

# Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice

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*“Ideals without technique are a mess. But technique without ideals is a menace.”*<sup>1</sup>

—Karl Llewellyn

It has been repeatedly concluded over many decades that legal education fails to adequately train students for the practice of law.<sup>2</sup> The educational critique gained vigor in 2007 when the Carnegie Foundation published its study of the professional training of lawyers, concluding that legal education focused too heavily on teaching the cognitive analysis of legal doctrine and not enough on teaching practical skills and professional values.<sup>3</sup> On the heels of the economic downturn, a new line of criticism of legal education has emerged, which takes law schools to task for imposing the soaring costs of legal education on law students graduating into a contracting market for legal services.<sup>4</sup> With declining student enrollments and greater competition among law schools for applicants, the mandate to lower costs is no longer just a moral imperative for many law schools—reductions in tuition revenue make cost-cutting an inescapable reality.<sup>5</sup>

These critiques of legal education push law schools toward two seemingly contradictory goals: (1) provide more practical training to a greater number of students and (2) lower operational costs. This Article is for those who have a sincere desire to do both. It is based on the premise that the educational critique repeated over decades is correct: legal education needs to deliver better education across a broader spectrum of essential lawyering skills and values. However, it accepts the economic reality that law schools cannot achieve this goal by simply grafting additional low-enrollment experiential courses onto the existing law school curriculum and hoping that students will select them in a largely unstructured upper-level curriculum. Instead, the basic program of legal education needs to be restructured to move students in an orderly way through the acquisition of basic legal knowledge, essential lawyering skills, and underlying professional values.

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1. Karl Llewellyn, *On What's Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 662 (1935).

2. For a comprehensive review of the history of such critiques of legal education going back to the end of the nineteenth century, see A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1982–2015 (2012).

3. WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW 74–84 (2007) [hereinafter CARNEGIE REPORT]. The same year, the Clinical Legal Education Association released a volume describing the best practices for planning and implementing a well-rounded program of legal education. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007) [hereinafter BEST PRACTICES REPORT].

4. BRIAN Z. TAMANAHA, THE CRISIS IN LEGAL EDUCATION 18–19 (John M. Conley & Lynn Mather eds., 2011) (discussing the high costs imposed as a result of accreditation); Brent E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S. C. L. REV. 55, 59–60 (2012); Spencer, *supra* note 2, at 1951–56.

5. Todd Petys, *The Analytic Classroom*, 60 BUFF. L. REV. 1255, 1256–58 (2012).

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Although this Article will offer concrete suggestions for both a substantially restructured program of legal education and a menu of suggestions for more immediate and low-cost options, it will first address the mental and psychological barriers to reform—the mistakes in thinking—that keep law faculties from implementing change. At the deepest level of these mental barriers is a basic myth: professional education can meaningfully separate theory from practice.<sup>6</sup> This myth divides law school education into a series of dichotomies. It views the traditional case method of instruction in legal education as teaching “doctrine” and lumps together all other kinds of instruction—legal writing, simulations, clinics, and externships—as teaching “skills.” It aligns the teaching of doctrine with theory and the teaching of skills with practice.<sup>7</sup> It divides responsibility for the law school curriculum, significantly outsourcing lawyering skills instruction to adjunct professors or assigning it to faculty members in job statuses that give them less power and authority in faculty governance.<sup>8</sup> The imbalance in faculty governance perpetuates the imbalance in instruction by keeping curricular decision-making in the hands of traditional classroom teachers.

Part I of this Article challenges the dichotomy between theory and practice. It demonstrates that what is traditionally thought of as “doctrinal” instruction regularly sacrifices breadth of doctrinal knowledge in favor of a particular kind of skills training: the ability to analyze appellate cases, to extract and synthesize their underlying principles, and to apply these principles to new situations.<sup>9</sup> However, instruction based on traditional casebooks also has structural limitations as skills training: (1) it provides students with a closed and artificial universe of legal authority that neither captures the breadth of substantive law they will need as practitioners nor gives them practice in finding the law they will need to know; (2) it fails to contextualize legal analysis and reasoning within the larger framework of the lawyering process, which includes problem-solving and advocating for clients based on their unique circumstances and operating in the context of unstructured facts; and (3) it overlooks the forward-looking analysis associated with transactional lawyering. Once the traditional case method instruction is revealed as a kind of skills training, the foregone opportunities to create more balanced coverage of skills instruction in law school become clear.<sup>10</sup>

Part II of this Article examines the characteristics of integration, collaboration, and progression that represent a well-balanced law school curriculum. Like well-executed Socratic classroom instruction, other lawyering skills, such as client interviewing, client counseling, fact development,

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6. See generally Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577 (1987).

7. *Id.* at 578.

8. Spencer, *supra* note 2, at 2022–23.

9. See *infra* Part I.A.

10. Spiegel, *supra* note 6, at 578.

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negotiation, and persuasion, have underlying analytic frameworks that explain processes of behavior that seem intuitive to experts who have internalized them. By making these underlying frameworks explicit, instructors in other skills courses can use them to step students through the lawyering processes of analyzing facts, understanding their clients' interests and positions, and artfully persuading others.<sup>11</sup> The breakdown between theory and practice erodes the justification for an "outsourcing" model of legal education, in which law school faculty primarily concern themselves with teaching the theory and analysis of appellate cases, and view "other skills" as belonging outside the realm of the legal academy.<sup>12</sup> Additionally, it helps define a greater faculty role in skills instruction, and suggests a different division of responsibility and opportunities for collaboration between the legal academy and the practicing bar in developing a well-rounded program of professional instruction.<sup>13</sup>

Part III addresses two major barriers to reform in legal education: (1) the specter of bar examination, which motivates student demand for bar instruction and drives faculties to offer case method instruction in core bar courses; and (2) concerns about the costs of experiential education, which make it difficult to balance instruction in legal education by simply adding more experiential courses.<sup>14</sup> Part III proposes both structural changes to the legal education and a menu of alternative strategies for delivering skills instruction by redeploying existing resources within law schools and realigning the partnerships between the legal academy and the practicing bar.<sup>15</sup>

#### I. THE CASEBOOK METHOD OF INSTRUCTION

This Part explores both the benefits and the shortcomings of the casebook method of instruction. The appellate case method in legal education was originally designed as an interactive instructional method for uncovering and synthesizing the organizing principles that underlie substantive doctrinal law.<sup>16</sup> However, its lasting value has been secured by a different feature: its facility in instilling the habits of mind that characterize a distinctively lawyer-like mode of analysis and reasoning. In short, the case dialogue method of instruction is valuable as a form of professional skills training.

Yet, viewed as skills training, the case method of instruction can take students only a limited distance toward becoming competent, entry-level professionals because its structure limits the ability to develop a broad range of

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11. *See infra* Part II.A.

12. *See infra* Part II.B.

13. *See infra* Part II.C–D.

14. *See infra* Part III.A.

15. *See infra* Part III.B.

16. *See Spiegel, Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 581 (1987).

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lawyering skills.<sup>17</sup> Moreover, its inefficiency limits its usefulness in teaching either the breadth of substantive doctrinal law a practicing lawyer needs to know, or the research skills lawyers use to find the law that is relevant in their practice.

*A. What the Appellate Case Method Accomplishes*

As originally conceived by Christopher Columbus Langdell, the appellate case method was a method of teaching the substantive law that practicing lawyers needed to know.<sup>18</sup> At the heart of Langdell's pedagogy was a formalist conception of law as a system of finite, neutral, and consistent principles, which could be extracted from the study of appellate cases and used to logically derive correct results in future cases.<sup>19</sup> Langdell sometimes analogized the study of law to the study of natural science.<sup>20</sup> In this view, appellate cases are like specimens that can be examined to reveal fundamental legal doctrines, which could then be "so classified and arranged that each should be found in its proper place, and nowhere else. . . ."<sup>21</sup> It followed from this view of the law that the "proper workshop" for aspiring lawyers was the law library, which Langdell described as being to the law school what "the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, [and] the botanical garden to the botanists."<sup>22</sup> Langdell's belief in the possibility of distilling from appellate cases a complete set of principled doctrines, the mastery of which permitted lawyers to "apply them with constant facility and certainty to the ever-tangled skein of human affairs,"<sup>23</sup> justified the appellate casebook method as the study of substantive doctrinal law.<sup>24</sup>

The formalist jurisprudence that justified the Langdellian case method quickly buckled under critique, captured most aptly by Oliver Wendell Holmes's aphorism that "the life of the law has not been logic: it has been experience."<sup>25</sup> Following Holmes, thinkers aligned with American Legal Realism insisted that judges decide cases, not on the basis of logical deduction, but based on the

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17. *See infra* Part I.B.

18. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 53 (1983).

19. *Id.* at 53–54; Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 11 (1983).

20. WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 11–13 (1973).

21. Grey, *supra* note 19, at 13 (quoting CHRISTOPHER COLUMBUS LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (2d ed. 1879)).

22. Christopher Columbus Langdell, *Harvard Celebration Speeches*, 3 LAW QUARTERLY REV. 123, 124 (1887).

23. Grey, *supra* note 19, at 13 (quoting CHRISTOPHER COLUMBUS LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (2d ed. 1879)).

24. *Id.* at 11–12.

25. OLIVER WENDELL HOLMES, JR. *THE COMMON LAW* 1 (1881). *See also* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897).

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judges' senses of the factual situations and their ideas about good public policy.<sup>26</sup> According to this critique, legal rules and principles do not dictate and may not even determine judicial decisions; rather, judges use legal reasoning to justify the results they intuitively or pragmatically want to reach.<sup>27</sup> Realist critics shared Langdell's premise that the most central task for lawyers was prediction of how judges would decide cases.<sup>28</sup> However, realists insisted that to learn this skill one must study, not the reasoning used to justify decisions, but the behavior of judges and the patterns of judicial decision making.<sup>29</sup>

Despite the effective dismantling of legal doctrine's pretensions to systemic completeness and logical determinacy, the appellate case method of instruction continues to thrive.<sup>30</sup> Why, one might wonder, would such a thoroughly discredited jurisprudence continue to drive what the Carnegie Foundation characterized as the "signature pedagogy" of legal education?<sup>31</sup> The answer is that the case method thrives, not because it teaches legal doctrine especially effectively, but because it imparts an essential set of foundational lawyering skills.<sup>32</sup>

The importance of the case analysis and legal argumentation skills can be explained jurisprudentially as well. As future participants in the legal system, law students need to learn to incorporate what H.L.A. Hart called an "internal point of view" of the law, which views rules of law as the source of reasons for action<sup>33</sup> even as they acknowledge that the development of law may be influenced by external factors.<sup>34</sup> By studying the law from an external perspective, as the Legal Realists did, you can understand, for example, that federal judges appointed by a Democratic president are statistically more likely to rule in favor of civil rights plaintiffs, and that this tendency is amplified if they sit on a panel with other

26. Brian Leiter calls this the "Core Claim" of Legal Realism. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275–76 (1997).

27. Karl Llewellyn, *Some Realism about Legal Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236–42 (1931); Joseph C. Hucheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. Q. 274 (1928).

28. See e.g., HOLMES, *The Path of Law*, *supra* note 25, at 457.

29. JEROME FRANK, *LAW AND THE MODERN MIND* x–xi (1930).

30. Gary Shaw, *A Heretical View of Teaching: A Contrarian Looks at Teaching, the Carnegie Report, and Best Practices*, 28 TOURO L. REV. 1239, 1259–62 (2012).

31. CARNEGIE REPORT, *supra* note 3, at 23–24.

32. Shaw, *supra* note 30.

33. H.L.A. HART, *THE CONCEPT OF LAW* 134–47 (1961).

34. Legal Realism shares an external, behavioral perspective on law with its more recent academic progeny, the Law and Economics, Critical Legal Studies, and Law and Society movements, all of which view the influence of external forces studied in the social sciences on law. Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 632–38 (1989) (discussing Critical Legal Studies, Law, and Economics and feminist legal theory); Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 335–40 (1988) (discussing Critical Legal Studies and Law and Economics as responses to Legal Realism); see generally Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be"* 2005 WIS. L. REV. 365 (discussing the roots of the Law and Society movement in Legal Realism).

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judges appointed by Democratic presidents.<sup>35</sup> But, you cannot argue to a federal judge that her appointment by a Democratic president is a reason for her to rule in favor of your client. Although lawyers' advocacy may be informed by understanding the external economic and political dynamics of law's development and implementation, at the end of the day, legal arguments are crafted in terms of the authority of legal rules and consistency with underlying principles.<sup>36</sup>

The appellate case method has pedagogical benefits that go beyond developing law students' capacity to read cases and formulate legal arguments, the most celebrated of which is its facility in teaching law students the deep structure of "thinking like lawyers."<sup>37</sup> As the recent Carnegie study of professional legal education noted, the repeated parsing of appellate cases in first-year law school classes teaches students to think in a distinctly legal way about the material at hand, honing in on legally relevant facts with "both precision and generality."<sup>38</sup> The professor-student dialogue that characterizes the case method continually shifts the facts or points of view from which students view the facts, demonstrating how different facts would strengthen or weaken different legal arguments.<sup>39</sup> The resultant ability to sort and categorize facts according to generalized elements of legal doctrine—to "spot legal issues"—is part of the deep structure of legal professionalism, defined by the American Bar Association as the "most fundamental legal skill" comprising competence to practice law.<sup>40</sup>

The lasting value in the case dialogue method thus lies in its facility as a particular kind of skills instruction; along with teaching foundational legal doctrine, it effectively hones the skills of legal analysis and argument and develops characteristically lawyer-like habits of thinking.<sup>41</sup> However, once these skills are imparted, its value diminishes, as does students' engagement in the learning process, which falls off dramatically during the second and third years of repetitive case method instruction.<sup>42</sup> The next Section turns to the legal

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35. See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 838–39 (2008) (summarizing the work of "New Legal Realists" on demographic factors influencing judicial decision making).

