

TRANSFORM—DON'T JUST TINKER WITH—LEGAL EDUCATION

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In this two-part article, Part I evaluates how the past decade's "transformation" of legal education amounts so far to just so much time-honored tinkering. Over the past ten years, most schools changed very little, and the small number that changed a fair amount (overwhelmingly in the second and third years) borrowed directly from what other law schools have been doing for decades. Because we must learn all we can from these recent years (and earlier eras), Part I aspires to present in something like realistic form the institutional, material, and ideological forces we all encounter and too often reproduce. What makes the past decade's near-ritualistic experience all the more regrettable is that we have available an alternative vision of legal education ready now for a full roll-out. Because this vision traces its origins, its implementation, its improvements to the best of clinical programs in the United States, cynics will doubtlessly scoff. Facing down the disparagers, Part II will sketch the radically different assumptions, methods, and aspirations that define how this vision contrasts with the at best status-quo-plus version of legal education strongly internalized and widely practiced. Part I is not at all the "set-up" to Part II, and Part II is not at all an impractical ideal offered to soften the blunt realities portrayed in Part I. The two parts stand alone and belong together, both to chasten and embolden us, at least if we're willing.

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INTRODUCTION

What then shall we do about fundamentally changing legal education? Shall we just encourage every law school to proclaim they already have? After all, during the past ten years of colossal agitation over the quality of legal education, several high-profile law schools claim to have revolutionized the curriculum for the first time since 1870. In fact, they appended only this or that feature to the same basic design, and all the newly implemented components had already been part of curricula at other institutions. And other law schools have followed suit. You get the point. We could simply declare victory and evacuate this godforsaken territory.

That’s the message many people I know have taken away from the past decade. Certainly those who favor nothing more than at most status-quo-plus changes excitedly convey triumphant closure in every way they can. And those who conscientiously and optimistically engaged (on special committees, as part of national coalitions, with the state bar, before the ABA, with the AALS) anticipating fundamental change feel “duped,” “frustrated,” “cheated,” “mugged,” “suckered,” “double-crossed,” and “furious.” Many who pursued reform share a sense of “I’m done with all that, maybe forever.” Finally those who predicted from the start the exact unfolding of events and certainly the outcome wonder why we must repeat this elaborate ritual when, in their eyes, the results and effects can be described as pre-determined. Repeat: Declare victory and evacuate this godforsaken territory.

We can learn far more, though, from our most recent profession-wide focus on the quality of legal education. We not only can, we should. At least we should if we count ourselves as among those who think far more should have come of all the exceedingly smart sweat labor. If we count ourselves as among those who cannot abide the

hyperbolic marketing of only modestly reformed legal education. If we count ourselves as among those who do not want again to be hoodwinked into huge amounts of work doomed almost immediately to vanish from memory like the report of yet another task force. Indeed, we should if we count ourselves as among those who simply care to learn about how institutions, systems, and cultures work.

And if you just happen to be weird like me, there's an even more immediate here-and-now reason. If you're a holdout who believes we're not yet finished with this period of unrest, if you're a holdout despite the largely successful efforts to declare an end to this chapter in the history of legal education, if you're a holdout despite the exhaustion and perhaps disillusionment visible in some of the most extraordinary advocates for fundamental change, then you may want to treat what we can learn from the past decade as essential feedback. How can we holdouts do better? If we want to transform systems, we must understand how people have managed to resist, deflect, and channel radical and reform initiatives.

That's how I found myself at the keyboard banging out my explanation of what has come to pass. Working with, watching, hearing from, reading about many involved in separable and collective efforts to change legal education has helped me take in, as always, varied perspectives and divergent experiences. Taking stock helps me grapple with where we are now and helps me confront just how well I have comprehended the circumstance. In this two-part article, I mean to evaluate afresh the tinkering in order to work through with others how to transform the seemingly unchangeable.

Much as many others have contributed to what I feel and think, my depiction will extend beyond where even my most trusted advisors would have me go. They agree entirely with writing about what has occurred thus far. After all, we in the legal profession, and particularly in legal education, have just been through a turbulent period. Serious critiques of legal education, deepened and sharpened by the pressures of the Great Recession, dulled the luster and even threatened the credibility of law schools. Wouldn't such forces produce an environment hugely favoring the changes long urged by dreamers of all sorts? Besides, inside and outside critics were not just carping without a plan. At least some came equipped with wide and deep, legitimately laudable proposals.

My trusted advisors agree, too, that over roughly the past decade, those driven to improve legal education have done what they could. These crusaders are a motley crew. They include dedicated mainstream idealists and radical utopians. They have been resourceful and even ingenious. They deserve thick written case studies commemorat-

ing their efforts. Some managed to succeed, impressively compared to what insiders would have predicted, modestly compared to what they sought. Others invested great ingenuity and resolve only to fail, in some instances enduring rough reversals after initial successes. Still others never introduced a formidable proposal; they could not imagine successfully bucking the odds. Especially with the end of the Great Recession, with curricular weariness overcoming many, the time for fundamental change may well have come and gone. Go ahead and report what has taken place, exhort my advisors, and offer a diagnosis about why.

Most of those I work closely with think material forces—vested interests in the status quo—tell the entire tale we need to acknowledge. They would have me portray how those forces entangle and strangle even the worthiest transformational proposals. Then they would have me call it a day. Over. Hard stop. I respect this opinion. I especially do because at least some of these sage advisors predicted with great accuracy how this past decade would unfold and how it would end. When these women and men bet, they win seemingly as often as most casinos. And I'm not holding a straight flush, much less anything royal.

Still, I'm challenging the house. I think they're all missing what's there to see or dismissing what they do recognize as neither here nor there. However muscular the material forces, and they are indeed monstrously strong, I insist ideas matter too—mattered to what already has occurred and matter right this moment. And what my betting buddies regarded as early as 2007 as utterly predictable was and is, in my view, *predictable but not inevitable*. I believe the forces slope the playing field, but do not necessarily yield this outcome or any other, for that matter.

That makes my explanation of what has thus far happened more involved than my counselors would have me produce. But that's not the end of their disagreements with my approach. Experience has convinced me we most often do not understand how forces work unless we experience them in something like realistic form. (That's why the final four chapters rather than the first are the most important in *Rebellious Lawyering*.) Far too many insist upon "executive summaries" (abstracts, lists, formulas, emojis). Even and especially about "theories." Abridgements can play important roles. But unless we know what the everyday looks and feels like when aiming to rebel against the strong currents of all that's regnant, we have little idea what we're in for. And experience overwhelmingly indicates the ill-prepared abandon their counter-vision, acquiesce in things as they are, far faster and far more permanently than those trained in advance to recognize

and appreciate what they shall encounter.

So in this explanation of what happened over the past decade, I'll aim *not* to sum up the ideas that I think matter. Instead, I'll offer them in the forms I perceive as most influential. In design and content, I'll aim for verisimilitude in my portrayal. I'll write "in role," as if I were one of the leading thinkers responsible for the production of each line of thought. Going into and coming out of these hopefully realistic reproductions, I'll describe how the pressures of the past ten years produced ideas far more candid about legal education than widely honored norms have typically permitted, and far more open to the possibility of transformation than most scholarship produced during less heavily pressured periods. Yet precisely because these ideas still cling too loyally to widely shared categories and conventions (to orthodox "discursive structures"), they contributed to our failure—our failure thus far—to transform legal education.

My wise advisors do not necessarily disagree with my conviction that experiencing ideas in forms that replicate life might well prove experientially more illuminating than a summary. What they regard as unwise is taking the time to write true-to-life versions of how influential writers floated significant ideas. In their experience, many (and probably most) who participated in and cared about the debate over the future of legal education never studied the books and articles and reports that over the course of history and even over the past ten years shaped views. Or some perused one or two and perhaps not terribly carefully. Do I really anticipate that those who have not read during the fiery times will read now when the excitement appears entirely to have worn off and the battle seems over and lost?

I try never to pretend more than a tiny number will read what I write. And when writing about legal education, that tiny number likely shrinks. My friends are trying to protect me from my own enthusiasms, I realize. Yet I have decided to disregard their guidance. For those who do choose now to read, I want to make available, in structurally and rhetorically upstanding renditions, the ideas and the material forces I regard as influencing (not determining) the experiences to date and the apparent outcome. Yet my choice to aim painstakingly to recreate versions of what so many already have chosen not to consume reflects, I admit, a deeper and broader conviction.

We're not all part of one team, as Barrack Obama so soothingly insists and as Donald Trump so casually suggests. That's a false and perilous pacifier—whether we're talking about presidential elections, the transform-legal-education movement, or anything else. Our deepest assumptions and aspirations and methods routinely conflict. Yes, of course, cooperation inheres in every conflict; of equal significance,

hostilities interrupt every truce. Yet to permit ourselves to believe this nonsensical we're-all-on-one-team rhetoric encourages people to cycle—time and again—from genial denial of conflicting aims and interests to abject disappointment at the failure to achieve consensus reforms to genial denial again. Haven't we experienced enough of this dysfunctional and destructive sequence to understand the importance of breaking the pattern? Perhaps Anna Freud would insist our efforts shall be in vain, but I'm always willing to take a shot.

Besides, because I am writing to take stock of my own current feelings and thoughts, I want to produce a document true to what in early 2017 I thought was going down. Taking stock in this way turns out to be a predictably uncertain venture. We are unable to retrieve, much less record, all we feel and think. And, in chronicling what we can, we may not be as discerningly and savagely candid as we need to be. About what we see in the world and about what we can summon the guts to perceive in ourselves. All the more reason to generate published documents, with indelible dates, detailing the reality we credit. That way, we can provide ourselves (and others who care) a better target to evaluate, and, yes, disagree with, and, yes, improve. In this sense, at least, being wrong entails its own honor.

Yet there is a final way my wise friends will regard my depiction and diagnosis as ill-advised. While they disagree with my belief that ideas matter at least as much as material forces, and while they think I'm wasting my time aiming for accurate replicas of how influential ideas made their way into print, they strongly believe I'm acting incautiously, recklessly, by choosing to offer in Part II of this article, even in compressed form, an alternative vision of legal education. They are not surprised I have one. Every critique entails a counter-vision. And anyone reading what I shall write about the past ten years will recognize a strong influence at work in describing what I have learned and what I think about it all—just as they should realize some vision (however much incipient) equips them even tentatively to evaluate what I think.

What my counselors regard as rash to share in print is the particular alternative vision I happen to regard as superb and ready-to-go. On the basis of my experience since 1970, and on the basis of all I have studied across eras and boundaries, I confidently believe we can discern and define a fully developed alternative vision both embodied by the best of clinical programs in the United States and ready immediately to be implemented. That's right. The alternative vision would replace—not supplement, replace—the basic approach to legal education first introduced in 1870 and strongly fortified even as it has been variously modified. And that vision would shape the particulars across

the entire curriculum.

My friends think I'm setting myself up for ridicule when, in their eyes, there's no payoff. They consider my point of departure crazily counter-factual. Not many at all, they insist, truly and deeply want radically to transform legal education. My friends warn that my truncated sketch of this alternative vision will intrigue only a handful and will be regarded by most as utterly "off-the-wall." Disparate stakeholders, they insist, do not believe clinicians capable of offering anything deep and wide and comprehensive and affordable enough to constitute a "vision"—at least not one any sane institution should treat as intelligible, as worthy of consideration, as perhaps persuasive. Experience indicates my thoughtful advisors are likely correct. And since they're trying only to protect me, I treasure their admonition.

But what if, just what if, plenty of people still care about providing the most ambitious and effective training imaginable? And what if—what if—we all cherished students, clients, and the legal system as much as we habitually profess? What if we insisted on truth in advertising? And what if declared that, in a year's time, all law schools must ban the Socratic-casebook approach (yes, ban the Socratic-casebook, from every year), thoroughly scrutinize the methods and aims of every seminar, every colloquium, and every "experiential offering" (yes, including all clinics)?

And on top of all this, what if we demanded all law schools must learn from one another, from past and current programs and courses and literature and more? Learn precisely in order to borrow what already has been demonstrated to be ambitious and effective? Learn by closely studying? Yes, by studying and not just hearing about, not just skimming the titles of a reading list we ourselves have not read, not just treating every method as if we're already familiar with it or cannot imagine it can be better than what we already do, perhaps superior to anything we had ever imagined? What if we worked initially and in sustained ways to sincerely respect what others have done, have been doing, have recently successfully introduced? Yes, what if we learned from others by deeply appreciating before prematurely rejecting through familiar shrugs and clichéd critiques?

And what if we demanded bold and explicit shout-outs (credit, recognition, commendation, tributes) from every borrower to all originators and developers of everything borrowed? And what if we featured prominently these shout-outs on all law and university websites and magazines and all other promotional materials? What if we banned pretending to be "groundbreaking" when we either know or should know the claim to originality is a flat-out falsehood or at least terribly misleading? And instead of performing "cutting edge," what if

we cultivated in ourselves and one another the inclination inquisitively to trace provenance and enthusiastically to thank others? What if we dropped all modern-day versions of feigning and instead focused our considerable resources and energies developing an education worthy of the diverse roles lawyers fill? Perhaps even worthy of some percentage of the sky-high prices students now pay to attend law school? Where then might we be?

Of course we would all have to adapt, a tad to a lot. And some of us might well ultimately have to be “counseled out.” That includes non-clinicians and clinicians, students, staffers, administrators, deans, graduates, commentators. We would have to fundamentally reorient our hiring and hyping practices. And we would have to nurture a teaching ethic certainly evident in today’s law schools and universities, but almost always eclipsed by the once merely growing and now indisputably dominant ethos. Today’s prevailing ethos prioritizes individual career over institutional welfare, scholarship over teaching, and Leni Riefenstahl-worthy propaganda over honest portrayals of, well, pretty much everything.

All these demands and still more would doubtlessly feel richly rewarding to some and deeply disaffecting to others. For others still, new mandates would trigger some blend of tension, satisfaction, and exhaustion. These various pressures and diverse reactions would themselves reveal just how far we now are from where we need to be. That should hardly surprise. Remaking organizations, institutions, or an industry imposes adjustments, often enough dramatic. Change—from the inside out—requires everyone to be open to the very shaking-up we may mistakenly perceive as involving only “them.” Deans as much as staffers, students as much as faculty, development officers as much as registrars would soon enough experience the effects of transformation.

But one thing we would *not* have to create afresh in fundamentally changing legal education is an alternative vision to give life to in this transition. And we wouldn’t because clinical programs already embody—certainly, at their best—an entirely alternative vision of legal education, of law practice, of continuing education for the bar. That’s a mouthful, I realize. Even an audacious claim. But I am not waxing romantically. And I am not at this moment aiming to build up the often sagging spirits of underrated and underestimated clinicians. Instead I am sharing sober perceptions of what already has happened, what remains still-to-be appreciated in what we do, and what someday should come to pass.

In Part II of this two part article, I shall describe how clinical programs offer a coherent approach to teaching and learning how to

lawyer and how continually to improve as a practitioner. In terms of closely studying and truthfully depicting what lawyers do when they lawyer (within and across roles and institutions), in terms of resourcefully developing and implementing and improving bold and creative training aims and methods (from small student-to-faculty ratios to large student-to-faculty ratios), in terms of explicitly melding the practical and the interdisciplinary and the theoretical (enriching one another), in terms of embracing the ubiquity of power in all we create (systems, communities, relationships, strategies), in terms of learning to operate within and across legal, economic, social, and cultural roles and realms (as lawyers must), in terms of embracing the inevitable entanglement of law and ideology (of course within judges too), this alternative vision has proven itself ambitious and effective. It works. Measured by the highest standards, it works.

To be sure, the range of sources we clinicians have borrowed from is immense indeed. From far outside campus life to other schools and departments within universities and colleges to “continuing education” for diverse crafts and arts and professions and trades to preschool and K-12 education to schooling offered in other nations to coaching offered in diverse sports to training offered over the years, yes, by non-clinicians within legal education. Typically, the best experiences in clinical education—in education of every sort—owe debts to others far outside visible boundaries, to sources beyond the conventional imagination of the professions. That reality should be openly celebrated, not downplayed, much less evaded.

Indeed, this alternative vision reflects the insights and products of heterodox thinkers and doers, an incredibly eclectic crowd, including shortcut-taking students, savvy staffers, astute administrators, deep-thinking doctrinalists, imaginative academic support teachers, inspired first-year lawyering (legal research and writing) faculty, corporate executives, community activists, radical theorists, managing attorneys and regional counsel for legal services organizations, executive directors of large organizations, ambitious clinicians, alienated out-groups, solo and small firm practitioners, staff lawyers for state and federal agencies, human rights campaigners, management consultants, corporate transaction lawyers, children’s advocates, labor organizers, and more, and more, and more. The formation and realization of this alternative vision is a collective achievement, remarkable and resilient, and, yes, both already a prime-time worthy creation and always still-in-the-making.

Of course I fully appreciate that non-clinical faculty critical of clinical legal education—and of all of us clinicians—will find absolutely preposterous what I have just written about an entirely alterna-

tive vision. Some regard us as a bunch of lightweight self-serving phonies, “liberals” or “leftists” without much deeply to contribute to law or legal education. Others think we’re sensibly part of legal education, well, sensibly so long as we constitute only a sliver of what law schools do, always beholden to and circling around their updated Socratic casebook classrooms and their favorite seminars and colloquia. Still others regard us as actually entirely unnecessary, even an intellectual wasteland, but they understand the necessity of cutting deals with the ABA, state bars, and those alumni and current students and prospective students who pay close attention to the size and quality of clinical programs.

Non-clinicians hardly will be alone, however, in finding my claims exaggerated at best and delusional at worst. A strand of clinicians I know consider what we collectively do in the same way as the most passionate defenders of traditional legal education: as adjectives and adverbs adding some flavor to the nouns and verbs that drive the real intellectual action. More often than not, these clinicians regard their work as the “practical element” or the “skills training” law students need to complement the “critical cerebral core” advanced best by precisely what I’m banning (Socratic casebook method) and what I’m scrutinizing closely (seminars, colloquia).

If ever this group of clinicians has studied—studied, not just paged through—the first-rate literature demonstrating persuasively how their own characterization of skills is both crude and wrong, they certainly have not grasped the point. They seem not to see—not to understand—how theory and practice are one. Or maybe they do. Perhaps they choose consciously to employ a coarsely simple-minded definition of “skills” precisely because it matches so well the emerging consensus among non-clinicians of the limited role clinicians should play in modern legal education. By acquiescing in such vulgarities, these clinicians strive zealously to protect their tiny market niche.

Yet acknowledging the probable reactions of certain contemptuous non-clinicians and the clinicians who kowtow to them should not veil, and I emphatically do not want it to mask, how much others still will disagree with the Alternative Vision I’ll sketch in Part II. Even among those who read carefully, study closely, utterly grasp what I am celebrating and why, I still anticipate disagreement. People I know well and respect greatly—including those I’ve worked closely with in creating new programs and enhancing existing training—will likely offer views deviating from my own. Even the closest collaborators vary in their judgments of curricular development, delivery, and improvement.

Even the most committed of those desiring to revolutionize legal

education—including radical clinicians and non-clinicians with utopian views and those idealists among mainstream reformers, for example—would likely design very different law schools. That is at it should be. Much as I can describe an alternative vision of legal education, I myself can easily imagine translating that vision into many, many concrete variations. And I would do so, as would others, to respond to the needs and aspirations of particular schools, with particular students and graduates, with particular communities they regard themselves as serving, with particular faculties, full-time and adjunct.

These various instantiations would result in both strongly parallel and importantly varied experiences from which all could learn. Through diverse looking law schools, we could now implement a shared vision that produces great and good lawyers, the sort law schools ought always to have produced, the sort thoroughly prepared and always willing to get better and better over the course of their careers. And to a far greater degree than before, we could provide continuing education for one another, through grounded examples and full-blown analyses. Mandatory because teaching and learning is our first priority, illuminating because our shared vision and wide-ranging experiences would yield training exciting and engaging.

How might we improve what we're already doing—overall, within spheres, through particular courses? How might we introduce options for trying to achieve aims already plenty well-served by certain of our existing learning opportunities, yet in need of further elaborations? How might we make feasible a powerful intuition not yet translated into teaching and learning formats? Proceeding from premises that fundamentally conflict with those that drive status-quo-plus law schools (divergent aims and methods), we already would be successfully training theoretically sophisticated, empirically curious, practice-ready lawyers—lawyers as able and willing to always learn as are the faculty at their law schools.

“No, no, no,” my advice-givers already must be saying. Rapturous talk of an alternative vision embodied in the best of clinical programs and available for immediate adoption throughout legal education certainly qualifies as the sort of “off-the-wall” stuff many in the legal profession and in legal education will mock and condemn. At least they will mock and condemn if they cannot effectively ignore such views out of existence. (Ignoring typically works, though.) Especially because so many do not read. And even if they do read, they certainly do not open-mindedly entertain. And, perhaps as importantly, they do not open-mindedly entertain and resourcefully search to discover the various parts of curricula and the diverse teachers and students already pursuing this Alternative Vision. Disinterest can save us, at least

sometimes, from taunting and bullying tweets.

I write with eyes wide open, though. The environment in 2017 already has proven significantly less friendly than it has been in the past decade to major suggestions, much less comprehensive visions, of fundamental change. “Significantly less friendly” may understate the frostiness and the surliness. I’ve learned this directly from work on curricula at a number of institutions and indirectly through the reports of others. There’s little patience for any new rounds of proposals. Deans and voting majorities of faculties at most law schools are signaling no and no more. That’s true even when presented with obviously first-rate proposals about aspects of education sorely in need of improvement. If initiatives do not get buried by administrative rigmarole, then the full faculties kill them.

Impressive state and national proposals face similar fates. When a sophisticated committee of practicing and academic lawyers recommended law school graduates must take at least fifteen experiential units to sit for the California bar exam, many regarded the moment as a breakthrough. A committee uncommonly knowledgeable about every sort of law practice, about law school finances and educational formats, about how to implement realizable reforms had put its imprimatur on a proposal many confidentially regarded as decades overdue. Few anticipated, however, how much the California Supreme Court (the final arbiter) and a certain strata of deans (the heavyweight lobbyists) would circle the wagons. While the Court tried its best to ignore the proposal (literally leaving it sitting in the in-box for the longest time), the deans in an arrogant, flip, and embarrassingly sloppy letter of opposition sounded a familiarly vainglorious message: We know best so everyone else butt out. Then the backward-looking Court announced six units of experiential education would do, mimicking an already existing ABA requirement.¹ And the majority of California voters fear where the United States Supreme Court is headed?

The past decade has left most in and around legal education seemingly better defended than at the close of the Twentieth Century. Voting law faculty across the country sort through pedagogical proposals with pontifical confidence, labeling a few very modest proposals sensible and practicable, identifying a few others as perhaps-worthy-of-consideration-but-not-yet-ripe, and marginalizing anything

¹ See State Bar of California Task Force on Admissions Regulation Reform, Phase II Final Report (Sep. 25, 2014), available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000012730.pdf>; Darby Dickerson et al., Ass’n of Am. L. Sch. Deans Steering Comm., Statement on the California Task Force on Admissions Regulation Recommendations (TFARR) (July 6, 2015), available at <http://www.aals.org/tfarr-statement>.

more significant as either whacky or too ambitious ever to work or both. Meanwhile, state bars and the ABA (or at least voting majorities of such organizations) all appear to have hunkered down. “Put this talk of transformation behind us,” many assert, “and let law schools evolve more organically.” Most equate the restoration of the status quo with prosperity and order.

If that’s true, all the more reason not to hold my tongue and to speak my piece. I write with absolutely no Pollyannaish expectations. You know, “if only voting folks would see what’s right before them, much good and great would follow.” That’s not just wishful thinking, that’s delusional. Decades have proven that, unless coerced, most voting faculty at the great majority of law schools will not change how they themselves teach, their portfolio of work, or their views of the fundamental training law students need. (What was true of Harvard in 1870 is every bit as true today.) Neither do I write intending, simply, to set the record straight about the most extraordinary of clinical accomplishments. Of course we should generously give credit where credit is due. And I hope to contribute to a deeper and wider recognition of what clinical programs, at their best, have accomplished and offer to all. But even that much-desired effect misses my main aim.

Especially if the time seems nearly to have passed for any fundamental revolution in legal education, then I want with others to keep up what little pressure those “in power” may still feel. Deans, voting faculty, the California Supreme Court, the ABA, and all those who want to put this past decade behind them should sense that they cannot yet again get their way without hearing from vocal opposition. They should worry that, at some point, their practiced indifference toward creative, ever-improving, and successful legal education will be understood by wider and wider swaths of people as a shameful failure to have fulfilled what should be their primary mission.

People now wielding power in familiar ways may never care to change. Yet, perhaps like the CIA, perhaps like the Chicago Police Department, perhaps like the Middle East, they just may have to. Some coalition will take them on. Some or perhaps many will resourcefully document and compellingly challenge the role of those within and surrounding law schools who exert their influence to sustain an indefensible status quo and to diminish a compelling alternative vision of legal education. And those coalitions likely shall include—indeed, necessarily must involve—people with the gifts, insights, and energies of:

a Meg Satterthwaite or a Craig Futterman or a George Bisharat or a Tara Ford or a Dale Minami or a Kim Taylor-Thompson or an Anthony Thompson or a Jenny Horne or a Gary Peck or a Mona

Tawatao or an Eric Cohen or a Raquel Montoya-Lewis or a Francisco Valdes or a Shauna Marshall or a Charles J. Ogletree Jr. or a Wendell Tong or a Tom Brudney or a Sharon Samek or a Napoleon A. Jones Jr. or a Linda Lera-Randle El or a Tom Adler or a Sally Dickson or a Fred Korematsu or a Santos Rivera or a Jennie Rivera or a James [Sákéj] Youngblood Henderson or a Marie Battiste or a Roy B. Cazares or a Regina Austin or a Hector E. Ramon or a Char Hamada or a Fernando S. Mendoza or a Maria Yellow Horse Brave Heart or a Steven Adelsheim or a Randolph N. Stone or a Janeen Steel or a Don Nakanishi or a Paula Y. Fendall or a Luke Cole or an Alicia Alvarez or a Garrick Lew or a Dorothy Mónica or a Tom Elke or a Mary Elke or a Robert M. Takasugi or an A. Mina Tran or a Bruce Friedman or a Helen Zia or a Raymond Ivey or a Maria Santiago or a Chester (Chet) Mirsky or a Sarah (Sally) Burns or a Richard Boswell or an Angela E. Oh or a Walter F. Ulloa or a Frances Leos Martínez or a Patrick Patterson or a Lisalyn R. Jacobs or a Bill (Mosco) Ramos or a Karen Umemoto or a Leonard D. Thomas or an Alison Anderson or an Edwin (Eddie) Ellis or a Carrie Garrow or a Paul A. Di Donato or a Dorlynn Simmons or a Keith Aoki or a Margarite (Margie) Quiñones or a Yumari Martínez or a Sister Mary Nerney.

Or a Michelle Fei or a Randy Hertz or a Paula Galowitz or an Ascanio Piomelli or an Alina Ball or a Marty Guggenheim or a Janese Bechtol or a Stephen Carpenter or a Maureen Sanders or a Michael D'Amelio or a Dorothy Roberts or a Richard Abel or an Ann Shallick or a Bryan Stevenson or a Cathy Mayorkas or a Derrick Bell or an Erwin Chemerinsky or a Roxanne Spruce Bly or a Father Rufus Whitley or a Stacey Hawver or a Steven K. Derian or a Lorinda Fong or an Jesus Bernal or an Alexandria Ruiz or a Mark N. Aaronson or an Asli Bâli or a Sandro Galeo or a Jennifer Aherns or a David Vlahov or a Vijay Nandi or a Frank Bleckman or a Marissa Dagdagan or a Colin Cloud Hampson or an Alma Medina or a Jerry Kang or a Sung Hui Kim or a Frank E. A. Sander or an Amber Baylor or a John Allen or a Daria Fisher Page or a Devon Carbado or a Cheryl Harris or a C. Edwin Baker or a Laura Gómez or a John Elson or a Brenda Montes or a john a. powell or a Julia Figueira-McDonough or a Tom Stoneburner or a Julie Davies or a Louie Vega or a Christina Ramirez or Sam Sani or a Martha Gómez or a J. Bernard Alexander or an Ana Graciela Nájera Mendoza or a Jelani Lindsey or a Dania López Beltran or a Kenneth Klee or a Christina R. Manalo or an Emerson Yearwood or a Michelle Light or an Eduardo R.C. Capulong or a Karen Lash or a Gregory Ellis or a Melanie A. Ayerh or a Matthew Kadushin or a Caroline Mayhew or a Rafiq Kalam I-Din or a Meriem Soliman or a Robert C. Turner or a Dian Sohn or a Daniel Abraham-

son or a Kathy Brady or a Mark Silverman or a Saul Sarabia or an Ingrid V. Eagly or an Alvin H. Warren or a Junea Williams-Edmund.

Or a Jonathan Varat or a Barbara Varat or a C. Keith Wingate or a Stacey Strongarone or a John Sexton or a Susan Prager or a William Warren or a Ndidi Oriji or an Edward J. Schwartz or a Steven Steinglass or a Tammi Wong or a Cruz Reynoso or a Kenia Acevedo or a Patrick Goodman or a Kirsten D. Levingston or a Kip Bobroff or a Kara Bobroff or an Aderson Francois or a Chavela Vargas or a Pavel Wonsowicz or a Martha Kegel or a Walter J. Leonard or a Kirsten Holmquist or a Russell A. Simpson or a Priscilla Ng or a Leon Letwin or an Anne Richardson or a David Duchrow or a Virginia Keeny or a Muhammad Kenyatta or an Iman Anabtawi or a Francisco Poitevin or a Louise Erdich or a David Whitehead or a Meaghan Glisczinski or a Priya Baskaran or a Christopher Edley Jr. or a Cecilia Burciaga or a José Antonio Burciaga or an Elliot Millstein or a Susan Bryant or a Miles Furutani or a Julie Goran or a Clyde Spillenger or an Andrea McArdle or a Francisco Silva or an Audrey McFarlane or a Michael Zubrensky or a Tsui Yee or a Lucie White or a Dean Rivkin or a K. Babe Howell or a Henry Ong or a Stella Ong or a Kathleen A. Sullivan or a Noah Zatz or a Jessica Cattelino or a Kainoa Alviado or a Peggy Davis or a C. Michael Higgins or a Kara Mikulich or an Alex Milulich or a Pui-Yee Yu or a Daniel Bussell or a Deborah Jean Weiner or a Darryl A. Piggee or a Joanna Schwartz or a Lynn M. LoPucki or a Hayne Yoon or a Jason D. Williamson or a Katie Hurley or a Damon Agnos or a Rachel Germany or a Roger Haber or a Lucía Sánchez or a Duncan Kennedy.

