jacobsson lecture. See Mohamed A. El-Erian, *Navigating the New Normal in Industrial Countries*, INT’L MONETARY FUND (Oct. 10, 2010), <http://www.imf.org/external/np/speeches/2010/101010.htm>. The concept itself is an old one, however, and not given much credence by economists. See Catherine Rampell, *The ‘New Normal’ is Actually Pretty Old*, N.Y. TIMES ECONOMIX BLOG (Jan. 11, 2011, 10:27 AM), <http://economix.blogs.nytimes.com/2011/01/11/the-new-normal-is-actually-pretty-old/>; Alice Gomstyn, *Finance: Americans Adapt to the ‘New Normal,’* ABC NEWS (June 15, 2009), <http://abcnews.go.com/Business/Economy/storynew?id=7827032&page=1#.UeQE42T71P8>. Legal bloggers seem to find the expression irresistible. The most well-known proponents are Patrick Lamb and Paul Lippe, who named their blog on the *ABA Journal Online* after the expression. See *Welcome to ‘The New Normal,’* THE NEW NORMAL (Oct. 13, 2010, 10:31 CDT), [http://www.abajournal.com/legalrebels/article/welcome\\_to\\_the\\_new\\_normal](http://www.abajournal.com/legalrebels/article/welcome_to_the_new_normal).

<sup>24</sup> Even some graduates with jobs could not make the loan payments. See Leipold, *supra* note 10, at 13-15 (describing the declining salaries paid new law graduates in firms of all sizes, and those paid to graduates forced to take jobs outside the legal market). But see Simkovic, *supra* note 12 (describing how law school graduate loan default rates are lower than the default rates for graduates of higher education generally), and Dinovitzer, Garth & Sterling, *supra* note 12 (describing the effect of law school debt on job choice and career satisfaction).

<sup>25</sup> See Barton, *supra* note 1, at 31 (“[M]any of the law students from five years ago did not belong in law schools. They came because it was a default choice for smart college graduates who were bad at math but still wanted a safe career with a large salary.”).

<sup>26</sup> See Barton, *supra* note 1, at 35 (“Disgruntled law graduates started the ball rolling with so-called ‘scam-blogs’ decrying law school as nothing more than a bait and switch hustle.”). The screamers may not represent a significant percentage of law school graduates generally. The blogosphere has become a bit of an echo chamber on topics of this sort. Even academic commentators have been known to raise their voices. Criticism of the Simkovic/McIntyre paper on the value of a law degree is a good example, though that debate now appears to be

Legal bloggers were quick to capitalize on the situation.<sup>27</sup> Young lawyers read blogs out of proportion to the profession at large, and stories about student educational debt guaranteed large and enthusiastic audiences. Early discussions described the problem—the cost of law school, the size of the collective debt, the unavailability of traditional mechanisms for dealing with it (e.g., bankruptcy)—more than they analyzed it. When this became old hat, emphasis shifted to

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over. See, e.g., Simkovic & McIntyre, *supra* note 21. See also Michael Simkovic, *Brian Tamanaha Says We Should Look at the Below Average Outcomes (And We Did)*, CONCURRING OPINIONS (July 18, 2013, 9:50 AM), <http://www.concurringopinions.com/archives/2013/07/brian-tamanaha-says-we-should-look-at-the-below-average-outcomes-and-we-did.html#sthash.EGH1GZyw.dpuf> (debate between Michael Simkovic and Brian Tamanaha over the economic value of a law degree); Michael Simkovic, *Brian Tamanaha's Straw Men (Part 1): Why We Used SIPP Data from 1996 to 2011*, BRIAN LEITER'S LAW SCH. REPORTS (July 24, 2013, 5:17 AM), <http://leiterlawschool.typepad.com/leiter/2013/07/brian-tamanahas-straw-men-part-1-why-we-used-sipp-data-from-1996-to-2011.html> (same); Michael Simkovic, *Brian Tamanaha's Straw Men (Part 2): Who's Cherry Picking?*, BRIAN LEITER'S LAW SCH. REPORTS (July 25, 2013, 9:23 AM), <http://leiterlawschool.typepad.com/leiter/2013/07/brian-tamanahas-straw-men-part-2-more-years-of-data-are-just-as-likely-to-increase-the-earnings-prem.html> (same); Michael Simkovic, *Brian Tamanaha's Straw Men (Part 3): We use better (and more) data than studies Tamanaha praised in his book*, BRIAN LEITER'S LAW SCH. REPORTS (July 26, 2013, 9:55 AM), <http://leiterlawschool.typepad.com/leiter/2013/07/brian-tamanahas-straw-men-part-3-we-use-better-and-more-data-than-studies-tamanaha-praised-in-his-bo.html> (same); Michael Simkovic, *Brian Tamanaha's Straw Men (Part 4): We would have to be off by 85 Percent for our basic conclusion to be incorrect*, BRIAN LEITER'S LAW SCH. REPORTS (July 29, 2013, 9:56 AM), <http://leiterlawschool.typepad.com/leiter/2013/07/brian-tamanahas-straw-men-part-4-we-would-have-to-be-off-by-85-percent-for-our-basic-conclusion-to-b.html> (same); Michael Simkovic, *Sample Size, standard errors, and confidence intervals*, BRIAN LEITER'S LAW SCH. REPORTS (Aug. 5, 2013, 6:29 AM), <http://leiterlawschool.typepad.com/leiter/2013/08/sample-size-standard-errors-and-confidence-intervals.html> (Simkovic responding to Deborah Merritt's criticisms of the "Economic Value" paper). See also *infra* note 104. Not everything in the debate was shouting, there also were some funny parts. See, e.g., Professor Diamond's declaration of a winner, after first showing that everyone was on the same side. See Stephen F. Diamond, *Man Bites Dog: "Bad Cop" Law Prof Paul Campos, Leader of Anti-Law School Camp, Backs New JD Value Study*, TAXPROF BLOG (July 19, 2013), [http://taxprof.typepad.com/taxprof\\_blog/2013/07/what-is-the.html](http://taxprof.typepad.com/taxprof_blog/2013/07/what-is-the.html) (business law professor explaining the concepts of net present value and opportunity cost to "law and literature" trained law professor); Stephen F. Diamond, *Brian Tamanaha to the Law School World: "Never Mind,"* TAXPROF BLOG (July 29, 2013), [http://taxprof.typepad.com/taxprof\\_blog/2013/07/diamond-responds.html](http://taxprof.typepad.com/taxprof_blog/2013/07/diamond-responds.html) [hereinafter Diamond, *Never Mind*] (describing Brian Tamanaha's "surrender" in the debate). See also Brian Leiter, *Reflections on "The Economic Value of a Law Degree," and the Response to It*, BRIAN LEITER'S LAW SCH. REPORTS (July 30, 2013, 4:54 AM), <http://leiterlawschool.typepad.com/leiter/2013/07/the-economic-value-of-a-law-degree-redux-1-1.html> (summing it all up).

<sup>27</sup> The blog *Above the Law* is the most notorious of these. It runs a version of a law school debt story almost every day. For a representative sample, see *Search Results for Student Debt*, ABOVE THE LAW, <http://abovethelaw.com/?s=student+debt> (last visited Nov. 6, 2014).

assigning blame, and almost instantly attention focused on law schools. Schools were faulted for charging too much, misleading applicants about employment prospects, not preparing students for a changing market, and being profligate spenders (overpaying and under-working a lazy professoriate) and passing the cost on to the group least able to bear it (i.e., students).

This focus on law schools was a little surprising. Law schools had not caused the recession and were not major players in the economy. This non-sequitur notwithstanding, in short order reform of legal education became the principal blogging game in town, and the demand for “practice ready” graduates became the proposal around which most bloggers united.<sup>28</sup> Graduates who are able to function

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<sup>28</sup> Even the American Bar Association weighed in on the issue. See *ABA House of Delegates Recommendation 10B, 2011 Annual Meeting*, AM. BAR ASS'N (adopted as revised 2011), available at [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2011\\_hod\\_annual\\_meeting\\_daily\\_journal\\_FINAL.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2011_hod_annual_meeting_daily_journal_FINAL.authcheckdam.pdf) (“RESOLVED, That the American Bar Association urges legal education providers to implement curricular programs intended to develop practice ready lawyers including, but not limited to enhanced capstone and clinical courses that include client meetings and court appearances.”) (capitalization in original).

See also AMERICAN BAR ASSOCIATION, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION: DRAFT REPORT AND RECOMMENDATIONS 2-3 (Sept. 20, 2013) (on file with author) (“The balance between doctrinal instruction and focused preparation for the delivery of legal services needs to shift still further toward developing the competencies required by people who will deliver legal services to clients.”). This latest ABA paper on legal education is a deeply flawed document. Starting from what it describes as a “fundamental tension” between legal education’s dual status as a “public [and] private good,” *id.* at 6-7 (what the Report actually describes is the tension between education and training—it mistakenly thinks of those as the same thing), it proposes reconstituting law schools as technical training institutes “devoted specifically to preparing students to pursue and compete for jobs.” *Id.* at 13. It makes a few, mostly adjectival, concessions to critics of its earlier working paper on the same subject, *see supra* note 7, but for the most part it retains the anti-intellectualism and worker bee myopia which characterized that earlier work. It shows no awareness of the obligation to prepare lawyers to implement rules and operate institutions to serve the ends of justice, fairness, equality, and efficiency, for example, or the obligation to future generations to help construct legal norms and institutions that can adapt to changing social and political circumstances, needs, and beliefs. Instead, it focuses obsessively on the present and constructs a blueprint for satisfying students’ immediate “customer” desires rather than theirs and the legal system’s long-term interests.

In this same spirit, it depicts legal scholarship as a drag on education, adding to its cost without producing any corresponding benefit, ignoring the numerous contributions of legal scholarship to the development of law over the years. See, e.g., Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (privacy); Boris I. Bittker, *Tax Shelters, Nonrecourse Debt, and the Crane Case*, 33 TAX L. REV. 277 (1978) (tax); Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265 (2013) (commodities trading); ROBERT H. BORK, *THE ANTITRUST PARADOX* (2d ed. 1993) (antitrust); Charles A. Reich, *The New Property*, 73 YALE L.J. 733

competently as lawyers from day one in the office, so the argument went, would have a better chance of finding work than graduates who need extensive training to become cost effective and trustworthy.<sup>29</sup> If law schools want their students to get jobs therefore, they must make them “practice ready” when they graduate.<sup>30</sup> Perhaps this is correct,

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(1964) (property); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (environmental protection); Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707 (1983) (copyright); Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, available at <http://www.democracyjournal.org/5/6528.php> (consumer financial protection); GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) (product safety); and dozens of others. See *THE CANON OF AMERICAN LEGAL THOUGHT* (David Kennedy & William Fisher III eds., 2006) (describing twenty law review articles that have had a profound effect on the shape of American law and legal institutions); Michelle M. Harner & Jason A. Cantone, *Is Legal Scholarship Out of Touch? An Empirical Analysis of the Use of Scholarship in Business Law Cases*, 19 U. MIAMI BUS. L. REV. 1 (2011) (describing the influence of legal business law scholarship on the decisions of the Delaware Supreme Court). It also ignores the systemic contributions of scholars like Henry Hart and Albert Sachs, Mitchell Polinsky, Richard Posner, and numerous others, who changed the ways in which generations of judges and lawyers go about their business and think about law and legal institutions. Scholarship is the legal system’s seed corn, and destroying seed corn eventually makes an ecosystem uninhabitable.

