

PEER REVIEW ARTICLE†

THE END OF LAW SCHOOLS: LEGAL
EDUCATION IN THE ERA OF LEGAL
SERVICE BUSINESSES

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† For more information on the *Mississippi Law Journal’s* peer review process, see Jack Wade Nowlin & Brian Clark Stuart, *Foreword: The Mississippi Law Journal Peer Review Process*, 84 MISS. L.J. i (2015).

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INTRODUCTION

Law school, as most of us have known it, is doomed. Law school today—which is but a gloss on Langdell’s Harvard¹—

¹ See A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 2027 (2012) (“[T]he contemporary law school remains remarkably Langdellian in its design as a three-year system in which doctrinal legal

remains based on a system designed to prepare students to practice general law in an 1870s world. Students learn a bit about criminal law, a smattering of contracts, a little about torts, a smidgeon of property law, and some of the essentials about how cases are moved through a court system. When they emerge, they typically can read and analyze cases, and are told they have learned to “think like a lawyer.”² In a way, they have.

But, at least in the typical required curriculum, they haven’t been taught how to negotiate,³ they haven’t been taught how to build teams or work within organizations,⁴ and they haven’t been

knowledge and legal analytical abilities are transmitted to students mostly via a traditional or modified case-dialogue approach, supplemented with optional or mandatory experiential learning components.”) (footnotes omitted); *see also* Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 340 (2007) [hereinafter Gordon, *Geologic Strata*] (“The American law school—in the basic shape we recognize it today—originated with the model of legal education that President Charles W. Eliot and Dean Christopher Columbus Langdell established at Harvard in 1870.”); Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 597 (2007) (“The plain fact is that American legal education, and especially its formative first year, remains remarkably similar to the curriculum invented at the Harvard Law School by Christopher Columbus Langdell over a century and a quarter ago.”); Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609, 610 (2007) [hereinafter Rubin, *What’s Wrong*] (“[T]he basic educational approach that law schools use remains essentially unchanged from the one that C.C. Langdell introduced at Harvard in the years following the Civil War.”).

² For a discussion of how “think like a lawyer” serves as a unifying and sometimes dehumanizing theme across all tiers of law schools, see ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007).

³ One reform of the past forty years, however, has been to move negotiation courses into the curriculum, often as part of “Alternative Dispute Resolution” offerings, a packaging which can mask how universally negotiation skills matter to a lawyer’s work. At most schools, such courses remain optional, and the ABA does not require negotiation instruction for accreditation nor is it tested on bar exams. *See* JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* 126 (2013) [hereinafter MOLITERNO, *CRISIS*] (“Unlike the paucity of such offerings in 1975, in 2012, every law school offers courses in negotiation, mediation, and arbitration. Some include it in aspects of their mandatory skills curriculum, and thus every student receives some instruction in the ADR arts. The ABA did not then and has never added such a requirement to the accreditation standards. Nonetheless, the course books in these areas have multiplied, and it is the rare student who has not at least had exposure to negotiation instruction in law school.”).

⁴ *See* Michael Kelly, *A Gaping Hole in American Legal Education*, 70 MD. L. REV. 440 (2011) (arguing that law schools should teach students how to work within organizations).

taught how to work with clients.⁵ They don't learn project management techniques and wouldn't know how to discuss modern information management technologies. It would be considered déclassé at most schools to suggest that they should learn how to market themselves, either within the organizations they will join or to the general public. They haven't been shown how to build a balanced life in the law, one where they can achieve professional excellence and yet have a satisfying personal life.⁶ In short, they haven't been taught how to "think like a lawyer" in many of the core areas that define successful lawyers today, and will increasingly define them tomorrow.⁷

However, that is not why law schools are doomed. Law schools are doomed for a more fundamental reason: law schools only offer training aimed to make students into lawyers.⁸ Like a zombie, law schools stagger forward reliant on a vision from a past life, ignoring today's diverse world of legal services and the pervasive changes wrought by the rise of the administrative state. To live, legal education needs to be connected to law as it is experienced today. New institutions should be designed based not

⁵ See Gail A. Jaquish & James Ware, *Adopting an Educator Habit of Mind: Modifying What It Means to "Think Like a Lawyer,"* 45 STAN. L. REV. 1713, 1715 (1993) ("[T]he most important work that lawyers do for society is to communicate the law and its application to nonlawyers, so that nonlawyers can make informed decisions.").

⁶ Plenty of advice exists on just this topic, suggesting a recognized need. See, e.g., NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW* (2010); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

⁷ Complaints that law school graduates emerge from law school unprepared to practice law have been around almost as long as Langdell's case method of instruction, and continue to appear with regularity. See ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA, BULL. NO. 15 (1921) [hereinafter REED REPORT]; Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003 (1994).

⁸ It may be argued that many law students, by choice or necessity, take jobs other than practicing law; thus, law schools do not just train lawyers. One could also resurrect the old canard that law school is an all-purpose education in critical thinking that prepares students for virtually any career other than neurosurgery. The argument in this Article is that the education law school offers, rooted in a methodology principally aimed at preparing students to represent clients before common law courts, does not efficiently or adequately prepare students for the new world of legal services in a modern regulatory state.

on what best serves law students or legal educators, but on what best serves the needs of today's underserved society.⁹

Law schools redesigned for the needs of today's society need first to take into account that "legal services" no longer just means lawyers. Already today, services once delivered by lawyers are being delivered by non-lawyer organizations with other important skill sets. Companies that offer "compliance" or "risk management" or "document management" or even "legal consulting" are displacing lawyers, as corporate counsel select the consultant best fitted to meet the current need.¹⁰ The displacement will not just happen at the high end of the market where corporations shop for complex services; already, online document creation systems encroach on work once done by small firm lawyers, and as technology improves the beach head will expand as fast as regulatory barriers fall. To serve society, legal education needs to engage with this changing market.

Once engaged with today's broader world of legal services, legal education needs to move beyond a vision of legal services that sees mastery of legal rules as the core skill. In a world where the administrative state means that laws touch the activity of companies and individuals at every turn, solving client and societal problems rarely involves just knowing doctrine.¹¹ Society's needs can only be met if legal education moves beyond parsing doctrine and starts to explore the world where law meets behavior.