Or a M. Shanara Gilbert or a W. Haywood Burns or an Annie Miyazaki or a Donald Hagman or an Alice W. Ballard or a Howard Lesnick or a Trina Grillo or an Eric Wright or a Stephanie Wildman or a Hiroyuki Koda or a Perla Esquivel or an Ethan Fallon or a Janai S. Nelson or a M. Andrew Treptow or a Julie Cramer or an Anthony Tolbert or a Marlene Garza or a George Bach or a Julie Santana or a Sam Santana or a Kathleen Esperas-Nemeth or a William Kennedy or an Andrea Matsuoka or a Harry Pregerson or a Sharon Hing or a David Kane or a Bernida Reagan or a Jorge Guzman or a Julie Gutman or an Edward L Rubin or a Carole Goldberg or a Duane Champagne or a Jeffrey Prieto or a Rachel Bloomekatz or a Thelton Henderson or a Janet Cooper Alexander or a Paul Boland or a Nancy Morawetz or a Paul Bergman or a Debi Magdaleno or a Marina (Mina) Magdaleno or a Harold McDougall or a Teresa Leger or a Randall Kennedy or a Karen Park or a Benjamin Aaron or an Eva Wood or a Rafael Yaquian-Illescas or a Melinda Binder or a David Binder or a Jean Koh Peters or a Muneer Ahmad or a Jane Aiken or a

Darren Schecter or a Susan Chua or a Paul Butler or a Lisa Hayden or a Stephen M. Bainbridge or a Keiana Auzenne or a William Quigley or a Kathryn Russell-Brown or a James Liebman or a June Kim or a Joseph P. Gone or a Skye Donald or a Paul Goldstein or a Sunita Patel or a Jason Wu or a Leah Wortham or a Tomas Ybarra-Frausto or a Barbara A. Schatz or a Chris Fore or a Carla Bernal or a Steven Shiffrin or a Sherri Lynn Johnson or an Anthony Amsterdam.

Or a Bill Ong Hing or a Lenora Fung or a Joaquin Avila or a Michelle Alexander or a Richard Parker or a Cathleen Price or an Albert Moore or a Sean Pine or a John Hope Franklin or Jennifer H. Choi or a Robert Stumberg or an A. Rachel Camp or a Fabián Renteria or an Abigail Coursolle or a Juan Carlos Ochoa or Heather Littlejohn or a Jonathan Zasloff or a Gloria Valencia-Weber or a Frank López or a Katie Murphy or a Jon Feingold or a Roslyn Powell or a Christian Kurpiewski or a Theresa Zehn or a Ruhandy Glezakos or a Jacqueline Serna or an Alex Wang or a Hyeon-Ju Rho or a Reginald Alleyne or a Grace Lee or a Sameer Ashar or an Olimpia Guardado Castille or a Leon Letwin or an Evonne Silva or a Michael Abel or an Enid Colson or a Roger A. Fairfax Jr. or a Henna Kahn or a Tim Iglesias or a Jennifer Wright or a Matt Nosanchuk or a Julian Harris-Calvin or a Jesus M. Barraza or a Phyllis Goldfarb or a William Klein or a Kim Card or an Andrés Dae Keun Kwon or a Julia Vasquez or a Sherod Thaxton or an Allison Hoffman or a Guy Rogers or a Giselle Chang or an Ethan Weaver or an Anabel Agloro or a Christoph Riddle or an Anthony Alfieri or an Angela Onwuachi-Willig or an Eric Yamamoto or a Katherine Ojeda Stewart or a Jon D. Michaels or a Rocio La Rosa or a Homer La Rue or a Vanessa Carroll or a Charles R. Lawrence III or a Mari Matsuda or a Kevin R. Johnson or a Rohini Khanna or a Jose Iniguez or a Eugene Volokh or a Rebecca Stone or a Siobhan Waldron or a Gerry Singen or a Roslyn L. Foy or an Evan T. Lee or a Maria Burgos or a Harry G. (H.G.) Prince or a Yun Hee Kim or a John Hart Ely or an Audre Lorde.

Or a Gloria Anazaldúa or a Renato Rosaldo or a Mary Louise Pratt or a Michael Pinard or a Harle G. Montgomery or a Kenneth Montgomery or a Kat Choi or an Abram Chayes or a Linda Mabry or a Peter Gabel or a Paulette Rodríguez López or a Máximo Langer or an Olati Johnson or a David Barnhizer or a Christine Zuni Cruz or a Donald J. Brown or a Shiu-Ming Cheer or a Ryon Nixon or a Veronica de la Cruz or a Phillip Trimble or an Angela J. Davis or a Charles Yang or an Amanda Carlin or a Dale Eccleston or a Catherine (Cady) Kaiman or a Neil Edwards or a Tendaye Achiume or a Richard Delgado or a Jean Stefancic or a James O. Leckie or a Nancy Perez or a Christian Hollweg or a Patience Crowder or a Timothy Malloy or a

Juliette Tran or an Ezra Ross or a Tatiana Pavlova-Coleman or a Thomas Holm or an Effie Turnbull Sanders or a Michael Subit or a Jasleen Kohli or a Douglas NeJaime or a Kristin Nicole Henning or a Conrad Petermann or a Rachel E. López or a James N. Rosse or an Irene Oritseweyinmi Joe or a Donald Trautman or a Britannia Poon or a Tim Hallahan or a Mary Ann Rundle or a John DeGolyer or a Maria Martinez Sanchez or a James Park or a Cara Trombadore or a Han Lu or a Rocio Sánchez or a Claudia Polsky or a Jerome Bruner or a Zina Gina Badri or a Jerome M. Culp Jr. or a Ruthy Lowenstein Lazar or a John McElroy or a Carol Izumi or a Frank H. Wu or a David Wilkins or a Hanna Fenichel Pitkin or a Brian Leiter or an Adrienne D. Davis or a Daniel Tarullo or a Clare Dalton or an Earl Johnson Jr. or a Kafi Blumenfield or a Frank Michelman or a Mary T. Hernández or a Russell Robinson or a Jeanne Charn or a Gary Bellow.

These *and so many others* who already have contributed indispensably to imaginative change will continue playing a part in the mobilizations we so obviously need to transform rather than just tinker with legal education.

I. THE CURRENT CIRCUMSTANCE OF LEGAL EDUCATION IN THE UNITED STATES

Changes formally proposed within and about legal education rarely alter much. Even when they do, they only infrequently take lasting hold. Even those that take hold somewhere often get pushed so far to the edges that few outside of the institution and sometimes within the institution even know of their existence. Yet the 1870 re-orientation of Harvard Law School's curricular ambitions and methods was fundamental, did take hold, and ultimately extended its reign to all of legal education. Even if the odds are long, particularly toward the apparent end of this most recent period of unrest, might today's changes still possibly threaten the 1870's-inspired status quo?

A. *Sketch of Current Circumstances*

In the last decade, a number of law schools announced plans to transform legal education. The word “transform” does not exaggerate the claims made—even as it highlights the gap between hype and reality. In 2008, then Dean Elena Kagan proudly proclaimed that changes adopted at Harvard “mark a major step forward in our efforts to develop a law school curriculum for the 21st century. Over 100 years ago, Harvard Law School invented the basic law school curriculum, and we are now making the most significant revisions to it since that

time.”²

Critics rightly mocked the declaration. Every proposed change at Harvard, they insisted, had been recommended long ago and already implemented by one or more other law schools in this country.³ But even persuasive proof of misleading publicity would not change the brute fact that Harvard’s much ballyhooed action would likely induce a chain reaction, simply because Harvard is Harvard, not because of any notable ingenuity.⁴

Sure enough, not to be outdone and soon following Kagan’s trumpet blast, Stanford’s then Dean Larry Kramer invited donors to fund “a bold step that will transform modern legal education as we know it.”⁵ And the University of California opened up a brand new law school, UC Irvine, precisely to create training demanded by the 21st Century and not yet provided by other law schools—training that Erwin Chemerinsky, the widely and deservedly respected founding Dean, declared would graduate students not only able to “think like a lawyer” but actually capable of practicing law.”⁶

But the transformation movement was hardly limited to the most powerful or the brand new. In the past decade, leaders of the American Association of Law Schools directly supported and encouraged

² Elaine McArdle, *A Curriculum of New Realities*, HARV. L. BULL., Winter 2008, 18, 20 (citing Dean Elena Kagan), available at <http://today.law.harvard.edu/feature/a-curriculum-of-new-realities/>. Harvard went through this initial, very modest Kagan-led phase and then another more expansive, Martha Minow-led phase, hiring clinicians and introducing more clinics than ever before in its history. For a brief summary of Harvard’s changes, see Appendix 1, *infra* at note 217.

³ Perhaps the most high-profile source of often-savvy skeptics can be found on Brian Leiter’s Law School Reports, <http://leiterlawschool.typepad.com>. For an example of Leiter’s own skepticism about the proposed Harvard changes, see his comments to the *Harvard Crimson*. Paras D. Bhayani, *Another Feather in Kagan’s Cap*, HARVARD CRIMSON, Oct. 10, 2006, available at <https://www.thecrimson.com/article/2006/10/10/another-feather-in-kagans-cap-the/>.

⁴ See, e.g., WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN LEGAL EDUCATION (1994); ROBERT B. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s (1983); Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 323 (1981); Charles R. McManis, *The History of the First Century of Legal Education*, 59 WASH. U. L.Q. 597 (1981-82).

⁵ Message from Larry Kramer, Richard E. Lang Professor and Dean, Stanford Law School, available at http://www.law.stanford.edu/wp-content/uploads/sites/default/files/landingpage/6294/doc/slspublic/SLS_case.pdf (inviting donors to fund Stanford Law School in taking “bold step that will transform modern legal education as we know it”) [hereafter cited as “Kramer Message”]. For Kramer’s overarching thoughts, see Larry Kramer, “Memorandum: Developments at the Law School” (Stanford Law School 2007), <http://www.aals.org/documents/curriculum/stanfordcurriculummemo2.pdf>. For a brief summary of Stanford’s changes, see Appendix 1, *infra* at notes 227-31.

⁶ For a description of Chemerinsky’s views, see Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595 (2008). For a brief summary of UC Irvine’s curriculum, see Appendix 1, *infra* at notes 232-35.

“transformation.”⁷ Often sparked by the Best Practices and Carnegie Reports, perhaps even more powerfully by demonstrated interest in these reports, diverse schools have enlisted—even taken the lead.⁸ Northwestern and Washington & Lee, to name only two, immediately come to mind.⁹ Whether waiting for this moment or feeling pressured or both, they seized the opportunity.

Some schools created their own in-house transformation team; others worked together in groups, sharing their innovations and their ideas.¹⁰ Some did both, adopting a slate of changes and learning about changes adopted elsewhere. In particular the LEARN Consortium—initially a cluster of ten law schools (CUNY, Georgetown, Harvard, Indiana Bloomington, NYU, Southwestern, Stanford, Dayton, New Mexico, and Vanderbilt), including faculty of notable distinction and verve, working in conjunction with the Carnegie Foundation, whose report served as the focus for many in this reform movement—developed its own set of prescriptions and investigations.¹¹

⁷ Certainly the work of Susan Prager, John Sexton, and Rachel Moran proved important, manifested in collective action taken at various AALS Programs and Workshops. *See, e.g.,* Howard Erlanger, Bryant Garth, Jane Larson, Victoria Nourse & David Wilkins, *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335; 2006 AALS Workshop for New Law Teachers & Workshop for New Clinical Teachers, http://www.aals.org/events_2006nltprogram.php.

⁸ *See* ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (Clinical Legal Education Association 2007), available at http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf (hereafter cited as “BEST PRACTICES”); WILLIAM M SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (Carnegie Foundation for the Advancement of Teaching 2007) [hereafter cited as “CARNEGIE REPORT”]. A summary of the Carnegie Report’s findings is available at archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf.

⁹ For AALS surveys completed by law schools reporting curricular innovation, see http://www.aals.org/services_curriculum_committee_survey.php. For samples of press releases and coverage, see, e.g., News Releases, Northwestern University Law School, *Northwestern Law Announces Accelerated JD, Other Proposals* (Jun. 20, 2008), <http://www.law.northwestern.edu/news/newsdisplay.cfm?ID=191>; Elia Powers, *Beyond the First Year*, Nov. 8, 2006, <https://www.insidehighered.com/news/2006/11/08/stanford> (describing Stanford Law School’s proposed reforms to its second and third year curriculum); David M. Schizer, *Focus On: Innovative Teaching: A Message from the Dean*, <http://www.law.columbia.edu/curriculum/innovative> (describing several of Columbia’s innovative courses). For brief summaries of Northwestern’s and Washington & Lee’s curricular changes, see Appendix 1, *infra* at notes 218-26 and 236-41.

¹⁰ Many institutions hosted conferences as sites for brainstorming and planning. Such conferences were held, for example, at the University of Maryland, <http://www.law.umaryland.edu/faculty/conferences/detail.html?conf=74>, and the University of Washington Law School. For conference materials, see <http://bestpracticeslegaled.files.wordpress.com/2008/09/crossroadsmatlsonline.pdf>.

¹¹ *See* LEGAL EDUCATION ANALYSIS & REFORM NETWORK (“LEARN”), GENERAL DESCRIPTION OF PLANNED PROJECTS, 2009-2010, available at www.albanylaw.edu/media/user/celt/learnprojects.pdf. The initial ten law schools came together in the wake of the Carnegie Report to encourage “innovation in law school curriculum, pedagogy and assess-

Even those schools with no announced plans of altering their curriculum took the opportunity during the same years to publicize how for some considerable number of years they already had been offering students the very transformed education others now boastfully labeled “revolutionary.” For example, in a 2008 article in *The National Law Journal*, then Dean Mike Schill described how UCLA School of Law had already “moved aggressively” in the direction of training students “to be lawyers” and not just “think like lawyers,” particularly through substantive specializations in the second and third year and clinical offerings that provide students real world experiences.¹² More than a decade of experience at UCLA, wrote Schill, demonstrated that “[d]eep interdisciplinary knowledge and mastery of theory can coexist very well with increased specialization and practical skill development.”¹³

At all these schools, in all these formal consortia and informal networks, in all these reports, articles, and proposals, it has proven impossible to miss the power of the mainstream in this reform movement. Many proudly insisted, rather as Barack Obama routinely did, that they were “non-ideological” and “pragmatic,” interested only in improving the state of affairs, whatever that might turn out to mean.¹⁴ Others urged far more direct connection with university schools and departments (cross-enrollment, joint degrees), and still others the need for far more experiential offerings (of various sorts, live and simulated). The mainstream idealists (those comfortably part of the status quo) and the radical utopians (those explicitly perceived as off-the-wall outsiders) felt this just might be “the time” where they could

ment.” *Id.* at 10.

¹² See, e.g., Michael Schill, *Beyond The First Year*, Nat’l L.J. (Jul. 7, 2008). For other roughly parallel instances of sharply framing a law school’s tradition with this modern “revolution” in mind, see, for example, the University of Wisconsin’s “Law in Action” description: <http://law.wisc.edu/law-in-action/>. Outdoing Schill and UCLA, Wisconsin lists on its Dean’s Page, <http://law.wisc.edu/law-in-action/davislawinactionessay.html>, a sample literature describing the history and the nature of this “law in action” tradition at Wisconsin, including Paul D. Carrington & Erika King, *Law and the Wisconsin Idea*, 47 J. LEGAL EDUC. 297 (1997); Kenney B. Davis, Jr., *Law in Action*, available at law.wisc.edu/m/yjgzz/law_in_action_a_history_davis.pdf; W. Scott van Alstyne, Jr., *The University of Wisconsin Law School 1868-1968: An Outline History*, 1968 WISC. L. REV. 321; John E. Conway, *The Law School: Service to the State and Nation*, 1968 WISC. L. REV. 345; Willard Hurst, *Changing Responsibilities of the Law School 1868-1968*, 1968 WISC. L. REV. 336; Stewart Macaulay, *Wisconsin’s Legal Tradition*, 24 GARGOYLE 6-10 (1994). All are worth reading, though several praise Wisconsin’s history by perhaps unintentionally ignoring earlier and parallel achievements elsewhere in the country.

¹³ Schill, *supra* note 12, at 2.

¹⁴ For powerful explications of Obama’s complex and contradictory Center-Right and Center-Left politics, see DAVID REMNICK, *THE BRIDGE: THE LIFE AND RISE OF BARACK OBAMA* (2010); RANDALL KENNEDY, *PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY* (2010).

squeeze through their respective visionary aims. And, naturally enough, those absolutely opposed to or agnostic about any change stayed actively involved precisely to keep the crazies under control and to limit the effects of any changes on law school life as they had come to benefit from.

An intriguingly quirky crowd responded to this transformation fervor with their own brand of ingenuity. Deans and leading faculty members at various schools told me, beginning in 2007 and continuing through today, that they planned on doing nothing more than framing differently what their law schools already had been doing. Having closely examined calls for transformation and the enacted curricular reforms at various law schools, they had grown to appreciate how much their own schools already had achieved (well, *nearly enough* achieved) what others aimed to realize. That did not say all that much, they confidentially admitted, since so much talk typically leads to so little action. As responsible leaders of institutions, they of course would make room for any alteration their faculty cared to entertain. But, at bottom, they regarded their jobs as repackaging messages about what their law schools already did wonderfully well. With so little actually happening, why not brand yourself as way ahead of the curve?

You may be chuckling, perhaps jeering. How could these deans and faculty leaders—whom some would call skeptics and perhaps even cynics—believe their current curricula, utterly unchanged, matched those revamped by Harvard, Stanford, and UC Irvine? How could they measure up to what other leaders describe as the first fundamental transformation of legal education as we have known it since 1870? And why would these deans and faculty leaders predict that the then mounting fervor, described by some as unmatched in modern history,¹⁵ would ultimately lead to nothing more than what we already have experienced? How could they have been betting that all the studies and conferences and committee reports and faculty meeting and bar proposals would deliver, at most, curricula no more ambitiously designed than what their own schools—or at least a few schools of the many making this claim—already had been delivering?

But pause, please, before condemning. Carefully inspected, existing curricula at some (no, absolutely *not* all) of these law schools

¹⁵ “Existing law schools,” wrote Martha Minow in a 2010 blue paper, “are exploring reforms more seriously and intensively than in any time since the past 50 years, and in some cases, more dramatically than since the past 100 years.” MARTHA L. MINOW, MAKING GLOBAL LAWYERS FOR THE 21ST CENTURY: KEYNOTE ADDRESS TO THE FUTUREED 2 CONFERENCE AT HARVARD LAW SCHOOL 1 (2010), available at https://clp.law.harvard.edu/assets/Minow_Blue_Paper.pdf.

already did look very much like those only just introduced at schools that made the most noise about transforming legal education. And some faculty and deans were accurate enough in declaring that what they then offered students would at least match in diversity and sophistication what LEARN schools had been considering or ultimately proposed.¹⁶ That hardly ends the debate about whether and how to alter legal education, to be sure. Indeed, this crowd's appreciation of the largely go-nowhere-new outcomes of this transformation movement may itself signify just how much and for how long we have needed broad and deep changes. But aren't these reasons we should hesitate before automatically disparaging this quirky crowd—these deans and faculty members—for deciding they ought to sell what they believe they already did rather than invest huge resources remaking wheels they had been using for some time?

More chastening, perhaps, these deans and faculty leaders (and plenty of my trusted friends) seem to have been astute in predicting that not much more was going to happen. For all the extraordinary efforts and contributions, including by people I personally admire greatly, perhaps we've already seen virtually all we're likely to see. Even more to the point, virtually all we're now seeing already existed or had once existed in various curricula around the country. Not just last year. And not just in the early years of the 21st Century. You can find samples of today's touted transformations—indeed, you can uncover earlier examples more ambitious in aspirations and methods than current alterations—in curricula of early decades and generations. The transformed legal education looks very much like the legal education already provided before folks caught the fever. Cynics and skeptics—the intriguingly quirky crowd—would seem to have made among the canniest bets.¹⁷

B. Fresh and Familiar Consensus and Menu of Reforms

What might explain why the much heralded transformation of law school curricula looks very much like the very same curricula in need of transformation?

For all the bickering about accuracy, for all the plotting for recog-

¹⁶ The norm even at change-leader LEARN schools remains the same: a schedule heavily weighted toward doctrinal classes taught through the case method, relying on edited appellate cases and viewing the world through a judge's eyes. See Institute for Law Teaching and Learning, <http://iaals.du.edu/educating-tomorrows-lawyers/content/educating-tomorrows-lawyers-consortium>.

¹⁷ Most overlook that Roy Stuckey, the ambitious and thorough author of *Best Practices for Legal Education*, himself assumed that, after all the action, there would be no significant change to the process for becoming a lawyer in the United States. See BEST PRACTICES, *supra* note 8, at 1.

dition, most involved in the debate, in the implementation, and in the selling of their respective transformations appear to make the same claims. And by most, I mean to include advocates for, agnostics about, and critics of fundamental change. They would appear to reflect a recent consensus, though just as obviously they have been in the process of creating or at least fortifying one. That consensus includes both a familiar portrayal of legal education (its demonstrable achievements and continuing promise) and a familiar critique (its inherent limits and notable disadvantages). At its core, this consensus:

- celebrates the triumph of teaching “thinking like a lawyer” (or “legal reasoning” or “legal analysis”) through the Socratic case method;
- bemoans the failure to cultivate more systematically and more variously training that maps the capacities implicated in the diverse roles lawyers fill across varied institutions, the education to produce lawyers as “practice-ready” as three years will permit;
- stresses the need to inform education with the most sophisticated interdisciplinary ideas;
- emphasizes the necessity to situate training within an increasingly regulated and globalized and decreasingly judge- or court-centered (particularly a Supreme Court-centered) world;
- betrays a thoroughly contradictory commitment: at once, to do *whatever law schools must* to remedy many flaws and omissions and to do *only what law schools must* to enhance a product not really much in need of improvement.¹⁸

The consensus leads, in turn, to a menu of pre-approved options for reforms. That might not at first be apparent. Choices sometimes get formulated concretely in strongly contrasting fashion. Should law school end after two years to free law students to learn how to practice or last five years in order to encompass significant chunks of interdisciplinary study and joint degree programs?¹⁹ Should some law

¹⁸ Many in legal education regard the Carnegie and Best Practices reports as the best illustration of this consensus. See CARNEGIE REPORT, *supra* note 8; BEST PRACTICES, *supra* note 8.

¹⁹ See, e.g., Preble Stolz, *The Two-Year Law School: The Day the Music Died*, 25 J. LEGAL EDUC. 37 (1973) (describing the rejection of ABA proposal that would have authorized law schools to grant degrees to students completing two years of study). A decade later, Murray Schwartz published an article that, particularly in its themes and particulars, reflected the past and foreshadowed the first ten years of 21st Century activity. Murray Schwartz, *Economics in Legal Education*, 33 J. LEGAL EDUC. 365 (1983). A decade before Stolz and two decades before Schwartz, David Cavers explored legal education in two years, only one of many penetrating recommendations he made about legal education over the course of his career. See David F. Cavers, *A Proposal: Legal Education in Two Calendar Years*, 49 A.B.A. J. 475 (1963).

schools train working lawyers and others train thinking intellectuals? Should some law schools go out of business, others adapt to new demands, and others still remain the elite we need? Should schools across the globe and campuses across a state coordinate far more actively than they do now or go it alone to offer an utterly distinctive brand of education? Should faculty continue to expend the same substantial time and energy publishing what they do today or dramatically redirect their attention to the training of law students?

Here, however, resist drawing the wrong inferences. The apparently strongly contrasting choices display conceptual possibilities regarded as “intellectually commendable” rather than practicable trajectories seen by most as professionally worthy. The proposal to permit law students either to take the bar after two years or to pay for what law schools offer in the third should have been regarded as utterly down-to-earth, worthy, ingenious. Law schools would have been required to test the attractiveness of their third year offerings to students already feeling perhaps too burdened by debt and perhaps too bored by legal education. Yet for all the popular attention the proposal received, voting insiders appeared to regard the change as attention-grabbing but, ah, as a realistic matter unacceptable.²⁰

The deeper point proves even more telling. As divergent as suggested paths might appear, they result not from contradictory portrayals and critiques but from the same consensus. That accord equips diverse institutions to choose as they must in the face of particular constraints without breaching the dominant ethos. Not every law school is resource-rich; not every law school can ignore the bar exam. The consensus authorizes practicably necessary pre-approved options on the reform menu. To be sure, awareness of constraints and achievability can be virtues. But these qualities can be only as righteous as the compact that begets the *carte de jour* (the bill of fare).

C. *Strange and Predictable*

1. *What Feels Strange*

Some who know legal education’s history find the current circumstance strange. These “old souls” find this collective performance so recognizable as to suggest a phantasm. Even those who unflappably shrug “what’s new?,” acknowledge the surreal nature of it all. And they all wonder, often out loud: Shouldn’t legal education already have experienced in the late Twentieth Century the very transforma-

²⁰ See Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 NYU J. LEGIS. & PUB. POL’Y 599 (2012). Others in earlier years examined the same option. See, e.g., Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 2 HOLY CROSS J. L. & PUB POL’Y 139 (1997).

tion now proclaimed as happening today? Weren't all the pieces and the explanations already imagined? Didn't the legal profession already appreciate that law schools had to prepare future lawyers for the diverse demands of legal work? And hadn't at least some notable law schools already begun to make necessary changes in the 1980s and early 1990s? And, in part, earlier still? In the 1970s? Again, if only in part, in some even earlier eras?

The questions these old souls pose can get way more particular: Don't members of current law school faculty carefully examine curricula offered at other schools? Don't they know what they're pushing as brand new already has been invented? Implemented? Even assessed? And if they haven't systematically inspected other curricula for any and every idea (not just those they might lift easily without citation), then why not? Haven't they read the professional and academic and popular literatures about the history of legal education? The studies commissioned by the ABA and foundations? Not just Carnegie and Best Practices.²¹ But MacCrate, where Randy Hertz and Anthony Amsterdam played prominent roles?²² And earlier reports still, some powerfully insightful and prescient, especially those principally authored by Alfred Z. Reed?²³ And haven't they studied biting and exasperated responses to these studies, say like John Schlegel's to MacCrate?²⁴ And haven't they studied tremendously knowledgeable and refreshingly forthright appraisals of the likelihood of implementing MacCrate's recommendations, say like John Elson's?²⁵ And deep critiques of Carnegie, say like Anthony Alfieri's and Kristen Holmquist's?²⁶ Or friendly elaborations offered separately by Commission members, say like Carnegie's Judith Wegner's?²⁷

²¹ See CARNEGIE REPORT, *supra* note 8; BEST PRACTICES, *supra* note 8.

²² See ABA SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (REPORT ON THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) (1992) [hereafter cited as “The MacCrate Report”].

²³ See ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW (1921); ALFRED Z. REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA (1928).

²⁴ Schlegel's assault on McCrate qualifies as biting and exasperated, as he would himself proudly acknowledge. See John Henry Schlegel, *Law and Endangered Species: Is Survival Alone Cause for Celebration?*, 28 IND. L. REV. 391 (1995). So, too, does Pierre Schlag's. See Pierre Schlag, *Values*, 6 YALE J.L. & HUMAN. 219, 229-31 (1994).

²⁵ See John S. Elson, *The Regulation of Legal Education: The Potential for Implementing the MacCrate Report's Recommendation for Curricular Reform*, 1 CLIN. L. REV. 363 (1994). Separable in its approach and yet of similarly high quality in evaluating MacCrate's possible consequences is Beverly Balos, *Conferring on the MacCrate Report: A Clinical Gaze*, 1 CLIN. L. REV. 349 (1994).

²⁶ See Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073 (2009); Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353 (2012).

²⁷ See Judith Welch Wegner, *Reframing Legal Education's 'Wicked Problems,'* 61

Haven't current law school faculty across the country at least read the better law review articles, reports, and books about legal education? Some written by past prominent figures? The obvious roll call includes Jerome Frank and Karl Llewellyn.²⁸ Less obvious and perhaps even more powerful nominations as "must-reads" would include John Wigmore, Felix Cohen, William Rowe, John Bradway, David Cavers, and Rose Elizabeth Bird.²⁹ And certainly potently knowledgeable and provocative are both Frank Michelman's majority report and Duncan Kennedy's dissent to the 1982 Harvard Law School Report of the Committee on Educational Planning and Development.³⁰

How about *The Happy Charade*, the frank empirical study co-authored by Mitu Gulati, Robert Sockloskie and Richard Sander?³¹ And *The Language of Law School: Learning to "Think" Like a Lawyer*, Elizabeth Mertz's grounded empirical exploration of the modern Socratic case method?³² Or more recent articles penned by notable modern scholars Laura Kalman, Harry Edwards, Bill Ong Hing, Lani Guinier, Susan Sturm, Carrie Menkel-Meadow, Edward Rubin, John Schlegel, Margaret Berry, John Dubin, and Peter Joy, to name just some?³³

RUTGERS L. REV. 867 (2009).

²⁸ See, e.g., Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); KARL N. LLEWELLYN, *The Study of Law as a Liberal Art*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 375 (1962).

²⁹ See John H. Wigmore, *Nova Methodus Discendae Docendaeque Jurisprudentiae*, 30 HARV. L. REV. 812 (1916); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); William V. Rowe, *Legal Clinics and Better Trained Lawyers - A Necessity*, 11 ILL. L. REV. 591 (1917); John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173 (1930); David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449 (1943); Cavers, *supra* note 19; David F. Cavers, *A Proposal Renewed: Legal Education in Two Calendar Years*, 66 A.B.A. J. 973 (1980); Rose Elizabeth Bird, *The Clinical Defense Seminar: A Methodology for Teaching Legal Process and Professional Responsibility*, 14 SANTA CLARA LAWYER 246 (1974).

³⁰ For the ambitious report, authored by Michelman, that aimed to trigger broad curricular reform and shaped these experimental sections and for the Kennedy dissent, see REPORT OF THE COMMITTEE ON EDUCATIONAL PLANNING AND DEVELOPMENT, HARVARD LAW SCHOOL, May 1982 (hereafter cited as "MICHELMAN REPORT").

³¹ See Mitu Gulati, Robert Sockloskie & Richard Sander, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235 (2001).

³² See ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK" LIKE A LAWYER* (2007).

³³ For only some notable contributions, see LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); LANI GUINIER, *MICHELLE FINE & JANE BALIN, BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLIN. L. REV. 1 (2000); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J. L. & GENDER 247 (2006); Carrie Menkel-Meadow, *Taking Law and ___ Really*

Is that too much to expect of law school faculty contemplating or implementing change? Or of members of the ABA and state bars obligated to insure the best imaginable education for future lawyers? After all, some among those deans and faculty members wagering on at most status-quo-plus changes (minor tinkering billed as transformation) have made a point of skimming just such pieces precisely to test their own instincts—or at least to confirm their own inclinations—about just how much to expect from the current reform movements in legal education. They studied the equivalent of the *Daily Racing Form* (“giving horseplayers the tools to win big since 1894”), before laying down their bets.

