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# Journal of Law and Education

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VOLUME 44

\_\_\_\_\_ 2015

NUMBER 4

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## **Flourish or Founder: The New Regulatory Regime in Legal Education**

SARAH VALENTINE†

*There is a new regulatory regime in legal education. Outside regulators, whether nationwide or state specific, are seeking to alter the education and training provided by U.S. law schools. These new mandates build on decades of work distilling how best to provide a professional legal education. Law schools have long fought outside reform; we do so now at our peril. This Article explores the current reforms, places them in historic context, and then articulates how legal educators should engage with the reforms to recenter student learning. Contrary to the prevailing wisdom, this Article argues that law schools can flourish if we embrace the regulatory reforms and may founder if we continue to resist them.*

### **Table of Contents**

<b>I. Introduction .....</b>	<b>3</b>
<b>II. Outside Regulators: Accreditors and Licensing Authorities .....</b>	<b>6</b>
<b>A. Regional Accreditors and the ABA .....</b>	<b>6</b>
<b>B. State Licensing Authorities .....</b>	<b>9</b>

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<b>III. The Need for Legal Education Reform: Perceptions of Systemic Curricular and Pedagogical Inadequacies .....</b>	<b>10</b>
<b>A. Connecting Analytic Skills to Problem Solving and Professionalism .....</b>	<b>12</b>
<b>B. Modernizing the Curriculum to Prepare Graduates for Success .....</b>	<b>16</b>
<b>C. A Student Learning Centered Pedagogy .....</b>	<b>19</b>
<b>IV. Pillars of Reform and the Underpinnings of the Current Regulatory Intervention .....</b>	<b>23</b>
<b>A. The 1970s and 1980s: Early Attempts at Curricular Reforms through Outside Regulation.....</b>	<b>24</b>
<b>B. The MACCRATE Report (1992).....</b>	<b>27</b>
<b>C. BEST PRACTICES and CARNEGIE REPORT (2007).....</b>	<b>28</b>
<b>D. Higher Education's Embrace of Student Centered Learning and Outcomes and Assessment based Pedagogy .....</b>	<b>30</b>
<b>V. Current Curricular Reform Efforts: Accreditors and the Bench and Bar Reassert Themselves .....</b>	<b>35</b>
<b>A. The ABA and Regional Accreditors.....</b>	<b>36</b>
<b>B. State Licensing Authorities and Admission to Practice Rules .....</b>	<b>43</b>
2. Arizona .....	46
3. New York .....	48
4. California .....	50
<b>VI. The Road to Transformation: Individualized, Experientially Based, and Student Centered .....</b>	<b>52</b>
<b>A. Recent Examples of Law School Transformation.....</b>	<b>54</b>
<b>B. Seven Principles to Guide Transformation.....</b>	<b>57</b>
1. Don't reinvent the wheel .....	58
2. Embed the process into the life of the law school .....	59
3. Be mission guided.....	59
4. Don't think small .....	61
5. Educate the students of today and tomorrow.....	61
6. Focus on Pedagogy .....	63
7. Be a bridge to the future of the profession .....	64
<b>VII. Conclusion .....</b>	<b>65</b>

## I. Introduction

There is a new regulatory regime in legal education, one born of decades of dissatisfaction with the professional education provided in American law schools. Those of us in the legal academy have a decision to make. Will we resist regulatory reform as we have in the past, making only cosmetic changes to meet the letter of the law, or will we embrace change, recenter student learning, and by doing so revitalize legal education. If we engage and join with the bench and bar we will flourish. If we fail to engage with the reforms, fail to listen to those outside our walls, we will founder and our students will suffer the consequences.

There is a history of critique from the bench and bar, as well as from within the legal academy itself that law schools fail to prepare students for the professional practice of law.<sup>1</sup> However it has grown more insistent in the past forty years<sup>2</sup> and recently spilled over into the public sphere with newspaper articles decrying the failure of law schools to teach "lawyering,"<sup>3</sup> blogs warning students away from law school, and books touting one or more failures of the legal academy.<sup>4</sup> The major areas of critique are directed at the lack of skills and professionalism education law schools provide, the antiquated curriculum, and the limited pedagogical methodologies employed.

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<sup>1</sup> See A. Benjamin Spencer, *The Law School Critique In Historical Perspective*, 69 WASH. & LEE L. REV. 1949 (2012) (tracing the consistent criticism of law schools from the late 1800's). See also ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNTS OF CONDITIONS IN ENGLAND AND CANADA, 281 (1921) ("The failure of the modern American law school to make any adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly.").

<sup>2</sup> See Peter A. Joy, *Law Schools and the Legal Profession: A Way Forward*, 47 AKRON L. REV. 177,183-4 (2014) (describing a number of post 1970 discussions about law school's failure to teach lawyering and professionalism).

<sup>3</sup> David M. Moss, *Legal Education At The Crossroads*, in REFORMING LEGAL EDUCATION: LAW SCHOOLS AT THE CROSSROADS 1, 2 (David M. Moss & Debra Moss Curtis eds., 2012) (referencing a New York Times article entitled "*What They Don't Teach Law Students: Lawyering*") [hereinafter REFORMING LEGAL EDUCATION].

<sup>4</sup> BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012); RICHARD SUSSKIND, THE END OF LAWYERS? (2010).

American legal education is a hybrid institution, born of the legal profession and the modern research university.<sup>5</sup> It is an institution long criticized for failing to meet the needs of its graduates, of the profession, and of society.<sup>6</sup> In part this is because it is perceived as identifying with and thus favoring one parent - the academy - over and to the detriment of the other.<sup>7</sup> As law schools have become firmly ensconced in the academy, whose coin of the realm is scholarship and research productivity, faculty focus on education for practice and profession has been radically de-emphasized.<sup>8</sup>

Unfortunately, law schools have fallen away from their university heritage as well, distancing themselves from the educational reforms to improve student learning adopted in undergraduate and professional education. Law schools now find themselves isolated: untethered from the profession, unmoored from higher education, and beset by unrelenting calls to reform. Those seeking reform have become convinced, not without reason, that

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<sup>5</sup> See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4 (2007) [hereinafter CARNegie REPORT], See also ROBERT STEVENS, LEGAL EDUCATION IN AMERICA: FROM THE 1850'S TO THE 1980'S 266 (1983) ("Legal Education's Heritage was one of an inherent conflict between the professional and the scholarly.") [hereinafter LEGAL EDUCATION IN AMERICA].

<sup>6</sup> ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 2 (2007) [hereinafter Best Practices].

<sup>7</sup> CARNegie REPORT, *supra* note 5, at 4 (describing this as legal education's "contested agenda").

<sup>8</sup> CARNegie REPORT, *supra* note 5, at 4 - 8. Accord Ruthann Robson, *Enhancing Reciprocal Synergies Between Teaching and Scholarship*, 64 J. Legal Educ. 480, 482 (2015) (Noting that between teaching and scholarship it is the production of scholarship by law faculty that is incentive and valorized); Brent E. Newton, *Preaching What they Don't Practice" Why Law Faculties' Preoccupation With Impractical Scholarship And Devaluation Of Practical Competencies Obstruct Reform In The Legal Academy*, 62 S.C. L. REV. 105 (2010) (describing law professors as self identifying as "university professors" rather than "practitioner-teacher," focused more on esoteric scholarship and rankings than teaching); 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, 360-61 (2001) (indicating that the legal academy's hiring, promotion and tenure policies incentive law faculty to be "minimally competent teachers and excellent scholars").

change will not come from within the legal academy.<sup>9</sup> While agreeing that law schools are attempting to respond to the new environments in which it finds itself, the American Bar Association (ABA) and others see the academy's response as fragmented, lacking in coordination, and ineffective.<sup>10</sup>

In response to this perceived resistance, outside regulators, be they accrediting bodies or state licensing authorities, are compelling curricular and pedagogical change. Over the past forty years,<sup>11</sup> those with the power to do so have gone from urging law schools to reform to taking concrete steps likely to lead to broad and fundamental changes in legal education in the United States. They have done so primarily to address the accusations that law schools graduates are neither equipped to practice law nor understand what is required to be a professional.<sup>12</sup>

However, while the regulatory changes focus on improving the practical education and professionalism training law students receive, they provide an opportunity for much more. They provide the opportunity for reviewing and re-organizing a law school's pedagogical methodologies and curriculum to better prepare students for success in an evolving economic and employment atmosphere. Regardless of an individual school's mission, creating a more intentional and sequenced learning environment will recenter student learning, creating a more effective program of education.

This Article explores where we as legal educators find ourselves, how we got here, and then posits how we can move forward and flourish rather than flounder. I suggest law schools embrace the regulatory changes and

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<sup>9</sup> AMERICAN BAR ASSOC. TASK FORCE ON THE FUTURE OF LEGAL EDUCATION at 15 (2014) [hereinafter TASK FORCE ON THE FUTURE OF LEGAL EDUCATION] (describing law school faculty as conservative and resistant to change); Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 519 (2007) (describing law school culture as “remarkably static, non-adaptive, and resistant to change”).

<sup>10</sup> TASK FORCE ON THE FUTURE OF LEGAL EDUCATION *supra* note 9, at 17.

<sup>11</sup> There have been calls for curricular changes since the inception of American legal education. This article is focused primarily on the period since 1970 because the recent regulatory changes stem from this wave of critique.

<sup>12</sup> This is a longstanding critique but one that has gained considerable traction with the recession, the collapse of the market for attorneys, and sky rocketing student debt.

attempt to leap ahead of the regulators. By understanding this regulatory paradigm shift and the theories, debates, reports, and studies which underpin the changes, we as legal educators have the opportunity to effect real and substantial reform that address the shortfalls of the current law school pedagogy and curriculum.

After the Introduction, the second section provides an overview of the authorities that regulate U. S. legal education. The third section discusses the critiques of American legal education, specifically perceptions of its curricular and pedagogical limitations, which have a detrimental effect on student learning. The fourth section discusses the historic underpinnings of the recent regulatory interventions and the fifth section details these recent interventions and mandates. The final section provides examples from five law schools that have recently built or transformed their program of legal education to meet the challenge of preparing students to be competent professionals able to succeed in a changing legal environment. This section ends with seven principles drawn from the current regulatory reform efforts as well as the foundations upon which those reforms were built. These principles can guide law school faculty as we regain our place in the profession by re-centering student learning and re-building our connections to the profession.

## **II. Outside Regulators: Accreditors and Licensing Authorities**

Law schools, like all institutions of higher education, are regulated directly through the educational accreditation process. They are also, like other professional schools whose graduates must pass state licensing exams, regulated by state authorities who set licensing standards in individual states. Each of these regulatory authorities can exert an enormous amount of influence over a law school's program of study. Until relatively recently these authorities have been relatively lax in their oversight of legal education, but this is now changing.

### **A. Regional Accreditors and the ABA**

Any university or college seeking to offer its students financial aid must be accredited by an organization approved by the Department of Education

(DOE).<sup>13</sup> There are six regional higher-education accrediting organizations in the United States currently authorized by the DOE to accredit most colleges and universities.<sup>14</sup> The process of accreditation and reaccreditation is focused primarily on assessing how well the educational mission of the school is being accomplished with the goal of quality assurance and continuing improvement.<sup>15</sup>

All law schools, except the relatively small number of freestanding schools, are housed within a college or university accredited by a regional higher education accrediting body. Even so, in the past law schools were largely immune to the demands and oversight of the regional accreditors. That is rapidly changing as these regional accrediting bodies have begun holding institutions accountable for all educational departments regardless of whether the department is also accredited by another organization.<sup>16</sup> Thus as regional accrediting bodies have shifted to evidence based outcomes and assessment focused accreditation process, law schools held accountable by these accreditors have had to shift their curriculum accordingly.

In addition to regional accreditors there are a number of accrediting bodies that accredit professional programs whose graduates are expected to pass

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<sup>13</sup> *Thomas M. Cooley Law Sch. v. The Am. Bar Ass'n*, 459 F.3d 705, 707 (2006) ("The federal government does not directly accredit institutions of higher education. Rather, the Secretary of Education approves accrediting agencies for different types of educational programs, and these accrediting bodies set independent standards for accreditation. Accreditation is important to a school for a number of reasons, not the least of which is that it allows the students of the school to receive federally-backed financial aid.").

<sup>14</sup> ABA SEC. LEG. EDUC. & ADMIS. TO THE BAR, REPORT OF THE OUTCOMES MEASURES COMMITTEE 46 (July 27, 2008) [hereinafter OUTCOMES REPORT] available at:

<http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf>

<sup>15</sup> Sarah Molinero, *Reexamining The Examiners: The Need For Increased Government Regulation Of Accreditation In Higher Education*, 51 DUQ. L. REV. 833, 839-40 (2013).

<sup>16</sup> See Mary Crossley and Lu-in Wang, *Learning By Doing: An Experience With Outcomes Assessment*, 41 U. TOLEDO L. REV. 269 (2010) (noting that Pitt Law adopted assessment of student learning outcomes reluctantly, at the prompting of University administration, after the University itself was prompted to undertake assessment by its accrediting agency); OUTCOMES MEASURES REPORT *supra* note 14, at 47 (noting regional accreditors beginning to actively require law school information in the accrediting process).

one or more postgraduate licensing exams.<sup>17</sup> The ABA's Council of the Section of Legal Education and Admission to the Bar (the Council) is the entity the U. S. Department of Education has approved as the accrediting body for law schools.<sup>18</sup> This allows the Council, independent of the ABA,<sup>19</sup> to set the standards law schools must meet if they wish be approved by the ABA and receive federal student financial aid monies,<sup>20</sup> a necessity for most law schools to remain in business. The regulations the Council adopts have a direct effect on the curriculum and pedagogy adopted in all ABA accredited law schools.

The regulations promulgated by the Council are known as the "ABA Standards and Rules of Procedure for Approval of Law Schools" (the Standards), and are reviewed and revised regularly through a committee process that includes the opportunity for law school and faculty input.<sup>21</sup> However, while the Council is the accrediting body for law schools it answers to both the Department of Education and the profession. Housed as it is within the ABA, the Council is aware of and often guided by the demands for legal education reform contained in the reports and studies

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<sup>17</sup> Sarah Molinero, *supra* note 15, at 839-40 (2013). *Accord* OUTCOMES MEASURES REPORT, *supra* note 14, at 20 (describing the professional accrediting bodies the Committee chose to review as those governing allopathic and osteopathic medicine, dentistry, veterinary medicine, pharmacy, psychology, teaching, engineering, accounting and architecture).

<sup>18</sup> AM. BAR ASS'N, SEC. OF LEGAL ED. AND ADMISSION TO THE BAR, THE LAW SCHOOL ACCREDITATION PROCESS, 3 (2013) available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_revised\\_accreditation\\_brochure\\_web.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_revised_accreditation_brochure_web.authcheckdam.pdf); U.S. DEP'T OF EDUC., ACCREDITING AGENCIES RECOGNIZED FOR TITLE IV PURPOSES. (webpage provides a list of accrediting agencies whose accreditation enables the institutions they accredit to establish eligibility to participate in the Federal student financial assistance programs administered by the Department under Title IV of the Higher Education Act of 1965 and lists the ABA's Council of the Section of Legal Education and Admission to the Bar) available at: [webhttp://www2.ed.gov/admins/finaid/accred/accreditation\\_pg9.html](http://www2.ed.gov/admins/finaid/accred/accreditation_pg9.html) (last visited 7/14/2014).

<sup>19</sup> The Law School Accreditation Process, *Id.*

<sup>20</sup> *Id.*; *Thomas M. Cooley Law Sch.*, 459 F.3d at 707.

<sup>21</sup> See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2013-2014 at vii, *available at* [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf)

emanating from within the ABA itself.<sup>22</sup> Although the legal academy has often been able to resist or water down reforms proposed by the ABA,<sup>23</sup> the profession is now re-asserting itself in the accrediting process and through state licensing procedures.<sup>24</sup>

### **B. State Licensing Authorities**

State licensing authorities also exercise a powerful influence over U.S. law school curriculums as each state determines its own admission standards, including educational requirements, that applicants must meet to be admitted to practice. For large jurisdictions such as New York or California, this ability to require specific educational requirements for admission has the ability to effect curricular decisions at law schools across the country.

State licensing authorities have always influenced legal education through the content of the state bar exam.<sup>25</sup> However, as the profession has remained dissatisfied with legal education more states are adding additional state specific requirements to their licensing regimes, many directly

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<sup>22</sup> "The current legal education reform movement builds on a history of more than a century of criticism and recommendations for reform. Experts have called for reform in a series of reports including an ABA Reports issued in 1879 and 1890, the 1914 REDLICH REPORT, the 1921 REED REPORT, the 1971 CARRINGTON REPORT, the 1979 CRAMTON REPORT, the 1992 MACCRATE REPORT, and the 2007 CLEA BEST PRACTICES REPORT, and the 2007 CARNEGIE REPORT. These reports and other analyses repeatedly faulted law schools for over-emphasizing instruction in legal doctrine and analysis at the expense of practical legal training. Based on surveys of lawyers, researchers have found that law school graduates are insufficiently prepared to perform important legal tasks including diagnosing and planning solutions for legal problems, instilling others' confidence, negotiation, fact gathering, drafting legal documents, counseling, obtaining and keeping clients, and managing legal work." John Lande, *Reforming Legal Education To Prepare Law Students Optimally For Real-World Practice*, 2013 J. DISP. RESOL. 1, 4.

<sup>23</sup> See e.g. STEVENS, LEGAL EDUCATION IN AMERICA, *supra* note 5, at 240 (describing law schools successful attempt to fight curricular reform and the imposition of new ABA Standards aimed at increasing professional skills courses).

<sup>24</sup> See *infra* section V.