Change implies creation as well as loss, and the new diversity in legal services creates an opportunity for a different

⁹ See Renee Newman Knake, *Democratizing Legal Education*, 45 CONN. L. REV. 1281, 1284 (2013) ("The untapped market for legal services is potentially worth billions of dollars."); Gillian Hadfield, *Lawyers, Make Room for Nonlawyers*, CNN (Nov. 25, 2012, 12:25 PM), <http://www.cnn.com/2012/11/23/opinion/hadfield-legal-profession/> [<http://perma.cc/85NV-HR4P>] (noting that unserved legal needs of Americans are annually worth twenty billion to hundreds of billions of dollars).

¹⁰ See Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J.L. & BUS. 1 (2012) [hereinafter *Rethinking Regulation*]; Tanina Rostain, *The Emergence of "Law Consultants,"* 75 FORDHAM L. REV. 1397 (2006).

¹¹ See MOLITERNO, *CRISIS*, *supra* note 3, at 232 ("I have met lots of lawyers in my 32 years since law school. So far I have never had a lawyer say that she solved a client's problem solely based on what she learned during a particular Tuesday afternoon session of the Torts or Contracts class.").

type of educational institution, one we can call a School of the Legal Professions. These new schools would leave behind the appellate court-centered ideology of law schools conceived in a common law world, and look to all the ways law is experienced and encountered in the modern regulatory state. Such broader institutions would be positioned to shift the educational ideology from one centered on the appellate courtroom to an ideology centered on people and institutions affected by today's pervasive legal regulation.

This Article explores why such successor institutions now make sense, and examines in broad strokes what their offerings might look like. Recognizing that legal services has become a world of niched specialists, such schools would explore training not just for generalist lawyers, but for more narrowly trained specialists equipped to solve niche problems. Recognizing that solutions to problems that are in part legal require skill sets far beyond those offered in law schools, such schools would also explore training for new occupations—even professions—aimed at equipping practitioners with both legal and non-legal skills. Training of lawyers would change as well, with a shift of focus away from providing a methodology to parse doctrine and towards the other methodologies practicing lawyers use in day-to-day life. Focused on the broader world of legal services—and with more engagement with those expected to comply with legal rules—the research associated with such a school should diverge from the doctrinal analysis that has, in varying forms, dominated law school research since Langdell, and look more to law as it is lived and applied.

Conceiving of legal education in terms beyond just lawyers provides the new vision, the new ideology,¹² of education for legal

¹² The term “ideology” is not used in this Article in a technical or term of art sense. Terms such as “conception,” “paradigm,” “philosophy,” or “underlying assumptions” can be substituted if the reader finds that more comfortable. The point is, for over a century the case-method law school has been touted as a transformative experience, one that trains students to “think like a lawyer.” Even without applying formal analytical tools to define an “ideology” or a “habitus,” one can take the assertion seriously that the case method law school is transformative, that it is transformative toward a certain end, and that this end includes core beliefs about what lawyering is and how lawyers should think. *Cf.* J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998) (analyzing ideology in the larger context of human cultural understanding); PAUL RICOEUR, *LECTURES ON IDEOLOGY AND UTOPIA* (George H.

services that will help achieve the transformative change in legal education that is prevented by Langdell's outdated version of "thinking like a lawyer." Langdell's method was based on a view of the law where only lawyers and judges could touch law, a law centered on written opinions from appellate courtrooms. In the world of today's administrative state, highly technical laws impact every phase of personal and economic life, often with lawyers and judges nowhere in sight. With new kinds of legal services arising in light of this, it is an opportune time for new institutions of legal education to arise, with a viewpoint attuned to today's world.

I. THE TRADITION: LAW SCHOOLS AND LAWYERS DEFINING LEGAL SERVICES

Legal education and the legal profession literally grew up together, and each has helped define the other. A process that saw the emergence of modern legal professions across Europe was recapitulated centuries later in the United States. In each case, education defined what legal professionals do, and the practice of law defined what legal educators teach. The result is that each tends to imagine itself, and its possibilities, only in terms of the other.

Since modern law schools arose, however, the nature of the practice of law has changed. Law practice, once a generalist trade for lawyers working alone or in small firms, has become a field for specialists. A model for legal education that was formed in the age of common law generalists has not fundamentally changed in the light of a changing profession, and no longer fits the needs of that profession. To work toward what is needed today requires a bit of background on how law schools and law practice have evolved.

A. The Rise of Western Legal Professions

What we think of as the modern western legal profession emerged during the Middle Ages, driven in part by the rediscovery of mature Roman legal codes and in part by the needs of the

Taylor ed., 1986) (discussing ideology and utopia); and Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137 (2001) (critiquing the ideological forces underlying the traditional model of legal education).

church and lay rulers.¹³ The emerging specialists met a need in both church and lay settings for dispute resolution and the demarcation of legal rights and duties. From the beginning, university training seemed to be part of the process. Indeed, as the legal advisors gradually formed into something resembling a modern profession, the tie with the university was central.¹⁴

The relationship went both ways. Law students, civil and canonical, represented a major part of the medieval university student body. At some schools, more than half of all students were engaged in the study of law.¹⁵ The study of law, along with the study of theology, provided the body of students that provided a base on which the great medieval universities were built.

As lawyers sought professional status, the link with formal education proved significant. Professionalization came faster in those areas where university trained advocates predominated, and over time formal education became an element of the professional definition. The credentials provided by the university helped establish the status and competence of lawyers.¹⁶

For our purposes, the important thing to note is this: Even at the outset of the western legal tradition, the profession and the academy were intertwined. The conception of what constituted legal work drew heavily on what law students were taught; the curriculum for law students was based on what practicing advocates needed to know. In a sense, the two settings shared a common ideology of what law was about based in large part on the legal work of that era.

¹³ See JAMES A. BRUNDAGE, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS* (2008).

¹⁴ *Id.* at 219 (“Universities were indispensable for the development of the medieval legal professions.”); HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 120 (1983) (“The emergence of modern Western legal systems in the late eleventh and the twelfth centuries was closely related to the emergence of the first European universities.”).

¹⁵ See BRUNDAGE, *supra* note 13, at 267-68.

¹⁶ *Id.* at 220-21 (“The study of law at a university provided institutional credentials that carried greater distinction and greater assurance of competence than did private study with a handful of individual masters.”).