Certainly everyone has at least read Tony Amsterdam’s *Clinical Legal Education—A 21st Century Perspective*,³⁴ declare the old-timers. Haven’t they? Amsterdam is about as respected as you can be, both by practicing lawyers and by legal academics. And his *Clinical Legal Education* essay is, what, about six pages in length? Writing in 1984, but for the coming century’s projected sensibilities, Amsterdam depicts early 21st Century law schools as already having put to rest the tired and tiring dichotomies drawn between “skills” and “theory” and the rest of the familiar litany.

In Amsterdam’s imagined rendering, law schools across the United States at the beginning of the 21st Century already offer an education as effectively ambitious as the actual challenges facing lawyers are complex. In place of Langdell’s universe of big-classroom Socratic exploration of edited appellate judicial opinions, Amsterdam

Seriously: Before, During and After “The Law”, 60 VAND. L. REV. 555 (2007); Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609 (2007). For a line of important literature stressing or revolving around gender, race, disabilities, sexual orientation, age, class, see, e.g., Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993); GUINIER, ET AL., *supra*; Sari Bashi & Maryana Iskander, *Why Legal Education is Failing Women*, 18 YALE J.L. & FEMINISM (2006); Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483 (2007); Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U. J. GENDER SOC. POL’Y & L. 511 (2005); Bonita London, Vanessa Anderson & Geraldine Downey, *Studying Institutional Engagement: Utilizing Social Psychology Research Methodologies to Study Law Student Engagement*, 30 HARV. J.L. & GENDER 389 (2007). For my own earlier published contributions, both frontally challenging conventional legal education and describing a counter vision already implemented through sequenced and coordinated curricular alternatives introduced at Stanford beginning in the 1980s, see Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989) [hereafter cited as López, *Anti-Generic Legal Education*]; Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989) [hereafter cited as López, *Work We Know So Little About*].

³⁴ Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

conjuges a curriculum that—like the work of the best lawyers—both goes radically beyond the opinions of appellate judges and bores more probingly into the full rhetorical and institutional dynamics that lead to published judicial opinions.³⁵

Amsterdam may have been wishing out loud more than predicting with confidence. Or he may well have been trying seductively to help realize the future as he would like to see it. Still, in his essay, he's anything but some "loony futurist." He is not throwing out possibilities—not a single one—beyond what already in 1984 had been introduced into various curricula. And he has good reason to know. He helped develop such courses and sequenced programs, in certain illustrative formats, during his years at Stanford and then in more comprehensively programmatic fashion during his lengthy tenure at NYU.³⁶

Reading *Clinical Legal Education—A 21st-First Century Perspective* in 2017 produces the effect of setting what might have been against what is. What explains the gap between Amsterdam's buoyant 1984 projection and what happened in fact over the ensuing three decades? How can law schools have advanced so much less than he envisioned? Especially when some had already accomplished so much? Especially when strands of allies at different institutions had already implemented changes that looked as if they had become a permanent part of legal education? How could law schools have traveled backwards? Still debate what Amsterdam regarded three decades ago as already tired and tiring?

But the current transformation environment can strike old-souls as even more mystifying still. How can quoted faculty members no longer appear even to remember—much less acknowledge—that in the 1970s and 1980s and early 1990s, law schools can be fairly described as having fully justified the future readily imagined in Amsterdam's essay? Mustn't they know that:

- At UCLA, in the late 1970s and early 1980s, with Dean William Warren's and Dean Susan Prager's enthusiastic encouragement, a team of law professors built one section of the first year curriculum around lawyering rather than law, introduc-

³⁵ This interpretation may be more what I am reading into the essay than what Amsterdam aims to convey—though I don't believe so, in part from conversations and in part from other related work. See, e.g., Anthony Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992); Anthony Amsterdam, *Telling Stories and Stories About Them*, 1 CLIN. L. REV. 9 (1994); Anthony Amsterdam et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLIN. L. REV. 1 (2005).

³⁶ For just some of the coverage of Amsterdam, see Nadya Labi, *A Man Against the Machine*, NYU LAW MAGAZINE (2007), available at <http://blogs.law.nyu.edu/magazine/2007/a-man-against-the-machine/>; Jeffrey Toobin, *Comeback*, THE NEW YORKER, Mar. 26, 2007, available at <http://www.newyorker.com/magazine/2007/03/26/comeback-8>.

ing life-like simulated problems, not just cutting across but bouncing far outside doctrinal areas, through everything from transactional to litigation work.³⁷

- At NYU, beginning in 1981, Anthony Amsterdam and a gifted team built a synchronized interdisciplinary three-year lawyering sequence (Lawyering, Simulated Clinics, Live Clinics) that, over the years, has grown even more sophisticated and remains, in 2017, what almost all other schools still aim to achieve (whether they acknowledge it or not).³⁸
- At Harvard, in the Fall of 1983, with the backing of Dean James Vorenberg, and influenced by Gary Bellow and Frank Sander and Al Sachs, one first year section of students led by a team of law professors shared “bridge periods” where materials and problems straddled doctrinal boundaries (intent, liability) and intellectual traditions (realists, formalists, critical legal studies, law and economics).³⁹
- At Stanford, from the mid-1980s to the mid-1990s, strongly supported by Dean John Hart Ely, two different teams of faculty, administrators and students developed and implemented ambitiously coordinated and sequenced three-year specializations, one focused on Lawyering for Social Change and the other on Corporate Transactional Practice, combining interdisciplinary literatures, life-like simulations, and live-client clinics.⁴⁰
- In Fall 1983, the brand new law school sponsored by the City University of New York (CUNY) opened its doors, the product of remarkable planning by Howard Lesnick and Charlie Halpern and John Farago (and still others), dedicated to producing a superior public interest lawyer through a distinctively far-reaching set of ideas and methods, a collective approach to the law school and lawyering enterprise.⁴¹

³⁷ See, e.g., Alison Anderson, *Lawyering in the Classroom: An Address to First Year Students*, 10 *NOVA L. J.* 271 (1986); Gerald P. López, *Teaching Lawyering as What Should Be at the Heart of All First-Year Doctrinal Courses* (unpublished manuscript 1982).

³⁸ For short sketches of the NYU creation and development, see, e.g., NYU Law, *The Trajectory of Legal Education*, <http://www.law.nyu.edu/experientiallearninglab/methods/origins> (last visited Jan. 30, 2017); *Clinics in the Spotlight*, NYU LAW MAG. (2003), available at <http://blogs.law.nyu.edu/magazine/2003/clinics-in-the-spotlight/>; Clint Willis & Suzanne Barlyn, *Bringing the Law to Life: NYU's Clinical Program Helps Students Change the World—One Case at a Time*, NYU LAW MAG. 21 (Aut. 2007), available at <https://is-suu.com/nyulaw/docs/2007>.

³⁹ See Todd D. Rakoff, *The Harvard First-Year Experiment*, 39 *J. LEGAL EDUC.* 491 (1989).

⁴⁰ See López, *Anti-Generic Legal Education*, *supra* note 33.

⁴¹ See Howard Lesnick, *The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 *NOVA L. J.* 633 (1985); Howard

- And, of course, starting in the late 1960s, clinical education at diverse institutions achieved notable success, especially in the face of limited resources, all while Northeastern continued its distinctive approach to “cooperative legal education,” all while unsung stars like Myron Moskowitz (carrying forward the tradition of others like David Cavers, Addison Mueller, and Frank Sander) proselytized for replacing the case method with the problem method, and so much more still.⁴²

On both coasts, and in the heartlands, old-timers share their astonishment in booming hallway voices and whispered asides during faculty meetings. About activities at their own institutions: “Haven’t we read this memo before?” “Decades ago?” “Was that faculty discussion as bizarre for you as it was for me?” “Could you have scripted 80%? Or more?” And about the hyperbole almost routinely used at schools other than their own to announce new courses and programs: “Whose leg are they pulling?” “Who believes them?” “Do they believe themselves?” “Do they really not know [X] has been doing that for 25 years?” “Do they really not know I did that over 30 years ago?” “What’s going on here?”

What may be most important to note is the diversity of those weirded out by the current circumstance. It’s not only that they range from elders to youngsters, across gender, racial, LGBT, class, and ideological boundaries. Those asking these questions and making these comments include proponents and opponents of any significant change in legal education. And they include agnostics too, both those now exhausted by earlier efforts to change legal education and those who decided long ago to spend their considerable talents and limited energy on matters other than curricular reform.⁴³ What they all share is the knowledge that they have been here before. Here meaning where legal education is in 2017. And what they cannot quite figure is why, so overwhelmingly, others behave as if they have not. It’s a film

Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157 (1989); Charles Halpern, *A New Direction in Legal Education: The CUNY Law School at Queens College*, 10 NOVA L. J. 549 (1985); Vanessa Merton, *The City University of New York Law School: An Insider’s Report*, 12 NOVA L. REV. 49 (1987).

⁴² For an historical sketch of clinical legal education, see Barry et al., *supra* note 33. For a sample of Moskowitz’s thoughtful campaign, see Myron Moskowitz, *Beyond the Case Method: It’s Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992). For the history and mission of Northeastern University School of Law, see <http://www.northeastern.edu/law/about/history.html> (last visited Jan. 31, 2017). For a glimpse of the creative unrest of these years, see John C. Weistart, *The Law School Curriculum: The Process of Reform*, 36 DUKE L.J. 317 (1987).

⁴³ The literature now and then speaks to reasons some stand by and watch—including just how hard transforming legal education turns out to be. See, e.g., John Henry Schlegel, *A Damn Hard Thing To Do*, 60 VAND. L. REV. 371 (2007).

Kubrick would have relished making.

Some of today's deans and faculty leaders seem to be saying there is a difference. A huge difference—indeed, a global shift. And they often describe this shift, it appears, aiming both preemptively to immunize their hyperbole from ridicule and to bring everyone up to speed about what may still not be commonly appreciated. What stirs today's revolution, they insist, differs markedly from what propelled earlier curricular innovations. Today's clients want to know something more than what the law says. They want to know what might help them understand, frame, and address what they're dealing with. Facing this new reality, domestically and internationally, law schools must come up with a pedagogical mission—and related clusters of courses—to educate graduates to meet the transformed demands now imposed on all lawyers working across institutions and roles.⁴⁴

But talk about getting lost in your own fictions. Much may well have changed about the work of lawyers.⁴⁵ But many clients always have directly asked for more than “what the law says”—and far more clients still always desired help in dealing with the mess they're in, the transaction they need to design, the institution they must rebuild. And some lawyers always have regarded those demands as centrally defining their practice.⁴⁶ And some faculty—through courses and programs

⁴⁴ See, e.g., Larry Kramer, *Stanford Law School Dean: We Aim To Teach Our Students Not Just to Spot Problems, But to Solve Them*, A.B.A. J. LEGAL REBELS (Mar. 29, 2012), available at http://www.abajournal.com/legalrebels/article/stanford_law_school_dean_larry_kramer/; Elena Kagan, *The Harvard Law School Revisited*, 11 GREEN BAG 2D 475 (2008), available at www.greenbag.org/v11n4/v11n4_kagan.pdf.

⁴⁵ For a standard slice of the large professional and scholarly literatures, see, e.g., STEPHEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* (2013); JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1994); JOHN P. HEINZ, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005); SOL LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994); JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSE TO CHANGE* (2013); NEW YORK CITY BAR ASSOCIATION TASK FORCE ON NEW LAWYERS IN A CHANGING PROFESSION, *DEVELOPING LEGAL CAREERS AND DELIVERING JUSTICE IN THE 21ST CENTURY* (2013), available at <http://www2.nycbar.org/pdf/developing-legal-careers-and-delivering-justice-in-the-21st-century.pdf>; RICHARD E. SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2010); RICHARD E. SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013); William D. Henderson, *Letting Go of Old Ideas*, 20 MICH. L. REV. 1111 (2013); David B. Wilkins, *Making Global Lawyers: Legal Practice, Legal Education, and the Paradox of Professional Distinctiveness*, in *TRIBUNA PLURAL LA REVISTA CIENTIFICA: ACTO INTERNACIONAL: GLOBAL DECISIONMAKING* (Reil Academia de Doctors, 2014).

⁴⁶ In the world of corporate lawyers, the modern scholarly literature theoretically depicting what transactional lawyers do often is regarded as beginning with the knowledgeably sophisticated contributions of Ron Gilson. See, e.g., George W. Dent Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279 (2009). For the seminal piece by Gilson, see Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE. L.J. 239 (1984). It would be wrong, however, not to include the influen-

and published work—have depicted lawyers working with individual, group, and institutional clients who want lawyers to help deal with the diverse circumstances in which they find themselves entangled.⁴⁷ And these faculty have regarded law students as deserving a legal education that trains them to do such work well, both upon graduation and as demands mutate over the course of their careers.⁴⁸ And those

tial contributions of James Freund to the professional literature, an acknowledgment Gilson would enthusiastically endorse. See JAMES FREUND, *ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS* (1975).

In the broadly defined world of public interest and clinical legal education and in the overlapping realms of “poverty law” and “criminal practice,” the modern scholarly literature describing what lawyers do and prescribing what they should do originates with figures such as Anthony Amsterdam, Gary Bellow, David Binder, Bea Moulton, Jean Cahn, Edgar Cahn, Susan Price, Stephen Wexler, Marty Guggenheim, and Randy Hertz. For only a sample of their publications, see ANTHONY AMSTERDAM, *TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES* (1988); RANDY HERTZ, ANTHONY AMSTERDAM, MARTIN GUGGENHEIM, *TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES* (2014); GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS, PROBLEM SUPPLEMENT, CRIMINAL* (1978); GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS, PROBLEM SUPPLEMENT, CIVIL* (1978); DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 *YALE L.J.* 1317 (1964); Edgar S. Cahn & Jean C. Cahn, *Power To the People or the Profession?—The Public Interest in Public Interest Law*, 79 *YALE L.J.* 1005 (1970); Stephen Wexler, *Practicing Law for Poor People*, 79 *YALE L.J.* 1049 (1970).

⁴⁷ In addition to Gilson’s and Freund’s influence on curricular offerings, see *supra* note 46, it is impossible for me not to mention that, even in the modern canon, we ought not forget the teaching and writing of remarkable scholar lawyers like Alison Anderson, William Klein, Frank Sander, David Horowitz, whose various courses (“Deals,” “Taxation,” “Corporate Transactions,” to name some) amounted to simulated clinics in the 1970s and 1980s, complete with methods and materials most regard as of far more recent vintage and introduced only when in recent years law schools acknowledged “transactions” as important to education and clinical courses. See, e.g., Alison Anderson, *Lawyering in the Classroom: An Address to First Year Students*, 10 *NOVA L.J.* 271 (1986); WILLIAM KLEIN, *BUSINESS ORGANIZATION AND FINANCE* (1980); Frank E. A. Sander, *Learning by Doing*, 25 *HARV. L. SCH. BULL.*, Apr. 1974, at 16 (tax workshop); DAVID R. HERWITZ, *BUSINESS PLANNING: MATERIALS ON THE PLANNING OF CORPORATE TRANSACTIONS* (2d ed. 1984). Having worked with Klein, Sander, Gilson, and Anderson, the transactional work central to my Economic Development Clinic reflected lessons they imparted, in the clinic’s early incarnation at Stanford and later at UCLA and NYU. See Gerald P. López, *Economic Development in the “Murder Capital of the Nation,”* 60 *TENN. L. REV.* 685 (1993). In the broadly defined worlds of practice included within the sweep of clinical education, in addition to Amsterdam, Bellow, and Moulton, we must certainly prominently salute those like William V. Rowe, A. Z. Reed, and John S. Bradbury who early in the 20th Century insisted on the need for clinical education and often put the idea into action. See, e.g., Rowe, *supra* note 29; REED, *TRAINING FOR THE PUBLIC PROFESSION*, *supra* note 23; Bradway, *supra* note 29. And with equal admiration we must salute other modern clinicians, beginning in the 1960s and 1970s, who resurrected the intellectual ambition and passion of Rowe, Reed, and Bradbury, including people like Paul Boland, Paul Bergman, Paula Galowitz, William Graham, Chester L. (Chet) Mirsky, Elliot Millstein, Patrick Patterson, Harriet Rabb, and Anne Shalleck to acknowledge only some of those who contributed.

⁴⁸ Beginning decades before 2017, a sizeable cluster of law faculty, mainly clinicians

and some prominent non-clinicians, already had formulated their training of students around the appreciation of the empirical fact that clients explicitly ask for and most often want far more than “what is the law” from the lawyers with whom they work. For just a small sample, see, e.g., William Pincus, *Educational Values in Clinical Experience for Law Students*, CLEPR NEWSLETTER, Vol. II, No. 1, Sept. 1969, reprinted in CLINICAL EDUCATION FOR LAW STUDENTS 78 (Council on Legal Educ. for Prof. Resp. ed., 1980); RANDY HERTZ, ANTHONY G. AMSTERDAM & MARTY GUGGENHEIM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES (2014)(1991); Gary Bellow, *Steady Work: A Practitioner's Reflection on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996); Gary Bellow & Jeanne Charn, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L.J. 1633 (1995); GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978); Symposium, *The 25th Anniversary of Gary Bellow's and Bea Moulton's The Lawyering Process*, 10 CLIN. L. REV. 1 (2003); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992); Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL L.J. 687 (1995); John S. Elson, *The Regulation of Legal Education: The Potential for Implementing The MacCrate Report's Recommendation for Curricular Reform*, 1 CLIN. L. REV. 363 (1994); Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529 (1995); Bill Ong Hing, *Nonelectoral Activism in Asian Pacific American Communities and the Implications for Community Lawyering*, 8 ASIAN PAC. AM. L.J. 246 (2002); Hing, *supra* note 33; Bill Ong Hing, *The Emma Lazarus Effect: A Case Study in Philanthropic Revitalization of the Immigrant Rights Community*, 15 GEO. IMMIGR. L.J. 47 (2000); Bill Ong Hing, *Coolies, James Yen, and Rebellious Advocacy*, 14 ASIAN AM.L.J.1 (2007); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLIN. L. REV. 147 (2000); Dale Minami, *Asian Law Caucus, Experiment in an Alternative* (1980) (unpublished manuscript, on file with author); Charles J. Ogletree, *The Quiet Storm: The Rebellious Influence of Cesar Chavez*, 1 HARV. LATINO L. REV. 1 (1994); Charles J. Ogletree, *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81 (1995); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLIN. L. REV. 427 (2000); Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395; Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLIN. L. REV. 541 (2006); Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383 (2009); Ascanio Piomelli, *Rebellious Heroes*, 23 CLIN. L. REV. 283 (2016); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994); Dean Hill Rivkin, *Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed*, 66 TENN. L. REV. 467 (1999); Ann Shalleck, *The Feminist Transformation of Lawyering: A Response to Naomi Cahn*, 43 HASTINGS L.J. 1071 (1992); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993); Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019 (1997); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996); Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUD. LEG. ETHICS 199 (1999); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996); Kim Taylor-Thompson, *Taking It To the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153 (2004); Lucie E. White, “Democracy” in Development Practice: *Essays on a Fugitive Theme*, 64 TENN. L. REV. 1073 (1997); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1988); Lucie E. White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992); Lucie E. White, *Representing “The Real Deal,”* 45 U. MIAMI L. REV. 271 (1990–91); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Lucie E. White, *To Learn and*

weirded out by the past decade know enough about all this to ask one another and to ask me exactly where the surreal may end, may bump up against a limit, may fall over an edge.

And they're right to wonder, since it's not at all obvious. It's bad enough to caricature clients and lawyers, to pay no attention to what has gone on at schools other than your own, to know very little indeed about legal education more generally. Right? But what exactly explains why some of today's deans and faculty leaders wipe out their own institution's history? And yet they do, employing the standard maneuvers of untrustworthy historians, becoming, say, William H. Prescott-like in writing what they prefer to feature, ignoring all else, imposing their own views on and about all those before them, including indigenous peoples.⁴⁹ Even at schools with rich and provocative pedagogical pasts, publicity about the transformed legal education almost never cites as precedent the "pre-transformed" curricula. Is it an unwritten rule that there is to be no open celebration of earlier efforts that anticipated (indeed, that already may have once realized) where law schools now insist they, for the first time ever, are now headed?

Do today's leaders not know their own institution's histories? Or current curricula? Is the need to project being at the forefront of the current transformation so great that law school spokespeople must neatly disregard earlier (and often significant) contributions made by their own co-workers? Earlier generations? Is this the logic of the new propaganda? A cost of creating the illusion of pedagogical progress? Of intellectual creativity? Is all this roughly the equivalent of Vanilla Ice (and his producer) obviously stealing the base line from David Bowie and Freddie Mercury's "Under Pressure" for his "Ice, Ice, Baby," unconvincingly pretending the opening was entirely original, and, to make a bad situation worse, downgrading a great hook by

Teach: Lessons from Driefontein on Lawyering and Power, 1988 WIS. L. REV. 699 (1988). For especially illuminating scholarship produced by clinicians and practitioners as part of this Symposium, see Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 CLIN. L. REV. 5 (2016); Stephen Carpenter, *Family Farm Advocacy and Rebellious Lawyering*, 24 CLIN. L. REV. __ (forthcoming 2017); Eduardo R.C. Capulong, *Client as Subject: Humanizing the Legal Curriculum*, 23 CLIN. L. REV. 37 (2016); Patience Crowder, *What's Art Got to Do with It: A Rebellious Lawyer Mindset in Transactional Practice*, 23 CLIN. L. REV. 53 (2016); Tara Ford, *Pegasus Legal Services for Children Taking Stock of a Rebellious Non-Profit Practice in New Mexico*, 23 CLIN. L. REV. 107 (2016); Martha L. Gómez, *The Culture of Non-Profit Impact Litigation*, 23 CLIN. L. REV. 635 (2017); Bill Ong Hing, *Contemplating a Rebellious Approach to Representing Unaccompanied Immigrant Children*, 23 CLIN. L. REV. 167 (2016); Brenda Montes, *A For-Profit Rebellious Immigration Practice in East Los Angeles*, 23 CLIN. L. REV. 707 (2017); Daria Fisher Page, *Etta & Dan: Seeing the Prelude to a Transformative Journey*, 23 CLIN. L. REV. 251 (2016); Shauna Marshal, *Rebellious Deaning*, 24 CLIN. L. REV. __ (forthcoming 2017).

⁴⁹ See, e.g., ALEJANDRA C. ELENES, *TRANSFORMING BORDERS: CHICANA/O POPULAR CULTURE AND PEDAGOGY* (2011).

making it part of a miserable song?⁵⁰

2. *What Feels Predictable*

What's so surprising? That's what many would ask, including some of the most astute observers of legal education, including at least some of the old souls who find themselves so puzzled by the déjà vu quality so few seem to acknowledge. And the explanation for why these folks find all this so predictable (even if, for some, surreal) combines nonchalance and bite. Legal education regularly resists change, they would insist, change of any sort. Calls for transformation get deflected, delayed, and ultimately diluted.⁵¹ Inertia plays its role, as does lethargy. But the real deal is straightforward: Too many have too much at stake in the current arrangements (jobs, status, power, dollars, and more) to overturn the very systems (law schools, casebook publishers, commercial bar outfits, state bars, the ABA and AALS, and more) that together provide them material and professional sustenance.⁵²

After all, these observers would note, mere calls for fundamental change upset many, and the likelihood of realizing any major alteration upsets more still, including some of very same people urging an upheaval. Most students prefer, if only half-consciously, to combine critiques of their education with a desire to maintain a status quo that has rewarded their past efforts and touts their future professional success. Alumni often insist training ought to leave graduates as “practice-ready” as possible while balking at the implication that they themselves may not have been well-trained. Staffers characteristically pay little attention to proposals, then immediately raise implementation concerns if plans appear likely to gain faculty approval.

Yet, as these observers would be the first to stress, and as many prominent mainstream scholars have emphasized in print, all these constituencies and still more historically tend to matter far less than faculty and deans.⁵³ Insiders to confidential faculty exchanges have

⁵⁰ For an interview of Vanilla Ice initially denying the assertion, only later to settle a lawsuit, by all accounts for a substantial sum, see https://www.youtube.com/watch?v=a-1_9-z9rbY.

⁵¹ See López, *Anti-Generic Legal Education*, *supra* note 33.

⁵² For a sample of literature exploring overlapping systems, see RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013); LEGAL EDUCATION IN THE DIGITAL AGE (Edward Rubin ed., 2012); W. Warren H. Binford, *Envisioning a 21st-Century Legal Education*, 41 WASH. UNIV. J.L. & POL'Y 157 (2013); Douglas W. Lind, *An Economic Analysis of Early Casebook Publishing*, 96 LAW LIBR. J. 1 (2004).

⁵³ Influential mainstream scholars, including the likes of Roger Cramton and Geoffrey Hazard, focused on faculty power to determine what and how law schools teach and recurring faculty opposition to much needed and sophisticated curricular reform. As Hazard put it: “The blunt fact is that a law school faculty largely determines the education that the

always known many faculty routinely refuse to vote for institutional greatness over career interests. And those who witness faculty testimony at state bar association hearings and ABA sessions would agree. But this disposition to favor individual career concerns over institutional well-being appears these days to include larger numbers, perhaps significantly larger numbers, than ever before. Because this tendency typically gets passed along through anecdotal reports, and because sources almost always insist on anonymity, most defenders of the status quo shrug off, dismiss, deny such empirical claims. “Not us,” they would and do insist, time and again.

Yet the contemporary dynamics within legal education and the profession no longer remain so hidden from view. Particularly in recent years, emulating the work of earlier generations of whistleblowers, scholars like Brian Tamanaha, William Henderson, and Paul Campos have excavated, described and analyzed the inner workings of law schools and the other systems to which they link.⁵⁴ Though from distinctive perspectives and through dissimilar rhetorical choices, these scholars illuminate from the inside various dimensions and details of legal education and the legal profession, particularly how tenured faculties and deans benefit most of all from the status

school provides.” Geoffrey C. Hazard, *Competing Aims of Legal Education*, 59 N.D. L. REV. 533, 547 (1983). For similarly strong views, in the same and earlier eras, see Roger Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321 (1982); Frank, *supra* note 28.

⁵⁴ See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); PAUL CAMPOS, *DON'T GO TO LAW SCHOOL (UNLESS): A LAW PROFESSOR'S INSIDE GUIDE TO MAXIMIZING OPPORTUNITY AND MINIMIZING RISK* (2012). For a sample of William Henderson's recent publications, see William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461 (2013); William D. Henderson, *Law Firm Strategies for Human Capital: Past, Present, Future*, in *STUDIES IN POLITICS AND SOCIETY* (Austin Sarat, ed., 2011); William D. Henderson & Andrew P. Morriss, *How the Rankings Arms Race Has Undercut Morality*, NAT'L JURIST, Mar. 2011; William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms*, 22 GEO. J. LEG. ETHICS 1395 (2009); Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in U.S. News & World Reports Law School Rankings*, 83 IND. L.J. 791 (2008); Andrew P. Morriss & William D. Henderson, *The New Math of Legal Education*, 12 YOUNG LAW. 1, Jul. 2008; Marc Galanter & William D. Henderson, *The Elastic Tournament: The Second Transformation of the Large Law Firm*, 60 STAN. L. REV. 816 (2008); William D. Henderson, *How the “Cravath System” Created the Bi-Modal Distribution*, Legal Profession Blog, July 18, 2008, http://lawprofessors.typepad.com/legal_profession/2008/07/how-the-cravath.html; William D. Henderson, *Part II: How Most Law Firms Misapply the “Cravath System”*, Legal Profession Blog, July 29, 2008, http://www.elsblog.org/the_empirical_legal_studi/2008/07/how-most-law-fi.html; William D. Henderson & Andrew P. Morriss, *What Law School Rankings Don't Say About Costly Choices*, NAT'L L.J., Apr. 16, 2008; William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163 (2005). For a sample of the range of others commenting these days, and in the past, on such matters, see, e.g., RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* (2016).

quo at the expense of everyone else. You do not have to agree with the diagnoses offered by Tamanaha, Henderson, and Campos, much less their solutions. Yet we should appreciate their respective and collective roles in focusing attention, from the perspectives of sharp-minded insiders, on matters of importance typically obscured from view.⁵⁵

Most faculty members adamantly deny the charge that their vested career interests, rather than the institution's future health, drive their voting. The very best of these women and men express pride in how and what they teach, an openness to thought-through and feasible curricular proposals, and a desire to improve legal education. Whatever their chronological age, they regard themselves as combining the strength of estimable traditions and the curiosity pivotal to 21st Century demands. Especially through their commitment to research, they're proud to be part of an institution dedicated to educating future lawyers prepared to serve global clients with evolving needs and aims.

At least some faculty, though, openly concede anxiety about this past decade's talk of transformation. They would rather dodge the possibility that they may not be equipped to participate in a freshly conceived educational program. Only a small number could readily envision having to fundamentally retool. Instead they would like to think their existing capacities would fit somewhere valuably even within a dramatically different law school. Some privately concede this may amount to grandfathering them in for the remainder of their careers. The great majority, however, cannot readily conceive of law schools changing so much that their pedagogical expertise (their current courses as they now teach them) would still not prove necessary, even pivotal, to the well-rounded education of law students.

Meanwhile, today's deans avoid—and perhaps dread—any adjustments that consume energy, generate friction, and threaten financial success. Well, they do unless they already have come to believe the very success of their deanship requires significant curricular changes, even of a sort they themselves might otherwise condemn. Imagining history's judgment certainly has moved leaders of all sorts across public, private, and civic divides to enthusiastically endorse what they otherwise oppose. Some of the changes we have seen in

⁵⁵ Henderson's and Tamanaha's work typically evoke respect, from inside and outside university boundaries. Campos' written views appear to be popular among students and perhaps far less well received by law school faculty and deans. Especially hostile to Tamanaha and Campos among law faculty has been Brian Leiter. Some flavor of these exchanges can be found in this Balkin Blog response by Tamanaha: Brian Tamanaha, *Leiter's Contradictory Conclusion*, BALKINIZATION (July 30, 2013), <https://balkin.blogspot.com/2013/07/leiters-contradictory-conclusion.html>.

legal education in the past decade reflect what at least several deans regard as jumping ahead, and not just catching up with, market realities. They have their legacy in mind.

Even when deans and a voting majority of faculty back curricular additions and amendments of the sort we've seen over the past decade, unsurprised observers see virtually all the changes as proving their point. Law schools, they repeat, both want to announce suitably impressive programmatic proposals and to make certain little upsets the status quo they have created, sustained, and continue to benefit from. If you're going to change, goes this line of thinking, then you certainly stick with what already works. Whatever unfavorable has been said about legal education in the past decade, most laud the capacity of law schools to teach "thinking like a lawyer" (what the Carnegie Report calls the "cognitive").⁵⁶ Stick with the first-year Socratic case method courses and maintain as many as possible of these same courses in the second and third years.