The Task Force’s mindset reminds me of my brief experience as a member of the Long Range Planning Committee of a major state bar. Long range planning for our Committee consisted of someone saying: “You know, last week this happened to me; there ought to be a law against it,” and the Committee (with me excepting) agreeing. See Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1600 (2014) (“Smart people operating as part of a group may be perfectly willing to make decisions on the basis of their pooled reflections. Particularly if they can claim expertise or are confident about their power, they may also be willing to recommend bold action that they deem normatively desirable without worrying about empirical support and without any rigorous attempt to assess costs and benefits.”). Hopefully, the ABA House of Delegates will understand the risks in such casual empiricism and spare law schools the harm wreaked by similar short term thinking in the present day worlds of law practice and business. “The customer is always right” may have worked for Marshall Field in selling dry goods, but it is a prescription for disaster in legal education.

<sup>29</sup> See Dilloff, *supra* note 14, at 427-32.

<sup>30</sup> The available evidence suggests that this strategy does not work. Over two decades ago the MACCRATE REPORT found that law firms preferred their own in-house skills training programs to those of law schools, and that they did not view participation in law school skills courses as an important factor in hiring. See REPORT OF TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, ABA LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 7 n.2 (1992) [hereinafter MACCRATE]. This makes sense. Firms with the resources to train new lawyers (i.e., mostly Biglaw firms) can design (or contract for) programs tailored closely to their types of practice and firm culture, and these programs will be more efficient than the less sophisticated, generic ones offered by law schools. Firms also have better access than law schools to expert practitioners to teach such programs. Accord Dilloff, *supra* note 14, at 451-53. If anecdotal evidence is correct, Biglaw associates laid off during the recent recession are having a more difficult time find-

but there are many reasons to doubt it.

To begin with, it is not clear what types of “practice” proponents of the concept of “practice ready” have in mind. Biglaw practice differs from small and medium size firm work, for example, government work from private practice generally, in-house corporate work from each of these, and all of them from prosecuting and defending criminal defendants, or representing clients in a neighborhood legal services office for the poor. Each setting involves working with different kinds of clients on different types of problems, provides access to different levels of resources and supervisory guidance, and requires different types of knowledge and skills. In some of these settings lawyers work principally with ideas and texts (writing memos, proofreading documents, reviewing transcripts), in others principally with people (interviewing clients, deposing witnesses, negotiating with lawyers, arguing to judges), and in still others principally with institutions (filing documents and searching records in courts, agencies, departments, registries, and the like). People have known for a long time that law is not a “unitary profession.”<sup>31</sup>

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ing work than less “practice ready” new law graduates, and this also suggests that law firms like to do their own training. Law school skills courses are valuable primarily to students who will work in firms where in-house training is not available. See MACCRATE, *supra*, at 30 (“[I]f the recruits for [law firms with their own training programs] are getting needed or highly useful training, [one must ask:] what of the much larger number of new attorneys who begin practice by themselves or in offices that do not provide such training?”). Deborah Merritt’s recent discussion of the employment effects of Washington & Lee Law School’s “practice ready” curriculum, see Karen Sloan, *Reality’s knocking*, NAT’L L.J. (Sept. 7, 2009), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433612463&Realitys\\_knocking&slreturn=20130719130100](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433612463&Realitys_knocking&slreturn=20130719130100) (subscription required) (describing the Washington & Lee curriculum), confirms these conclusions. See Deborah J. Merritt, *An Employment Puzzle*, LAW SCHOOL CAFE (table started on June 18, 2013), [www.lawschoolcafe.org/thread/an-employment-puzzle/](http://www.lawschoolcafe.org/thread/an-employment-puzzle/) (“Washington & Lee pioneered an experiential third-year program that has won accolades from many observers . . . Surely graduates of this widely praised program are reaping success in the job market? Sadly, the statistics say otherwise. Washington & Lee’s recent employment outcomes are worse than those of similarly ranked schools.”).

<sup>31</sup> See Phoebe A. Haddon, *Education for a Public Calling in the 21st Century*, 69 WASH. L. REV. 573, 580 (1994) (“[A]n effort to define lawyering as a ‘single public profession of shared learning, skills and professional values’ which is focused on the past . . . is shortsighted and potentially unproductive.”); Lande, *supra* note 4, at 1 (“[L]awyers work on many types of problems . . . .”); Wallace Loh, *Introduction: The MacCrate Report—Heuristic or Prescriptive?*, 69 WASH. L. REV. 505, 511 (1994) (“[T]he legal profession is in fact stratified and specialized in its functions, and not all lawyers are cut from the same mold.”); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 534-49 (1994) (describing differences between practice “cultures,” with special focus on commercial litigation and family law practice); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths*

Law schools cannot prepare students for all of these types of work because the range of skills needed is too large. But they also cannot target sub-categories of the work because students will not know what types of practice they will enter when they graduate. They may know what they would like to do, but they cannot be sure there will be jobs in those fields, or if there are jobs, that they will be competitive in the markets to fill them. They also cannot be sure that their preferences in law school will remain intact once they have worked in a field. Some expectations may turn out to be unwarranted and some assumptions false. Should this happen, the time spent learning skills no longer used might appear, in retrospect, to have been a greater waste of time than the time now spent learning law they think they will not use.<sup>32</sup>

If the concept of “practice” could be given a single meaning, however, there still would be the question of what it means to be “ready” for that practice.<sup>33</sup> Must newly minted lawyers be able to

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*from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 166 (1994) (describing differences in lawyer practice roles). For descriptive accounts of different types of practice, see LINCOLN CAPLAN, SKADDEN (1993), and DAVID MARGOLICK, UNDUE INFLUENCE (1993). Law school graduates who do not work in law firms will need even different types of skills.

The differences among types of legal work are not limited to practice skills. Conventions for truth telling, candor, and fair play also vary considerably from one type and location of practice to another. See, e.g., MILTON R. WESSEL, *THE RULE OF REASON: A NEW APPROACH TO CORPORATE LITIGATION* 1-31 (1976); Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181 (1981) (describing differences in professional conventions in different types of practice); Donald D. Landon, *Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice*, 1985 AM. B. FOUND. RES. J. 81 (describing differences between small town and big city practice); Michael Meltsner & Philip G. Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 CLEARINGHOUSE REV. 259 (1973) (describing special tactics available to legal services lawyers). Only the skill of “thinking like a lawyer” cuts across all categories of legal work and is performed in the same way everywhere and all of the time. For descriptions of the “thinking like a lawyer” skill, see Barry B. Boyer & Roger C. Crampton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 270 (1974); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

<sup>32</sup> Professor Hamilton argues that certain fundamental competencies, values, and virtues fit all legal work settings and all types of law firms. He describes these qualities in such general terms, however, and in so many different ways, that it is hard to know specifically what he has in mind. Overall, he seems to be saying that law firms and clients prefer to hire responsible individuals with well-developed social skills and adult work habits. See Hamilton, *supra* note 14, at 25-33. This is as helpful as it is controversial.

<sup>33</sup> Neil Dilloff, a senior partner in the world's second largest private law firm, provides a list of “top ten” competencies needed to be practice ready. See Dilloff, *supra* note 14, at 438-43. Reviewing all ten would be unwieldy, so I will limit myself to the first two. The

perform on their own, for example, without the guidance and supervision of experienced mentors? If so, must they function at the level of the “reasonably competent practitioner,” or is it enough that they remain above the level of the lowest common denominator? Must they be proficient at their work, or is it enough that they appear proficient?<sup>34</sup> Are they “practice ready,” for example, if they can draft a coherent and logically organized memorandum or pleading irrespective of its quality,<sup>35</sup> or ask a series of understandable and logically or-

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“[f]irst, and perhaps foremost” lawyer competency, says Dilloff, is the ability to make judgments. *Id.* at 438. Exercising good judgment, he explains, is “about knowing what is right or wrong . . . know[ing] the right way to do things.” *Id.* No doubt this is true, though he does not explain how to tell the difference between right and wrong, particularly in hard cases, and that is where most people need help. As a second point, he recommends that law schools teach problem-solving skills. This is important, he says, because “[t]he only way to be able to ‘think out of the box’ is to practice living outside one (or at least expanding the size of the box).” *Id.* at 438-39. If one lives outside the box, however, one already thinks outside of it, by definition; how to live outside the box is where advice is needed. Similarly, expanding the size of the box would seem to make it more difficult to get outside of it, yet Dilloff does not explain how the two instructions are to be coordinated. The rest of his “top ten” discussion is written at the same level of detail.

Professor Hamilton also emphasizes the importance of teaching judgment, but he is similarly circumspect about how it is done. *See* Hamilton, *supra* note 14, at 20. Like Dilloff, he is strong on general exhortation and short on operating instructions. His exhaustive survey of the literature on lawyer competencies would be a meta-analysis of the studies in the field but for the fact that it contains almost no analysis, even when the study findings he describes are confusing or contradictory (*e.g.*, studies finding that law schools are highly rated at teaching “legal analysis and legal reasoning” but not highly rated at teaching “substantive law,” without discussing how it is possible to do legal analysis without knowing substantive law). *See* Hamilton, *supra* note 14, at 21. No one would argue with recommendations written at this level of generality, the problem is in knowing what they mean. For better efforts, *see* Janet Weinstein et al., *Teaching Teamwork to Law Students*, 63 J. LEGAL EDUC. 36, 46-64 (2013) (describing law school instruction in teamwork skills); Clark D. Cunningham, *What Do Clients Want From Their Lawyers?*, 2013 J. DISP. RESOL. 143 (describing methods for soliciting client views about lawyer competencies). Admittedly, it is difficult to describe “soft” practice skills, and equally difficult to describe how they could be taught, but unfortunately those are the burdens that come with making the “practice ready” argument. For the most sophisticated effort in this regard, *see* Marjorie M. Shultz & Sheldon Zedeck, *Identification, Development, and Validation of Predictors for Successful Lawyering* (Sept. 2008), available at <https://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf> (identifying a set of twenty-six distinctive lawyer “effectiveness factors”).