<sup>25</sup> An example of this is widespread adoption of the multistate professional responsibility exam in in the post-Watergate period as the profession sought to right its ethical reputation. See James E. Moliterno, *Crisis Regulation*, 2012 MICH. ST. L. REV. 307, 329.

affecting curricular reform.<sup>26</sup> These requirements can range from requiring pre admission courses in professional responsibility,<sup>27</sup> or on state law,<sup>28</sup> to requiring instruction in substance abuse,<sup>29</sup> or the provision of 50 hours of pro bono services before sitting for the bar exam.<sup>30</sup> States can also impact law school curriculum by limiting or prohibiting certain instructional methodologies or limiting the number of credits taken in certain types of courses.<sup>31</sup> This is not a new phenomenon<sup>32</sup> although it is one that has been recently been revitalized.

### **III. The Need for Legal Education Reform: Perceptions of Systemic Curricular and Pedagogical Inadequacies**

“When you haven't changed your curriculum in 150 years, at some point you look around.”<sup>33</sup>

Or not.

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<sup>26</sup> Antoinette Sedillo Lopez, et al, *Legal Education At A Crossroads: Innovation, Integration, And Pluralism Required!*, 43 WASH. U. J.L. & POL'Y 11, 26 (noting the recent steps state licensing authorities have taken to address perceived deficiencies in new lawyer competencies).

<sup>27</sup> See e.g. Ind. Code. Ann. Tit. 34 R. 13 §4(C).

<sup>28</sup> Alabama requires all applicants to complete a course on Alabama law, the content of which is determined by the Alabama Board of Law Examiners, prior to admission. Rule VI(B)(A)(3) Alabama Bar, Rules Governing Admission to Alabama State Bar available at:

<https://www.alabar.org/assets/uploads/2014/08/Admissions-RulesGoverningAdmissions2014.pdf>

<sup>29</sup> Ohio Gov't Bar R.1, § 3(E)(2).

<sup>30</sup> 22 N.Y.C.R.R. § 520.16.

<sup>31</sup> Until December of 2014 New York prohibited any asynchronous classes, (see old 22 NYCRR 520.3(c)(6)(i) and (iii)), and still limits how many distance learning credits may be applied to graduation requirements. 22 NYCRR 520.3(c)(6).

<sup>32</sup> See *infra* section IV.(A) describing past State course requirements.

<sup>33</sup> Justice Elena Kagan, then dean of Harvard Law School as cited in Jonathan D. Glater, *Training Law Students for Real-Life Careers*, THE NEW YORK TIMES, October 31, 2007, available at <http://www.nytimes.com/2007/10/31/education/31lawschool.html>.

Legal education has rarely been inclined to embrace far-reaching change<sup>34</sup> and has been very successful at fighting the outside imposition of reform.<sup>35</sup> Cohorts of faculty and a few individual law schools have dedicated themselves to improving legal education, but systemic change is rare.<sup>36</sup> Indeed there remains broad based perception that most law schools and the faculty and administrators who run them are incapable of addressing<sup>37</sup> or even recognizing<sup>38</sup> the problems.

Law schools and law faculty no longer have the luxury of remaining static and in order to move forward we must engage with and respond to the calls for curricular and pedagogical reform. We must recognize that analytic skills are not the only or even the most crucial aspect of "thinking like a lawyer" but rather are part of a toolbox of skills students must learn to be the professional problem solvers their clients expect. We need to acknowledge the technological and market forces that continue to alter the

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<sup>34</sup> CARNEGIE REPORT, *supra* note 5, at 190-191.

<sup>35</sup> See Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards For Clinical Faculty*, 75 TENN. L. REV. 183 (2008) (describing the extensive time and ultimate watering down of regulations seeking to strengthen the position of clinical faculty in law schools).

<sup>36</sup> See REFORMING LEGAL EDUCATION, LAW SCHOOLS AT THE CROSSROADS, (David M. Moss & Debra Moss Curtis eds. 2012) (chapters on schools that have made recent curricular changes). See also CARNEGIE REPORT *supra* note 5, at 34 - 45 (describing the programs of the City University of New York (CUNY) and New York University (NYU) law schools as illustrative of programs of legal education which have historically provided a more integrated and progressive lawyering curriculum).

<sup>37</sup> See TASK FORCE ON THE FUTURE OF LEGAL EDUC. *supra* note 9, at 4 & 14 (finding the culture of law school including faculty who are risk adverse and well apart from the "market and change driven environments part at the root of the current problems with legal education); see also William Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 463 (2013) ("This is a profoundly difficult period of transition for most U.S. law schools. Many law professors are bound to have a visceral, negative response toward curricular changes that will eat up our discretionary time and push us away from an established reward structure and toward new and unfamiliar subjects and teaching methods. We would prefer not to go on this journey. The enormous risk here is that we use our well-oiled intellects to resist unpleasant facts, such as the trend lines discussed in the body of this essay.").

<sup>38</sup> Deborah L. Rhode, *Legal Education: Rethinking The Problem, Reimagining The Reforms*, 40 PEPP. L. REV. 437, 454 (2013) ("A fundamental problem in American legal education is a lack of consensus among its most influential members that there is a fundamental problem, or one that they have a responsibility to address.").

world in which our students will be working and seeking employment. Above all, we must learn to teach in a student-centered way that returns learning to its rightful place at the center of legal education.

#### **A. Connecting Analytic Skills to Problem Solving and Professionalism**

Law Schools are responsible for preparing students, *upon graduation* for admission to the bar and "effective, ethical and responsible participation as members of the legal profession."<sup>39</sup> This requires law schools to teach the skill of legal analysis but only as one among many skills. The definition of a professional is much broader than merely a competent analytic thinker. The goal of professional education regardless of the area of expertise is to teach students to "think, perform, and to conduct themselves" as moral and ethical professionals.<sup>40</sup>

Thus law schools must effectively educate students in the other fundamental skills that connect legal analysis and reasoning to the ability to solve problems for clients. This obligation is not one that is centered around educating students for litigation, any more than it centers on educating law students for guiding entrepreneurial business start ups, drafting child custody stipulations, or mediating treaty disputes. Already future law graduates face a world in which there is no assurance that advocacy work before a tribunal is how they will assist clients.<sup>41</sup> Therefore it is critical for law schools to focus on providing foundational skills that

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<sup>39</sup> ABA Standard 301(a). Objectives of Program of Legal Education. Standard 301(b) requires law schools to establish learning outcomes to achieve Standard 301(a).

<sup>40</sup> See Michael L. Boyer, *Atticus Finch Looks at Fifty*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 356, 370 (2012) (describing the six elements which define a profession - public service, special skill, training and education, state recognition, self-discipline, and motivation beyond commercial gain); CARNEGIE REPORT, *supra* note 5, at 22.

<sup>41</sup> "The legal profession is becoming a subset of a larger legal industry that is increasingly populated by non-lawyers, technologists, and entrepreneurs. Lawyers have a so-called monopoly on advocacy work before a tribunal and client counseling on legal matters, but that is of little consolation. Virtually every other aspect of a legal problem can be broken down into its component parts, reengineered, streamlined, and turned into a legal input or legal product that is better, cheaper, and delivered much faster. For the next several decades, this will be the growth sector for legal jobs, although it is not preordained that these jobs will be filled by law graduates or even U.S. citizens." Henderson, *Blueprint*, *supra* note 37, at 462-63.

allow their graduates to flexibly pivot towards whichever career paths open up for them. Luckily, over the past fifteen to twenty years there has been a distillation of these skills and how to teach them effectively.

The CARNEGIE REPORT has often been simplistically read as merely illuminating a cognitive / practical divide in legal education.<sup>42</sup> However, the lawyering skills the report describes as missing from law schools are not merely technical skills such as drafting a complaint or a will. Rather the skills law schools are failing to teach are fundamental lawyering skills which include the capacity to engage in complex practice, make judgments under conditions of uncertainty, learn from experience, and create and participate in a responsible and effective professional community.<sup>43</sup> The lawyering skills articulated in the MACCRATE REPORT,<sup>44</sup> on which Carnegie relies, begin with the capacity to develop and evaluate strategies for problem solving and also include effective communication, the ability to counsel, negotiate, organize and manage work as well as recognizing and resolving ethical dilemmas.<sup>45</sup>

Marjorie Shultz and Sheldon Zedeck recently developed a more detailed description of what lawyers must be able to do through an empirical study distilling factors predicting lawyer effectiveness.<sup>46</sup> In order to define effective lawyering skills and Shultz and Zedeck conducted hundreds of interviews with lawyers, judges, law faculty, law students, and clients and worked with over 2000 law school alumni.<sup>47</sup> Their research confirmed that professional competence "requires not only the analytic quickness and precision that law school currently seeks, teaches and rewards but that it also requires relational skills, negotiation and planning skills, self-control

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<sup>42</sup> Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 357 & 363 (2012).

<sup>43</sup> CARNEGIE REPORT *supra* note 5, at 22.

<sup>44</sup> A.B.A. TASK FORCE ON LAW SCH. & THE PROFESSION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM (1992) [hereinafter MACCRATE REPORT].

<sup>45</sup> *Id.*, at 138.

<sup>46</sup> Marjorie Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 LAW & SOC. INQUIRY 620 (2011).

<sup>47</sup> Kristen Holmquist, Marjorie Shultz, Sheldon Zedeck, David Oppenheimer, *Measuring Merit: The Shultz-Zedeck Research on Law School Admissions*, 63 J. LEGAL EDUC. 565, 577-579 (2014).

and self-development, creativity and practical judgment, among other proficiencies."<sup>48</sup>

Similarly, William Henderson has consistently argued that to prepare students for the globalized 21<sup>st</sup> century law schools must teach complex problem-solving skills that include the ability to "communicate, collaborate, gather facts, assess data, lead, follow, and approach problems with both empathy and objectivity."<sup>49</sup> Kristen Holmquist details what a "room full of eminent lawyers, judges and mediators" described as the lawyering skills law schools need to teach: the ability to recognize the complexity of their clients' stories and desired outcomes; an understanding of and ability to work within a lawyer's varied roles and relationships to clients, institutions, and society at large, as well as the start of developing confidence and judgment.<sup>50</sup>

In an eloquent essay, Mari Matsuda defines her ideal lawyer as a strategic generalist with a radically interdisciplinary toolkit.<sup>51</sup> For Matsuda this means "knowing enough to ask useful questions, call in experts, and identify the knowledge paths that require exploration. A good strategist assesses available resources: What do I know? What do I not know? What do I need to know?"<sup>52</sup>

Lawyer as problem solver, as communicator, collaborator, confidant, advisor, and fiduciary; these roles cannot be taught by focusing only on developing critical thinking skills. They cannot be taught through the case-method discovery of doctrine. They cannot even be taught by mandating clinical or externship credits. Preparing students to take on these roles requires integration of creative problem solving and experiential learning throughout our curriculums. It requires an intentionally structured program that builds on itself and a pedagogy that provides for and actively teaches students to become self-reflective learners. Only then can students begin to develop analytic thinking skills that intertwine and support other necessary skills such as problem solving, listening across difference, working

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<sup>48</sup> *Id.* at 566.

<sup>49</sup> Henderson, *Blueprint*, *supra* note 37, at 504-05.

<sup>50</sup> Holmquist, *supra* note 42, at 353-54.

<sup>51</sup> Mari J. Matsuda, *Admit That The Waters Around You Have Grown: Change and Legal Education*, 89 IND. L.J. 1381, 1393-94 (2014).

<sup>52</sup> *Id.*

collaboratively, thinking creatively, and understanding their professional role.

Creative problem solving is what lawyers do, and thus must be legal education's foundation, embedded in all classes.<sup>53</sup> Deeper and more meaningful integration of experiential skills training would allow students to grapple with and learn from the messiness of life behind the appellate opinions currently relied on in much of legal education.<sup>54</sup> An intentional and sequenced program can empower students to become responsible for their own education as they successfully navigate ever more complex challenges.<sup>55</sup> Meaningful integration of skills and doctrine, analysis and experience would create a program of education stronger than the sum of its parts.<sup>56</sup>

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<sup>53</sup> Gordon A. MacLeod, *Creative Problem-Solving for Lawyers?!*, 16 J. LEGAL EDUC. 198 (1963-1964) (suggesting that law schools must teach the ability to resolve legal problems effectively and responsibly," as problem solving is "the skill of lawyering). See also Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BALTR. L. REV. 173, (2010) (explaining how legal research is a complex problem-solving skill interconnected with issue spotting, legal analysis, synthesis of information, and application of law to facts).

<sup>54</sup> Experiential courses taught with simulations and hypothetical problems introduce students to the process of fact development, problem solving, applied legal analysis, legal drafting, litigation, dispute resolution, and ethical decision making, and help foster the practice and professional identity apprenticeships. But only clinical courses, where students learn in role with real clients who have complex, real-world problems, present the indeterminate situations necessary for students to develop judgment; to incorporate professional knowledge, skills, and values; to internalize the attorney role; to comprehend client responsibility; and to learn how to learn from experience. Karen Tokarz, *et al*, *Legal Education at a Crossroads: Innovation, Integration, And Pluralism Required!*, 43 WASH. U. J.L. & POL'Y 11, 13-14 (2013). See also Holmquist, *Challenging Carnegie*, *supra* note 42, at 376 (proposing "that we allow students to experience much more of lawyerly thinking than they currently do in the doctrinal classroom. Both the cognitive psychology literature and our own experience tell us that students learn best when they get their hands dirty.").

<sup>55</sup> See BEST PRACTICES, *supra* note 6, at 94 - 96.

<sup>56</sup> More than a few law faculty argue that law schools can only focus on critical thinking skills and should not be expected to undertake teaching anything else.. See, e.g., John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993) (objecting to any suggestion that law schools be required to implement any part of the MACCRATE REPORT recommendations in part because of the financial

Unfortunately, many recent responses to demands for better skills and professional education continue to reinforce the perceptions that law faculty as a whole are reluctant - and at times hostile to taking the steps necessary to educate legal professionals. Some faculty reaction to the recently proposed requirements for experiential learning were met with derision, claims that the proposals were primarily an attempt at securing clinical faculty job security or as an attempt by law firms to shift training costs to law schools.<sup>57</sup> The shortsightedness of such responses becomes even clearer when seen against the backdrop of a curriculum that is ossified and out of date.

### **B. Modernizing the Curriculum to Prepare Graduates for Success**

Critiqued for graduating students lacking the fundamental skills and understanding of professional identity, law schools are also critiqued for failing to modernize their curriculum to reflect the world in which their students will work. It is not surprising that the phrase "the traditional law school curriculum" does not need to be explained or that the required first year courses at most law schools are alarmingly similar, and have been for

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considerations and in part because law schools are not fungible and should be able to decide for themselves their curriculum), Reginald Mombrun, *Curriculum And Teaching In America's Law Schools: Why Federal Income Tax Courses Are More Relevant Than Ever*, 17 EDUC. & L.J. 105, 138-39 (2007) (arguing that law schools cannot be expected to teach more than critical thinking and a few other basic skills such as writing and research), Robert, Condlin, *'Practice Ready Graduates': A Millennialist Fantasy*, 31 TOURO L. REV. 75, 87-89

(arguing that there are too many types of practice to have law schools focus on creating "practice ready graduates"). This argument substitutes the strawman of the myriad specific practical skills a professional may need with the overarching foundational skills necessary for any professional setting that are delineated by MacCrate, Carnegie, Shultz & Zedeck and others.

<sup>57</sup> See, e.g., Brian Leiter's *Law School Reports*, blog postdated 12/10/13 and entitled, *More mischief afoot at the ABA!*, available at:

<http://leiterlawschool.typepad.com/leiter/2013/12/more-mischief-afoot-at-the-aba.html>; Letter from the Yale Law School Sterling Professors, dated 1/29/2014.

While the letter was objecting to the proposal of 15 credits of experiential learning be required (this was later reduced to 6), it objects to any prescription of experiential learning, indicating that the "precise mix of experiential and other curricular formats ought not to be prescribed."

[http://www.law.yale.edu/documents/pdf/News\\_&\\_Events/SterlingProfessorsofYaleLawSchoolCommentLetter1-29-14.pdf](http://www.law.yale.edu/documents/pdf/News_&_Events/SterlingProfessorsofYaleLawSchoolCommentLetter1-29-14.pdf). See also Condlin, *supra* note 56, at 95-96 (alleging that calls for skills training are an attempt by firms to shift training costs).

more than a hundred years.<sup>58</sup> While there is substantial overlap between curricular content, skills and professionalism, and teaching methods, the calcification of the law school curriculum is a problem in and of itself.

It is clear that the legal profession is not the autonomous discipline it once was<sup>59</sup> and that lawyers are now more likely to be project managers than “bespoke generalists.”<sup>60</sup> Given the globalization of work and increasing complexity of problems law graduates confront, it is critical for students to learn the importance of interdisciplinary knowledge and develop the capacity for effective collaboration.<sup>61</sup> Teaching and learning across disciplines is also valuable pedagogically, advancing problem solving and critical thinking skills as well as self reflection and humility.<sup>62</sup>

Most other professional schools explicitly teach teamwork with an understanding that in today's complex world single disciplinary approaches cannot resolve, and often exacerbate problems.<sup>63</sup> Law schools, if they teach teamwork at all, leave it to individual faculty.<sup>64</sup> If students are to learn to

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<sup>58</sup> See Mark Edwin Burge, *Without Precedent: Legal Analysis In The Age Of Non-Judicial Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 143, 177 n.154 (citing descriptions of the unchanging nature of law school curriculums).

<sup>59</sup> See Edward Rubin, *The Future of Legal Education: Are Law Schools Failing and, if so, How?* 39 LAW & SOC. INQUIRY 499, 512 (2014) (noting that while legal scholarship has recognized that law is no longer an autonomous discipline the curriculum has not changed).