And if you're going to add anything to what law school already does superbly, goes this wisdom, then you add what will hold up intellectually, prove institutionally administrable, and professionally vendible. Adding courses on global/comparative dynamics, statutory/regulatory institutions, and the diverse roles lawyer play in modern life (transactional, human rights, regulators, mediators—to name only some) makes complete sense precisely because they've proven successful elsewhere. And to satisfy calls for transformation, you ordain your changes brand new, without antecedents, not just in legal education generally but even at your own institution. Unsurprised observers ask: How does this in any way endanger the vested interests of tenured-track faculty and deans? What's the big deal?

When pushed, those offering this explanation focus principally on two overlapping forces. It's always incredibly difficult to change the status quo, they all say. And, most often with a discernible lament, they stress the modern law school obsession with commercial rankings, especially U.S. News.⁵⁷ These two forces—inertia and rankings—unite, of course, strengthening one another. Together they tilt law schools mulishly toward only those adjustments that satisfy ranking and marketing aims rather than toward significantly improving educa-

⁵⁶ See CARNEGIE REPORT, *supra* note 8, at 188.

⁵⁷ The literature on commercial rankings of law schools has grown very large indeed, most condemning and opposing, including virtually all deans as early as 2005. See LAW SCHOOL DEANS SPEAK OUT ABOUT RANKINGS (Law School Admission Council 2005), available at <http://www.lsac.org/pdfs/2005-2006/RANKING2005-newer.pdf>. For one of the early influential articles finding praiseworthy aspects and prompting later debates about how best to rank law schools, see Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403 (1998).

tion. A force central to legal education's history and another pivotal in legal education's contemporary look combine to produce what we now experience and to explain why the much acclaimed transformation looks, in 2017, almost entirely like the familiar tinkering of the past.

The same two forces, say these unfazed observers, account for the exaggeration (and, yes, deception) in today's press releases and websites and quotes and speeches. Law schools have always engaged in questionable commercial practices. Going all the way back to the late 19th and early 20th Century, Harvard hawked the "revolutionary" Socratic case method by ignoring other forms of the case method and other ambitious legal education programs.⁵⁸ The audacious advertising that took hold in the late 20th Century—especially after NYU School of Law, led by then Dean John Sexton, showed how U.S. News could serve as an exploitable resource and not just a time-consuming gauntlet of reporting requirements—is simply an evolutionary extension of those early years. Though other deans may lack Sexton's gifts, they now routinely use his playbook: If you think you've got the goods, use U.S. News to ascend; if not, avoid descent.⁵⁹ At all costs, though, everything is global and brand-new and communal and entrepreneurial and exciting as can be.

In this environment, why wouldn't law schools now claim routinely to offer what legal education in the United States never before has made available? And why wouldn't law schools entirely ignore immediate and past predecessors of today's transformed curricula? Everyone embellishes. Everyone knows others embellish. Exagger-

⁵⁸ In a 1921 publication for the Carnegie Foundation, Alfred Reed challenged what had been, especially through Ames and Pound, Harvard's self-serving account of the originality of its contributions to legal education. See REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW, *supra* note 23. Five decades later, in 1974, former Harvard Law School Dean Erwin Griswold, conceded Reed's insight. See Erwin Griswold, *Law and Lawyers in the United States*, HAMLYN LECTURES, at 39 (16th Series 1974). And the greatly admired historian Willard Hurst confirms that it was John Pomeroy, at NYU and Hastings, who first introduced a brand of the Socratic case method to substitute for the standard lectures of the era. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS 261 (1950). Pomeroy's son pays his father that same tribute. See John Norton Pomeroy, Jr., *John Norton Pomeroy*, 3 GREAT AMERICAN LAWYERS: A HISTORY OF THE LEGAL PROFESSION IN AMERICA 123 (William Draper Lewis, ed. 1909).

⁵⁹ For just one of many ways U.S. News rewards schools that "burn" money per student and ways to fix this perverse and gameable bias, see <http://abovethelaw.com/2016/01/how-to-fix-the-u-s-news-law-school-rankings/>. For William Henderson's 2010 "back-of-the-napkin" calculation about how Larry Kramer, Stanford's then Dean, could target money to leapfrog Harvard and Yale and become #1 in U.S. News, see http://www.elsblog.org/the_empirical_legal_studi/2010/07/can-stanford-be-1-in-the-us-news-rankings-the-data.html. Even as early as 2002, some law schools proved disgraceful in aiming to satisfy U.S. News, see Dale Whitman, *Doing the Right Thing*, AALS NEWSLETTER, Apr. 2002, at 1-5.

ated exaggeration is the norm—across the ranks of law schools. Some openly condemn these practices. But these critics, even with a blog as prominent as, say, Brian Leiter’s, can’t possibly turn the tide, can they? And perhaps inadvertently they give license to those who now realize they can both embellish and join critics in condemning embellishment. In any event, for legal education the payoff is huge, especially in the face of the combined forces at work: This particular brand of hoopla permits law schools to proclaim transformation while never actually having to challenge fundamentally the status quo or even for a moment to take their eyes off U.S. News.

D. Sensing Some Other Powerful Force Also at Work

“That’s all you need to write about.” At least that’s what I keep hearing. I hear it in fact from diverse colleagues who experience the same *déjà vu* I do and from those at my law school and in my life with whom I regularly talk teaching. And I hear the same advice in my head when I imagine voices of other wise and insightful people I’ve worked with over the years (Tom Adler, Janet Cooper Alexander, Reginald Alleyne, Regina Austin, Joaquin Avila, Derrick Bell, Roy Cazares, Bill Cohen, Sally Dickson, Michael D’Amelio, John Ely, Paula Galowitz, William Gould, Char Hamada, Bill Ong Hing, Napoleon Jones, Shauna Marshall, Cathy Mayorkas, Dorothy Monica, Susan Prager, Hector Ramon, Maria Santiago, Jon Varat, Bill Warren, to name only some).⁶⁰

The perceived impossibility of changing the status quo and defying U.S. News & World Reports Rankings would explain:

- why some leading faculty and deans believe only modest alterations will result from today’s frenzy, alterations matching what already has taken hold elsewhere in legal education;
- why many people label as transformative what they’ve lifted without citation from some other school, from some imaginative clinician or non-clinician, from a colleague working right down the hallway;
- why many elaborately stage as a huge transformation, even a revolution-in-progress, changes that stay utterly within already approved and already rewarded boundaries.

⁶⁰ For perhaps the most well-known of the published materialist analyses produced by this formidable line-up, see Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1984). For later work excavating archival records arguably confirming Bell’s hypothesis, see MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000). For a recent essay revisiting these themes and reasserting the power of materialist interest convergence, see Richard Delgado, *The Shadows and the Fire: Three Puzzles for Civil Rights Scholars*, 6 ALA. C.R. & C.L. L. REV. 21 (2014).

In 2017, what more need be said about raw power? About institutional practices? About individual personalities? About Realpolitik revealed?⁶¹

Much as I respect those I've worked with, those trying even to protect me, much as I appreciate the power of their analyses, I disagree. I believe something equally gripping and less fully conscious helps explain this surreal and predictable convergence and much else (including the current particulars in trying to change the status quo and deal with and defy U.S. News). The past decade's events all have taken place within a set of operative convictions and conventions, a set of "background rules of the game," what I call for now a deep stock story.⁶² That deep stock story structures possibilities, distributes consequences, provides standards for measuring plausibility and persuasiveness. That deep stock story typically domesticates any potentially unruly possibilities inherent in each challenge and decrees only an already-familiar slate of alterations and explanations compelling enough to adopt.⁶³

⁶¹ Some regard all that has happened as cyclically doomsday stuff, millennialist through and through, and even point to how individuals like Karl Llewellyn could bounce between condemning the uselessness of legal education during economic hard times only to return to the role of cheerleading apologist when the good times returned. See Robert J. Condlin, *Practice Ready Graduates: A Millennialist Fantasy*, 31 *TOURO L. REV.* 75 (2015).

⁶² For my initial published use of stock story in describing human problem solving, on its own terms and as the origin of its stylized variations, including in particular professional lawyering, see Gerald P. López, *Lay Lawyering*, 32 *UCLA L. REV.* 1 (1984).

⁶³ As in earlier works over the decades, my perhaps idiosyncratic formulation of what I am calling here the deep stock story reflects the influence of and anticipates varied work produced by politically diverse and formidable thinkers, all developing their own accounts of overlapping phenomena we variously call hegemony, ideology, denial, background rules of the game, trapped sociological imagination, consciousness, false consciousness, disciplinary discourses, frameworks of intelligibility, system justifications, default settings, and more. Here is just one slate of authors (among many) worthy of careful study, beginning appropriately with Gramsci. See, e.g., ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (1971); RICHARD T. ELY, *PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH* (1914); CHARLOTTE PERKINS GILMAN, *HERLAND* (1979)(1915); John R. Commons, *Law and Economics*, 34 *YALE L.J.* 371 (1925); Robert Lee Hale, *Economics and the Law*, in WILLIAM F. OGBURN & ALEXANDER A. GOLDENWEISER, *THE SOCIAL SCIENCES AND THEIR INTERRELATIONS* (1927); VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* (1929); JOHN DEWEY, *THE QUEST FOR CERTAINTY: A STUDY OF THE RELATION OF KNOWLEDGE AND ACTION* (1929); JOHN R. COMMONS, *INSTITUTIONAL ECONOMICS* (1934); Robert Lee Hale, *Economic Theory and the Statesman*, in *THE TREND OF ECONOMICS* (Robert G. Tugwell, ed., 1924); ROBERT HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* (1952); ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENCE* (1937); CHESTER BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* (1958); HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* (1947); Herbert Simon, *Behavioral Model of Rational Choice*, 69 *Q. J. ECON.* 99 (1955); MICHEL FOUCAULT, *MADNESS & CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (Richard Howard trans., Vintage Books ed. 1988)(1961); THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962); C. WRIGHT MILLS, *SOCIOLOGICAL IMAGINATION* (1959); HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* (1967);

Yet no deep stock story reigns unchecked, unquestioned, and unopposed.⁶⁴ On close enough inspection, we can detect resistance, insubordination, mutiny. More often than not, defiance goes unrewarded, even lost to succeeding generations, who imagine themselves “the first” to challenge what has before been frequently confronted. In unusual circumstances—most often but not always after years of effort—disputes themselves become elements of the deep stock story. The inclusion of disputes within the deep stock story can be understood as a victory for the challengers. But almost always inclusion expresses, at once, efforts to destabilize the status quo and efforts to neutralize the opposition. Not least important in this ambivalence is the notion of “mulling over the merits” of the now accepted and acceptable disputes. Mulling can last lifetimes.

Across eras, most of what has been written about legal education (books, reports, articles, essays, letters, blogs) follows perceptible protocols to preempt or at least guard against challenges, especially legitimately powerful calls for fundamental change. Here are but some:

- Describe law schools as, at a minimum, professionally responsible, intellectually respectable, and obviously successful.
- If possible, avoid altogether serious critiques, either by never relating them, by caricaturing them into oblivion, by footnoting them so obscurely that only the most assiduous readers even no-

FRIEDRICH W. NIETZSCHE, *THE WILL TO POWER* (Walter Kaufmann & R.J. Hollingdale trans., Walter Kaufmann ed. 1967)(1901); SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* (1970); HANNA FENICHEL PITKIN, *WITTGENSTEIN AND JUSTICE* (1972); AUGUSTO BOAL, *THEATER OF THE OPPRESSED* (Charles A. McBride & Maria-Odilia Leal McBride trans., Theatre Communications Group ed. 1985)(1974); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 209 (1979); Hanna Fenichel Pitkin, *Justice: On Relating Private and Public*, 9 *POL. THEORY* 327 (1981); Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 *ALSA FORUM* No. 1, at 32 (1982); Bernice Johnson Reagon, *Coalition Politics: Turning the Century*, in *HOME GIRLS: A BLACK FEMINIST ANTHOLOGY* 343 (Barbara Smith ed., 1983); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); Duncan Kennedy, *The Stakes of Law: Or Hale and Foucault!*, 15 *LEGAL STUD. FORUM* 4 (1991); JOHN GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* (1980); GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* (1987); RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* (1989); Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 *J. LEGAL EDUC.* 167 (1987); DUNCAN KENNEDY, *SEXY DRESSING ETC.* (1993); J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998); David Charny, *Farewell to an Idea? Ideology in Legal Theory*, 97 *MICH. L. REV.* 1596, 1603 (1999); John T. Jost et al., *Non-Conscious Forms of System Justification: Implicit and Behavioral Preferences for Higher Status Groups*, 38 *J. EXPERIMENTAL SOC. PSYCHOL.* 586, 593 (2002); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2007).

⁶⁴ For my depiction of another even more widely influential deep stock story at work in the framing and addressing of the “problem of undocumented Mexican migration” and for the elaboration of my own rival to displace this orthodox ideology, see Gerald P. López, *Don't We Like Them Illegal?*, 45 *U.C. DAVIS. L. REV.* 1711 (2012).

tice them.

- If made to deal with sensible objections (say, the utterly soporific impact of the Socratic casebook method, especially in second and third year), then spryly work your way around the trouble.
- If compelled to deal with compelling countervailing course offerings (say, clinics), then acknowledge the need for some practical training so long as it does not convert law schools into an intellectually shrunken trade school. And, at all costs, of course, do not forget to emphasize how expense alone makes utterly unworkable any more expansive role for clinical offerings.

Yet during the past ten or so years, the very best literature about legal education violated at least some of these widely shared and deeply internalized protocols. Severe pressures—both to produce law graduates as practice-ready as three years permit and to improve the experience of law students during their formal legal education—may have liberated some, obligated still others, and chastened everyone writing. In any event, so long as the demands for fundamental modifications persisted, the finest mainstream literature revealed a willingness to name, to describe fairly, and at least to try to deal with most of what (though *not* all of which) previously would have been typically ignored or ridiculed. They surfaced disputes half-buried within the deep stock story, and in so doing acknowledged the legitimacy of certain strands of opposition to the status quo.

This “warts and all” slant to examining legal education may have surprised some and enraged others. Most were unaccustomed to such candor. After all, unrest of this sort had last surfaced in print and in particular law school curricula during the 1970s, 1980s, and early 1990s, and most in the legal profession (including those teaching in law schools) appeared to know next-to-nothing about the nature and details of earlier insurrections. Still, those who wrote during the past ten or so years appear to have felt (and some told me directly they deeply appreciated) that the Emperor would have been seen as having no clothes were they not to deal openly with at least some major challenges that had gained currency. Especially since some who produced the better scholarship qualified as mainstream-as-mainstream-can-be, and even much esteemed within the mainstream, others too joined the debate, seemingly shielded by the mainstream’s “heavy hitters,” especially by their evident readiness to speak truthfully.

Do not misunderstand, please. My stubborn insistence that this deep stock story helps explain this surreal and predictable convergence and much else does not mean I believe most in the legal profession either know well the deep stock story’s contemporary varieties or could explicitly name its operative protocols. As it happens, I don’t

think many can. If I'm right, though, that should hardly surprise. Law schools have never emphasized, much less treasured knowing, the history of legal education in the United States. A brilliant co-worker insists I repeat this sentence, at least if I am not already yelling it from the rooftops: Law schools have never emphasized, much less treasured knowing, the history of legal education in the United States.

In all my years of teaching at different schools, and in all my years of reviewing curricular offerings at a much wider variety of schools, I can count perhaps on no more than two hands the number of courses directly addressing the history of legal education, much less addressing the topic with breadth, depth, and detail. And matters do not get much better when speaking about faculty. In publications touching on the history of legal education, the text and footnotes routinely prove limited and almost pre-scripted. Most faculty I know do not routinely read contemporary or historical literature addressing legal education, much less hold themselves accountable for knowing the history of the institutions in which they've made their living. In this way, most in the legal profession, including most tenured law professors, prove to be the product of their three years of law school education.

Yet we need not know well, much less be able to spell out, a relevant cluster of background rules to have internalized the convictions and conventions that gave rise to and continue their reign. My claim is that despite our formal lack of knowledge of the deep stock story and its evolving contemporary variations—or perhaps because of our shared ignorance—we have absorbed and reproduced the messages. We size up ideas, proposals, and critiques through our already existing ways of doing things. And except in periods of extreme stress, enhancing the cumulative effects of many years of seemingly ineffective mobilizations, we're not at all likely to change our paradigmatic understandings of what we should do in legal education and why. We cling to our categories and methods, even as we embrace certain critiques as part of both the deep stock story and its many unfolding variations. Indeed we believe all the more in our categories and methods precisely because we have been open-minded enough to acknowledge critiques as we process suggestions, proposals, and alternatives.

It matters hugely, though, to various strands of folks within and outside the legal profession that *some* can produce and *some* have produced estimable histories of legal education. And it matters that included among those who have written such histories are people widely regarded as heavyweights, as historians, as thinkers about legal education. Especially among legal academics, some leaders of the bar, and some variegated clusters of everyday folks and elites, there is the

need to believe that sensible rationales, and, better still, deep and persuasive reasons, back our decisions to continue doing what we're doing or to make at most status-quo-plus changes in the face of calls for transformation.⁶⁵ The very existence of such histories sustains our collective faith that we're about ideas far more than material well-being.

Even if we have never read most of these articles and books, even if we do not really know any of them at all well, and even if we ourselves cannot produce them, their presence and their availability bolster our sense that we're doing what's right by our students and the profession and clients across the globe.

That's how we roll.

II. THREE VERSIONS OF THE SAME DEEP STORY

The deep stock story comes packaged in a variety of ways. The assortment should not surprise. In the past decade or so, many have addressed and responded to the state of legal education. These authors fill varied roles and serve diverse institutions. They display in their written products widely disparate knowledge about the past of legal education and about the current curricula of the many law schools educating future lawyers. And they demonstrate widely contrasting familiarity with what others have been writing during the same decade.⁶⁶

In my judgment, three dominant and separable mainstream versions of the deep stock story deserve our special scrutiny. All three tell of the need for change—about what law schools have done well and what they must do better still. Yet they do so through separable as well as overlapping themes, events, and characters. They do so through separable as well as overlapping methods for formulating

⁶⁵ What I describe as appeals to rationality—or belief that such appeals can be made by someone widely respected—may simply be an example of the claim, made by notable interdisciplinary thinkers, that “humans seem to have an inherent tendency to seek an explanation which amounts to finding some consideration relevant to full rationality which had not been taken into account before.” Kenneth J. Arrow, *Is Bounded Rationality Unboundedly Rational? Some Ruminations*, in MIE AUGIER & JAMES G. MARCH, *MODELS OF A MAN: ESSAYS IN MEMORY OF HERBERT A. SIMON* 47 (2004). For earlier variations of the same point, see, e.g., Herbert A. Simon, *Rationality as Process and as Product of Thought*, 68 *AM. EC. REV.* 1 (1978); William J. Goode, *Rational Choice Theory*, 28 *AM. SOCIOLOGIST* 22 (1997).

⁶⁶ See, e.g., McArdle, *supra* note 2; Kramer Message, *supra* note 5; CARNEGIE REPORT, *supra* note 8; BEST PRACTICES, *supra* note 8; Antoinette Sedillo Lopez, *Leading Change in Legal Education—Educating Lawyers and Best Practices: Good News for Diversity*, 31 *SEATTLE U. L. REV.* 775 (2008); Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 *VAND. L. REV.* 597 (2007); Rubin, *supra* note 33; Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 *VAND. L. REV.* 515 (2007); Menkel-Meadow, *supra* note 33; Barry et al., *supra* note 33.

some questions and not others. And they do so through separable as well as overlapping techniques for building into their analyses a thorough ambivalence about opposing trajectories legal education might well pursue.

I call these three histories of legal education the Popular Portrayal and Critique, the Functional Portrayal and Critique, and the Historically More Particular and Ideologically More Explicit Portrayal and Critique. In writing my own versions of these three important versions of the deep story, I aim to reproduce the structure, rhetoric, and vibe of each genre. I shall write only what I regard writers of each strain as able and willing to write, and I shall footnote only what I regard writers within each category as able and willing to footnote. If I come close to my aspirations, you should find each of the versions coherent, authoritative, and even perhaps now and then distinguished. Depending upon your predilections, you may even find one or more persuasive on its own terms.

Recognize, though, how much each version, despite its distinctive qualities, hews closely enough to the deep stock story as to be intelligible and credible. Even in the midst of tumultuous periods, calls for transformation typically must pay homage to the status quo precisely to gain respectability. Notice, too, how much each version reports, perhaps even supports, both a freshly discovered resolve to do *whatever* law schools must do to meet legitimate demands and an always admirable inclination to *change only what should be changed to enhance an already valuable product*.

The ambivalence about opposing trajectories appears in all three versions as an emotional and intellectual force. This ambivalence is akin to a fierce and simultaneous belief in utterly opposing futures, rather than any humdrum indecision or unsureness. This commitment simultaneously to laud and critique traditional legal education—in ways calculated to be interpreted later as ultimately faithful to the deep stock story—certainly ranks as among the primary impediments to transforming law schools.

A. *Version I: The Popular Portrayal and Critique*

At the Harvard Law School, in 1870, a newly appointed professor and Dean, Christopher Columbus Langdell, revolutionized legal education.⁶⁷ Aiming to prove law a science, and with no apparent hesitation in challenging the status quo, he immediately replaced the then Harvard regimen of lecture and the lecture-and-recitation with a sys-

⁶⁷ See, e.g., LAPIANA, *supra* note 4, at 27-28; Rakoff & Minow, *supra* note 66, at 597; Rubin, *supra* note 33, at 610; STEVENS, *supra* note 4, at xiv-xv; Grey, *supra* note 4, at 47-48; Chase, *supra* note 4, at 332; McManis, *supra* note 4, at 598.

tem paralleling scientific protocols and aspirations.⁶⁸

From the script science had authored, Langdell introduced appellate court opinions selected from the library as the specimens to be studied.⁶⁹ He employed a classroom question-and-answer format later labeled the Socratic Method to probe the cases and to embody the science of law.⁷⁰ And with appellate decisions as the phenomena, and the Socratic Method as the means to teach, students learned both deep principles and legal science. Stitched together, these principles defined a coherent whole about Contracts, other bodies of doctrine, and law itself.⁷¹ And in the learning of these principles, students developed the capacity themselves to engage in the science of law.

In admiring and emulating the sciences, Langdell aspired immediately to introduce a model of law and an educational system that depended upon and developed a defensible empirical and rational methodology.⁷² Closely observe phenomena; draw out powerful inferences; transform these inferences into elegant abstract principles; apply these principals deductively; describe the coherent whole of any body of doctrinal thought. Scientific law was immanent in these appellate decisions. As Langdell saw it, a law teacher should provide students the means by which to perceive these principles and to apply them correctly in new situations.⁷³

When an appellate decision itself revealed a mistake in the scientific process, Langdell's job as teacher was to help students identify this error. Together, appellate decisions and the Socratic exchange provided the means for identifying and critiquing any doctrinal blunder.⁷⁴ The critique inevitably implied a contrasting principle that the appellate court should have detected and applied. This proved true

⁶⁸ See, e.g., Christopher Columbus Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 123, 123 (1887) (“[L]aw is a science, and . . . all the available materials of that science are contained in printed books.”); LAPIANA, *supra* note 4, at 70; Robert B. Stevens, *Law School: Legal Education in America from the 1850's to the 1990's*, in *LAWYERS: A CRITICAL READER* 145, 146-47 (Richard Abel, ed. 1997); Grey, *supra* note 4, at 5.

⁶⁹ See, e.g., Langdell, *supra* note 68; LAPIANA, *supra* note 4, at 254 (describing development of casebooks); Stevens, *supra* note 68, at 147; Chase, *supra* note 4, at 338-39.

⁷⁰ See, e.g., Langdell, *supra* note 68; CHARLES WARREN, 2 *HISTORY OF THE HARVARD LAW SCHOOL* 372-73 (1908) (describing Langdell's implementation of Socratic Method); Stevens, *supra* note 68, at 147.

⁷¹ See, e.g., Langdell, *supra* note 68 (describing his approach); CHRISTOPHER C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871); Grey, *supra* note 4 (describing Langdell's theoretical approach of “classical orthodoxy”).

⁷² See, e.g., Langdell, *supra* note 68.

⁷³ See *id.*; LANGDELL, *supra* note 71; Oliver Wendell Holmes, Jr., *Book Notices*, 14 AM. L. REV. 233, 234 (1880) (critiquing Langdell's legal science approach and calling Langdell a “legal theologian”).

⁷⁴ See CHRISTOPHER C. LANGDELL, *SUMMARY OF THE LAW OF CONTRACTS* 12-15 (1880) (criticizing “mailbox rule” as doctrinally unsound); see also Langdell, *supra* note 68; Stevens, *supra* note 68, at 146-47 (describing Langdell's approach).

whether the error entailed a misapprehension of the principle or of the methodological process for discovering and applying the principle with defensible scientific rigor.⁷⁵

The correction championed by Langdell could then be proposed for adoption in place of the gaffe advanced as a defensible presentation of legal doctrine. If an acceptance of an offer had to be received to cohere with Contracts doctrine scientifically understood, then Langdell stood willing to challenge the “mailbox rule” that permitted the mere posting of an acceptance to bind the person making the offer.⁷⁶ In these related ways, the case method demonstrated and improved both the relevant body of doctrine and the scientific methodology legal scientists must grasp and follow.

For Langdell, emulating science and scientists seemingly ineluctably led to focus his attention and the attention of students on appellate court decisions. Focus on appellate court decisions reflected at least two important judgments. Appellate cases were readily available in the library. And the library, insisted Langdell (who spent his early years working in libraries⁷⁷), “is to us all that the laboratories of the university are to the chemists and the physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.”⁷⁸

Langdell regarded training in principles of law as the central mission of legal education and sophistication in dealing with legal principles as the central capacity of superb lawyers. Rather than consigning students to the largely passive and parroting roles of the lecture and lecture and recitation approach, Langdell insisted students should actively practice discovering—through the scientific methodology—how to infer, abstract, and apply legal principles.⁷⁹ Rigorous education in scientific method and scientifically developed principles shoved to the margins—really, entirely dispatched with—any need to regard the everyday work of lawyers as at all pedagogically valuable.

History tells us some may well have backed Langdell—or at least

⁷⁵ See sources cited *supra* note 70.

⁷⁶ See *id.*; see also Grey, *supra* note 4, at 3-5 (describing Langdell’s doctrinal wrangling with “mailbox rule”).

⁷⁷ See David A. Garvin, *Making the Case: Professional Education in the World of Practice*, HARV. MAG., Sept.–Oct. 2003, at 56, 58 (describing Langdell, during his student years, as spending his “extra time as a research assistant and librarian, holed up in the school’s library reading legal decisions and developing an encyclopedic knowledge of court cases”); Frank, *supra* note 28, at 1303 (describing Langdell as “bookish” man who, during “his student days at Harvard Law School . . . haunted the library, poring over Year Books”). Langdell’s considerable contributions to the modern law school library are thought to stem from his early time in libraries. See, e.g., WARREN, *supra* note 70, at 488 (describing Langdell’s work with Harvard Law Library); LAPIANA, *supra* note 4, at 11 (noting that Eliot may have recruited Langdell in part because of his reputation in library circles).

⁷⁸ Christopher C. Langdell, *The Harvard Law School*, 3 L.Q. REV. 123, 123 (1887).

⁷⁹ See LAPIANA, *supra* note 4, at 55; Stevens, *supra* note 68, at 146-47.

withheld criticism—only because they wondered whether or not his appeal to the status of science might in time benefit them or their law schools or their universities. But if others used “law as a science” as a pretext for gaining legitimacy and other advantages, Langdell did not. He believed what he taught and struck others as earnest, dedicated, and persevering. Indeed, some regarded him as evangelical, for in his reportedly shy manner, and with the power of Harvard behind him, he proselytized for this way of thinking about and teaching law.⁸⁰

Langdell needed considerable conviction and resilience to survive the backlash his system engendered. From the start, members of the Harvard faculty balked at replacing their much loved lectures and recitations. Some prominent faculty retired instead of co-existing with, much less adapting to, the new regime.⁸¹ Perhaps Langdell anticipated the decision of his colleagues. Certainly their exit did not seem at all to give him pause. Instead, he treated their departures as opportunities to hire faculty well-suited and committed to extending his scientific case method. Most notably, in 1873, Eliot and Langdell hired James Barr Ames, the first faculty member at Harvard—in what would become a long line—who had never practiced law and began teaching immediately upon graduation.⁸²

Yet the most vocal dissenters included a sizeable number of Langdell's own students.⁸³ His students' hostility may have surprised and disappointed Langdell. He had envisioned a brand of vigorous adult education. Instead of merely serving as passive recipients of lectures, instead of aping through recitations of what lecturers and treatises declared, students in Langdell's classroom would be expected to prepare and participate as independent thinkers. They would study selected appellate decisions, join Langdell in the search of discoverable principles, and learn along the way both the relevant body of law and, most importantly, the scientific methodology Langdell employed and taught.⁸⁴

⁸⁰ See, e.g., Holmes, *supra* note 73, at 234 (referring to Langdell as a “legal theologian”).

⁸¹ See, e.g., Russell Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 533-34 (1991); Chase, *supra* note 4, at 337-38 (attributing retirement of Professors Parker and Parsons to reforms at Harvard Law School made by Eliot and Langdell); LAPIANA, *supra* note 4, at 18-20, 25-27 (describing faculty resistance to case method in its early days); WARREN, *supra* note 70, at 382 (same). Cf. LAPIANA, *supra* note 4, at 92 (describing similar moves by Columbia faculty when it adopted case method in 1880s).

⁸² See LAPIANA, *supra* note 4, at 15-16; WARREN, *supra* note 70, at 388-89; Chase, *supra* note 4, at 338; see also Grey, *supra* note 4, at 2 n.5 (discussing other students of Langdell's who became worthy practitioners of Socratic method).

⁸³ See, e.g., WARREN, *supra* note 70, at 382 (discussing criticism and exit from Harvard Law School of students in 1871 term); Weaver, *supra* note 81, at 534-36; Chase, *supra* note 4, at 338-39; Stevens, *supra* note 4, at 147.

⁸⁴ If Langdell wrote only sparingly and spoke outside the classroom only infrequently,

But, in the beginning, the gap between Langdell's vision and everyday reality proved immense. Students complained vehemently.⁸⁵ About responsibilities Langdell insisted they shoulder. About the question and answer exchanges. About what, if anything, they could claim to have learned as a result. They insisted they did not know what the discussions aimed to accomplish, complained of not learning the law, and at best found the process mystifying even when they sensed they might well be learning something important.