<sup>34</sup> The “practice ready” argument seems to demand proficiency at practice skills, not just awareness of them. *See supra* note 18.

<sup>35</sup> Chris Sevier’s Complaint in his fraudulent representation, products liability, and intentional infliction of emotional distress diversity action against Apple is a case in point. The Complaint alleges in clear, logically organized, coherent, and sometimes even eloquent prose, that Apple’s failure to sell its products in “safe mode,” with its control panels set to block pornography websites, “caused him to see pornographic images that appealed to his biological sensibilities as a male and lead [sic] him to . . . develop an arousal addiction . . .

dered questions in an interview or deposition, irrespective of the questions' helpfulness to the case? Must they be able to teach themselves a new body of law over the weekend, adapt standard forms to fit a client's estate plan, do "country conditions" research, trace a chain of title in a registry of deeds, file a document with an agency, interview a witness, or perform any of the dozens of other such tasks assigned to entry-level lawyers (and paralegals) in even mid-size and small law firms?<sup>36</sup> Someone who cannot do all of these things is not "ready" to practice law in one sense of the term, but expecting new law graduates to be able to do all of them is wishful thinking. The list of required skills is simply too long.<sup>37</sup>

Proponents of "practice-ready" education do not seem to understand the difference between socialization and education. Socialization is the work-based process of internalizing the habits, values, beliefs, vocabularies, and motor skills of a profession to make them second nature.<sup>38</sup> A fully socialized individual is able to use legal

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[which caused him] to prefer . . . cyber beauties over his wife . . . his marriage to fail" and his wife to "abduct[ ] his son." Complaint at 21, *Sevier v. Apple Inc.*, 2013 WL 3063595 (M.D. Tenn. June 19, 2013) (No. 3:13-cv-00607). Mr. Sevier, a lawyer (and songwriter), may express his ideas skillfully but he is not "practice ready" to draft a Complaint.

<sup>36</sup> One of the most common complaints of lawyers is that law students cannot write. See Dilloff, *supra* note 14, at 434 ("My observation is that many first year students need to work on their writing—some, a lot.") Lawyers are not the only ones to make this complaint. Teachers at every level of education (elementary school, junior high school, high school, college, graduate and professional school) say the same thing about the students they inherit from the previous level. While the complaint has some validity in each instance, it has more to do with substantive socialization than technical writing skill. Each time students move to a new educational or occupational level, with its own distinctive vocabularies, theoretical frameworks, intellectual standards, practice conventions, and the like, they must learn a new form of life. The skills and knowledge that enabled them to be successful at the previous level can help them get started at this process, but to become full-fledged members of the new environment they must assimilate native-speaker ways of thinking, speaking, and behaving, and this takes time. Given this, pointing out that new law graduates cannot write is a little like pointing out that babies do not know how to use flatware, or that puppies do not know to urinate outside. These are true points no doubt, but the conditions are not permanent, or anyone's fault, and they will change if insiders are patient and explain how things are done. Professor Williams pointed this out many years ago, and his is still the single best discussion of the topic. See Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1, 13-16 (1991).

<sup>37</sup> See Hamilton, *supra* note 14, at 5-8 (describing a list of "Common Values, Virtues, Capacities and Skills" that runs on for several pages).

<sup>38</sup> The socialization process also inculcates what Michael Polanyi first famously described as "tacit knowledge," the unwritten practices and conventions that give meaning to knowledge in an area of practice or study and that cannot be transmitted explicitly in propositional form but learned only through the active immersion in shared activities with mem-



knowledge and practice skill to signal to others that he is an insider and should be treated as such. Becoming socialized in a profession is a long-term process, however, a consequence of repeated immersion in the profession's tasks, relationships, and body of knowledge. The process has a natural life cycle that cannot be accelerated or reproduced (except minimally) by facsimile experiences in schools. Legal education contributes to professional socialization—being a law student is itself a type of professional role—but it provides too limited an experience of actual law practice to move one very far along in that process. It can apprise students of the skills needed to succeed in practice, describe the components of those skills, provide standards for evaluating their performance, and show how the skills can be adapted to changing circumstances, needs and beliefs, but it cannot make students skillful. That takes longer than an academic semester.

Schooling and work divide responsibility for the education of law students along a kind of understanding/performance line: the former provides the background information, theory, and critical thinking skills needed to understand the legal system intellectually, and the latter provides the opportunity to turn that intellectual understanding into behavioral dispositions by putting the understanding into practice. The two processes interlock and overlap, of course, each doing the work of the other on occasion, but at their core they are fundamentally different, and cannibalizing one to bolster the other will bring the entire system down. They work in tandem, not in isolation, and each is essential to the development of a professional practitioner.<sup>39</sup>

Law school clinical instruction brings these two processes together by having students represent clients in actual cases and review

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bers of social groups that possess the tacit knowledge. See MICHAEL POLYANI, *THE TACIT DIMENSION* 4-5 (1966). See also MICHAEL POLYANI & AMARTYA SEN, *THE TACIT DIMENSION* 4 (2009) (a reissuance of Polyani's book with a Foreword by Amartya Sen); HARRY COLLINS & ROBERT EVANS, *RETHINKING EXPERTISE* (2007) (applying the concept of tacit knowledge to the development of expertise generally); Nicky Priaux & Martin Weinel, *Behavior on a Beer Mat: Law, Interdisciplinarity & Expertise*, J.L. TECH. & POL'Y (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2405160](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405160) (applying the concept of tacit knowledge to the development of legal expertise).

<sup>39</sup> This understanding/performance distinction is similar to the one described by Nicholas Lemann between "research," the pursuit of knowledge and understanding without the constraints of immediate practical applicability, and "mass higher education," the low cost training in consensus practical skills. See Nicholas Lemann, *The Soul of the Research University*, *THE CHRONICLE OF HIGHER EDUC.* (Apr. 28, 2014), <http://chronicle.com/article/The-Soul-of-the-Research/146155?cid=megamenu>.

their efforts with supervisors against explicit standards of competent performance. The distinctive feature of this type of instruction is its ability to confront its subject both methodologically and substantively: to analyze skills while actually using them. Students work on problems in the first person, in lawyer role, in the full richness of real-life factual situations, with the ready-made pressures that responsibility for the interests of others produces. They make choices and judgments to a degree absent in other types of instruction and live with the consequences. This makes the issue of responsibility a meaningful concern.<sup>40</sup> The driving force in this process is the dynamic of role adjustment and the need it generates to understand and justify one's actions.<sup>41</sup> Performing unfamiliar tasks under expert observation, with real interests at stake, requires a cognitive framework that reduces the anxiety unfamiliarity generates and gives consistency and coherence to one's behavior. Since this process is tied intimately to a sense of self, the motivational energy generated is very high.<sup>42</sup>

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<sup>40</sup> Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in *CLINICAL EDUCATION FOR THE LAW STUDENT* 374, 384-85, 391 (Council on Legal Education for Professional Responsibility ed., 1973). See also Michael Meltsner & Philip G. Schrag, *Report from a CLEPR Colony*, 76 *COLUM. L. REV.* 581, 585-86 (1976):

Issues of . . . responsibility . . . loom large on the clinical agenda . . . . Should they [the students] drown adversary litigators in a sea of paperwork, lie to adversaries for bargaining advantage, or decide, as a legal aid lawyer, to represent one type of client rather than another when resources are too scarce to represent both? Clinical courses are superior vehicles for sensitizing students to these issues, because the student must actually make a choice among competing options. Unlike the student in a classroom, he cannot stop after pointing out the risks and costs inherent in each available course of action, but must actually select one of them, execute it, and incur the associated costs. His decision may well be irreversible, and he will have to live with its consequences for weeks or months thereafter.

*Id.*

Dean Gerard Nash of the Monash University in Melbourne put the point succinctly: "Responsibility cannot be simulated . . ." William Pincus, Text of Remarks at the Annual Luncheon of the Association of American Law Schools—January 4, 1980, in *WILLIAM PINCUS, CLINICAL EDUCATION FOR LAW STUDENTS* 425 (1980) (quoting Gerard Nash).

<sup>41</sup> As Professor Bellow once put it: "experience produces a qualitative change in the mode and content of knowing, which cannot be replicated by the transmission of information or the discussion of cases . . . in a classroom. The way in which legal concepts and ideas are understood after they have been used . . . 'feel[s]' differently in a sense that is not fully explained by the fact that they are more readily remembered." Bellow, *supra* note 40, at 382.

<sup>42</sup> *Id.* at 383-85. These epistemological and motivational consequences alter the professor-student relationship in profound ways. In classroom instruction students often are unable

Underlying this process are two foundational premises, one psychological and the other philosophical. The psychological premise grows out of the work of Erik Erikson and has to do with the way that adults develop identity.<sup>43</sup> Personality is not well set by the time a student enters law school.<sup>44</sup> Our society prolongs the development of identity<sup>45</sup> by extending formal education well beyond adolescence.<sup>46</sup> This in turn delays role commitments, including occupational commitments, attendant upon adult status and creates a space in which educational instruction can have a significant developmental impact. Because law students do not usually think explicitly about their roles as lawyers, the construction of their professional identities results largely from the emulation of role models—those who are respected, or in some cases feared or hated, for their performance of practice tasks.<sup>47</sup> Clinical practice instruction provides students with models of technically competent lawyer behavior and the opportunity to try out that behavior under expert guidance to make it part of their personality. In theory, little could be done to improve upon such a design.<sup>48</sup>

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to judge the effectiveness of professor behavior, in part because of the absence of any shared frame of reference within which to form and express their views. Practice instruction provides this frame of reference, in the form of a shared law-practice world in which students gain confidence, knowledge, and critical perspective through the performance with their professors of lawyer practice tasks. This, in turn, increases their understanding and scrutiny of professor actions and pronouncements and frees them to judge those actions and pronouncements critically.

<sup>43</sup> ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1994); ERIK H. ERIKSON, *IDENTITY AND THE LIFE CYCLE* (1994).

<sup>44</sup> Not everyone agrees with this. See, e.g., James J. White, *The Anatomy of a Clinical Law Course*, in *CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE* 158, 171 (Edmund W. Kitch ed., 1970) (“Only a fool would suggest that . . . [a] law teacher could recast a twenty year old liar or do much else about the fundamental values which his environment has instilled in him.”). See also Brainerd Currie, *Reflections on the Course in the Legal Profession*, 22 *J. LEGAL EDUC.* 48 (1969); James E. Starrs, *Crossing a Pedagogical Hellespont via the Pervasive System*, 17 *J. LEGAL EDUC.* 365 (1965). Some law professors claim that they can shape the professional behavior but not personal behavior of students. The nature of this distinction is not self-evident. See MICHAEL J. KELLY, *LEGAL ETHICS AND LEGAL EDUCATION* 38 (1980).