B. The Rise of the Modern U.S. Law School and the Modern U.S. Legal Profession

Centuries later, the same process of law schools and lawyers evolving together repeated itself.¹⁷ While North America had lawyers almost from the first European colonization, the profession developed in an almost ad hoc fashion until the mid-nineteenth century. Coastal cities had somewhat more learned bars, involving apprenticeships and on occasion training in Europe. On the frontier, by contrast, qualifying as a lawyer was a more casual affair. A few minutes of informal discussion with a local judge could be enough to earn admission to the bar.

This began to change in the nineteenth century with the creation of the first law schools.¹⁸ Some law schools, such as the Litchfield Law School, seem to have grown organically from apprenticeship programs, with experienced lawyers going beyond the relatively intimate and unstructured apprentice relationship to a more structured program.¹⁹ Others started with an endowed chair at a college, which in some cases led over time to the growth of a professional school.²⁰

In the era before the Civil War, however, law schools remained marginal and lackluster. Relatively few lawyers passed through the nascent law schools. Of those that did, the course of education was often quite short, and limited for the most part to canned lectures. The educational program did not claim to be all that was needed but provided a foundation that would be finished by an apprenticeship with a practicing lawyer.²¹ That all began to change when a new approach was taken at Harvard.

¹⁷ The history of American legal education is an oft-told story. *See, e.g.*, ALBERT J. HARNON, LEGAL EDUCATION IN THE UNITED STATES (1953); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983); Stephen R. Alton, *Roll Over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 OKLA. CITY U. L. REV. 339 (2010); Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT'L L.J. 335 (2006); Spencer, *supra* note 1.

¹⁸ A brief history of the professionalization of the U.S. legal profession can be found in RICHARD L. ABEL, AMERICAN LAWYERS 44-48 (1989).

¹⁹ *See* Spencer, *supra* note 1, at 1966-68.

²⁰ *Id.* at 1968.

²¹ *Id.* at 1972 (“[F]rom the time of Blackstone through the establishment of university law schools, we can see that formalized legal education was focused on instruction in the English common law and modern American legal doctrine as a

1. Langdell Creates the Modern American Law School Around a Court-Centered Understanding of Law

The modern American law school started with Christopher Columbus Langdell, and Langdell started with the belief that law can be understood and taught as a science.²² This belief was based on a more basic ideology: that what mattered in law was understanding and rationalizing the law applied in courtrooms by judges.²³ This ideology—arguably the very invention of the modern idea of legal doctrine²⁴—was baked into the curriculum and structure of law schools built on Langdell’s model.

Langdell’s ideology arguably fitted the law practice of that era.²⁵ The modern regulatory state, with its pervasive legal requirements, had yet to be invented. Legal practice still was tied mostly to the courtroom, where cases were argued and decided. Commercial office practice, where lawyers helped architect business structures, was in its infancy. An education based on

foundation for subsequent training in practical skills after law school under the tutelage of practicing attorneys.”).

²² See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 170-74, 188 (1993); Christopher Columbus Langdell, Address to the Harvard Law School Association at the Quarter-Millennial Celebration of Harvard University (Nov. 5, 1886), in *Harvard Celebration Speeches*, 3 *LAW Q. REV.* 118, 124 (1887) (“[L]aw is science, and . . . all the available materials of that science are contained in printed books.”). *But see* BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906*, at 349-51 (Daniel Ernst & Thomas A. Green eds., 2009) (arguing that while Langdell disciples did analogize law to a science, the written record does not conclusively show that Langdell actually held that view).

²³ See SHELDON AMOS, *THE SCIENCE OF LAW* 24-25 (1874) (“In other words, a series of logical processes is involved in the *interpretation* of every law, whether written or unwritten, and the correctness of these processes may furnish ground for indefinite doubt and argument. . . . [T]hese logical processes are permanent and universal, and the application of them to the interpretation of law imparts their own permanence and universality to the Science of Law.”).

²⁴ See Catharine Pierce Wells, *Langdell and the Invention of Legal Doctrine*, 58 *BUFF. L. REV.* 551, 553 (2010) (“[T]he modern notion of legal doctrine was at the center of Langdell’s contribution to American law. It was doctrine that Langdell sought to teach by the case method; doctrine that formed the substance of his contract theory; and doctrine that he believed should be consulted in the decision of cases.”).

²⁵ See Edward Rubin, *The New Course Book and the New Law School Curriculum*, in *LEGAL EDUCATION IN THE DIGITAL AGE* 200, 200-01 (Edward Rubin ed., 2012) [hereinafter *LEGAL EDUCATION*].

cases fit the time, and corresponded with what Langdell himself had experienced in his own fifteen years in practice.²⁶

At the center of both Langdell's ideology and his instructional method was the reported common law case.²⁷ For Langdell, each case was akin to a newly discovered biological specimen or a mineral outcrop.²⁸ The specimen could be analyzed in terms of where it fit within the categorical analysis of the field.²⁹ Essential principles could be drawn from careful examination of the correctly decided cases and applied like Euclidean postulates to new situations.

The search for the underlying principles provided the basis for the science.³⁰ The body of cases, correctly analyzed, would reveal a set of internally consistent principles inherent in either human nature or Anglo-Saxon culture,³¹ and expressed case by

²⁶ Despite Langdell's justly earned reputation for breaking the tie between law practice and law teaching, his own period of practice of 15 years far exceeds the normal length in practice for law professors today. See KIMBALL, *supra* note 22, at 42-83.

²⁷ For Langdell, the science of law was restricted to the world of reported common law cases. Law based on statutes and constitutions was outside the ambit. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 469 (3d ed. 2005) ("But from the strict Langdell standpoint, these recent changes—many of them statutory—were not part of the science of law. Even constitutional law was not part of this science—it was too textual, and was therefore an excrescence.").

²⁸ See Gordon, *Geologic Strata*, *supra* note 1, at 342 ("Langdell himself wanted to use cases to illustrate the small number of basic 'principles' underlying fields of doctrine: the casebooks would reveal the historical processes by which those principles had evolved to their modern forms and would also provide students the primary examples ('specimens') through which they could induce the basic principles for themselves.").

