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# Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools

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# Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools\*

Nancy B. Rapoport<sup>1</sup>

## ABSTRACT

This essay argues that discussions of educational reform in U.S. law schools have suffered from a fundamental misconception: that the education provided in all of the American Bar Association-accredited schools is roughly the same. A better description of the educational opportunities provided by ABA-accredited law schools would group the schools into three rough clusters: the “elite” law schools, the modal (most frequently occurring) law schools, and the precarious law schools. Because the elite law schools do not need much “reforming,”<sup>2</sup> the better focus of reform would concentrate on the modal and precarious schools; however, both elite and modal law schools could benefit from some changes to help law students move from understanding the theoretical underpinnings of law to understanding how to translate those underpinnings into practice. “Practice” itself is a complex concept, requiring both an understanding of the law and an understanding of how to relate well to others. Because law students may not understand how to relate well to those with different backgrounds from their own, law

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1. Gordon Silver Professor of Law, William S. Boyd School of Law, University of Nevada-Las Vegas. Many thanks to the University of Edinburgh and its conference, *Beyond Text in Legal Education* (June 20-21, 2009), at which I first presented an earlier version of this paper, and to Rachel Anderson, Jack Ayer, Zenon Bankowski, Peter Bayer, Bernie Burk, Maks Del Mar, Randy Gordon, Jennifer Gross, Jeff Lipshaw, Paul Maharg, Nettie Mann, Morris Rapoport, and Jeff Van Niel.

2. My allegation that elite law schools don’t need much reforming stems from my experience that students at the elite schools matriculate at law school having received a good education already. They probably could be left alone with some law books and some law review articles and do a decent job of teaching themselves. The faculty members at elite schools, of course, can—and do—add to their students’ education, but there’s a lot less remedial work that they must do first.

schools should do more to explain how one's perspective is both limiting and mutable. Too many law schools suggest that students can "see" different perspectives by, essentially, merely thinking harder. The essay concludes with some suggestions regarding possible reforms of U.S. legal education, focusing primarily on the modal law schools.

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#### I. INTRODUCTION

In my work with practicing lawyers, I've noticed that most senior<sup>3</sup> lawyers bemoan the inability of recent law graduates to "hit the ground running." They're frustrated by the graduates' failure to move from drafting competent memos discussing current case law to providing useful advice to clients. They're also frustrated by the inability of most lawyers to write coherently, make persuasive arguments, and play well with others.

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3. My age and older.

In my work with my academic colleagues, I've noticed that many of us (me included) have been using an underlying assumption while teaching: that our students have at least a nodding acquaintance with certain cultural touchstones. We assume that the students have some<sup>4</sup> sort of background in the liberal arts.<sup>5</sup> Although that assumption may have been true when *we* were law students,<sup>6</sup> I doubt that it's true at most U.S. law schools today.

Not only do U.S. law professors need to recalibrate their assumptions about their students' academic backgrounds, but they also need to recalibrate their goals. Assuming—and this assumption is far from accurate—that law professors want their graduates to be, at the very least, competent lawyers,<sup>7</sup> professors need to re-think how they convey their material.

Now that skills-based legal education has become part of the norm in U.S. legal training,<sup>8</sup> lawyers are expecting that newly

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4. Every time I grade a paper that exhibits a profound misunderstanding of basic spelling, grammar, and punctuation, I question this assumption.

5. Heaven forbid that we assume that some students have a background in the sciences, either. I don't think that we spend enough time figuring out what our students' baseline knowledge is before matriculation.

6. It probably wasn't true, but who's to say? Both Will Rogers (who said it first) and Jack Ayer (who reminded me of it) have said that "[t]hings ain't what they used to be and probably never was." QUOTE GARDEN (July 17, 2011), <http://www.quote garden.com/nostalgia.html>. Maybe back before World War II, most students had studied the classics and knew something about history, the sciences, and literature; sometime thereafter, though, as the idea of a core curriculum became less popular, we lost that common ground.

7. I'm not sure that most U.S. law professors would include "training law students to be lawyers" in their job descriptions—unless we're talking about clinicians. See John D. Ayer, *So Near to Cleveland, So Far from God: An Essay on the Ethnography of Bankruptcy*, 61 U. CIN. L. REV. 407, 408 ("[L]aw is one post-graduate discipline where the students are not training to do the same job as their teachers."); *id.* at 408 n.4 ("There is a delicious irony here: 'real' academics like to dismiss the law schools as mere barber colleges whereas from the standpoint of the student/consumer, it is they who operate by apprenticeship and we who operate closer to the plane of 'pure' theory."). See also Nancy Rapoport, *What Do Law Students Want, and What Should They Want*, LAW SCHOOL SURVIVAL MANUAL: FROM LSAT TO BAR EXAM (July 10, 2010, 11:08 AM), <http://lawschool-survivalmanual.blogspot.com/2010/07/what-do-law-students-want-and-what.html> (discussing what type of legal education law professors want to provide and what types of legal education law students want to receive).

8. STANDARDS FOR APPROVAL OF LAW SCHOOL, Standard 302(b) (2012), provides:

(b) A law school shall offer substantial opportunities for:

- (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;
- (2) student participation in pro bono activities; and

- (3) small group work through seminars, directed research, small classes, or collaborative work.

*See also id.* at Interpretation 302-5 (“The offering of live-client or real-life experiences may be accomplished through clinics or field placements. . . .”). More recently, the ABA has focused on whether and what type of outcome measures law schools should use to measure student achievement. *See* ABA Section of Legal Education and Admissions to the Bar, *Interim Report of the Outcome Measures Committee* (May 12, 2008), available at <http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBcQFjAA&url=http%3A%2F%2Fwww.abanet.org%2Flegal%2Fcommittees%2FOutcomeMeasures.doc&ei=cBY6TMrxE4L4swPF7OBR&usg=AFQjCNEIG2sr4c1-oiEhdetkiWxJzZ5s5g&sig2=KmhbtMRKVzrYHDFd-6lF9g>. The proposed new standard to capture student learning outcomes is set forth below:

Standard 302. LEARNING OUTCOMES

- (a) A law school shall identify, define, and disseminate each of the learning outcomes it seeks for its graduating students and for its program of legal education.
- (b) The learning outcomes shall include competency as an entry-level practitioner in the following areas:
- (1) knowledge and understanding of substantive law and procedure;
  - (2) competency in the following skills:
    - (i) legal analysis and reasoning, critical thinking, legal research, problem solving, written and oral communication in a legal context;
    - (ii) the ability to recognize and resolve ethical and other professional dilemmas; and
    - (iii) a depth and breadth of other professional skills sufficient for effective, responsible and ethical participation in the legal profession.
  - (3) knowledge and understanding of the following values:
    - (i) ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;
    - (ii) the legal profession’s values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law; and
    - (iii) responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them.
  - (4) any other outcomes the school identifies as necessary or important to meet the needs of its students and to accomplish the school’s mission and goals.

*See id.* Proposed Standard 302, available at <http://www.abanet.org/legaled/committees/Standards%20Review%20documents/Drafts%20for%20Consideration/Student%20Learning%20Outcomes%20May%205%202010%20draft.doc>. Compare the proposed standard to current Standard 302, which focuses on input (curriculum) instead of output (results):

Standard 302. CURRICULUM

- (a) A law school shall require that each student receive substantial instruction in:
- (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
  - (2) legal analysis and reasoning, legal research, problem solving, and oral communication;
  - (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;

minted lawyers have some understanding of the practice of law and not just legal theory. For too few schools, however, is this expectation justified. This essay explores the tension inherent in preparing law graduates for a world in which they need to “hit the ground running,”<sup>9</sup> while acquiring the liberal arts background that will give them an edge in analytical thinking and useful problem-solving skills.

## II. THE FALLACY OF A UNITARY MODEL OF U.S. LAW SCHOOLS

Practitioners and academics alike critique U.S. legal education as if all law schools were alike—alike in student body, instruction methods, faculty productivity, or career opportunities.<sup>10</sup> Even the

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(4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and

(5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.

(b) A law school shall offer substantial opportunities for:

(1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence;

(2) student participation in pro bono activities; and

(3) small group work through seminars, directed research, small classes, or collaborative work.

*Id.* Standard 302, available at [http://www.google.com/url?sa=t&rct=j&q=american%20bar%20ass%20%80%99n%20standards%20for%20approval%20of%20law%20school%20standard%20302&source=web&cd=1&ved=0CCYQFjAA&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fmigrated%2Flegaled%2Fstandards%2F20072008StandardsWebContent%2FChapter\\_3.pdf&ei=RxFdT9-sOqHE0QGU0\\_WxCA&usq=AFQjCNEaYs2-MNo8y6ayrE9WjNzvlPzQ4g&cad=rja](http://www.google.com/url?sa=t&rct=j&q=american%20bar%20ass%20%80%99n%20standards%20for%20approval%20of%20law%20school%20standard%20302&source=web&cd=1&ved=0CCYQFjAA&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fmigrated%2Flegaled%2Fstandards%2F20072008StandardsWebContent%2FChapter_3.pdf&ei=RxFdT9-sOqHE0QGU0_WxCA&usq=AFQjCNEaYs2-MNo8y6ayrE9WjNzvlPzQ4g&cad=rja).

9. This need is especially true now that the job market for graduates is so awful. *See, e.g.*, Karen Sloan, *New Lawyers Face Delayed Start Dates—At Best*, NAT’L L.J. (March 24, 2009), <http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202429317928>. In fact, the job market is so horrible that we’re seeing a few lawsuits brought by disenchanting law graduates who can’t find jobs. *See, e.g.*, *Students Sue N.Y. Law School for \$200 Million*, COURTHOUSE NEWS SERVICE (Aug. 11, 2011), <http://www.courthousenews.com/2011/08/11/38921.htm>; *see also* Karen Sloan, *NALP Clashes with ABA Over Jobs Data*, NAT’L L.J. (Aug. 1, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202509192905&slreturn=1&hbxlogin=1>.

10. *See* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); *see also* ROBERT McCRATE ET AL., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 7 (1992), available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

*U.S. News & World Report* rankings<sup>11</sup> rank every ABA-accredited law school in the U.S. across one set of variables. Those rankings tend to reward schools that approximate Yale<sup>12</sup>—the top schools that are highly selective in their admissions, with prominent and extremely productive faculties, and numerous career opportunities for their graduates.<sup>13</sup> The rankings imply a precision in differentiating school “quality” that is impossible for *U.S. News* to justify or for me to believe. (Is the #5 school truly different in quality from the #6 school, or—for that matter—the #16 school?)<sup>14</sup> Instead, these rankings indicate that schools actually group into clusters, so that the schools within a cluster are much more similar to each other than they are different from each other.<sup>15</sup> Nevertheless, some of the variables that *U.S. News* uses (for example, bar passage and placement rates)<sup>16</sup> can be helpful as a means of distinguishing the very best schools from the very worst.