<sup>45</sup> Identity is “the sense of self, formed from emotionally significant relationships with others which shape one’s being and one’s image of self . . . .” Andrew S. Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 *U. MICH. J.L. REFORM* 248, 250 (1975).

<sup>46</sup> Alan Stone calls this a “crucial variation” in our culture and “an entirely new phenomenon in the history of civilization.” Alan A. Stone, *Legal Education on the Couch*, 85 *HARV. L. REV.* 392, 399 (1971).

<sup>47</sup> Watson, *supra* note 45, at 250; see also Bellow, *supra* note 40, at 381.

<sup>48</sup> Things do not always go as well in practice as theory suggests they should. See Con-

The philosophical premise underlying practice instruction traces its roots to Aristotle<sup>49</sup> and has to do with the way that virtue is known. It holds that only someone who has had the experience of acting in a certain way is capable of understanding that way of acting. Understanding is arrived at by reflecting on activities that have been experienced pre-reflectively and internalized as habits. Critical reflection on habits, to harmonize behavior with belief, is an important but chronologically second step in the process. The neophyte need not (and in fact cannot) be aware at first of why the acts he imitates are virtuous or skillful; it is enough that he knows that people regarded as virtuous and skillful behave in that way. Only after reflecting on behaving in this way does the virtuous and skillful nature of the behavior become clear, and at that point the behavior becomes a disposition. Until disposition is present, however, the character of action cannot be fully understood.<sup>50</sup>

Given this epistemology, it is not hard to see how law school clinical practice instruction was thought to provide an ideal setting for the development of lawyer practice skills and values. In practice courses students are able to imitate the behavior of skillful and virtuous lawyers responding to real problems and reflect on their (the students') efforts under the guidance of experts using explicit conceptions of competent practice. By experiencing and reflecting on what it is to act skillfully and ethically, students are thought to be able to develop an understanding of competent professional practice and act in accordance with it. Again, in theory, little could be done to improve upon such a design.

The problem, of course, is that the time frame of a law school semester does not permit this process to play out to any significant extent. Acting in lawyer role for thirteen weeks (or even an academic year), does not provide an opportunity to observe, imitate, reflect on, and internalize the skills and values of professional practice to any substantial extent. Students will be novices at the end of this process

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dlin, *Moral Failure*, *supra* note 4, at 324-32 (criticizing the models of effective practice demonstrated in some parts of clinical education).

<sup>49</sup> See, e.g., SIR DAVID ROSS, *THE NICOMACHEAN ETHICS OF ARISTOTLE* 28-39 (1975). See also M.F. Burnyeat, *Aristotle on Learning to Be Good*, in *ESSAYS ON ARISTOTLE'S ETHICS* 69 (Amélie Oksenberg Rorty ed., 1980).

<sup>50</sup> The skill learned in this process is that of practical judgment, the capacity to decide what to do when different sorts of objectives and values, not all of them commensurable, bear upon the same situation.

as much as at the beginning, advanced novices perhaps, but novices nonetheless. They will have seen only a small number of lawyer skills and values in operation and have had almost no chance to try them out with the frequency needed to make them dispositions. Given the limited opportunity to practice provided by practice instruction, therefore, it is unrealistic to expect law students to be “practice ready” by the time they graduate from law school. They may have stood for the first time, but they will not yet be out of the crib.<sup>51</sup>

If actual practice instruction cannot make students practice ready, instruction based on simulated practice experience is even less likely to do so. Simulated experiences are easier to construct and administer than actual practice experiences, and thus can be used to provide more extensive opportunities to try out lawyer skill tasks, but simulated experiences are useful mostly for teaching the motor skill dimension of lawyer tasks. They lack the real life emotional, psychological, and informational content needed to permit students to make

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<sup>51</sup> This is not an argument against practice-based instruction in general. Practice skill cannot be learned independently of activity. Without the requisite experience even an intellectually gifted person is incapable of behaving skillfully. Since practice courses help one begin to develop skills, such courses are an important part of a law school curriculum. My point is simply that they should not be the dominant part of that curriculum, or play a larger role than they do in most law schools at the present time. See Lande, *supra* note 4, at 5 (“[L]aw schools have revised their curricula in the last decade to increase practical education. Under A.B.A. Standard 302(a)(4), students were required to receive ‘substantial instruction’ in ‘professional skills’ . . . [and] the A.B.A. . . . found that most law schools [meet] this requirement . . . .”) (footnote omitted). See also Sheldon Krantz & Michael A. Millemann, *Legal Education in Transition: Trends and Their Implications*, NEB. L. REV. (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2510609](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510609) (describing “significant recent changes in legal education that have added practice-based courses, or practice-based components to courses, in all three years of legal education”). The ABA has changed its views on the adequacy of practice instruction programs over the years and now believes that law schools are not doing as much as they should in that regard. See AM. BAR ASS’N, *supra* note 7, at 2 (“[L]aw schools have done much to expand . . . opportunities [for skills training and experiential learning, but] [t]here is [the] need to do more.”). Consequently, it recently changed the law school accreditation standards to require six hours of experiential learning credit as a condition of graduation. See [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review.html](http://www.americanbar.org/groups/legal_education/committees/standards_review.html) (Report of the ABA Standards Review Committee on the Implementation of New Standards and Rules for Approval of Law Schools); [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/201406\\_revised\\_standards\\_clean\\_copy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201406_revised_standards_clean_copy.authcheckdam.pdf) (Revised Standards for Approval of Law Schools); [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/2014\\_hod\\_standards\\_concurrence\\_announcement.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2014_hod_standards_concurrence_announcement.authcheckdam.pdf) (Notice of approval of Revised Standards and Rules by the ABA House of Delegates).

the judgments involved in deciding how to proceed in the first instance. Take client or witness questioning as an example. It is a relatively simple thing to teach someone to ask questions in a clear and understandable form. One needs only to have the person rehearse the questions over and over again—eliminating dependent clauses, big windups, preemptive apologies and explanations, rising inflection, qualifiers and modifiers, unintended pauses, inappropriate pace, interruptions, filibusters, and the like—until the questions are direct, clear, and succinct. This aspect of question asking is learned in the same manner as athletic technique—by repetition and critique. But simulated question asking is to actual question asking what batting practice is to hitting in an actual baseball game. The physical part is the same, but the judgments involved in determining how to proceed are not. Real life questioning must take the other person’s emotional and intellectual states into account, as well as the circumstances that affect the person’s willingness and ability to respond fully and accurately to one’s questions. Simulated question asking does not provide the contextual richness needed to do this.<sup>52</sup>

In the end, however, these concerns are largely beside the point. The argument for “practice ready” graduates is not driven by a desire to prepare law students for practice as much as one to shift the cost of new lawyer training from law firms to law schools. Increasingly, clients with leverage (Biglaw clients in particular) are unwilling to permit new law firm associates to work on their projects;<sup>53</sup> they will not pay for on-the-job training.<sup>54</sup> In the old days, law firms saw

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<sup>52</sup> Neil Dilloff suggests that field trips to clients’ offices and visits from “outside business people, government officials, and others to discuss and simulate client conferences, strategy meetings, and problem solving,” will “resonate” with students and leave lasting impressions. See Dilloff, *supra* note 14, at 437-38, 439, and 448. Perhaps this is true for people who believe in “Road to Damascus” moments, but most people learn skills by actively practicing them, not by listening to war stories, or watching dog and pony shows. There is no voyeur form of experiential learning.

<sup>53</sup> David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html> (citing American Lawyer survey that found that “47 percent of law firms had a client say, in effect, ‘We don’t want to see the names of first or second-year associates on our bills.’”).

<sup>54</sup> See Leipold, *supra* note 10, at 8 (“[C]orporate clients continue to be unwilling to absorb th[e] costs [of training new lawyers.]”); Dilloff, *supra* note 14, at 446 (“[clients] don’t want to pay for a new way to ‘learn on the job.’ They want law schools to have already trained the new lawyer.”) Dilloff doubles down on the claim, adding that “graduates and employers” also want law schools to do the training. *Id.* (“[T]he desires of all three constituencies .

new lawyer training as their responsibility, and some still do,<sup>55</sup> but now that they are ranked publicly according to several measures of profitability<sup>56</sup> most firms are looking for ways to cut costs, and one popular strategy is to pass the expense of training new lawyers on to the next person in line; and law school is that next person. The push for practice ready graduates should be seen for what it is, therefore, a move by law firms to save money,<sup>57</sup> not a program for improving the education of law students.<sup>58</sup>

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. . . [is that] new lawyer [skills] should be taught in law school . . .”), but this is a little self-serving. Clients do not want to pay for training, that much is clear, but it does not follow that they care one way or another about whether law schools or law firms pay for it. They have no stake in that argument. Graduates also could not care less about who pays as long as they are trained. Dilloff is right that “employers” (i.e., law firms), do not want to pay for training, but his curiously circumspect way of making that point reminds one of Priscilla Mullins’ question to John Alden. See Henry Wadsworth Longfellow, *The Courtship of Miles Standish*, in HENRY WADSWORTH LONGFELLOW, POEMS AND OTHER WRITINGS 280, 294 (2000) (“Why don’t you speak for yourself, John?”).

<sup>55</sup> See Dilloff, *supra* note 14, at 431-32 (describing a law firm “grace period” in “the old days” in which “the new lawyer’s primary job was to learn, . . . [but] [t]oday, things are much different”).

<sup>56</sup> See *The 2014 Am Law 200*, AM. LAW., May 29, 2014, [http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202494427064&The\\_2014\\_Am\\_Law\\_200](http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202494427064&The_2014_Am_Law_200) (rankings of law firms according to “Gross Revenue, Profits Per Partner, Revenue Per Lawyer”). See also Dilloff, *supra* note 14, at 432 (“[T]oday’s economics of law do not permit extensive non-billable training.”); *id.* n.28 (“Escalating salaries and associate turnover require that entry-level attorneys generate substantial billable hours from the day they walk in the office and begin consuming expensive overhead.”) (quoting Robert W. Hillman, *The Hidden Costs of Lawyer Mobility: Of Law Firms, Law Schools, and the Education of Lawyers*, 91 KY. L.J. 299, 303-04 (2002). Gilding the lily, Dilloff blames even the Howrey collapse, at least in part, on the failure to transfer new lawyer training costs. Dilloff, *supra* note 14, at 432 n.26 (describing how Howrey tried to maintain a new lawyer training program and “[the firm] is now defunct . . . . [The program] turned out to be a luxury that the firm could not afford.”). New lawyer training costs were the least of Howrey’s problems.