²⁹ See *id.*; Spencer, *supra* note 1, at 1975 ("Langdell believed that law was a form of natural science in that it consisted of a coherent system of rules derived from general principles that could only be discerned through the study of observable phenomena—the judicial opinions in which the principles were manifested.").

³⁰ The notion of law as a science, while used by Langdell, did not originate with Langdell. See Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 87 (Gerald L. Geison ed., 1983) [hereinafter *American Enterprise*]; see also Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) (contrasting Langdell's view of law as a science to other conceptions of legal science); Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421 (1999) (discussing Langdell's thought in the context of different nineteenth-century conceptions of science).

³¹ See SHELDON AMOS, *THE SCIENCE OF LAW* 27 (1874) ("It appears, then, from the above investigation, that there is a true Science of Law based upon the irrefragable,

case through the judges. Built into Langdell's view of the law was a belief that these legal principles were not merely technical nor arbitrary, but could be intuited from the underlying structure.

The notion that law was a science provided, in part, a justification for locating legal education in institutions of higher education.³² If law was a science, like biology or physics, it deserved the same kind of systematic study. Practicing lawyers needed a foundation in the science, just as mining engineers needed a foundation in geology or doctors in biology. In an era where scientific knowledge was displacing theological dogma, it also provided a kind of prestige to the endeavor.³³

While Langdell's science imported doctrinal categories from Roman law,³⁴ the science of the law was not limited to any one subject area. Rather, the whole of the common law expressed underlying principles, and seemingly disparate areas were equally susceptible to the methods of inquiry advanced by Langdell. A study of how the law developed, case by case, would reveal an underlying structure both within and across categories against which new developments could be assessed.³⁵

The analogue to the medical students' hospital, under Langdell's system, was not the law office nor the courts, and

permanent, and invariable facts of the constitution of human society, as exhibited in the state of the physical, logical, and ethical constitution of man.”); Edward Rubin, *Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It*, 41 SAN DIEGO L. REV. 55, 57 (2004) [hereinafter Rubin, *Contracts*] (“Like many legal scholars of his day, Langdell believed that the law, and more specifically the common law, was animated by enduring principles that inhered in Anglo-American legal culture.”).

³² See 2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 374 (The Lawbook Exch., Ltd. 1999) (1908) (“If law be not a science, a university will best consult its own dignity in declining to teach it.” (quoting Speech of Professor Langdell, at the Meeting of the Harvard Law School Association, on Law School Day of the Commemoration of the 250th anniversary of the Founding of Harvard College (Nov. 5, 1886))); G. Edward White, *The Impact of Legal Science on Tort Law, 1880-1910*, 78 COLUM. L. REV. 213, 220 (1978).

³³ See STEVENS, *supra* note 17, at 53; Michele R. Pistone & John J. Hoeffner, *No Path But One: Law School Survival in an Age of Disruptive Technology*, 59 WAYNE L. REV. 193, 207-08 (2013) [hereinafter *Law School Survival*] (“A broader achievement was securing the place of law schools within the larger academic community of universities and colleges. Law schools did so by branding and emphasizing the law as a type of science, not a mere practical and worldly occupation.”).

³⁴ See Gordon, *Geologic Strata*, *supra* note 1, at 367.

³⁵ See Grey, *supra* note 30, at 17.

certainly not the rough and tumble world where clients lived, but the law library.³⁶ Students and scholars wishing to understand the law could find all they needed in the stacks of the library.³⁷

A science needs scientists, and Langdell's vision included a corps of professional legal scholars, freed from the competing demands of practice. Up until Langdell's time, law was most often learned in apprenticeships with practicing lawyers, and even when schools were involved the lecturer typically had built a reputation in practice. Langdell's innovations included a new class of professors, who moved from being top students of the law in law schools to teaching and scholarship, with little or no time in practice.

Langdell developed a pedagogical method consistent with his beliefs.³⁸ Just as a budding geologist needed to spend time with mineral specimens, from which the basics of the science could be induced, budding lawyers needed to spend time with the source materials of legal science. For Langdell, this was the reported case law of the common law judiciary.³⁹

The basics of the case method are familiar, even today, to anyone who has studied at an American law school. The exemplar cases are placed before the students, and the professor painstakingly leads the students through them in order to extract important underlying principles. Emphasis may have changed to some degree—today's students may spend a bit less time worrying

³⁶ See Christopher Columbus Langdell, Address at the Quarter-Millennial Celebration of Harvard University (Nov. 5, 1886), in *Harvard Celebration Speeches*, 3 LAW Q. REV. 118, 124 (1887).

³⁷ See O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) ("The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds.").

³⁸ See FRIEDMAN, *supra* note 27, at 468 ("There was a theory behind Langdell's method. He believed that law was a 'science'; it had to be studied scientifically, that is, inductively, through primary sources. These sources were the printed cases; they expressed, in manifold dress, the few, ever-evolving and fructifying principles that were the foundations and the genius of the common law.") (footnote omitted).

³⁹ See Gordon, *Geologic Strata*, *supra* note 1, at 342 ("Langdell himself wanted to use cases to illustrate the small number of basic 'principles' underlying fields of doctrine: the casebooks would reveal the historical processes by which those principles had evolved to their modern forms and would also provide students the primary examples ('specimens') through which they could induce the basic principles for themselves.").

about whether a holding can be reconciled with prior decisions, and a bit more time thinking about how the Coase theorem relates to the rule—but the basic process has changed little. Then and now, the process claimed to train students to “think like lawyers,” equipped with skills that could be applied across doctrinal silos.⁴⁰

Law schools and legal scholars have long since abandoned any notion of a science of the law. Despite that, modern law schools continue to base their curricula on Langdell’s approach, and present law to future lawyers as something best found in reported judicial opinions.⁴¹ Underlying Langdell’s “scientific” approach are assumptions that have stayed with legal educators to the present day.

Langdell’s method puts legal doctrine at the center of both legal training and of thinking about what law is. Facts are taken as established,⁴² and both judicial and extra-judicial processes given short shrift. Facility with parsing legal doctrine defines skillful lawyering, above all the other skills that make a good lawyer.⁴³

Crucially, Langdell’s approach defines law in terms of the courts. In a world where courtroom practice has withered away,⁴⁴ legal practice requires skills well beyond courtroom arguments. These skills are approached, at best, obliquely in the case method. Contracts, for example, becomes a course in contract adjudication, and not contract design or drafting.⁴⁵

⁴⁰ See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 2-3, 5 (2007) [hereinafter CARNEGIE REPORT].