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11. I discount these rankings because they create a false sense of an ordinal ordering of law schools, rather than recognizing that several schools are identical, or nearly identical, in terms of the factors that *U.S. News* uses to measure law school quality.

12. For how “sticky” these rankings can be, see, for example, Bill Henderson, *Can Stanford Be #1 in the US News Rankings? The Data*, EMPIRICAL LEGAL STUDIES (July 31, 2010), [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2010/07/can-stanford-be-1-in-the-us-news-rankings-the-data.html](http://www.elsblog.org/the_empirical_legal_studi/2010/07/can-stanford-be-1-in-the-us-news-rankings-the-data.html).

13. Well, maybe not so much any more. See, e.g., Staci Zaretsky, *UVA Law’s Employment Numbers Are Less Than Impressive*, ABOVE THE LAW (Aug. 11, 2011, 1:19 PM), <http://abovethelaw.com/2011/08/uva-laws-employment-numbers-are-less-than-impressive>.

14. For a graphic illustration of how misleading the rankings can be, see Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 361 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=703843](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=703843).

15. For example, in the calendar year 2010 *U.S. News* rankings, the top twelve schools (from Yale to Northwestern) had an average score of 88 (on a scale of 100), with a standard deviation of 6 score points; the next twelve schools had scores that averaged 71 points with a standard deviation of just over 4 score points. Progressing down the list in the top 100 shows much tighter standard deviations. Taking the scores for the 34<sup>th</sup> ranked schools (Fordham, Ohio State, University of Washington, and Washington & Lee) to the scores for the 42<sup>nd</sup> ranked schools (BYU, George Mason, Arizona, Hastings, and Utah), the average score is just over 60 and the standard deviation is only 1.3 score points. Taking the scores for the 48<sup>th</sup> ranked schools (American, SMU, Tulane, and Maryland) to the scores for the 54<sup>th</sup> ranked schools (Florida State and Connecticut) shows an average score of 53 and a standard deviation of 1.4 score points. The middle of the top 100 schools is very tightly clustered, so that small differences in the *U.S. News* factors create large spreads in rank. The score differential between being ranked 60 (a score of 50) and being ranked 98 (a score of 42) is only 8 points.

16. Placement rates are, however, quite easy to manipulate. Rumors abound that some top law schools invest in hiring their own graduates in order to maintain a high “placement at graduation” figure. See, e.g., Robert Morse, *U.S. News Takes Steps to Stop Law Schools From Manipulating the Rankings*, MORSE CODE (May

I prefer to group law schools into three clusters: the elite, the modal,<sup>17</sup> and the precarious.<sup>18</sup> These three clusters differ in kind, not just in quality. They differ in terms of the composition of their student body and in terms of the opportunities that they offer for their graduates and faculty.<sup>19</sup>

By “composition” of the student body, I don’t mean those two quantifiable indicia of academic success—undergraduate GPA and LSAT score—that *U.S. News* weighs so heavily in its rankings, although both UGPA and LSAT scores can be dependent variables for the independent variable of “preparedness for law school.”<sup>20</sup> And I don’t want to focus on innate ability, because there’s not a darn thing that we can do about that. Are there people who are innately better suited to becoming lawyers than others? Sure. There are people who are innately better suited to becoming chemists, too, or airline pilots, or mechanics, or any vocation. The elites will have a disproportionately higher number of students innately suited to be lawyers than will the precarious schools, and not every school within a cluster will have the same distribution of innately suited students. Even within the cluster, there will be a rough pecking order with differing innate talent. But there’s more to becoming a lawyer than having an innate talent for the field. Talent may be necessary, but it’s not sufficient.

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20, 2010), <http://www.usnews.com/education/blogs/college-rankings-blog/2010/05/20/us-news-takes-steps-to-stop-law-schools-from-manipulating-the-rankings>; see also Paul L. Caron, *Did 16 Law Schools Commit Rankings Malpractice?*, TAXPROF BLOG (May 12, 2010), [http://taxprof.typepad.com/taxprof\\_blog/2010/05/did-16-law-schools.html](http://taxprof.typepad.com/taxprof_blog/2010/05/did-16-law-schools.html); see also Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES MAGAZINE, July 31, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9E0DE7D7103CF932A05754C0A9639C8B63&sec=&spon=>.

17. In mathematics, the “mode” “is the number that is repeated more often than any other.” Elizabeth Stapel, *Mean, Median, Mode, and Range*, PURPLE MATH, <http://www.purplemath.com/modules/meanmode.htm> (last visited Mar. 26, 2012).

18. There is a range within each of these clusters, just as there is a range within the rankings of law schools, but the differences between the top and bottom of the range within clusters is much smaller than the differences among clusters.

19. There are many ways to categorize law schools. One could cluster schools based on where they place their graduates (nationally, internationally, or regionally), based on how many of them remain lawyers throughout their careers or move to other fields, or based on any number of other factors. I prefer to recognize that, at some imprecise level, these three clusters of law schools (elite, modal, and precarious) provide different opportunities for their students, faculty, and graduates.

20. Some of my friends believe that UGPA and LSAT are extremely good measurements of both ability and preparation. I agree that, in the aggregate, UGPAs and LSATs reflect ability and preparation; I don’t agree that these numbers are accurate measurements for every student. (I hope not, because I’m still convinced that I had the lowest LSAT score in my law school class.)



I want to focus on the underlying factor of preparedness itself: the type of background that lends itself to acquiring proficiency in the skills of legal research, analysis (both logical and numerical), and communication. Students who attended rigorous undergraduate institutions—those with challenging majors, a broad core curriculum, and significant writing experience—are better prepared to adapt their experiences to the demands of traditional legal education than are students who have entered law school without such a background. Those with the strongest backgrounds will be more comfortable thinking abstractly; they'll be more familiar with ways to interpret what they're learning; and they'll be more able to communicate their understanding of the material. I view students who matriculate at the modal law school to have some level of preparedness but to need more coaching in the basics. And I view students who matriculate at precarious law schools as being akin to athletes who may have great potential but who have received little to no training in their sport of choice.<sup>21</sup> Such a student is going to need coaching in all of those skills that he missed along the way.<sup>22</sup> Again, both across and within clusters, the level of preparedness will differ, just as the range of innate talent does. There's no solid line of demarcation between the not-quite-as-good elites and the very best modals, or between the not-quite-as-good modals and the schools that may fall into and out of the precarious category from year to year.

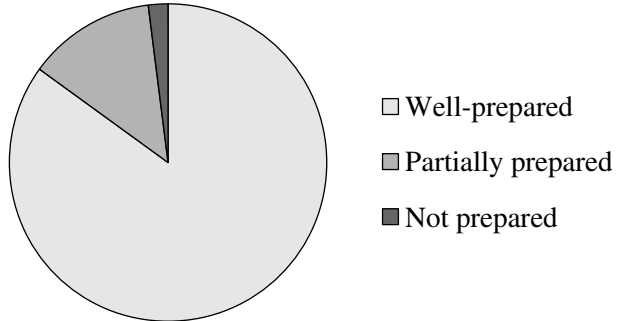
Here are some graphic ways to think about the issue of preparation in the three clusters of schools:

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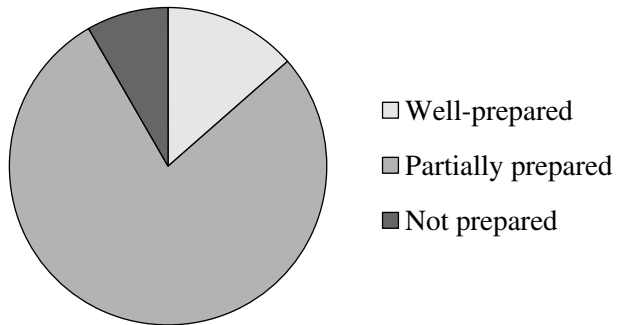
21. Many thanks to my colleague Peter Bayer for this analogy. I like his analogy because it emphasizes that the difference in skill level isn't due to intelligence but to some failure of the educational system itself. If we could rewind time and place those students at the precarious schools in K-16 schools that provided the right coaching and material, many of those students likely would have the ability to succeed at an elite school.

22. As for the composition of the faculty at all three types of schools, I'd hazard a guess that the resumes of professors in each type of school have gotten significantly better over time. Hiring committees these days have the luxury of a pool of entry-level faculty candidates with multiple graduate degrees (for example, candidates who have both a J.D. and a Ph.D.), published articles, and high-level experience in the government or in law firms.

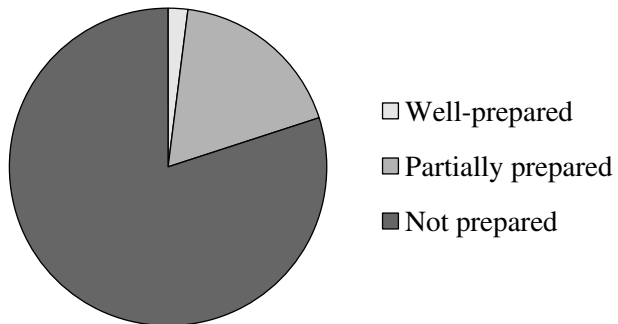
PREPAREDNESS—ÉLITES



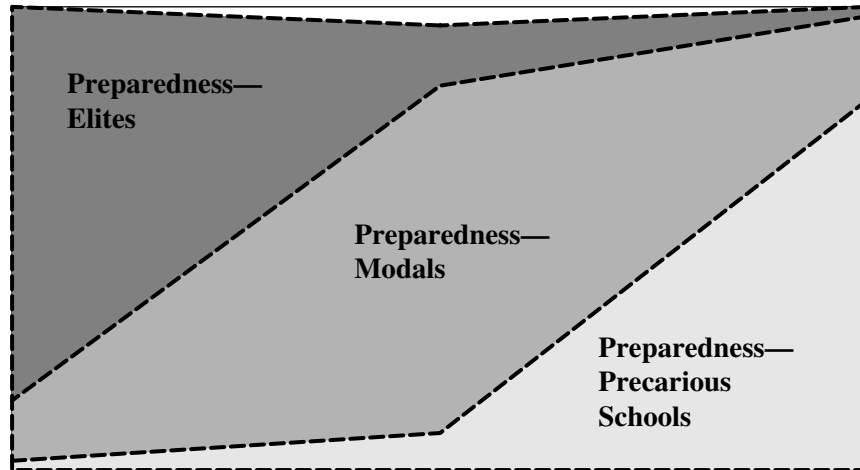
PREPAREDNESS—MODALS



PREPAREDNESS—PRECARIOUS



If we combine all of these charts, we'd get a preparedness distribution that would look something like this:



More of the students in the elite-school cluster will be well-prepared, although some of the students won't be, and a few might not be prepared at all. Most of the students in the modal-school cluster will be reasonably prepared but not well-prepared; some of them will be very well-prepared, and some will lack all preparation. At the precarious schools, very few will have the preparation that they'll need to succeed.