<sup>60</sup> William D. Henderson, *Three Generations Of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373 (2011) (describing the legal profession moving from a period of the bespoke generalist, through a period of specialization, and arriving at a place where attorney are required to be project managers).

<sup>61</sup> Linda Morton, *et al*, *Teaching Interdisciplinary Collaboration: Theory, Practice, And Assessment*, 13 QUINNIPIAC HEALTH L.J. 175, 177 (2010) (linking problem solving skills to the ability to create “webs of interrelated knowledge” and the ability to work in teams).

<sup>62</sup> Lisa Radke, *et al*, *Teaching The Newly Essential Knowledge, Skills, and Values in a Changing World*: Section H: Interprofessional Education (2015) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2562537](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562537)

<sup>63</sup> See *Id.* at 177 (2010) (noting that single disciplinary approaches cannot resolve and often exacerbate serious problems), See also, Janet Weinstein, *et al*, *Teaching Teamwork To Law Students*, 63 J. LEGAL EDUC. 36, 39 & 43 (2013) (noting that teamwork is explicitly taught in Medical, Business, Engineering, Nursing and Social Work schools).

<sup>64</sup> Weinstein, *Id.*, at 44 - 46 (discussing several law faculty who have written about teaching teamwork in their individual classes).

work collaboratively they must be taught how to do so explicitly throughout the curriculum.

Law faculty, like those in medicine or engineering, need to understand the importance of teamwork and interdisciplinary problem solving skills. We must also learn and adopt collaborative teaching methodologies to impart and reinforce these skills. Without a systemic approach, collaborative learning like other fundamental skills is left to the whim of individual faculty increasing the likelihood it will never be taught to most law students. In a world in which interdisciplinary collaboration is now commonplace, students untrained in these skills are left at a disadvantage.

The explosive changes in technology have similarly altered the provision of law related professional services.<sup>65</sup> Law schools must recognize the enormity of this change and develop a curriculum that adequately prepares their graduates for this reality.<sup>66</sup> The future will belong to hybrid professionals who understand and are able to manage technologically based interdisciplinary solutions.<sup>67</sup> Unfortunately many law faculty have actively resisted engaging with technology at the level that their students and the profession have already embraced.

A growing number of students are entering law school having already experienced a technologically advanced undergraduate education that offered online, blended, flipped, and hybrid classes.<sup>68</sup> Most will go on to a

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<sup>65</sup> This includes the effect that technology has in creating tools that maximize the capacity for people to engage in litigation without an attorney. Marsha M. Mansfield, Louise G. Trubek, *New Roles To Solve Old Problems: Lawyering For Ordinary People In Today's Context*, 56 N.Y.L. SCH. L. REV. 367 (2012). Entities such as LegalZoom, Rocket Lawyer and similar organizations are already providing services to millions of customers. Luz E., *Training Lawyer-Entrepreneurs*, 89 DEN. U. L. REV. 887, 896 (2012).

<sup>66</sup> See, NEW YORK STATE BAR ASSOC. REPORT OF THE TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION, 99 (advocating that law schools provide more courses on e-discover, knowledge management, courtroom legal technology, and project management). (p. 99) <http://www.nysba.org/futurereport/>.

<sup>67</sup> Richard S. Granat, Stephanie Kimbro, *The Teaching Of Law Practice Management And Technology In Law Schools: A New Paradigm*, 88 CHI.-KENT L. REV. 757, 765 (2013) (describing Susskind's hybrid professionals who know law but also have technology based skills in project management, technology, and risk management).

<sup>68</sup> Simon Canick, *Infusing Technology Skills Into The Law School Curriculum*, 42 CAP. U. L. REV. 663, 674 (2014).

profession demanding expertise in e-discovery, case management systems, technologically enhanced collaboration, communication, and presentation skills, as well as the ability to understand, manipulate and control social media.<sup>69</sup> In between these same students are apt to stumble into an educational institution where laptops might be banned and technologically advanced teaching often means a PowerPoint presentation.

With more law graduates entering solo or small firm practice students will need to have a program of legal education which includes learning how to create business plans that target niche markets and to use technology to create viable income streams.<sup>70</sup> In a global world, our graduates will routinely be working with clients in another city if not several time zones away. Law schools that fail to address the changes in the business of lawyering in their curriculums place their graduates at a disadvantage leaving them scrambling to catch up and losing valuable time in establishing successful professional careers.<sup>71</sup>

### C. A Student Learning Centered Pedagogy

The critiques of legal education go far beyond the failure to adequately teach practical skills, professionalism or to modernize the curriculum. The well-supported charge is that legal education, unlike other programs of professional education, fails to take education seriously.<sup>72</sup> While other

<sup>69</sup> *Id.* at 686 - 705.

<sup>70</sup> *Id.*; Herrera, *supra* note 65, at 891 and 920.

<sup>71</sup> See, e.g., Herrera, *supra* note 65, at 909 (attorneys estimating it took five years after graduation to become comfortable with the business - including the technology aspects - of practice); Steven Lichtman, *The Rise Of 'Dr. No'* 34 PA. LAW. 18, 21 (2012) (arguing that if law schools want new law graduates be entrepreneurial in finding work then legal education must teach entrepreneurial skill sets).

<sup>72</sup> "Although the core mission of most law schools is to educate students, virtually no legal educators have educational training or experience when they are hired, and few law schools provide more than cursory assistance to help new faculty develop their teaching skills." BEST PRACTICES, *supra* note 6, at 106. Talbot D'Alembert, put it more succinctly: "Is there any education theorist who would endorse a program that has students take a class for a full semester or a full year and get a single examination at the end? People who conduct that kind of educational program are not trying to educate." Talbot D'Alemberte, *Law School in the Nineties: Talbot D'Alemberte on Legal Education*, 76 ABA JOURNAL 52 (1990). Accord, GREGORY MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS (2000) 25-26 ("The absence of any defined student or institutional outcomes, the presence of incoherent curricula, and teachers operating in isolation are

professions embraced learning theory and adopted outcomes based assessment to try and determine whether they were actually accomplishing their educational goals,<sup>73</sup> law school faculty remain, by and large, wedded to the past, merely replicating the way they were taught.<sup>74</sup>

This reluctance to move from a teacher-centered pedagogy<sup>75</sup> to one that is focused on student learning outcomes, has negative ramifications beyond merely failing to teach lawyering skills and professionalism. The pedagogy and process of legal education is recognized as limited at best, and at worst actively harmful to the emotional and psychological well being of many law students.<sup>76</sup>

Law school pedagogy weighted heavily toward Socratic dialog and end of semester exams has been described as perpetuating the pernicious effects of race,<sup>77</sup> gender,<sup>78</sup> and class<sup>79</sup> discrimination. Over reliance on doctrinal

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commonplace in our institutions.") available at:

<http://lawteaching.org/publications/books/outcomesassessment/>.

<sup>73</sup> CARNEGIE REPORT *supra* note 5, at 175-76 (describing medical education's integration of training and assessment); Deborah Maranville, *et al*, *Lessons For Legal Education From The Engineering Profession's Experience With Outcomes-Based Accreditation*, 38 WM. MITCHELL L. REV. 1017, 1019-20 (2012) (describing the trend in higher and professional education away from a teacher centered paradigm to one that is centered on student learning); OUTCOMES REPORT, *supra* note 14, at 20 -22 (providing an overview of trends in the accreditation of ten other professions indicating a focus on performance based evidence of student learning).

<sup>74</sup> Moss, *supra* note 3, at 4 (noting that is not surprising that most law school curricula and teaching has not evolved because most faculty think exemplary teaching is an updated version of how they were taught in law school).

<sup>75</sup> Dennis R. Honabach, *Precision Teaching In Law School: An Essay In Support Of Student-Centered Teaching And Assessment* 34 U. TOL. L. REV. 95 (2002) (describing why most law faculty focus on the performance of teaching rather than on whether or not student learning is taking place in the classroom).

<sup>76</sup> BEST PRACTICES, *supra* note 6, at 29, 29 - 36 (citations omitted) (describing "clear and growing data that legal education is harmful to the emotional and psychological well-being of many law students"); Jaime R. Abrams, *Reframing the Socratic Method*, 64 J. Legal Educ. # at # (2015) (noting that many have questioned its pedagogical effectiveness and that it is considered to contribute to the general depression and malaise of law students) currently on SSRN [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2566996](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566996).

<sup>77</sup> Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY, 711, 712-13 (2004) (analogizing progress through law school as a forked river in which young white and socially

"coverage" and the focus on teaching analogical reasoning often eliminate discussions of concepts of justice<sup>80</sup> and along with the very competitive nature of legal education quashes the social justice and public interest goals of students.<sup>81</sup> The structure of education at most law schools is unsupportive to the incoming students who may be underprepared or academically weaker even though they could succeed with a more thoughtful pedagogy, integrated curriculum and academic support.<sup>82</sup>

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privileged students ride a smooth swift current and minority students joined by older law students, law students with physical or learning disabilities and those from disadvantaged socioeconomic origins are forced into often dangerous white-water rapids. "Both rivers run parallel and end at the same place, but the rides are different indeed, and fewer complete the white-water course.").

<sup>78</sup> Eli Wald, et al, *Looking Beyond Gender: Women's Experiences At Law School*, 48 TULSA L. REV. 27 (2012) (describing a "robust body of literature" suggesting that law schools reproduce much of gender inequality evident in the profession at large).

<sup>79</sup> Lucille A. Jewel, *Bourdieu And American Legal Education: How Law Schools Reproduce Social Stratification And Class Hierarchy* 56 BUFF. L. REV. 1155 (2008) (class-based elitism remains within the structure of legal education, but cloaked in terms of objective merit and individual ability).

<sup>80</sup> ROBIN L. WEST, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM 88-92 (2014) (discussing the pedagogical implications of the absence of discussions about justice in law schools). *But cf.* Ruthann Robson, *The Politics Of The Possible: Personal Reflections On A Decade At The City University Of New York School Of Law*, 3 N.Y. CITY LAW REV. 245, 252-4 (2000) (describing teaching at a law school designed to educate students seeking to be social justice and public interest attorneys).

<sup>81</sup> Sarah Valentine, *Leveraging Legal Research*, 145-146 in VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER (Society of American Law Teachers, Golden Gate University School of Law, eds. 2011).

<sup>82</sup> See Deborah Zalesne & David Nadvorney, *Why Don't They Get It?: Academic Intelligence and the Under-Prepared Student as "Other,"* 61 J. LEGAL EDUC. 264, 272 (2011) (under prepared students can succeed if academic and legal reasoning skills are taught explicitly along with substance in law school courses); Cassandra L. Hill, *The Elephant in the Law School Assessment Room: The Role of Student Responsibility and Motivating Our Students to Learn*, 56 HOW. L.J. 447 (2013) (suggesting that law faculty understanding and use of assessment can lead to a better learning environment because it can foster student understanding of, responsibility for, and involvement in, their own education); Suzanne J. Schmitz & Alice M. Noble-Allgire, *Reinvigorating the 1L Curriculum: Sequenced "Writing Across the Curriculum" Assignments as the Foundation for Producing Practice-Ready Law Graduates*, 36 S. ILL. U. L.J. 287303 (2012) (sequencing of first year courses assisted academic support faculty in identifying struggling students).

Even when individual faculty make efforts to teach in a more responsible and professional manner, more often than not the arc of a program at any individual school is seen as an atomistic series of classes with little thought to organizational coherence or sequenced learning.<sup>83</sup> This weakens the educational experience even in law schools that have tried to increase the integration of skills or professional training. Instead of following an intentionally mapped and planned path<sup>84</sup> that culminates in a professional education, law students are left to find their way, not always successfully, through a maze of unrelated upper level seminars, bar electives, and experiential offerings. Such a program separates skills mastery from doctrinal mastery with few students able to stitch the fragments together in to a coherent whole.<sup>85</sup>

This unstructured education flies in the face of contemporary learning research's conclusions that fractionalized instruction maximizes "forgetting, inattention, and passivity."<sup>86</sup> Adults acquire knowledge best from active participation in holistic, complex, and meaningful learning environments organized around long-term goals. Active participation in carefully structured learning allows "education for understanding" or the ability to transfer the knowledge learned in one environment to new problems and situations.<sup>87</sup> This suggests that even those for whom "thinking like a lawyer" is the polestar of legal education over-reliance on lecture based courses in an unstructured curriculum inhibits the acquisition of legal analysis and reasoning skills.

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<sup>83</sup> See BEST PRACTICES, *supra* note 6, at 94 - 96 (discussing the need for law schools to achieve more instructional coherence); Ronald H. Silverman, *Weak Law Teaching, Adam Smith and a New Model of Merit Pay*, 9 CORNELL J.L. & PUB. POL'Y 267, 286-289 (2000) (discussing fragmented and unsystematic teaching at both course and institutional levels).

<sup>84</sup> To be effective any program of instruction needs to be more than a collection of independent courses - they must be "pathways for learning." BEST PRACTICES, *supra* note 6, at 94 - 96 quoting *Principles of Good Practice in the New Academy*, in ASS'N OF AM. COLLEGES AND UNIVERSITIES, GREATER EXPECTATIONS: A NEW VISION FOR LEARNING AS THE NATION GOES TO COLLEGE 30 (2002).

<sup>85</sup> Abrams, *supra* note 76, at # (fn 77-78 on SSRN)

<sup>86</sup> Robert B. Barr & John Tagg, *From Teaching to Learning - A New Paradigm for Undergraduate Education*, in Nov./Dec. CHANGE 13, 22 (1995).

<sup>87</sup> *Id.* See also Todd E. Pettys, *The Analytic Classroom*, 60 BUFF. L. REV. 1255, 1313-20 (2012) (discussing teaching strategies to increase student analytic capability).

While individual law professors<sup>88</sup> and schools<sup>89</sup> have struggled mightily to humanize legal education and make it more student-centered and practice focused, until recently there was no nationwide mandate for reform. As educators, our focus seems to have wandered, leaving the authors of BEST PRACTICES to lament that "[i]n the history of legal education in the United States, there is no record of any concerted effort to consider what new lawyers should know or be able to do on their first day in practice or to design a program of instruction to achieve those goals."<sup>90</sup> This is now changing as outside regulators take steps to address what they see as educational deficiencies in both law school curriculums and teaching methodologies.

#### **IV. Pillars of Reform and the Underpinnings of the Current Regulatory Intervention**

To understand why the accrediting bodies and licensing authorities are no longer waiting for law schools to lead, a quick review of recent history is illuminating. The steps recently implemented by outside regulators are consistent with and built on the critiques and reform efforts of the past. Thus, they did not stem from the recent economic downturn and will remain in place regardless of law school enrollment patterns.

In addition, during the past forty years when law schools were fighting calls for educational reform, higher education in general and professional

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<sup>88</sup> See Barbara Glesner Fines, *Fundamental Principles And Challenges Of Humanizing Legal Education*, 47 WASHBURN L.J. 313, 321 (2008) (describing several faculty who have created more humane and student-centered teaching methods and courses).

<sup>89</sup> For example, CARNEGIE REPORT, *supra* note 1, at 34 cites the City University of New York (CUNY) and New York University law schools as examples of more intentional and integrated law schools. See *infra* Section VI (A number of law schools have recently reformed their curriculum or are in the process of doing so). In addition many schools have attempted to address the stress emotional distress which law school or law practice can cause. For example the University of Miami and the University of California at Berkley, among others have Mindfulness in Law programs. Leonard L. Riskin, *Awareness And The Legal Profession: An Introduction To The Mindful Lawyer Symposium*, 61 J. LEGAL EDUC. 634, 635 - 637 (2012).

<sup>90</sup> BEST PRACTICES *supra* note 6 at 3.

education in particular were embracing these reforms. Legal education is not so dissimilar as to suggest that it alone of the professional schools should be allowed to ignore evidence-based changes to curricular design and teaching. Finally, the arguments law schools make against curricular or pedagogical reform have remained the same for decades. In the face of what is now an avalanche of evidence supporting reform, these same arguments ring hollow.

Over the past forty years there have been a series of reports and studies consistently articulating the need to reform legal education. These works challenged the autonomy of the legal academy and the academy fought back in often-apocalyptic terms<sup>91</sup> claiming the proposed reforms were anti-intellectual attacks<sup>92</sup> that would reduce law schools to technical<sup>93</sup> or trade schools<sup>94</sup> and limit the flexibility and creativity of individual institutions.<sup>95</sup> As some of the changes were adopted or individual schools embraced them, legal education continued to thrive.<sup>96</sup> Unfortunately the seemingly knee-jerk resistance to calls for reform continues through to the present.

#### **A. The 1970s and 1980s: Early Attempts at Curricular Reforms through Outside Regulation**

The 1970s and 80s saw a series of skirmishes between law schools and the bench and bar. The Second Circuit Court of Appeals floated a proposal to require any attorney who wished to practice in its courts to have taken a

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<sup>91</sup> See *infra* note 116 and accompanying text (Then Dean Matasar suggesting that any attempt by the organized bar to require law schools to implement the MACCRATE REPORT would cause a war between the two).

<sup>92</sup> STEVENS, LEGAL EDUCATION IN AMERICA, *supra* note 5, at 238.

<sup>93</sup> *Id.* at 239

<sup>94</sup> Hiring faculty members with more practice experience will for some conjure up images of legal academy as “trade school,” a pejorative label that undoubtedly contributes to faculty divisiveness on the important subject of curriculum reform. R. Michael Cassidy, *Beyond Practical Skills: Nine Steps For Improving Legal Education Now*, 53 B.C. L. Rev. 1515, 1530 (2012).

<sup>95</sup> See, e.g., Letter from Sterling Professors of Yale *supra* note 57 (requirements of experiential learning interferes with experimentation and innovation).