36. See Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 599 (2007) (explaining the verisimilitude of the case method in relation to practice as a reason why it has survived the Realist critique of "law as science").

37. This shift in emphasis came early in the twentieth century. Spiegel, *supra* note 6, at 582–83.

38. CARNEGIE REPORT, *supra* note 3, at 54–55.

39. *Id.* at 64–66.

40. ABA MODEL RULES OF PROF'L CONDUCT, R. 1.1, cmt. 2 ("Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.").

41. Petyts, *supra* note 5, at 1284–91 (citing longitudinal empirical studies concluding that law students' legal analysis improves over the second or third year of law school).

42. *Id.* at 1270–71; Spencer, *supra* note 2, at 2034–35. *But see* Shaw, *supra* note 30, at 1291–93 (arguing

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knowledge, lawyering skills, and analytic frameworks that the case dialogue method misses—subjects that should form the basis for the law school curriculum beyond the first year of law school.

### *B. What Case Method Instruction Misses*

As effective as the case dialogue method is in teaching the deep structure of “thinking like a lawyer,” the repetitive focus on analysis of appellate cases through three years of law school leaves much to be desired. As a method of teaching substantive law, it is both inefficient and incomplete: the absence of actual clients and factual context under-develops client problem-solving and advocacy skills, and the litigation context of disputes in appellate cases fails to capture the analytic frameworks for using the law in transactional contexts.

#### *1. Inadequacy in Teaching Substantive Law*

Perhaps the most surprising shortcoming of the case dialogue is its inadequacy in covering the basic substantive law that practicing lawyers need to know.<sup>43</sup> Although this criticism may seem novel in an age when the focus of criticism of the case method is its failure to teach a breadth of lawyering skills, the criticism is not new. The 1928 Reed Report noted that, in comparison to the lecture method, the case dialogue method “is so onerous, demanding as it does perhaps twice as much time . . . that it increases the probability that the student will have to omit branches of law, acquaintance with which would be of value to him in his future practice.”<sup>44</sup> In the mid-1940s, Karl Llewellyn similarly decried the case method’s futile attempt at broad subject-matter coverage, arguing that “man could hardly devise a more wasteful method” of imparting knowledge about the law.<sup>45</sup> And, as some have noted, the reality of classroom teaching today reflects a significant trend toward ramping up subject-matter coverage in upper-level courses.<sup>46</sup>

However, attempting meaningful subject-matter coverage with traditional casebook materials is fraught with inherent problems that cannot be solved by moving more quickly through the material provided in a casebook. One of the problems is the sheer volume of material that practicing lawyers need to know, which cannot effectively be collected in a single edited volume. However, there

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for a continuing but diminished role of Socratic method in the second and third years).

43. *Id.* at 1267–69.

44. ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 223 (1921).

45. Karl L. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 215 (1948). Llewellyn’s views shaped the 1944 report of the Committee on Curriculum of the Association of American Law Schools, published as *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345 (1945) [hereinafter LLEWELLYN REPORT].

46. Petys, *supra* note 5, at 1272–73.



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are also deeper structural problems with the casebook format. For example, by providing students with carefully excerpted cases gathered together in a single volume, the case method actively discourages students from developing the research skills necessary to find relevant law for themselves.<sup>47</sup> The focus on extracting legal principles from cases also gives short shrift to developing the analytical skills needed to read and understand the law in fields dominated by statutes and administrative regulations. The need to create casebooks for a national market distorts instruction in areas dominated by state and local law by collecting exemplary cases from diverse jurisdictions rather than teaching the interplay between statutory, administrative, and case law in a single jurisdiction.

The instruction in a typical Criminal Law class illustrates some of these shortcomings. The heart of legal research and analysis in criminal practice begins with state and local statutes, yet Criminal Law casebooks largely ignore in-depth coverage of any particular jurisdiction in favor of collections of appellate cases drawn from diverse jurisdictions. To help teach the importance of statutory analysis, Criminal Law textbooks sometimes utilize the Model Penal Code. However, unlike uniform laws or model rules in other areas, the influence of the Model Penal Code is largely historical;<sup>48</sup> state criminal codes have never closely tracked the language in the Model Penal Code even in areas like the definition of *mens rea*, where the Model Penal Code has been especially influential.<sup>49</sup> Moreover, the basic outline of doctrinal coverage in Criminal Law is imbalanced when compared to the substantive law that lawyers in practice need to know. Students may spend an entire Criminal Law class discussing the idiosyncratic question of whether a defendant can be held criminally responsible for actions taken while sleepwalking, but never touch on common issues that routinely arise in criminal law practice, such as whether a defendant legally possesses illegal drugs found underneath the passenger's seat of the car he is driving.

Law schools typically offer Criminal Law as a first-year course, and its lapses in substantive coverage can be forgiven in light of the indirect benefit students derive from using Criminal Law casebook materials as fodder for learning how to think like lawyers. Gathering a sampling of cases together in one volume makes sense when the primary purpose is to teach students how to read and analyze appellate cases. Studying the Model Penal Code can provide additional practice in the transferable analytical skill of deriving elements from statutory language. And the focus on exotic examples, like sleepwalking

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47. *See id.*

48. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 947–53 (1999) (describing the main influences of the Model Penal Code as stimulating jurisdictions to codify their criminal law, re-orienting scholarship from common law to legislative perspectives on criminal law, and clarifying the principles of *mens rea*).

49. *See generally* Danny Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229 (1997) (surveying adoption of the *mens rea* requirements in twenty-two states).

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defendants, helps illustrate basic underlying principles, such as the requirement that criminal liability requires a voluntary act. However, once students master the skills associated with legal analysis and reasoning and move on to upper-level courses, the time-consuming process of extracting law and slowly identifying underlying principles through the give-and-take of appellate case dialogue becomes increasingly difficult to defend.<sup>50</sup>

### 2. *The Missing Context of the Lawyering Process: Clients and Facts*

In 1969, Chief Justice Warren Burger said that “[t]he shortcomings of today’s law graduate lies not in a decent knowledge of the law but that he has little, if any, training in dealing with facts or people—the stuff of which cases are really made.”<sup>51</sup> Although the skills of legal analysis, reasoning, and argument are unquestionably important, they are embedded within a much broader lawyering process, which extends from the moment a client walks through the door for an initial consultation through the resolution of the client’s case.<sup>52</sup> The lawyering process requires a range of essential skills beyond legal analysis and reasoning, including client interviewing and counseling, persuasive factual analysis, negotiation, and advocacy.<sup>53</sup> The appellate case method suffers significant structural deficiencies as a platform for teaching these other lawyering skills because the study of appellate cases lacks two important elements: (1) experience with the way legal issues arise in the context of the clients’ non-legal interests and objectives, and (2) experience with indeterminate factual situations that require investigation and development of facts.

#### a. *Client Problem-Solving*

As the Carnegie Report points out, one of the most glaring elements missing from the case dialogue method is experience with clients.<sup>54</sup> Ann Shalleck has elaborated on this point, arguing that in typical law school classrooms, clients appear as “cardboard figures”<sup>55</sup> removed from the social contexts that gave rise to their cases and severed from the web of relationships within which their disputes

50. Spencer, *supra* note 2, at 2034–35 (discussing the declining benefit of case method in upper years).

51. William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 469–70 (1995) (quoting Chief Justice Warren Burger, Address Before the ABA Convention Prayer Breakfast (Aug. 10, 1969)).

52. The particular description of the lawyering process contemplates a dispute resolution context. The casebook method also has deficiencies with respect to representation of clients in the transactional planning context, which will be considered *infra* Part I.B.3.

53. STEFAN H. KRIEGER, ET AL., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION AND PERSUASIVE FACT ANALYSIS* 3–4 (4th ed. 2011).

54. CARNEGIE REPORT, *supra* note 3, at 57.

55. Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1735 (1993).

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arose.<sup>56</sup> Clients appear in the case dialogue—if at all—as nominal placeholders for legal arguments: “If you represented the plaintiff [in this case], what would you argue in support of this rule?”<sup>57</sup> Such questions ask students to imagine how they would serve the interests of hypothetical clients who presumably want to win, as winning is conventionally defined, without any thought as to how the clients’ actual motivations, commitments, relationships, or the costs of litigation, might affect the decisions of real-life clients.<sup>58</sup>

If left uncorrected, this oversimplification of clients’ objectives can lead to deeper problems of legal professionalism. In 1975, philosopher and early legal ethicist Richard Wasserstrom noted that professionals have a tendency to view a client or a patient “not as a whole person but as a segment or aspect of a person—an interesting kidney problem, a routine marijuana possession case, or another adolescent with an identity crisis.”<sup>59</sup> This “legal objectification” of clients can result in problematic lawyer-client relationships, in which lawyers represent, not the actual clients before them, but standardized clients that the lawyers have constructed out of the legal interests the lawyers have imputed to them.<sup>60</sup>

Wasserstrom’s concern that lawyers’ professionalized view of clients might create a mismatch between what clients actually want and what lawyers pursue for them bears out in empirical studies of the legal profession.<sup>61</sup> Sometimes, the mismatch is a result of the law’s failure to provide a remedy for a client’s grievance, such as when divorce clients want to assign blame for the break-up of marriage in no-fault divorce systems that do not require parties to establish blame as a condition of getting a divorce.<sup>62</sup> In other instances, lawyers overestimate the importance of financial outcomes to clients when compared with other non-monetary objectives, such as the importance to medical malpractice plaintiffs of acceptance of responsibility, prevention of reoccurrence, answers, and apology.<sup>63</sup> In either case, lawyers’ professionalized view of their clients’ problems is shaped by the lens of legal issue-spotting that they bring to a client’s situation, which

56. *Id.* at 1733.

57. *Id.* at 1735.

58. *Id.* at 1736. *See also* MODEL RULES OF PROF’L CONDUCT, R. 1.2, cmt. [2] (“[L]awyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.”).

59. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 21 (1975).

60. William H. Simon, *The Ideology of Advocacy*, 1978 WIS. L. REV. 29, 55 (1978); Warren Lehman, *The Pursuit of A Client’s Interests* 77 MICH. L. REV. 1078, 1087–88 (1979).

61. *See e.g.*, AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 142–53 (1995) (studying client interactions with divorce lawyers); Tamara Relis, “*It’s Not About the Money!*”: *A Theory on Misconceptions of Plaintiffs’ Litigation Aims*, 68 U. PITT. L. REV. 701 (2007) (surveying medical malpractice lawyers and clients); Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065, 1071–81 (2003) (surveying empirical research on lawyer-client relationships of criminal defense, divorce, personal injury, property and civil rights, and corporate lawyers).

62. SARAT & FELSTINER, *supra* note 61, at 37.

63. Relis, *supra* note 61, at 346.

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may not accurately capture the non-legal issues that predominate the clients' view of the problem or situation.<sup>64</sup>

By staying within the realm of hypothetical clients and their imagined objectives, the casebook method of legal instruction does little to prepare law students to ascertain a client's multidimensional and sometimes shifting objectives. Nor does the method prepare them to advocate for and advise clients whose legal issues are intertwined with an array of non-legal concerns.<sup>65</sup>

#### *b. Facts, Factual Investigation, and Persuasive Storytelling*

Another major area of activity and concern for practicing lawyers is the analysis and development of facts.<sup>66</sup> The statements of facts in appellate opinions consist of only a few facts drawn from the record of a lower court, selected and presented to lend rhetorical support to the legal conclusion that the author of the appellate opinion has drawn.<sup>67</sup> Traditional law school examinations mirror this process: students are provided with a short statement of fixed and predetermined facts and evaluated on how well they spot and analyze the legal issues raised by those facts.

In the practice of law, by contrast, lawyers must develop facts through investigation and discovery. Lawyers often begin with a preliminary legal theory that puts the client's version of facts into existing structures of legal claims and defenses.<sup>68</sup> But this preliminary analysis is only the beginning of the process. Lawyers must go on to analyze the factual propositions that might establish such legal claims or defenses; the documents or witnesses that might exist to substantiate, contradict, bolster or undermine those factual propositions; and the tools of investigation and discovery that the lawyer might use to pursue such potential evidence.<sup>69</sup> The process of factual analysis proceeds in the opposite direction from the process of issue-spotting that professors test repeatedly in traditional law school examinations. Rather than beginning with a set of fixed facts and applying the law to them, factual investigation uses the law as a fixed framework and analyzes how the facts might be developed to meet or frustrate the establishment of legal claims and defenses.

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64. DAVID A. BINDER, ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 2–15 (2d ed. 1991).

65. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 *GEO. J. LEGAL ETHICS* 103, 132–34 (2010).

66. Spencer, *supra* note 2, at 2037–38.

67. John Luebsdorf, *The Structure of Legal Opinions*, 86 *MINN. L. REV.* 447 (2001) (describing the rhetorical choices made in appellate opinions when viewed as stories); Ron Moss, *Rhetorical Strategies in Judicial Opinions*, 2 *SCRIBE* 103, 105–07 (1991).

68. See generally Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 *HASTINGS L.J.* 861 (1992) (discussing the interaction between client narratives and universalized legal narratives that constitute legal claims).