The students who matriculate at the elite schools<sup>23</sup> reap the benefit of their preparation in several ways. The most obvious benefit is the exceptionally good networking opportunities available at those schools.<sup>24</sup> There is, for example, a direct relationship between the perceived status of that school and how “deep” into a class employers will reach. There's a halo effect: if someone is at, say, Yale or Harvard or Stanford, that person is assumed to be talented, whether or not he actually is. Employers play the odds that the better the school, the more likely it is that hiring students from that school will be a safe bet. Within schools, too, employers are betting that the students with the most bells and whistles, such as law review and moot court, are going to be the ones most likely to do well in their careers.<sup>25</sup> More graduates of elite schools, then, will

23. Not all of the elite schools are private; some of them are flagship state institutions.

24. *But see supra* note 9.

25. There are other predictors of success that many employers often overlook. I'm impressed by those students who do decently in school while they're working their way through or taking care of their children or parents. I'd be intrigued by

find attractive opportunities for their first jobs and can parlay those jobs into robust careers over time. To the extent that the job market is depressed these days, even good jobs are difficult to find, but the graduates of elite law schools still have a comparative edge.<sup>26</sup> Not only are the job prospects for graduates better at the elite schools, but also the faculty members of the elite schools have more opportunities as well: anecdotal evidence suggests that professors at elite schools achieve better placement of unsolicited articles in the best-regarded law reviews<sup>27</sup> and that these professors have more visibility in the national media. Students with access to these better-known professors, then, can tap their professors' visibility for such benefits as clerkship recommendations. In a very real sense, the rich (elite) get richer (maintain their elite status). Students and professors at the modal law schools still have opportunity, of course, but the halo effect isn't as significant. Employers won't reach as "deep" into the class when looking for candidates. Professors will have to try a little harder to get their articles placed in

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someone who has these extra responsibilities and participates in student organizations as well.

26. For example, I found the 2011 *U.S. News* listing of judicial clerkships for the Class of 2008 to demonstrate a link, albeit imperfect, between the perceived prestige of the school and the percentage of Article III federal judicial clerks. See *Whose 2009 Graduates are Most Likely to be Employed as Federal Judicial Clerks with Article III Federal Judges?*, U.S. NEWS & WORLD REPORT, [http://grad-schools.usnews.Rankingsandreviews.com/best-graduate-schools/top-law-schools/article\\_iii\\_clerks](http://grad-schools.usnews.Rankingsandreviews.com/best-graduate-schools/top-law-schools/article_iii_clerks) (last visited Feb. 29, 2012). The link isn't perfect because some of the schools at the top of the pecking order were eclipsed in clerkships by schools lower down in the pecking order. For example, Georgia's placement rate of 10.4% of its graduating class in these most prestigious clerkships was only a tiny bit behind Vanderbilt's rate of 10.6% and was way ahead of Texas and Michigan's rate of 9%. Whether one uses the *U.S. News* rankings, which have significant problems, or such measures as citation rate, see, e.g., *Law Journals: Submissions and Ranking*, WASH. AND LEE UNIV. SCH. OF LAW, <http://lawlib.wlu.edu/LJ/> (last visited Feb. 29, 2012); see also Alfred L. Brophy, *The Relationship Between Law Review Citations and Law School Rankings*, 39 CONN. L. REV. 43 (2006), one can see a rough relationship between the perceived status of the school and the elite job opportunities for its graduates.

27. See, e.g., Leah M. Christensen, *Navigating the Law Review Article Selection Process: An Empirical Study of Those With All the Power—Student Editors*, 59 S.C. L. REV. 175, 188-89 (2007) ("A majority of respondents from nearly every school segment indicated they are influenced by the law school where an author teaches. . . . These results suggest that top[-]ranked law schools are concerned with an author's credentials."); see also James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 530 (1994) ("A former editor of one journal admitted that during her year as an editor, the journal received an article that the editors very much liked from a professor at a nonelite law school. After much debate, they decided that they couldn't 'take a chance' on that professor's law school. Later that year, they received an article in the same field from a professor at an elite law school, an article that they thought inferior. But they accepted it anyway.").

well-regarded law reviews. It's up to the individual student or professor to prove himself.

Most law schools provide a good education for their students and a comfortable living for their professors, but they don't provide the same types of networking opportunities as do the elite schools. Yet many of these schools charge tuition that's as high as the tuition that the elites charge, probably because there are certain types of overhead costs that are fairly constant across school clusters.<sup>28</sup> But if the modal schools are not going to offer better networking opportunities, then they should come up with some reason to justify their tuition rates<sup>29</sup> other than some sort of cost-plus basis.<sup>30</sup>

What makes a school precarious has less to do with the intelligence of the student body or the fame (or teaching ability) of the faculty and more to do with whether the school's graduates can perform well on that necessary link between a law degree and a law license: the bar exam. Therefore, I define a precarious school as one in which the graduates bear a significant risk that they will fail the bar exam and therefore be unable to support themselves as lawyers. Students at precarious schools don't have droves of employers clamoring for them, and professors at precarious schools are unlikely to "trade up" to schools significantly higher in the pecking order.

In determining if—and how—legal education needs to change, then, we need to take a glimpse at the legal education at each of these three clusters of schools. First, though, let's think about the economics of law practice today.

Some famous law firms have cratered, and layoffs, mergers, and even bankruptcies are part of regular stories in the *ABA Jour-*

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28. For example, every law school has a library, an admissions department, and a placement department.

29. For an interesting take on the current state of law schools, see Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651 (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1989114##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989114##).

30. Or they could warn law students that a high debt load at graduation might not translate into a job that can pay off that debt load. See *Changes in Legal Education: Some Thoughts From Dean David Van Zandt*, ABOVE THE LAW (Feb. 3, 2010, 8:23 PM), <http://abovethelaw.com/2010/02/changes-in-legal-education-some-thoughts-from-dean-david-van-zandt/> (“[Northwestern’s dean, David] Van Zandt and some of his Northwestern colleagues did a study to determine the added value of a J.D. degree. They concluded that the break-even starting salary for a law school graduate is \$65,000. Put another way, going to a law school with a median salary upon graduation that’s below \$65,000 is not a wise investment.”); see also Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 102 [hereinafter *Big But Brittle*].

*nal* and such blogs as LAW SHUCKS. Part of the problem with law firm economics comes from the shift from law as a profession in which practitioners could earn a comfortable living to a business in which partners want to earn seven-figure salaries.<sup>31</sup> The astronomical starting salaries of a few years ago are giving way now to salary reductions, but billable rates are still high enough to run the risk of pricing lawyers out of their own markets. As the hourly rates increase along with the billable hour requirements (as a way of staving off more layoffs), the time to train novice lawyers drops dramatically. Many BigLaw firms can't afford the type of painstaking training—observing more senior lawyers in action, brainstorming approaches to issues as a real-time “clinic”—that would help their more junior lawyers develop more quickly.<sup>32</sup> The leverage is all wrong (there are too many people to train), and clients don't want to foot the bill for that training. Smaller law firms also have lost the opportunity to provide significant learn-by-watching training, and many government jobs throw their new employees into the deep end of the pool on their first day. As a result, if law schools don't train their students, and employers can't “afford” to train them, then future lawyers will miss an important developmental stage. There should be some law schools that can and will step up to the plate to train novice lawyers before those novices enter practice. Which schools are best suited for that type of training?

#### A. *Education at the “Elites”*

There is nothing particularly unique in the way that the law professors teach at any of the elite schools. They use the same types of textbooks (many of which they've written themselves), they provide the same opportunities for clinical legal education, and they make themselves at least somewhat available to their students outside class.

As I've discussed above, at least two significant factors<sup>33</sup> separate the elite law schools from the rest of the schools: professors at these schools are more uniformly engaged as highly-visible participants in issues of national or international importance,<sup>34</sup> and stu-

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31. See *Big But Brittle*, *supra* note 30, at 5–87.

32. Peter Bayer has put it more succinctly than I ever could. He says that what some law firms really want is “twenty years of experience *via* three years of legal education.” Comments on an earlier draft of this paper, from Peter Bayer to the author (Aug. 10, 2010) (on file with author).

33. There may be other factors, but not for my purposes in this essay.

34. See, e.g., Brian Leiter, *Where Current Law Faculty Went to Law School*, BRIAN LEITER'S LAW SCHOOL RANKINGS (March 17, 2009), [http://www.leiterrankings.com/jobs/2009job\\_teaching.shtml](http://www.leiterrankings.com/jobs/2009job_teaching.shtml); Brian Leiter, *Top Ten Law Faculties in*

dents at these schools<sup>35</sup> have unparalleled networking opportunities. There are scads of “scary smart” students at these schools, as well as scads who are vastly accomplished. These students want to attend an elite school in part because they’re more likely to get great opportunities during and after law school, and those opportunities will naturally keep coming because there are so many great students. It’s a feedback loop. Graduates of elite schools are more likely than graduates of other schools to become law professors, law partners at BigLaw firms, legislators, judges, and CEOs/CLOs.<sup>36</sup> By virtue of going to elite law schools, classmates can provide key introductions for each other—both nationally and internationally.<sup>37</sup> Recognize, though, that there’s a second feedback loop at work here: employers want to use the status of their new hires to improve the employer’s overall prestige, and therefore they reach out to the graduates of the most prestigious schools, which makes those schools even more prestigious over time.<sup>38</sup>

Although elite schools are not facing extreme pressure to change, they have adapted their curricula to provide a better educational experience for their students: even Harvard has created

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*Scholarly Impact, 2005-2008*, BRIAN LEITER’S LAW SCHOOL RANKINGS, (February 19, 2009), [http://www.leiterrankings.com/faculty/2008faculty\\_impact.shtml](http://www.leiterrankings.com/faculty/2008faculty_impact.shtml); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996); Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540 (1985).

35. It is probably true that, on average, students who attend the elite schools have better educational backgrounds than students who attend the modal or precarious schools. After all, if a school has over 5,000 applications a year for relatively few seats, it has the luxury of choosing from among the best-prepared students and can select from that group those with the most interesting backgrounds. But it is not necessarily true that the students with the best educational backgrounds are by definition the most innately intelligent. The ones with the best educational backgrounds simply have had opportunities that their less privileged counterparts have lacked. There are exceptionally intelligent people who have had great opportunities, and exceptionally intelligent ones who haven’t, just as there are less intelligent people who have had great opportunities and less intelligent ones who haven’t.