⁴¹ See Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 902 (1997) (noting a tendency to dismiss Langdell’s law as science as “misguided, if not downright looney” but also noting its continuing effect on the legal academy).

⁴² Many lawyers operating in fields with well-established doctrine tend to describe their job as “practicing facts.” Langdell’s method tends to obscure that facts are malleable at the onset of transactions and inchoate at the start of litigation.

⁴³ See CARNEGIE REPORT, *supra* note 40, at 115 (“The ability to grasp the legal significance of complex patterns of events is essential, but so are skills in interviewing, counseling, arguing, and drafting of a whole range of documents.”).

⁴⁴ See generally John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012).

⁴⁵ See Rubin, *Contracts*, *supra* note 31, at 58. In recent years, both in doctrinal and clinical courses, there has been more attention paid to including actual contracts in law school education. This, however, is at the option of the individual professor, and drafting skills—unlike the doctrine imparted in a case study course—are not tested on bar exams. See, e.g., Victor Fleischer, *Deals: Bringing Corporate Transactions into the*

Focusing on doctrine and courts, Langdell's version of "thinking like a lawyer" left little room for law as lived in larger society.⁴⁶ By their nature, laws apply to everyone, not just lawyers, and impact behavior in broader society, not just in court cases. Langdell's approach sees this larger world, if at all, only through a peephole in the courtroom door. We hear bits of the stories of the litigants, but nothing from non-litigants, whose brushes with legal requirements may be just as life defining.⁴⁷

Langdell and his successors moved legal education into the research university, and equipped it with a pedagogical method and a theory. While the theory has been abandoned, the method and the university setting have continued.⁴⁸ The method and the assumptions it is built on continue to dominate American legal education, with profound consequences for not just law students but also for consumers of legal services. Legal education also has continued in the setting of the higher educational institutions, which were told at the outset that professional training belonged within their walls because of the scientific nature of the inquiry. Again, while belief in the justifying science soon faded, the siting of law schools in research universities led to an increasingly severe separation from the world of legal services.

2. Langdell's Method Spreads and Becomes the Dominant Gateway to the Legal Profession

Though not without its critics⁴⁹—including, from almost the outset, cries that Langdell's method did not produce practice-

Law School Classroom, 2002 COLUM. BUS. L. REV. 475; Edith R. Warkentine, *Kingsfield Doesn't Teach My Contracts Class: Using Contracts to Teach Contracts*, 50 J. LEGAL EDUC. 112 (2000).

⁴⁶ See FRIEDMAN, *supra* note 27, at 471 ("[T]he vices of the method lay deep. In the most radical sense, the new method severed the cords, already tenuous, that tied legal study to American scholarship, and American life.")

⁴⁷ See FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 22-23 (2012) (discussing selection effect).

⁴⁸ See Rubin, *Contracts*, *supra* note 31, at 58 ("Of course, no one believes in Langdell's theory of law anymore, so much so that it is difficult to describe it without lapsing into sarcasm, but the pedagogic method used in law schools is still based on this concept of law.")

⁴⁹ Not everyone was enamored of the Langdell system. Woodrow Wilson was asked about a design for a law school at Princeton, and his vision involved seeing law in a broader context than just litigation:

ready lawyers—Langdell’s approach proved robust. From its beginnings at Harvard, it soon spread to other schools. By the early twentieth century, Langdell’s case method was featured at most of the leading schools.⁵⁰

The nature and duration of law school changed throughout the same period. Law school training, once as short as a year for a complete education, gradually increased to two years and then to three. At the same time, the prerequisites for attending law school were increased, with a once optional undergraduate college education becoming the norm.⁵¹

Another change took place alongside the spread of Langdell’s methods—law schools became the required gateway to the legal profession. Prior to the Civil War, relatively few lawyers had attended law school. Only twenty-two law schools existed before the war, and many of those had scant enrollment.⁵² The lack of schools reflected another reality—formal education was not required to enter the profession. As late as 1879, twenty-three of the then thirty-eight states did not require any formal preparation to enter practice.⁵³ Of the fifteen states requiring some kind of apprenticeship, only seven required as much as three years as an apprentice.⁵⁴ None required a law degree, although in some states law school could reduce the required duration of apprenticeship.⁵⁵

The years on either side of the dawn of the twentieth century saw, however, a vast increase both in the number of law schools and in the number of students enrolled in law schools. The existing law schools expanded their class size. New law schools

[N]ot a duplicate of those [law schools] already in full blast all over the country, but an institutional law school, so to speak, in which law shall be taught in its historical and philosophical aspects, critically rather than technically, and as if it had a literature besides a court record, close institutional connections as well as litigious niceties,—as it is taught in the better European universities.

Gordon, *Geologic Strata*, *supra* note 1, at 345 (alteration in original) (quoting Letter from Woodrow Wilson to Albert Shaw (Nov. 3, 1890), *in* THE PAPERS OF WOODROW WILSON, 1890-1892, at 63 (Arthur S. Link ed., 1969)).

⁵⁰ See FRIEDMAN, *supra* note 27, at 542.

⁵¹ See *id.* at 542-43.

⁵² See ABEL, *supra* note 18, at 41.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.*

appeared, most providing an education modeled on Langdell's model for local and regional markets.

In most states, throughout the same period admission requirements besides law school became more formal. What once might have involved a desultory examination before a local judge gave way to structured bar exams and formal admission requirements. The nature of the bar exam was, by practical necessity, friendly to the increasingly numerous law school graduates, requiring analysis of fact patterns in a way not altogether dissimilar to law school exams.

Along with the rise of legal education came the rise of a new kind of law practice. The first significant law firms began to arise in the years after Langdell reinvented legal education.⁵⁶ The graduates of the law schools fed into these firms, and a select few of the alumni of the firms came back to schools to teach. The modern corporate law firm and the modern law school began at about the same time, and formed a mutually reinforcing symbiotic relationship.⁵⁷

Thus, as Langdell's method spread, and as formal education became required for a legal career, law schools and the legal profession—especially the elite part of the legal profession—evolved into a mutually reinforcing duality. As the nineteenth century ended and the twentieth century dawned, law schools and the established bar worked together to establish law school as the gateway to a high status profession.⁵⁸ Apprenticeship went from

⁵⁶ The largest firm in 1872 had only six members. By the turn of the twentieth century, there were about seventy firms with five or more lawyers, with the largest being ten lawyers. FRIEDMAN, *supra* note 27, at 489.