<sup>57</sup> There is a contradiction, of course, in both wanting law schools to pay for training and not trusting law schools to train. See *supra* note 30 (describing how law firms do not give skills instruction great weight in the hiring decision). It is not uncommon for “espoused theory” and “theory in use” (as Chris Argyris and Donald Schön used to put it) to contradict one another in the lives of individuals, so I suppose it should not be surprising to find the same contradiction in the lives of law firms as well. Alan Frost, *Organizational Learning Theory from a Company-Wide Perspective*, KMT, <http://www.knowledge-managementtools.net/organizational-learning-theory.html> (last visited Nov. 1, 2014).

<sup>58</sup> The ABA Task Force on the Future of Legal Education concedes as much. See AM. BAR ASS’N, *supra* note 7, at 16 (“[I]n the second half of the twentieth century . . . [t]he legal profession increasingly began to assign, or try to assign, more responsibility to law schools for the practical and business aspects of the education of lawyers, mainly for economic reasons (including unwillingness [sic] of clients to subsidize the education of new lawyers.”)). Mark Price, the labor economist, put the point succinctly. He said: “it is at least comforting to know that law firms are not that different from firms in Manufacturing or Health Care[.]”

Unfortunately for law firms, the strategy cannot work. Law schools cannot teach students how to find mentors, coordinate paralegal assignments with other lawyers, share secretaries with partners, secure the best work assignments, or do any of the dozens of other such practical tasks that are needed in firms “on day one of their first full time job.”<sup>59</sup> These are situation-specific skills that require local knowledge, on-site experience, and insider help, and law schools cannot reproduce the circumstances and conditions in which they are learned.<sup>60</sup> They cannot recreate the complex personal histories, institutional arrangements, power structures, and practical incentives and constraints that characterize even the simplest law firm practice setting, and to insist that they do that is a little like insisting that they suspend the laws of physics. It is easy to understand why firms would want to shift the cost of training new lawyers, but why they think they should be able to do it is baffling. They seem to believe

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that is[,] they would prefer that somebody else pay for the skills that make them profitable.” Frank Pasquale, *New York Times Financial Advice: Be an Unpaid Intern Through Your 20s (Then Work till You're 100)*, CONCURRING OPINIONS (Nov. 20, 2011), <http://www.concurringopinions.com/archives/2011/11/new-york-times-financial-advice-be-an-unpaid-intern-through-your-20s-then-work-till-youre-100.html> (quoting Mark Price). See also Diamond, *supra* note 21, at 4-5 (“Under tremendous economic pressure today, on a global scale, capital is looking for ways to cut costs, particularly legal costs.”). It is a sad statement about the contemporary legal world that many in the profession, professors and lawyers alike, seem to think that law schools exist solely to satisfy the needs of law firms. Legal education has obligations to law, legal institutions, and individual students that are equal to, and different from, its obligations to firms.

<sup>59</sup> See Dilloff, *supra* note 14, at 429:

A person is “ready to practice” if she knows “how to deal with her secretary (who also services three other lawyers, including a senior partner) and her paralegal (who also works for five other lawyers, including two partners), has her eye out for a potential mentor, has the ‘people skills’ to seek out the right lawyers for whom to work, has an ability to ferret out the type of assignments she likes and clients for whom she wishes to work, and has developed a can-do pleasant attitude[.] [Without these skills] all the ‘book learning’ in law school will be of secondary importance.”

*Id.* at 430-31.

<sup>60</sup> The same is true for the suggestion that law schools should teach students “business sense.” Business sense is developed by representing business clients, and law school practice courses do not provide much of an opportunity to do this (there are a few limited exceptions). If they tried, the organized Bar would object, since most businesses can pay for representation. Law schools can offer courses and programs in conjunction with business schools, of course, and many do, but I take it the “business sense” recommended by Dilloff and Hamilton refers to business sense of the “client identification and loyalty” kind, and that “sense” can be learned only by working for actual clients.



that it is possible to have a world in which there are only benefits and no burdens, only income and no expenses, but this vision of law firm nirvana does not exist. Firms will have to bear some of the cost of new lawyer training whether they want to or not.

Proponents of “practice ready” education want to change the nature of law school radically, not just add a few skills courses to the curriculum. Skills courses have been around for decades they argue, and yet most law school graduates still are not “practice ready.” In their view, law schools need to reverse the traditional instructional hierarchy, to make skills instruction the central theme and “thinking like a lawyer” the subplot. The problem with this argument is that it is based on a kind of worker-bee myopia that fails to understand education’s principal contribution to development: to provide students with the knowledge and critical thinking skills needed to adapt received wisdom to changing circumstances, beliefs, and needs over time. For legal education that means help law students devise more effective ways to structure law and legal institutions and live worthwhile professional lives. Reducing legal education to motor skill training is just another example of the destructive short-term thinking that pervades the present day worlds of law and business.

### III. “THINKING LIKE A LAWYER” IS THE ULTIMATE PRACTICE SKILL

There is a more substantial objection to the argument for “practice ready” graduates, however, than the fact that law schools cannot produce them. Increasing the time spent training students in practice skills will divert attention and resources from what law schools do best: teach the critical thinking skills that underlie and give shape to lawyer practice behavior generally. Helping students learn to “think like a lawyer,” as the expression goes,<sup>61</sup> is the most

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<sup>61</sup> The term usually is defined to include analytical and analogical reasoning, theory building, the interpretation of texts, instrumental and strategic reasoning, and persuasive argument. See Fried, *supra* note 31; Sunstein, *supra* note 31. Dean Arthurs has pointed out the essential connection between these reasoning skills and substantive knowledge. See Harry Arthurs, *The Future of Legal Education: Three Visions and a Prediction* 6 (Osgoode CLPE Res. Paper No. 49/2013, Sept. 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2349633](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2349633) (describing law schools as “knowledge communities” that “exist to collect, critique, produce and disseminate knowledge”). Ironically, critical thinking skills, in one or another variation, are usually listed as among the important lawyer competencies used to support the case for “practice ready” graduates. See Hamilton, *supra* note 14, at 5, 6, 12,

important contribution law schools can make to professional development. “Thinking like a lawyer” is the ultimate practice skill and for law schools to reduce the attention given to developing it would be a self-inflicted wound of immense proportions.<sup>62</sup>

Both in presenting their own work and evaluating the work of others, lawyers use a set of skills they refined (and sometimes learned for the first time) in law school: reasoning analogically, analyzing facts, synthesizing principles, devising ends-means strategies, interpreting texts, marshaling reasons and evidence to support arguments, and the like.<sup>63</sup> These skills underlie and direct even the most mundane law practice tasks, from scanning a deposition transcript for issues to argue; reviewing a contract for errors and omissions; eliciting witness testimony to support a theory of the case; interviewing a client to determine if he has a claim; choosing a strategy for gaining leverage in negotiation;<sup>64</sup> or making an argument to an adversary, mediator, bureaucrat, colleague, client, witness, judge, or clerk. Each of these tasks begins with and is grounded in an understanding of the background normative standards and practical constraints that govern the issues under consideration and define the parties’ options. Without this understanding a lawyer’s behavior would be only coincidentally effective.<sup>65</sup>

Take the client interview as a case in point. A client might tell a jumbled, partial, or confusing story about something that happened to him and ask if he had any legal rights in the matter. A law-

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21 (describing survey results in which “analytical skills,” “analysis and reasoning,” and “ability in legal analysis and legal reasoning” are listed as among the most important lawyer competencies).

<sup>62</sup> See Barton, *supra* note 1, at 39 (“[C]orporate clients are seeking . . . not their time, but their insights” from lawyers.). See also Michelle M. Harner, *The Value of ‘Thinking Like a Lawyer,’* 70 MD. L. REV. 390 (2011) (describing thinking like a lawyer as the “hallmark” of being a lawyer).

<sup>63</sup> Law schools are able to teach these skills at sophisticated levels because the conditions needed for high-level thinking are present in schools to the same extent that they are present in practice.

<sup>64</sup> Reconciling interests, if you are a communitarian. See Robert J. Condlin, *Every Day and in Every Way We Are All Becoming Meta and Meta, or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)*, 23 OHIO ST. J. ON DISP. RESOL. 231, 236-44 (2008) (describing communitarian bargaining).

<sup>65</sup> Law school graduates often take their critical reasoning skills for granted, believing that they had them when they entered law school. It is one of the many ironies of the present day critique of legal education that critics use skills learned in law school to criticize law schools for failing to teach them skills.

yer would need to ask about the relevant factual details the client did not provide on his own, organize and evaluate the story to determine if a legal remedy was available, predict the chances of a successful recovery, and calculate the cost of obtaining it, all before being able to say anything helpful to the client about what he might do. The lawyer could try to learn this information and do this analysis using a standard set of questions and rules of thumb put together somewhat serendipitously from practice manuals, past experiences, other lawyers' tips, and the like, but this would treat the client's story as generic, miss its idiosyncratic features, and guarantee only that the lawyer could complete the interview, not conduct it skillfully. Questioning in a boilerplate manner like this often amounts to little more than practicing mistakes (one's own and others'), under the guise of following received wisdom.

To be truly effective, the lawyer's inquiries and analysis would need to be adapted to the circumstances of the case, and to make those adaptations he would need to understand the legal and practical norms that govern the situation and the wide variety of ways in which they could be interpreted and used. There is a direct connection in interview questioning, in other words, between ideas in the head and questions out of the mouth. Questions are the end product of an analytical process that is no less important because it operates below the surface and is taken for granted. The ability to ask questions in a confident and engaging manner is a far less useful skill than the ability to think of what questions to ask in the first instance.<sup>66</sup> If one had to choose between form and substance (though the choice is rarely quite that stark), an awkwardly asked question that is on point is preferable to a stylishly asked question that is irrelevant. The former may have only a small chance of being helpful, but the latter has none. Only lawyers who can think like lawyers can ask questions like lawyers.

Legal negotiation provides another example. At its core, negotiation is an advocacy process. Judgments about acceptable outcomes inevitably are based on comparisons of proposals on the table with available alternatives.<sup>67</sup> The best negotiators use normative

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<sup>66</sup> *But see* Dilloff, *supra* note 14, at 434 ("Law schools . . . must . . . teach . . . their students . . . how to say something in addition to what to say.").