69. KRIEGER ET AL., *supra* note 53, at 149–57.

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Along the way, lawyers are likely to confront the factual ambiguity and conflict caused by imperfect recollection, omission, and conscious or unconscious shaping of reality to align with self-interest.<sup>70</sup> Rather than passively accepting “the facts” presented to them, lawyers must examine witnesses’ possible motives, read between the lines of documents, and test different versions of the facts for their consistency with other facts, their plausibility compared to how people would be expected to behave, and how well they account for contrary facts that undermine them.<sup>71</sup> As Jerome Frank once wrote, at the trial court level, judicial fact-finding is, in the end, a judge’s “subjective, fallible reaction to the subjective, fallible reactions of the witnesses to the actual, objective facts.”<sup>72</sup> In developing cases, lawyers must learn how to maneuver within the realm of deeply subjective and shifting factual uncertainty.

Factual analysis involves more than just analyzing how facts fit within the frameworks formed by the legal elements of claims and defenses. To be effective advocates, lawyers also need to know how to weave facts and inferences into persuasive stories.<sup>73</sup> As Justice Souter aptly noted in *Old Chief v. United States*, “a syllogism is not a story.”<sup>74</sup> When evidence is presented in narrative form, it has persuasive force “with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences . . . necessary to reach an honest verdict.”<sup>75</sup> Stories are powerful because of their emotional appeal, identified in Aristotle’s classical study of rhetoric as *pathos*.<sup>76</sup> Stories invite their listeners to enter the viewpoint of the characters and empathize with their perspective on events, moving us “to care, and hence pave the way to action.”<sup>77</sup> Storytelling is also powerful because narrative “corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional,

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70. Jean Sternlight & Jennifer Robbennalt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. DISPUTE RESOL. 437, 448–86 (2008) (surveying the psychological aspects of information-processing, memory, and cognitive heuristic biases that prevent people from conveying and gathering accurate information).

71. Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMPLE L. REV. 1, 18–23 (1993) (listing these among other factors that lead to the persuasiveness of a case theory). See also Naomi Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475 (1993).

72. Jerome Frank, *Say It With Music*, 61 HARV. L. REV. 921, 924 (1948).

73. STEVEN LUBET, NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON’T, CAN’T, AND SHOULDN’T HAVE TO TELL THE WHOLE TRUTH 1–6 (2001); Ohlbaum, *supra* note 71, at 24–25; Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994).

74. *Old Chief v. United States*, 519 U.S. 172, 189 (1997).

75. *Id.* at 187. See also Toni M. Massaro, *Empathy, Legal Storytelling, and The Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099 (1989).

76. ARISTOTLE, ON RHETORIC 1.2 in ARISTOTLE: ON RHETORIC, A THEORY OF CIVIC DISCOURSE 38–39 (George A. Kennedy, trans. 1991). Aristotle’s distinction between *pathos* (emotional appeal), *logos* (logical appeal), and *ethos* (appeal based on the character or credibility of the speaker), has been highly influential in the development of modern rhetorical studies. *Id.* at ix–x.

77. Massaro, *supra* note 75, at 2105.

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abstracted rhetoric of law.”<sup>78</sup> Effective advocates use narrative structures to construct storylines out of the facts of a case,<sup>79</sup> exhort decision makers to play the narrative role of hero in a story of the quest for justice,<sup>80</sup> and explain the development of the law as a story with a deep narrative structure.<sup>81</sup>

The casebook method of instruction provides only limited opportunities for students to explore the complexities of factual analysis that will confront them in practice. The pre-digested statements of facts in appellate cases are the end products of a long process of factual development, investigation, discovery, analysis, and strategic choices made in advocacy.<sup>82</sup> The casebook method does not help a student to study a case “from the front” and anticipate how to develop the facts moving forward.<sup>83</sup>

#### *3. The Missing Analytical Frameworks for Teaching Transactional Planning*

A third shortcoming of the casebook method is its limitations in teaching transactional and other non-litigation law practices, particularly the work of business lawyers. Transactional practice encompasses commercial deal-making,<sup>84</sup> including deals involving contracts for acquisition of goods, contracts for services, and the creation of multi-party joint ventures.<sup>85</sup> Other non-litigation business lawyering involves advising clients on internal operations, internal structuring, and compliance with regulatory and tax laws.<sup>86</sup> The role of transactional lawyers has been defined specifically in terms of the value that lawyers add to transactions by reducing transaction costs, regulatory costs, and other costs associated with the transaction.<sup>87</sup> More broadly speaking, “the

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78. Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989).

79. Binny Miller, *Teaching Case Theory*, 9 CLINICAL L. REV. 293, 297–98 (2002).

80. Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55, 64–65 (1992).

81. Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 886–90 (2010).

82. Rakoff & Minow, *supra* note 36, at 601.

83. Llewellyn, *supra* note 45, at 213–14.

84. Shreya Atrey, *O ‘The Damn Good Deal Lawyer’ Where Art Thou?*, 13 T.M. COOLEY J. PRAC. & CLINICAL L. 331, 337–38 (2011).

85. George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279, 289–90 (2009).

86. *Id.* at 297.

87. The seminal work in this area is Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984). He suggested that lawyers add value to a transaction by functioning as “transaction cost engineers.” *Id.* at 243. See also Dent, *supra* note 85 (broadening Gilson’s focus on the role of lawyers in acquisitions and calling for a broader definition of the business lawyer’s role as an “enterprise architect”); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486 (2007) (empirically testing Gilson’s hypotheses about how lawyers add value to transactions); Edward A. Bernstein, *Law & Economics and the Structure of Value Adding Contracts: A Contract Lawyer’s View of the Law & Economics Literature*, 74 OR. L. REV. 189, 198–200 (1995) (providing a transactional

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challenge facing a business lawyer is how to manage and allocate risk in the face of uncertainty.”<sup>88</sup>

The conceptual theory underlying the basic skills component of transactional lawyering—what one author calls the “why you do what you do”—are a relatively recent development in legal education.<sup>89</sup> However, commentators have noted significant differences between the skills and norms of litigators and transactional lawyers.<sup>90</sup> The litigation context, in which casebook instruction resides, implicitly teaches students the skills of crafting the law into persuasive legal arguments.<sup>91</sup> The non-litigation context requires different kinds of analyses and application of the law.<sup>92</sup> For example, deal lawyers must be able to translate a party’s deal into the basic structural building blocks of a contract: representations, warranties, covenants, and conditions precedent.<sup>93</sup> To add value to a deal, deal lawyers also need to understand the basic categories of non-legal business considerations that will matter to their clients, such as money considerations, risk allocation, the location of control in the future, how broadly or narrowly to draft standards, and terms covering the endgame of the deal relationship.<sup>94</sup> The foundational skills have been said to include the ability to engage in cost-benefit analysis;<sup>95</sup> the ability to identify the recurring structural problems that create transaction costs;<sup>96</sup> and the ability to evaluate risks, structure agreements, negotiate terms, and draft documents.<sup>97</sup>

The casebook method’s focus on appellate cases exposes students to deals that have gone bad, but does little to expose students to these underlying structures of analysis that transactional lawyers use to successfully engineer agreements that do not raise later disputes.<sup>98</sup> Even in courses like contracts and property, where the bulk of the work lawyers do is transactional, the casebook method focuses on litigated cases, rather than the more common type of business

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lawyer’s view on Gilson’s thesis).

88. Robert C. Illig, *The Oregon Method: An Alternative Model for Teaching Transactional Law*, 59 J. LEGAL EDUC. 221, 222 (2009).

89. See Atrey, *supra* note 84, at 340; Victor Fleischer, *Deals: Bringing Corporate Transactions Into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 479 (2002).

90. Eric J. Gouvin, *Teaching Business Lawyering in Law Schools: A Candid Assessment of the Challenges and Some Suggestions for Moving Ahead*, 78 UMKC L. REV. 429, 431 (2009); Stephen J. Friedman, *Why Can’t Law Students Be More Like Lawyers?*, 37 U. TOL. L. REV. 81, 87–88 (2005).

91. See Atrey, *supra* note 84, at 341; Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223, 223–24 (2004).

92. Stark, *supra* note 91, at 224.

93. *Id.* at 225 (claiming that “there is an underlying similarity to all contracts” that applies “not only to a car purchase agreement and an employment contract agreement, but also to a multibillion-dollar acquisition agreement, a license agreement, and a construction contract”).

94. *Id.* at 229–31.

95. Bernstein, *supra* note 87, at 191.

96. Fleischer, *supra* note 89, at 482.

97. *Id.* at 478.

98. Gouvin, *supra* note 90, at 434 (2009).

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case studies that business schools use to teach their students forward-thinking business judgment.<sup>99</sup> The litigation focus often carries over into the skills curriculum of law schools, where simulation courses and clinics continue to be “skewed toward litigation practice and give short shrift to transactional practice.”<sup>100</sup> Moreover, unlike litigation, where students’ pre-law school understanding is shaped by multiple media images of lawyers in role,<sup>101</sup> transactional practice has no common cultural reference point, leaving students preparing for a transactional legal practice with a task akin to “trying to complete a jigsaw puzzle without the benefit of seeing the box.”<sup>102</sup>

Law schools’ failure to teach students to “think like transactional lawyers” causes newly-minted lawyers to “fumble around and effectively muddle through problems without adding value,”<sup>103</sup> feeding the negative view that many business clients already hold of lawyers.<sup>104</sup> Notably, entry-level lawyers tend to view contractual provisions as boilerplate language without understanding “the purposes of those provisions and the thinking that underlies them.”<sup>105</sup> Hence, they “stick too closely to precedents and retain unnecessary or inefficient terms because they are unfamiliar with the structure of the documents or do not trust their own judgment.”<sup>106</sup> However, if lawyers function merely as draftsmen filling out pre-existing forms without exercising professional judgment, they fail to add value to a transaction.<sup>107</sup> Even worse, improperly trained business lawyers may “overlawyer” cases,<sup>108</sup> “seeing a problem behind every bush, overcompensating to avoid risk, [and] generating conflict.”<sup>109</sup>

Although business lawyers eventually hone and calibrate their transactional skills in practice, the lack of preparation in law school leaves them on their own to “[s]omehow, in the midst of fourteen-hour days . . . take a step back and think about how the current transaction differs from the last and why that might be so,

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99. Dent, *supra* note 85, at 319; Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study as Course Materials for Transaction Oriented Elective Courses: A Response to the Challenges of the MacCrate Report and the Carnegie Foundation for Advancement of Teaching Report on Legal Education*, 11 TRANSACTIONS: TENN. J. BUS. L. 9, 12–13 (2009).

100. Gouvin, *supra* note 90, at 430.

101. Illig, *supra* note 88, at 225.

102. *Id.* at 221.

103. Gouvin, *supra* note 90, at 452.

104. Gilson, *supra* note 87, at 241–42 (clients see business lawyers “at best as a transaction cost, part of a system of wealth redistribution from clients to lawyers”).

105. Friedman, *supra* note 90, at 89.

106. Fleischer, *supra* note 89, at 483.

107. *Id.* at 479; Schwarcz, *supra* note 87, at 501 (finding based on empirical research that “transactional counsel reduce regulatory costs, and thus add value, primarily by performing transaction-regulatory legal work: by providing expertise in the law and regulations that generally govern the transaction and by understanding the rationale for the contractual provisions in the transaction documents).

108. Bernstein, *supra* note 87, at 191, 193.

109. Dent, *supra* note 85, at 311 (quoting JAMES C. FREUND, SMART NEGOTIATING: HOW TO MAKE GOOD DEALS IN THE REAL WORLD 186 (1992)).



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and then carry the lesson forward to the next transaction.”<sup>110</sup> Law school instruction could do more to help law students prepare for the transactional and business side of lawyering by developing pedagogical methods and delivering instruction that exposes law students to the analytical constructs they will need to plan, structure, and problem-solve in non-litigation settings.

As this Part has explained, the lasting value of the appellate case dialogue method lies not in its efficiency in teaching substantive law, but in its facility in imparting a foundational set of lawyering skills and habits of thinking. To deliver a well-rounded professional education, law schools need not abandon the appellate case dialogue method of instruction, but they must be willing to move beyond it. The next Part explores in more detail the features of a well-balanced law school curriculum.

## II. TOWARD A WELL-BALANCED LAW SCHOOL CURRICULUM

To transcend the limitations of the appellate casebook method, law schools must strike a better balance among instruction in doctrinal knowledge, instruction in practice skills, and instruction in professional values.<sup>111</sup> Law schools cannot reasonably achieve this balance by simply adding credit hours of lawyering skills courses until they are equal in proportion to the credit hours currently allocated to doctrinal instruction; balance requires an *integration* of skills and professionalism instruction with doctrinal learning.<sup>112</sup> In addition to being integrated, a law school curriculum must be *progressive*, exposing students to a wider array of lawyering skills in increasingly challenging and less structured settings.<sup>113</sup> Finally, although there is a temptation for traditional law faculty to “farm out” skills instruction to adjunct professors or isolate it in clinic and externship courses, a truly balanced curriculum must involve *collaboration* between the legal academy and the practicing bar.<sup>114</sup> This Part will explain why the characteristics of integration, progression, and collaboration are so important.

### A. A Common Core Pedagogy of Skills Instruction

In 1944, Karl Llewellyn proposed a large-scale reorientation of legal education around the acquisition of what he called the “craft-skills of the lawyer.”<sup>115</sup> In Llewellyn’s vision, after the first year of law school, instructional

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110. Fleischer, *supra* note 89, at 486.