<sup>96</sup> For instance, most law schools now provide some access to experiential or clinical legal education although those programs and the faculty who teach in them often remain separate from the primary program. See STEVENS, LEGAL EDUCATION IN AMERICA, *supra* note 5, at 241.

specific set of courses.<sup>97</sup> Known as the Clare Proposal, this move reflected then Chief Justice Burger's documented concern that law schools were failing to inculcate professionalism and skills training in their graduates.<sup>98</sup> While the Second Circuit proposal failed to gain traction, two states amended their rules for admission to practice in a way that influenced legal education in those states.

The most far-reaching of these was Indiana's Rule 13. In the early 1970s the Indiana Supreme Court began to consider rules that required anyone seeking to take the Indiana Bar to have completed a list of 54 credits of mandatory courses.<sup>99</sup> Rule 13 passed although the portion requiring specific courses did not become effective until 1977 to allow time for compliance. Similar to the recently adopted rules in Arizona and New York, Rule 13 also allowed students who had completed two years of law school and taken the prescribed courses to take the Indiana bar exam early.<sup>100</sup>

In 1977, the judiciary in South Carolina followed Indiana's lead and required students to have taken fourteen specific courses including trial advocacy before being admitted.<sup>101</sup> The rules were also in response to the bench and bar's perceptions that law graduates were failing to receive adequate skills training.<sup>102</sup> Opposition to the Second Circuit proposal as well as the Indiana and South Carolina rules was remarkably consistent.

Law schools argued that the Clare proposal would reduce law schools to "technical schools."<sup>103</sup> Indiana's Rule 13 was described as "infamous,"<sup>104</sup>

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<sup>97</sup> STEVENS, LEGAL EDUCATION IN AMERICA *supra* note 5, at 238-9. Called the Clare proposal, it required practitioners to have taken evidence, civil procedure, criminal procedure, professional responsibility, and trial advocacy.

<sup>98</sup> David H. Vernon, *The Expanding Law School Curriculum Committee: The Move by Courts and the Organized Bar to Control Legal Education*, 1 J. LEGAL PROF. 7, 14-15 (1976).

<sup>99</sup> Michael I. Swygert, *Valparaiso University School of Law, 1879-2004: A Contextual History*, 38 VAL. U. L. REV. 627, 1003 (2004).

<sup>100</sup> Francis X. Beytagh, *Prescribed Courses as Prerequisites for Taking Bar Examinations: Indiana's Experiment in Controlling Legal Education*, 26 J. LEGAL EDUC. 449, 453 (1974). For discussion of the new admission rules in Arizona and New York see section V. below.

<sup>101</sup> STEVENS, LEGAL EDUCATION IN AMERICA, *supra* note 5, at 239.

<sup>102</sup> Bruce Littlejohn, *Ensuring Lawyer Competency: The South Carolina Approach*, 64 JUDICATURE 109 (1980).

<sup>103</sup> STEVENS, LEGAL EDUCATION IN AMERICA, *supra* note 5, at 239 (citation omitted).

"the bottom of a slippery slope,"<sup>105</sup> and a "frontal attack" on the independence of law schools.<sup>106</sup> Arguments against South Carolina's rules were that they would stifle creativity and inhibit innovation.<sup>107</sup> Both state's rules went forward and while over time both states rescinded their rules, there is no indication it was because it disrupted the states law schools program of education. At least a part of Indiana's reasoning behind the rescission of Rule 13 was the need to remove barriers to national recruiting for Indiana firms.<sup>108</sup>

During roughly this same time period, the clinical legal education movement was gaining momentum, in part because it was seen as something of a peace offering from law schools to those calling for better skills training.<sup>109</sup> However, there was significant faculty opposition. Clinical education was seen not only as competing for faculty resources but also as implicating a move away from law as an academic pursuit.<sup>110</sup> This opposition remains even now.<sup>111</sup> ABA attempts to require clinical instruction or to provide security of position for clinical faculty were undermined by the academy because those attempts, like demands for skills

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<sup>104</sup> Robert M. Jarvis, *An Anecdotal History Of The Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 377 (1996).

<sup>105</sup> David H. Vernon, *The Expanding Law School Curriculum Committee: The Move by Courts and the Organized Bar to Control Legal Education*, 1 J. LEGAL PROF. 7, 18

<sup>106</sup> Swygert, *supra* note 99.

<sup>107</sup> Charles B. Blackmar, *South Carolina is Out of Line: Response to Chief Justice Littlejohn*, 55 THE BAR EXAMINER 4, 6 (1986) (arguing against South Carolina's Rule 5), Douglass G. Boshkoff, *Indiana's Rule 13: The Killy-loo Bird of the Legal World*, 3 LEARNING & L. 18, 20 (1976).

<sup>108</sup> Randall T. Shepard, *Indiana Law, The Supreme Court, And A New Decade*, 24 IND. L. REV. 499, 513 (1991).

<sup>109</sup> STEVENS, LEGAL EDUCATION IN AMERICA, *supra* note 5, at 240.

<sup>110</sup> James W. Ely, Jr., *Book Review, Law School: Legal Education In America From The 1850s To The 1980s By Robert Stevens*, 59 NOTRE DAME L. REV. 485, 489 (1984).

<sup>111</sup> The majority of law schools maintain a two tiered structure in which clinicians do not enjoy the "same "employment security, status, monetary and non-monetary benefits, rights of citizenship, academic freedom and autonomy" enjoyed by non-clinical faculty." Todd A. Berger, *Three Generations And Two Tiers: How Participation In Law School Clinics And The Demand For "Practice- Ready" Graduates Will Impact The Faculty Status Of Clinical Law Professors*, 43 WASH. U. J.L. & POL'Y 129, 129 (2013).

training or particular courses, were seen as intruding on law school autonomy and stifling creativity.<sup>112</sup>

### **B. The MACCRATE Report (1992)**

In 1992 the ABA's MACCRATE REPORT articulated the skills and values<sup>113</sup> the authors thought necessary for a legal professional to have to provide competent representation no matter the client. The report urged law schools to offer courses to teach these competencies and to use teaching methodologies provide opportunities for students to perform lawyering tasks and receive appropriate feedback and to do so in a manner that includes reflective evaluation of the performance.<sup>114</sup> While this was not the first time the concept of competencies had been brought to the academy's attention, the MACCRATE REPORT laid them out in a "sort of canonical form"<sup>115</sup> becoming a touchstone for those seeking to increase the skills and professionalism taught in law schools.

The reaction to the report, especially from law deans and doctrinal faculty was less than welcoming. When detailing his concern about the Reports ability to destabilize law schools, one dean warned the profession explicitly about attempting to do more than to continue to encouraging curricular reform stating, "it would be a serious tactical mistake to ally with outside regulators to make MacCrate mandatory for law schools. Doing so would amount to a declaration of war against the law schools by the organized bar. Such a war-- as with all holy wars--would be an ugly one, with no prisoners, and with high numbers of casualties."<sup>116</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> The fundamental lawyering skills set forth in MACCRATE are Problem Solving, Legal Analysis and Reasoning, Legal Research, Factual Investigation, Communication (written and oral), Counseling, Negotiation, Litigation and Alternative Dispute-Resolution Procedures, Organization and Management of Legal Work, and Recognizing and Resolving Ethical Dilemmas. The Fundamental Values established are Provision of Competent Representation, Striving to Promote Justice, Fairness and Morality, Striving to Improve the Profession, and Professional Self-Development. MACCRATE REPORT *supra* note 44 at 138 - 140.

<sup>114</sup> *Id.* at 243.

<sup>115</sup> CARNEGIE REPORT *supra* note 5, at 173-174.

<sup>116</sup> Richard A. Matasar, *The Maccrate Report From The Dean's Perspective*, 1 CLINICAL L. REV. 457, 486 (1994).

### C. BEST PRACTICES and CARNEGIE REPORT (2007)

Although the MACCRATE REPORT increased the attention paid to clinical education no coordinated change to the traditional law school curriculum materialized.<sup>117</sup> However the report kindled a decades of conversations about legal education around the country often led by bar associations and the judiciary.<sup>118</sup> It was out of these discussions that BEST PRACTICES, the 2007 work from the Clinical Legal Education Association was distilled. Its goal was to provide law schools "an alternate vision of all the components of legal education, based on educational research and scholarship: an integrated combination of substantive law, skills, and market knowledge, and embracing the idea that legal education is to prepare law student for the practice of law as members of a client-centered public profession."<sup>119</sup>

Drawing from education and learning theory as well as from the MACCRATE REPORT, the CARNEGIE REPORT, and other studies of legal education, BEST PRACTICES provides a blueprint for reorganizing legal education to re-center student learning. Covering everything from class design and assessment methods to organizing a program of instruction to decrease atomization, the work provides advice and direction for better teaching even for those faculty who might be deterred by what some consider its caustic critique of the current state of legal education.<sup>120</sup> BEST

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<sup>117</sup> A. Benjamin Spencer, *The Law School Critique In Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 2008-09 (2012); Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 146 (2001) (noting that while the MacCrate Report was championed by those in clinical education a decade after publication there is little evidence that it transformed legal education).

<sup>118</sup> BEST PRACTICES, *supra* note 6, at viii.

<sup>119</sup> *Id.*

<sup>120</sup> "Whatever the merits of *Best Practices'* allegations and opinions, neither their tone nor their conclusionary nature will encourage law faculty to keep reading. That is a shame. Much of *Best Practices* is well worth reading. And while I disagree with some of it, it has caused me to think about what I do in (and out of) the classroom. *Best Practices* has helped me recognize sins I have long committed, and it has opened my eyes to a strange new world that I had barely glimpsed during twenty-eight years in the classroom. It has unintentionally challenged me to spend two years reading and thinking about an astounding amount of empirical research on higher education. Finally, just as I challenge my best students to confront some dark parts of the law, *Best Practices* has inspired me to confront some of the dark parts of legal education." Michael T. Gibson, *A Critique Of Best Practices In Legal Education: Five Things All Law Professors Should Know*, 42 U. BALT. L. REV. 1, 4 - 5 (2012).

PRACTICES also provides a well-developed map for adopting the outcomes and assessment process the ABA has now prescribed law schools follow.

The CARNEGIE REPORT was also published in 2007 and also focused on curricular and pedagogical change in legal education. The goal of its authors was to engender in law schools "more focused attention to actual and potential effects of the law school experience on the formation of future legal professionals."<sup>121</sup> However, unlike either the MACCRATE REPORT or BEST PRACTICES, THE CARNEGIE REPORT was seen as providing the dispassionate perspective of an outsider with no internal agenda.<sup>122</sup> This limited the ability of the academy to dismiss it merely as a propaganda tool of the profession, the ABA, or the clinical movement.

Similar to other reports published by the Carnegie Foundation for the Advancement of Teaching, the CARNEGIE REPORT includes a literature review of legal education, consultation with the Association of American Law Schools, and site visits to sixteen U.S. and Canadian law schools.<sup>123</sup> The Report was premised on the understanding that the goal of all professional education is to initiate learners into each of three apprenticeships -- cognitive, practical, and that of identity or purpose --- and argued that legal education focused far too heavily on the first of those apprenticeships.

Calling for law schools and faculty to rebalance the program of legal education so that these three apprenticeships are equally integrated throughout, the Report makes clear that this requires creating a context-based education, accompanied by informative feedback, reflection, and ongoing self assessment.<sup>124</sup> Attempting to re-center legal education within a professional education context, The Report argues that legal education must instill the "specialized skills standards, judgment, and values that

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<sup>121</sup> CARNEGIE REPORT, *supra* note 5, at 12.

<sup>122</sup> Bryant G. Garth, *From MacCrate To Carnegie: Very Different Movements For Curricular Reform*, 17 LEGAL WRITING: J. LEGAL WRITING INST. 261, 265-66 (2011).

<sup>123</sup> CARNEGIE REPORT, *supra* note 5, at 15 and 27. *See also*, Neil Hamilton, *Fostering Professional Formation (Professionalism): Lessons From The Carnegie Foundation's Five Studies On Educating Professionals*, 45 CREIGHTON L. REV. 763 (2012) (discussing the five Carnegie Foundation studies of higher education in medicine, nursing, clergy, engineering, and law).

<sup>124</sup> CARNEGIE REPORT *supra* note 5, at 95 (context based) and 145-146 (feedback and reflection).

define practice in a profession" in addition to transmitting expert knowledge.<sup>125</sup>

While the CARNEGIE REPORT and BEST PRACTICE, like the MACCRATE REPORT 15 years prior, stirred some law schools to change, once again the legal academy as a whole seemed to ignore the suggestion that legal education actually needed a fundamental overhaul.<sup>126</sup> This may have been due in part to the pre-recession boom in law school applications.<sup>127</sup> Whatever the reason while there has been progress there has not been national curricular or pedagogical reform, both of which are necessary to place student learning at the center of legal education.

#### **D. Higher Education's Embrace of Student Centered Learning and Outcomes and Assessment based Pedagogy**

During the time when law schools and legal education were embracing law school as primarily an academic pursuit to defend against curricular or pedagogical reform, the American university was dramatically changing its approach to education. Over the past twenty years there has been a paradigm shift in higher education away from an instruction-centered approach to one centered on student learning and success.<sup>128</sup> Ignored by most in the legal academy, this shift to student centered learning has been

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<sup>125</sup> Spencer, *supra* note 117, at 2010.

<sup>126</sup> Stephen D. Easton, *Tough Times Ahead For Legal Education: Opportunities Ahead For UW College Of Law*, 36 WYO. LAW. 58, 59 (efforts at most law schools in response to the reports are minimal); Frank T. Read, M.C. Mirow, *So Now You're A Law Professor: A Letter From The Dean*, 2009 CARDOZO L. REV. DE NOVO 55, 63 n.22 ("Except for some national reports issued every dozen years or so, the profession continues to be rather unreflective about the structure and content of the curriculum we offer our students"); Michele R. Pistone, John J. Hoeffner, *No Path But One: Law School Survival In an Age of Disruptive Technology*, 59 WAYNE L. REV. 193, 226 (2013)(indicating that while the CARNEGIE REPORT and BEST PRACTICES "have been treated respectfully by the law school establishment, but history to this point suggests that to expect more than minor movement toward a more practice-based curriculum is to open oneself up to inevitable disappointment." - citation omitted); Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87, 103 (2010) (for all its careful preparation and comprehensive scope, the 2007 CARNEGIE REPORT has encountered "widespread indifference" within the legal academy).

<sup>127</sup> Pettys, *supra* note 87, at 1256.

<sup>128</sup> Barr & Tagg *supra* note 86, at 13.

adopted by most if not all other programs in higher education - be it at the undergraduate, graduate or professional level.<sup>129</sup>

In the old instruction paradigm the focus was on the delivery of knowledge from teacher to student. In a learning paradigm the focus is not on the transfer of knowledge per se but on creating environments and experiences that bring students to discover and construct knowledge for themselves.<sup>130</sup> Learning centered teaching requires; 1) a shift in responsibility for learning towards students, 2) active student engagement with course materials that allow students to construct and apply knowledge to promote understanding, and 3) formative assessment opportunities (feedback) to allow students to learn from their mistakes and move toward mastery.<sup>131</sup>

In brief, learning centered teaching shifts the focus from what the instructor does to what the student learns: from inputs to outcomes. At an institutional level this forces universities to take responsible for the quality of instruction they provide.<sup>132</sup> At a course level individual faculty and students together become responsible for student learning.<sup>133</sup> Clarifying the responsibility for education increases student engagement and lays the foundation for students to develop self regulated learning skills. It also creates an environment in which students and faculty see themselves united in the educational endeavor.

The student centered learning paradigm requires the setting of specific and articulated learning goals and robust and continual assessment both to evaluate whether or not the learning environment is successful and to provide feedback to support individual student learning.<sup>134</sup> The goals and objectives, be they institutional or for an individual student, are learning

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<sup>129</sup> See OUTCOMES REPORT, *supra* note 14 (detailing adoption of learning outcomes in undergraduate, graduate and professional programs in the U.S. and abroad). See also Catherine A. Palomba, *Assessment Experiences in Accredited Disciplines*, in ASSESSING STUDENT COMPETENCE IN ACCREDITED DISCIPLINES: PIONEERING APPROACHES TO ASSESSMENT IN HIGHER EDUCATION 253 - 255 (Palomba & Banta eds. 2001) (discussing the adoption of learning outcomes in graduate program in Pharmacology, Computing Machinery and Nursing).

<sup>130</sup> Barr and Tagg, *supra* note 86, at 15.

<sup>131</sup> Alison Mostrom & Phyllis Blumberg, *Does Learning-Centered Teaching Promote Grade Improvement*, 37 INNOVATIONS HIGHER EDUC. 397 (2012).

<sup>132</sup> Barr & Tagg, *supra* note 86, at 15.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*; Munro, *supra* note 72, at 17 - 18.

outcomes. The process of setting learning outcomes and assessing whether the goals have been met provides a construct to hold educational institutions responsible for learning at both the institutional level and at the individual student level.<sup>135</sup>

At an institutional level, outcome measures may also be accreditation criteria which allow assessment of whether or not a law school has "fulfilled its goal of imparting certain types of knowledge and enabling students to attain certain types of capacities as well as achieving whatever other specific mission(s) the law school has adopted."<sup>136</sup> Gregory Munro describes outcomes and assessments as the process of developing a set of practices "by which an educational institution adopts a mission, identifies desired student and institutional goals and objectives (outcomes), and measures its effectiveness in attaining these outcomes."<sup>137</sup> Such a process would create a positive institutional culture of intentionality around a school's pedagogical goals that significantly improves educational quality.<sup>138</sup>

At the individual student level learning outcomes provide students clear understanding of what they should know, understand, be able to do and the attributes they should develop in each course.<sup>139</sup> In a student-centered paradigm, assessment is seen primarily as a tool to promote learning and provide feedback.<sup>140</sup> Done correctly, assessment fosters learning, inspires confidence, allows a student to self-monitor, and learn to self-assess.<sup>141</sup> Formative assessment, which is feedback during a course or program of study, provides students the information about their level of comprehension at a time when they can still adapt and improve. Developing reflection and course correction capacity in students is essential for a professional education and is only supported with formative assessment methods.<sup>142</sup>

American higher education's move to institutional outcomes and assessment came from a confluence of factors, including advances in

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<sup>135</sup> Barr and Tagg, *supra* note 86, at 15.