36. See, e.g., Brian Leiter, *Supreme Court Clerkship Placement, 2000-2008 Terms*, BRIAN LEITER’S LAW SCHOOL RANKINGS (January 12, 2009), [http://www.leiterrankings.com/jobs/2000\\_08\\_scutus\\_clerks.shtml](http://www.leiterrankings.com/jobs/2000_08_scutus_clerks.shtml); Brian Leiter, *The Top 15 Schools From Which the Most “Prestigious” Law Firms Hire New Lawyers, 2008 (or where to go to law school to work at super-elite firms on the two coasts)*, BRIAN LEITER’S LAW SCHOOL RANKINGS (October 13, 2008), [http://www.leiterrankings.com/jobs/2008job\\_biglaw.shtml](http://www.leiterrankings.com/jobs/2008job_biglaw.shtml); RICHARD MONTAUK, HOW TO GET INTO THE TOP LAW SCHOOLS 4-5 (2001); see also 1-2 ALMANAC OF FEDERAL JUDICIARY (2009).

37. Most flagship state law schools provide the opportunity for professor involvement and student networking as well, at least at the state or regional level.

38. Thanks to my colleague Rachel Anderson for this point.

small sections for its first-year courses.<sup>39</sup> Northwestern has provided a two-year option and an opportunity for J.D. candidates to work side-by-side with Kellogg M.B.A. candidates.<sup>40</sup> Stanford has enhanced the transactional side of its curricular offerings with its “deals” course,<sup>41</sup> it has beefed up its clinics, and it has dramatically increased its cross-disciplinary education.<sup>42</sup> Aside from the poten-

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39. See Beth Potier, *Big plans highlight Elena Kagan's 2L: HSL dean looks forward to a busy year*, HARVARD UNIVERSITY GAZETTE, Sept. 16, 2004, <http://www.news.harvard.edu/gazette/2004/09.16/03-kagan.html>.

40. See *Graduate Program in Law and Business*, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, <http://www.law.northwestern.edu/academics/llmkellogg/> (last visited Mar. 11, 2012).

41. See *Deals*, STANFORD LAW SCHOOL, <http://www.law.stanford.edu/program/courses/details/273/Deals/> (last visited Mar. 11, 2012) (“This course applies economic concepts to the practice of structuring contracts.”).

42. Stanford Law School, for example, is offering its students more opportunity to put law in a larger context:

Stanford Law School Dean Larry Kramer said the pedagogical changes the school is spearheading are focused on the second and third year curriculum. He hopes Stanford’s reform—which began last year and should be fully implemented by 2009—will provide a model for legal education generally.

“Talk to any lawyer or law school graduate and they will tell you they were increasingly disengaged in their second and third years,” Kramer said. “It’s because the second and third year curriculum is for the most part repeating what they did in their first year and adds little of intellectual and professional value. They learn more doctrine, which is certainly valuable, but in a way that is inefficient and progressively less useful. The upper years, as presently configured, are a lost opportunity to teach today’s lawyers things they need to know. Lawyers need to be educated more broadly—with courses beyond the traditional law school curriculum—if they are to serve their clients and society well.”

“Business, medicine, government, education, science, and technology have all grown immensely more specialized,” Kramer said. “Legal education must adapt. How can a lawyer truly comprehend and grapple with a complex intellectual property dispute without understanding anything about the technology at issue? What counselor can effectively advise a client about investing in China or India without understanding their particular legal structures, to say nothing of their different cultural expectations and norms?”

To serve clients capably or address major social and political issues, lawyers now must work in cross-disciplinary/cross-professional teams, particularly given that they work in increasingly sophisticated industries and fields—engineering, medicine, biotech, the environment. They must also practice law in a global context. “Where only a tiny number of graduates used to practice law across national borders, today only a tiny number do not,” Kramer noted. “International law, particularly the law governing private actors in the international arena, has gone from the periphery to the center, and law schools have been scrambling to adapt.”

A “3d” JD: *Stanford Law School Announces New Model for Legal Education*, STANFORD LAW SCHOOL, <http://www.law.stanford.edu/news/pr/47/> (last visited Mar. 11, 2012). Thanks to Jeff Lipshaw for calling my attention to this development. See also Judith Romero, *Stanford Law School Advances New Model for*



tially crushing (and non-dischargeable)<sup>43</sup> cost of tuition,<sup>44</sup> the benefits of an elite legal education can potentially last a lifetime, especially considering that many law schools mitigate post-graduation debt via the establishment of loan forgiveness opportunities for students who want to work in public interest after graduation.<sup>45</sup>

Most students in elite schools enter law school better prepared to take advantage of the legal education that their professors can offer, and they leave law school with powerful connections.<sup>46</sup> What's not to like? For the most part, these students are exceptionally talented and easy to teach—so easy to teach, in fact, that most of them could probably teach themselves. I wonder, though, whether we could make the elite law school's curriculum even better by giving the students some opportunities to use the right side of

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*Legal Education*, SLS NEWS (Feb. 13, 2012), <http://blogs.law.stanford.edu/news/feed/2012/02/13/stanford-law-school-advances-new-model-for-legal-education/>.

43. Student loans in the U.S. are typically non-dischargeable debts. In other words, even if a student files a bankruptcy petition to discharge some of his or her debts, the debts for student loans will not receive the discharge, and the student will still be responsible for paying those loans in full after bankruptcy. The only way that a student can receive a discharge for his or her loans is by proving “undue hardship” under 11 U.S.C. § 523(a)(8), which is exceptionally difficult to prove.

44. Tuition isn't always (or even usually) less expensive at the non-elite schools.

45. Many schools, including many non-elite schools, offer LRAPs (Loan Repayment Assistance Programs). See, e.g., *Low Income Protection Plan (LIPP)*, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/current/sfs/lipp/index.html> (last visited Mar. 11, 2012) (Harvard Law's loan repayment program); *COAP (Loan Repayment Assistance Program (LRAP))*; YALE LAW SCHOOL, <http://www.law.yale.edu/admissions/COAP.htm> (last visited Mar. 11, 2012) (Yale Law's loan repayment program); *Loan Repayment Assistance Program*; STANFORD LAW SCHOOL, <http://www.law.stanford.edu/program/tuition/assistance/> (last visited Mar. 11, 2012) (Stanford Law's loan repayment program); *The Loan Repayment Assistance Program*, NYU LAW, <http://www.law.nyu.edu/financialaid/lrap/index.htm> (last visited Mar. 11, 2012) (NYU Law's loan repayment program); *Law School Public Interest Programs—Loan Repayment Assistance Programs (LRAP)*, AMERICAN BAR ASSOCIATION, [http://www.abanet.org/legalservices/probono/lawschools/pi\\_lrap.html](http://www.abanet.org/legalservices/probono/lawschools/pi_lrap.html) (last visited Mar. 11, 2012) (listing other law schools' loan repayment programs); see also *Loan Forgiveness*, FINAID, <http://www.finaid.org/loans/forgiveness.phtml> (last visited Mar. 11, 2012). In the current (bad) economic climate, though, even schools such as Harvard are cutting back their loan repayment programs. See Elie Mystal, *The Harvard Law Financial Aid Situation (With Emails)*, ABOVE THE LAW (Dec. 1, 2009, 10:00AM) <http://abovethelaw.com/2009/12/the-harvard-law-financial-aid-situation-with-emails/>.

46. I use the phrase “better prepared” in the sense that the students have read more widely in classic literature, have taken rigorous classes that require abstract reasoning and interpretive analysis, have written longer and more in-depth papers about a variety of subjects, and are conversant with classic theory in history, economics, science, statistics, and math.

their brains as much as they're using the left side of their brains.<sup>47</sup> I'll discuss this idea more below.

*B. Education at the "Modals"*

There are great professors at every law school, from the top law schools to the least prestigious ones. There are great students at the modal and the precarious schools, too. What distinguishes modal and precarious schools from the elite schools isn't an absence of talent. Instead, it's both the level of preparedness of the students and the level of engagement of the faculty. The top people at modal and even precarious schools—professors and students alike—would likely thrive at the elite schools,<sup>48</sup> but the rest of them would struggle, depending on the level of preparedness they brought to the school (students) and the quality of their engagement (faculty). Put bluntly, there are some professors at these schools that are not at the top of their game, and there are some students at these schools that probably shouldn't become lawyers. Sacrilege, I know; but it's true.

I've had the great fortune to be at modal schools at which most (not all, but most) professors are actively engaged as scholars and as teachers, and at which most of the students are decent at analysis and communications. But I've also seen professors at these schools who no longer write and whose teaching is disengaged.<sup>49</sup> Those professors who are not performing at full throttle are enjoying the benefits of academia without living up to their academic responsibilities.<sup>50</sup> Many of the students at modal law schools likewise are not living up to their potential. Some of them have communication and analytical skills that are horrifyingly bad. The students are certainly intelligent, but they've missed some important steps in their

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47. For an explanation of the difference between the left and right sides of the brain, see, for example, *Left vs. Right Which Side Are You On?*, MIDDLE TENNESSEE STATE UNIVERSITY, <http://frank.mtsu.edu/~studskl/hd/LRBrain.html> (last visited Mar. 11, 2012).

48. In fact, the top students at the modal schools may well have gotten into elite law schools but have chosen not to attend an elite school for personal reasons. Some law students choose to matriculate at schools considered less prestigious for reasons that might include full scholarships at the less-prestigious schools, incomplete advice on choosing a school, and family or business reasons for staying in a particular location.

49. Of course, there are disengaged teachers and scholars at the elite schools and the precarious schools, too.

50. For my take on the limits of academic freedom, see Nancy B. Rapoport, *Academic Freedom and Academic Responsibility*, 13 GREEN BAG 2D 189, 191 (2010) (reviewing MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (Yale University Press 2009)).

education. They need to improve their grammar and the lucidity of their writing; they need to backtrack and catch up on philosophy, history, statistics, and economics; and they need to perfect their study skills.<sup>51</sup>

Many of the better students at modal schools will go on to distinguished careers, and some of the faculty will “trade up” to schools that are higher in the pecking order. What modal schools are selling is a decent legal education and a decent work environment for faculty—and it’s an honest sale. But the education at these schools could be much better if the professors were willing to acknowledge that they are teaching students with backgrounds markedly different from their own.

Very few law schools spend the time to analyze the career paths that most of their graduates take and calibrate the curriculum accordingly in order to provide their students with the best start for their careers. These schools are missing an opportunity to distinguish themselves from the Yales and NYUs; instead, they’re doing their darnedest to mimic them. (I have a sneaking suspicion that modal schools tend to mimic the elites because the faculties of those schools want to increase their own odds of moving “up” to elite schools. Why else do faculties push so hard for 3-course teaching loads, generous research leaves, and bounties for publishing articles in the top journals?) Moreover, giving up the desire to mimic the Harvards and Yales of the world would be tantamount to admitting that a modal school can never be “the best” at legal education.<sup>52</sup> Try telling a law professor that he or she isn’t the best at something. You’ll make an enemy for life.<sup>53</sup>

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51. Peter Bayer has suggested to me that, perhaps, students actually did learn how to write well before law school but—upon matriculating—have mistakenly decided that what they “knew” about writing before law school no longer applies. In essence, such students have talked themselves into believing that legal analysis is so different from other types of analysis that nothing in their prior education will be useful in law school. Yikes! Of course, it doesn’t help when their law professors give them the impression that “thinking like a lawyer” is some sort of special gift. See Nancy B. Rapoport, *Is “Thinking Like a Lawyer” Really What We Want to Teach?*, 2001 ALWD CONF. PROCEEDINGS 91, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=936248](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=936248).