111. The Carnegie Report calls these the “three apprenticeships of professional education.” CARNEGIE REPORT, *supra* note 3, at 27–29.

112. Spencer, *supra* note 2, at 2025. See also CARNEGIE REPORT, *supra* note 3, at 194–97; BEST PRACTICES REPORT, *supra* note 3, at 97–100.

113. Spencer, *supra* note 2, at 2025.

114. *Id.* at 2025–26.

115. Llewellyn, *supra* note 45, at 216.

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materials should shift from appellate cases to other kinds of materials; and law schools should select upper-level courses, not based on the importance of their subject-matter, but based on their suitability in helping students develop a broader range of skills.<sup>116</sup> To achieve a balance of skills, knowledge, and professionalism, law schools must be willing, like Llewellyn, to rethink the tacit commitment to subject-matter coverage as the dominant organizing principle of the law school curriculum.<sup>117</sup>

The first step in any such reorientation is recognizing that what we most often picture as “lawyering skills” instruction shares a common pedagogical structure with the case dialogue method. It has been well-accepted since at least the turn of the twentieth century that the case dialogue method inculcates a set of foundational cognitive lawyering skills.<sup>118</sup> What is less commonly remarked is that the appellate case dialogue method also shares a common basis in standard experiential learning techniques. Experiential learning occurs in a repetitive cycle of (a) preparation for an experience, (b) performance in role, (c) reflection on one’s performance, and (d) synthesis of the experience with existing knowledge and other experience.<sup>119</sup> In this process, the teacher is less focused on conveying material than on coaching the student through the process of preparing for an experience and reflecting on it.<sup>120</sup> The cycle of preparing, doing, and reflecting also trains entry-level professionals in habits of reflective practice needed for continued professional growth throughout their careers.<sup>121</sup>

Skills instruction assists the cycle of experiential learning by interposing instruction that develops the concepts and theories underlying the skills being taught, and provides reflective evaluation and feedback on the students’ performance.<sup>122</sup> For example, in a clinic, students might be taught a conceptual framework that breaks down the steps that lawyers go through in analyzing the facts of a case and developing a fact investigation plan.<sup>123</sup> Students then have an opportunity to apply that framework to a clinic case they are working on, and to reflect on the process in one-on-one supervision sessions and receive

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116. LLEWELLYN REPORT, *supra* note 45, at 366–67.

117. Spencer, *supra* note 2, at 2058.

118. Spiegel, *supra* note 6, at 582–83; Spencer, *supra* note 2, at 1977.

119. J. P. OGILVY, *LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS* 3 (2d ed. 2007); Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience through Properly Structured Clinical Supervision*, 40 MD. L. REV. 279, 285 (1981).

120. Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401, 415–17 (2000).

121. *Id.* at 404–12.

122. AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 243 (1992) [hereinafter MACCRATE REPORT].

123. See KRIEGER ET AL., *supra* note 53, at 149–57.

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individualized coaching that helps them through the process in the unstructured setting of real practice.<sup>124</sup>

The appellate case method employs similar experiential learning techniques to teach legal analysis and reasoning by providing students with opportunities to perform those skills, supported by in-class guidance and feedback from the instructor.<sup>125</sup> The Carnegie Foundation's study of legal education describes how professors in first-year law school courses instill the foundational skills of "thinking like a lawyer" by using techniques of modeling, coaching, scaffolding, and fading.<sup>126</sup> In the case dialogue method, professors will *model* the correct way to read a case by stating the relevant facts or holding of a case, and they will *coach* by providing feedback that directs students to focus on the relevant information.<sup>127</sup> For students who are struggling, the professor will provide *scaffolding* that makes more explicit the structural elements that the professor is looking for, such as the holding of the case, the appellate court's reasoning, and the extension or modification of the holding to other similar factual situations.<sup>128</sup> And, as students gain mastery over the techniques of case analysis, the instructor can *fade*, encouraging students to perform the skills of case analysis without explicit guidance.<sup>129</sup>

When considered as a form of experiential learning, the case dialogue method falls short in a couple of aspects, neither of which is intrinsic to its design. First, it is almost always carried out in large classroom settings, where the professor calls on students one at a time, relying on other students to learn vicariously from watching the interaction.<sup>130</sup> The other is that professors who are not sufficiently attuned to the skills development aspect of the case method approach may rush through it in an attempt to cover more substantive material and lose the focus on the techniques that they are teaching.<sup>131</sup> However, when well-executed in class sizes that allow for sufficient student participation and interaction, the case dialogue method can fulfill its potential as experiential education in foundational lawyering skills.<sup>132</sup>

Once the case dialogue method's pedagogical structure is revealed as continuous with, rather than separate from, the pedagogy employed in teaching other lawyering skills, the keys to unlocking an integrated law school curriculum

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124. Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277, 279–81 (1982).

125. Shaw, *supra* note 30, at 1281–85.

126. CARNEGIE REPORT, *supra* note 3, at 61.

127. *Id.* at 61–62.

128. *Id.*

129. *Id.* at 60–63.

130. Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 351 (2001).

131. See Petys, *supra* note 5, at 1274.

132. Shaw, *supra* note 30, at 1278–85.

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are in hand. Importantly, the recognition of a common pedagogical structure breaks down the perceived divide between doctrinal teaching as primarily theoretical and skills teaching as primarily practical, revealing both that experiential learning techniques pervade the case dialogue method and that skills instruction depends on teaching the conceptual theories underlying practice.<sup>133</sup>

#### B. Theories of Practice: “Making the Invisible Visible”

Teaching lawyering skills is not simply a matter of sending students into practice settings and expecting them to learn from experienced practitioners. As Blackstone wrote in 1803, in his critique of the apprenticeship system, “if practice be the whole [a student] is taught, practice must also be the whole he will ever know: *if he be uninstructed in the elements and first principles upon which the rule of practice is founded*, the least variation from established precedents will totally distract and bewilder him.”<sup>134</sup> As this quote suggests, a key component of experiential education is articulating the theories underlying practice, which are used to help students internalize what they absorb from practice experiences and transfer it to other contexts.<sup>135</sup>

The challenge, according to Donald Schön, one of the leading figures in the theory of professional education,<sup>136</sup> is to “solve the problem of describability, to figure out how to describe what [professionals] are doing in a way that allows other people also to learn.”<sup>137</sup> The pedagogical techniques of the case dialogue method have unlocked the “problem of describability” with respect to the skills of legal analysis and reasoning by breaking down and articulating the steps through which experienced lawyers extract the relevant rules from appellate cases, “mak[ing] the invisible visible, both in the mind of the teacher and the mind of the learner.”<sup>138</sup>

In Llewellyn’s time, the conceptual theories underlying other lawyering skills had yet to be articulated in ways that made them teachable. The “first great and immediate need and opportunity of legal education today,” he wrote in 1944, lies “in making their theory conscious and in giving elementary practice in their use.”<sup>139</sup> Llewellyn was hopeful that the mid-1940s would see growth in the

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133. See generally Spiegel, *supra* note 6 (arguing that doctrinal instruction and clinical education are each based in both theory and practice).

134. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND sec. 1 (Lonang Institute 2005) (1765–1769), available at <http://www.lonang.com/exlibris/blackstone/bla-001.htm> (on file with the *McGeorge Law Review*) (emphasis added).

135. CARNEGIE REPORT, *supra* note 3, at 62; David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLIN. L. REV. 191, 199 (2003).

136. Neumann, *supra* note 120, at 401–03.

137. Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231, 247 (1995).

138. CARNEGIE REPORT, *supra* note 3, at 59.

139. LLEWELLYN REPORT, *supra* note 45, at 217.

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theoretical conceptualization of a wider range of craft-skills, fueled by the return to the legal academy of a generation of law teachers who had dispersed into practice during World War II.<sup>140</sup> During their wartime sabbaticals, law instructors immersed themselves in law practice “with . . . teachers’ understanding of how experience in practice can be organized for teaching,”<sup>141</sup> making them ideally suited, in Llewellyn’s eyes, to take on the project of re-inventing the law school curriculum.

Llewellyn’s hope went largely unfulfilled in the post-War period, which saw increasing standardization and curricular stagnation in legal education.<sup>142</sup> However, it gained traction a couple of decades later, when the Ford Foundation poured money into the legal academy for the purpose of creating real-practice legal clinics in law schools,<sup>143</sup> and a generation of clinical teachers who remained embedded in practice began to develop the conceptual frameworks for teaching other lawyering skills. The articulation of the conceptual frameworks underlying lawyering skills was the brainchild of Gary Bellow and Bea Moulton, who co-authored the seminal textbook in lawyering skills, *The Lawyering Process: Materials for Clinical Instruction in Advocacy*.<sup>144</sup> With the rapid growth of clinical programs in law schools across the country, course materials for clinical teaching were in high demand.<sup>145</sup> Bellow and Moulton answered that demand with a set of teaching materials that provided a breakdown, description, and critical analysis of the lawyering process in terms of its discrete tasks and roles, such as “interviewing, counseling, negotiat[ing], drafting, oral advocacy,” and factual investigation.<sup>146</sup> Bea Moulton has explained how she and Gary Bellow explored the lawyering process from scratch, breaking down the tasks in which lawyers engaged into their component parts. They also researched materials from other disciplines—psychology, sociology, decision theory, probability

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140. *Id.* at 364–65.

141. *Id.* at 365 (emphasis in original).

142. STEVENS, *supra* note 18 at 205–31.

143. Between 1968 and 1978, the Ford Foundation granted \$11 million to the Council on Legal Education for Professional Responsibility (CLEPR) to provide support to clinical legal education programs. Margaret Martin Barry, et al., *Clinical Legal Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 19 (2000). The Department of Education picked up where the Ford Foundation left off and appropriated in excess of \$87 million to fund clinical legal education programs from 1978 to 1997.

144. For a description of the importance and impact of this early textbook, see Susan Bryant & Elliott S. Milstein, *Reflections upon the 25th Anniversary of The Lawyering Process: An Introduction to the Symposium*, 10 CLINICAL L. REV. 1 (2003).

145. Michael Meltsner, *Celebrating The Lawyering Process*, 10 CLINICAL L. REV. 327, 327 (2003); Bea Moulton, *In Memoriam: Gary Bellow*, 114 HARV. L. REV. 416, 420 (2000) (“Clinicians were starting from scratch in school after school, helping students represent thousands and thousands of poor people. They needed a book.”).

146. Gary Bellow & Earl Johnson, *Reflections on the University of Southern California Clinical Semester*, 44 S. CAL. L. REV. 664, 673 (1971).

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analysis, game theory—that would bring theoretical perspective and critical depth to the analysis of basic lawyering tasks.<sup>147</sup>

As lawyering skills instruction has expanded and matured over the years,<sup>148</sup> the raw material now exists for teaching the analytical frameworks for a broad range of “fundamental lawyering skills.”<sup>149</sup> The skills identified in the early clinical teaching materials focused on the litigation context.<sup>150</sup> However, a growing number of law professors are now developing similar vocabularies of practice in the transactional context as well.<sup>151</sup> As these transactional law teachers articulate the conceptual and analytical frameworks that underlie transactional practice, they are developing useful teaching materials for others that can be used in transactional skills instruction.<sup>152</sup>

#### *C. Collaboration Between Academics and Practitioners*

The development of a robust analytical literature on the conceptual basis and underlying theory of lawyering skills makes it possible to implement, in concrete terms, what Karl Llewellyn could only imagine: a well-balanced law school curriculum organized around acquiring the “craft-skills” of lawyers.<sup>153</sup> However, there remains the question of how best to implement this ideal. As commentators note with dismay, law faculties are dominated by professors with little practice experience upon which to draw in teaching a broader range of lawyering skills.<sup>154</sup> One tempting solution is to abjure responsibility and delegate the job to adjunct professors on the theory that they are better situated to teach the practice of law. However, the “farming out” model of skills instruction is also unsatisfactory.<sup>155</sup> The central dilemma of professional skills instruction is that, while experienced practitioners have high levels of professional experience and competence, they

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147. Bea Moulton, *Looking Back at The Lawyering Process*, 10 CLIN. L. REV. 33, 50–51 (2003); Moulton, *supra* note 131, at 419.

148. *See generally* Carrie Menkel-Meadow, *The Legacy of Clinical Education*, 29 CLEV. ST. L. REV. 555 (1980) (examining various theories behind and approaches to lawyering); *see also Symposium: The 25<sup>th</sup> Anniversary of Gary Bellow’s and Bea Moulton’s The Lawyering Process*, 10 CLINICAL L. REV. 1, et seq. (2003) (discussing different approaches to lawyering through a symposium of clinical textbooks authors).

149. MACCRATE REPORT, *supra* note 122, at 138–41.

150. Moulton, *supra* note 147, at 35.

151. *See, e.g.*, Stark, *supra* note 91; Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69 (2009); Fleischer, *supra* note 89.

152. Stark, *supra* note 91, at 229–31 (extracting certain commonly recurring issues—money, risk, control, standards, and endgame—that she used to formulate a “five-prong framework” for teaching law students how to analyze business issues that might arise in a deal); Fleischer, *supra* note 89, at 483–90 (discussing an adaptation of Gilson’s “transaction cost engineering” model for use in skills courses on deal-making).

153. *See, e.g.*, Fleischer, *supra* note 89, at 491.