<sup>136</sup> OUTCOMES REPORT, *supra* note 14, at 3.

<sup>137</sup> MUNRO, *supra* note 72, at 11.

<sup>138</sup> CARNEGIE REPORT, *supra* note 5, at 182 - 3.

<sup>139</sup> BEST PRACTICES *supra* note 6, at 55.

<sup>140</sup> CARNEGIE REPORT *supra* note 5, at 171.

<sup>141</sup> BEST PRACTICES *supra* note 6, at 235.

<sup>142</sup> CARNEGIE REPORT, *supra* note 5, at 173.

educational learning theory.<sup>143</sup> It also developed as a reaction to universities being identified as "primarily research institutions" where the focus on faculty specialization and scholarship came at a detriment to student learning,<sup>144</sup> the same arguments long directed at legal education. For many professional schools their accrediting bodies,<sup>145</sup> related professional organizations,<sup>146</sup> and state licensing authorities<sup>147</sup> hastened along their adoption of learning outcomes and assessments in their programs of education. Legal education now finds itself in precisely this situation.

Experiential education is a type of education or teaching that is deeply supportive of student centered learning and fits well into the outcomes and assessment structure. Combining academic inquiry with actual experience, it allows a faculty member to guide a student through the sequence of experience, reflection, examination, and application.<sup>148</sup> By definition experiential learning is active learning and in legal education takes place in

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<sup>143</sup> Deborah Maranville, *supra* note 73, at 1019-20.

<sup>144</sup> Munro, *supra* note 72, at 22 (university faculty promotion and tenure standards emphasized scholarship not teaching).

<sup>145</sup> MARY J. ALLEN, *ASSESSING ACADEMIC PROGRAMS IN HIGHER EDUCATION 2* (2004) (Accrediting agencies as major force in promoting use of outcomes assessment). *See also* Trudy W. Banta, *Assessing Competence in Higher Education* in *ASSESSING STUDENT COMPETENCE IN ACCREDITED DISCIPLINES: PIONEERING APPROACHES TO ASSESSMENT IN HIGHER EDUCATION 8 - 9* (Palomba & Banta eds. 2001) (connecting the beginning of the shift to outcomes assessment in higher education to a 1988 DOE Exec. Order and the codification of that executive order in the 1998 amendments to the Higher Education Act).

<sup>146</sup> Catherine A. Palomba, *Assessment Experiences in Accredited Disciplines*, in *ASSESSING STUDENT COMPETENCE IN ACCREDITED DISCIPLINES: PIONEERING APPROACHES TO ASSESSMENT IN HIGHER EDUCATION*, *id.* at 253-55 (discussing how the professional organizations in the field of Pharmacology, Computing Machinery, Nursing played active roles in encouraging their respective educational programs to adopt outcomes and assessment to force curricular change).

<sup>147</sup> *See* Hugh A. Stoddard, *Measuring the Professionalism of Medical Students*, in Trudy Banta et al, *DESIGNING EFFECTIVE ASSESSMENT: PRINCIPLES AND PROFILES OF GOOD PRACTICE 248* (2009) (Medical Schools in the United States have been under increasing pressure from accrediting agencies, licensing boards, and professional academic societies to ensure that medical school graduates have acquired the attitudes and behaviors that are expected of a physician.).

<sup>148</sup> Steven Hartwell, *Six Easy Pieces: Teaching Experientially*, 41 *SAN DIEGO L. REV.* 1011, 1013 (2004), Deborah Maranville, *Infusing Passion And Context Into The Traditional Law Curriculum Through Experiential Learning*, 51 *J. LEGAL EDUC.* 51, 59 (2001).

clinics, guided externships, and classes taught using simulations.<sup>149</sup> While not as robust, experiential learning can also take place when faculty bring aspects of real life lawyering into a doctrinal class.<sup>150</sup> The crux of experiential learning is that it allows students to experience and grapple with law as it is – messy, “complicated and imperfect--rather than the organized, packaged version in a casebook or hornbook.”<sup>151</sup>

In professional programs of medicine, dentistry, engineering, architecture, social work and education -- anywhere students are expected to become practicing professionals -- experiential clinical education is the norm.<sup>152</sup> Even in the undergraduate university experiential learning is widespread and conventional to an almost-taken-for-granted extent.<sup>153</sup> This is true even as these institutions have had to grapple with similar issues arising in law schools - attempts to marginalize experiential programs in part because “real academics don’t do those sorts of things.”<sup>154</sup> However, engaged learning requires this sort of teaching to be integrated into an overall program of education, something the American University now recognizes.

Whether it was the need to ensure that college graduates were ready for the job market or graduates of professional schools were ready to practice,<sup>155</sup> higher education, including professional and graduate education, has embraced student centered learning, experiential education, as well as outcomes and assessment based education. They have also embraced the understanding that inherent in outcomes and assessment is continued

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<sup>149</sup> Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 413-14 (1999).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Peter Joy, *Law Schools And The Legal Profession: A Way Forward*, 47 AKRON L. REV. 177, 196 (2014) (listing the experiential credit requirements for multiple professions).

<sup>153</sup> DAVID THORNTON MOORE, ENGAGED LEARNING IN THE ACADEMY: CHALLENGES AND POSSIBILITIES 1 (2013).

<sup>154</sup> *Id.*, at 2.

<sup>155</sup> "Assessment plays a major role in the process of medical education, in the lives of medical students, and in society by certifying competent physicians who can take care of the public." J. M. Shumway & R.M. Harden, AMEE Guide No. 25: *The Assessment of Learning Outcomes for the Competent and Reflexive Physician*, 25 /6 MEDICAL TEACHER 569 (2003).

curriculum review and reform as well as the adoption of student centered teaching methodologies.<sup>156</sup>

## **V. Current Curricular Reform Efforts: Accreditors and the Bench and Bar Reassert Themselves**

Unwilling to wait any longer for law schools to take the lead in reforming legal education, accreditors and state licensing authorities are now focusing on law school curriculum and teaching methodologies with a reinvigorated energy. Over the past decade, beginning with New Hampshire's creation of an alternative licensing program and culminating in the overhaul of the ABA Standards governing the Program of Legal Education,<sup>157</sup> outside regulators are intentionally challenging and disrupting the landscape of legal education in significant ways.

These regulatory changes are far broader and more cohesive than in the past, involving not only the ABA's Council as an accrediting body, but also regional accreditors governing public and private universities as well as licensing authorities in multiple and influential jurisdictions. The goals and methodologies of these regulatory reforms are remarkably similar. Each draws on and references the importance of fundamental skills and professionalism training encapsulated by the MACCRATE REPORT, BEST PRACTICES, and the CARNEGIE REPORT.

The regulatory changes prioritize learning outcomes that go far beyond legal analysis and doctrine and embrace student centered experiential education. Such accord suggests that the understanding of the requirements for an adequate legal education has thoroughly and irrevocably shifted, whether the legal academy chooses to recognize it or not. The bench and bar are no longer willing to cede primary control of legal education to the legal academy they feel has ignored their concerns. The changes being implemented are those that have long been championed and the reforms are based on the MACCRATE REPORT, BEST PRACTICES, and the CARNEGIE

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<sup>156</sup> "Learning outcomes determine curriculum content, teaching methodologies and assessment. All decisions concerning the curriculum are based on achieving the desired learning outcomes." *Id.*, at 570.

<sup>157</sup> The August 2014 revisions to the ABA Standards affected many of the standards. This article is focused only on those changes affecting the program of legal education law schools must provide.

REPORT, as well as the shift in learning theory that supports outcomes and assessment practices.

### **A. The ABA and Regional Accreditors**

The ABA's Standards have not always been seen as a source of legal education reform even when ABA authored reports highlight systemic curricular concerns and endorsed reform.<sup>158</sup> That has changed with the 2014 Standards revisions, which are extensive and for the first time draw explicitly from education and learning theory to focus on what students are learning as opposed to what law schools teach.<sup>159</sup> The most far-reaching change to the standards center on this, adopting the approach taken by the regional accreditors in higher education more than a decade ago.<sup>160</sup>

At the start of the most recent Standards revision process, a special committee was formed to look at law school accreditation specifically to determine whether the Council should adopt outcomes based accreditation.<sup>161</sup> It is telling that the Committee's solicitation for comments yielded little input from the legal academy,<sup>162</sup> a result that was repeated a year later when another Committee was established to look further into outcomes accreditation processes used by other accrediting agencies.<sup>163</sup> The Outcomes Committee thus educated itself beginning with recognizing higher education's shift from an instructional to a learning centered

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<sup>158</sup> The history of the legal profession's self-regulation during self-identified crisis times (such as the present) is not a happy one. James E. Moliterno, *The Future Of Legal Education Reform*, 40 PEPP. L. REV. 423 (2013). See also Karen Tokarz, et al, *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 WASH. U. J.L. & POL'Y 11, 22-23 (2013) (describing the ABA's limited role in addressing law student competency to practice).

<sup>159</sup> Provocatively, under a paragraph entitled "*Explain the reason for the shift from assessing curriculum to assessing student learning. What's broken in legal education*" the Student Learning Outcomes Committee argues: "While it is true that excellent teaching is necessary for student learning, most would agree that it is not sufficient to guarantee student learning. In addition to strong teaching, student learning requires that students are motivated and that students have adequate feedback to improve their skills." Memo from Steve Bahls, Chair of the Student Learning Outcomes Committee to the Standards Review Committee dated April 17, 2010. Available at [student\\_learning\\_outcomes\\_key\\_issues\\_april\\_17\\_2010\\_2.authcheckdam](#).

<sup>160</sup> See *supra* notes 128 - 129 and accompanying text.

<sup>161</sup> OUTCOMES REPORT *supra* note 14, at 3.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 4.

paradigm and outcomes assessment. The Committee also turned to, and relied heavily on, the insights provided by the CARNEGIE REPORT and BEST PRACTICES.<sup>164</sup>

Under the new standards law schools are now required to establish learning outcomes, which are linked to the objectives of the program of legal education which law schools are evaluated on for accreditation purposes. This is a "quantum shift" in law school accreditation.<sup>165</sup> The direction toward which this shift will lead law schools is evidenced by the Outcomes Report Committee's recommendation that the ABA's Standards Review Committee rely on resources such as the authors of the CARNEGIE REPORT, the Clinical Legal Education's Association's Best Practices Project and accreditors in other fields of higher education when implementing the changes.<sup>166</sup> Given the new Standards, it seems the Standards Review Committee has followed the suggestion.

A major example of this is the new mandate that law schools develop student learning outcomes to guide their program. ABA Standard 301(a) requires a law school to "maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession."<sup>167</sup> Standard 301(b) is completely new and requires law schools to "establish and publish learning outcomes designed to achieve" the objectives set forth in 301(a). A completely revised Standard 302 then sets forth the minimum requirements for law schools<sup>168</sup>:

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<sup>164</sup> OUTCOMES REPORT, *supra* note 14, at 5 (referencing BEST PRACTICES and the CARNEGIE REPORT).

<sup>165</sup> *Id.* at 61.

<sup>166</sup> *Id.*

<sup>167</sup> Standard 301. OBJECTIVES OF PROGRAM OF LEGAL EDUCATION

(a) A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.

(b) A law school shall establish and publish learning outcomes designed to achieve these objectives.

<sup>168</sup> While the Standards are meant to establish the base line requirements, the Interpretations to Standard 302 make explicit that while the 302 outcomes must be met, each school can add additional outcomes supporting the schools mission. Interpretation 302-1 For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document

**Standard 302. LEARNING OUTCOMES**

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.

Standard 302, as well as its Interpretations,<sup>169</sup> have clearly adopted the profession's focus on the need for skills beyond "thinking like a lawyer." While knowledge and legal analysis are required outcomes, they are only one of several in which law schools must show their program of education provides competency. In addition, the new Standard 302 ignores the academy's suggestions that professionalism and ethical behavior cannot be taught and includes references to both twice in section 302.<sup>170</sup> This reflects the profession's longstanding call to increase the attention law schools pay to developing ethics and professionalism in law students.<sup>171</sup>

The Council also promulgated additional standards connected to student learning outcomes and introduced assessment requirements at both a student and an institutional level. Standard 314 requires law schools to

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drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.

Interpretation 302-2 A law school may also identify any additional learning outcomes pertinent to its program of legal education.

<sup>169</sup> *Id.*

<sup>170</sup> The CARNEGIE REPORT suggests that the legal academy's refusal to take the teaching of professionalism and ethics seriously is because faculty do not see it as their responsibility because they believe law school is too late to affect ethical commitment and professional responsibility or because they see it as conflicting with the values that underlie the cognitive apprenticeship - rigor, skepticism, intellectual distance, and objectivity. CARNEGIE REPORT, *supra* note 5, at 133.

<sup>171</sup> See, Nicola A. Boothe-Perry, *Standard Lawyer Behavior? Professionalism As An Essential Standard for ABA Accreditation*, 42 N.M. L. REV. 33, 63-68 (2012) (describing continued calls for expanding the coverage of ethics and professionalism in legal education).

utilize both formative and summative assessment methods to measure and improve student learning. It also requires that law schools ensure meaningful feedback is provided to students.<sup>172</sup> To ensure that the outcomes and assessment program is effective the Standards also require law schools to conduct ongoing evaluations to determine "the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum."<sup>173</sup>

That outcomes and assessment will factor heavily into accreditation evaluation is made explicit by revision to Standard 204 and the elimination

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<sup>172</sup> Standard 314. ASSESSMENT OF STUDENT LEARNING

A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.

Interpretation 314-1 Formative assessment methods are measurements at different points during a particular course or at different points over the span of a student's education that provide meaningful feedback to improve student learning.

Summative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student's legal education that measure the degree of student learning.

Interpretation 314-2 A law school need not apply multiple assessment methods in any particular course. Assessment methods are likely to be different from school to school. Law schools are not required by Standard 314 to use any particular assessment method.

<sup>173</sup> Standard 315. EVALUATION OF PROGRAM OF LEGAL EDUCATION, LEARNING OUTCOMES, AND ASSESSMENT METHODS

The dean and the faculty of a law school shall conduct ongoing evaluation of the law school's program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.

Interpretation 315-1 Examples of methods that may be used to measure the degree to which students have attained competency in the school's student learning outcomes include review of the records the law school maintains to measure individual student achievement pursuant to Standard 314; evaluation of student learning portfolios; student evaluation of the sufficiency of their education; student performance in capstone courses or other courses that appropriately assess a variety of skills and knowledge; bar exam passage rates; placement rates; surveys of attorneys, judges, and alumni; and assessment of student performance by judges, attorneys, or law professors from other schools. The methods used to measure the degree of student achievement of learning outcomes are likely to differ from school to school and law schools are not required by this standard to use any particular methods.

of Standard 202 and 203. The former standards included very generalized language on what the self - study and strategic planning and assessments law schools were required to provide. New Standard 204 requires very detailed information be provided in the re-accreditation self-study report including evidence based assessments of the quality of the educational program, an assessment of the school's continuing efforts to improve educational quality, and an evaluation of the school's effectiveness in achieving its education objectives.<sup>174</sup> New Standard 204 also requires that a law school link its educational objectives to its mission.<sup>175</sup> This linkage was deemed important by the Outcomes Committee who suggested that law schools be allowed leeway to define their own mission but supported explicitly linking individual mission to outcome assessment.<sup>176</sup>

The ABA explicitly signaled that outcomes and assessment were critical to accreditation through the "Explanation of Changes" document it issued in 2014. The Council stated that Standard 203 was eliminated "in light of revised Standard 315."<sup>177</sup> Thus it is clear the new Standards link accreditation to adoption of learning outcomes through Standards 301 and 302 and assessment of student learning at both a student and institutional level through Standards 314 and 315.

In addition, the Standards break other new ground. Until the 2014 revisions the ABA did not require law schools improve the quality of their legal education but merely set minimum educational standards law schools must

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<sup>174</sup> Standard 204. SELF STUDY

Before each site evaluation visit the law school shall prepare a self-study comprised of (a) a completed site evaluation questionnaire, (b) a statement of the law school's mission and of its educational objectives in support of that mission, (c) an assessment of the educational quality of the law school's program, (d) an assessment of the school's continuing efforts to improve educational quality, (e) an evaluation of the school's effectiveness in achieving its stated educational objectives, and (f) a description of the strengths and weaknesses of the law school's program of legal education.

<sup>175</sup> *Id.*

<sup>176</sup> OUTCOMES REPORT, *supra* note 14, at 21-22.

<sup>177</sup> AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, EXPLANATION OF CHANGES, available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/201408\\_explanation\\_changes.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201408_explanation_changes.authcheckdam.pdf). Last visited 10/19/2014.

meet to remain accredited.<sup>178</sup> This lack of focus on improving the quality of a legal education put the accreditation of legal education distinctly outside the purpose of accreditation in higher education and professional schools.<sup>179</sup> The Standards and Review Committee responsible for the new Standards adopted as a guiding principle that law schools must, "though institutional self-examination and planning, constantly improve the quality of education and professional preparedness of [their] graduates."<sup>180</sup> The Committee declared it essential that "accrediting agencies create appropriate incentives for programs and institutions to improve the quality of their education."<sup>181</sup>

Heeding the bench and bar, and ignoring at least some law faculty,<sup>182</sup> the Council also agreed to require six credits of experiential learning within a "simulation course, a law clinic, or a field placement."<sup>183</sup> Standard 304

<sup>178</sup> See Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1490-91 (2011) ("In contrast to the approach taken by all of the regional and most of the professional accreditors, the Section of Legal Education and Accreditation leaves quality improvement entirely to the law schools, and then only in the form of an advisory statement encouraging schools to "continuously seek to exceed these minimum requirements." Even that encouragement was undercut in 2010 when the Council eliminated Standard 104, which had provided that "an approved law school should seek to exceed the minimum requirements of the Standards.").