Students did not merely grouse and condemn. In the first three years of Langdell's system, Harvard's student enrollment decreased from 165 to 117.⁸⁶ Perhaps not surprisingly, some alumni openly joined the revolt.⁸⁷ Perhaps students and alumni expected to abort Langdell's reign. Certainly they understood their clout, and perhaps they detected the unwillingness of most faculty to absorb such strong and nasty bashing. Meanwhile, perhaps recognizing the mistake Langdell and Harvard had made, other Boston area universities seized the opportunity to start law schools of their own.⁸⁸

Langdell outlasted the early damnation. With the support of the University Administration and newly hired faculty, Langdell's case method took hold.⁸⁹ A quarter century later, at the time of his retirement, Langdell's approach to legal education had become firmly established at Harvard and, through the leadership of protégées and converts, at a half dozen other law schools. And over the next several decades, with the spread of the case method to other elite schools and the sober-minded praise by prominent figures like Louis Brandeis, the Langdellian case method became the dominant mode of educating future lawyers.⁹⁰

Even a system as adaptable as the case method needed augmentation. From nearly the beginning, faculties introduced curricular op-

most presume his aspirations paralleled those of President Charles Eliot. For illustrations of Eliot's aspirations and achievements as Harvard's President, see CHARLES W. ELIOT, *The Unity of Educational Reform*, in EDUCATIONAL REFORM: ESSAYS AND ADDRESSES (1905).

⁸⁵ See, e.g., Weaver, *supra* note 81, at 534-36.

⁸⁶ See sources cited *supra* note 83.

⁸⁷ See Chase, *supra* note 4, at 338; Weaver, *supra* note 81, at 536-37.

⁸⁸ See Stevens, *supra* note 68, at 150-51 (discussing proliferation of schools during this period).

⁸⁹ See, e.g., Weaver, *supra* note 81, at 539-40. Cf. Stevens, *supra* note 68, at 148 (termining ABA's 1892 critique of Harvard model "the last serious doubts the legal establishment expressed about the case method. The fashionability of the Langdell system grew with remarkable rapidity.")

⁹⁰ See *id.* See also James M. Landis, *Mr. Justice Brandeis and the Harvard Law School*, 55 HARV. L. REV. 184, 187-89 (1941) (describing Brandeis's admiration of Langdell); see also Weaver, *supra* note 81, at 540; Chase, *supra* note 4, at 332; STEVENS, *supra* note 4, at 156 (suggesting case method endured without attack until 1930s); Garvin, *supra* note 77.

tions. Think only of seminars, public law, and regulatory courses. And later, schools offered simulated and live clinics, colloquia, independent research, and more.⁹¹ These additions responded to demands by law students, the interests of the faculty, and requirements of the organized bar.⁹² As these satellites appeared, as they added to the diversity of curricula, they strengthened the intellectual centrality of Langdell's case method. If Langdell would find the diversification surprising and unnecessary, he would be pleased to see legal analysis has remained at the scientific core.

Imaginative supplements to and internal variations on Langdell's case method have their limits, though. Even with all that has been added and altered (especially available to students in the second and third year), today's education still parallels too strongly Langdell's 1870 model rather than a 21st Century model of what lawyers variously do and should know how to do.⁹³ True, modern casebooks look characteristically like the "Cases and Materials" that, certainly by the 1930s, began to replace Langdell's lean "Casebook."⁹⁴ But when compared to other business schools and medical schools that use their own versions of "cases" and a "case method," law schools have done the least to change their basic approach to texts and teaching.⁹⁵ Appellate opinions serve as the suns around which and through which all else revolves.

To be sure, what teachers and students together do with these opinions has changed some from what Langdell first introduced as his pedagogy. Unlike Langdell, not many teachers today openly aim to prove law a science, and not many undertake to make an entire body of doctrine cohere in axiomatic fashion. Unlike Langdell, teachers may not rely exclusively on the "cold call" and may intermingle mini-lectures with Socratic questioning. But teachers still expect students to read cases, to prepare for exchanges with the teacher and not much with one another, to identify opposing lines of argument, to pick apart inconsistencies within reasoning, to note exceptions that threaten to swallow the rule, to deal with spare hypothetical variations on the decision, with equally lean variations on the initial hypotheticals, and so

⁹¹ See, e.g., STEVENS, *supra* note 4, at 159 (discussing advent of seminars and clinical courses in early 1900s); Stevens, *supra* note 68, at 150 (describing variety of law school teaching methods that proliferated in late 1800s and early 1900s); Barry et al., *supra* note 33, at 6-10 (describing early calls for clinical programs in law schools).

⁹² See sources cited *supra* note 91.

⁹³ See generally Rubin, *supra* note 33 (arguing Langdell's methods were already outmoded at time he introduced them at Harvard, and suggesting they are especially out-of-date today).

⁹⁴ See STEVENS, *supra* note 4, at 158.

⁹⁵ See CARNEGIE REPORT, *supra* note 8, at 45.

on.⁹⁶

Through such preparation, through such exchanges, students learn to think like lawyers in the paradigmatic legal ways of litigation. And they learn to think quickly on their feet, to improve their capacity to see and to articulate argument lines, and to comprehend the ambiguity generated by the very availability of arguments for both sides. In so many ways, this achievement realizes Langdell's central goals: That students realize how few principles actually hold together an entire body of doctrine and grasp that what constitutes a true lawyer requires mastery of these principles (and the body of doctrine they comprise) and the ability "to apply them with consistent facility and certainty to the ever-tangled skein of human affairs."⁹⁷

Yet even the best teachers and best students encounter limits to what they can do through the standardized oral exchanges around facts, issues, arguments, and holdings. Even the most optimistic idea of what students learn falls considerably short of what lawyers do or know in the various roles they play within diverse institutions. Most lawyers fill roles that have nothing whatsoever to do with litigation.⁹⁸ Even if they're aware of the law, even if they work loosely in its shadow, the sort of reasoning encouraged and rewarded in today's case method often encourages habits of thought and behavior different from and perhaps even antagonistic to what many lawyers find required of them. Think only of corporate transactional work, environmental policy making, human rights practice, and mediation—the counseling and brainstorming with others that make up so much of what so many lawyers do.

The limits of the case method have not been lost on students or faculty. While together they remain remarkably allegiant to the virtues of Langdell's case method in the first year, they already realize and anticipate how their own loyalties get tested in the second and third year.⁹⁹ Only the most entertaining or unforgiving teachers still grab the attention of most second and third year students. Even so, students appreciate that, at least if the teacher follows the Socratic script, only a small number of moves make up the entire question and answer exchange. Having internalized (at least most of) these moves, students prepare less, if they prepare at all seriously.¹⁰⁰ Meanwhile, fretting over the increasingly disengaged classroom, teachers often

⁹⁶ See *id.*

⁹⁷ LANGDELL, *supra* note 71, at vi.

⁹⁸ See CARNEGIE REPORT, *supra* note 8, at 45.

⁹⁹ See Weaver, *supra* note 81, at 517, 561-62 (citing to studies performed by AALS); Rubin, *supra* note 33, at 558.

¹⁰⁰ See Weaver, *supra* note 81, at 563-64.

turn their back on the Socratic method and lean more heavily on lecture, sacrificing what may be their own convictions (if not Langdell's) about the values of rigorous exchange.¹⁰¹

Abuse of the Socratic method only further loosens its grip on students and faculty. Students perhaps bow and scrape before a punishing instructor, but customs no longer unquestioningly protect teachers as they once did. Quite apart from any abuse, the case method simply runs out of gas after (if not before) the end of the first year.¹⁰² Students still take these case method courses in large numbers, either because they themselves enjoy the less demanding regimen or because they fear the bar exam or because they cannot gain entrance into enough seminars, clinics, and colloquia. In any event, even the incredibly humane and earnest second- and third-year case method classroom achieves limited growth in students and teachers and, as much as anything, calls attention to its own limits.¹⁰³

Students consuming a steady diet of Socratic case method courses in all three years learn too little of the diverse capacities required in modern legal life. And, through the modern case method courses, students too frequently come to equate what lawyers do with the doctrinal filtering of hypotheticals, posed in brief form in the classroom and at greater length on the traditional law school exam.¹⁰⁴ Regulated industries, statutory regimes, and globalized settings all require training beyond common-law doctrine. Langdell certainly proved himself correct enough that you can learn common law principles and end up working effectively in all the states of the union.¹⁰⁵ But not learning in advance a particular state's laws turns out to be different than not studying in advance modes of thought and behavior defined outside the appellate litigation context. And those modes have greatly increased in today's globalized world, calling into question reliance on Langdell's venerable system.¹⁰⁶

For all the remarkable qualities of Langdell's approach, for all the admirable refinements, the time has come to alter how we educate our future lawyers. Thinking like a lawyer—the reasoning so beautifully explored and modeled in the first year classroom—remains pivotal to a lawyer's work.¹⁰⁷ But statutory and regulatory regimes deserve cen-

¹⁰¹ *See id.*

¹⁰² *See id.* at 562-63.

¹⁰³ *See* Gulati et al., *supra* note 31, at 266 (concluding that for most law students “substance of the third year seems remote and largely irrelevant”).

¹⁰⁴ *See, e.g.*, CARNEGIE REPORT, *supra* note 8, at 84.

¹⁰⁵ *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 472 (3d ed. 2005).

¹⁰⁶ *See, e.g.*, Rubin, *supra* note 33, at 622.

¹⁰⁷ *See, e.g.*, CARNEGIE REPORT, *supra* note 8, at 51-56 (discussing importance of “thinking like a lawyer”); BEST PRACTICES, *supra* note 8, at 59-65 (same).

tral attention, as do the global dynamics that operate as much in domestic local venues as in Geneva and Sao Paulo.¹⁰⁸ As deserving of a central place in future training is all that takes place outside of litigation, often utterly attenuated from doctrinal analyses. Students must be taught to practice like lawyers and to become lawyers—across varying roles and institutions—and not just to reason like lawyers about appellate cases.¹⁰⁹

B. *Version II – The Functional Portrayal and Critique*

Legal education in the United States has proven plenty successful educationally, more successful still financially, and even more successful still if measured by allegiance. In 2017, virtually every law school still adheres to a single approach introduced in 1870 at the Harvard Law School by Christopher Columbus Langdell.¹¹⁰ When most of us speak seriously about transforming law schools, we still imagine building around the current core casebook method that nearly universally has been rejected and mocked when evaluated by the aspiration of “legal science” that Langdell hoped to demonstrate and develop.¹¹¹ How can a method that failed on its own terms have become synonymous with what legal education must centrally include if it is to be at all successful?

The apparent paradox invites our attention to an important matter of architecture: What gives Langdell’s approach such might, and what do those architectural elements tell us about transformational options we should consider today? If you examine the approach with an eye on function, if you examine not its historical origins but its facility to satisfy various purposes at once, you begin to appreciate Langdell’s creation.¹¹² With diverse constituencies making distinct demands of legal education, Langdell managed to fashion an approach that may not have achieved his most idiosyncratic desires, but man-

¹⁰⁸ See Rubin, *supra* note 33, at 658; see also McArdle, *supra* note 2 (discussing ways in which curricular changes at Harvard are aimed at addressing these modern issues).

¹⁰⁹ See, e.g., CARNEGIE REPORT, *supra* note 8, at 51-56.

¹¹⁰ See, e.g., Paul D. Carrington, *Hail! Langdell!*, 20 LAW & SOC. INQUIRY 691, 693 (1995) (making this claim at least as of 1995); Rubin, *supra* note 33, at 610, 613 (same in 2007).

¹¹¹ See, e.g., *id.* at 650-51 (calling not for “radical reform,” but for modest changes that recognize “economic, social and conceptual developments that have occurred since the Langdellian curriculum was implemented in the 1870s”); Rakoff & Minow, *supra* note 66, at 603 (characterizing their proposal as a “shift”).

¹¹² Functionalism encompasses the work of many who contributed to the early years of realism. See, e.g., Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Jerome Frank, *What Constitutes a Good Legal Education?*, 19 A.B.A. J. 723 (1933); Cohen, *supra* note 29; THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935).

aged to satisfy diverse, seemingly impossible-to-please “publics.”¹¹³

While Langdell failed to establish law as a science, he succeeded in providing a pedagogical approach that made learning law highly respected and even envied. To the surprise of many skeptics, law took its place among the revered disciplines of university life.¹¹⁴ At the same time, in even wider intellectual circles, Langdell’s case method offered teachers and students a way of teaching and learning celebrated for its capacity to inculcate a form of reasoning or analysis distinctive—some would insist, unique—to lawyers.¹¹⁵

That intellectual achievement provided central professional payoffs. The Langdellian education—what students learned in law school and carried forward with them through their careers—made lawyers central, perhaps even indispensable to meeting diverse societal challenges. In the New Deal, lawyers played central roles in designing, staffing, and studying executive, legislative, administrative, and judicial institutions.¹¹⁶ This considerable influence has been achieved through a pedagogical system that proved financially lucrative beyond perhaps what even Langdell imagined, with a single professor regularly teaching classes approaching two-hundred students.¹¹⁷

Historians disagree about whether or not Langdell built his approach with all these goals in mind.¹¹⁸ Some insist he most certainly did, pointing typically to the brief introduction in his 1871 casebook and to the handful of recorded public observations he made about his invention.¹¹⁹ Others say that, as time unfolded, he came to appreciate the virtues of his approach. From this point of view, acknowledging the intersection of such possibilities hardly threatens Langdell’s legacy. After all, choice, accident, and luck combine in even the most extraordinary achievements.

But the important point, agree all, is that Langdell created an approach that seemed, almost implausibly, to displace the Harvard status quo, to weather a very stormy launch, to spread to other schools through a combination of the work of his own disciples and the independent judgment of others, and then to take hold of every school precisely because of its extraordinary power to educate with the high-

¹¹³ The term “publics” borrows directly from the work of John Dewey. *See, e.g.*, JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927).

¹¹⁴ *See, e.g.*, LAPIANA, *supra* note 4, at 8-10, 79.

¹¹⁵ *See id.* at 151.

¹¹⁶ *See* STEVENS, *supra* note 4, at 160.

¹¹⁷ *See* BEST PRACTICES, *supra* note 8, at 4-5; Rubin, *supra* note 33, at 614; STEVENS, *supra* note 4, at 268.

¹¹⁸ *Cf.* Chase, *supra* note 4, at 332 (suggesting Langdell did anticipate all the changes to legal education with which he is credited); HURST, *supra* note 8, at 86 (suggesting Langdell purposely instituted this program); Weaver, *supra* note 81, at 521 (discussing controversy).

¹¹⁹ *See* LANGDELL, *supra* note 71, at v-vii; Langdell, *supra* note 68.

est aspirations large numbers at affordable prices. If today someone in law were to propose such a trajectory for a radical transformation, would anyone regard as plausible such a success story?

Whether with advance or after-the-fact appreciation, Langdell's system functioned so well on so many fronts that we ought to appreciate its architectural elements, alone and together. Why teach so many? Even in 1870, and even at Harvard, financial feasibility mattered.¹²⁰ Langdell must have felt the pressures to reach roughly as many as did those lecturers he hoped to persuade to teach his way or ultimately to displace. To prove law was already an unacknowledged science, he drew upon the most available artifacts, the published opinions of the appellate courts. He reported that cases taught him by far the most and revealed that he could retrieve and assemble appellate court decisions from the library he had come to love as a student and a librarian.¹²¹

To demonstrate the scientific methodology ingrained in appellate opinions, Langdell chose cases carefully. Well-selected cases could demonstrate more readily than the general run what students should learn to discern.¹²² To help students perceive what he himself did with cases, Langdell initiated a question and answer format.¹²³ The format aspired, at once, to draw out students' own considered impressions of appellate decisions and to help them sharpen their judgment both through their exchanges with him and through the reasoning he himself modeled.

Langdell's case method served to strengthen what later some would call the classical theory of law.¹²⁴ In his view, through radical alteration of the Harvard system, legal scientists could discover truths. Those truths could be understood and described as cohering, as together offering an elegantly interlocking set of principles that define both a particular body of law like Contracts and, by extension, law

¹²⁰ See Chase, *supra* note 4, at 332.

¹²¹ See Langdell, *supra* note 68; see also Garvin, *supra* note 77, at 56, 58 (describing Langdell's attachment to libraries); Jerome Frank, *A National Bar Program Subject: What Constitutes A Good Legal Education?*, 19 A.B.A. J. 723, 723 (1933) (describing Langdell as "bookish" man who, during "his student days at Harvard Law School . . . haunted the library, poring over Year Books"); WARREN, *supra* note 70, at 488 (describing Langdell's work with Harvard Law Library); LAPIANA, *supra* note 4, at 11 (noting Eliot may have recruited Langdell in part because of his reputation in library circles).

¹²² See Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719 (2005). See also LANGDELL, *supra* note 71, at vi; Weaver, *supra* note 81, at 531 (describing Langdell's approach to selecting cases).

¹²³ See, e.g., Weaver, *supra* note 81, at 532-33.

¹²⁴ The term and the ideas have been explored in the work of Duncan Kennedy. See, e.g., DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT, 1850-1940* (1975); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980).

itself.¹²⁵ Through a body of doctrine and a legal system scientifically understood and developed, discoverable legal truths could be applied rigorously and could then predictably determine the correct outcomes to cases. In the course of articulating a new way of teaching and learning, Langdell offered a jurisprudential defense for believing law was a sphere separate from others, worthy and noble and reliable.¹²⁶

What made each design element—and all of them together—remarkable turned out to be the effect they had *even when* they failed Langdell's own particular aspirations. If the case method did not convince people that law was a science, it did persuasively demonstrate that, at the heart of law, was a form of analysis or reasoning both estimable and admirable.¹²⁷ The term “thinking like a lawyer” signifies how much across professions and disciplines, across expert and lay boundaries, people came to believe lawyers think in unique or at least distinctive ways.

If choosing cases revealed that not every judge wrote scientifically defensible decisions and that Langdell himself had given a peculiar twist to the scientific method, it also suggested to every future teacher how much the very act of selection could serve particular doctrinal, pedagogical, and jurisprudential purposes. Even if others would not have chosen cases as the phenomena to study, they did learn from Langdell how much the order and nature of topics could frame the questions they preferred to pursue. In the name of the very same body of doctrine (Contracts, Torts, Crimes), teachers realized they could teach their very own course.

And law teachers could customize in various ways. They could create their own casebook. They could choose a casebook for the selection and ordering of cases. They could assign cases from a casebook in a different order and even supplemented by still other materials. The effects of selection and ordering could be seen at every stage. When students prepared for the classroom; when students came together with the professor to explore through the Socratic exchange the facts, issues, holdings, and reasoned elaborations; when students

¹²⁵ See LANGDELL, *supra* note 71, at v-vii; Langdell, *supra* note 68.

¹²⁶ For a small sample of works that demonstrate Langdell's impact on classical legal thought, see Francis Wharton, *Recent Changes in Jurisprudence and Christian Apologetics*, 2 PRINCETON REV. 149 (1878); CHRISTOPHER GUSTAVUS TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886); WILLIAM A. KEENER, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1888); Joseph Beale, *Gratuitous Undertakings*, 5 HARV. L. REV. 222 (1891); *Lochner v. New York*, 198 U.S. 45 (1905) (majority opinion); JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW (1909); JAMES BARR AMES, *Law and Morals*, in LECTURES ON LEGAL HISTORY (1913); Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461 (1916); see also WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT (1998).

¹²⁷ See CARNEGIE REPORT, *supra* note 8, at 48-54.

pulled together the year's cases in preparation for the final examination. What some had regarded as the straightjacket Langdell left for everyone to wear turned out to provide material for many fashions indeed.

As if legitimating law and providing a remarkably flexible pedagogical method were not enough, Langdell made law schools the financial envy of other units of the university. Langdell first imagined and then proved that a single faculty member could effectively employ the case method with large numbers of students.¹²⁸ How many would have predicted what today we take totally for granted: That you can engage many in conversations of the sort we typically imagine true only of very small numbers? Langdell proved at Harvard—and any place that so chose—that a single teacher could routinely teach amphitheatres of 185 students through the Socratic Method focusing upon appellate decisions.

With enormous and proven payoffs, Langdell's architecture appears able to last long into the future. But the capacity to endure should not alone recommend a pedagogical approach. What law schools must do today is educate lawyers to function in the diverse practices they end up pursuing. That's a fair standard. Indeed, that's what Langdell himself insisted he was doing in 1870. Even if he made the correct choice in the late 19th Century, overwhelming evidence tells us we cannot espouse his system unadorned as suited to the contemporary challenges lawyers face.¹²⁹

When scrutinized by the standards of 2017, Langdell's approach deserves mixed reviews. It succeeds still in teaching the legal analysis central to the adjudicatory process and to the world in which lawyers must guide others through the legal system. It succeeds in permitting a single professor to engage large numbers of students in adult learning, together pursuing rigorous methods that enable students to learn and practice the reasoning paradigmatically celebrated in the work of trial and appellate lawyers and judges.

But that's not all lawyers do, not by any stretch of the imagination.¹³⁰ Focusing through the Socratic Method on the legal analysis epitomized in appellate decisions neglects work lawyers routinely undertake and obscures more than it illuminates. Not all grievances go to or should go to courts. Not all facts come pre-packaged as "the record." Not all disputes regard some questions as issues and all

¹²⁸ See STEVENS, *supra* note 4, at 268.

¹²⁹ See CARNEGIE REPORT, *supra* note 8, at 194-202; BEST PRACTICES, *supra* note 8; Rakoff & Minow, *supra* note 66; Rubin, *supra* note 33, at 661-65; Gulati et al., *supra* note 103; Weaver, *supra* note 81, at 561-65.

¹³⁰ See CARNEGIE REPORT, *supra* note 8, at 45.

others as not mattering. Not all situations frame time in ways so unconcerned with the future and interested only in limited aspects of the past.

The constraints imposed by Langdell's approach to legal education create challenges spanning many fronts. In the nearly 140 years since Langdell radicalized Harvard, thinking about the work and education of lawyers has evolved. Drawing on many disciplines and experiences, on major cognitive and cultural and philosophical shifts, scholars and practitioners alike operate with convictions at odds with the classical approach to which Langdell contributed and of which he was a part.¹³¹ Today ideas about "facts," about "interpretations," about "principles," about "truth" and still more contrast with—often flatly contradict—the ideas that pervaded and supported the "scientific" model Langdell aimed to demonstrate and develop.

In his portrayal of law and the work of legal scientists, Langdell presupposed a world more knowable, more stable, more shared than most contemporary practitioners and scholars now find plausible, much less endorse. Insights from the natural and the social sciences, from professional worlds ranging from artificial intelligence to public health, have left working lawyers and theorists deeply appreciative of, even humbled by the fact, that we each know far less than we would like and, even with the help of previously unimaginable computer power, far less than ideally useful in understanding and dealing with physical, institutional, and social realities.¹³²

Even in the face of the very same information, we "see" from different perspectives, disagreeing about "the facts," what they are and what they mean, and about what, if anything, we can and should do to change the current state of affairs, and through what constellation of public, private, and civil institutions. Indeed, we know that ex ante decisions about any or all these questions may be driven as much by unconscious as conscious stocks of "how we understand," "what we regard as real," "what we perceive as needing change," and "what we do when we aim to change."

Langdell's case method resists these modern and post-modern insights. By procedural law and historical convention, the facts of an appellate case are presented as knowable, determinable, and stable. Indeed, the record on review hides the competing storylines at the

¹³¹ See, e.g., Holmes, *supra* note 73.

¹³² Behavioral law and economics offers just one brand of these insights, tracing its way back to social science giants like Daniel Kahneman and Amos Tversky, and to even more imposing giants like Herbert Simon and Allen Newell. See, e.g., Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1997-98).

appellate level and certainly the trial level—not to mention how we come to create our stories out of the messy reality of limitless data funneled through our cognitive processes. And doctrinal categories accept some arguments as sharpening analyses, while variously treating others as subordinate, as irrelevant, as unrecognizable.¹³³

In the past, the response to emphasizing these problems with Langdell's case method might well have been "that's academic." In the most positive sense, people might have said that's theory for scholars; in the most pejorative sense, that's useless fancy knowledge for scholars alone.¹³⁴ Langdell would likely have agreed—with both interpretations. After all, he insisted mastering doctrinal categories and analyses so as "to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer."¹³⁵ And even many who mocked his idea of law as a science agreed with Langdell's formulation about the central ability of lawyers *par excellence*.

Whatever may have been true of 1870 is not true today. Those who litigate must understand how to work with others to convert the endless information we call life into problems law recognizes and treats as worthy of a remedy.¹³⁶ And to do that well requires the ability, at once, to describe as true and stable what most obviously has just been constructed, awaits a challenge, and can be constructed and challenged in many other ways still. Langdell's case method does not invite students to perceive the world in this fashion, from the "ground up," looking forward through the universe of ever-changing data.

For all those who do not litigate, doctrinal mastery can be much overrated and even misleading. For the many with practices grounded in executive, legislative, and administrative spheres, for those doing corporate transactional work and conflict mediation, filtering the world through doctrinal schemas often only interferes with grasping what lawyers must do well in addressing diverse problems.¹³⁷ These lawyers must learn to characterize data in wildly diverse ways, each consonant with some set of conventions, each capable of identifying a range of solutions, hopefully effective enough to endure for some span

¹³³ See, e.g., STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001).

¹³⁴ Perhaps the most prominent article in this continuing debate is the initial broadside offered by Harry Edwards. See Edwards, *supra* note 33.

¹³⁵ LANGDELL, *supra* note 71, at vi.

¹³⁶ See, e.g., CARNEGIE REPORT, *supra* note 8, at 45; Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905 (1999-2000); BEST PRACTICES, *supra* note 8, Executive Summary; Rakoff & Minow, *supra* note 66; Rubin, *supra* note 33, at 661-65.

¹³⁷ See, e.g., BEST PRACTICES, *supra* note 8, at 16-24; CARNEGIE REPORT, *supra* note 8, at 45.

of time.

Most teachers know all this, as do many students. And many try to do something to provide the education modern lawyers need.¹³⁸ Most obviously, clinical programs demand students perceive the world variously (from a client's, an agency's, a tribunal's perspective), all at once, not to the exclusion of one another.¹³⁹ And they demand students grasp how different frames highlight some problems and solutions and not others, with varying degrees of effectiveness, difficult to measure in advance of unfolding events. But transformative as clinical education at its best can be, it demands considerably greater resources than Langdell's method.¹⁴⁰ For that reason, it cannot alone provide the answer legal education seeks in transforming itself.

For other answers, law schools have taken note of how other graduate schools approach their own large classrooms. Now and then, they have borrowed from public policy schools, medical schools, and particularly business schools.¹⁴¹ In particular, they have borrowed or developed their versions of the "cases" central to the business school approach. Incorporating far broader and more detailed information and more-openly and variously defined circumstances, these cases provide the opportunity for questions considerably different than those still typically employed by law professors.

Studies indicate this "case method" appears to develop ideas, skills, and sensibilities different from those law graduates possess. Compared to law students, business school students generate more alternative ways of characterizing problems and solutions, and choose more ably from among them.¹⁴² And, like medical students, business

¹³⁸ Even the most conservative of modern Socratic practitioners appear seamlessly to have absorbed modern insights and claimed them as known all along by traditionalists. See, e.g., Phillip E. Areeda, *The Socratic Method (SM) (Lecture at Puget Sound, 1/31/90)*, 109 HARV. L. REV. 911 (1996).

¹³⁹ See, e.g., John S. Bradway, *Legal Aid Clinic as a Law School Course*, 3 S. CAL. L. REV. 320 (1929-30); Barry et al., *supra* note 33.

¹⁴⁰ See *id.* at 21-30.

¹⁴¹ See, e.g., DAVID R. HERWITZ, BUSINESS PLANNING: MATERIALS ON THE PLANNING OF CORPORATE TRANSACTIONS app. A at A1-A37 (2d ed. 1984); see also Frank E. A. Sander, *Learning by Doing*, 25 HARV. L. SCH. BULL., Apr. 1974, at 16 (tax workshop). Stanford Law School has developed a series of environmental law case studies in this direction. See Stanford Law School, *Case Studies Abstracts*, available at <https://law.stanford.edu/environmental-and-natural-resources-law-policy-program-enrlp/case-studies-subjects/> (last visited Jan. 23, 2017).

¹⁴² See Garvin, *supra* note 77, at 60-61; Paul R. Lawrence, *The Preparation of Case Material*, in THE CASE METHOD OF TEACHING HUMAN RELATIONS AND ADMINISTRATION 215 (Kenneth R. Andrews, ed., 1953); Arthur Dewing, *An Introduction to the Use of Cases*, in THE CASE METHOD OF INSTRUCTION 7 (C.E. Fraser, ed., 1931); Powell Niland, *The Values and Limitations of the Case Method*, in THE CASE METHOD AT THE HARVARD BUSINESS SCHOOL 88 (Malcolm P. McNair, ed., 1954); Roland Christensen & A. Zaleznik, *The Case Method and Its Administrative Environment*, in THE CASE METHOD AT THE

students acknowledge better than do law students what they do not know and need to learn.¹⁴³ And the small numbers of law faculty who teach such cases have themselves become convinced of the advantages to teaching future lawyers in such ways rather than Langdell's.

But faculties have been at best difficult to persuade. "Where's the law?," they inevitably ask. Almost always they associate "law" with Langdell's case method, even if they would scoff at being labeled Langdellians. And, even if their curiosity is piqued, they back off as soon as they realize these cases must be researched and written, not simply pulled off the library shelf (well, the internet) and surrounded with small chunks of material. Without law at the center, and with materials that would require resources of all sorts to produce, faculty deflect recommendations with great dexterity.¹⁴⁴

Even if others produced the materials, however, faculty would have to learn how to ask questions different than those still central to Langdell's classrooms. Some might well find that exciting, even an extension or better still the realization of what they already aim to do with and against the grain of appellate cases. Others find the prospects paralyzing, however. They know how to teach what they teach and opening up the classroom to a much wider range of discussion feels overwhelming, certainly outside their comfort zone. And finally they argue—as they always do—that the first year should remain entirely or nearly entirely as it has always been, saving any such "experiments" for the advanced years, maybe even only the third year.

For each of these arguments sustaining the status quo, there are rejoinders. Certainly we have come to understand the law we aim to teach as considerably more fluid, more layered, more indeterminate than Langdell's case method openly welcomes. Why shouldn't we then invest resources into creating materials through which students learn how to do what they will find themselves doing as lawyers? And if that requires faculty retooling, then let us learn and continue to learn what we must to stay ahead of the curve. We can no longer insist we teach only what we already have grown comfortable teaching. And why wait until the third year or even the second to begin unsettling what Langdell's first year deeply imprints?¹⁴⁵ We should initiate our students, and ourselves, in the ideas central to working in ways intellectually and practically parallel to the demands of dynamic practices.