154. Newton, *supra* note 4, at 112; Fleischer, *supra* note 89, at 479.

155. LLEWELLYN REPORT, *supra* note 45, at 365.

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do not necessarily have the ability to translate this expertise into “teachable experience and competence.”<sup>156</sup>

Cognitive psychologists explain why it is difficult for an expert practitioner to articulate the underlying analytical frameworks of practice into a conceptual vocabulary that makes them teachable and transferable.<sup>157</sup> In the process of developing expertise, professionals internalize simplified schemas for structuring relevant information.<sup>158</sup> When confronted with a new problem, experts draw on these internalized schemas to hone in on the relevant facts, analyze the problem according to its deep structure, and formulate solutions based on previous experience with structurally similar problems.<sup>159</sup> Professionals’ tacit knowledge is exhibited by competent behavior, but not necessarily accurately described by those who exhibit it.<sup>160</sup> An expert problem-solver will move through the intermediate steps of reasoning so automatically and unconsciously that the process will seem intuitive.<sup>161</sup> Those who are good at what they do are not necessarily the best teachers. The best teachers are those who can explain what they are doing by breaking good practice down into its elemental steps and articulating the theories underlying that practice.<sup>162</sup>

It requires sustained intellectual work at the intersection of theory and practice to bring to the surface the structures that underlie expert practice and to articulate them into frameworks that are useful for teaching. When Bellow and Moulton began the project of developing teaching materials for clinical instruction, they found that existing literature on law practice—which “took a strong ‘this is the way to do it’ perspective”—was not going to be much help.<sup>163</sup> As Moulton later put it, “most of us in those days had no framework or vocabulary for describing what the task involved, and how to get better at it. We just *did* it, perhaps imitating whatever senior lawyers we had been fortunate enough to be around.”<sup>164</sup> More recently, in developing materials for teaching a new set of transactional skills, the new theorists of transactional practice have found existing practice-based materials unhelpful.<sup>165</sup> As Victor Fleischer wrote, to be useful as teaching materials, there needs to be a conceptual framework and “[t]o the extent transaction-oriented teaching materials exist[ed] at all, they

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156. LLEWELLYN REPORT, *supra* note 45, at 365.

157. Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Problem Solving*, 11 CLINICAL L. REV. 149, 167 (2004).

158. *Id.*; STEPHEN ELLMAN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 353 (2009).

159. Krieger, *supra* note 157, at 168; Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 VT. L. REV. 1, 24–26 (1998).

160. Schön, *supra* note 137, at 243.

161. ELLMANN ET AL., *supra* note 158, at 351; Weinstein, *supra* note 159, at 26.

162. Shaw, *supra* note 30, at 1298.

163. Moulton, *supra* note 147, at 50; Bellow & Johnson, *supra* note 146, at 673.

164. Moulton, *supra* note 147, at 46.

165. See Fleischer, *supra* note 89, at 479; Stark, *supra* note 91, at 228.

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tend[ed] to resemble a cookbook.”<sup>166</sup> When Tina Stark did an informal survey of law partners, asking them how they identified business issues that would “add value to the deal,” she got answers like it “requires a sixth sense,” or “[y]ou know one when you see one.”<sup>167</sup>

This is not to say that adjunct professors are incapable of developing skills courses that articulate and teach the conceptual frameworks underlying good practice; however, it is a mistake for academic law professors to simply assume that if they farm their students out to experienced practitioners, experiential learning will necessarily occur. Clinical professors, who remain engaged in active practice from within the walls of the academy, are ideally situated to articulate the conceptual frameworks underlying good practice; and the presence of active practitioners in the profession of teaching has done much to advance the development of teaching materials for a wide range of lawyering skills.<sup>168</sup> However, the artificially low caseloads in clinic teaching eventually distance clinical professors from the rhythms and approaches of practicing lawyers.<sup>169</sup>

A well-balanced curriculum is more likely to emerge from a series of collaborations between faculty members whose primary engagement in teaching brings a focus on the kinds of conceptual structures that are helpful to student learning and experienced lawyers who can provide perspective on what practicing lawyers do.<sup>170</sup> Some of the recent innovations in teaching transactional lawyering involve such collaborations, where students learn and apply the conceptual frameworks of deals and deal-making under the direction of law school faculty members and practicing lawyers share their perspectives or demonstrate their approaches to the same material.<sup>171</sup>

*D. Progression of Skills Development: Simulations, Clinics, and Externships*

In addition to covering a broader range of lawyering skills, a well-balanced law school curriculum must recognize the unique values of different types of experiential education and use them to structure a progression of learning

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166. Fleischer, *supra* note 89, at 479.

167. Stark, *supra* note 91, at 228. Karl Okamoto got similar answers over years of informally asking deal lawyers what makes someone great at their craft. Okamoto, *supra* note 151, at 70–71.

168. Stacy Caplow, *A Year in Practice: The Journal of a Reflective Clinician*, 3 Clin. L. Rev. 1, 2-3 (1996).

169. *Id.*

170. *See e.g.*, Fleischer, *supra* note 89.

171. *See e.g., id.* at 491–92 (stating that in the first half of the author’s Deals class, students learn the conceptual frameworks for deal-making and in the second half they study actual deals by analyzing them and then hearing from the lawyers or principals involved in the deal they just analyzed); Illig, *supra* note 88, at 234–37 (describing Transactional Practice Labs that are taught by adjunct professors and appended to substantive law courses); Okamoto, *supra* note 151, at 87–90 (describing a Transactional Lawyering course where professors taught conceptual frameworks for student simulations and then practicing lawyers provided demonstrations of how they would approach the same simulated exercises).



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experiences that increases in challenge and complexity.<sup>172</sup> The common practice in legal education has been to structure the first year of law school with a uniform slate of required courses and then to leave second and third year students largely on their own to fill out the balance of their credits from among a wide array of electives with little or no guidance.<sup>173</sup> As Brent Newton put it, “[a]fter completing their mandatory courses, law students at many schools are left at sea in choosing and scheduling courses.”<sup>174</sup> “Often students end up taking a somewhat random combination of courses . . . .”<sup>175</sup>

Although the American Bar Association now requires all law students to complete a minimal amount of professional skills training,<sup>176</sup> efforts to remediate the skills deficit in legal education often fall into a common error of lumping together all types of experiential education. For example, the American Bar Association is considering changes to its accreditation standards for law schools that would require all law graduates to complete at least six credits in “one or more experiential course(s)” that “must be: (i) simulation course(s); or (ii) faculty supervised clinical course(s); or (iii) field placement(s).”<sup>177</sup> This kind of undifferentiated skills requirement treats as interchangeable what are actually three distinctive and complementary pedagogical methods used in experiential education.<sup>178</sup>

Simulations are the simplest form of experiential learning and have the benefit of permitting instructors to isolate the particular skill or skills being

172. See ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 1992-2002 13-16 (2004), available at [http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/curriculumstudy/Curriculum\\_Survey.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/curriculumstudy/Curriculum_Survey.authcheckdam.pdf) [hereinafter ABA 2002 Curriculum Study] (on file with the *McGeorge Law Review*).

173. The trend toward unstructured electives in the upper levels of law school has been increasing. See ABA Curriculum Study, *supra* note 172; ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, SURVEY OF LAW SCHOOL CURRICULA: 2001-2010, Executive Summary 15-16 (2012), available at [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1341346391LawSchoolCurriculaSurveyExecSummary.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1341346391LawSchoolCurriculaSurveyExecSummary.pdf) [hereinafter Executive Summary of ABA 2012 Curriculum Study] (on file with the *McGeorge Law Review*).

174. Newton, *supra* note 4, at 87.

175. *Id.*

176. The current standard requires “substantial instruction” in “other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.” ABA STANDARDS FOR ACCREDITATION OF LAW SCHOOLS 2012–2013, Standard 302(4), available at [http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html). However, the ABA interprets “substantial” has been interpreted to mean that the skills instruction must “engage each student in skills performances that are assessed by the instructor” rather than a particular number of credits. ABA STANDARDS FOR ACCREDITATION OF LAW SCHOOLS 2012–2013, Interpretation 302-3, available at [http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html) (on file with the *McGeorge Law Review*).

177. ABA STANDARDS REVIEW COMM., *April '13 SRC Meeting Materials* 54 (April 2013), 54 (April 2013), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/april\\_2013/2013\\_apr\\_src\\_meeting\\_agenda\\_and\\_drafts.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/april_2013/2013_apr_src_meeting_agenda_and_drafts.authcheckdam.pdf) (on file with the *McGeorge Law Review*).

178. Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 CLINICAL L. REV. 807, 812 (2007).

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taught.<sup>179</sup> In simulations, students “perform law-related tasks in hypothetical situations,”—role-playing interactions like a client interview or witness examination and working with documents that might be found in a lawyer’s case file.<sup>180</sup> Although teaching with simulations is similar to using problems in classroom instruction, simulations are more elaborate than problems, which are used primarily to illustrate issues of law rather than to teach professional skills.<sup>181</sup> Some simulation courses focus on the repetition of a particular skill or set of skills, such as a course on trial advocacy, client interviewing and counseling, or negotiation; others focus on a particular lawyering task, such as deal-making, where students engage in a series of exercises that take a deal from beginning to end.<sup>182</sup>

Simulations necessarily simplify the factual and interpersonal complexity of actual lawyering, permitting the instructor to hone in on improving performance of the particular skills that are the target of the instruction.<sup>183</sup> In the process, it omits other skills that are interconnected in the practice of law. For example, a course in Trial Advocacy will focus on developing a case theory, presenting evidence, examining witnesses, and making opening and closing statements, but it will not teach students how to investigate the facts that come out in trial or role-play the lawyers’ meetings with the clients. A course on Interviewing and Counseling will focus on the interactions between the lawyer and the client and teach techniques for gathering information from clients and assisting clients in their decision-making processes. However, it will focus on these skills outside of the larger context of legal research, factual investigation, and dispute resolution that shape the lawyer’s advice to clients.<sup>184</sup>

In clinics, students are given primary responsibility for practicing law under the direct supervision of faculty members.<sup>185</sup> In-house clinics are taught in the context of a law office created within the law school to provide students with the opportunity to practice law under the supervision of faculty members.<sup>186</sup> Unlike simulations, where other students or actors play pre-determined roles, clinic students confront the complexities of real-life interactions with clients and other participants in the legal system<sup>187</sup> and perform professional skills in unstructured

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179. See generally BEST PRACTICES REPORT, *supra* note 3, at 181.

180. Stuckey, *supra* note 178; see also BEST PRACTICES REPORT, *supra* note 3, at 179–80.

181. Gouvin, *supra* note 90, at 442.

182. Jay M. Feinman, *Simulations: An Introduction*, 45 J. LEGAL EDUC. 469, 470 (1995); BEST PRACTICES REPORT, *supra* note 3, at 179–80.

183. Gouvin, *supra* note 90, at 442.

184. *Id.*

185. *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 511 (1992) [hereinafter *Report on the In-House Clinic*]; BEST PRACTICES REPORT, *supra* note 3, at 188–89; Elliott Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL EDUC. 375, 376 (2001).

186. Milstein, *supra* note 185, at 376.

187. *Report on the In-House Clinic*, *supra* note 185, at 511.

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settings where the facts are often unclear, inconsistent, and ambiguous.<sup>188</sup> Moreover, clinics provide the unparalleled opportunity to integrate legal knowledge, factual uncertainty, interpersonal relationships, and ethical challenges arising in real practice settings.<sup>189</sup>

Although the core of the clinical experience is the student's assumption of the lawyering role in real cases or matters,<sup>190</sup> clinic teaching involves a combination of other methods to support learning in that role: classroom instruction, supervision meetings, and case rounds.<sup>191</sup> The classroom component of clinic teaching permits group teaching of the conceptual theories underlying practice, providing students with a vocabulary and framework for their real-practice experiences.<sup>192</sup> In supervision meetings with their professors, students receive feedback on their work on clinic cases, debrief past events, and plan for future events under sometimes intensive questioning designed to analyze possible choices and uncover hidden assumptions.<sup>193</sup> Case rounds provide an opportunity for clinic students to work together to brainstorm a problem, debrief an experience, or discuss common themes arising in their cases.<sup>194</sup> Although clinic casework is often unpredictable and the lawyering experiences may vary from student to student, the small and intensive student-teacher relationships allow the teacher to individualize and calibrate guidance and feedback to the individual learning needs of the students.<sup>195</sup>

In externships, students are placed in practice "settings external to the law school," such as law offices, public interest agencies, or judicial chambers.<sup>196</sup> Externship students might represent clients, appear in court, or complete research and writing projects, and they get the opportunity to observe or assist lawyers or judges in their day-to-day work.<sup>197</sup> In the field placements, attorneys or judges supervise the work of externs directly, with law school faculty providing a supportive pedagogical role to help maximize the educational benefit of the students' field experiences.<sup>198</sup> Externships often include a classroom component,

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188. *Id.* at 512.

189. Karen Tokarz, et al., *Legal Education and the Legal Profession in Crisis: The Need for a New Law School Curriculum with Expanded Experiential Legal Education and Clinical Courses for All Law Students*, 43 WASH. U.J.L. & POL'Y (forthcoming 2013).

190. Peter Toll Hoffman, *Clinical Course Design and Supervisory Process*, 1982 ARIZ. ST. L.J. 277, 283–89 (1982).

191. Milstein, *supra* note 185, at 377.

192. *Id.* at 378; Kreiling, *supra* note 119, at 301–11.

193. See generally Peter Toll Hoffman, *The Stages of the Clinical Supervisory Relationship*, 4 ANTIOCH L.J. 301 (1986) (describing the variety of methods used in clinical supervision and their usefulness in different stages of the student's progress in the clinic).