<sup>179</sup> *Id.* at 1482.

<sup>180</sup> Donald J. Polden, Chair ABA Standards Review Committee, *Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education*, at 2 (May 6, 2009), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/principles\\_and\\_goals\\_accreditation\\_5\\_6\\_09.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/principles_and_goals_accreditation_5_6_09.authcheckdam.pdf)

<sup>181</sup> *Id.* at 2-3.

<sup>182</sup> See, e.g., Letter from the Yale Law School Sterling Professors dated 1/29/2014. While the letter was objecting to the proposal of 15 credits of experiential learning be required (this was later reduced to 6), the letter objects to any prescription of experiential learning, indicating that the "precise mix of experiential and other curricular formats ought not to be prescribed." Available at: [http://www.law.yale.edu/documents/pdf/News\\_&\\_Events/SterlingProfessorsofYaleLawSchoolCommentLetter1-29-14.pdf](http://www.law.yale.edu/documents/pdf/News_&_Events/SterlingProfessorsofYaleLawSchoolCommentLetter1-29-14.pdf)

<sup>183</sup> Standard 303. CURRICULUM

(a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:

(1) one course of at least two credit hours in professional responsibility that includes substantial instruction in the history, goals, structure, values, and responsibilities of the legal profession and its members;

defines an acceptable simulation course and law clinic and includes in both definitions the mandate that there be direct supervision of student performance by faculty and opportunities for performance, feedback by faculty, and self-evaluation.<sup>184</sup> To minimize any attempt for a law school to "double dip," Interpretation 303-1 explicitly disallows the use of one course to satisfy more than one requirement under this standard.<sup>185</sup>

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(2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and  
 (3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement. To satisfy this requirement, a course must be primarily experiential in nature and must:

- (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;
  - (ii) develop the concepts underlying the professional skills being taught;
  - (iii) provide multiple opportunities for performance; and
  - (iv) provide opportunities for self-evaluation.
- (b) A law school shall provide substantial opportunities to students for:
- (1) law clinics or field placement(s); and
  - (2) student participation in pro bono legal services, including law-related public service activities.

<sup>184</sup> Standard 304. SIMULATION COURSES AND LAW CLINICS

(a) A simulation course provides substantial experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member, and (2) includes the following:

- (i) direct supervision of the student's performance by the faculty member;
- (ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and
- (iii) a classroom instructional component.

(b) A law clinic provides substantial lawyering experience that (1) involves one or more actual clients, and (2) includes the following:

- (i) advising or representing a client;
- (ii) direct supervision of the student's performance by a faculty member;
- (iii) opportunities for performance, feedback from a faculty member, and self-evaluation; and
- (iv) a classroom instructional component.

<sup>185</sup> Interpretation 303-1 A law school may not permit a student to use a course to satisfy more than one requirement under this Standard. For example, a course that includes a writing experience used to satisfy the upper-class writing requirement [see 303(a)(2)] cannot be counted as one of the experiential courses required in Standard 303(a)(3).

The Standards revisions take effect immediately although there will be a transition period for the implementation of those Standards related to learning outcomes.<sup>186</sup> The Council, while building in a transition period, is clear that during the transition compliance will be assessed for accreditation purposes on the basis of the seriousness of the school's efforts to establish and assess student-learning outcomes.<sup>187</sup>

The revised standards indicate a novel willingness for the ABA as an accrediting body to be guided by the established practices in higher education, regional and professional accreditation policies, and the pedagogical approaches championed by the CARNEGIE REPORT and BEST PRACTICES.<sup>188</sup> The new Standards also signal a readiness to incorporate the views of practitioners as to what competencies law schools should be held accountable for teaching. While the bench and bar are likely to see the revised Standards as good first steps, in many ways state licensing authorities have already left the ABA behind.

#### **B. State Licensing Authorities and Admission to Practice Rules**

While in the past the legal academy was able to deflect and limit state intrusion into the curriculum or its pedagogy, the last decade has seen a consistent push by state authorities to force curricular change. The programs and rule changes described in this section are remarkable similar in their rational as well as their programmatic effects. They also draw on the reforms put forward by the MACCRATE REPORT, BEST PRACTICES, the CARNEGIE REPORT, and include the pedagogical methodologies supported by student-centered learning theory.

Each has come about through partnerships of thinkers from within and outside of the legal academy seeking to address the shortcomings of a modern legal education. By mandating or encouraging particular courses or experiential learning these programs and policies have already or when

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<sup>186</sup> See Transition and Implementation of the New Standards and Rules of Procedure For Approval of Law Schools, August 13, 2014 ¶ 4 indicating that Standards 301(b), 302, 303, 304 (experiential learning), 314 and 315 will begin to be applied in 2016/2017. Available at:

[http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2014\\_august\\_transition\\_and\\_implementation\\_of\\_new\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_august_transition_and_implementation_of_new_aba_standards_and_rules.authcheckdam.pdf)

<sup>187</sup> *Id.*

<sup>188</sup> OUTCOMES REPORT, *supra* note 14, at 1.

implemented will, change the curriculum and the pedagogy at the law schools they effect. Of note are four, those in New Hampshire Arizona, New York, and California. While the New Hampshire program is limited to the only law school within the state, the others will influence law school curriculums nation-wide because they apply to anyone seeking to be admitted to the bars of Arizona, New York, or California.

### 1. New Hampshire

The Daniel Webster Scholars (DWS) program formally began as a pilot program in 2005.<sup>189</sup> The program is highly innovative and grew out of brainstorming between the bench, bar and legal educators.<sup>190</sup> This group formed a committee whose goal was the creation of a licensing device that actually improved the quality of new lawyers in the state through pedagogical and curricular innovation.<sup>191</sup> The program was developed through a process of ascertaining what law students should be able to do upon graduation and what assessment methods could determine whether or not individual students were qualified.<sup>192</sup>

Such reverse engineering - identifying the knowledge, skills, behaviors and attributes they wanted law graduates to possess and then building a program to sequence and teach these traits all the while incorporating student and institutional feedback and assessment to determine if the program is working - is a manifestation of student-centered learning. It is the process that is encapsulated in and supported by the outcomes and assessment protocols now adopted by the ABA It also reflects much of the pedagogy suggested by BEST PRACTICES and embodies the type of curricular and pedagogical reform the CARNEGIE REPORT hoped to engender.<sup>193</sup>

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<sup>189</sup> John Burwell Garvey, "Making Law Students Client-Ready," *The Daniel Webster Scholar Honors Program: A Performance-Based Variant of the Bar Exam*, 85-SEP N.Y. ST. B.J. 44 (2013).

<sup>190</sup> John D. Hutson, *Preparing Law Students To Become Better Lawyers, Quicker: Franklin Pierce's Webster Scholars Program*, 37 U. TOL. L. REV. 103 (2005)

<sup>191</sup> *Id.* at 103.

<sup>192</sup> Hon. Linda S. Dalianis & Sophie M. Sparrow, *New Hampshire's Performance-Based Variant of the Bar Examination: The Daniel Webster Scholar Program*, THE BAR EXAMINER, Nov. 2005, at 25.

<sup>193</sup> Garvey, *supra* note 189, at 49-50 (one of the authors of the Carnegie Report has said of the DWS program "Never in our most optimistic moments did the Carnegie authors envision a school bringing real stenographers, real paralegals, real lawyers,

To successfully complete the DWS program students must demonstrate a foundational knowledge of doctrine as well as competency in the skills and values identified in the MACCRATE REPORT.<sup>194</sup> This means they must be able to show they know "how to listen, creatively solve problems, make informed judgments, recognize and resolve ethical problems, negotiate with and counsel people effectively, and be committed to continuing their legal education and contributing to the profession."<sup>195</sup> Upon successful completion of the program, students are certified as having passed the New Hampshire bar exam and are admitted to the New Hampshire bar upon graduation.

Curricular reform and a focus on student learning are at the heart of the DWS program. Keys to its success are integrated skills courses, which carefully build on one another and use of multiple and varied formative assessment that supports learning while gauging competency.<sup>196</sup> Unlike most legal education experiences, the DWS Program immerses students in a nearly continuous feedback loop during their education. Students study doctrinal law and then practice various legal skills in an experiential environment that incorporates that doctrine. They receive feedback from numerous sources and reflect upon their own performance. They internalize the feedback and then perform the skill again, receiving additional feedback. The DWS courses are sequenced to be increasingly complex and to incorporate and build upon skills and knowledge from the previous courses.<sup>197</sup>

The DWS program is the most innovative and far reaching of the state programs effecting law school curriculums as it covers the last two years of

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and yes, real judges into the training program. We can only hope that other state Supreme Courts will seriously consider the Webster Scholar method as an alternative approach to training and licensing.").

<sup>194</sup> Hutson, *supra* note 190, at 103. *See also* John Garvey, *supra* note 189, at 44 (Webster Scholars are introduced to the concept of assessment from the very beginning. As soon as they are admitted to the program, they are required to read the MacCrate Report and to become familiar with the skills and values they will need to demonstrate by the end of the program.).

<sup>195</sup> Dalianis and Sparrow, *supra* note 192, at 23.

<sup>196</sup> Among the program's curricular innovations are small practice based courses designed to teach an increasingly complex and integrated range of skills that build on one another. *Id.*

<sup>197</sup> Garvey, *supra* note 189, at 47.

law school. A recent report studying the program found that DWS graduates are more prepared for practice than non-DWS graduates.<sup>198</sup> Yet because of the depth of the collaboration between the University of New Hampshire School of Law and the bench and bar in the program's development and because it is limited to one law school, it is also the least disruptive of the recent changes. However, its impact has traveled far beyond New Hampshire as other states are studying the program and it has provided some of the impetus for the changes in New York and California.<sup>199</sup>

## 2. Arizona

In December of 2012, the Arizona Supreme Court amended Rule 34 of the Arizona Rules of the Supreme Court to allow third year law students at any ABA accredited law school within in eight credits of graduation to take Arizona's Uniform Bar Exam in February, prior to graduation.<sup>200</sup> A three-year experiment,<sup>201</sup> the program was developed in part to reduce student debt, increase employment opportunities, and to develop a curriculum that would better prepare students for practice.<sup>202</sup>

This program, like DWS was a collaboration between law schools and the courts although the impetus came from faculty at the University of Arizona Law School.<sup>203</sup> Those proposing the program were guided by the "persistent critiques that law schools do not do as much as they could to prepare graduates for many practice areas, and that the third year of law

<sup>198</sup> ALLI GERKMAN AND ELANA HARMAN, *AHEAD OF THE CURVE: TURNING LAW STUDENTS INTO LAWYERS* (2015) available at: [http://educatingtomorrowlawyers.du.edu/images/wygwam/pdf\\_resources/Ahead\\_of\\_the\\_Curve\\_Turning\\_Law\\_Students\\_into\\_Lawyers.pdf](http://educatingtomorrowlawyers.du.edu/images/wygwam/pdf_resources/Ahead_of_the_Curve_Turning_Law_Students_into_Lawyers.pdf)

<sup>199</sup> See New York State Bar Committee on Legal Education and Admission to the Bar, Report of the Subcommittee on Early Administration of the Bar Exam (March 4, 2014) (describing the Committee's role in connecting members of the judiciary and leaders in the New York State Bar with the Daniel Webster Scholar's Program), available at:

<http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=51613>.

<sup>200</sup> *In the Matter of Petition to Amend Rule 34, Rules of the Supreme Court*, Arizona Supreme Court No. R-12-0002 available at <http://www.azcourts.gov/Portals/20/2012Rules/120512/R120002.pdf>

<sup>201</sup> *Id.*

<sup>202</sup> See Sally Rider & Marc Miller, *The 3L February Bar Exam: An Experiment Under Way in Arizona*, 82:3 THE BAR EXAMINER 15 (Sept. 2013).

<sup>203</sup> *Id.* at 15.

school does not have a coherent role in legal education."<sup>204</sup> They also viewed the creation of the February Bar option as a "powerful lever to drive" curricular and education reform to emphasize more experiential learning and practical skills courses throughout the curriculum.<sup>205</sup>

In developing the curriculum leaders at Arizona Law described seeking assistance from outside the law school to get the expertise necessary to develop a more practice ready curriculum.<sup>206</sup> Similar to the DWS program Arizona Law established an advisory committee comprised of students, recent alums, practitioners, judges and representatives from the state bar as well as some faculty.<sup>207</sup> The program developed at Arizona Law<sup>208</sup> provides for students to take the remaining eight credits of graduation in a series of experiential and practice oriented courses that "focus on the transition from theory to practice."<sup>209</sup> While there was fairly wide faculty support for the shift, it was opposed by some faculty at the law school who saw the program as a "gimmick" and fell back on the old argument that students need three years of doctrinal courses for success after graduation.<sup>210</sup>

According to those who helped develop it, the February Bar program was an excellent mechanism for educational and curricular reform as it "led to reassessment of the entire law school experience, including the integration of a wider range of experiential and real world learning opportunities throughout the curriculum."<sup>211</sup> The University of Arizona Law School used the experience of the February Bar to revisit their curriculum to create a

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<sup>204</sup> *Id.* at 16. This was one of the complaints of those who supported the Clare proposal and the early state rule changes. STEVENS, LEGAL EDUCATION IN AMERICA, *supra* note 5, at 238 (noting that those proposing the changes felt that the second and third year of law school had become largely elective).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 21-23.

<sup>207</sup> *Id.* at 21.

<sup>208</sup> The early bar is open to any qualified student from an ABA accredited law school. However the program is likely to primarily affect students from the three Arizona law schools. University of Arizona's James E. Rogers College of Law has adopted a similar experiential and practice based program of study. See A Student's Guide to the February Arizona Bar Exam, Frequently Asked Questions at [https://www.law.arizona.edu/Current\\_Students/documents/Student\\_Guide\\_AZ\\_Feb\\_Bar\\_aug\\_2014.pdf](https://www.law.arizona.edu/Current_Students/documents/Student_Guide_AZ_Feb_Bar_aug_2014.pdf) last visited 10/11/2014.

<sup>209</sup> Rider & Miller, *supra* note 202, at 23.

<sup>210</sup> *Id.* at 19.

<sup>211</sup> *Id.*

more successful theory to practice legal education which better integrated experiential learning and professionalism into their program.<sup>212</sup>

### 3. New York

The changes in New York have had little law school input, at least initially. The general outline of both the 50 hours of pro bono and the Pro Bono Scholars program were both first announced by Chief Judge Lippman who then invited law schools and the bench and bar to provide input into how the programs might best be structured.

#### ***Mandatory 50 hours of pro bono for admission: The hands on experience of helping others***

In May of 2012, Chief Judge Jonathan Lippman of the New York Court of Appeals announced that within three years all applicants to the New York bar must have completed 50 hours of pro bono service prior to being admitted.<sup>213</sup> This is the first rule of its kind governing state bar admissions, although some law schools have mandated public service as a graduation requirement.<sup>214</sup> The rule requires that the work be done under legal supervision<sup>215</sup> and defines "pro bono" generally as the provision of legal services without charge to people of limited means, including not for profit entities and others seeking to promote access to justice.<sup>216</sup>

As announced by Judge Lippman, the goal is three fold. First, it is to address the crisis in access to justice where "millions of litigants appear in

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<sup>212</sup> *Id.* at 23

<sup>213</sup> Jonathan Lippman, Chief Judge, N.Y. Court of Appeals, *Address at Law Day 2012 Ceremony at the New York Court of Appeals* 1 (May 1, 2012), available at <http://www.nycourts.gov/whatsnew/Transcript-of-LawDay-Speech-May1-2012.pdf>.

<sup>214</sup> See Justin Hansford, *Lippman's Law: Debating the Fifty-Hour Pro Bono Requirement for Bar Admission*, 41 *FORDHAM URB. L.J.* 1141, 1145 (2014) (39 U.S. law schools mandate pro bono service a graduation requirement).

<sup>215</sup> The rule counts activities only if performed under the supervision of: i) a law school faculty member, including adjunct faculty and instructors; ii) an attorney admitted to practice and in good standing in the jurisdiction where the work is performed; or, iii) in the case of a clerkship or externship in a court system, a judge or attorney employed by the court system. 22 N.Y.C.R.R. 520.16.

<sup>216</sup> 22 N.Y.C.R.R. §520.16

court annually fighting for the essentials of life" unrepresented.<sup>217</sup> Second, it is to provide the experience of hands on legal training under the supervision and mentoring of attorneys and judges.<sup>218</sup> Finally, it is expected that providing pro bono services will help instill "future generations of lawyers admitted to practice in New York with a commitment to pro bono and public service."<sup>219</sup> While not everyone has embraced the rule,<sup>220</sup> it is currently in effect and may be spreading to other states.<sup>221</sup>

### ***Pro Bono Scholars - 500 hours of experiential learning***

In 2014 Judge Lippman followed the 50-hour pro bono rule with the announcement of the "Pro Bono Scholars" (PBS) program.<sup>222</sup> Like the Arizona program, it allows selected students to take the February bar prior to graduation and be admitted shortly after they complete their final semester.<sup>223</sup> However it goes further than Arizona in that PBS students devote their entire final semester of law school - up to 15 credits - to experiential learning through a clinic or highly supervised external

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<sup>217</sup> Advisory Committee on New York State Pro Bono Requirements, Report to the Chief Judge of the State of New York and the Presiding Justices of the Four Appellate Division Departments 1 (September 2012) available at <http://www.nycourts.gov/attorneys/probono/ProBonoBarAdmissionReport.pdf>

<sup>218</sup> *Id.* at 1-2.