These arguments have been made and heard before. And they

HARVARD BUSINESS SCHOOL, *supra*, at 213.

¹⁴³ See Garvin, *supra* note 77, at 65-66.

¹⁴⁴ See Weaver, *supra* note 81, at 547. Cf. Rubin, *supra* note 33, at 656.

¹⁴⁵ For contrasting views, see Powers, *supra* note 9; Schizer, *supra* note 9 (describing several of Columbia's innovative courses).

have failed before—at least they have failed to convince enough people to alter what we surely for some time have known should be changed. The brilliance of Langdell's architecture may ultimately be how much his case method approach (complete with renovated justifications and routines) provides cover for all those institutions and individuals who insist that what we're now doing works and what would be required of us all by a genuine transformation simply asks too much. Even Langdell and his allies might never have predicted the power to stave off sensible alternatives.

C. *Version III: The Historically More Particular and Ideologically More Explicit Dominant Story and Critique*

In reading popular and even many scholarly accounts of legal education, it is easy to conclude everything you *really* must know came into being in and followed 1870—when Harvard's President Charles Eliot hired Christopher Columbus Langdell to revolutionize the training of lawyers, first at Harvard and then in time across the United States.¹⁴⁶ Eliot and Langdell's case method approach did achieve an extraordinary hegemony, but only by eclipsing predecessors and swallowing challengers, embracing just enough to claim as its own the separable ideas of others. What might we learn by including in the basic account of legal education these conquests and normalizations? Might we perhaps perceive the distant origins of amendments to Elliot and Langdell's system introduced piecemeal over the past 140 years? Introduced by some perhaps unaware of their own debt to past visions and methods?

During the colonial period, lawyers were not highly regarded¹⁴⁷ and law seemed to most inseparably a part of and entangled with religion and politics.¹⁴⁸ Few saw any need for specialized education in law. At those few colleges offering training in law, it was part of the study of political theory, moral philosophy, theology.¹⁴⁹ Most typi-

¹⁴⁶ Even the highest quality scholars often treat 1870 as a natural place to begin deep analysis of legal education and legal thought. See Grey, *supra* note 4, at 1 ("It seems natural to begin the history of modern American legal thought in 1870."). Some have asserted the neglect of pre-1870 legal education history reflects the larger ignorance of legal history in the United States. See Robert Stevens, *Two Cheers for 1870: The American Law School*, in *LAW IN AMERICAN HISTORY* (Donald Fleming & Bernard Bailyn eds., 1971); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 102-03 (1977); Earl Finbar Murphy, *The Jurisprudence of Legal History: Willard Hurst as a Legal Historian*, 39 N.Y.U. L. REV. 900 (1964). For a highly popular, though critically challenged, version of this view, see DANIEL BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* (1965).

¹⁴⁷ The standard modern citation appears to be FRIEDMAN, *supra* note 105.

¹⁴⁸ See HAROLD GILL REUSCHLEIN, *JURISPRUDENCE: ITS AMERICAN PROPHETS* (1951).

¹⁴⁹ See REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW*, *supra* note 23, at 112-13.

cally, preparation for becoming a lawyer took the form of training in England at the Inns of Court, reading one or more books on law, or apprenticing with a member of the legal profession or in the clerk's office of a court.¹⁵⁰ Accounts suggest the demonstrated educational benefits of each option ranged from admirable to fatuous. Yet they presented real options, even if we would seem to lack the capacity to appraise with confidence anything except individual teachers and students and curricula, some of whom were wonderful and others corrupt.¹⁵¹

Perhaps the most prominent and provocative alternative to the standard ways of educating lawyers was the approach authored by Thomas Jefferson and George Wythe.¹⁵² Combining lectures and mock simulated work in executive, legislative, and judicial realms, Jefferson and Wythe's approach advocated an ambitious version of what early in the Twentieth Century might be described as "public administration."¹⁵³ Most of all, they imagined everyday citizens and statesmen at work, with deep understanding of what today we might call political theory, formal jurisprudence, financial institutions, and diverse simulated law work. Through Wythe's successors, especially St. George Tucker, education at William and Mary proved rigorous and spread to other schools, including Transylvania and later the University of Virginia.¹⁵⁴

Other professorships proved less successful, but several aimed to provide a broad education, the likes of which, according to J. Willard Hurst, "would not appear again until the 1920's."¹⁵⁵ Even the rela-

¹⁵⁰ Charles McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597 (1982).

¹⁵¹ For ideologically diverse literatures suggesting this conclusion, see, e.g., Harlan F. Stone, *The Lawyer and His Neighbors*, 4 CORNELL L.Q. 175, 178 (1918-19); REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW, *supra* note 23, at 20; HURST, *supra* note 58, at 151-52; CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 41 (1911); CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL 126-28 (1908) [hereafter cited as WARREN, HISTORY OF HARVARD LAW]; Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629, 630 (1932-33); ANTON-HERMAN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA (1965).

¹⁵² See ALONZO THOMAS DILL, GEORGE WYTHE, TEACH OF LIBERTY (1979). For another fine source on this extraordinarily interesting figure, see ROBERT B. KIRTLAND, GEORGE WYTHE: LAWYER, REVOLUTIONARY, JUDGE (1986). For a recent account of Wythe's death, see Robert & Marilyn Aiken, *Life and Death of George Aiken: "I Am Murdered,"* 31 LITIGATION 53 (2004-5).

¹⁵³ For a prominent example of such public administration theory, see HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS (1947).

¹⁵⁴ See REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW, *supra* note 23, at 118, 423, 450-51; Brainerd Currie, *The Materials of Law Study (Parts. 1 & 2)*, 3 J. LEGAL EDUC. 331, 351 (1950).

¹⁵⁵ HURST, *supra* note 58, at 258.

tively “unsuccessful” provided evidence of remarkable intellectual and practical ambition. In 1817, the University of Maryland’s David Hoffman published a proposed curriculum that included private law, moral and political philosophy, international law, Roman law and political economy. Aware of the common law’s borrowing from the civil law, he proposed examining the reciprocal relationship; influenced by Bentham, he argued for the careful study of statutes and ethics. The very ambitiousness of his curriculum led most to regard it as unworkable. Joseph Story of Harvard Law School praised Hoffman as offering “the most perfect system for the study of law which has ever been offered,”¹⁵⁶ but insisted it would take seven years to teach.¹⁵⁷

Meanwhile, a small number of “proprietary schools” made their own mark. Standing alone, without the support of a university, the best known of these schools proved to be Litchfield Law School (in Litchfield, Connecticut), which had a successful run from 1775 until it closed its doors in 1833.¹⁵⁸ Tapping Reeve, a well-educated and entrepreneurial spirit, transformed lectures he had developed for those apprenticing with him into a sequential program for Litchfield. Through these lectures, he aimed to encompass and embody the entire field of law, for which there was not yet an equivalent to Blackstone’s immensely influential Commentaries.¹⁵⁹ Reeve proved so successful that, by 1784, he had to house students in a new building, and in 1798, he hired James Gould, a former student, to help teach. Litchfield’s students studied a systematically analytic rendition of law, with weekly examinations and moot courts.

Alfred Z. Reed, a remarkably scrupulous historian of legal education, best captured what Litchfield managed to accomplish. In a world where legal education in Connecticut had amounted to uneven and often shoddy apprenticeships, Reeve presented the common law as a system of rationally connected principles. Yet Litchfield’s approach seemed narrow and shallow when compared to William and Mary,

¹⁵⁶ ARTHUR SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN*, 1817-1967, at 55-56 (1967).

¹⁵⁷ See REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW*, *supra* note 23, at 124-25; SUTHERLAND, *supra* note 156, at 55-56; Currie, *supra* note 154, at 362 (1951).

¹⁵⁸ See generally SAMUEL H. FISHER, *THE LITCHFIELD LAW SCHOOL 1775-1883* (1933).

¹⁵⁹ For various editions of Blackstone’s work, see WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (2d ed., Thomas Cooley 1872); WILLIAM BLACKSTONE, *AN ANALYSIS OF THE LAWS OF ENGLAND* (5th ed. 1762), later accompanied by WILLIAM BLACKSTONE, *DISCLOSURE ON THE STUDY OF LAW* (1758). For the impact of the Commentaries in the United States, see, e.g., REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW*, *supra* note 23, at 11; Waterman, *supra* note 151. Blackstone’s smug satisfaction with British wisdom led Jeremy Bentham to pen an early sardonic response, see JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT* (1776). For the deepest and best interpretation of Blackstone’s work, see Duncan Kennedy, *Structure of Blackstone’s Commentaries*, *supra* note 63.

where common law principles melded with deep and broad theory and interest in the work of lawyers. Reeve's intellectual ambitions may have approached Blackstone's—though not by any means Jefferson's or Wyeth's.¹⁶⁰

In making the common law the systematic focus on Litchfield's approach, Reeve largely ignored everyday law work, too. Perhaps he thought what lawyers did beneath his new systematic approach. Or perhaps he did so knowing his students upon completing their time at Litchfield went off to short apprenticeships.¹⁶¹ In any event, Reeve treated Litchfield's lectures about the common law as proprietary matters. In this sense, too, he veered drastically from the democratic aspirations of Jefferson and Wyeth. Even if Reeve felt obligated to protect his product, he seemed to share Blackstone's ideological convictions. He likely wanted to indelibly mark the boundaries between aristocratic lawyers and everybody else.

Against this backdrop, and parallel in time to the education at places like William and Mary, Transylvania, and Litchfield, Harvard started its own law school in 1817. Judge Isaac Parker, the First Royall Professor of Law at Harvard, endorsed a broad view of legal education. Yet he anticipated a time when formal study would become narrower and more focused, an examination of the common law followed by a suitable placement as an apprentice. Parker would appear to have been picturing a Litchfield within the Harvard umbrella. Whatever the merits of this notion, Harvard struggled during its first decade and even looked as if it might close its doors.¹⁶²

Then arrived Justice Joseph Story of the United States Supreme Court, appointed to the newly established Dane Professorship of Law.¹⁶³ Much as Story had been an admirer, in principle, of the intellectually ambitious approach of the University of Maryland, his aims for Harvard turned out to be far more traditional, if not myopic.¹⁶⁴ He aimed to develop law, not lawyers.¹⁶⁵ To do so, he focused education on the common law, explicitly to the exclusion of non-legal bodies of thought (political theory, moral philosophy, local government). Some have noted the incongruity of Story leading Harvard's dramatic narrowing of legal education, particularly in light of his lavish praise of

¹⁶⁰ See REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW, *supra* note 23.

¹⁶¹ See *id.* at 131-32.

¹⁶² See WARREN, HISTORY OF HARVARD LAW, *supra* note 151, at 366-70; Currie, *supra* note 154, at 360.

¹⁶³ See SUTHERLAND, *supra* note 156, at 81-89.

¹⁶⁴ See Currie, *supra* note 154, at 362-63, 367.

¹⁶⁵ See REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW, *supra* note 23, at 143-44, 146-49; Currie, *supra* note 154, at 363-65; SUTHERLAND, *supra* note 156, at 136.

David Hoffman and his intense interest in interdisciplinary thought.¹⁶⁶ But Story was not the first and certainly would not be the last legal academic whose interest in ideas proved radically wider and deeper than the pedagogical vehicles he created in his own classroom and even through his professional scholarship.

Unlike so many others, we should not underestimate Story's impact on the formal university training of lawyers. He divorced ambitious legal education from any other discipline within the university and from the great majority of experiences outside the campus. In the view of Brainerd Currie, "not even Langdell's case method, the best known of Harvard influences, has had a more pervasive and significant effect on legal education."¹⁶⁷ While Story laid the groundwork for the intensive and exclusive study of the common law as the means for a university to train future lawyers, he could not institutionalize his own success. After his death in 1845, Harvard's law school faced several difficult decades, as did Yale's. At least in its first incarnation, the study of the common law did not triumph.

When in 1870 Harvard President Charles Eliot hired Christopher Columbus Langdell, he hoped to elevate the status of law within the university, whose overall mission he aimed more generally to enhance.¹⁶⁸ Drawn to and versed in European progressive ideas about education (especially those of Johann Heinrich Pestalozzi),¹⁶⁹ Eliot played a hunch: Langdell appeared to be the man focused and determined enough to make law the equivalent of the sciences, securing the respect of intellectuals and professional alike.¹⁷⁰ More perhaps than even Eliot might have imagined, the two proved a splendidly successful team. Together they established law school as a three year graduate program, required as a prerequisite an undergraduate education, imposed admission standards, divided the curriculum into discrete courses and sequences, initiated the use of novel pedagogical materi-

¹⁶⁶ See Currie, *supra* note 154, at 362-63.

¹⁶⁷ *Id.* at 366.

¹⁶⁸ For examples of the substantial literature on Eliot, see HENRY JAMES, CHARLES W. ELIOT, PRESIDENT OF HARVARD UNIVERSITY, 1869-1909 (1930); HUGH HAWKINS, BETWEEN HARVARD AND AMERICA: THE EDUCATIONAL LEADERSHIP OF CHARLES W. ELIOT (1972). Even critics like John Jay Chapman perceived Eliot as having remade Harvard University. THE SELECTED WRITINGS OF JOHN JAY CHAPMAN 213 (Jacques Barzun, ed., 1957). For examples of Eliot's own thoughts, see CHARLES WILLIAM ELIOT, HARVARD MEMORIES (1923).

¹⁶⁹ See Charles Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518 (1920). Perhaps the central cited work of Pestalozzi is JOHANN HEINRICH PESTALOZZI, HOW GERTRUDE TEACHES HER CHILDREN (1800). For accounts of Pestalozzi's ideas, see GEORGE EDUARD BIBER, HENRY PESTALOZZI AND HIS PLAN OF EDUCATION (1831); KATE SILBER, PESTALOZZI: THE MAN AND HIS WORK (1965).

¹⁷⁰ No one better sketches the murkiness of the reasons for Eliot's hiring of Langdell than Anthony Chase. See Chase, *supra* note 4.

als and methods, and formally examined the students at the end of the year.¹⁷¹

The revolution occurred relatively rapidly at Harvard and far more slowly across the country. In both realms, Eliot and Langdell faced reservation, opposition, and exit. Faculty at Harvard left immediately; within three years, student enrollment decreased; the bar in Boston shifted their support from Harvard to the other venues, including the new Boston University Law School, where what lawyers did and apprenticeships proved the continuing center of attention.¹⁷² Meanwhile, even those intellectuals who admired Langdell's care and persistence openly questioned the notion that anyone should regard law as a science. In a brief review of Langdell's casebook, Oliver Wendell Holmes challenged Langdell's jurisprudence, concisely anticipating many of the most sophisticated critiques of the decades to come.¹⁷³

Langdell's focus on cases and use of what soon was to be called the Socratic Method struck many within university and professional life as odd, at best, and disastrous, at worst.¹⁷⁴ Langdell's composure under fire helped. Yet it is hard to imagine the transformation out-

¹⁷¹ From a vast literature identifying these accomplishments, an illustrative sample would include: STEVENS, *supra* note 146; JOEL PARKER, *THE LAW SCHOOL OF HARVARD COLLEGE* (1871); Paul N. Savoy, *Toward a New Politics of Legal Education*, 79 *YALE L.J.* 444 (1970); Edgar J. Phelps, *Methods of Legal Education*, 1 *YALE L.J.* 139 (1892); E. Norton, *THE HARVARD LAW SCHOOL* (ca., 1900); William Schofield, *Christopher Columbus Langdell*, 55 *AMER. L. REG.* 273 (1907); JOSEPH REDLICH, *THE COMMON LAW AND THE CASE METHOD* (1914); Francis Rawle, *A Hundred Years of the Harvard Law School*, 26 *HARV. GRADUATES' MAG.* 177 (1917); HARVARD LAW SCHOOL ASSOCIATION, *THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL* (1918); REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW*, *supra* note 23; REED, *PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA*, *supra* note 23; SAMUEL WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* (1941); HURST, *supra* note 58; DAVID CAVERS, *LEGAL EDUCATION IN THE UNITED STATES* (1960); ROSCOE POUND, *THREESCORE AND TEN YEARS OF THE HARVARD LAW SCHOOL* (1960); SUTHERLAND, *supra* note 156; WILLIAM L. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973); JERALD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); WILLIAM R. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* (1978).

¹⁷² See WARREN, *supra* note 70, at 305, 357, 396-97.

¹⁷³ See Holmes, *supra* note 73, at 234. Holmes' rejection of Langdell's jurisprudence did not signal a refusal to support Eliot and Langdell's case method. For Holmes' defense of Langdell's pedagogy, see OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 42-43 (1920).

¹⁷⁴ For example, Langdell's colleague, John Chipman Gray, wrote to President Eliot: In law the opinions of judges and lawyers as to what the law is, *are* the law, and it is in any true sense of the word as unscientific to turn from them, as Mr. Langdell does, with contempt because they are 'low and unscientific,' as for a scientific man to decline to take cognizance of oxygen or gravitation because it was low or unscientific. Letter from John Chipman Gray to President Eliot (Jan. 8, 1883), *quoted in* MARK DEWOLFE HOWE, 2 *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882*, at 158 (1963).

lasting its denigrating opponents were it not for Eliot's intellectual enthusiasm, professional popularity, and fundraising capacity.¹⁷⁵ With the help of those who backed the university-wide shake-up at Harvard, Eliot provided the cover every experimentalist, every insurgent, yearns for. Eliot did his public-relations work while Langdell did his classroom teaching.¹⁷⁶ And, with the help of newly hired protégées, especially James Barr Ames, Langdell and Eliot consolidated control over the curriculum and over the promotion of their pedagogical approach to other schools and the wider world.

The ultimate appeal and weakness rested in the decisions Langdell made and Eliot protected: the singular focus on private common law, through the exclusive study of appellate judicial decisions, through a question and answer method soon known as the Socratic Method. Each decision was a departure from the Harvard Law School education that proved otherwise unable to gain the respect of others within the University. And together they constituted a way of understanding law, of educating lawyers, and of learning what you must know to serve as a lawyer in any state and in any role.

Perhaps none of these achievements should be regarded as “revolutionary”—the trope used to describe Langdell in so much legal history and popular iconography. At Harvard, Story already had focused attention on the outpouring of judicial decisions and segregated the study of law from any other discipline or experience. At Harvard, teachers in other parts of the university by this time had implemented the European inclination toward discussion rather than lecture. And at New York University (and later at Hastings), John Pomeroy already practiced something like the “case method,” focusing upon judicial opinions through open exchanges with students.¹⁷⁷ Yet Eliot and Langdell managed to defend and extend a pedagogical system as rig-

¹⁷⁵ For only some of the critical praise of Eliot's accomplishments, see, e.g., ALAIN TOURAINE, *THE ACADEMIC SYSTEM IN AMERICAN SOCIETY* (1974); LAWRENCE R. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* (1965); MERLE EUGENE CURTI, *THE SOCIAL IDEAS OF AMERICAN EDUCATORS* (1935).

¹⁷⁶ See WARREN, *supra* note 70, at 396-97, 428; HOWE, *supra* note 174, at 260-72.

¹⁷⁷ In a tribute by his son, Pomeroy is described as already having anticipated Eliot and Langdell's case method, first at New York University and later at Hastings. See Pomeroy, Jr., *John Norton Pomeroy*, *supra* note 58. Willard Hurst corroborates Pomeroy's roles in teaching cases through a version of the Socratic Method:

At New York University Law School between 1865-1867 young Elihu Root studied law under John Norton Pomeroy. The course consisted in reading assigned cases and participating in discussion of them in a small class under the lead of Pomeroy's questions. Pomeroy's approach was radically different from the prevailing text-and-lecture method. But it did not fall to him to shape . . . the course of law training in the United States.

HURST, *supra* note 58, at 261. See also REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW*, *supra* note 23, at 3.

ously teaching students “how to reason,” how to “think like a lawyer,” in ways that began to evoke respect, even from those who rejected more formal claims of law as a science.¹⁷⁸

Perhaps most remarkable is how, by the early 20th Century, with the considerable work undertaken by faculty like William Keener at Columbia and Joseph Beale at Chicago, and with considerable support from wider social circles, a single vision of how best to educate lawyers spread out across diverse economic realms and roles.¹⁷⁹ Indeed, the power expressed through Eliot and Langdell’s approach ultimately rippled out across intellectual and professional domains, legitimating lawyers and legal education as central to social, commercial and political life.¹⁸⁰ If Eliot and Langdell started out to change Harvard, they ended up altering the status of lawyers within broader cultural life and the very cultural life through which lawyers were perceived.

From this point forward, in traditional and even many critical histories, the narrative almost writes itself. The formidable challenge issued by and the failure of the Realists to gut Eliot and Langdell’s approach;¹⁸¹ the consolidating peace reasserted by Hart & Sach’s legal

¹⁷⁸ For early and important examples of the praise from other legal academics of the case method’s capacity to develop legal analysis, see Christopher Tiedeman, *Methods of Legal Education* (pt. 3), 1 YALE L. J. 150, 154-55 (1892); William Keener, *Preface, Cases on the Law of Quasi-Contracts*, quoted in REDLICH, *supra* note 171, at 24; James Scott, *An Address Delivered at George Washington University*, 2 AM. L. SCHOOL REV. 4, quoted in REDLICH, *supra* note 171, at 25.

¹⁷⁹ For literature describing the spread of Eliot and Langdell’s approach, and the ways larger social forces and Eliot and Langdell’s pedagogy appear to have mutually reinforced one another, see, e.g., STEVENS, *supra* note 146, at 405, 426-35; JULIUS GOEBEL, FOUNDATION FOR RESEARCH IN LEGAL HISTORY, A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 131-58 (1955); JOHNSON, *supra* note 171; KENNEDY, *supra* note 124; OTTO RANK, MODERN EDUCATION: A CRITIQUE OF ITS FUNDAMENTAL IDEAS 12 (1932); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); WILLIAM APPLEMAN WILLIAMS, THE CONTOURS OF AMERICAN HISTORY 227-342 (1961); Morton Horwitz, *The Legacy of 1776 in Legal and Economic Thought*, 19 J. L. & ECON. 621 (1976).

¹⁸⁰ For modern portrayals of Eliot and Langdell’s ideological victories, see, e.g. Rubin, *supra* note 33, at 610; Bob Gordon, Jack Schlegel, James May & Joan Williams, *Colloquium, Legal Education Then and Now: Changing Patterns in Legal Training and in the Relationship of Law Schools to the World Around Them*, 47 AM. U. L. REV. 751 (1998).

¹⁸¹ The work of realists proceeds from different points of departure and toward different ends. For an example of realist critique with which most claim familiarity, see, e.g., JEROME FRANK, LAW AND THE MODERN MIND (1930). For an example of notable work cited routinely by several disparate strands of scholars, see Cohen, *supra* note 29. Among realists whose force proved great but whose contributions soon got lost, see the work of various empirically-minded social-science proponents (often associated with Columbia, Yale, and Johns Hopkins) such as HERMAN OLIPHANT, CASES ON TRADE REGULATION (1923); Walter Wheeler Cook, *The Logical and Legal Bases of Conflict of Laws*, 33 YALE L.J. 457 (1923-24); William O. Douglas, *A Functional Approach to the Law of Business Associations*, 23 ILL. L. REV. 673 (1928-29); JAMES C. BONBRIGHT, THE VALUATION OF PROPERTY

process theory;¹⁸² the revolution of the late 60's and 70s, leading to short-term angst triggered by Critical Legal Studies,¹⁸³ the toe-hold gained by clinical education,¹⁸⁴ the production of various strands of the Law and Society Movement,¹⁸⁵ and the pronounced role of law & economics in legal education and legal thought;¹⁸⁶ the lethargy of the late 80s and most of the 90s, and the excitement provoked by a more obviously globalized world, where lawyers play ever more diverse roles, where legal education must now finally transform Eliot and Langdell's regimen in order to prepare for what we're already dealing with, let alone what we cannot confidently predict.

(1937). For an illustration of several reports authored by then Dean of Columbia, Harlan Fiske Stone, during a period where some of these social-science realists aimed to change the curriculum, see Harlan Fisk Stone, *The Future of Legal Education*, 10 A.B.A. J. 233 (1924). These empirically-driven realists received scrupulous and generous attention in JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

¹⁸² The long unpublished manuscript finally, through the efforts of many, especially William Eskridge and Philip Frickey, became HENRY M. HART, JR. & ALBERT M. SACHS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

¹⁸³ For descriptions of these movements and work by some principal champions, see Richard Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985); Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 SO. CAL. L. REV. 1769 (1992); Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359; ANDREA DWORKIN & CATHARINE MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* (1988); William Felstiner, Richard Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming . . .*, 15 L. & SOC'Y REV. 631 (1981); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Duncan Kennedy, *Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute*, 1 RETHINKING MARXISM 100 (Fall 1988); Arthur Leff, "Law and," 97 YALE L.J. 989 (1987); CATHERINE MACKINNON, *FEMINISM UNMODIFIED*, (1987); ROBERTO UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1984); ROBERTO UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* (1987); ROBERTO UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987); PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

¹⁸⁴ See, e.g., Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, NLADA BRIEFCASE 106 (Aug. 1977); DAVID BINDER, PAUL BERGMAN & SUSAN PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

¹⁸⁵ Cf. Richard L. Abel, *Redirecting Social Studies of Law*, 14 LAW & SOC'Y REV. 803 (1980); Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986). For a knowledgeable analysis of decades of Law and Society work, see Richard L. Abel, *Law and Society: Project and Practice*, 6 ANN. REV. L. & SOC. SCI. 1 (2010).

¹⁸⁶ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 6-8 (1972); GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 39-40 (1970); Richard Posner, *The Present Situation in Legal Scholarship*, 99 YALE L.J. 1113 (1981); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

Much remains true in—and important about—this narrative. Much remains missing, too. Particularly without the systematic study of all law schools and all geographic regions, we cannot know patterns and details that diverge from and illuminate what we commonly understand. Even what we already do know, however, should make plain that the hegemony of Eliot and Langdell’s case method reflects campaigning more ruthless, flexibility more perceptive, and repackaging more imaginative than we might readily realize. Ultimately, the authority of Eliot and Langdell’s approach reinforces the ideology it contributes to and reflects.

Consider the standard Harvard-centered history of legal education. In the years when Harvard aimed to plug its model, Harvard’s deans (led by James Barr Ames and later Roscoe Pound) and their allies dismissed places like William & Mary as mere professorships.¹⁸⁷ They went out of their way to praise Litchfield, perhaps because it was defunct, perhaps because Story’s innovations (and, to a significant degree, Langdell’s) looked very much like creating a Litchfield within Harvard University.¹⁸⁸ Alfred Reed, in his ambitious 1921 work for the Carnegie Foundation challenged Ames and Pound’s self-serving account,¹⁸⁹ and in 1974 Dean Erwin Griswold acknowledged that the earlier law professorships certainly were early iterations of ambitious legal education.¹⁹⁰ But the story of legal education beginning at Harvard in 1817 and taking on its first intellectually ambitious form in

¹⁸⁷ James Barr Ames, Pound’s predecessor and Langdell’s successor as dean of the Harvard Law School, concluded that “the hopes that may have been entertained of developing schools of law out of the early law professorships were in the main doomed to disappointment.” JAMES BARR AMES, *LECTURES ON LEGAL HISTORY* 359 (1913). For an illustration of Pound’s dismissiveness, see Roscoe Pound, *The Law School and the Professional Tradition*, 24 MICH. L. REV. 156, 160 (1926-27) (early lectures by law professorships “were not and were not meant to be professional training in law. They were part of the general education of gentlemen, not part of the professional education of lawyers. They were lectures for college students generally and for the community at large.”)

¹⁸⁸ Pound pronounced law teaching in this country had begun with the expansion of apprenticeship training, which in turn produced “the first American law school,” the famous proprietary law school founded by Judge Tapping Reeve in Litchfield, Connecticut. *Id.* at 160-61. See also Roscoe Pound, *The Evolution of Legal Education* 7 (Inaugural Lecture delivered Sep. 19, 1903, while Professor of Law and Dean of the College of Law in the University of Nebraska). “The private law school at Litchfield,” declared Ames, “had for nearly twenty-five years no competitor, and throughout the fifty years of its existence was the only law school that could claim a national character.” AMES, *supra* note 187, at 359.

¹⁸⁹ See REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW*, *supra* note 23.

¹⁹⁰ “Though Wythe and Tucker were professors in a University,” as Erwin Griswold acknowledged in the Hamlyn Lecture, “without being set up as a separate ‘law school’ the difference is simply one of definition. There can be no doubt that Wythe and Tucker . . . were engaged in a substantial, successful and influential venture in legal education, and that their effort can fairly be called the first law school in America.” Griswold, *supra* note 58, at 39.

1870 persists, less innocent repetition and more conscious spin.¹⁹¹ Harvard became the mecca of law schools for a reason.

Think, too, about casebooks. Most know that Langdell's unadorned "cases" (appellate opinions) became "cases and materials," including background theoretical and empirical information, coupled with straightforward statements of hornbook law. Not often enough is it said, however, that published casebooks serve both novices and experts well. Newly hired faculty historically did not come from scholarly backgrounds, most often had not read at all widely or deeply in the subject they were assigned to teach, and even more frequently had no training or experience in teaching. Langdell-inspired casebooks provided these novices pre-packaged materials and a revered (if mysterious) method. That has become all the more true as casebook authors now compete for market share with better-than-ever teacher's manuals, complete with visuals, questions, and more.¹⁹² Even more thoroughly than thirty years ago, novices today can appear to know much about something they actually remember little of and are only keeping several weeks ahead of students.

At the same time, modern casebooks serve expert teachers well. As the decades unfolded, casebooks reveal what a wonderfully flexible instrument Langdell had presented his colleagues. Faculties could choose and order appellate decisions to reflect their own views of important themes.¹⁹³ They could surround appellate decisions with texts that reflected changing views in legal and interdisciplinary scholarship.¹⁹⁴ They could introduce hypothetical problems that demanded students think through how relevant doctrine might apply in varied circumstances.¹⁹⁵ They could inculcate their own particular take on the reasoning celebrated in the phrase "thinking like a lawyer." Indeed, the very selection and organization of appellate cases and materials permitted faculty with wildly disparate (yes, contradictory

¹⁹¹ For only some of the many examples of the acquiescence in Ames and Pound's account by scholars, see FRIEDMAN, *supra* note 105, at 279; STEVENS, *supra* note 4, at 415; E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. Rev. 695, 725-26; WARREN, *supra* note 70, at 357; Robert Stevens, *Law Schools and Legal Education, 1879-1979, Lectures in Honor of 100 Years of Valparaiso Law School*, 14 VAL. U.L. REV. 179 (1980).