52. Thanks to Peter Bayer for this point.

53. I learned this lesson the hard way. When I was a dean, one law professor was perfectly happy with a professorship that I had awarded to him until he found out that I had awarded a nicer (read: more munificent) professorship to one of his more junior colleagues. He stormed into my office and asked me why I had given the junior colleague the better professorship, and I told him that the junior colleague was, in fact, better than he was: he was more nationally known and more productive. Although I believed that statement then—and I still do now—the senior professor went from mildly resenting me to outright hatred, and he pestered

Graduates of most modal law schools won't find the doors of opportunity pushed open as wide as they are for graduates of elite schools, so why not train them so that they have an edge when they're competing with the elite-school graduates? A constant refrain from the practicing bar is that law graduates can't "hit the ground" running. They know some substantive law, and they know where to find the law, but they don't know how to advise clients, and they're not comfortable making the leap from being able to describe the state of current law to being able to advise clients on a course of conduct. Law graduates—from the graduates at elite law schools to the graduates at precarious law schools—are simply not prepared to solve their clients' problems.<sup>54</sup>

Here's the rub: If the graduates of elite schools don't have that problem-solving ability, at least they can migrate to opportunities that will help them learn problem-solving on the job. They can network. Graduates of modal law schools, who don't have that breadth of networking options, should offer employers something other than the cachet of their diplomas. They should offer employers some additional aptitude in problem-solving skills.

Unfortunately, the modal tenure-track or tenured law professor<sup>55</sup> won't want to change the curriculum dramatically enough to provide a solid, skills-based cohort of podium courses. Adding new requirements to existing courses is hard work, and the podium faculty<sup>56</sup> will point to the skills faculty—each of whom is more likely to have recent practice experience than are members of the podium faculty—as the appropriate source of gaining practical experience. Furthermore, teaching skills-based components of podium courses takes significantly more time during the semester because skills-based components require more feedback;<sup>57</sup> and the more time that a professor devotes to teaching, the less time she will have to conduct research during the school year. There's also

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me (*and his junior colleague, who had had no part in my allocation of professorships*) at every opportunity.

54. See, e.g., *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all>; *You Cannot Be Serious*, INSIDE THE LAW SCHOOL SCAM (Feb. 27, 2012), <http://insidethelawschoolscam.blogspot.com/2012/02/you-cannot-be-serious.html>; *Educators Debate: Are Law Schools In Crisis?*, NAT'L L.J. (Nov. 27, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202524763160&slreturn=1>.

55. I've taught at enough schools to be able to recognize a modal professor.

56. Faculty members who teach substantive law courses, as opposed to teaching courses involving hands-on experience.

57. That feedback includes the review of multiple drafts of papers and pleadings and many more face-to-face discussions with students.

the not-so-secret issue of status: there's a stubborn caste system in legal academia, with podium faculty members teaching substantive law at the top and the skills faculty members near the bottom, just ahead of adjuncts and the staff.<sup>58</sup> Add to that caste system the pecking order of law schools, and you can understand why there's significant resistance to changing legal education at modal law schools.

That resistance creates the lockstep model of legal education that we see today. The first year of law school at virtually every school involves an introduction to legal analysis, legal research, and some substantive law.<sup>59</sup> The second year offers more substantive law, and perhaps some externship experience. The third year adds the opportunity for clinical work. This lockstep model suggests—at least indirectly—that law is an end, rather than a means to an end. For faculty members, perhaps the law is an end in itself. But for the clients of our law school graduates, law is just one tool for lawyers to use to solve their clients' problems. To the extent that we could add more tools—for example, by tapping into students' undergraduate backgrounds in other disciplines—we would develop better problem-solvers.

### C. *Education at the "Precarious" Schools*

Just as a wholesale revamping of education at the elite law schools is not a pressing need, maintaining traditional educational programs at precarious schools is also a bad use of time and resources. Many people have argued that there's a need for schools with open admissions requirements, and I'm not going to suggest that open admissions programs are, by themselves, problematic. The concept of open admissions isn't the issue. Instead, the real issue is the disconnect between the promises that these law schools make to their students and their inability to fulfill those promises. At these precarious law schools, too many of their graduates fail the

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58. For a good description of the caste system, see Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS'N OF L. WRITING DIRS. 12 (2002), available at [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID1095450\\_code937546.pdf?abstractid=1095450&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1095450_code937546.pdf?abstractid=1095450&mirid=1); see also Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329 (2001).

59. ABA Standards require such instruction. See STANDARDS FOR APPROVAL OF LAW SCHOOL, Standard 302(a) (2012) ("A law school shall require that each student receive substantial instruction in: (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession; (2) legal analysis and reasoning, legal research, problem solving, and oral communication. . . .").

bar exam,<sup>60</sup> giving the lie to the claim that these law schools give their graduates “opportunity.” Opportunity for what? To incur significant debt without a way to pay it back? To read about six-figure starting salaries when the median starting salary for graduates of their own school is dramatically less?

Although cutoff points have inherent problems,<sup>61</sup> perhaps we should start by worrying about maintaining the accreditation of

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60. According to the Internet Legal Research Group, the ten law schools with the worst average bar passage rates during the years 2001, 2002, 2004, 2005, 2006, and 2007 (measured as the difference between the school’s bar passage rate compared to the state bar passage rate for that year) were Western State University, Appalachian School of Law, Texas Southern University, the University of the District of Columbia, Howard University, Southern University, Western New England, Thomas Jefferson, the University of Denver, and St. Thomas University. See *2009 Raw Data Law School Rankings Schools’ Pass Rate vs. State’s Avg. Bar Pass Rate (Descending)*, INTERNET LEGAL RESEARCH GROUP, <http://www.ilrg.com/rankings/law/index.php//desc/SchoolvsBar/2009> (last visited Mar. 11, 2012). By comparing this bar passage data to the school’s average placement rate at nine months after graduation (for those same years), one can start to see which law schools could carry the most risk for students who worry about their ability to repay their student loans.

Law school	Average percentage difference between school’s bar passage rate and state’s bar passage rate, for the years 2001, 2002, 2004, 2005, 2006, and 2007	Placement rate of graduates 9 months after graduation for the years 2001, 2002, 2004, 2005, 2006, and 2007
Western State University	-38.6%	57.9%
Appalachian School of Law	-27.3%	69.1%
Texas Southern University	-25.8%	88.1%
U. of the District of Columbia	-23.2%	66.9%
Howard University	-15.5%	94.1%
Southern University	-12.4%	84%
Western New England	-10.7%	76.1%
Thomas Jefferson	-10.5%	80%
U. of Denver	-10.3%	95.9%
St. Thomas University	-9.5%	83%

*Id.* Of course, placement data is easy to manipulate and bar passage rates can be affected, in part, by graduates’ abilities to take bar review courses and take time off from work to study. See Bob Morse, *U.S. News Takes Steps to Stop Law Schools From Manipulating the Rankings*, U.S. NEWS & WORLD REPORT, May 20, 2010, <http://www.usnews.com/blogs/college-rankings-blog/2010/05/20/us-news-takes-steps-to-stop-law-schools-from-manipulating-the-rankings.html>.

61. For example, I would be pretty nervous if there were a sizable difference between the state’s average pass rate and the school’s average pass rate.

schools with higher than 20 percentage points of difference between their graduates' bar passage rates and the pass rate of the state in which the majority of those graduates take the bar.<sup>62</sup> We should definitely worry about those schools with bad bar passage rates *and* low placement rates. Something has to change.

And when I say “change,” I mean “change dramatically.” It’s not that the students at these precarious schools aren’t smart or that the teaching at those schools is below par. But precarious schools should figure out a way to provide their students with the preparation that they lack. Maybe they can provide it by starting a semester early, with that first semester devoted to catching up on preparation. Maybe they can do it by requiring prerequisites for matriculation. But they need to do something, or too many of their students will fail the bar and won’t find law jobs.

The ABA Section of Legal Education and Admission to the Bar is the accreditation authority for U.S. law schools, and it has issued some “show cause” orders for schools with dismally low bar passage rates. But as far as I know, it has closed no fully accredited law schools for failure to comply with the accreditation standards.<sup>63</sup>

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62. Take a look at the bar passage rates for California’s July 2011 exam. Of the out-of-state schools whose graduates sat for that exam, two of them demonstrated a very low pass rate:

School	Percentage of that school’s takers who passed the July 2011 California bar exam
Suffolk University	10%
Thomas M. Cooley Law School	5%

*See July 2011 California Bar Examination General Bar Examination Statistics*, THE FACULTY LOUNGE (Dec. 28, 2011), <http://blurbawg.typepad.com/files/blogdoc1.pdf>. Just because these two schools had very low pass rates this time, though, doesn’t automatically put them in my “precarious” category. This list involves just one exam in just one state, often with very small sample sizes for each of the schools. To get a feel for which schools should fall into the “precarious” category, we’d need a lot more data. The good news is that more of that data is being compiled by sites like *Law School Transparency*. To get a feel for how such data could help, see *Live Transparency Index*, LAW SCHOOL TRANSPARENCY, <http://www.lawschooltransparency.com/transparency-index/> (last visited Mar. 11, 2012).

63. The ABA keeps its records confidential regarding the results of its order to show cause. Although one can discover whether a school has been denied accreditation in the first place, it’s well-nigh impossible to find out which schools are in danger of losing their accreditation. I can think of only one school that has lost accreditation, and it was a loss of *provisional* accreditation, not full accreditation. *See Karen Sloan, Irvine wins provisional accreditation, but La Verne loses ABA’s blessing*, NAT’L L.J. (June 14, 2011), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202497268315>.

Part of the problem that students at precarious schools face is that studying for the bar takes time and often takes money: money to replace any lost income for time spent studying, and money to pay for bar review courses, which can often increase a bar taker's odds of passing.<sup>64</sup>

Although passing the bar is not the only outcome by which a law school should be measured, it is a significant one. The ABA has taken some steps to address bar passage problems with a new accreditation standard dealing specifically with bar passage,<sup>65</sup> but it

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64. All of the bar review course purveyors claim that taking a bar review course increases the odds of passing. That's probably true, at least on the theory that the additional time spent taking a bar review course (including practice exams) is time spent on the material that the bar exams test.