⁵⁷ See *American Enterprise*, *supra* note 30, at 72 (“It has been widely noticed that the modern law school and the corporate law firm grew up together and achieved a symbiotic relationship to one another.”).

⁵⁸ Enhanced status for lawyers was a core value proposition of Langdell's approach from the outset. See FRIEDMAN, *supra* note 27, at 472 (“Why was Langdell's method so attractive in the long run? In some way, it suited the needs of the legal profession. It exalted the prestige of law and legal learning. At the same time it affirmed that law stood on its own two feet. It was an independent entity, a separate science; it was distinct from politics, legislation, and the opinions of lay people. This was a period in which interest and occupational groups fought for their places in the sun. Langdell concocted a theory that strengthened the claims of the legal profession. Law, he insisted, was a branch of higher learning, and it called for rigorous formal training. There was good reason, then, why only trained lawyers should practice law. They deserved their monopoly of practice. The bar-association movement began at roughly

being the primary gateway to the profession, to an acceptable but less desirable alternative, to not being an acceptable path at all in most states.

In the new century, law schools and the profession both found themselves engaged in a battle for status, and each found the other helpful in achieving higher status.⁵⁹ The leading law schools were situated in research universities and offered a nationalized curriculum mostly based on Langdell's model. The need for a formal education made what law school sold necessary—that lawyers were not just college men but holders of post-graduate degrees (in an era where college diplomas were rare) buttressed the elite status of the profession.

A new class of law schools had arisen, however, many offering instruction at night, and many preparing students on a straightforward occupational training basis for the local bar. The local and night law schools filled a niche not filled by the university schools. They admitted recent immigrants, and produced lawyers who could interact with poor immigrant clients in their native languages. They allowed those who needed full-time incomes to earn a degree while remaining employed. In short, they opened membership in the bar to a less elite class, able to serve less elite clients than were served by the traditional bar.

These new kinds of law schools threatened the status claims of both the academy and the bar. For the academy, the presence of non-academic schools provided a constant reminder that law school remained for its consumers, first and foremost, a ticket to an occupation. For the practicing lawyers, the prospect of lesser educated immigrants and even women joining the bar diminished the elite nature of the profession.

In response, the upper tier law schools fought for—and won—regulatory and accreditation standards from the American Bar Association (ABA) that pushed all schools toward their model. These standards required a full-time academic faculty of the type introduced at Harvard by Langdell, and so precluded faculties

the same point in time. Langdell's new method and the bar-association movement had a kind of ideological and political partnership.”).

⁵⁹ See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 21 (2012) (“The bar and elite legal academia thus shared a confluence of economic and professional interests in setting higher standards for legal education.”).

with substantial portions of practicing lawyers. The standards also required substantial law libraries—more needed for academic research than practice—and protections such as tenure.

Central to the debate was the notion that lawyering was a single profession. A report commissioned by the Carnegie Foundation argued that different standards should apply to the night and local law schools than for the national law schools because, in effect, the two different kinds of lawyering were different occupations.⁶⁰

Rejecting the notion that the work of legal services was divisible into different occupations, the ABA, allied with the Association of American Law Schools (AALS), chose to impose high academic standards on all law schools. Standards for accreditation of law schools were raised to the level of the academic schools.⁶¹ In all but a few states, graduation from an accredited law school became a prerequisite for taking the bar exam—and hence for engaging in legal services in an era of active enforcement against the unauthorized practice of law.

The period leading up to and following World War II thus saw the completion of a process that had begun with Langdell. Robert Stevens recounts the progression:

In the 1870s, legal education essentially meant a requirement for some period of law study followed by a bar exam. The second stage of growth had been recognition of law school as an alternative to apprenticeship. The third stage was the requirement of law school without the alternative of office study, and the fourth was recognition solely of ABA-approved law schools coupled with the requirement of attendance at college as well. The third and fourth stages in the movement had begun in the 1930s and were to come to fruition in the postwar years.⁶²

⁶⁰ See REED REPORT, *supra* note 7, at 417 (“The most clearly indefensible of these formulas has been the assumption that all lawyers do, and ought to, constitute a single homogenous body—in common parlance, a ‘bar.’”).

⁶¹ See STEVENS, *supra* note 17, at 173-77 (describing actions by the ABA, the AALS, and the National Conference of Bar Examiners throughout the 1920s and 1930s to raise minimum standards for law schools).

⁶² *Id.* at 205.

When the process was complete, the Langdell approach became the mandatory gateway to providing legal services.

Many scholars since have seen elitism and prejudice as underlying the decision to raise standards so as to make law school unaffordable for the great unwashed, and this must be at least partially true. However, in the report justifying the change, the committee gave a different reason consistent with the ideology of lawyering underlying the Langdell approach. The change was necessary, the committee argued, to develop awareness of “legal principles” and a mind “attuned to the common law.”⁶³ In an age where the regulatory state was being born, and where new types of lawyers could bring law closer to masses of citizens, Langdell’s library-oriented ideology of lawyering and legal services was codified. Legal services were tied to the common law courtroom.

While Langdell’s method never produced graduates ready to step right into practice, it did provide a base of legal knowledge and skills suited to untangling new doctrinal developments as they arose. On the profession’s side, the credo that the Langdell method taught one how to “think like a lawyer” provided a unifying theme for the profession itself. Law school taught students how to think like a lawyer, and lawyers were engaged in work that, while sometimes superficially different, required thinking like a lawyer.

The ideology built into this approach proved, in the academy, resilient to challenges from reform movements such as legal realism.⁶⁴ The law school experience continued to be built around Langdell’s methodology. Students were not sent into the field to see how citizens experienced the law, nor even told that such an enterprise would be meaningful, but were instead told in law schools high and low that “thinking like a lawyer” meant

⁶³ See TAMANAHA, *supra* note 59, at 26 (“Law school thus became what it is now: a three-year course of study taught by full-time academics. Justifications offered at the time in support of the third year are surprisingly thin for so momentous a decision. The only explanation provided in the ABA Report proposing the standards is that legal education must produce knowledge of legal principles and develop in students a mind attuned to the common law.”).