¹⁹² Of the many examples, in what seems an escalating push for market share, see MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* (10th ed. 2016).

¹⁹³ See, e.g., WILLIAM KLEIN, J. RAMSEYER & STEPHEN BAINBRIDGE, *BUSINESS ASSOCIATIONS, CASES AND MATERIALS ON AGENCY, PARTNERSHIP, AND CORPORATIONS* (8th ed. 2012).

¹⁹⁴ See, e.g., JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES & PRACTICES* (5th ed. 2010).

¹⁹⁵ See, e.g., CHARLES KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* (7th ed. 2012).

and hostile) views about law to teach students through the same case method introduced in 1870 to prove law a science.¹⁹⁶

Over the decades, in response to various schools of thought and political movements, Eliot and Langdell's approach became the centerpiece of the first year and the elective big doctrinal classrooms of the second and third years. That ascension can be understood as the triumph of all that now surrounds the case method: seminars, clinics, workshops, colloquia, cross-registration courses, independent research. The periphery serves to spice up the droning on of the Socratic examination of appellate judicial opinions—or at least so it might be said. And the study of everything from explicitly interdisciplinary topics, global dynamics, the administrative state, and diverse practice roles now has reduced in political significance Eliot and Langdell's pedagogy.

But that interpretation of core and periphery seems highly debatable—and perhaps dead wrong. The first year and the big doctrinal classrooms remain both the big cognitive footprint on students' categorical perception and the stuff of cultural lore. Even more to the point, the big doctrinal classroom is the real stuff of legal education—the “law,” the concrete stuff without which you just couldn't say you went to law school, perhaps couldn't even call yourself prepared to lawyer. And together those effects seem central to the ideological place of Eliot and Langdell in how we educate lawyers and what it means everyone must be able to do well in order to be perceived as well-educated.

As if all that were not enough to make Eliot and Langdell a formidable status quo, law schools realize the package works. Law students get upset if faculty wander at all far from appellate cases and the law. They may want their clinics, because live clients and close supervision are exciting, even engaging. Quite apart from the prohibitive expense of clinics, students themselves insist the “real deal” is to be found in the doctrine explored in the Socratic classroom. Besides, law schools make lots of money running themselves as they do—and they pay faculty well by academic standards. In the face of this comfortable arrangement, what likelihood is there of a sizeable enough contingent of faculty being willing to create a system that could put everything up for grabs, including their hard-won teaching assignments and salaries? We may legitimately hope for what we do not expect to see.

D. Predictable But Not Inevitable Convergence

Much as I respect the prognosticating power of betting skeptics

¹⁹⁶ See, e.g., James Boyle, *Torts* (2003), <https://law.duke.edu/boylesite/syllabus2003.pdf>.

and astute observers and old souls and close friends, the convergence we're now experiencing was not inevitable. At least, what we now see and hear and read about the transformation of legal education did not ineluctably follow from any of the three prominent portrayals and critiques of legal education. The three most prominent accounts invite many interpretations—and suggest many possible trajectories—other than the status-quo-plus curricula adopted by some law schools and still resisted by many more. The accounts may even be credibly described as far more radical than—or at least including radical elements missing from—the transformation that has ensued. How can these versions of the deep stock story offer, at once, options and rationales considerably beyond (perhaps even obliterating) the conventional, while defending as wise (or at least as necessary or unavoidable) traditional choices?

These three histories remain faithful to the background rules while at the same time (to varying degrees and in different ways) calling into question things as they are in legal education. If the Popular Portrayal and Critique far too unquestioningly lavishes praise on the Socratic Case Method, it certainly exhorts law schools to spend *considerably more* resources and time developing the practical skills and the professional identity law school graduates need. If the Functional Portrayal and Critique far too unequivocally extols the many-sided virtues of Langdell's system, it certainly *explicitly identifies the nature and some important limits* of the Socratic Case Method (yes, in ways already well established in more radical literatures about lawyering and law yet including themes and points typically ignored and obscured in mainstream accounts). And if the Historically More Particular and Ideologically More Explicit Portrayal and Critique seems entirely too resigned to (actually in favor of?) the continuing reign of the Eliot-Langdell system, it certainly provides consumers with a strong appreciation of other evocative options law schools have in the past chosen and might well still choose.

Far more unusually, in violating the traditional protocols in writing about legal education, these histories variously make explicit or at least visible the background rules. In stressing the need for first-rate (and, yes, "expensive") clinics rather than cheap, on-the-fly grab-bag of offerings shoved within the huge umbrella of experiential education, the Popular Portrayal and Critique openly puts out there that dollars must be redirected—redirected from presumably deserving priorities, almost all of which favor current tenured and tenure-track faculty and deans, the overwhelming number of whom have never taught clinically. In speaking soberly of the need for far more of the expansive and layered realistic problems (the "business school type,"

as one strand of mainstreamers are inclined to say) rather than the skimpy sort of hypotheticals law faculty so routinely use in claiming they “do problems too,” the Functional Portrayal and Critique brings (nearly?) to the surface the long-overdue need to challenge the traditional casebook industry and its authors and the equally important and delayed necessity of including in annual budgets financial incentives to write and, yes, publish the far-more-life-like brand of problems. And the Historically More Particular and Ideologically More Explicit Portrayal and Critique stresses the lack of intellectual ambition embodied in the Socratic case method—and perhaps beyond—especially when compared to what others in the past pursued as essential to the great education of future lawyers.

Even if only to avoid the charge that the Emperor has no clothes, the three histories violate some of the protocols of acceptable behavior when writing about legal education. And, in the process, they reveal at least some of the typically tacit background rules or the elements of the deep stock story. That’s especially abnormal for mainstreamers. What separates mainstream idealists from radical utopians, at least in part, is precisely the inability and unwillingness to surface and articulate the very assumptions and aspirations that typically pre-select as valuable and worthy only some proposals and discussions—banishing all others to various subordinate categories, from “in-principle-interesting-but-in-practice-not-administrable” to downright “off the wall” (flaky, freaky, mad, immoral, silly, adolescent, Communist, nihilist).¹⁹⁷ Idealists strongly desiring to remain allegiant to and influential within the mainstream typically plant their flag on the safe side of the border. Consciously or not, they characteristically accept as uncontested certain political convictions and practical constraints that at least weaken and more typically undermine their own utopian aspirations.¹⁹⁸

But the pressures of the past decade, particularly in the earliest phase of this period, produced histories of legal education that blurred this boundary. Of the many authors writing emails, blogs, letters, essays, articles, and books, most can be fairly described as mainly within the mainstream—securely so, even powerfully so. Their analyses of

¹⁹⁷ For just one sample, see Paul Carrington’s insistence that “legal nihilists” (later pin-pointing that he meant “CLS folks”) ought resign from their teaching posts, Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); Letter from Paul D. Carrington to Robert Gordon, in Peter W. Martin, “*Of Law and the River*,” and *of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 12 (1985).

¹⁹⁸ For a parallel analysis of mainstream idealists within the criminal justice reform movement, see Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POV. L.J. 1 (2014).

legal education combine conspicuous allegiance to the status quo and a willingness to question, a willingness to wonder aloud about counter-visions of the past and perhaps even the future, and even a willingness to disobey the powerful protocols dictating how to produce worthy and admired work about legal education. Since mainstreamers routinely prop up the status quo, these criticisms amounted to mainstreamers challenging themselves. At their most defiant moments, these diverse written expressions suggest Hans Kung's seemingly contradictory relationship to the Catholic Church: utterly loyal even as he challenges what traditionalists regard as hallowed.¹⁹⁹

In their more compliant passages, however, these three histories suggest an acceptance of the status quo Kung (not to mention, Martin Luther) would find disgraceful.²⁰⁰ They never stray too far from openly appreciating how the traditional system has demonstrated remarkable success, particularly in fulfilling its intellectual aspirations, particularly through the Socratic case method's capacity to teach the legal analysis at the heart of thinking like a lawyer. They never openly declare a break from all those who, together, vote in the majority on proposed curricular changes and from all those who, together, declare whether or not as a mainstreamer you remain comfortably within the crews making the calls and publicly admired for what you write, say, and do. They never burn any bridges, preserving for themselves and for others the right—in the not-too-distant future—to pledge allegiance to the traditional system, to declare a renewed faith in the Socratic case method, and to celebrate familiar status-quo-plus changes as revolutionary.

These three histories subvert *both* the protocols governing mainstream writing about legal education and the liberation from the status quo they appear to be declaring. Especially as products of intellectuals, these versions of the deep stock story cannot be perceived as missing what all the action says about legal education. They must get out front and convert existing critiques (including many from radical utopians they only infrequently and selectively credit) into important themes and points they now have themselves articulated. Then the mainstreamers can be understood as leaders if indeed the decade's pressures eventually make unavoidable fundamental alterations in legal education. But if shriveling into proud traditionalism seems doable, even perhaps necessary in the face of, say, the voting

¹⁹⁹ For a sampling of Kung's radical theological work, see HANS KUNG, *WHY I AM STILL A CHRISTIAN* (1987); HANS KUNG, *INFALLIBLE? AN UNRESOLVED ENQUIRY* (1994); HANS KUNG, *THE CATHOLIC CHURCH: A SHORT HISTORY* (2003).

²⁰⁰ For a short and compelling biography of Luther, see MARTIN MARTY, *MARTIN LUTHER: A LIFE* (2008).

strength of colleagues, they must offer intellectually respectable and pragmatically powerful explanations for the cozy path back nearly to where they started or to where other schools already have been. As mainstream declarations of the truth, particularly as documents produced by idealists within the mainstream, these histories want to have it both ways and need to have it both ways.²⁰¹

This should all be familiar, of course. Mainstreamers could write internally contradictory versions precisely because the deep stock story does not yield, does not compel “the correct answer.” And they could pursue the radical line they had come to regard as their own (at least intellectually) or retreat to a more familiar status-quo-plus “transformation” (or pursue any path, for that matter) because their own iterations, like every other imaginable iteration and like the deep stock story itself, do not determine the meaning.²⁰² In any era, and any moment in time, any group can take their shot at exploiting this “up-for-grabs” quality. That does not at all mean we can always do what we want, with a text or with law or in street encounters.²⁰³ But our inability to do what we desire does not reflect the “inherent one-sidedness” of any system’s stock of categories, stories, and arguments.²⁰⁴ Rather we can’t because intelligibility, credibility, and per-

²⁰¹ Obviously this depiction of mainstream writing about legal education over the past ten years resembles modern debates around liberal rights offered by people like Duncan Kennedy and Fran Olsen of the Critical Legal Studies Movement, left-liberals like Frank Michelman and Joe Singer, appreciative of and yet in disagreement with aspects of the CLS critique, and scholars of color like Patricia Williams and Richard Delgado, who challenge the critique from perspectives quite different from White left-liberals. See, e.g., Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* (Wendy Brown & Janet E. Halley eds., 2002); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 *TEX. L. REV.* 387 (1984); Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, 28 *NOMOS* 71 (1986); Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1 (1984); PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 *HARV. C.R.-C.L. REV.* 301 (1987). For an earlier compressed account of the same phenomena differently labeled, see Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 *YALE L.J.* 201 (1933). For my earliest published contribution to the then prominent and still vitally important but largely neglected debate, see Gerald P. López, *A Declaration of War By Other Means*, 98 *HARV. L. REV.* 1667 (1985).

²⁰² Credit for this insight—exquisitely elaborated—rightfully belongs to early members of the Critical Legal Studies movement, including Duncan Kennedy, Roberto Unger and Clare Dalton. See Duncan Kennedy, *Legal Formality*, 2 *J. LEG. STUDY* 351 (1973); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976); Roberto Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561 (1983); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997 (1985). Decades later, some ideological opponents of the Left, including prominent scholars and judges like Richard Posner, pressed this understanding, writing as if they had agreed all along. See Richard A. Posner, *Bad Faith*, *NEW REPUBLIC*, Jun. 9, 1997, at 34.

²⁰³ For one of my published analyses of this phenomenon, see López, *supra* note 201.

²⁰⁴ For some of us, this division—seeing the possibilities as fluid rather than inherently

suasiveness are themselves—like all else—the products of coercive power, expressed in many ways, including through the limits of circumstance, time, and persuasive chops.²⁰⁵

When the force of the past decade's insistence that we make legal education fundamentally better and dramatically more affordable dissipated, mainstreamers felt again free to do pretty much as they pleased. And their internally contradictory accounts of legal history provided them the intellectual support they needed for any retreat they chose to pursue. The idealists among them could still regard themselves as leaders of the reform movement. Well, they could only if they chose to accept piecemeal changes (all already familiar enough in legal education), to join in (or at least not to openly object to) touting these changes as “revolutionary,” and to abandon any more sweeping aspirations they themselves may ever have come to believe necessary. “Implicit loyalty oaths” do seem to remain a condition of remaining within the “inner circles of legality.”²⁰⁶

Meanwhile, radical utopians have had to confront, again, what should be obvious. Lacking voting power within law schools, the ABA and state bars (and lacking anything like the substantial cultural clout of the sort painfully and brilliantly built by, say, the Queer Movement), their various counter-visions would at best be reflected only in

one-sided—turns on our very understanding of power. *See, e.g.*, GERALD P. LÓPEZ, *REBELLIOUS LAWYERING* (1992), Lucie White, *Seeking . . . the Faces of Otherness . . . : A Response to Professors Sarat Felstiner and Cahn*, 77 *CORNELL L. REV.* 1499 (1992); Pionelli, *Foucault's Approach to Power*, *supra* note 48. For the debate within early Critical Legal Studies around “inherent one-sidedness” and “strategic exploitation of indeterminacy,” compare MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977) and Kennedy, *supra* note 202. For a recent conversation exploring this and much else, see Tor Kreyer, Carl Lisberger & Max Utzschneider, *Law on the Left: a Conversation with Duncan Kennedy*, 10 *UNBOUND: HARV. J. LEGAL LEFT* 1 (2015). For the debate among feminists cast in terms of domination of women by men, compare Catherine MacKinnon's insistence that women do nothing except speak the master's will with Angela Harris' critique of MacKinnon's utter failure to appreciate the reality of resistance. Compare *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *BUFF. L. REV.* 11 (1985) (conversation between Carol Gilligan and Catherine MacKinnon); CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATES* (1989) with Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 590-601 (1989). During this same period, others in print explored resistance in terms consistent with this far more fluid depiction of power and of the capacity of the subordinated now and then to overcome the odds. *See, e.g.*, Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 *STAN. L. REV.* 1 (1988); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2105 (1991).

²⁰⁵ For only one cluster of pieces making this point in overlapping ways from very different vantage points, see López, *supra* note 62; Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. LEGAL EDUC.* 518 (1986).

²⁰⁶ Here I borrow directly from Kennedy, *Structure of Blackstone's Commentaries*, *supra* note 23, at 218.

small chunks in this much hailed “transformation of legal education.” And even those chunks would most likely be described as brand new, omitting entirely attribution to the work of the very radical utopians most responsible for the existence of these innovations. Deep theories of interpretation have helped demystify much (including lawyering and law), but they must *not* be understood, much less employed, to obscure—as opposed to methodologically revealing—how power works.²⁰⁷

What remains intriguing, however, is whether or not the past decade has altered the conscious appreciation of the deep stock story, frontal challenges to its legitimacy, conscious choices to reinstate its rule. Making background rules explicit, or at least partially visible, creates otherwise unavailable opportunities and may even compel decisions typically left implicit. For those who admire these rules, the advantage may be to make everyone conscious that we are choosing them—recommitting ourselves quite formally. A referendum of this sort may dampen any unrest in the foreseeable future. The quiescence I now sense, as do others, may suggest the rebellion has failed and we all must get comfortable with the newly instituted status-quo-plus changes and all the exaggerations that surround them.

Knowing we are recommitting to a particular set of background rules can be disquieting, however. Before this past decade, we gave tacit permission to legal education to continue on its path. Now perhaps more of us apprehend we can be rightly understood as giving open authorization to voting majorities and leaders of law schools and bars to do—at best—only what the most triumphant proclaim—all while most still fake the funk, all while other visions have been pushed outside respectable discussion. Is that how we shall decide to be interpreted? How we choose to be regarded?

Can it be true, for example, that legal education need not be as good as it might be for students and for the profession and for everyone the profession serves simply because certain transformations would demand from the tenured faculty what a voting majority of them are unwilling to permit? Is our allegiance to the background rules expressed through the deep stock story and to the material interest of voting majorities of faculties, state bars and the ABA greater

²⁰⁷ Including pivotally how power operates through law and particularly judges (see John Henry Schlegel, *Book Review, Martha Minow, Michael Ryan & Austin Sarat, Narrative, Violence, and the Law: The Essays of Robert Cover (1992)*, 14 *LAW & HIST. REV.* 125 (1996); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *YALE L.J.* 1860 (1987); Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986)) and how power gets routinely exercised by private parties through coercive capacity comparable to public actors (see Robert Hale, *Law Making by Unofficial Minorities*, 20 *COLUM. L. REV.* 451 (1920)).

than our desire to provide the education modern lawyers most need?

E. Yet, Here's Where We're At

We near the place where I shall offer an alternative vision—a different slate of alterations and explanations—that diverges from and frontally challenges the deep stock story. Driven by contrasting assumptions and aspirations, and borrowing directly from the best of clinical programs, I shall sketch an alternative vision both more thoroughly theoretical and more thoroughly practical than the mid-level and low-mid-level activity that still characterizes legal education.²⁰⁸ The vision signifies the contributions of an unimaginably motley crew and invites implementation as far-reaching as its creators are various.

No, I shall not offer this alternative as a “pilot,” as an “experiment,” as a “probationary audition.” Why? Because I am among those who have been implementing this counter-vision for decades, mainly through clinical programs but often enough through other courses, other learning opportunities, consciously created to express what we need and want as the best imaginable training rather than what legal education has always done. And I am but one among many—including some of the nation’s best lawyers, teachers, scholars, students, and staffers. In the midst of traditional legal education, we have created a counter-curriculum, complete with students who thoroughly grasp the aims and methods and have contributed to the originality and refinement of how we learn and how we teach.

Much as I’m shooting for the moon, I’m offering the alternative vision less because I believe enough others will find it persuasive (or even plausible or even intelligible) and more because it helps make explicit, as would other counter-visions, the “status-quo-plus” nature of the current situation. When purportedly responsible trajectories for a transformed legal education look so very much like the trajectory that prompted the call to action, people paying attention start thinking sham. The current circumstance certainly includes the machinations of those who think this all a shell game. Yet the predicament I mean to identify cuts to our very way of understanding. The deep stock story unifies acceptable meaning and, especially with the end of the Great Recession, shoves fundamentally different approaches off the dais. Ardent critics of legal education are perhaps no less likely than others

²⁰⁸ Not for the first time am I insisting legal education must be both more theoretical and more practical, and not alone am I in insisting, even in the past fifty years, that any legitimate transformation would strongly emphasize both aims and their relationship to one another. See, e.g., López, *Anti-Generic Legal Education*, *supra* note 33; MICHELMAN REPORT, *supra* note 30 (Michelman majority and Kennedy dissent); John Schlegel, *Legal education—More theory, more practice*, 13 LEGAL SERVICE BULL. 71 (1988).

to identify and choose options utterly within the orbit of the very system they wish to alter.²⁰⁹

Standard fixes do not necessarily provide the remedy. It's obviously not enough to say everyone should know more about how legal education came to be, what it has fought off, whom it has variously served and defeated. Actual and would-be authors of the three versions of the deep stock story (or at least of the chunks I emulate in the three versions) know lots, several huge amounts, and still they most often converge on the same menu of options attractive to the less well-versed. It's obviously not enough to say everyone should realize how burdens shall be borne by the "transformation" currently envisioned. The principal proponents of the changes that largely insulate tenure-track faculty include those who may end up shouldering the greatest burden imposed by any changes. The deep story—and the status-quo-plus transformation it yields—transfixes various groups of people who already should know better, but apparently do not.

Or maybe they do. And maybe they're not alone. Maybe they all know better and simply do not want to deal with a legal education they would not recognize. Maybe they believe only incremental status-quo-plus changes can possibly make their way through a faculty vote and not lead to a fall in the rankings. Maybe they've grown weary of efforts to implement radical curricular changes, preferring not to squander precious energy on what experience and painful history indicate will go nowhere or, worse still, will take hold for a while only, in relatively short time to be scrubbed clean of radical implications, moved off center stage, and treated as if they lacked strongly coherent justifications (an unassailable "theory"). And maybe everyone shrugs their shoulders about the over-the-top marketing. After all, why should "transformation" be more sacred than any other word or concept?

All this can be true, however, and still rely upon a deep stock story more obscured than revealed precisely in order to serve the many contradictory reasons each of us may have for invoking its favors. That interpretation, of course, suggests a possibility at once mundane and strange. The current circumstance—and the role of the deep stock story in defining and justifying actions—mirrors the conventional practices of producing and critiquing "legal analysis" in the United States. Even when analyses claims to get at the root of what we do and why we do it, even when employed by someone deliberately aiming to rework what they no longer wish to abide, the pre-approved terms for formulating and resolving questions draw upon

²⁰⁹ See Gerald P. López, *Changing Systems, Changing Ourselves*, 12 HARV. LATINO L. REV. 15 (2009).

stock categories, stories, and arguments far more often than not antagonistic to the transformative venture.²¹⁰

Antagonistic does not mean impossible to overcome, obviously. But the odds of remaking legal education decrease, probably dramatically, once you venture openly outside approved boundaries. The background rules of the game, the conventions and convictions, remain most often unwritten but hardly unknown. Anyone wanting to be taken seriously may strongly endorse and battle for only those changes others already see as plausibly persuasive. That correspondence may not feel at all like a compromise; off-the-rack changes (globalization, regulatory state, having students “experience” yet another thing on a growing list of what legal education finally recognizes lawyers do) may be all the proponents of transformation can “see.” But if they do notice or imagine something not already pre-approved, they must try to configure the change as within a tolerable orbit of the deep story.

Of course lawyers, including law faculty, do not often venture openly outside approved boundaries. Instead characteristically they internalize and reproduce conventional restrictions, even when they mean fundamentally to alter a state of affairs. If they do see a change as elemental, and if they cannot configure their change to avoid looking obviously deviant, they face a familiar set of choices. They can abandon efforts to convince others of what they believe genuinely needed. They can endorse what seems doable and unobjectionable, perhaps providing new opportunities in the future to take another crack at the big change already overdue. (That’s the repeated rationalization, at any rate.) Or they can move forward with their undisguised transformation. But offering an off-the-wall proposal invites, at least for some while, tainting the particular proposed change and, perhaps permanently, damaging their own reputation in a community defined by status-quo-plus change.²¹¹

Perhaps all this explains what we see today. In 2017, with pressures significantly relieved, many mainstream reformers, including exceptionally prominent figures, have returned to extolling, even waxing lyrical about, the Socratic Case Method. No longer do we see the deep ambivalence of the Functionalist Portrayal and Critique. Nor do we see the sweep of the Historically More Particular and Ideologically More Explicit Portrayal and Critique that makes plain just how much

²¹⁰ In my own teaching and writing and lawyering, I focus hugely on this phenomena, and I have found only a few who have written in ingenious ways to communicate the experience. See, e.g., Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 26 J. LEGAL EDUC. 518 (1986).

²¹¹ Of course this dynamic operates across boundaries. See, e.g., López, *supra* note 198.

Eliot and Langdell made a conscious choice of systems against a backdrop of a quite varied menu of options. What we do see, though, is a freshly reconciled account, one weaving together elements of the past decade's three most prominent versions of the deep stock story around the triumphant embrace of the Socratic case method emblematic of the Popular Portrayal and Critique.

In this newly reconciled account, the Socratic case method deserves its place at the start and at center of legal education. Learning to recognize, to deconstruct, and to produce legal analysis remains at the heart of both what lawyers do and what law students must learn through the training law schools offer. Rather than trying to substitute a new foundation for a superb one, we should instead build our transformed approach around Socratic case method exploration of basic doctrinal areas. We can teach, say, traditional Contracts, Torts, Criminal Law, Civil Procedure, and Property, knowing students will learn substantive law, how to read and use appellate judicial opinions, and, most fundamentally, how to comprehend and generate quality legal analysis. The Socratic case method teaches these “core competencies.” Indeed it does so in ways that, compared to the lectures it displaced in 1870, demonstrate how even the most traditional law school classes are really “substantially experiential.”²¹²

Yet today's lawyers, goes this freshly reconciled account, need a broader swath of knowledge and skills. To make those available, law schools should follow the first-year doctrinal courses with learning opportunities that, in addition to second and third year Socratic case method courses, focus on a set of complementary competencies.²¹³ They certainly have in mind wide-ranging clinics—focusing on assorted clients dealing with varied situations, all requiring of students an appreciation of what varied lawyers must learn to do well. And these clinics may be live-client, simulated, or both live-client and simulated.

Indeed some believe these complementary competencies important enough that we should interrupt the first year's steady diet of Socratic case method courses with at least one course, even if an abbreviated one, that “students would take while they were still forming their fundamental conceptions of what lawyers do and how lawyers think.”²¹⁴ That first year course could be an appropriately ambitious

²¹² Joseph William Singer & Todd D. Rakoff, *Problem Solving for First-Year Law Students*, 7 *ELON L. REV.* 413, 430 (2015).

²¹³ See BEN W. HEINEMAN, JR., WILLIAM F. LEE & DAVID B. WILKINS, *LAWYERS AS PROFESSIONALS AND AS CITIZENS: KEY ROLES AND RESPONSIBILITIES IN THE 21ST CENTURY* (2014).

²¹⁴ Singer & Rakoff, *supra* note 211.

“Lawyering Skills” course. Or it could be other sorts of courses where students deal expansively and deeply and concretely with challenges facing a client. Or perhaps make room for both of these courses to disrupt the lessons of the Socratic case method. Prominent leaders of the bar and the academy—mainstream idealists at their best—make a coherent case that these complementary competencies must inevitably force law students to confront what they themselves need to operate effectively within and across institutions in the roles lawyers now fill.

There would appear to be more than a bit of sleight-of-hand going on here. An approach to the education of lawyers—that historically has provoked major criticism, from ideologically and professionally diverse observers—is now being “staged” as a celebrated masterpiece in the rolling out of the “transformed curriculum.”²¹⁵ In fact, those choreographing this staging include a handful who themselves have contributed over the past decade to our understanding of the limits of—and even certain weaknesses in—building legal education principally around the big-classroom study of edited appellate opinions. In renewing support for the Eliot-Langdell Socratic casebook system, these deans and faculty members must fully appreciate they may well reinforce the persistent mystification of “legal analysis,” “legal reasoning,” “thinking like a lawyer.” Either they are at peace with their born-again allegiance to the traditional Socratic case method or they figure they can limit any damage resulting from the Eliot-Langdell approach by surrounding that mainstay with diverse learning opportunities, expanding and strengthening the training future lawyers receive.

Whatever their heartfelt views, those offering this newly reconciled account often write and speak as if this fresh endorsement is absolutely no concession and instead a fresh appreciation. No matter what else gets picked apart, proponents and opponents and agnostics once again largely agree that the Eliot-Langdell system has demonstrated a remarkable capacity to teach “thinking like a lawyer” through the “legal analysis” or “legal reasoning” principally explored and developed through the Socratic classroom’s exploration of edited appellate opinions. That demonstrated capacity, insist these champions of transformed legal education, mandates carrying forward these courses as the core of the modernized curriculum, certainly in the first year and, at virtually all schools, throughout the second and third

²¹⁵ For only one contrasting cluster of the professionally and ideologically diverse contemporary critics of the Socratic Case Method, see Ronald J. Gilson & Robert H. Mnookin, *Symposium on Business Lawyering and Value Creation for Clients*, 74 OR. L. REV. 1 (1995); Elson, *supra* note 25; Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1971).

years. That central achievement anchors the “revolution,” providing legitimating stability as institutions experiment with how best to deliver with equal success new courses and emphases on global and comparative and legislative and regulatory and leadership aspects of the world into which law students will enter.

To be sure, there are weak and strong forms of actually implementing this newly reconciled version of the deep stock story. Some number of schools across the country fake the funk. They claim to subscribe to this newly reconciled version of the deep stock story and yet aim to do, in fact, as little as they can get away with and to undertake whatever they do utterly on-the-cheap. They rarely spend the time—or pay the best people—to think through and develop ambitiously and concretely all those courses ostensibly addressing the “complementary competencies.” They rarely hire ladder-track faculty or even lecturers with security of status to staff these courses, and they pay their part-time adjuncts poorly (even when measured by low standards). Perhaps because they never have imagined offering, much less requiring, serious training for Socratic case method teachers, they rarely demand that hires of any sort (from part-time adjuncts to ladder-track) train seriously in the materials and methods necessary to teach complementary competencies. And, to accommodate puffing on websites, in magazines, and for rankings, they try with a vengeance to include everything imaginable under the fashionable term “experiential.”

The presence of these posers, however, should only heighten the admiration we have for those law schools sincerely implementing this newly reconciled vision. They pay in dollars and in time—and they increasingly collaborate as they must with others—to get able people to produce quality courses addressing complementary competencies, clinics in particular and some non-clinics with materials and methods requiring students to step into “roles” of various sorts that lawyers fill on a daily basis across the globe. They cultivate, at least to some degree, though not yet nearly enough, an interest in the pedagogical demands required to teach well these complementary competencies. And they sometimes create materials, as they must, indeed materials that can be first-rate, in order to provide the basics necessary to expand the knowledge and skills, as they describe it, to practice as varied lawyers do.

It’s true that some law schools implementing vigorous versions of complementary competencies are among those I criticize for overselling their changes as revolutionary. Even if in my judgment the changes they have implemented are not transformative, even if these folks and these law schools borrow ideas and methods and entire

courses from others without conscientious attributions (forget about generous shout-outs), they still have already begun to offer an expanded slate of important learning opportunities for students. And their concerted efforts have produced engaging and productive options, especially in the second and third years, and every now and then (in highly limited but notable ways) within the first-year training lineup.

Through substantial efforts and expenditures, the relatively small number of law schools that have implemented hearty training in “complementary competencies” have perhaps drawn near those law schools that already had been providing their students these same or strongly parallel opportunities. Of course, the newly arrived do not promote themselves as aiming to catch up to or as perhaps now within the competitive elite. But that’s exactly what has happened. And within the mainstream, even among mainstream idealists, these schools should be seen as “strong.” Our recognition of their achievements should be generous and gracious, even as we openly insist they have not transformed legal education, and even as they demonstrate that what they’re calling first-time-ever innovations emulate what others before them have done (often exceptionally well).