194. See generally Susan Bryant & Elliott S. Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 CLIN. L. REV. 195 (2007) (describing the purposes and methods of teaching in case rounds).

195. Quigley, *supra* note 51, at 488.

196. Milstein, *supra* note 185, at 376.

197. Stuckey, *supra* note 178, at 812.

198. *Id.* at 811–12.

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where students may explore issues relating to lawyering, such as the development of professional identity or role, professional ethics, problem-solving, reflective practice, or work-life balance.<sup>199</sup> Externship students are usually also required to set and periodically revisit specific learning goals for themselves,<sup>200</sup> and to keep a journal or do other reflective writing.<sup>201</sup> The unique benefits of externship experiences are their authenticity; externships expose students to the practice of law in settings “closely similar to the actual setting in which [the] knowledge [they] acquire later will be used.”<sup>202</sup> However, because externships rely on practicing lawyers for the direct supervision of student legal work, they do not offer the same intensive opportunities for close instructor feedback, reflection, and analysis of the lawyering experience that clinics provide.<sup>203</sup>

Rather than viewing these different types of experiential learning as interchangeable, a well-balanced curriculum should move students through a series of experiential learning opportunities that begin with explicit guidance in structured environments like simulations and move into intensive coaching, supervision, and feedback as students perform in unstructured real-practice settings.<sup>204</sup> However, a sensible progression through experiential learning does not map neatly onto the three types of experiential courses because each type of experiential learning provides within it a range of possibilities for less and more challenging experiences.<sup>205</sup> Simulations, for example, can range from simple exercises allowing students to learn some basic information about the conceptual framework for a skill and perform an isolated task to a complex, multi-part extended experience that ranges over the course of an entire semester and integrates several lawyering tasks and skills.<sup>206</sup> Moreover, some types of legal work, such as high-stakes financial transactions, are best suited to study in an extended simulation format rather than a real-practice setting because “[n]o client would entrust a multi-million dollar transaction to law students.”<sup>207</sup>

Within the realm of supervised real-practice experience, Susan Brooks has distinguished between two kinds of roles that a student might play: a “mentee” relationship where they engage in supportive legal work as they shadow and observe lawyers in practice, or a “first chair” role of representing clients directly

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199. See generally, OGILVY, ET AL., *supra* note 119 (covering these among other topics in a general textbook for use in conjunction with externships).

200. *Id.* at 11–14.

201. *Id.* at 199–203.

202. *Id.* at 3; BEST PRACTICES REPORT, *supra* note 3, at 198–99.

203. *Report on the In-House Clinic*, *supra* note 185, at 511.

204. Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum*, 41 U. BALT. L. REV. 395, 412–13 (2012).

205. See Gouvin, *supra* note 90, at 441–42;

206. See *id.* at 441–46 (describing a range of different approaches to using simulations to teach transactional lawyering in doctrinal courses).

207. Fleischer, *supra* note 89, at 485–86.

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under supervision.<sup>208</sup> Clinics will almost always place students in a “first-chair” role, while most externships keep students within a “mentee” role.<sup>209</sup> However, when compared to externship placements in which students take on more “first chair” responsibilities with less guidance and feedback, the low caseload and close supervision of a clinic can serve as an intermediate and preparatory step. Complicating the picture is the often forgotten fact that law students are contemporaneously working at part-time and summer jobs, where they may be placed in a range of practice settings providing them with both mentee and first-chair experiences.

To structure a progression of experiential learning into their curricula, law schools have begun to orchestrate students’ movement through a series of learning experiences that provide increasing levels of complexity with skills-based course requirements.<sup>210</sup> For example, schools are increasingly adding courses to the first year that introduce basic aspects of lawyering skills as an introduction to the lawyering process or the problem-solving role of lawyers.<sup>211</sup> Some schools have provided skills structure to the upper-levels of the curriculum by requiring students to take a certain number of upper-level skills courses or requiring every student to take a real-practice clinic or externship experience.<sup>212</sup> The most notable effort to structure these experiences into a progression—rather than simply to require them—has been Washington & Lee’s introduction of an “experiential third year” comprised of clinics, externships, and capstone courses with extensive simulations.<sup>213</sup>

These are all laudable efforts and can serve as models for innovation elsewhere. But even well-intentioned law school faculties confront barriers as they approach curricular reform, and these barriers may seem even more daunting in current times of shrinking budgets and lower enrollments.<sup>214</sup> The next Part describes some strategies for overcoming these barriers by analyzing more carefully the perceived costs of curricular innovation, and providing concrete suggestions for change that are particularly suited to the environment of law schools today.<sup>215</sup>

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208. Brooks, *supra* note 204, at 412–13.

209. Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C. J. L. & SOC. JUSTICE 309, 322 (2012).

210. *See infra* Part III.B.1.

211. *Id.*

212. *See* Tokarz et al., *supra* note 189.

213. WASHINGTON & LEE UNIVERSITY NEW THIRD YEAR REFORM, <http://www.law.wlu.edu/thirdyear/> (last visited June 11, 2013) (on file with the *McGeorge Law Review*). For a more in-depth discussion of programs that require substantial skills instruction and clinics or externships, see Tokarz, et al, *supra* note 189.

214. *See infra* Part III.

215. *Id.*

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III. OVERCOMING THE BARRIERS TO INNOVATION IN THE LAW SCHOOL CURRICULUM

When the issue of reforming the law school curriculum to include more professional skills instruction is raised, it is often accompanied by an almost immediate repetition of the mantra that such ideas are nice but the cost of intensive, one-on-one supervision in experiential courses is prohibitively high.<sup>216</sup> In the current era of soaring tuition, a tightening job market, and declining student enrollments,<sup>217</sup> it is especially important to examine carefully how curricular reform can occur in ways that are cost-sensitive. This Part will explore the cost issue in more detail and offer suggestions for cost-sensitive re-deployment of resources to further the ends of curricular reform.<sup>218</sup>

A. *Defining the Costs of Curricular Reform*

1. *Monetary Costs*

The primary reason that experiential education is said to be too costly is that quality instruction that supports experiential learning requires a low student-teacher ratio to permit multiple opportunities for performance, feedback, and reflection.<sup>219</sup> Law school clinics are probably the most expensive form of experiential legal education in these terms, both because the student-teacher ratio usually stays in the range of eight to one or ten to one,<sup>220</sup> and because it takes the dedicated attention of a full-time teacher to maintain the high level of supervision of actual cases that clinic teaching demands.<sup>221</sup> Externships require less investment of faculty resources because volunteer attorney mentors directly supervise the student work. However, to provide a sound pedagogical framework for on-site learning, externships still require significant faculty investment in one-on-one meetings with students, field supervisors, and other support for

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216. See e.g., Rakoff & Minow, *supra* note 36, at 603; Joy, *supra* note 209, at 309-10; Illig, *supra* note 88, at 231-32.

217. TAMANAHA, *supra* note 4, at 2-6.

218. See *infra* Part III.A.1.

219. See generally Gouvin, *supra* note 90, at 444.

220. *Report on the In-House Clinic*, *supra* note 185, at 538. More recent data indicates that average student-teacher ratios fall within the range of five to eight students (40.9% of those surveyed) and nine to twelve students (32.3% of those surveyed). DAVID A. SANTACROCE & ROBERT R. KUEHN, CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION: THE 2010-11 SURVEY OF APPLIED LEGAL EDUCATION 16 (2012), available at <http://www.csale.org/files/CSALE.Report.on.2010-11.Survey.5.16.12.Revised.pdf> (on file with the *McGeorge Law Review*).

221. *Report on the In-House Clinic*, *supra* note 185, at 511 (“Although the clinical movement began with practitioners used as supervisors, many clinical teachers came to believe that student supervision by practitioners was problematic for a methodology in which teaching was not incidental to the enterprise but rather its primary function.”).

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feedback and reflection.<sup>222</sup> According to one set of guidelines, the appropriate student-faculty ratio in externships should be no more than sixteen to one if taught in a seminar format and ten to one if taught through individual tutorials.<sup>223</sup> Simulations are similarly structured to permit students to perform in role and receive individualized feedback, similarly limiting the size to which they can grow.<sup>224</sup>

It makes sense, in terms of simple math, to say that if a greater percentage of a law school's curriculum is to be delivered in settings with lower student-teacher ratios, law school education will cost more. However, this "simple math" reasoning overlooks the realities associated with the costs of legal education; and in so doing, it overlooks opportunities for expanding experiential education in ways that are cost-sensitive.

First, the argument overlooks the most basic question: more expensive compared to what? Lower student-teacher ratios improve the quality of student engagement and learning across the board, including in doctrinal courses.<sup>225</sup> Indeed, one of the major drawbacks of the case method approach is its reliance on self-directed, vicarious learning by the majority of students in a classroom, while the professor engages a few students in intensive, one-on-one exchanges.<sup>226</sup> The pedagogical objectives of the case dialogue method are also better achieved when the class size is small enough to permit the professor to call on students multiple times throughout the semester and engage a larger percentage of the class in structured, give-and-take discussions.<sup>227</sup>

Second, as Peter Joy recently described, the cost of lower student-teacher ratios must be put into context by noting the other costs that have driven up the sticker price of legal education in recent times.<sup>228</sup> Although law schools' investment in smaller-enrollment experiential courses has been one factor driving the increase, it is surpassed by other categories of expenditure.<sup>229</sup> Most notably, in recent years, law school faculty members have earned steadily more money to teach a steadily decreasing average course load.<sup>230</sup> Indeed, Robert Kuehn's recent

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222. See e.g. Laurie Barron, *Learning How to Learn: Carnegie's Third Apprenticeship*, 18 CLINICAL L. REV. 101 (2011) (describing the development of an on-site mid-semester meeting process).

223. J.P. Ogilvy, *Guidelines for the Evaluation of Legal Externship Programs*, 38 GONZ. L. REV. 155, 165 (2003).

224. Gouvin, *supra* note 90, at 443-44.

225. Schwartz, *supra* note 130, at 351-52.

226. *Id.*

227. Newton, *supra* note 4, at 101-02.

228. Joy, *supra* note 209, at 311 (describing rising tuition costs over the past three decades that significantly outpace inflation).

229. *Id.* at 315-18 (noting the costs of building renovation and construction and of increases in average faculty salaries).

230. *Id.* at 316-18. Moreover, increases in tuition during the boom years have not always been attributable to actual costs: some schools drive tuition costs up simply because they can and because it enhances their prestige to do so. *Id.* at 311-13.

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study of the “pricing” of clinical legal education suggests that there is *no* relationship between a school’s choice to require or guarantee a clinic to every student and its tuition.<sup>231</sup>

Low student-teacher ratios remain a legitimate cost factor to consider, but the “silver lining” in the cloud of precipitously-dropping law school enrollments is overall student-faculty ratios have been in sharp decline.<sup>232</sup> If law schools have the authority to lay faculty off in proportion to the reductions in their tuition revenues, overall student-teacher ratios could remain constant, but tenure and other forms of security of position limit these choices.<sup>233</sup> As a result, schools that have secured the faculty positions of clinical teachers in boom years of student enrollments will suddenly find they are now able to accommodate a larger percentage of their student body in their existing clinics and externship programs.<sup>234</sup> And, student-faculty ratios in other upper-level elective courses are likely to drop, permitting greater incorporation of experiential teaching methods into those courses as well.<sup>235</sup> The biggest threat to the quality of experiential educational programs is that the faculty who teach them may be particularly vulnerable to layoffs, compared with their colleagues who teach in the classroom.<sup>236</sup>

The monetary cost of experiential education, while not imaginary, has always been questionable as the primary justification for holding back on curricular reform.<sup>237</sup> When considered in the context of other cost-drivers of legal education, the choice not to develop a robust experiential program appears to be more a question of priority than necessity. However, in the new environment of legal education, the monetary cost barriers to curricular reform are fast fading into the background; in many ways, the time has never been better for schools to offer experiential education to their students. However, to do so, law schools must be creative in redeploying the relative surplus in faculty-teaching resources that many will likely be experiencing in the next few years.<sup>238</sup>

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231. Robert R. Kuehn, *Pricing Clinical Legal Education*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2318042](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318042) (last visited Oct. 25, 2013) (on file with the *McGeorge Law Review*).

232. See TAMANAHA, *supra* note 4, at 2–6.

233. The ABA requires law schools to “afford to full-time clinical faculty members a form of security of position reasonably similar to tenure.” ABA STANDARDS FOR THE ACCREDITATION OF LAW SCHOOLS, Standard 405(c) (2012).

234. See TAMANAHA, *supra* note 4, at 2–6.

235. See *id.*

236. Compliance and enforcement with the ABA standards governing the security of position of clinical professors has been problematic. Recent survey data indicates that approximately 20% of faculty members teaching in clinics are tenured and another 7% have clinical tenure. Another 17.5% have long-term contracts of five years or more. For a more detailed description of the history and enforcement of this requirement, see Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008). Given the history of enforcement, some schools will find themselves in the position of laying off the very faculty members who are best qualified to be leaders in curricular reform due to economic necessity.