⁶⁴ See STEVENS, *supra* note 17, at 155 (“Faced with what they believed to be a stagnating approach to law and legal education, law professors at Harvard, Columbia, and Yale had attempted individually or collectively to carry out an assault on the status quo. These attempts had failed to bring about any definable institutional change . . .”).

becoming facile with doctrinal reasoning. While law school instruction took note of the ever-growing regulatory state, the durable approach was not through the eyes of the impacted citizens and businesses, but principally through Langdellian courses structured around leading cases.⁶⁵

3. The Legal Profession Transforms into a Market-Driven World of Niched Specialists

The twentieth century also saw sweeping—even fundamental—changes in the U.S. legal profession. These changes were linked to larger changes in U.S. culture and governance, including the rise of modern corporations and the rise of the regulatory state. The role of lawyers evolved from advocates and conveyancers to, at least in some cases, serving as facilitators of business, and finally to specialists in technical niches. The practice of law went from individuals or small firms serving individuals or small firms to a setting where much legal practice was for, within, or against large organizations. The practice of law today has changed from that of earlier generations.⁶⁶

By the time these processes ran their course, the nature of legal work had fundamentally changed. Lawyers increasingly became market-driven technicians helping businesses and individuals cope with regulation that had become pervasive. Lawyers were increasingly subject to competition in the provision of legal services from non-lawyers, while at the same time doing work that was distinct from and not interchangeable with the work done by their law school classmates. Understanding how law practice has changed will be necessary to fully appreciate how much law school has not changed—how much it has remained true to a model built on a world of common law courts that no longer characterizes legal practice.

⁶⁵ *Id.*; see also Spencer, *supra* note 1, at 2028 (“[T]raditional doctrinal courses—which do in fact dominate the curricula at virtually all law schools—tend to involve the study of doctrine through the lens of cases and casebooks—even in statutory courses . . .”) (footnote omitted).

⁶⁶ See MOLITERNO, CRISIS, *supra* note 3, at 160 (“The profession of the new millennium is not our grandfather’s legal profession. There is no single version of a good lawyer. And the organized profession lacks the power it once had to impose such a single version.”).

a. The Rise of Large Corporations Changes Legal Practice

One big change in the practice of law relates to the nature of the clients served by many lawyers, and the relative power of those clients in the relationship. At the time Langdell launched modern legal education, large companies were just beginning to appear. Langdell's method was built for generalist lawyers serving small clients in what today would be considered small firms and small cities.

As the twentieth century progressed, more and more of legal practice became centered around serving or opposing large corporations. The trusts of the Gilded Age became the large corporations of the twentieth century. Organizing and financing such entities involved sophisticated legal work. Larger firms, generally based in national or regional financial centers, arose to handle the work of these entities.

At the same time, the growth of the regulatory state changed the landscape for law. At the time Langdell launched his model in 1870, law could be envisioned as something that culminated in courtroom proceedings before judges. As the administrative state took shape, law escaped the courtroom. Increasingly, legal rules were created by statute or regulation, and enforcement or interpretation of those legal duties happened with little judicial involvement.⁶⁷

These changes impacted the daily life of lawyers much more than they impacted the model of law schools. Law schools, as noted, stayed mostly true to the Langdellian model, especially in the required curriculum. Lawyers, on the other hand, could shape their careers advising, serving or opposing large corporations or the regulatory state itself without much recourse to common law courts or doctrine.

Small clients and small firms did not go away, of course, but the corporate sector became increasingly important. Corporate lawyers represented a larger percentage of lawyers employed and collected a larger percentage of the money spent on lawyers. An ever-growing number of lawyers were employed directly by corporations. The big law firms almost exclusively served substantial corporate clients. Even small firm and individual

⁶⁷ See Rubin, *What's Wrong*, *supra* note 1, at 617-20.

client practice often involved claims against corporations. The pursuit of these claims could become specialized, with small firms with individual clients focused exclusively on personal injury or labor claims, for example, with corporations on the opposing side.

b. The Rise of the Administrative State Makes Legal Burdens Pervasive

Langdell was born on a small farm in New Boston, Massachusetts,⁶⁸ a setting that had more in common with the long centuries before than today's urban, industrialized world. His first brush with law came at the hands of a teacher, also a small town lawyer in New Boston, who inspired him with the idea of joining the "learned profession" of law.⁶⁹ While Langdell moved on to an urban practice of the time, his vision of what constituted lawyering remained rooted in the pre-industrial, small town, generalist practice of his youth.

Since Langdell's youth, the nature of the modern economy has changed—indeed, by the time Langdell took his post at Harvard the process of industrialization was well underway. In the decades following the Civil War, the rapid march of industrialization transformed the American economy. In turn, this led to the growth of an administrative state divorced from the common law courts of Langdell's vision.

As Elihu Root explained it in 1916:

We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority.⁷⁰

⁶⁸ See KIMBALL, *supra* note 22, at 11-12.

⁶⁹ *Id.* at 15.

⁷⁰ JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 420 (2007) (quoting Elihu Root, Public Service by the Bar, Address as President of the American Bar Association at the Annual Meeting in Chicago (Aug. 30, 1916)).

The administrative apparatus of the modern state is not a child of the common law. In bits and pieces, the administrative state arrived at both federal and state levels. As the economy and society changed, legislatures developed new governmental entities to address the issues created.

The arrival of the administrative state changed the work of lawyers. Both counseling and advocacy had to take into account the new seats of power. No longer could legal practice look to the common law court as its sole home.