<sup>219</sup> *Id.* at 2.

<sup>220</sup> See Hansford, *supra* note 214, at 1141, n. 15-20 (describing critiques ranging from "limousine liberal idiocy" to indentured servitude).

<sup>221</sup> Chief Judge Jonathan Lippman, *New York's Template To Address The Crisis In Civil Legal Services*, 7 HARV. L. & POL'Y REV. 13, 27(2013). The Chief Justice of New Jersey has formed a committee to consider a similar rule. Report of the Working Group on the Proposed Preadmission Pro Bono Requirement April 30, 2013 available at: <https://ncforaj.files.wordpress.com/2013/05/nj-report-on-50-hr-rule.pdf>

<sup>222</sup> See Chief Judge Jonathan Lippman, *The State of the Judiciary 2014: Vision and Action in our Modern Courts* 3-4 (February 11, 2014) (describing PBS as dedicating their last semester in law school to working under guidance of law schools to gain 500 hours of practical experience) available at: <http://www.nycourts.gov/ctapps/soj2014.pdf>

<sup>223</sup> Given New York's normally lengthy period between successfully sitting for the bar and being admitted, shortening the time period is extremely beneficial to the PBS participants. The goal is to have them admitted within a month of their graduation.

placement serving indigent clients.<sup>224</sup> The program continues Lippman's focus on access to justice issues but also highlights his belief that law students must be provided with more opportunities to gain practical skills and more fully understand their responsibilities as members of the legal profession.<sup>225</sup>

Approved by the New York Board of Law Examiners, the program began in the fall of 2014 with the selection of students to sit for the February 2015 Bar prior to graduation.<sup>226</sup> After taking the bar exam students are expected to work 45 hour per week for twelve weeks under the supervision of law faculty and field supervisors. The program also has an academic requirement to provide opportunities for PBS students to reflect on the work, explore their ethical and professional role and further develop their skills.<sup>227</sup> The PBS placements are expected to provide "ample opportunity for client contact or be of direct benefit to an identifiable client or clients" and involve the use of legal skills and law related activities" appropriate for students.<sup>228</sup>

#### 4. California

The State Bar of California has adopted and is now preparing to implement significant new admission to practice regulations.<sup>229</sup> Like New York, the reforms require low or pro bono work prior to admission of the bar. However, driven by the now familiar belief that law graduates were entering the profession without the foundation necessary to represent clients competently, California went much further. Harking back to the

<sup>224</sup> See Pro Bono Scholars Program, A Legal Education Initiative 2 - 5, available at: <http://www.nycourts.gov/attorneys/probonoscholars/ProBono-Scholars-Program-Guide-2014.pdf>.

<sup>225</sup> Chief Judge Lippman, *supra* note 222, at 3.

<sup>226</sup> The participating law school decided their own individual criteria for the students although the PBS program reserved the right to refuse the student or the placement. See Pro Bono Scholars Program *supra* note 224 at 3 <http://www.nycourts.gov/attorneys/probonoscholars/ProBono-Scholars-Program-Guide-2014.pdf>

<sup>227</sup> Lippman, *supra* note 225 at 3.

<sup>228</sup> *Id.*

<sup>229</sup> THE STATE BAR OF CALIFORNIA, TASK FORCE REPORT ON ADMISSIONS REGULATION REFORM: PHASE 1 FINAL REPORT (June 24, 2013) available at [http://www.calbar.ca.gov/Portals/0/documents/bog/bot\\_ExecDir/ADA%20Version\\_STATE\\_BAR\\_TASK\\_FORCE\\_REPORT\\_%28FINAL\\_AS\\_APPROVED\\_6\\_11\\_13%29\\_062413.pdf](http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_%28FINAL_AS_APPROVED_6_11_13%29_062413.pdf) [hereinafter CALIFORNIA TASK FORCE REPORT]

concerns of the regulatory efforts in the 1970s and 80s,<sup>230</sup> California is in the process of mandating a pre-admission competency training program.<sup>231</sup> The California Bar established a Task Force specifically to determine whether such a program was necessary and if so to detail what it should entail.<sup>232</sup>

Designed to "close the gap in practice readiness"<sup>233</sup> the Task Force's Report cites to law schools that have increased clinical and experiential education opportunities and offered "new and innovative forms of coursework" which combine "traditional doctrinal teaching with practice-based teaching" and seeks to promote and build on these examples.<sup>234</sup> The Task Force recommended and the bar adopted, that prior to admission a candidate for the California bar must have taken at least 15 units of practice based experiential course work designed to develop law practice competencies.<sup>235</sup>

The Task Force supported its recommendations with the findings of the MACCRATE REPORT, the CARNEGIE REPORT, BEST PRACTICES, as well as with several recent ABA and State Bar Reports.<sup>236</sup> In outlining how to facilitate the transformation of law students into legal professionals the report argues that legal education must "focus concretely on the various competencies that it takes to be a good lawyer -- competencies not covered by doctrinal learning, including problem solving, exercising good judgment, client relations, time management, communication, and ability to see and understand opposing points of view."<sup>237</sup> The Report echoed the need for an integrated competency based curriculum and positively referenced

<sup>230</sup> See *supra* Section IV.(A).

<sup>231</sup> CALIFORNIA TASK FORCE REPORT *supra* note 229, at 1.

<sup>232</sup> See The State Bar of California webpage on the Task Force on Admission Regulation Reform at <http://www.calbar.ca.gov/AboutUs/BoardofTrustees/TaskForceonAdmissionsRegulationReform.aspx>

<sup>233</sup> CALIFORNIA TASK FORCE REPORT, *supra* note 229, at 2.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 1. In lieu of some or all of the 15 units students could substitute externship, clerkship or apprenticeship units. This only affects those seeking admission to the California Bar who are not admitted elsewhere. Memo of Jon Streeter, Chair of the Task Force on Admissions Regulation Reform to California State Bar Board of Trustees, October 12, 2013 at 7: *available at* <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000011266.pdf>

<sup>236</sup> CALIFORNIA TASK FORCE REPORT, *supra* note 229, at 3-5.

<sup>237</sup> The Report referenced the Schultz and Zedeck study in describing how to determine which competencies are most critical for law students to learn. *Id.* at 14.

the need for outcomes and evidence based education put forward by the ABA and others.<sup>238</sup>

The California Task Force was adamant that they were not imposing new curricula for law schools but rather were proposing, "a shifting of priorities within law schools in a way that encourages the existing trend toward incorporating more clinically-based experiential education."<sup>239</sup> However, the requirements do far more than merely encourage. Even with a several year implementation period, law schools will have to develop and implement a curriculum that includes a minimum of twenty-five percent of a students upper level coursework being taught in an experiential manner.<sup>240</sup> While not part of the mandates, the Task Force also argued that law schools should rethink their hiring standards given that few law faculty have the practical experience necessary to teach the skills required for practice.<sup>241</sup>

Taken together, the regulation reforms in New Hampshire, Arizona, New York and California have significant ramifications for legal education nationwide. The reforms also signal the next steps in the ongoing efforts to make legal education more student-centered and experiential. However, it would be a mistake for law schools and law faculty to see these trends as a declaration of war<sup>242</sup> and gird themselves for battle. It would also be a mistake to ignore the reforms and think they have no teeth. The reforms are real, they have teeth, and they will continue absent an extraordinary change in the environment law schools operate within. However, law schools across the country are succeeding by not waiting but leading the way forward.

## **VI. The Road to Transformation: Individualized, Experientially Based, and Student Centered**

The reforms described above may be seen as both dramatic and modest, in part because, except for the DWS program, they have not yet been fully implemented. In addition, the state reforms, while having the potential to

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<sup>238</sup> *Id.* at 15.

<sup>239</sup> *Id.* at 21-22.

<sup>240</sup> *Id.* at 16.

<sup>241</sup> *Id.* at 18.

<sup>242</sup> *See supra* note 116 and accompanying text.

affect schools nation-wide, can also be viewed as regionally limited. However there is clearly a gestalt in the reforms that is actively pushing legal education away from the status quo in legal education.

Forty years of pressure to broaden what is taught in law schools to reflect the skills, professionalism, and knowledge graduates must have to practice is finally starting to take hold. Law schools are now being told to reform their pedagogical methodologies to include a more structured and coherent program of study that is student-centered, more experientially based, and contextualized. Combined with the significant shifts in the legal employment environment these reforms are moving legal education rapidly towards a tipping point of significant structural change.<sup>243</sup>

As disconcerting as that may sound, the new regulatory paradigm also provides a magnificent opportunity for re-structuring individual law schools to support student learning within a competency based program that has the added benefit of making the school itself more viable.<sup>244</sup> Except for mandating that schools be more intentionally mission driven and evidence based, none of the reforms mandate specific programs of education. To the contrary, they encourage and require law schools to re-examination and re-evaluate their curriculums and pedagogies to determine whether or not we are providing the education we claim to be providing. This creates the opportunity for more individually creative programs among schools, not less.

In addition, because the regulatory reforms all arise from the same history and draw on the same foundation of knowledge, there is a wealth of guidance for law faculty and administrators to draw on as they adapt. Resistance or ennui may make things arduous at some schools, but the need for reform and guidance on how to accomplish it are well documented and straightforward. Recognizing the need for modernizing their pedagogy and curriculum many schools are already far along in reviewing and transforming their programs.

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<sup>243</sup> One argument is that dramatic curricular and pedagogical change can begin by focusing on reforming 12% of a law school's program of education with support and buy in from only 20% of a law school's faculty. Henderson, *Blueprint*, *supra* note 37, at 506.

<sup>244</sup> Henderson argues that the current system of legal education is unsustainable and that law schools will not be viable until law faculty shift their approach to legal education. *Id.*

### **A. Recent Examples of Law School Transformation**

Below are examples from six very different law schools that undertook recent curricular and pedagogical change. The transformations reflect the individual identities and unique challenges each school sought to address. However, even though undertaken before some of the regulatory changes discussed herein were finalized, the reforms described reflect the requirements of the new regulatory paradigm law schools now find themselves in. This is because the structure of the regulatory paradigm itself is not new. What is new is the willingness of outside regulatory bodies to hold law schools accountable.

Gonzaga University School of Law began its curriculum review process in 2007 guided in large part by the findings of the MACCRATE REPORT, the CARNEGIE REPORT and BEST PRACTICES.<sup>245</sup> At the beginning of the process Gonzaga's Curriculum Review Committee sought input not only from alumni, current students and faculty and the bench and bar but also reviewed five years worth of post-graduate employment data to understand where their graduates were going right after law school.<sup>246</sup> The revised curriculum "breaks down silos within the academic program" to increase integration and to ensure that courses build more intentionally on each other.<sup>247</sup> While adding third year clinic or externship requirements, the school significantly altered the first-year curriculum in order to add "skills and professionalism labs" connected to doctrinal courses. These labs provide an opportunity for students to practical specific legal skills within the context of a doctrinal course such as Torts or Civil Procedure.<sup>248</sup> However they also introduce students to the "professional values and habits that provide a foundation for the ethical practice of law."<sup>249</sup>

Beginning in 2009 William and Mitchell undertook to shift to an Outcomes approach to education. The goal was to assure their graduates have assessed proficiency in identified areas, make the steps to 'practical

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<sup>245</sup> Earl Martin & Gerald Hess, *Developing a Skills and Professionalism Curriculum - Process and Product*, 41 U. OF TOLEDO L. REV. 327, 338 (2010).

<sup>246</sup> *Id.* at 339.

<sup>247</sup> *Id.* at 345.

<sup>248</sup> *Id.* at 344.

<sup>249</sup> *Id.*

wisdom' transparent, and to promote program and faculty accountability.<sup>250</sup> The faculty commenced a curriculum review "to articulate core knowledge, skills, and professional attributes for students and to align their teaching and curriculum with the selected outcomes."<sup>251</sup> Out of this process came a new orientation program, an integrated first year pilot curriculum, new courses with explicit student outcomes in counseling, negotiating, and drafting, a greater focus on experiential learning, including new externship courses, client-representation clinics, as well as new project- and problem-based learning courses.<sup>252</sup>

While not a complete revamping of their curriculum, Suffolk University Law School recently developed a program whose goal is to graduate students who could, upon graduation, meet many of the needs of average-income individuals and families.<sup>253</sup> For students in the program the school created a structured and deliberate curriculum by extensively revamping the first year courses and making available only a limited menu of specific upper level electives.<sup>254</sup> The curriculum includes a significant emphasis on practitioner based technology, and requires a guided externship during the first summer and employment in either the Law School's own accelerator program or a small firm during the second year. It also mandates clinical courses throughout the entire third year.

Washington and Lee's faculty also recently undertook a substantial curricular review and reformed their entire third year curriculum.<sup>255</sup> They did so specifically to address the weakness of an unstructured second and third year of law school that offered little deliberate progress toward preparing students for practice.<sup>256</sup> Using the guidance contained in MACCRATE, BEST PRACTICES and the CARNEGIE REPORT, the school

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<sup>250</sup> Gregory M. Duhl, *Equipping Our Lawyers: Mitchell's Outcomes-Based Approach To Legal Education*, 38 WM. MITCHELL L. REV. 906, 917 (2012).

<sup>251</sup> *Id.* 908.

<sup>252</sup> *Id.*

<sup>253</sup> Jeffrey J. Pokorak, et al, *Stop Thinking And Start Doing: Three-Year Accelerator-To-Practice Program As A Market-Based Solution For Legal Education*, 43 WASH. U. J.L. & POL'Y 59, 77 (2013).

<sup>254</sup> *Id.* at 78 – 79.

<sup>255</sup> Lyman Johnson, et al., *Washington and Lee University School of Law: Reforming the Third Year of Law School* in REFORMING LEGAL EDUCATION: LAW SCHOOLS AT THE CROSSROADS 11, 15 (David M. Moss & Debra Moss Curtis eds., 2012).

<sup>256</sup> *Id.* at 16.

created a highly experiential third year of study in which students would be expected to "exercise and express professional judgment in a variety of contexts."<sup>257</sup> The program provides ongoing and immediate feedback to students to assist them in taking more responsibility for their own learning.<sup>258</sup> Taking a cue from higher education the school set specific guidelines for the new third year curriculum and established institutional assessment mechanism to determine whether or not the program was successful as well as to continue to refine and improve the program.<sup>259</sup>

Thurgood Marshall School of Law (TMLS), guided by its mission of preparing a diverse group of students for leadership roles throughout law, business and government has developed a significant experiential learning environment.<sup>260</sup> The program is described as being oriented around a holistic student centered learning approach that values assessment and student directed learning.<sup>261</sup> What makes the development of a robust experiential learning program at TMLS even more interesting is that it was done at a law school with "perpetual" concerns about bar passage and where the curriculum is structured toward bar subjects and enhancing academic support.<sup>262</sup> Even within this context the school is working towards a goal of increasing the opportunity for all students to take 30 credits of upper level experiential education courses.<sup>263</sup>

Finally, UNT Dallas College of Law, a brand new public law school is using the language of learning centered education to market itself. One of its three stated goals is developing a practice-based education through a mapped curriculum that includes commitment to assessment based pedagogy "to enhance student learning."<sup>264</sup> The school's courses are built around learning outcomes and multiple opportunities for experiential

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<sup>257</sup> *Id.* at 21.

<sup>258</sup> *Id.* at 22.

<sup>259</sup> *Id.* at 32.

<sup>260</sup> SpearIt, Stephanie Smith Ledesma, *Experiential Education As Critical Pedagogy: Enhancing The Law School Experience*, 38 NOVA L. REV. 249, 264 (2014).

<sup>261</sup> *Id.* at 264.

<sup>262</sup> *Id.* at 269.

<sup>263</sup> *Id.*

<sup>264</sup> Royal Furgeson, Ellen Pryor, *Making the Grade: The UNT Dallas College of Law, Which Opens this Fall, Wants to Provide a Top-Notch Law Education at a Low-Cost Tuition Price*, 77 TEX. B.J. 226 (2014). The other two goals are widening access and keeping tuition and student debt as low as possible.

learning.<sup>265</sup> Upper-level courses are designed as "2 + 1" courses that include two hours of substantive law combined with an hour lab for hands on applications of the material learned.<sup>266</sup> In keeping with its intention of providing a practice based program of education, the school has articulated a hiring policy that provides a preference for faculty with seven to ten years of practice experience and has defined scholarship in such a way as to "not to create disincentives" towards teaching and service.<sup>267</sup>

These are just a few of the schools<sup>268</sup> that have recently undertaken the difficult but rewarding work of curricular and pedagogical reform and in the process have recentered student learning. Reform such as this will be required under the new regulatory paradigm. However, as shown by these brief examples, if schools are willing to aim high they can do much more than merely meeting the mandatory minimums as educational institutions. By taking the opportunity the regulatory mandates provide, schools can re-orient themselves and make a successful professional program of legal education accessible for all.

### **B. Seven Principles to Guide Transformation**

So how to move forward? Below are seven principles drawn from the current regulatory reform efforts and the foundations upon which those reforms were built. Accreditors and licensing organizations have already begun to mandate pedagogical and curricular reform. These principles can guide law school faculty as we regain our place in the profession by recentering student learning, engaging in curricular reform and in the process re-building our connections to the profession. The principles below can help us as we decide not merely to follow, but to flourish and lead ourselves and our students into the future of the practice of law.