237. Joy, *supra* note 209, at 309–10.

238. A common objection at this point in the discussion is that faculty members simply lack the



## 2. Other Costs

The prospect of redeploying existing faculty teaching resources away from traditional doctrinal instruction and toward experiential education raises two other kinds of cost issues. One is the cost to students of “spending” their discretionary, upper-level law school credits on experiential instruction.<sup>239</sup> The other is the cost to faculty in terms of the time, effort, and imagination that it takes to develop or redesign courses that integrate a broader range of professional skills instruction and to learn to teach in new and unfamiliar ways.<sup>240</sup>

To illustrate these costs to students in expending discretionary credits, I use the example of my own experience at Hamline University School of Law. Hamline recently adopted an experiential progression plan for integrating skills instruction throughout the curriculum that will apply to students who enter in the fall of 2014. Hamline had already recently developed a two-credit, first-year lawyering course called Practice, Problem-Solving, and Professionalism, which focuses on introducing students to lawyering skills, professional identity, and professional role through a variety of assignments, exercises, interactions with practicing attorneys, and simulated role-plays.<sup>241</sup> The plan for experiential progression was to build on this first-year introduction to skills by requiring students to take two one-credit lawyering skills lab modules in the second year of law school and twelve other credits in professional skills courses in the upper-level curriculum. Hamline offers a wide range of skills courses, clinics, and externships; and, with projected declines in student enrollment, offering enough slots to meet these proposed requirements was not an issue. However, it quickly became apparent that the proposed experiential requirements were on a collision course with both core bar instruction and with students’ participation in some of

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competencies to engage in instructional methods that deviate from the traditional case dialogue method. However, I believe those who raise that objection overstate it for two reasons. First, as demonstrated in Parts I and II, there are a lot of similarities in pedagogical structure between the case dialogue method and other skills instruction, and there is reason to expect that faculties with competencies in one kind of skills instruction, a high level of intelligence, and a proper grounding in the theories underlying other skills, can learn to adapt their methods. Second, much of the frustration vented in the direction of law schools as a whole is based on a stereotype of professors with PhDs and no practice experience and informed, if at all, by experience with elite law schools. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34–42 and n.15 (1992) (discussing complaints based on observations of practices at elite law schools and a survey he circulated to his former clerks who had largely graduated from these law schools). The applicability of these stereotypes to non-elite schools (or schools not striving to be elite by replicating the hiring practices at elite schools) is questionable.

239. See generally Joy, *supra* note 209 (discussing the function and expenses related to clinical legal training).

240. *Id.*

241. For a more lengthy description of the development and implementation of this course, see generally Bobbi McAdoo et al., *It’s Time to Get It Right: Problem-Solving in the First-Year Curriculum*, 39 WASH. U. J. L. & POL’Y 39 (2012).

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Hamline's certificate programs in Health Law, Business Law, and Dispute Resolution.

Hamline has a fairly typical law school curriculum that—like most schools—requires instruction in the usual line-up of first-year subjects.<sup>242</sup> The law school requires upper level students to take a smattering of additional courses including at least two credits of Professional Responsibility, International Law, and a two-credit seminar.<sup>243</sup> When students take the forty-two credits needed to meet Hamline's graduation requirements and add the thirty-eight credits it takes to cover all thirteen of the non-required courses that teach subjects tested on the bar examination, the total reaches eighty credits. Students who elect to take all of the bar courses offered in the upper-level curriculum have only eight remaining credits to spend.<sup>244</sup> In the end, a significant core of the Hamline faculty was unwilling to pass a set of course requirements that prevent students from taking as many bar courses as they wanted to take<sup>245</sup> and cut back on the number of required credits, while retaining the overall progressive structure of the plan.<sup>246</sup>

The Hamline experience drives home some of the deeper challenges curricular innovation faces. Developing new and innovative experiential courses and adding them as electives that students can choose is a good thing, and if law schools build a robust skills and experiential program, at least some students will take full advantage of it.<sup>247</sup> But the traditional law school curriculum is set in its

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242. Within the first two years, Hamline students are required to take: Contracts (6 credits); Torts I (3 credits); Civil Procedure (6 credits); Criminal Law (3 credits); Property (3 credits); Constitutional Law I (3 credits); Professional Responsibility (2 credits); Legal Research and Writing (5 credits in the first year and 2 credits thereafter); and International Law (3 credits). *Graduation Requirements for JD*, HAMLINE UNIV. SCH. OF LAW (2013), <http://law.hamline.edu/Content.aspx?id=2147503615> (on file with the *McGeorge Law Review*).

243. In the process of considering the experiential progression plan, the faculty also voted to amend the International Law requirement to require that students complete at least two credits from a menu of courses that expose students to law in a global context, some of which are skills or experiential courses.

244. An internal three-year study showed that Hamline students actually spent their discretionary credits a number of different ways and their bar passage did not clearly correlate with their choices. About two-thirds of the students elected to take in the range of seven to nine elective bar courses and a vast majority took at least six. This data was based on Hamline students who took the Minnesota bar prior to Minnesota's adoption of the Uniform Bar Examination, when the total number of course needed to cover subjects tested on the bar was eleven instead of thirteen. Memorandum from Kate Kruse and Bobbi McAdoo to the Faculty of Hamline University, Experiential Progression Proposal (March 6, 2013) [hereinafter Memo to Faculty] (on file with the *McGeorge Law Review*).

245. The situation was complicated by the fact that Minnesota had just adopted the Uniform Bar Examination, which tested a different list of subjects that demanded an additional six credits of courses to achieve full bar coverage. The certificate programs are also working to expand the experiential requirements within the certificates so that students can meet an expanded skills requirement while completing a certificate.

246. Hamline ended up passing an Experiential Progression Plan that retained its progressive structure but required fewer credits—one lab in the second year and six credits in the upper level—along with a commitment to studying how bar instruction might be abridged or courses combined to lessen the total number of credits needed to cover all the subjects tested on the bar.

247. For example, Hamline's internal study showed that students elected an average of 9.77 credits in skills courses at a time when Hamline required only two skills credits. However, the number of skills credits that students elected were distributed along a range from one to twenty-eight credits: about 12% of the students

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ways. Structuring the curriculum to require all students to progress through a series of experiential courses requires a broad, coordinated, and holistic approach that re-shapes the curriculum to make room for students to meet experiential requirements along with their other learning goals.

The next Section looks at a menu of relatively low-cost options that might be part of such a curricular re-structuring. They are low-cost for faculty because, while they require faculty to expend time and effort, learn new ways of teaching, and collaborate with members of the practicing bar, they generally stay within the skill sets that faculty members see as their strong suits: teaching, research, and analysis.<sup>248</sup> They are low-cost for students because they look, in part, at ways of making core bar and other upper-level instruction more efficient so that it does not have to be pitted against skills instruction. And, for law schools that already have enough skills and real-practice experiential offerings in their curriculum to fully serve the reduced class sizes of the next several years, they will be low in monetary costs as well.<sup>249</sup>

*B. A Menu of Low-Cost Innovations to Implement the Goal of a Well-Balanced Curriculum*

Before turning to a specific menu of ideas, it is important to be reminded that the end-game of a well-balanced curriculum aims at: (1) *integrating* substantive law instruction into a broader range of skills instruction so that skills coverage becomes a structuring criterion as important as doctrinal coverage; (2) creating a *progression* of experiential learning that teaches the conceptual frameworks underlying skills instruction in structured settings first and requires students to perform lawyering tasks in increasingly unstructured settings; and (3) is characterized by *collaboration* between the legal academy and the practicing bar that avoids “farming out” experiential learning to members of the practicing bar.<sup>250</sup>

This menu of ideas is not meant to constitute a comprehensive program of legal education, nor to substitute for the process of developing one. And, it does not attempt to state benchmarks for the number of credits that schools should allocate to skills instruction in a well-balanced curriculum, another important

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met the minimum requirement by taking one 2- or 3-credit class; about 15% took fifteen or more total credits; and the rest fell somewhere in between with no discernable pattern of distribution. Bar passage did not correlate with the number of skills credits that students elected. Memo to Faculty, *supra* note 244.

248. See Rakoff & Minow, *supra* note 36, at 605 (saying of the first-year problem-solving course at Harvard that “distinctly legal capacities are engaged in the analysis of complex, rich factual descriptions of problems and in the generation of alternative avenues for problem-solving”).

249. As noted previously, this will depend on law schools’ budget-cutting priorities and the extent to which they have protected the job security of their clinic and other experiential teaching faculty. See *supra* note 236 and accompanying text.

250. See *supra* Part II.

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project being carried out by others.<sup>251</sup> The proposals that follow should be seen as a menu of tactics schools might use as part of a larger strategy to achieve a well-balanced and well-integrated law school curriculum.

### *1. Incorporate Introductory Instruction to Lawyering Skills and Competencies into the First Year of Law School*

Many schools have already developed first-year courses or lawyering programs introducing lawyering skills like client problem-solving. Harvard Law School made a splash with the introduction of its first-year curriculum that uses case studies and accompanying readings to focus on developing problem-solving skills.<sup>252</sup> New York University has an extensive and long-standing Lawyering Program that uses simulations and exercises to integrate basic lawyering skills instruction with legal research and writing.<sup>253</sup> Many other schools have now developed similar instruction dedicated to lawyering skills, sometimes in conjunction with an expanded legal research and writing program.<sup>254</sup>

Schools might also choose to incorporate introductory skills instruction into the first year through a coordinated effort among first-year instructors to work skills exercises into their classes. Because the first-year curriculum is structured and uniform, it is possible for a school to identify in advance the four or five skills it wants to introduce in the first year and to integrate a coordinated set of exercises based on these skills into each first-year substantive law course. Either method—stand-alone course or coordinated integration—would achieve the benefit of helping first-year law students put their developing skills of legal analysis and reasoning into the larger lawyering process.

### *2. Append Skills Labs to Core Bar Courses as Intermediate Skills Training*

One of the best-received components of Hamline's Experiential Progression Plan was the recommendation that one-credit lab modules be appended to core bar courses and that students be required to take at least one of these labs in their second year of law school.<sup>255</sup> The "lawyering skills lab" idea is based on the lab

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251. Others have made the case for what a comprehensive reform should be. For example, in a recent article, Karen Tokarz, Antoinette Sedillo Lopez, Peggy Maisel, and Robert F. Seibel recommend that every law graduate should "complete a minimum of 21 credits in experiential courses over the three years of law school, including at least five credits in law clinic or externship courses." Tokarz, et al, *supra* note 189, at 2.

252. Rakoff & Minow, *supra* note 36 (describing the conceptualization of what has become Harvard Law School's first-year problem-solving workshop).

253. THE LAWYERING PROGRAM, <http://www.law.nyu.edu/academics/lawyeringprogram/index.htm> (last visited June 11, 2013) (on file with the *McGeorge Law Review*).

254. See e.g. Nancy M. Maurer & Linda Fitts Mischler, *Introduction to Lawyering: Teaching Students to Think Like Professionals*, 44 J. LEGAL EDUC. 96 (1994) (describing Albany's program of integration with legal writing); McAadoo et al, *supra* note 241 (describing Hamline's program based on a problem-solving model).

255. See Memo to Faculty, *supra* note 244.

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structure of undergraduate science courses, where substantive material is taught in large sections of classes and applied in smaller lab sections.<sup>256</sup> Labs permit students to get multiple experiences performing and receiving feedback on a series of lawyering tasks in a way that is more directly integrated with the concurrent substantive law instruction.<sup>257</sup> Labs can be offered relatively inexpensively by using adjuncts to teach a one-credit lab module accompanying a substantive law course. For that reason, labs costs are relatively inexpensive in terms of asking faculty to teach outside their comfort zones.<sup>258</sup> And, because they are offered for low credit and concurrently with core bar instruction, labs are also a low-cost option for students trying to balance competing demands on the expenditure of their discretionary credits.

Some of the attractions of labs, however, also raise caution. The division of responsibility between faculty-taught courses and adjunct-taught labs can slip into a “farm out” model that reinforces the divide between theory and practice, rather than integrating the students’ learning in the classroom and in the lab.<sup>259</sup> Delegating the development of a lab entirely to adjuncts without collaboration is likely to result in a set of exercises teaching what lawyers practicing in the field think students ought to know how to do—what Victor Fleischer called a “cookbook” model of training in contrast to teaching the conceptual theories underlying practice.<sup>260</sup> A “farmed out” lab also runs the risk of undercutting the authority of the classroom teacher with the message that in the lab you are going to learn the way things “really work.”

The keys to success in the lab model are collaboration, communication, and coordination.<sup>261</sup> The professors who teach the courses need to be involved in selecting exercises that will supplement and apply the substantive law instruction in the underlying course and that fit best into an overall plan to create synergies between the classroom and lab instruction.<sup>262</sup> One way is to choose doctrinal issues that students have difficulty grasping and might better understand through application.<sup>263</sup> If the labs are being developed as part of a systematic program,

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256. Illig, *supra* note 88, at 234 (describing the University of Oregon’s Mergers & Acquisitions lab).

257. *See id.* at 234–35.

258. *Id.* at 236 (describing how Oregon asked law firms to “sponsor” labs instead of hiring individual adjuncts).

259. *Id.* (“Our tenure track faculty are free to focus on their strengths—doctrine and policy—while leaving the teaching of dealmaking to those with the best inside knowledge of the current norms and procedures of practice.”).

260. Fleischer, *supra* note 89, at 479.

261. Illig, *supra* note 88, at 234.

262. *Id.*

263. For example, in developing a lab for an Evidence course I taught at the University of Nevada Las Vegas, we focused one lab on the topic of “opening the door” to adverse character evidence in criminal cases, which is much easier to grasp if you see how it plays out in application. The lab was also designed to teach witness examination skills, but it did so in the context of helping students grasp a difficult doctrinal concept.