65. Standard 301(a) of the American Bar Association's 2011-2012 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS provides: "A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession." See *id.*, available at <http://www.abanet.org/legaled/standards/standards.html>. Interpretation 301-6 provides:

*A. A law school's bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests:*

*1) That for students who graduated from the law school within the five most recently completed calendar years:*

*(a) 75 percent or more of these graduates who sat for the bar passed a bar examination, or*

*(b) in at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.*

*In demonstrating compliance under sections (1)(a) and (b), the school must report bar passage results from as many jurisdictions as necessary to account for at least 70% of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.*

*2) That in three or more of the five most recently completed calendar years, the school's annual first-time bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.*

*In demonstrating compliance under section (2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending*



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*order of frequency. When more than one jurisdiction is reported, the weighted average of the results in each of the reported jurisdictions shall be used to determine compliance.*

*B. A school shall be out of compliance with the bar passage portion of 301(a) if it is unable to demonstrate that it meets the requirements of paragraph A(1) or (2).*

*C. A school found out of compliance under paragraph B and that has not been able to come into compliance within the two-year period specified in Rule 13(b) of the Rules of Procedure for Approval of Law Schools [ ] may seek to demonstrate good cause for extending the period the school has to demonstrate compliance by submitting evidence of*

*(i) The school's trend in bar passage rates for both first-time and subsequent takers: a clear trend of improvement will be considered in the school's favor, a declining or flat trend against it.*

*(ii) The length of time the school's bar passage rates have been below the first-time and ultimate rates established in paragraph A: a shorter time period will be considered in the school's favor, a longer period against it.*

*(iii) Actions by the school to address bar passage, particularly the school's academic rigor and the demonstrated value and effectiveness of the school's academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the school's favor; ineffective or only marginally effective programs or limited action by the school against it.*

*(iv) Efforts by the school to facilitate bar passage for its graduates who did not pass the bar on prior attempts: effective and sustained efforts by the school will be considered in the school's favor; ineffective or limited efforts by the school against it.*

*(v) Efforts by the school to provide broader access to legal education while maintaining academic rigor: sustained meaningful efforts will be viewed in the school's favor; intermittent or limited efforts against it.*

*(vi) The demonstrated likelihood that the school's students who transfer to other ABA-approved schools will pass the bar examination: transfers by students with a strong likelihood of passing the bar will be considered in the school's favor, providing the school has undertaken counseling and other appropriate efforts to retain its well-performing students.*

*(vii) Temporary circumstances beyond the control of the school, but which the school is addressing: for example, a natural disaster that disrupts the school's operations or a significant increase in the standard for passing the relevant bar examination(s).*

*(viii) Other factors, consistent with a school's demonstrated and sustained mission, which the school considers relevant in ex-*

remains to be seen if the ABA will actually de-accredit those very few schools that can't meet the new standard. Unless the ABA puts teeth in its standards, precarious law schools have nothing to fear. *U.S. News*, with its misleading ordinal rankings and manipulable statistics, shouldn't be the only consumer-protection avenue for potential law students. The ABA should step up to the plate.<sup>66</sup>

With the right changes, schools could move from the precarious cluster to the modal cluster. Obviously, if more resources could be invested in these precarious schools so that their students and graduates could receive extra training and extra coaching, the risk of failing the bar and being unemployed after graduation would decrease. But such resources—one-on-one (or small group) tutoring, grants to enable graduates to take bar-review courses and forego employment while studying for the bar, and additional courses to cover material that the students may have missed as undergraduates—are prohibitively expensive. Although these precarious schools are not evil schools, and their faculty, staff, and students are not evil people, we should stop pretending that these schools are

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*plaining its deficient bar passage results and in explaining the school's efforts to improve them.*

*Id.*

66. Allowing the few truly precarious schools to continue matriculating students without requiring them to display some easy-to-understand consumer protection warnings seems to be tantamount to consumer fraud. I understand that statistics describe groups of data, and that the statistics in the table in footnote 60 do not predict any single matriculant's success on the bar and in finding a post-graduation job. Nonetheless, the ABA could require schools that fail to meet certain outcome-based criteria (in particular, metrics for bar passage and placement) to post prominently a warning in all of its materials along the following lines:

NOTICE: THE AVERAGE OF THE LAST FIVE YEARS' WORTH OF BAR PASSAGE DATA FOR OUR GRADUATES WHO TAKE THE [INSERT PRIMARY STATE'S BAR] IS [\_\_%], AND THE AVERAGE OF THE LAST FIVE YEARS' WORTH OF PLACEMENT DATA AT THE NINE-MONTH MARK AFTER GRADUATION IS [\_\_%]. BEFORE YOU DECIDE TO APPLY TO OR MATRICULATE AT OUR SCHOOL, YOU SHOULD UNDERSTAND THAT THERE IS A RISK THAT YOU WILL NOT BE ABLE TO PASS THE BAR EXAM ON THE FIRST TRY OR TO FIND A JOB AFTER GRADUATION. WE WILL DO EVERYTHING WE CAN TO HELP YOU SUCCEED, BUT YOU NEED TO UNDERSTAND THE RISK.

Such a notice wouldn't necessarily be permanent. The ABA could develop benchmarks for improvements in bar passage and placement that would trigger a lifting of the notice requirement.

On the other hand, perhaps even the most explicit notice wouldn't work. Virtually every law student I've ever met is convinced at matriculation that he or she will be in the top ten percent of the class, thereby getting all of the benefits of that top 10% status and avoiding all of the problems of students who rank at the bottom of the class.

equivalent to the modal schools. We're talking about apples and anvils here.

There are probably around 20 elite law schools,<sup>67</sup> and there may be four or five (or more)<sup>68</sup> truly precarious schools these days, with several other modal schools hovering near the "precarious" cluster of schools.<sup>69</sup> By definition, all of the other schools fall into the modal cluster, and within that modal cluster, there are several smaller clusters as well, as measured by preparedness and opportunity. If we focus on the education that we provide to students enrolled in these modal schools, we could affect a significant number of students. First, though, we must recognize another misconception: that students come to a modal law school with any sort of deep understanding of how to think critically.

### III. THE VANISHING LIBERAL ARTS PARADIGM

At some indeterminate, apocryphal time in the history of legal education, I'm sure that most matriculating law students had some

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67. The old joke about being one of the thirty schools in the "top 20" comes to mind here.

68. Of course, the line between being a modal school and being a precarious one will be fuzzy, but here's the test I'd use: if more than half of a school's graduates can't pass the bar on the first try and don't have jobs needing or preferring law degrees at the 9-month post-graduation point, then the school is "precarious." Although not all of the schools being sued about their bar passage or placement rates would fit my definition of "precarious," some of them might. For a list of some of these schools, see *Law School Litigation*, LAW OFFICES OF DAVID ANZISKA, [http://anziskalaw.com/Law\\_School\\_Litigation.html](http://anziskalaw.com/Law_School_Litigation.html) (last visited Mar. 11, 2012).

I did a quick sort of some law schools' 2009 statistics on the Internet Legal Research Group's database, and the five schools with the lowest "employment at 9 months" rates were Touro College (Fuchsberg), Thomas M. Cooley, Ave Maria, Appalachian, U.D.C., and Western State. See *2009 Raw Data Law School Rankings Employed at 9 Months (Descending)*, INTERNET LEGAL RESEARCH GROUP, <http://www.ilrg.com/rankings/law/index.php/4/desc/Employ9Mos/2009> (last visited Mar. 11, 2012). I then did the same search, sorting by bar passage rate, and here are the lowest five: Whittier, Thomas Jefferson, U.D.C., Appalachian, and Western State. See *2009 Raw Data Law School Rankings Schools' Bar Pass Rate (Descending)*, INTERNET LEGAL RESEARCH GROUP, <http://www.ilrg.com/rankings/law/index.php/4/desc/Bar/2009> (last visited Mar. 11, 2012). There's overlap on both lists, but not a perfect match. 2009, though, was one of those years in which employment rates might not be particularly accurate, because it's only recently that the issue of misstating placement statistics has gotten attention. See, e.g., Paul Campos, *Served: How law schools completely misrepresent their job numbers*, THE NEW REPUBLIC, April 25, 2011, available at <http://www.tnr.com/article/87251/law-school-employment-harvard-yale-georgetown?page=0,0>; LAW SCHOOL TRANSPARENCY, *Advocating for consumer-oriented legal education policy*, <http://www.lawschooltransparency.com/#> (last visited Mar. 11, 2012).

69. Look to the bar passage and placement rates of all of the law schools to calculate your own list of precarious schools. We may draw the line at different places. See *supra* note 68.

shared common knowledge. They had studied much of the same history, science, classics, and art, and they could understand many of the literary references that their professors made in class.<sup>70</sup> Whatever the educational backgrounds were of these (fantasy?) students, it's clear that the diversity of educational backgrounds in our students today keeps us from any legitimate assumption that our students have the same common knowledge base that we do. Some of this diversity is good: we're seeing more students with science, engineering, and mathematics backgrounds; more students who speak several languages; and more students who have lived outside the U.S. But we're also seeing students with much weaker, less expansive educational backgrounds than we saw even fifteen years ago.<sup>71</sup> We're seeing students who write less ably, who are more gullible about the credibility of references in their research, and who don't understand the link between what they're learning in law school and what lawyers do.<sup>72</sup> As a result of the less-than-prepared backgrounds of our students, we face a real risk of having to reshape both what we teach them and how we teach them.

*A. Are We Accepting Less-Prepared Students?*

Every week for the past several years, I've read some posting on some academic or legal blog bemoaning the scandalously bad

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70. At least one law school used to assume that certain courses would be useful to a post-undergraduate legal education.

No particular prelegal subjects are specified. However, the school will give preference to applicants who have completed, with a distinguished record, college courses in English composition and public speaking, and in at least six of the following subject groups: social science: government, economics and sociology; philosophy and ethics; psychology and logic; English and American literature; English and American history; mathematics; accounting; laboratory science: biology, chemistry and physics; ancient or modern foreign languages.

2 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES, 729 (Steve Sheppard, ed. 2007). Jeff Lipshaw has pointed out to me, though, that lawyers in earlier times may not have had a traditional legal education or a shared educational background at all; many of our earliest lawyers "read law" as a lawyer's apprentice and didn't attend law school. And there weren't as many law schools back then, either.

71. I've found the lack of preparedness demonstrated across every possible measure of categorizing students; there's no one group that somehow drags down the rest of the student body.