<sup>67</sup> Professors Fisher and Ury famously labeled the alternative to a negotiated agreement as a BATNA, a "best alternative to negotiated agreement." ROGER FISHER & WILLIAM URY,

standards to make these comparisons, so that their agreements are not the product of routine, arbitrariness, power, or fortuity.<sup>68</sup> Lawyers usually disagree about normative standards, however, both their meaning and application, and to resolve these disagreements they discuss their competing views until they reach some sort of mutually acceptable understanding (even if it is only to agree to disagree). A negotiator who is able to persuade the other side to see things his way in these discussions, everything else equal, does better than a negotiator who is not.

Negotiation usually is personal and conducted in private, and these qualities make the stylized properties of public advocacy both rude and ineffective. The best negotiators discuss their differences in a conversational manner,<sup>69</sup> expanding one another's understanding of the problem rather than dismissing their different views out of hand. They try to inform and instruct more than impress and compete, and to create doubt in pre-negotiation assessments more than capitulation to a superior view. In a real sense, they act as both colleagues and adversaries, searching for outcomes in their mutual interest while trying to bend those outcomes to their individual advantage. While conversational, therefore, negotiation also is substantive.<sup>70</sup> A skillful negotiator does not try to turn a weak claim into a strong one by using socio-psychological tricks, clever word play, or rhetorical force. Instead, he invents more and better arguments, and supports them with more and better reasons, than his counterpart on the other side. He convinces his adversary, not that he is the better negotiator, but that he has the stronger case.<sup>71</sup> Advocacy of this sort depends upon the ability to spot issues, generate arguments, and analyze problems from a greater number of perspectives than an adversary. A negotia-

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GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 101-11 (1981). I focus on dispute negotiation in the example given, but advocacy plays an important role in transactional negotiation as well. See Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 3-11 (1992) (describing the differences between dispute settlement and transactional negotiation). In commercial transactions the terms of a deal usually depend upon what is regarded as the "market" for that particular type of deal at that particular time, but what is "market" changes frequently and its present meaning is always subject to debate.

<sup>68</sup> See Condlin, *Bargaining Without Law*, *supra* note 14, at 303-06 (describing the different bases on which disputes may be resolved informally).

<sup>69</sup> See *id.* at 310-26 (describing conversational advocacy).

<sup>70</sup> See *id.* at 313-16 (describing the substantive properties of conversational argument).

<sup>71</sup> See *id.* at 324.

tor who does this will be deferred to when it comes time to settle, and a negotiator who is deferred to will get better results. When personal qualities and practical factors are held equal, effective negotiation has almost a one-for-one relationship with skillful legal analysis and argument.<sup>72</sup> One needs to think like a lawyer, in other words, to negotiate like a lawyer.

Practice readiness also requires an understanding of lawyer role as much as a command of lawyer practice skill. For most students, law school will be the last good opportunity to consider in detail, relatively unconstrained by financial, familial or psychological factors, how best to live their lives as lawyers: what ends to serve, what interests to defend and advance, and what principles to stand for. Law schools have an obligation to help students think through these questions, identifying the various paths available in legal work and constructing standards for choosing among them. As part of this obligation, they need to encourage students to ask themselves, albeit provisionally, where they fit in professional life (or if they fit at all), and to what types of settings they are best suited.<sup>73</sup> Practice itself does not provide many opportunities or incentives for considering these questions, or much help in answering them.

Not all students will be interested in issues of professional role, of course; many will be pre-occupied with technique. That is the novice's curse. But that is not an argument against organizing legal instruction around them. Issues of role pervade law practice and someone interested in a satisfying career as a lawyer must come to grips with them or risk being rudderless in professional life.<sup>74</sup> From a

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<sup>72</sup> It is widely believed that negotiation is mostly bluff and bluster and that the discussion of substantive concerns plays a small and not very important part. This can be true, and will be if one does not insist on more, but when bluff and bluster confront reasons and evidence, each advanced with equal force, reasons and evidence win. To think otherwise is to believe that substantive law is irrelevant to legal disputes when substantive law defines legal disputes. I discuss this topic at length in Condlin, *Bargaining Without Law*, *supra* note 14, at 298-309.

<sup>73</sup> Neil Dilloff recommends using practitioners to help examine these questions. See Dilloff, *supra* note 14, at 453 ("There is nothing like spending ten minutes with a senior practitioner, government official, in-house counsel, or law firm partner to get a truer picture of what practicing law means in different roles."). He has a somewhat exaggerated view of the teaching potential of ten minutes, even for "senior practitioners," but his claim is true if read literally and the phrase "nothing like" is emphasized.

<sup>74</sup> See David L. Chambers, *Satisfaction in the Practice of Law: Findings from a Long Term Study of Attorneys' Careers 2* (Univ. Mich. Pub. Law & Legal Theory Research Paper No. 330, May 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=227](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=227)

law school's perspective, students who confront such issues will be better adjusted and more thoughtful lawyers than students who do not, and adding even a small number of better adjusted and more thoughtful lawyers to the profession is better than adding a legion of unthinking automatons with virtuoso motor skills.<sup>75</sup> Even students who believe they know how they want to live their professional lives will benefit from testing their views. If the views are well founded, testing will confirm them, and if they are not, testing will be a life-saver. Providing a forum for the critical examination of how to live one's life as a lawyer is one of the most important contributions law schools can make to the development of students. To shortchange the examination of that issue in order to prepare students to navigate the currents, shoals, and reefs of law office politics would be perverse.

#### IV. WHY SKILLS INSTRUCTION HAS ALWAYS BEEN A HARD SELL IN THE LEGAL ACADEMY

The campaign to expand the place of skills instruction in the law school curriculum has met with mixed success over the years and this makes it somewhat of an anomaly in law school curricular reform. Other reform projects, and there have been many, have received clear up or down votes, becoming full citizens of the law school or disappearing altogether (some doing both). Each has had its probationary period when acceptance hung in the balance, but unlike skills instruction, each eventually has been taken in or kicked out. Yet, after all these years, skills instruction remains in a kind of curricular limbo, its status still the subject of intense debate. How can this be explained?<sup>76</sup>

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4162 (survey of Michigan Law graduates found that "overall work satisfaction [was] much more closely related to perceptions of the social value of their work and the quality of their relations with co-workers than it [was] to their satisfaction with income or their prestige in the community"). See also DANIEL H. PINK, *DRIVE* 99 (2009) (describing the importance of autonomy to career satisfaction and the law firm billable hour as "perhaps the most autonomy-crushing mechanism imaginable"); Steven J. Harper, *A Dangerous, Million-Dollar Law School Distraction*, AM. LAW. DAILY (July 26, 2013), [http://www.americanlawyer.com/PubArticleALD.jsp?id=1202612503156&A\\_Dangerous\\_MillionDollar\\_Law\\_School\\_Distraction&slreturn=20130626132953](http://www.americanlawyer.com/PubArticleALD.jsp?id=1202612503156&A_Dangerous_MillionDollar_Law_School_Distraction&slreturn=20130626132953) ("Anyone desiring to become an attorney shouldn't do it for the money.").

<sup>75</sup> See Konefsky & Sullivan, *supra* note 17, at 2 ("The real task of legal education must be to prepare students, as best we can, for a lifetime of successful, ethical, and personally rewarding practice.").

<sup>76</sup> The history of clinical legal education does not offer much help with this question. Af-

Part of the answer, no doubt, lies in the nature of skills instruction itself. To some extent it is an alien element in the world of legal education. Historically, legal education has been about the study of law, its content, nature, and effects, the interests it serves, and the extent to which it embodies and effectuates the normative commitments of the society. The goal in such study is intellectual understanding, and the skills most directly implicated are analysis and research. Skills instruction, on the other hand, is about what law delivers more than what it promises and legal education always has been concerned more with promise than delivery.

One way to understand the legal academy's reluctance to embrace skills instruction is to identify the common properties of successful curricular reform efforts in the past, to see if they define a tacit standard of acceptance, and then hold skills instruction up to that standard. The first step in doing this, constructing a consensus list of successful reforms, is itself controversial. Many legal academics still see doctrinal analysis and statutory interpretation as the only true subjects of law study, and dismiss everything else as marginal, faddish, or irrelevant. Others see only their own particular policy or modeling projects as fully assimilated and everything else as temporary or shallow. Sometimes it is difficult even to determine what counts as a reform: does it include a marginal extension of, or improvement on, an original theory, for example, or must it offer a wholly distinctive view? However one answers these questions, there have been several undeniable reforms of the American law school curriculum over the years (albeit sometimes temporary), and most of them have been pro-

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ter much huffing and puffing in the 1960s and 1970s, clinical and traditional law faculty members reached a kind of educational cease-fire, agreeing to co-exist but not necessarily to think kindly of one another. The cease-fire was not memorialized in any formal document and it was not reached at the same time in all law schools. Instead, it just sort of happened, serendipitously and irregularly as law faculty members, clinical and traditional alike, started to live with one another side by side (or more accurately, floor by floor, or building by building), if not harmoniously, at least in mutual toleration. While not ideal, this seemed to work but, sadly, it was not destined to last. Perhaps peace was just too lifeless, too unprincipled, or too low-tech for some, but whatever the reason, the pot was stirred again by the MacCrate and Carnegie Reports (and now, the Task Force on Legal Education), and the game was back on. See MACCRATE, *supra* note 30; EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (William M. Sullivan et al. eds., 2007) [hereinafter CARNEGIE]. Throughout all of this ferment "thinking like a lawyer" has remained first among equals in the spectrum of legal educational goals, but the millennialist revival of this never-ending story has placed that status in jeopardy once again. Somewhere, the ghosts of Marx and Santayana must be chuckling.

duced either by a “law and . . .” movement of some sort, or a critical jurisprudential school of thought. My own list would include the programs in law and policy sciences,<sup>77</sup> law and social sciences,<sup>78</sup> law and philosophy,<sup>79</sup> law and economics,<sup>80</sup> and law and health sciences,<sup>81</sup> as well as the critical jurisprudential schools of legal realism,<sup>82</sup>

<sup>77</sup> See, e.g., Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); Myres S. McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L.J. 1345 (1947). See also STEVENS, *supra* note 4, at 265-70 (describing “Law, Science, and Policy” approach to law study). The first successful curricular reform of legal education was the case method itself, but I will treat that as the slate on which successive reform projects have written. See STEVENS, *supra* note 4, at 36, 38, 52-56, 60-63, 122-23 (describing the introduction of the case method in American law schools).

<sup>78</sup> This category includes courses of instruction associated with the Law & Society movement, see Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986); John Monahan & Laurens Walker, *Social Science Research in Law: A New Paradigm*, 43 AM. PSYCHOLOGIST 465 (1988), as well as those of earlier Sociological Jurisprudence. See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912). It also includes courses of instruction in Law and Psychology/Psychiatry. See, e.g., Stone, *supra* note 44; Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91 (1968).