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such as Hamline's lab requirement, they also need to fit into the comprehensive plan for developing skills throughout the curriculum.<sup>264</sup>

#### 3. Offer Short Courses and Online Modules on Basic Bar Subjects

One of the most unfortunate ways that the traditional law school curriculum creates barriers to students' robust development of a broader range of professional skills is by teaching upper-level bar courses exclusively or primarily in large sections through the case dialogue method.<sup>265</sup> As a result of this curricular choice, students who want courses that cover the material tested on the bar examination end up taking a high number of high-enrollment courses with a repetitive instructional methodology, rather than branching out into smaller classes providing more robust opportunities for performance and feedback and development of a broader range of skills.

It is possible to address this concern by substantially integrating other skills instruction into the organizing fabric of an upper-level bar course in the same way that instruction in legal analysis and reasoning is built into the fabric of the case dialogue method.<sup>266</sup> In the world of low-cost options, it is also possible to sever the coverage of core bar doctrine from the traditional classroom teaching entirely and deliver some of that instruction in the format of smaller, lower-credit modules. Many schools have opportunities for offering short courses in the summer or in the interim between semesters that could be used for this purpose.<sup>267</sup> Advancements in technology also make it possible to create collections of relatively short, focused pre-recorded "Ted Talks" on core bar subjects.<sup>268</sup>

The availability of bar instruction in short modules gives students a lower-cost option to gain a foundation in some of the subject matters tested on the bar and to choose the more intensive and in-depth coverage of bar subjects in areas in

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264. Hamline, for example, has an overall plan to develop skills sets in three areas—advocacy, client problem-solving, and transactional planning—that begins in the first year with its problem-solving course and ends with required credits of more advanced skills instruction. The University has designed the labs to be an intermediate level of skills development. The first phase will develop lab modules that further develop advocacy, client problem-solving and transactional skills in Evidence, Family Law, Wills and Trusts, Secured Transactions, Criminal Procedure, and Torts II.

265. See generally Lewyellen, *supra* note 45 (discussing the traditional education methods of law schools).

266. For an exemplary effort, see generally Carolyn Grose, *Outcomes-Based Education One Course at a Time: My Experiment with Wills and Trusts*, 62 J. LEGAL EDUC. 336 (2012) (describing the systematic and holistic restructuring of a large-enrollment bar course to integrate client interviewing, client counseling, and storytelling skills and to integrate and balance that teaching with basic doctrinal coverage).

267. See SANTACROCE, *supra* note 220, at 28.

268. Classroom instructors could also use pre-recorded modules to free up time for more interactive skills-based learning in class. See Michelle Pistone, *Flipped Learning for Legal Education*, BEST PRACTICES FOR LEGAL EDUCATION (Apr. 25, 2013), <http://bestpracticeslegaled.albanylawblogs.org/2013/04/25/flipped-learning-for-legal-education/> (on file with the *McGeorge Law Review*).

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which they expect to practice.<sup>269</sup> As students exercise this option, the enrollment in some core bar courses will diminish, paving the way for integrating more interactive and skills-based instruction into those courses.<sup>270</sup>

#### 4. *Ditch the Casebook in Upper-Level Electives*

One of the professional skills most overlooked in legal education is the skill of legal research. The ABA requires all law schools to provide instruction in legal research, and basic legal research skills are a core component of most first-year required legal research and writing courses.<sup>271</sup> However, upper-level doctrinal instruction continues to rely on casebooks collecting and delivering the relevant substantive law to students within the covers of a single edited volume. By ditching the casebook in upper-level courses and requiring students to research and discover the relevant law as they learn it, law schools could do a better job of moving students progressively toward entry-level competence in legal research throughout the curriculum.<sup>272</sup>

Advancements in technology make it possible to replace the printed casebook with instructional materials that provide a platform for the basic doctrine in a substantive area and structured portals through which students can research relevant law. Teaching from materials that were structured research portals rather than edited volumes would open up new possibilities of teaching law as it is integrated in statutes, administrative regulations, and other materials. Students could use such materials to do targeted research assignments outside of class that begin with significant scaffolding that walks students through the process of finding a particular kind of relevant authority, such as an administrative regulation implementing a statute or an IRS opinion letter. As the course progresses, the assignments could become progressively less structured so that students would need to integrate the research strategies learned in earlier class assignments to complete the later assignments.<sup>273</sup> In the classroom, professors could draw on many of the same pedagogical techniques they use in the case dialogue method: modeling research techniques on computer screens in front of the class, calling on students to inquire what answer a student found and how he or she found it, and engaging other students to see if they found a different answer, or found the same answer through a different route.<sup>274</sup>

From the students' perspective, ditching the casebook would reduce costs because casebooks are an expensive way to access material, most of which is in

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269. Stuckey, *supra* note 178, at 822–23.

270. Fleischer, *supra* note 89, at 479.

271. See ABA STANDARDS FOR ACCREDITATION, *supra* note 176.

272. Stuckey, *supra* note 178, at 822–23.

273. See Schwartz, *supra* note 130, at 379–82 (discussing a constructivist theory as applied to law schools).

274. BEST PRACTICES REPORT, *supra* note 3, at 165.

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the public domain and available to them online. But ditching the traditional casebook entirely is not cost-free to faculty because there currently does not exist a wealth of alternative materials from which professors can draw. Developing such teaching materials would require a substantial investment of time and imagination.<sup>275</sup> But the project of developing such materials is within the strengths and competencies of most faculty members because legal research is something in which law professors regularly engage. In developing casebooks, law professors already research a field broadly and find the cases they want to include in published casebook materials. It would not be a stretch for members of the legal academy to develop materials designed to build students' research capacities.

Moreover, there are lower-cost ways of taking incremental steps toward the goal, such as developing a set of progressive research assignments and exercises in courses that rely on the casebook as the primary course material. By developing exercises and assignments in subject areas that rely primarily on state and local law, professors could demonstrate how substantive law develops in context, rather than through a disjointed collection of materials from diverse jurisdictions.

#### *5. Incorporate Substantial Simulation-Based Teaching into Specialized Upper-Level Electives*

One innovation many schools have already developed is specialized upper-level electives incorporating substantial and extensive simulations in advanced or specialized areas. For example, the experiential third year at Washington & Lee incorporates a large number of what it calls "practicums," along with real-practice experiential courses, such as clinics and externships.<sup>276</sup> In practicums, the focus is on applying the substantive law in a specialized area by engaging in practice-based exercises.<sup>277</sup>

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<sup>275</sup> See generally Grose, *supra* note 266 (describing her process in creating an outcomes-based course).

<sup>276</sup> Washington & Lee School of Law, Third Year Component Descriptions, <http://law.wlu.edu/third-year/page.asp?pageid=652> (last visited June 14, 2013) (on file with *McGeorge Law Review*).

<sup>277</sup> For example, Washington & Lee describes its Entertainment Law Practicum by saying:

This course focuses on the practical elements of drafting and negotiating deals in the entertainment industry. The course will introduce students to understanding deal structures and terms, identifying issues and finding creating solutions to problems, negotiating on your client's behalf (with an emphasis on what's important to your client, what isn't, and why), and drafting the necessary documents. In order to best simulate a real-world work environment, students will be involved in two deals simultaneously, one in which they represent the "talent" and one in which they represent the "corporate entity." There will be a live, hands-on negotiation element to the course, as well as a written element intended to mirror how deals are done through drafting and revision of documents by e-mail. The instructor will also endeavor to have guest "clients" come to class to provide students with a realistic experience in addressing client needs and concerns, and giving the best advice (including advice that a client may not want to hear).



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Such courses provide an opportunity to better incorporate the unique perspectives of adjunct professors into the curriculum.<sup>278</sup> Many schools already employ adjunct professors to teach upper-level courses in specialized areas of law where, as Robert Illig put it, “ongoing practice experience is highly valued and appropriately skilled full-time faculty scarce.”<sup>279</sup> Such courses are also sometimes offered in areas of advanced or highly specialized areas of law that are not tested on bar examinations, such as Sports Law or Entertainment Law.<sup>280</sup> Rather than asking adjunct professors to teach such specialized areas from casebooks, law schools could take full advantage of adjunct professors’ in-depth knowledge of practice by redeploying them to methods of teaching that are more practice-based.<sup>281</sup>

6. *Look for Ways to Increase the Capacity of Clinic and Externship Programs*

No matter how creatively a law school reallocates its resources from traditional classroom instruction into simulations, nothing substitutes for the value of the real-practice experience students gain in law school clinics and externships.<sup>282</sup> Surveys of recent law graduates confirm this observation.<sup>283</sup> Real practice experiences provide opportunities to integrate theory, doctrine, practice, procedure, skills, and ethics into unstructured settings that cannot be duplicated in simulated materials.<sup>284</sup> Although there is much to be gained by supplementing or replacing some of the classroom focus on legal analysis and reasoning with simulated lawyering exercises, it would be a mistake to deploy existing resources away from real-practice experiences for this purpose. As long as a law school does not cut back its real-practice opportunities, the recent trend of declining student enrollments will necessarily increase the real-practice opportunities for the students who remain.<sup>285</sup>

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*Id.*

278. Illig, *supra* note 88, at 236.

279. *Id.*

280. Fleischer, *supra* note 89, at 479.

281. Illig, *supra* note 88, at 223.

282. Joy, *supra* note 209, at 326; Tokarz, et al., *supra* note 189.

283. In a survey of new nonprofit and government lawyers, over 83% rated legal clinics as “very useful” in preparing them for the practice of law, with externships/field placements rated as “very useful” by 72% and skills courses by only 48%. NALP, 2011 SURVEY OF LAW SCHOOL EXPERIENTIAL OPPORTUNITIES AND BENEFITS: RESPONSES FROM GOVERNMENT AND NONPROFIT LAWYERS 26 (2012). A survey of new associates in private law firms reached similar results, with almost two-thirds (63%) rating legal clinics as “very useful,” followed closely by externships/field placements (60%) and skills courses lagging far behind (38.5%). NALP, 2010 SURVEY OF LAW SCHOOL EXPERIENTIAL OPPORTUNITIES AND BENEFITS 26 (2011).

284. BEST PRACTICES REPORT, *supra* note 3, at 166–67.

285. *See id.* at 110.

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However, schools should also look at options for increasing the number of slots available in clinic and externship programs without reducing the aspects of these programs that make them especially pedagogically valuable. In clinics, the limited student capacity is created by the intensive demands of individualized student supervision as well as the demands of casework.<sup>286</sup> Unlike a classroom course, which can absorb additional students without substantially increasing the workload of the professor, the individualized instruction of clinical pedagogy requires a greater investment of instructional time for each student that is added to a clinic course.<sup>287</sup> Moreover, increasing the number of students in a clinic also increases the number of clients or cases that the clinic professor must supervise, and these cases might continue after a semester ends, making further demands on clinic faculty time.

By employing a co-teaching model, clinic courses can expand their capacity for individualized supervision through collaboration with adjunct professors or non-clinic faculty who feel comfortable taking a rotation in an existing clinic.<sup>288</sup> Clinics can also expand their relative capacity by using “hybrid” models combining closely-supervised work on small, individual cases with immersion in real-practice settings outside the walls of the law school.<sup>289</sup> Such hybrid collaborations reduce the workload of individual clinic professors by reducing the number of cases that the in-house component of the clinic must absorb.<sup>290</sup> They have the additional benefit of combining the unique strengths of clinics and externships, providing students both the intensive and individualized supervision available in clinics and the verisimilitude of externship placements in law office settings.<sup>291</sup>

A school may also divert some of its surplus faculty resources into real-practice experiential education by recruiting non-clinical professors to teach small sections of students in its externship program.<sup>292</sup> Unlike clinic teaching, which requires direct supervision of students in the practice of law, externship professors play a supportive pedagogical role.<sup>293</sup> Effective externship teaching requires professors to understand the theory behind reflective practice and to use it to support the learning experiences students are having in their field placements.<sup>294</sup> In one-on-one consultations, externship professors help students identify and figure out how to address problems or frustrations they are experiencing in their placements. These are basic teaching skills that most law

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286. See *supra* Part II.D; Joy, *supra* note 209, at 309.

287. Joy, *supra* note 209, at 309.

288. Barry, et al., *supra* note 143, at 28.

289. *Id.*

290. Joy, *supra* note 209, at 309.

291. See *supra* notes 180–203 and accompanying text.

292. Joy, *supra* note 209, at 321.

293. *Id.* at 321–22.

294. *Id.*

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school professors either already possess or can develop within the context of a thoughtfully organized and well-supported externship program.<sup>295</sup>

Externship teaching also has the benefit of putting faculty in regular contact with members of the practicing bar who serve as field supervisors for the student placements.<sup>296</sup> Fostering such connections can help academic professors stay in touch with developments in the practice of law and can also help build good relationships between a law school and its alumni who serve as field supervisors for externship placements.

#### IV. CONCLUSION

The short menu of suggestions offered here is only a start, but it is hopefully the start to a larger dialogue of reform in legal education. Reform has long been hampered by the myth that theory can be separated from practice and in misconceptions about the nature of both doctrinal teaching and professional skills training. It is time for legal education to break free of the limitations in this kind of thinking. The first step is recognizing the substantial professional skills component in the traditional appellate case method of instruction and the substantial theoretical component in professional skills education. Once law schools recognize the basic continuities in pedagogical structure with other forms of experiential education, they can unlock a new world of possibilities for developing and re-deploying existing resources of faculty time and money to better educating law students for the practice of law.

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295. See Schwartz, *supra* note 130, at 383–409.

296. Joy, *supra* note 209, at 321.