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<sup>265</sup> *Id.* at 230.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> See e.g., Cynthia F. Adcock, *Creating an Outcomes-based Curriculum at Charlotte School of Law* in REFORMING LEGAL EDUCATION: LAW SCHOOLS AT THE CROSSROADS 139, *supra* note 255 (describing the process by which Charlotte School of Law, guided by the CARNEGIE REPORT and BEST PRACTICES and decided to shift to an outcomes based program of legal education); Myra E. Berman, *Portals to Practice: A Multidimensional Approach to Integrating Experiential Education into the Traditional Law School Curriculum*, 1 J. EXPER. LEARNING 157 (2014).

### 1. Don't reinvent the wheel

The current reforms were built in large part on a few specific and influential works, such as the MACCRATE REPORT, BEST PRACTICES and the CARNEGIE REPORT, as well as the reports and studies those works incorporated.<sup>269</sup> Many law schools that have undertaken successful reform have relied on the principles and goals elucidated in these works to guide them.<sup>270</sup> Reinventing the wheel is not only unnecessary it would be a waste of time, energy, and effort. In addition, given that the current mandates rely heavily on them, law schools risk going astray if they attempt to create a program that satisfies the calls for curricular and pedagogical reform without incorporating the guidance these works provide.

Another other source of information and guidance to be explored are the undergraduate and professional schools that have incorporated learning outcomes, student-centered pedagogy, and experiential learning in the past few years. The faculty and administrators in these schools have much to offer law faculty given the relative recency of the adoption of outcomes assessment in higher education. Law schools that have undertaken curricular reform that includes introducing outcomes and assessment into their programs have successfully tapped into this expertise.<sup>271</sup>

In addition, all law schools have a history of change and reform on which they can draw. Bringing that history into the process may provide a place from which to begin that is less alienating and more beneficial to building faculty support.<sup>272</sup> Understanding the reasons and rationales behind past

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<sup>269</sup> See *supra* section IV.

<sup>270</sup> See, e.g., *supra* notes 256-259 and accompanying text (describing Washington and Lee's reliance on the MACCRATE REPORT, the CARNEGIE REPORT and BEST PRACTICES when reforming the school's curriculum).

<sup>271</sup> See Mary Crossley and Lu-in Wang, *Learning by Doing*, *supra* note 16, at 278-279 (describing engaging experts at University of Pittsburg and other local schools when instituting outcomes); Deborah Maranville, et al, *Lessons For Legal Education From The Engineering Profession's Experience With Outcomes-Based Accreditation*, *supra* note 73, at 1031- 1040 (describing three lessons from Outcomes based approaches that can be gleaned from the experience of Engineering schools).

<sup>272</sup> Faculty buy-in is a critical aspect of curricular or pedagogical reform. See Munro, *supra* note 72, at 97 (describing the importance of faculty collaboration and cooperation); D.M. Moss and D.M. Curtis, *Essential Elements for the Reform of Legal Education* 222 in REFORMING LEGAL EDUCATION, *supra* note 3, (describing faculty buy in as the essential element for curricular reform success).

curricular reforms, as well as the perceived success or failure of such reform allows schools to minimize the chances of merely repeating themselves instead of actually moving forward.

## **2. Embed the process into the life of the law school**

The goal of pedagogical and curricular reform is to promote an adaptable and ever improving professional educational institution. This requires a continuing process not a periodic one. Our failure to keep step with the profession is a large part of why outside regulators have taken the active and clear steps described above. Along with adopting outcomes and assessment, the ABA has also mandated that law schools document continuing efforts to improve educational quality.<sup>273</sup> This continuing improvement is necessary to ensure that law schools evolve - modernizing their curriculums to educate their students for the current and future practice of law. This requires an iterative and data driven process where information is continually collected and assessed.<sup>274</sup>

For example, during outcomes assessment schools may develop mechanisms to learn where its graduates are employed upon graduation<sup>275</sup> or collect input from alumni to understand what current graduates should be able to do upon graduation. Mechanisms for gathering and reviewing this data should be designed with the understanding that this information will be continually collected and assessed. Curricular mapping is also often suggested as an excellent place to begin the process of curricular reform.<sup>276</sup> However this process should not be relegated to a snapshot "map" every seven years right before reaccreditation. Rather schools should establish a process that provides a clear understanding of the curriculum on an ongoing basis. The goal of a solid professional education is an ever-evolving destination. It requires law schools to build their own internal GPS system allowing them to recalculate and recalibrate as needed, to stay on course.

## **3. Be mission guided**

The new ABA Standards require that law schools develop a mission and educational objectives supporting that mission.<sup>277</sup> Mission statements

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<sup>273</sup> See Standard 204, *supra* note 174.

<sup>274</sup> *Essential Elements for Curricular Reform*, *supra* note 272, at 227.

<sup>275</sup> See *supra* note 246 and accompanying text.

<sup>276</sup> See *Essential Elements for Curricular Reform*, *supra* note 272, at 224.

<sup>277</sup> See *supra* note 176 and accompanying text.

provide guidance that allows law schools to ensure that their curriculum is less a discrete set of classes and more of a coherent whole.<sup>278</sup> Mission statements also provide a shared vision and can create unity and direction,<sup>279</sup> each necessary for schools to undertake reform successfully. In recommending that the Standards Review Committee develop standards to address mission, the Outcomes Review Committee stressed the importance of the connection between institutional mission and outcomes and assessment measures found in the accreditation of other professions.<sup>280</sup>

Many law schools do not have a mission statement suggesting they function not as a community of scholar-teachers with a shared mission, but as a collection of independent contractors who share space but have no discernable coalescing purpose or goal.<sup>281</sup> Many other schools have bland mission statements that give no indication of uniqueness or direction.<sup>282</sup> This is a missed opportunity for many reasons. A well-crafted and honest<sup>283</sup> mission statement can serve as part of the schools GPS system.<sup>284</sup> When Gonzaga University School of Law undertook reform, one of the first steps the faculty made was revising the school's mission statement.<sup>285</sup> Moving from seven paragraphs to one single statement clarified and reaffirmed the schools core educational function as well as its uniqueness and was then used as a guide for the overall planning process.<sup>286</sup>

<sup>278</sup> Munroe, *supra* note 72, at 4 (lack of a mission creates lack of focus and the curriculum becomes a collection of discrete activities).

<sup>279</sup> Gordon T. Butler, *The Law School Mission Statement: A Survival Guide for the Twenty-first Century*, 50 J. LEGAL EDUC. 240, 241-242 (2000).

<sup>280</sup> OUTCOMES REPORT, *supra* note 14, at 22 - 24 and 61.

<sup>281</sup> Jerome Organ, *Missing Missions: Further Reflections on Institutional Pluralism (or its Absence)*, 60 J. LEGAL EDUC. 157, 164 (2010).

<sup>282</sup> Butler, *supra* note 279, at 270 (compares mission statements from various law schools and concludes that they are "seldom meaningful").

<sup>283</sup> George Critchlow, *Kim Kardashian and Honey Boo Boo: Models for Law School Success (or Not)*, 45 CONN. L. REV. 1319, 1342 (2013) ("Draft and embrace a mission statement that is honest and realistic, consistent with the law school's history, location and purpose, and that appeals to the desired applicant pool. This obviously requires discipline, focus, and effort on the part of deans and faculty. It requires law schools to resist the temptation to produce vanilla flavored mission statements that are generic, self-promoting, and redolent with "national" law school rhetoric.").

<sup>284</sup> See *supra* notes 273 - 276 and accompanying text.

<sup>285</sup> See Martin & Hess, *supra* note 245, at 334.

<sup>286</sup> *Id.*

#### 4. Don't think small

The reforms called for by the bench and bar, learning theorists and law school accreditors are not about small "s" skills training. Rather the demand is that law schools create a program and pedagogy that teaches the fundamental skills of legal analysis, problem solving, collaboration, working across differences and creativity. The bench and bar, learning theorists, and higher education accrediting organizations have all coalesced around the understanding that law school is falling short in its approach to educating legal professionals, and has been for quite awhile.<sup>287</sup> The skills described as missing from legal education are those essential to problem solving and for serving clients in a professional and ethical manner. Do not fall for the straw man argument that wrongly characterizes the call for teaching fundamental skills as demanding that law schools teach the myriad of technical skills a lawyer may use in practice.<sup>288</sup>

The call for more experiential learning should not be seen as a requirement to add "skills" to our curriculums and pedagogy. Rather the call for integrating experiential learning deeper into our programs of education are based on studies showing that students learn to recognize, analyze and creatively solve complex problems best through integrated experiential learning.<sup>289</sup> In addition, while formative assessment is not yet required in all classes, schools should not relegate them to the clinics or externships. The report on the DWS program highlighted two factors driving the accelerated competence of their graduates - formative assessment strengthened by opportunities for personal reflection and the practice (experiential) context strengthened by peer collaboration.<sup>290</sup> Attempting to silo the new mandates will limit the ability for a law school to provide a professional education.

#### 5. Educate the students of today and tomorrow

Our professional organizations, our students, as well as individual law schools and law faculty are supportive of expanding the pool of students we admit and graduate so as to diversify law schools and the legal

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<sup>287</sup> See *supra* section III and IV.

<sup>288</sup> See Robert Condlin, *supra* note 56.

<sup>289</sup> See *supra* notes 52 - 55 and accompanying text.

<sup>290</sup> AHEAD OF THE CURVE, *supra* note 198, at 14.

profession.<sup>291</sup> The structures and student-centered teaching methodologies that provide a supportive learning environment for nontraditional students intersect and overlap with much of the reforms outside licensing authorities are now mandating for law schools. Thus schools committed to supporting nontraditional students could use the regulatory reform process as an impetus to creating an environment more conducive to the success of all students.

A school serious about supporting the success of a diverse student body would place that in their mission statement. As described above, a mission statement identifies the purposes and values that guide the organization and its members in making decisions and allocating resources.<sup>292</sup> A school's mission is also now directly tied to educational outcomes and assessment.<sup>293</sup> Thus having as part of its mission the successful education of a diverse student body means a school would create an educational program with student-centered education in mind.

There are many ways this could be done, one example would be for a school to adopt cultural competency or cultural sensibility as one of its learning outcomes pursuant to ABA Standard 302.<sup>294</sup> This is not an unconventional step given that the ABA Standards already suggest cultural competency as one of the other professional skills needed for competent and ethical participation in the legal profession.<sup>295</sup> Understanding and being mindful of cultural difference has also long been recognized as a critical

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<sup>291</sup> Paula Lustbader, *Painting Beyond The Numbers: The Art Of Providing Inclusive Law School Admission To Ensure Full Representation In The Profession*, 40 CAP. U. L. REV. 71, 84 - 85 (2012).

<sup>292</sup> Jerome Organ, *Missing Missions: Further Reflections On Institutional Pluralism (Or Its Absence)*, 60 J. LEGAL EDUC. 157, 159 (2010).

<sup>293</sup> ABA Standard 204, *supra* note 174; Munro, *supra* note 72, at 3-4. *See also* OUTCOMES REPORT, *supra* note 14, at 22-24.

<sup>294</sup> Cultural sensibility allows professionals to recognize that culture is a complex compilation of numerous influences and emphasizes understanding of how culture, in turn, influences interactions or knowledge. This approach requires professionals to be aware of and use their understanding of culture to develop constructive and positive relationships and skills. It requires the ability for self reflection and potentially changing, ones own perspectives, behaviors, and attitudes. *See* Andrea A. Curcio, *et al*, *A Survey Instrument To Develop, Tailor, And Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177 (2014).

<sup>295</sup> *See* Interpretation 302-1 *supra* note 168.

skill for the practice of law or any profession.<sup>296</sup> It is explicitly referenced by Shultz and Zedeck,<sup>297</sup> and appears as part of several of the MACCRATE REPORT skills<sup>298</sup> as well as in BEST PRACTICES.<sup>299</sup>

Adopting cultural sensibility as a learning outcome would also alert faculty to the importance of cultural difference and help create space for the voice and values of nontraditional students to be heard in the classroom, reducing the isolation and disenfranchisement these students often feel.<sup>300</sup> It would send a message of support to faculty who designed their course materials and courses in such a way as to maximize the diversity of experiences discussed in the classroom and put other faculty on notice that cultural diversity was of paramount importance to the institution. Cultural sensibility as a learning outcome would also put the broader community of students, faculty, staff, alumni, employers, and others on notice that a law school was serious about creating a safe and supportive learning environment for all students.

## 6. Focus on Pedagogy

While curricular reform is critical it must be built on a foundation of pedagogical knowledge and reform. This need not require we give up our entire approach to legal education. It certainly does not require a choice

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<sup>296</sup> Curcio, *supra* note 294. See also Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 40 (2001) ("By teaching students how to recognize the influence of culture in their work and to understand, if not accept, the viewpoint of others, we provide students with skills that are necessary to communicate and work positively with future clients and colleagues.).

<sup>297</sup> Shultz & Zedeck, *supra* note 46, at 629 (able to see the world through the eyes of others as one of the 26 lawyering effectiveness factors).

<sup>298</sup> It is threaded through many of the MACCRATE skills, e.g. linking understanding the client's preferences, needs, and interests as necessary to determine the client's goals. MACCRATE, *supra* note 44, at 142.

<sup>299</sup> BEST PRACTICES includes "sensitivity and effectiveness with diverse clients and colleagues" in the section on teaching professionalism and states firmly that "cross cultural competence is a skills that can be taught. BEST PRACTICES, *supra* note 6, at 88-89.

<sup>300</sup> Elizabeth M. Bloom, *Teaching Law Students To Teach Themselves: Using Lessons From Educational Psychology To Shape Self-Regulated Learners*, 59 WAYNE L. REV. 311, 314 (2013); Carole J. Buckner, *Rationalizing Grutter v. Bollinger's "Compelling Educational Benefits of Diversity": Transforming Aspirational Rhetoric into Experience*, 72 UMKC L. Rev. 877, 892 (2004).

between Socratic teaching or more experiential pedagogies. Each has its place and each should inform the other.<sup>301</sup> It will require that everyone reflect on and reconsider how they teach and be open to teaching more effectively. In addition, a prioritizing of pedagogy does not mean that scholarship is jettisoned. It will mean a realignment of scholarship and teaching. Our scholarship is important but only if it informs our teaching and connects us to the profession, something that may be new to us but is far from impossible.<sup>302</sup>

Faculty must also be willing to embrace outcomes and assessment based learning and to learn from the data the assessment process provides. This will require changes from all of us, be we podium faculty, clinicians, legal writing or academic support faculty. It will require that we be open to learning from one another and reevaluating our own courses and teaching. As we require students to become self-reflective learners, we too must continually assess and update our teaching methods both in our individual classes but also across the entire program of legal education we offer our students.

This iterative process of evidenced based teaching and learning can lead to curricular reforms as we build our programs to support educational transference from course to course and year to year. Combined with the knowledge and input of the bench and bar and educational theorists, this process of reflecting on our individual classes and our program as a whole will create a knowledge base that can help us meet the new requirements for continuing improvement of educational quality.<sup>303</sup>

### **7. Be a bridge to the future of the profession**

For too long law schools and law faculty have been perceived as removed and aloof from the profession. In order to move forward we must actively begin to build bridges. We must build bridges to the bench and bar and to gain a clear understanding of where and how our graduates practice. Law faculty even those who teach in clinics and externship programs, are generally several steps away from earning a living through the practice of

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<sup>301</sup> See Abrams, *supra* note 76 (describing techniques to better situate the Socratic method in student centered learning).

<sup>302</sup> See, Robson, *supra* note 8 (describing four mutually reinforcing categories that can create synergies between teaching and scholarship making one better at both).

<sup>303</sup> See ABA Standard 204 *supra* note 174.

law. If law schools seek to graduate students who will earn their living in the law, we must deepen our understanding of what that actually means in today's world. We can no longer afford to only teach "the law" or "how to think like a lawyer," or even how to draft a complaint or we will remain out of step with the profession.

However bridges to the profession cannot only be bringing in adjuncts to teach the practice courses. This merely silos the practitioner. Larger steps such as partnering with practicing attorneys when teaching doctrinal classes, when writing law review articles or when developing projects can build broader stronger bridges to the profession. In each of these endeavors the law faculty may need to do the heavy, time intensive lifting, however the pay off could be a connection that spans not one semester but many.

We must also build bridges to other disciplines and organizations and to the rest of the academy. Interdisciplinary practice is fundamental to problem solving in today's complex and global society. Providing the space and impetus for our students to learn to collaborate with others as equals requires bringing in outsiders to the law school as equals. These bridges could be as varied as developing projects and programs with other professional schools to teach cross-disciplinary collaboration. In addition, non-law faculty and administrators are oases of knowledge about implementing outcomes and assessment and other aspects of student-centered learning. Those outside our walls have much to offer legal education as we grapple with the new demands of our accreditors and licensing bodies. We must recognize expertise and reach across our self imposed moats and work with others.

## **VII. Conclusion**

Law school faculty and administrators are faced with a choice. We could set our sights low - shuffling curriculums, adding a few "skills" or "simulation" classes, including discussions of "professionalism" in more doctrinal courses, tweaking syllabi - aiming to meet the letter of the mandates. Or we can, like those in higher and other professional education institutions, embrace the theory and rationale behind the demands and use them as a springboard to address the systemic problems in our pedagogy and curriculum. We can begin the process of continually improving legal education, not merely maintaining the status quo.

While it is far too soon to gauge the affect the new regulatory environment will have on legal education, it is clear it has transformative potential. Whether individual law schools use this opportunity to pivot toward a more student centered approach to legal education, one that provides Matsuda's multi-layered tool kit<sup>304</sup> to their students depends in large part on their faculty. Law faculty must be willing to be guided by learning theory to create a student-centered pedagogy and an intentionally structured curriculum. We must embrace the consistent and long-lived demand for better educated law graduates. And we must be willing to be guided by the reports and guidance we have heretofore rejected. It requires hard work, but many schools have already shown the way, the rest of us need join them on this journey or we will founder and our students will be left behind.

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<sup>304</sup> Matsuda, *supra* note 51, at 1400.