<sup>79</sup> See STEVENS, *supra* note 4, at 274-75; Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 STAN. L. REV. 1627 (1993); Symposium, *Contemporary Legal Theory*, 36 J. LEGAL EDUC. 441 (1986); William Twining, *Academic Law and Legal Philosophy: The Significance of Herbert Hart*, 95 L.Q. REV. 557 (1979).

<sup>80</sup> See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (1988); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (2d ed. 1989); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); James Boyd White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161 (1986).

<sup>81</sup> LAW, MIND, AND BRAIN (Oliver R. Goodenough & Michael Freeman eds., 2009); LAWRENCE O. GOSTIN ET AL., *LAW AND THE HEALTH SYSTEM* (2014); Oliver R. Goodenough & Micaela Tucker, *Law and Cognitive Neuroscience*, 6 ANN. REV. L. & SOC. SCI. 61 (2010); Owen D. Jones, *Seven Ways Neuroscience Aids Law*, in *NEUROSCIENCE AND THE HUMAN PERSON: NEW PERSPECTIVES ON HUMAN ACTIVITIES* (A. Battro, S. Dehaene & W. Singer eds., 2013); Nita A. Farahany, *Incriminating Thoughts*, 64 STAN. L. REV. 351 (2012); Frank Pasquale, *Grand Bargains for Big Data: The Emerging Law of Health Information*, 72 MD. L. REV. 682 (2013); Frank Pasquale, *Access to Medicine in an Era of Fractal Inequality*, 19 ANNALS HEALTH L. 269 (2010); Amanda C. Pustilnik, *Violence on the Brain: A Critique of Neuroscience in Criminal Law*, 44 WAKE FOREST L. REV. 183 (2009).

<sup>82</sup> See JEROME FRANK, *LAW AND THE MODERN MIND* (1930); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* chs. 5 & 6 (1992); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); WILFRID E. RUMBLE, JR., *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (1968); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (2d ed. 1973); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1979).



legal process,<sup>83</sup> critical legal studies,<sup>84</sup> feminist legal theory,<sup>85</sup> critical race theory,<sup>86</sup> and LGBT theory.<sup>87</sup> Many other projects, schools, pro-

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<sup>83</sup> See KALMAN, *supra* note 82, at 222-24; STEVENS, *supra* note 4, at 270-71. For the bible of the legal process movement, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1958). See also William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 709-23 (1991) (discussing the “new” legal process scholarship using the work of John Hart Ely as an example).

<sup>84</sup> See, e.g., MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); STEVENS, *supra* note 4, at 275; Symposium, *Critical Legal Studies*, 36 STAN. L. REV. 1 (1984); Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245 (1989); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); David M. Trubeck, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984); Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

<sup>85</sup> See, e.g., FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Rosanne Kennedy eds., 1991); ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989); DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* (1989); Isabel Marcus et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11 (1985); Symposium, *Feminism in the Law: Theory, Practice and Criticism*, 1989 U. CHI. LEGAL F. 1; Owen M. Fiss, *What is Feminism?*, 26 ARIZ. ST. L.J. 413, 423-28 (1994).

<sup>86</sup> See, e.g., DERRICK A. BELL, JR., *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Stephen L. Carter, *Academic Tenure and “White Male” Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065 (1991); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1 (1989); Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39 (1991); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219; Colloquy, *Responses to Randall Kennedy’s Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990).

<sup>87</sup> See, e.g., David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997 (2002); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

grams, and movements of varying sizes and scope no doubt could be included in this list.<sup>88</sup>

“Law and . . .” programs are supplementary in nature, cross-pollinating the legal subject matter with theories and methods from other mature disciplines.<sup>89</sup> They expand theoretical perspectives and methodological tools to permit a more comprehensive examination of the nature and function of law, the effectiveness of legal institutions, and the legitimacy of legal results. Critical jurisprudence, on the other hand, does not supplement legal study so much as seek to transform it. It argues, in one form or another, that conventional theory distorts and effaces the interests of marginalized groups, is internally contradictory, is based on false and ideologically motivated assumptions of social fact, is intellectually incoherent, and overstates its own

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<sup>88</sup> They could include: legal formalism, *see, e.g.*, Robert W. Gordon, *The Elusive Transformation*, 6 YALE J.L. & HUMAN. 137, 154-57 (1994) (reviewing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992)); M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); analytic jurisprudence, *see, e.g.*, Edgar Bodenheimer, *Modern Analytical Jurisprudence and the Limits of Its Usefulness*, 104 U. PA. L. REV. 1080 (1956); H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); rights jurisprudence, *see, e.g.*, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); law and literature, *see, e.g.*, Symposium, *Law and Literature*, 60 TEX. L. REV. 373 (1982); Symposium, *Law and Literature: “No Manifesto,”* 39 MERCER L. REV. 739 (1988); Robin L. West, *Adjudication Is Not Interpretation: Some Reservations about the Law-as-Literature Movement*, 54 TENN. L. REV. 203 (1987); law and interpretation, *see, e.g.*, Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989); civic republicanism, *see, e.g.*, Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801 (1993); legal pragmatism, *see, e.g.*, Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 383-85 (1986); Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); law and religion, *see, e.g.*, MILNER S. BALL, *THE WORD AND THE LAW* (1993); HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* (1993); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993); THOMAS L. SCHAFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* (1981); and law and globalization, *see* Carole Silver, *Getting Real About Globalization and Legal Education: Potential and Perspectives for the U.S.*, 24 STAN. L. & POL’Y REV. 457 (2013). *See also* John O. Mudd, *Academic Change in Law Schools*, 29 GONZ. L. REV. 29, 30 n.3 (1993-94) (summarizing the literature describing curricular change movements in American law schools).

<sup>89</sup> I think of a discipline as mature if it has a well-defined intellectual history, more than one major theoretical tradition, conflicting schools of thought within each tradition, shared analytical and empirical methods, and a core of basic knowledge that most in the discipline accept as true.

impartiality.<sup>90</sup> In a sense, it challenges law to have the courage of its convictions.<sup>91</sup>

While ostensibly different, therefore, one an outsider project interested in broadening law study and the other an insider project interested in transforming it, “law and . . .” programs and critical jurisprudential theories have important properties in common. Both are normative projects, for example, concerned with issues of law, politics,<sup>92</sup> and morality more than issues of skills, training, and technique, and focused on reforming rules, policies, and procedures more than refining practice conventions and consensus strategies. Change legal rules, these projects seem to assume, and justice will be done; expand theoretical perspectives and understanding will increase. Except for some forms of feminist jurisprudence, neither project is a “thousand points of light” or “eternal vigilance” type of reform in which collective change is seen as the sum of individual changes in the lives of discrete actors. Each seems suspicious of reforms that require the coordination of thousands of individuals over time, in fact, where one cannot be sure everyone will do his part, or even that the parts will be understood consistently from one person to the next. If the satisfaction in legal thinking comes from knowing that future generations will march to the “measure of [one’s] thought,”<sup>93</sup> it is not surprising

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<sup>90</sup> The so-called nihilists state these claims in the strongest terms. See, e.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

<sup>91</sup> Though this challenge often is expressed in the language of “fancy theory,” for the most part critical jurisprudence is not a theory-driven project. Its proponents, trained mostly in law, argue the side of the analytical coin that says “not.” They challenge popular beliefs using familiar legal ideas (e.g., justice, fairness, even-handedness, consistency, equality, and the like) and methods in a manner everyone in law school recognizes and accepts as legitimate. They do not need to be assimilated because they start in the mainstream, and this explains their relatively quick and easy acceptance, notwithstanding the often unwelcome nature of what they have to say. The Legal Realists and Critical Legal Studies “Crits” are the classic examples.

<sup>92</sup> I use “politics” here in its classical sense, as shorthand for the normative ideas and principles (e.g., justice, fairness, equality) that a society uses to interpret and govern social life. I do not mean organizational politics.

<sup>93</sup> See THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS 32-33 (Max Lerner ed., Modern Library 1953) (1943) [hereinafter HOLMES];

Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying

that the properties of law school curricular reform would be similarly grandiose.

If past curricular reform efforts have been concerned principally with issues of law, politics, and morality, therefore, and have been based on ideas borrowed from other mature disciplines or critical jurisprudential schools of thought, skills instruction has a different focus and a different pedigree. It is about lawyer behavior more than law (and individual lawyer behavior more than lawyer behavior in the aggregate), and strategic maneuvering more than politics and morality.<sup>94</sup> For the most part, it accepts the moral and political beliefs of the existing legal world as givens and focuses on teaching students to achieve instrumental success within that world. Its analytical categories are technical more than political, and its perspective is personal more than systemic. It is a field without its own distinctive Freud-Marx-Jesus debates (and more importantly, without its own Freud, Marx and Jesus), which is to say that it is a field that is not yet completely conceptualized, connected, and grounded.<sup>95</sup>

The study of skills need not be relentlessly instrumental. Jurisprudentially, it could be based on a kind of Holmesian “bad man”

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man, and in hope and in despair have trusted to your own unshaken will—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought—the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army . . . it is only thus that you can know that you have done what it lay in you to do—can say that you have lived, and be ready for the end.

*Id.*

<sup>94</sup> I do not suggest that practice skills are unrelated to politics and morality, just that the connections among the three are not self-evident and often are not made explicit in the literature on skills instruction.

<sup>95</sup> Accord Joseph P. Tomain & Michael E. Solimine, *Skills Skepticism in the Postclinic World*, 40 J. LEGAL EDUC. 307, 316 (1990) (“[U]ntil we connect skills programs to a sound, coherent, normatively grounded theory of lawyering—skills training will remain an empty technical exercise.”). In a sense, skills instruction has the potential to re-work legal education radically, substituting a functionalist approach to law for a conceptualist one. In this, it shares the agenda of Legal Realism, at least Realism as envisioned in the 1920s and 30s, if not the one institutionalized in the 1950s. See KALMAN, *supra* note 82, at 230-31. But just as the potential of Realism was squelched by the Realists, *see id.*, so too the potential of skills instruction is in danger of being squelched by skills teachers. This happens all too often when curricular reform efforts become mainstream and produce what sociologists used to call the “institutionalization of means” and the “formalization of routine.” See J.B. LON HEFFERLIN, *DYNAMICS OF ACADEMIC REFORM* 11 (1969).