72. At least, the students who come to us straight from undergraduate study seem to have less of an idea that they're transitioning into a profession. Those students who come to law school in a second-career transition seem to have a better handle on the concept of law school as a professional school, because they come to law school for more focused reasons. They also are better, on average, at time management; they understand what it takes to earn a living; and they may even have been clients of lawyers themselves.

communication skills of our students. Instead of our legal writing professors teaching high-level rhetoric and analysis, they have to do a fair amount of remedial training in basic writing skills.<sup>73</sup> That leaves less time for training in the type of analysis and writing that good lawyers must learn. If students can't write well, they can't think well. If they can't think well, they can't reason well. If they can't reason well, they can't solve problems well.<sup>74</sup> And that means that they can't become good lawyers.<sup>75</sup>

*B. "Substantive Law" vs. "Skills Courses": The False Dichotomy*

Students can't become good lawyers without understanding what lawyers do, either. There is a nasty distinction in the legal academy between those who teach substantive ("podium") law and those who teach "skills" courses. The podium professors tend to have more prestige, more job security, better salaries, and fewer job responsibilities. The "skills" professors have to evaluate their students more frequently than once a semester, and their subjects convey quite directly what "real lawyers" do. Legal writing is not intuitive: it takes training. So does live-client representation. Although it's true that one can't be a lawyer without knowing substantive law, one also can't be a lawyer without the ability to understand (and deliver, within the bounds of ethics) what a client wants and needs. Good lawyers use an understanding of psychology, sociology, economics, history, and business in their work, and "skills" courses come a lot closer to teaching the integration of these other approaches than do "podium" courses. At some point, we need to give students that "aha!" moment that comes from the realization that people can have very different perspectives and values, even of shared experiences, and that an understanding of such different perspectives is essential for them to try to solve their clients' problems.

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73. When I was at the University of Houston Law Center, we instituted a program at orientation testing the ability of our students to understand basic grammar, punctuation, and argument structure, and students who performed poorly were sent to the campus's writing center to get help. A significant proportion of matriculating students were required to learn (re-learn?) skills that they should have had in middle school. I have no idea whether the school still does such testing, but I believe that testing and remediation beats the heck out of pretending that such a serious problem doesn't exist.

74. Actually, the problem is even scarier than I've described above, and it's something that Peter Bayer and I have discussed over cheap lunches: if they can't write well, they probably can't think well; and if they can't think well, they can't write well. It's a vicious circle.

75. Don't get me started on the failure of most students to understand even basic economics, statistics, and history. Good lawyers need that background, too.

It's possible to send the graduates of elite law schools out into the world hoping that they figure out how to be lawyers later, although it's not a good idea. At any rate, many of the elite school graduates will work in jobs that provide some supervision of their work product. But it's criminal to send the graduates of modal schools out into the world—where they're more likely to work in smaller firms or as solo practitioners—until we've given them the skill sets necessary to avoid malpractice.

Part of the reason that we're not giving them those “how to be a lawyer” skills that they need is that some of us might not have them, either. Law schools tend to hire faculty members who have wonderful academic pedigrees but not necessarily a lot of real lawyering experience,<sup>76</sup> and even those professors who have worked as lawyers may have left practice too early (say, in the first three years) to have a real feel for the breadth and depth of a legal career. But that problem opens up a can of worms far too unwieldy to address here.

### C. *Curriculum Failure or a Generational Shift?*

Students tend to gravitate toward upper-level skills courses because they provide more timely feedback and they allow for the integration of several different areas of law in a hands-on setting.<sup>77</sup> Even though skills courses are hard work, students recognize the reason for the hard work and seem mentally prepared for it. Asking for the equivalent amount of work in podium courses tends to result in pushback from students. When students experience different “types” of podium instruction—group work, problem-based casebooks, role-playing—more than a few of them complain<sup>78</sup> that they don't “enjoy”<sup>79</sup> it. And yet group work, problem-solving, and learning how to view issues from multiple vantages are all part of a good lawyer's day.

I don't want to be an old grouch—yet. But I'm seeing a reluctance of the newest generation of law students to try to write well in high-pressure (i.e., exam) situations, along with the failure of some

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76. See, e.g., Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias* (Univ. of Tenn. Legal Studies Research Paper Series, Research Paper No. 176, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2007934](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007934).

77. They may come to appreciate their legal writing courses later in life, but during the first year of law school, most students resist “enjoying” the legal writing curriculum.

78. My most recent student evaluations include the tropes of “too much reading!” and “I hate group work and working problems in class.”

79. I'm not sure when “enjoying” a course became an objective in itself.

students to write as if they actually have earned undergraduate degrees.<sup>80</sup> Moreover, some students appear to be incapable of following even the simplest set of instructions, which bodes ill for their ability as lawyers to file documents in court or comply with complex regulations governing deals. When I raised the issue of writing ability on my blog,<sup>81</sup> many of the comments argued that how law students communicate is less important than what they communicate. These comments miss the point: bad communication isn't communication at all. Graduates of modal law schools have to be able to prove themselves to potential employers. If they can't follow directions or communicate, they can't prove themselves. As the old saying goes, "close" only counts in horseshoes and with hand grenades.

#### IV. WHAT'S MISSING IN MODAL LEGAL EDUCATION?

Don't get me wrong. Legal education isn't a disaster, at least at the elite and modal schools. But we could do much more to teach our students that law is merely one tool in the lawyer's quiver. Lawyers solve problems—or, if you prefer, lawyers solve conundrums. Contrary to popular belief, we're not just hired guns who go on rampages at our clients' request. When good lawyers go about their business of solving problems, sometimes they use the law (if it's on their client's side). Sometimes they use other tools: psychology and sociology, economics, even "mere" common sense. But too many law students graduate with the impression that law solves problems. To do a jazz riff off of that old National Rifle Association slogan, law doesn't solve problems. People do.

##### A. *Teaching Students that Every Case and Every Contract Involves Real Humans*

What could we do to teach law students, even first-year law students, about how people solve problems? We could spend time, in our podium courses, reminding students that everything they read is ultimately about specific people and their individual problems. Cases are about people. Statutes develop to solve problems that people have had (even if they often can't solve the problems that people are about to have).<sup>82</sup> And yet, the way even the best of us teach somehow manages to fail to convey to law stu-

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80. There is no such thing as the plural possessive of "its," but I see it every year in papers and on exams.

81. See Nancy Rapoport, *Classic exam bloopers (and a rant)*, NANCY RAPOPORT'S BLOGSPOT (Dec. 23, 2009), <http://nancyrapoport.blogspot.com/search?q=writing>.

82. Think "Sarbanes-Oxley" here.

dents in podium courses that they can learn valuable lawyering skills even as they're studying substantive law.

We sneak in the idea of “litigants as people” in little ways, of course. We do some role-playing and some problem-solving, and despite the discomfort of those law students who don't appreciate these methods, we should continue to use these little hints of how real lawyers behave. But we could take the time, even in some of our more time-pressed courses, to do even more. We could pause and examine a case not just from the point of view of discerning the appropriate law but in terms of what engendered the underlying dispute.<sup>83</sup>

Here's an example. In 1995, Professor Judith Maute published an article<sup>84</sup> in the *Northwestern Law Review* about a classic contracts case, *Peevyhouse v. Garland Coal & Mining Co.*<sup>85</sup> In that

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83. In a way, reminding law students that every case that they read involves real people reminds me of how Reb Saunders taught his son Danny that being intelligent, without being compassionate, was soulless:

A man is born into this world with only a tiny spark of goodness in him. The spark is God, it is the soul; the rest is ugliness and evil, a shell. The spark must be guarded like a treasure, it must be nurtured, it must be fanned into flame. It must learn to seek out other sparks, it must dominate the shell. Anything can be a shell, Reuven. Anything. Indifference, laziness, brutality, and genius. Yes, even a great mind can be a shell and choke the spark.

Reuven, the Master of the Universe blessed me with a brilliant son. And he cursed me with all the problems of raising him. Ah, what it is to have a brilliant son! Not a smart son, Reuven, but a brilliant son, a Daniel, a boy with a mind like a jewel. Ah, what a curse it is, what an anguish it is to have a Daniel, whose mind is like a pearl, like a sun. Reuven, when my Daniel was four years old, I saw him reading a story from a book. And I was frightened. He did not read the story, he swallowed it, as one swallows food or water. There was no soul in my four-year-old Daniel, there was only his mind. He was a mind in a body without a soul. It was a story in a Yiddish book about a poor Jew and his struggles to get to Eretz Yisroel before he died. Ah, how that man suffered! And my Daniel *enjoyed* the story, he *enjoyed* the last terrible page, because when he finished it he realized for the first time what a memory he had. He looked at me proudly and told me back the story from memory, and I cried inside my heart. I went away and cried to the Master of the Universe, ‘What have you done to me? A mind like this I need for a son? A *heart* I need for a son, a *soul* I need for a son, *compassion* I want from my son, righteousness, mercy, strength to suffer and carry pain, *that* I want from my son, not a mind without a soul!’”

. . .

“Better I should have had no son at all than to have a brilliant son who had no soul. . . .”

CHAIM POTOK, *THE CHOSEN* 283-86 (1967).

84. Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 *Nw. U. L. REV.* 1341 (1995).

85. *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1960).



article, Prof. Maute explored the case from the very human perspective of the participants. She reviewed original documents and, only after reviewing the history and the attorneys' legal arguments, did she critique the case. The article provides an extraordinary opportunity for law students to "know" about a case from the perspectives of the litigants and the lawyers. Instead of reading an appellate court's take on the issues—which, as with all history, is written by the victorious<sup>86</sup>—this article's readers have the ability to put themselves in the shoes of the Peevyhouses, Garland Coal, or their lawyers. Prof. Maute's article can turn a podium class into a practicum in the wink of an eye.

And even though most podium teachers (including me) wouldn't give up course coverage entirely to create a practical experience for our students, we can awaken them to the understanding that every time we teach a case or a statute, we are taking real situations with real people and showing students how the law tried to address real problems. If we emulate the Maute-style of deep analysis even a few times in a course, our students may "get" that they need more than substantive knowledge to be good lawyers. Maybe they'll even "get" that they need more than law to be good lawyers.

Should we mandate this approach in law schools? Of course not; a school should have a lot of freedom in choosing a curriculum. But we could use our colleagues in other disciplines to help us find and analyze materials that we could integrate in our courses. We could also pair up with practicing lawyers to team-teach some course sessions that would demonstrate how experienced lawyers might approach a situation.<sup>87</sup> We could encourage textbook authors to move beyond books that draw mostly from reported cases to textbooks that integrate some real-world materials either as lead-ins to the discussion of cases or as stand-alone methods of teaching a subject. In other words, we should add some new approaches to the tried-and-true methods of teaching. The reward of seeing the "aha!" moments in the classroom as well as the clinic would be satisfying.

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86. The aphorism, "history is written by the victors," is generally attributed to Winston Churchill. See *Winston Churchill Quotes*, THINKEXIST.COM, [http://thinkexist.com/quotation/history\\_is\\_written\\_by\\_the\\_victors/150112.html](http://thinkexist.com/quotation/history_is_written_by_the_victors/150112.html) (last visited Mar. 11, 2012), but see *Who Said "History is written by the victors?"*, YAHOO! ANSWERS, <http://answers.yahoo.com/question/index?qid=20080216221010AA MzgcS> (last visited Mar. 11, 2012).

87. The CARNEGIE REPORT has several good suggestions for improving U.S. legal education. See SULLIVAN ET AL., *supra* note 10. In that report, the authors urge law schools to pull together both legal knowledge and a hands-on experience. See *id.* at 12.