For all the important distinctions between these strong and weak schools, anyone deeply dissatisfied with familiar status-quo-plus changes and aiming to overturn legal education as we know it should devise a plan that, among other aspirations, targets both sorts of institutions. We can and should expose all the posers, either to push them to dramatically improve or to drive them out of business. And we can and should do so without losing sight of what remains far from transformative about the “strong institutions” implementing notable (if hardly original) courses training complementary competencies. Doing both provides a way of pressuring everyone to understand that individuals and institutions consciously chose and deliberately pursued this fresh reconciliation of the three recent versions of the deep stock story. They elected a fancily rationalized way to hustle back toward fully naturalizing all that typically goes unchallenged within law schools.

In the name of transformation, we do not need in early 2017 still more tinkering: some additional clinics here, some alternative regulatory courses and colloquia there, expanded externships everywhere.²¹⁶ Peripheral changes have been nearly always the response to periods of deep disgruntlement. And even when the tinkering is strong rather than weak, it is as much a ploy to ease us all back into submission as it

²¹⁶ My absolute opposition to tinkering of this sort extends back decades. See López, *Anti-Generic Legal Education*, *supra* note 33.

is a late-arriving strategy to catch up with those law schools that for some time have already been providing that quality of education. That truth helps explain the many demonstrable falsehoods (“alternative facts”) offered over the past decade to publicize everything from phony to actual status-quo-plus alterations.

We find ourselves, as always, within a conflict of diverging desires, each aiming to assert its dominion over the state of affairs, everyone aware that not all can have their way.²¹⁷ For those of us who aspire to topple traditional legal education, to challenge and replace its assumptions and methods and aspirations, we must mobilize around a fierce unwillingness to accept familiar status-quo-plus changes as transformative and an equally ferocious effort to move beyond the limits of the deep stock story to articulate and insist upon the legal education our students (and so many others) deserve and require. That may be the last thing the weary, the frustrated, the disillusioned care to hear. Yet resilient, ardent, and creative collective actions offer perhaps the only chance of enhancing the coercive power those of us offering a truly alternative vision must wield, whether it’s the one I shall outline in Part II or others we can readily render.

The transformation that should have happened this past decade—and in earlier periods still—must happen now.

²¹⁷ I borrow here directly from Holmes, whose words foreshadow far more fully elaborated ideas about power variously expressed later by others:

I think it most important to remember whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what is really before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which both cannot have their way. The social question is which desire is stronger at the point of conflict.

HOLMES, *supra* note 173, at 239.

APPENDIX 1. CURRICULAR REFORMS AT SELECTED SCHOOLS 2007–2009

This Appendix provides brief summaries of the major curricular reforms undertaken by five law schools during the period from 2007 to 2009. During this period, all of legal education faced increased demand from students and from other constituencies for a law school experience that would better prepare them to work as lawyers. Each of the five law schools in this Appendix—Harvard Law School, Northwestern University Pritzker School of Law, Stanford Law School, UC Irvine School of Law, and Washington and Lee University School of Law—claimed to be implementing novel and far-reaching reforms.

The descriptions of reforms at these five schools reflect each school's own statements and materials discussing their planned changes. No independent evaluation has been undertaken.

A. *Harvard*

In September 2008, Harvard Law School announced curricular reforms that it characterized as “the most significant revisions to” legal education since “Harvard Law School invented the basic law school curriculum” over 100 years ago.²¹⁸ These changes sought to inject the curriculum with an international perspective and to emphasize interdisciplinary study. Harvard added three new courses to its first year curriculum, including: a legislation and regulation course, a foundational course on international and comparative law, and a complex problem solving course. The problem solving course would be taught in the new winter term of the first year. In order to make room for these changes, standard first year doctrinal classes were reduced from five credits to four credits. Harvard also announced that it would provide more guidance to students on how to shape their upper-level studies to develop particular focus without being narrowed into specialists, advising them on “how to go deep, not just broad, and how to develop some sense of expertise . . . to see how law looks when you're beyond the introductory level.”

For upper division students, the faculty adopted five new programs of study: Law & Government; Law & Business; International & Comparative Law; Law, Science & Technology; and Law & Social Reform. The reforms also included expanding the clinical curriculum.

B. *Northwestern*

Northwestern built upon the prior strategic plan that it implemented in 1998 to create *Plan 2008: Preparing Great Leaders for the*

²¹⁸ McArdle, *supra* note 2.

Changing World.²¹⁹ The 1998 plan had introduced changes such as evaluative admissions interviews and a work-experience policy for applicants. In 2008, Northwestern sought to go beyond what it characterized as other schools' "merely tinker[ing] with the existing educational formats by adding on various courses or expanding clinical-type activities" to address "the core competencies that it takes to be an effective lawyer in a variety of organizations over a multi-job career."²²⁰ Northwestern's approach focused on "competency development" and identified the "foundational competencies" that law students need to be successful.²²¹ These competencies, in addition to legal analysis and advocacy skills—"[t]he basic foundational competency of legal education"—included: communication, teamwork, strategic understanding, basic quantitative skills, cross-cultural work, project management and leadership.²²² In order to achieve these competencies in students, Northwestern developed new courses and expanded others, and made some changes to its admissions policies. For example, the school expanded on its Communication and Legal Reasoning Program and its strategic understanding elective course.²²³ It also implemented new admissions requirements, including requiring applicants to write an essay about a project they led and to provide an employer reference form assessing the applicant's project management and other abilities.²²⁴ In addition, Northwestern developed a new course designed to provide a fundamental understanding of the principles of accounting, finance, and statistics to give the context and understanding that attorneys need in working with business and other clients.²²⁵

The school also instituted two changes to its third-year curriculum. First, the school planned to make a full-time, faculty-supervised intensive experiential semester available to all of its students, either at the school's legal clinic programs or through externships.²²⁶ Second, the school instituted an accelerated J.D. program with a structured curriculum focused on developing core competencies and lasting five

²¹⁹ See David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 RUTGERS L. REV. 1127, 1136 (2009); see also Northwestern Pritzker School of Law, *Leading Law: Strategic Plan*, <http://www.law.northwestern.edu/about/leadership/documents/Strategic-Plan-Northwestern-Pritzker-School-of-Law.pdf> (last visited Oct. 11, 2016).

²²⁰ Van Zandt, *supra* note 219, at 1136.

²²¹ *Id.*

²²² *Id.*; Northwestern Pritzker School of Law, *Northwestern Law Announces Accelerated JD, Other Proposals*, News Releases (June 20, 2008), <http://www.law.northwestern.edu/about/news/newsdisplay.cfm?ID=191>.

²²³ See Van Zandt, *supra* note 219, at 1137-39.

²²⁴ See *id.* at 1140.

²²⁵ See *id.* at 1139.

²²⁶ See *id.* at 1141-42.

semesters.²²⁷

C. Stanford

In November 2006, Stanford Law School announced several changes to its curriculum, mostly affecting the second- and third-year students.²²⁸ These changes focused on giving students more interdisciplinary learning opportunities, including by transitioning the law school to the quarter system to make interdisciplinary study more feasible and to facilitate development of additional joint degrees that could be completed in three years, rather than four.²²⁹ Less in-depth “concentration sequences” allowed non-joint degree students to take advantage of classes in other disciplines as well. The school also added new simulation courses focused on teamwork and problem solving, in which law students were to work with students in other Stanford graduate programs.²³⁰ The clinical program was expanded and transformed to teach students how to work with clients and colleagues, how to address ethical dilemmas arising in practice, and how to apply legal concepts to clients’ situations. Two new clinics were also added—one training students as corporate counsel for nonprofit organizations, as well as a national criminal appeals clinic.²³¹ Stanford also planned to implement a “clinical rotation,” in which students would spend a quarter working only in a clinic, which was designed to provide a more intensive experience with a better professional ethics component, and a deeper research and writing component.²³²

D. UC Irvine

The UC Irvine School of Law enrolled its inaugural class in 2009. The first-year curriculum focused on building skills by analyzing traditional doctrinal subjects in the context of different skills.²³³ The fall

²²⁷ See *id.* at 1142-43.

²²⁸ See Stanford Law School, *A “3D” JD: Stanford Law School Announces New Model for Legal Education* (Nov. 28, 2006) available at <https://web.archive.org/web/20081204095658/http://www.law.stanford.edu/news/pr/47/>. In the 1980s, Stanford had made some changes to its first year curriculum, including offering international law, administrative and regulatory law, problem solving/quantitative analysis, and some “perspectives” courses. Even so, the first year curriculum still focused on the core first-year classes taught in the traditional manner to “teach core legal concepts and the basic process of legal argumentation.” *Id.*

²²⁹ See *id.*

²³⁰ See *id.*

²³¹ See *id.*

²³² See *id.*

²³³ See University of California Irvine School of Law, *First-Year Curriculum*, available at <https://web.archive.org/web/20100609171141/http://www.law.uci.edu/registrar/curriculum.html> (pulled from the June 9, 2010 page of law.uci.edu available at archive.org) (last visited Oct. 6, 2016).

semester of the first year includes the following classes: Legal Profession (exploring different practice settings and the challenges of each), Lawyering Skills I (teaching fact investigation, interviewing, legal writing and analysis, legal research, negotiation, and oral advocacy), Common Law Analysis: Private Ordering (teaching how law is derived from judicial decisions through common law of contracts), Procedural Analysis (using civil procedure to teach students about procedural rules), and statutory analysis (focusing on criminal law). The spring semester consists of: Legal Profession II, Lawyering Skills II (giving students experience in a legal clinic setting, conducting intake interviews), Common Law Analysis: Public Ordering (examining how lawyers reason and develop arguments in the common law by focusing on torts), Constitutional Analysis (teaching students the basics of constitutional law), and International Legal Analysis.²³⁴ First-year students are also assigned a lawyer mentor from the local legal community to provide guidance in academic and career matters.²³⁵

UCI Law requires upper-level students to complete at least one semester of clinical education and students are encouraged to log at least 120 pro bono hours in three years.²³⁶

E. *Washington and Lee*

In March 2008, Washington and Lee University School of Law announced that it was “entirely reinventing the third year to make it a year of professional development through simulated and actual practice experiences.”²³⁷ Courses in the experiential third year would be offered in traditional clinics and externships, as well as in new practicums. Project simulations would include traditional legal subject matter, “including transactional areas such as banking and corporate finance that have often been overlooked in the hands-on offerings of traditional law school curriculums.”²³⁸ Students would spend the first

²³⁴ *See id.*

²³⁵ *See* University of California Irvine School of Law, *Curriculum: Training for the Practice of Law*, <http://www.law.uci.edu/academics/curriculum.html> (last visited Oct. 6, 2016).

²³⁶ *See id.*

²³⁷ *See* Washington and Lee University School of Law, *Washington and Lee School of Law Announces Dramatic Third Year Reform* (Mar. 10, 2008), <http://law2.wlu.edu/news/storydetail.asp?id=376>; Rod Smolla, *A Message from the Dean*, Washington and Lee University School of Law, <https://web.archive.org/web/20090708132244/http://law.wlu.edu/thirdyear>. Referring to the revamped third year curriculum, Dean Rod Smolla claimed: “This is one of the boldest reforms in American legal education since Dean Christopher Columbus Langdell pioneered the new curriculum at Harvard Law School in the late 19th century. For the next 100 years, American law schools largely followed the Harvard model, and in many respects it has worked remarkably well.” *Id.*

²³⁸ *See* Washington and Lee University School of Law, *Washington and Lee School of*

two weeks of each semester in a practice skills immersion course, either focusing on office and transactional practice skills or on litigation and conflict resolution skills.²³⁹ The new curriculum also included a year-long professionalism program in which practicing lawyers and judges assist students in developing legal professionalism, including legal ethics and pro bono service.²⁴⁰ These changes aimed to give students practice exercising professional judgment, working in teams, solving problems, counseling clients, negotiating solutions, and serving as advocates and counselors.²⁴¹ The third year was to be taught by a combination of permanent law faculty, adjunct faculty, and visiting “professors of practice.”²⁴²

Law Announces Dramatic Third Year Reform, *supra* note 237.

²³⁹ See Washington and Lee University School of Law, *Washington and Lee's New Third Year of Law School*, at 3, available at <https://web.archive.org/web/20150921001613/http://law2.wlu.edu/deptimages/The%20New%20Third%20Year/ThirdYearProgramCommunicationsDocumentfinal.pdf> (last visited Oct. 6, 2016).

²⁴⁰ *See id.*

²⁴¹ *See id.*

²⁴² *See id.*

APPENDIX 2. CURRENT CLINICAL OFFERINGS AT SELECTED SCHOOLS

This Appendix presents the 2016-2017 clinical course offerings at five law schools: Harvard Law School, Northwestern University Pritzker School of Law, Stanford Law School, UC Irvine School of Law, and Washington and Lee University School of Law. Especially for Harvard and Stanford, the number and nature of clinics represents a second wave of changes, following the changes trumpeted as a transformation. Compiled from course catalogs found on the law schools' websites, this Appendix includes the size of the student body, the semesters in which the clinics were offered in during the 2016-2017 year, who taught the clinic, and the teacher's position.

A. *Harvard*

For 1,767 students, Harvard Law School has 33 clinics. Two of these clinics—the International Human Rights Clinic and the Harvard Legal Aid Bureau—are also offered as advanced clinics.²⁴³ Of the 40 faculty teaching in these clinics, 3 are Professors of Law, 13 are Clinical Professors of Law, 20 are Lecturers on Law, 2 are Visiting Professors, 1 is an Assistant Clinical Professor of Law, and 1 is a Professor of Practice.

Capital Punishment Clinic

- Winter/Spring
- Professor – Carole Steiker (Professor of Law)

Child Advocacy Clinic

- Winter/Spring
- Professor – Elizabeth Bartholet (Professor of Law)

Community Enterprise Project of the Transactional Law Clinics

- Spring
- Professors – Brian Price (Clinical Professor of Law),
Amanda Kool (Lecturer on Law)

Criminal Justice Institute: Criminal Defense Clinic

- Fall/Winter, Winter/Spring
- Professor – Dehlia Umunna (Clinical Professor of Law)

²⁴³ Harvard Law School, *Course Catalog*, <http://hls.harvard.edu/academics/curriculum/catalog/index.html?year=2016-2017&keywords=&faculty=&term=&subject=&otherFilter=&xtype=Course&xtype=Reading+Group&xtype=Seminar&rows=50> (last visited Oct. 11, 2016); Harvard Law School, *Faculty Profiles*, <http://hls.harvard.edu/faculty/index.html> (last visited Oct. 11, 2016).

Crimmigration Clinic

- Spring
- Professor – Philip Torrey (Lecturer on Law)

Cyberlaw Clinic

- Fall, Spring
- Professor – Christopher Bavitz (Clinical Professor of Law)

Delivery of Legal Services Clinic

- Fall, Spring
- Professor – Jeanne Charn (Lecturer on Law)

Education Law Clinic

- Fall, Spring
- Professors – Susan Cole (F, S) (Lecturer on Law), Michael Gregory (S) (Clinical Professor of Law)

Employment Law Clinic

- Fall, Spring
- Professor – Steve Churchill (Lecturer on Law)

Environmental Law and Policy Clinic

- Fall, Winter, Spring
- Professor – Wendy Jacobs (Clinical Professor of Law)

Federal Tax Clinic

- Fall, Spring
- Professor – Keith Fogg (Visiting Professor)

Food Law and Policy Clinic of the Center for Health Law and Policy Innovation

- Fall, Winter, Spring
- Professor – Emily Broad Leib (Assistant Clinical Professor of Law)

Government Lawyer: Attorney General Clinic

- Fall, Winter, Spring
- Professor – James Tierney (Lecturer on Law)

Government Lawyer: Semester in Washington Clinic

- Spring, Winter/Spring
- Professor – Jonathan Wroblewski (Lecturer on Law)

Government Lawyer: United States Attorney Clinic

- Fall, Spring
- Professor – Alex Whiting (Professor of Practice)

Harvard Immigration and Refugee Clinic

- Fall, Spring
- Professors – Deborah Anker (F) (Clinical Professor of Law), Sabrineh Ardalan (S) (Lecturer on Law)

Harvard Legal Aid Bureau

- Fall/Spring
- Advanced 3L – Fall/Spring
- Professor – Esme Caramello (Clinical Professor of Law)

Harvard Negotiation and Mediation Clinic

- Fall, Spring
- Professor – Robert Bordone (Clinical Professor of Law)

Health Law and Policy Clinic of the Center for Health Law and Policy Innovation

- Fall, Spring
- Professor – Robert Greenwald (F) (Clinical Professor of Law), Amy Rosenberg (S) (Lecturer on Law)

Housing Law Clinic

- Fall, Spring
- Professor – Maureen McDonagh (Lecturer on Law)

ITA Prosecution Perspectives Clinic

- Fall/Winter
- Professor – John Corrigan (Lecturer on Law)

International Human Rights Clinic

- Fall, Spring
- Advanced 3L – Fall
- Professor – Tyler Giannini (F, S) (Clinical Professor of Law), Susan Farbstein (S) (Clinical Professor of Law)

Judicial Process in Trial Courts Clinic

- Spring
- Professor – John Cratsley (Lecturer on Law)

Litigating in the Family Courts: Domestic Violence and Family Law Clinic

- Fall, Spring
- Professor – Nnena Odum (Lecturer on Law)

Making Rights Real: The Ghana Project Clinic

- Winter
- Professor – Lucie White (Professor of Law)

Mediation Clinic

- Spring
- Professor – David Hoffman (Lecturer on Law)

Predatory Lending and Consumer Protection Clinic

- Fall, Spring
- Professors – Roger Bertling (Lecturer on Law), Toby Merrill (Lecturer on Law)

Public Education Policy and Consulting Clinic

- Fall, Spring
- Professor – James Liebman (Visiting Professor)

Semester in Human Rights

- Fall
- Professor – Tyler Giannini (Clinical Professor of Law)

Sports Law Clinic

- Spring, Winter
- Professor – Peter Carfagna (Lecturer on Law)

Supreme Court Litigation Clinic

- Winter
- Professors – Thomas Goldstein (Lecturer), Kevin Russell (Lecturer)

Transactional Law Clinics

- Fall, Spring
- Professor – Brian Price (Clinical Professor of Law)

Veterans Law and Disability Benefits Clinic

- Fall, Spring
- Professor – Daniel Nagin (Clinical Professor of Law)

B. Northwestern

For 666 students, Northwestern University Pritzker School of Law has 17 clinics. There are no clinics offered in the Winter 2017 term.²⁴⁴ Of the 33 faculty teaching in these clinics, 2 are Professors of

²⁴⁴ Northwestern Pritzker School of Law, *Course Catalog*, <http://www.law.northwestern.edu/academics/curricular-offerings/coursecatalog/> (last visited Oct. 11, 2016); Northwestern

Law, 7 are Clinical Professors of Law, 9 are Clinical Associate Professors of Law, 11 are Clinical Assistant Professors of Law, 3 are Adjuncts, and 1 is a Clinical Fellow.

Clinic: Civil Rights Litigation

- Fall, Spring
- Professors – Locke E. Bowman (F/S) (Clinical Professor of Law), Sheila A Bedi (F/S) (Clinical Associate Professor of Law), Alexa Anne Van Brunt (F/S) (Clinical Assistant Professor of Law), David M. Shapiro (F/S) (Clinical Assistant Professor of Law), Vanessa del Valle (F) (Clinical Assistant Professor of Law)

Clinic: Entrepreneurship Law Center

- Summer, Fall, Spring
- Professors – Esther S. Barron (Clinical Professor of Law), Stephen F. Reed (Clinical Professor of Law)

Clinic: International Human Rights Advocacy

- Fall, Spring
- Professor – Bridget Arimond (Clinical Professor of Law, Director)

Clinic: Juvenile Justice/Criminal Trials and Appeals/PreTrial Representation

- Fall, Spring
- Professors – Thomas F. Geraghty (Class of 1967 James B. Haddad Professor of Law), Maria E. Hawilo (Clinical Assistant Professor of Law)

Clinic: Juvenile Justice: Post-Sentencing Advocacy and Reform

- Fall, Spring
- Professors – Julie L. Biehl (Clinical Associate Professor of Law), Alison R. Flaum (Clinical Associate Professor of Law)

Clinic: Juvenile Justice: Pre-Trial, Trial, and Post-Dispositional Advocacy

- Fall, Spring
- Professors – Carolyn E. Frazier (Clinical Assistant Professor of Law), Shobha L. Mahadev (Clinical Assistant Professor of Law)

Clinic: Mediation Advocacy

- Fall
- Professor – Alyson M. Carrel (Clinical Assistant Professor of Law)

Clinic Practice: Center for Criminal Defense

- Fall, Spring
- Professor – Jeffrey Urdangen (Clinical Associate Professor of Law)

Clinic Practice: Center on Wrongful Convictions

- Fall, Spring
- Professors – Karen L. Daniel (Clinical Professor of Law), Andrea Lewis (Clinical Assistant Professor of Law), Gregory R. Swygert (Clinical Associate Professor of Law)

Clinic Practice: Civil Litigation

- Fall, Spring
- Professors – John S. Elson (Professor of Law Emeritus), Laurie I. Mikva (Clinical Assistant Professor of Law)

Clinic Practice: Complex Civil Litigation & Investor Protection

- Summer, Fall (2 sections), Spring (2 sections)
- Professor – J. Samuel Tenenbaum (Clinical Associate Professor of Law)

Clinic Practice: Criminal Defense - The Death Penalty

- Fall, Spring
- Professor – Robert Charles Owen (Clinical Professor of Law)

Clinic Practice: Environmental Advocacy

- Summer, Fall, Spring
- Professor – Nancy C. Loeb (Clinical Assistant Professor of Law)

Clinic Practice: Federal Criminal Appellate Practice (3 sections)

- Fall, Spring
- Professors – Sarah O'Rourke Schrup (F/S: 2 sections) (Clinical Associate Professor of Law), Eugene Robert Wedoff (F: 1 section) (Adjunct), TBA (S: 1 section)

Clinic Practice: Immigration Law

- Fall, Spring

- Professor – Uzoamaka Emeka Nzelibe (Clinical Associate Professor of Law)

Clinic Practice: The United States Supreme Court

- Fall, Spring
- Professors – Sarah O’Rourke Schrup (Clinical Associate Professor of Law), Jeffrey T. Green (Adjunct), Carter G. Phillips (Adjunct)

Clinic Practice: Wrongful Convictions and Juvenile Justice

- Fall, Spring
- Professors – Steven A. Drizin (F/S) (Clinical Professor of Law), Laura Hepokoski Nirider (F) (Clinical Assistant Professor of Law), Megan Glynn Crane (F/S) (Clinical Fellow)

C. *Stanford*

For 572 students, Stanford Law School has 11 clinics.²⁴⁵ Each of these clinics is offered as a full-time clinic, and some are also offered as advanced clinics. For the full-time clinics, students enroll in three separate courses associated with the clinic, including: Clinical Coursework, Clinical Methods, and Clinical Practice. Students can continue working in most clinics on a part-time basis after having completed a term working in the clinic full-time. These “Advanced” clinics, as the continuing courses are called, are offered for each clinic except the Criminal Prosecution Clinic. Of the 23 faculty teaching in these clinics, 9 are Professors of Law, 2 are Associate Professors of Law, 11 are Lecturers in Law, and 1 is a Professor of Clinical Education.

Community Law Clinic

- Advanced – Fall, Winter, Spring
- Full-time – Winter, Spring
- Professors – Juliet M. Brodie (The Mills Professor of Law), Lisa Douglass (Lecturer in Law), Danielle Jones (Lecturer in Law)

Criminal Defense Clinic

- Advanced – Fall, Winter, Spring
- Full-time – Fall, Spring
- Professors: Suzanne A. Luban (Lecturer in Law), Ronald Tyler (Associate Professor of Law)

²⁴⁵ Stanford Law School, *Course Catalog: 2016-2017 Autumn*, https://law.stanford.edu/courses/?tax_and_terms=4837&page=1&ls=clinic (last visited Oct. 11, 2016); Stanford Law School, *Directory: People*, <https://law.stanford.edu/directory/> (last visited Oct. 11, 2016).

Criminal Prosecution Clinic

- Full-time – Winter
- Professors – George Fisher (Judge John Crown Professor of Law)

Environmental Law Clinic

- Advanced – Fall, Winter, Spring
- Full-time – Fall, Winter
- Professors – Deborah A. Sivas (Luke W. Cole Professor of Environmental Law), Alicia E. Thesing (Lecturer in Law)

Immigrants' Rights Clinic

- Advanced – Fall, Winter, Spring
- Full-time – Winter, Spring
- Professors – Jayashri Srikantiah (Professor of Law), Lisa Weissman-Ward (Lecturer in Law)

International Human Rights and Conflict Resolution Clinic

- Advanced – Fall, Winter, Spring
- Full-time – Winter, Spring
- Professors – James Cavallaro (Professor of Law), Diala Shamas (Lecturer in Law)

Juelsgaard Intellectual Property and Innovation Clinic

- Advanced – Fall, Winter, Spring
- Full-time – Winter, Spring
- Professors – Phillip R. Malone (Professor of Law), Jef Pearlman (Lecturer in Law)

Organizations and Transactions Clinic

- Advanced – Fall
- Full-time – Fall, Spring
- Professors – Jay A. Mitchell (Professor of Law), Michelle Sonu (Lecturer in Law)

Religious Liberty Clinic

- Advanced – Fall, Winter, Spring
- Full-time – Winter, Spring
- Professors – Zeba Huq (Lecturer in Law), James A. Sonne (Associate Professor of Law)

Supreme Court Litigation Clinic

- Advanced – Fall (2 sections), Winter (2 sections), Spring (2 sections)

- Full-time – Spring (2 sections of Clinical Practice)
- Professors – Jeffrey L. Fisher (Professor of Law), David Goldberg (Lecturer in Law), Pamela S. Karlan (Kenneth and Harle Montgomery Professor of Public Interest Law)

Youth Education Law Project

- Advanced – Fall, Winter, Spring
- Full-time – Winter, Spring
- Professors – William S. Koski (Eric and Nancy Wright Professor of Clinical Education), Carly Munson (Lecturer in Law)

D. UC Irvine

For 572 students, UC Irvine School of Law has thirteen clinics.²⁴⁶ During the 2016-2017 school year, nine of these clinics are also offered as an advanced clinic for students who wish to continue their work in the clinic. Of the 29 faculty teaching in these clinics, 2 are Professors of Law, 7 are Clinical Professors of Law, 2 are Assistant Clinical Professors of Law, 10 are Lecturers, 1 is a Visiting Lecturer, 6 are Adjunct Clinical Professors, and 1 was not readily determined.

Appellate Litigation Clinic

- Fall (6 sections; one professor per section), Spring
- Professor – Peter Afrasiabi (Adjunct Clinical Professor), Kathryn Davis (Lecturer), Paul Hoffman (Adjunct Clinical Professor of Law), Erwin Chemerinsky (Professor of Law), Stuart Miller (Lecturer), David Ettinger (Lecturer)

Civil Rights Litigation

- Spring
- Advanced – Spring
- Professors – Paul Hoffman (Adjunct Clinical Professor of Law), Michael Seplow (Lecturer)

Community and Economic Development (CED)

- Fall, Spring
- Advanced – Fall, Spring
- Professor – Ana Marie Del Rio (F/S) (Lecturer), Carrie Hempel (F) (Clinical Professor of Law), Robert Solomon

²⁴⁶ UC Irvine School of Law, *Course Catalog*, https://apps.law.uci.edu/CourseCatalog/cap_results.aspx (last visited Oct. 11, 2016); UC Irvine School of Law, *Our Faculty: Full-time Faculty, Adjunct Faculty, Lecturers*, <http://www.law.uci.edu/faculty/> (last visited Oct. 11, 2016).

(S) (Clinical Professor of Law)

Criminal Justice Clinic

- Fall, Spring
- Professor – Katharine Tinto (Assistant Clinical Professor of Law)

Domestic Violence Clinic

- Fall, Spring
- Advanced – Fall, Spring
- Professors – Patricia Cyr (Lecturer), Jane Stoeber (Clinical Professor of Law)

Environmental Law Clinic

- Fall, Spring
- Advanced – Fall, Spring
- Professor – Suma Peesapati (Visiting Lecturer), Michael Robinson-Dorn (Clinical Professor of Law)

Fair Employment & Housing Clinic (Elective)

- Spring
- Professor – Lori Speak (?)

Immigrant Rights Clinic

- Fall, Spring
- Advanced – Fall, Spring
- Professors – Sameer Ashar (Clinical Professor of Law), Annie Lai (Assistant Clinical Professor of Law), Emi MacClean (Lecturer)

Intellectual Property, Arts, and Technology Clinic

- Fall, Spring
- Advanced – Fall, Spring
- Professors – Christina Gagnier (Lecturer), Jack Lerner (Clinical Professor of Law)

International Human Rights Clinic (Elective)

- Fall, Spring
- Advanced – Fall, Spring
- Professors – Paul Hoffman (Adjunct Clinical Professor of Law), Catherine Sweetser (Adjunct Clinical Professor)

International Justice Clinic

- Fall, Spring
- Advanced – Fall, Spring

- Professors – David Kaye (Clinical Professor of Law), Ramin Pejan (Adjunct Clinical Professor)

Reproductive Justice Clinic

- Fall
- Professors – Michele Goodwin (Professor of Law), Hon. Lynne Riddle (Lecturer)

Veterans Clinic (Elective)

- Spring
- Advanced – Spring
- Professor – Antoinette Balta (Lecturer)

E. Washington and Lee

For 314 students, Washington and Lee University School of Law has 6 clinics.²⁴⁷ Four of these clinics are full-year clinics, and a fifth can be taken as a full-year clinic if students so choose. Of the 9 faculty teaching in these clinics, 1 is a Visiting Professor of Law, 5 are Clinical Professors of Law, 1 is an Associate Clinical Professor of Law, and 2 were not readily determined.

Advanced Administrative Litigation Clinic (Black Lung)

- Full year
- Professor – Daniel Evans (F) (Visiting Professor of Law), Timothy MacDonnell (S) (Clinical Professor of Law)

Community Legal Practice Center

- Full year
- Professor – C. Elizabeth Belmont (Clinical Professor of Law)

Criminal Justice Clinic

- Full year
- Professor – John D. King (Clinical Professor of Law)

Immigrant Rights Clinic

- Fall
- Professor – David Baluarte (Associate Clinical Professor of Law)

²⁴⁷ Washington and Lee University School of Law, *Course Schedules*, <https://law2.wlu.edu/students/page.asp?pageid=100> (last visited Oct. 11, 2016); Washington and Lee University School of Law, *Faculty*, <http://law2.wlu.edu/faculty/> (last visited Oct. 11, 2016).

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Tax Clinic

- One semester or full year
- Professor – Michelle L. Drumbl (Clinical Professor of Law)

Virginia Capital Case Clearinghouse

- Full year
- Professor – Donovan (F) (?), Engle (F) (?), David I. Bruck (S) (Clinical Professor of Law)