(or Legal Realist “functionalist”) view, for example, one that looks at law and legal institutions from the perspective of how they will be manipulated by self-interested actors, and concerned with making suggestions, both to individuals and institutions, for neutralizing (or at least minimizing the harmful effects of) that manipulation.<sup>96</sup> Early in its history, skills instruction looked as if it might develop in a jurisprudential direction, but for the most part that did not happen.<sup>97</sup> Instead, many of its practitioners went down the path of technique (“best practices,” in the now-fashionable terminology),<sup>98</sup> inventing and cataloguing socio-psychological moves and maneuvers (adapted from ego psychology, game theory, behavioral economics, and the like) for instrumental use in interactions with clients, adversaries, and others. When this happened, issues of politics and morality were minimized, placed on hold, or dropped out of the picture altogether, and at that point skills instruction began to look like a foreign element to many in the legal academy.<sup>99</sup>

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<sup>96</sup> See HOLMES, *supra* note 93, at 74:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

*Id.*

<sup>97</sup> For discussions in the early clinical literature of the relationship of skills to justice, see, e.g., William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980); Marie Ashe, *The “Bad Mother” in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017 (1992); Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 CLINICAL L. REV. 41 (1994); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990). Much of this writing takes the form of richly annotated ethnographies of law practice, discussing skills in the context of what it means to succeed as a lawyer while treating others humanely, pursuing justice before material or reputational success, and living full emotional, social, and intellectual lives.

<sup>98</sup> See CARNEGIE, *supra* note 76; ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION (2007).

<sup>99</sup> For the most part, the early clinical law professors were former legal services lawyers whose political and moral views shaped their teaching in very explicit ways. See Anthony G. Amsterdam, *Clinical Legal Education—A 21<sup>st</sup> Century Perspective*, 34 J. LEGAL EDUC. 612 (1984); Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977); Michael Meltsner & Philip G. Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 CLEARINGHOUSE REV. 259 (1973). They taught about poverty and its effects, institutional ineptitude and unresponsiveness, distributional inequities, preju-

The most prominent of the skills instruction reforms, the clinical education movement of the 1960s and 1970s, was based on a substantive critique of legal education that succeeded in major part because it was made at a time (not unlike the present) when the legal world was in turmoil and law schools were undergoing a crisis of confidence.<sup>100</sup> Law faculties varyingly were convinced, intimidated, or shamed into increasing their skills offerings but not to the point where such instruction became the central focus of law study. Some still regret the decision to do this and they comprise a large segment of those opposed to the “practice ready” reform.<sup>101</sup> Others, particularly those who participated in clinical courses in law school, are willing to give skills instruction more time to develop, but they too often are reluctant to make it the focal point of law study. Proponents

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dice and its consequences, and the possibilities and limits of an ends-based morality authorizing system manipulation to produce good outcomes in individual cases. See Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI-KENT L. REV. 243, 275 (1992) (“Most of the early programs in clinical education dealt with problems of poverty and thus involved the law school in performing services for the poor as well as addressing the issue of how problems of the poor could best be solved.”); Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31, 33 (1993) (“In some clinics there is a political agenda grounded in liberalism that remains committed to using the legal system as a vehicle for change.”). Many (but not all) of those who followed in the wake of these early clinicians dropped this legal services agenda, however, in an effort to broaden the appeal of clinical courses to law students generally, and they did not always replace it with a jurisprudential equivalent. See Tomain & Solimine, *supra* note 95, at 314-15; Tarr, *supra*, at 35-36 (“Some clinics want[ed] to de-emphasize the political agenda of their programs to make them more palatable to various constituents, such as law school faculties and administrations, conservative students, local bars, funding sources, and alumni. By focusing on ‘skills’ instead of on poverty law and justice, the programs seem less objectionable.”); Peter Toll Hoffman, *Clinical Scholarship and Skills Training*, 1 CLINICAL L. REV. 93, 105 (1994) (“[N]o doctrine or theory underlies many lawyering skills, but instead only a collection of anecdotal suggestions about how to accomplish particular tasks . . . . [U]ntil [the skills] subject matter can be presented in the guise of a theory, it will receive little respect or recognition from law teachers . . . .”). The legal services perspective remains alive and well in some clinical programs, see *2013 Conference on Clinical Education in San Juan, Puerto Rico*, 2013 AALS NEWS (Aug. 2013), at 22-24 (describing clinical programs focused on social justice issues); Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 CLINICAL L. REV. 39 (2013) (describing a model of clinical education that “holds great potential for creating systematic change,” but it is no longer the dominant model everywhere, having lost out to the “Best Practices” movement in many places).

<sup>100</sup> See Condlin, *supra* note 4, at 332-36 (describing the political forces that coalesced to pressure law schools to adopt skills training programs).

<sup>101</sup> See Lande, *supra* note 4, at 7 (describing “skepticism by some faculty about the value of skills courses and a belief that students should learn practical skills after graduation” as one of the obstacles to making legal education more practical).

of skills instruction have yet to convince the professoriate that the study of practice skill is a natural extension of the intellectual and substantive activity going on in the rest of law school, the application of “thinking like a lawyer” skills to the practical realm. That this would remain a live concern more than fifty years after the clinical revolution of the 1960s and 1970s reflects the difficulty of the issues.<sup>102</sup>

## V. CONCLUSION

The debate over the place of “practice ready” skills instruction in American legal education is a little like the Thirty Years War.<sup>103</sup> The causes of the War went back decades to unresolved grievances, unfulfilled promises, unfair treaties, unmade marriages and unrealized images of one’s place in the world, so that while ostensibly about religion, the War also was about the division of wealth, territory, status, and power. It flared up and died down on a regular basis for at least thirty, and as many as one hundred, years depending upon where one lived, and more than once when it appeared to be over a new country was heard from (usually at the prodding of some evil genius), in the form of an invasion or an alliance, and the fighting started all over again. Like two-party resolutions to multi-party bargaining problems, peace treaties routinely were desta-

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<sup>102</sup> Practitioners do not always understand that the issues are difficult. See Dilloff, *supra* note 14, at 428 (wondering why fifteen years after the MACCRATE REPORT, and five years after the CARNEGIE REPORT, “there has been [so] little comprehensive reform in how lawyers are trained”); Lande, *supra* note 4, at 4-5 (describing the Bar’s repeated attempts to make major changes in legal education and the limited success it has had in those efforts). For a description of the widespread contradictions, confusions, and incoherencies in the MACCRATE REPORT, and an explanation of why it should not have been implemented, see Robert J. Condlin, *MacScholarship: Another Perspective on the MacCrate Report, Lawyering Skills, and Legal Education* (Sept. 12, 1994) (on file with author).

<sup>103</sup> At first, the War looked like just another religious conflict, common in central Europe at the beginning of the seventeenth century, when the forces of Lutheran Protestantism challenged the armies of the Catholic Counter-Reformation at every available opportunity. But the fighting that began with an airborne assault on the Catholic Lords Regent of Matthias of Austria, King of Bohemia, by a group of Protestant delegates to the Prague assembly was no ordinary war. Lasting nearly a century, it drew all of Europe into its vortex, and by the time it was over it had helped undermine the authority of the Hapsburg dynasty, accelerated the demise of the Holy Roman Empire, and brought about a permanent transformation in European statecraft. See HENRY KISSINGER, *DIPLOMACY* 56-75 (1994); GEOFFREY PARKER, *THE THIRTY YEARS’ WAR* *passim* (1984); *THE THIRTY YEARS’ WAR* *passim* (Theodore K. Rabb ed., 1972) [hereinafter RABB].

bilized by those treated badly by the settlement terms, those who would benefit from the devastation more fighting would bring, and those who simply liked to fight. Only an epoch-making shift in geopolitical thinking, from the universalist morality of medieval Christianity's "one god in heaven and one ruler on earth," to the modern Realpolitik based view of *raison d'état* and balance of power, freed the belligerents to design and implement a lasting peace.<sup>104</sup>

The law school skills instruction debate also goes back decades to unresolved disagreements, unrequited overtures, and unforgiven slights, sometimes reducing to a trickle, only to become resurgent at the urging of a powerful interest group or strong personality; and it too seems destined never to end.<sup>105</sup> While ostensibly about the content and structure of American legal education, it also is about the allocation of power, status, and authority in the legal profession, the important practical question of who will pay for what, and the seemingly intractable problem of how to connect theory to practice.<sup>106</sup> Whether the debate will end like the War, with a reconciliatory intellectual breakthrough, remains to be seen, though there are reasons to be doubtful, and the argument for practice ready graduates shows why. Where the discussion of morality and politics is called for, it focuses on moral skills and costs. Where theory is needed, it offers

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<sup>104</sup> The entire experience, in the words of one commentator, was "an object lesson on the dangers and disasters which can arise when men of narrow hearts and little minds are in high places." C.V. Wedgwood, *The Futile and Meaningless War*, in RABB, *supra* note 103, at 32.

<sup>105</sup> While it may have no obvious analogue to the Second Defenestration of Prague, the debate is replete with arguments about not "throwing out the baby with the bath water." See, e.g., Frank, *supra* note 4, at 914-18 (throwing out traditional instruction); Carl McGowan, *The University Law School and Practical Education*, 65 A.B.A. J. 374 (1979) (throwing out skills instruction). See also KALMAN, *supra* note 82, at 175 ("Frank wanted to throw the baby out with the bath water.").

<sup>106</sup> Steve Ellmann describes the problem well. "[I] think that [one of] the reasons for practice education's incomplete acceptance . . . is that there really is a longstanding, deep anxiety among law professors (non-clinicians and clinicians alike) about whether theory and practice are meaningfully connected. If what 'academics' do is theorize, then a law school needs to be a theoretically focused place; if what professional schools teach is practice, then a law school needs to be a practice-focused place. There are big anxieties, I suspect, on both sides of that sentence. I'd resolve the tension by persuading all concerned that the theory and practice are integrally connected, but as long as that's not a deeply held conviction it will remain true that law teachers primarily concerned with practice will be different from law teachers primarily concerned with theory." Email from Steve Ellmann, Professor of Law and Director of Clinical and Experimental Learning, New York Law School, to author (Aug. 25, 2013) (on file with author).



taxonomy. Where depth is required, it glides cheerfully over the surface. And where multiple points of view are needed, it narrows discussion to a single idea.<sup>107</sup> It has all the qualities of a lost cause having a Warholian moment. Hopefully, the good sense that prevailed in the last century has some life left in it yet.

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<sup>107</sup> See Diamond, *Never Mind*, *supra* note 26 (describing a combatant in the debate characterizing opposing views as “faulty,” “misleading,” “not true,” having only “the external trappings of precision and rigor,” “puffed up exaggeration,” “brazen bluff,” “sloppy,” “slanted,” “ad hoc,” “compromised,” “chest-pounding,” “full of holes,” “dubious,” “flawed,” “fudged,” “distorted,” and “substantially overstated,” just before admitting that he was wrong about all of that).