### B. *Teaching Students About Perspective*

If we're going to teach our students that all law involves real people, then we need to emphasize that real people don't always share the same perspective. Nattering on about this truism won't work. The typical "you need to understand that different people have different perspectives" lecture divides students into those who tune out immediately and those who have always been aware that their perspectives may differ from the majority's perspective. We need to find a better way to make this point.

Thanks to my experience at the University of Edinburgh's *Beyond Text in Legal Education* conference, I had my own "aha!" moment, when I realized that we can use the arts to demonstrate different perspectives. Many of the exercises that the artists devised for us forced us to look at the world from new perspectives—not by preaching at us to think about others' perspectives, but by demonstrating that perspective is a mutable concept.

My favorite example comes from an activity that Zoë Fothergill, Curator of Education and Development at the University of Edinburgh's Talbot Rice Gallery, designed. She asked us to take three pieces of paper, each with an instruction written on it, and then to stand in front of any artwork in the collection. Each of those pieces of paper had us examine our chosen artwork from three different physical perspectives. As I recall, my three instructions required me to view the art from a prone position on the floor, from a standing position about an inch away from the canvas, and through a toy magnifying glass. It was clear from the activity that each different angle triggered a completely different perception of the art.

Not all law schools are near art galleries, but a creative faculty could develop jazz riffs on exercises like these. The arts are a way to give students new perspectives on how society works (or doesn't work). Imagine the effect that a professor can have by translating Zoë Fothergill's "perspectives" exercise into an explanation of how to interview a client<sup>88</sup> or how to draft a brief for a particular judge or court. Saying that different people see the world differently is a truism. Drawing the link between a difference in perspectives and

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88. Law students tend to want to interview clients using legal terminology, rather than using the terminology familiar to the client. As an example, a student in a bankruptcy clinic might ask a client if she has given anything of value to someone else in the past year. A student more aware of different perspectives might ask, instead, if the client has given any birthday or anniversary gifts, or if the client has something like a baseball card collection that she has asked someone else to "hold" for her during the bankruptcy.

communicating effectively as a lawyer is a teachable moment. And we should draw that link every semester or quarter, as students mature in their appreciation of the law.

If our students don't have a good background in the arts, then all they have—or all that we know that they have—to draw on for problem-solving is what we give them in law school. Therefore, what we should be giving them in law school needs to be better than what we have been giving them (law books, with a smattering of “other” ways of thinking).

## V. TOWARD A NEW MODEL OF MODAL LEGAL EDUCATION

Modal law schools have a choice: they can follow the elites, hoping to become elite themselves,<sup>89</sup> or they can diverge and be more useful to their students. If modal law schools can't provide the vast networking abilities that the elites can, then they should provide different benefits. The world doesn't need as many ABA-accredited law schools as it has already, just as the world has figured out that it doesn't need as many U.S.-based BigLaw firms as it once did, and I wouldn't be a bit surprised if some law schools closed over the next decade or so.<sup>90</sup> To survive in today's world, what would a shift in the modal school's education look like?

### A. *Requiring Certain Pre-Matriculation Courses*

Because students at the elites tend toward having stronger educational backgrounds than students at the modal schools, the modal schools could require students to take certain courses to bring them up to speed before matriculating. Medical schools and business schools already do this by allowing their students to major in anything they want as undergraduates, as long as their undergraduate transcripts demonstrate that they've taken certain fundamental courses. Modal law schools could require certain basics: for example, some fundamental courses in philosophy, sociology, psychol-

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89. The faculties at law schools that expect to move up to elite status by mimicking the elite schools are probably composed of people who assumed that more than 10% of their own entering first-year class would end up in the top 10% of the class.

90. For a good discussion of the pressures forcing change on legal education, see Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598 (2010); Judith Welch Wegner, *Response: More Complicated Than We Think*, 59 J. LEGAL EDUC. 623 (2010); Scott Westfahl, *Response: Time to Collaborate on Lawyer Development*, 59 J. LEGAL EDUC. 645 (2010).

ogy, economics, history, literature, and, yes, the scientific method.<sup>91</sup> We're not going to agree on all of the possible prerequisite courses, but different schools could experiment with a different mix of required courses.<sup>92</sup> For example, schools in Texas might require a course in a foreign language or some other evidence that an incoming student has the ability to speak more than one language, on the theory that Texas has one of the most diverse populations in the country.

The faculties on most modal law schools will push back at the suggestion of prerequisites, arguing that "if Yale doesn't require these courses, why should we?" But the time for the pretense that all law schools should be (or could be) Yale is long past.<sup>93</sup> Honest law faculties can admit this to themselves, and frankly, these same faculties would discover that teaching students with some shared educational background would be a joy. Naturally, there would be a lag in communicating any new admissions requirements, but these requirements could be phased in, in much the same way that Northwestern Law School phased in its requirement that students should have at least two years of work experience before matriculation.<sup>94</sup>

### *B. Transitioning from Legal Analysis to Problem-Solving*

As with any transition from novice to experienced practitioner, beginning lawyers have a difficult time making the jump from legal research to legal advice. We've trained them to recognize good legal arguments from bad ones,<sup>95</sup> and to research their cases exhaustively, but we haven't trained them well—at least in the podium

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91. I'm not suggesting that we should have a pre-law major, because I don't want to restrict legal education to those who have figured out early in their undergraduate careers that they were going to go to law school. I believe that having a diversity of educational backgrounds is good. But I know that I benefitted from having certain courses as an undergraduate, many of which were required by my Legal Studies major at Rice University. For example, I took Economics of the Law, Philosophy of Law, and American Legal History. Rice doesn't even have a Legal Studies major any more (or even a minor in Legal Studies). If law schools require certain courses, students interested in law school will find a way to take them.

92. Here's a ballpark way to start, courtesy of Peter Bayer, with some tinkering from me: three credits of Western Philosophy, three credits of Logic, three credits of American History, three credits of American Government, six credits of Composition or some sort of Advanced Writing or Rhetoric, three credits of a basic science course, and three credits of some form of literary criticism.

93. Remember, in one sense, even Stanford can never be Yale. See Henderson, *supra* note 12.

94. And, because we're talking about reform, this "work experience" before law school concept would also be a boon to the modal law schools.

95. We haven't trained them to stop listing the bad arguments in their exam answers, though.

courses—to use their legal skills to devise and explain a solution to a client’s problems. Finding supporting caselaw is easy.<sup>96</sup> Knowing what to do with it is hard.<sup>97</sup>

Frankly, I think that the modal law schools’ failure to teach the transition from knowing the law to using the law is partially responsible for the tendency of some lawyers (even some experienced ones) to use the law inappropriately. Just as some law students will graduate with the mistaken assumption that all arguments are equally “good” and that lawyers should make all arguments (even the silly ones), some lawyers will continue to think that because the law lets their clients do something, they should facilitate their clients’ wishes every single time. As Elihu Root pointed out (possibly apocryphally), “The law lets you do it, but don’t. . . . It’s a rotten thing to do.”<sup>98</sup>

I’m a big fan of ethics in all podium courses—what Deborah Rhode has called “ethics by the pervasive method.”<sup>99</sup> But even ethics discussions don’t go far enough, because they don’t include how group dynamics and cognitive errors can make even the most “upstanding” person do very bad things.<sup>100</sup> Just as we need other disciplines to understand how best to solve our clients’ problems, we need to understand human behavior to realize how easy it is for lawyers to step over the ethical line. If we want to train our law students to give good advice, we should also train them to avoid fooling themselves into making their own bad decisions.

### *C. Working with Graduate and Professional Students from Other Disciplines*

In order to communicate to law students that many disciplines could contribute to problem-solving, law schools could open its courses to graduate and professional students from other disciplines. For those law schools that are not affiliated with universities—the “independent” law schools—nothing stops them from

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96. Most of the time.

97. The CARNEGIE REPORT describes two academic disciplines—engineering and medicine—that have, at their core, the combination of coursework and hands-on problem-solving. See SULLIVAN ET AL., *supra* note 10, at 79-80; see also *id.* at 87-125.

98. SOL M. LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 48 (1996).

99. DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* (2d ed.1998).

100. We discussed this problem in our latest Enron book. See generally NANCY B. RAPOPORT, JEFFREY D. VAN NIEL & BALA G. DHARAN, *ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER* (2d ed. 2009).

choosing to affiliate for this purpose with a university. A basic “introduction to law school” course for these non-law-trained students could get them up to speed. After all, first-year law students haven’t “done” law school before, either. In-class discussions would be far richer with the introduction of perspectives from other disciplines, and law students would develop a cadre of new colleagues upon whom they could call in the future when facing a thorny problem.<sup>101</sup>

## VI. CONCLUSION

Preparedness counts. It counts in terms of how well incoming law students can absorb what a legal education can offer, and it counts in terms of how well those students can perform after they graduate. Although elite law schools are beginning to experiment with legal education, they have the luxury of experimenting with students who can afford an experiment gone awry. At the other end of the spectrum, “precarious” law schools can’t afford to replicate the curriculum of the elite schools. They must recognize that their students, although bright, lack the same level of preparedness that students in elite schools have, and they must provide a curriculum that helps their students catch up on what they’ve missed.

Some modal law schools are experimenting, too, but most modal law schools are still afraid to experiment because they’re afraid of differentiating themselves from the elite schools. They’re afraid of losing status. Because modal law schools can’t offer the networking advantages that elite law schools have, they should instead offer an education that relates more specifically to the careers that their graduates are likely to have.<sup>102</sup> I’m not suggesting that modal law schools should convert to some sort of “how to fill out forms and find the courthouse” model—far from it.<sup>103</sup> But modal law schools shouldn’t ignore the discussions of the realities of law practice, either. There’s plenty of room to provide students with a

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101. Grading these non-law-trained students would be the hitch, but there are ways around that problem. The students from other disciplines could be graded on a pass/fail basis, for example. Possibly, law schools—all of them strapped for cash these days—could even develop certification problems for these other students.

102. Bernie Burk and David McGowan have pointed out that, in today’s economy, newly minted graduates are competing with laid-off lawyers for jobs. *See* Burk & McGowan, *supra* note 30, at 94. Given that twist in the job market, modal law graduates who can’t hit the ground running are at an even bigger disadvantage.

103. You might be surprised, though, to find how easy it is to teach theory while showing students how to fill out forms, such as a proof of claim in a bankruptcy case.

rich curriculum that enables them to recognize their clients' problems, communicate with those clients more effectively, and draw on legal and non-legal problem-solving tools. Modal law schools today can use "case histories" as a companion to studying cases. They can also use the arts as a way of shaking up preconceptions about perceptions. They could require certain courses as prerequisites to admission. In the best of worlds, they could use a revamped curriculum to turn out lawyers who might even be better at the practice of law than the graduates of the elite schools.<sup>104</sup> But they need to stop chasing the tails of the elite schools. There's room in legal education for a variety of models, as long as we recognize that every law school should have a curriculum that meets the needs of its own students.

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104. My husband went to a modal law school, and he is a far better lawyer than I am.