More importantly, the rise of pervasive regulation through the administrative state changed the relationship ordinary citizens and businesses had with law. No longer could the elucidation of eternal principles from common law decisions provide a guide to conduct. The force of legal compulsion went far outside the courtroom, imposing positive as well as negative duties, and it was up to those under the law's sway to find a way to comply.

c. The Rise of the Specialist Lawyer Fragments the Profession

Langdell's vision presupposed a generalist lawyer, bringing a broad knowledge to bear on a variety of cases, with litigation and the resulting court opinions at the center of the lawyer's universe. An evolution in the nature of legal practice soon overtook that vision. Over time the practice of law has become increasingly specialized, with a corresponding shift toward office practice and away from trials.⁷¹

At the outset, lawyers viewed their professional status as depending on their breadth—their ability to move beyond technical or secular concerns, and engage with the concerns implicit in being guardians of the system of justice.⁷² As scholars of the entire “science of law,” they held a broad based knowledge

⁷¹ See Ariens, *supra* note 7, at 1060 (“Today, legal specialization is an unexceptional aspect of the profession of law. It is so unexceptional that assertions of specialization and concentration are expected of lawyers.”); William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 379-80 (2011); Herbert M. Kritzer, *The Future Role of “Law Workers”*: *Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917, 919-20 (2002).

⁷² See Ariens, *supra* note 7, at 1011.

not accessible to those without full legal training. As “officers of the court,” they were responsible to the legal system not just for their correct treatment of their clients but for their role as guardians of the system of justice.⁷³

In the late nineteenth and early twentieth centuries, this changed. Spurred in part by the rise of modern corporations, firms arose that had specialized expertise in corporate issues such as railroad reorganizations. Vast fortunes were built by lawyers who never appeared before a judge.⁷⁴

In this era, corporate “specialists” moved beyond advocacy and conveyancing to facilitating business.⁷⁵ Lawyers engineered corporate structures and oversaw commercial transactions. Amidst rapid industrialization and an ever-expanding administrative state, they lubricated the gears of commerce.

The rise of these specialist lawyers challenged the conception of professionalism in important ways. Lawyers who never entered a courtroom might still view themselves as officers of the court, but the day-to-day control over their activities by judges was absent. They might have broad academic training in a range of legal topics, but their bread and butter required a narrower focus and a deep specialized knowledge. By the 1920s specialization had become the norm in elite firms, with highest professional status not reserved for the generalist in the courtroom but for the specialist able to master the complex technicalities of a specialized field.⁷⁶

From nearly the beginning, this trend toward specialization drew criticism. As long ago as 1910, for example, an aspiring candidate for the New Jersey governorship named Woodrow Wilson lectured the ABA on the rise of specialization. Such specialization, he argued, displaced the lawyer statesmen who had served earlier generations.⁷⁷

⁷³ *Id.* at 1013-14.

⁷⁴ *Id.* at 1017 (citing the case of John W. Sterling, founder of Shearman & Sterling and a major benefactor of Yale University).

⁷⁵ See Roscoe Pound, *The Law School and the Professional Tradition*, 24 MICH. L. REV. 156, 159 (1925) (shift of leading lawyer role from trial work to serving companies).

⁷⁶ See Ariens, *supra* note 7, at 1004-05.

⁷⁷ *Id.* at 1028-29 (citing Woodrow Wilson, *The Lawyer and the Community*, Address at the 33d Annual Meeting of the American Bar Association (Aug. 31, 1910), in 35

It is tempting to conclude from the long history of these complaints that the argument is specious, and that things are pretty much as they were. A hankering for generalist lawyer statesmen, or for broadly based professionals shielded from the rawest demands of the market economy, may seem little more than nostalgia for a bygone age that never in fact existed.

Against this is the reality that what we mean by specialization has changed over the years, with law practice cut into finer and finer slices. At the time Wilson spoke, a large firm constituted perhaps ten or twenty lawyers, and specialization could mean a transactional practice focused on corporate clients. A generation or two later, a divide would exist between corporate lawyers steeped in the Uniform Commercial Code and handling commercial transactions, and a partner steeped in securities regulations who focused on public offerings. Today, in firms numbering thousands of lawyers, specialization involves granular slices where, for example, attorneys replicate certain types of private equity deals over and over and over again, making sure they conform with subsections of subsections of regulatory schemes.

Specialization can occur across multiple axes. These include:

(1) Legal specialization. A lawyer bases all or most of his practice in an understanding of a limited area of law. For older generations, lawyers who specialized in the antitrust laws or the securities acts would be examples. Today, the silos of legal expertise tend to be more granular and the expertise correspondingly more narrow, such as lawyers who are expert in the kinds of regulatory compliance imposed on health care providers.

(2) Project Specialization. In this context, a lawyer has an expertise in implementing a particular kind of activity or project. For example, a lawyer with legal specialization in Employee Retirement Income Security Act (ERISA) law might play a role in implementing or revising a pension plan, or a lawyer with securities law expertise might play a role in

A.B.A. REP. 419 (1910), reprinted in Woodrow Wilson, *The Lawyer and the Community*, 192 N. AM. REV. 604 (1910)). The argument with regard to lawyer statesman prefigured a more developed argument advanced by Yale Law Dean Anthony Kronman nearly a century later. See KRONMAN, *supra* note 22.

helping a highly leveraged private equity transaction close. In this kind of specialization, lawyers may work repeatedly on the same kind of project, alongside other consultants such as actuaries or investment bankers who also provide specialized skills, and perhaps alongside lawyers from other legal systems.

(3) Industry Specialization. Some lawyers specialize by industry. A lawyer might identify himself as a healthcare lawyer. Some lawyers might be generalists within the industry; others might further specialize, such as those who offer services with regard to patient privacy compliance in the healthcare industry under the Health Insurance Portability and Accountability Act (HIPPA).

A lawyer may be a specialist along all those axes—for example, a specialist in HIPPA who has a practice focused on putting in place compliance plans for healthcare providers. Some lawyers may maintain complementary specialties, such as lawyers experienced in private equity restructurings who find work in bankruptcy restructurings when deal work slows. In a modern 1,000-lawyer firm, specialties become self-reinforcing, as lawyers who wish to stray from their own field meet pushback from other lawyers who have claimed that specialty as their own.

In such a world of niched specialization, lawyers become consultants, brought in to handle a specific technical task, sometimes working alongside⁷⁸ and at other times competing with non-lawyer consultants. In-house departments reach out to outside lawyers when either the outside firm can do the work more efficiently, or when the outside firm has expertise not available in the in-house department. In both such situations, specialized expertise often provides the justification.⁷⁹

⁷⁸ See Robert Eli Rosen, *"We're All Consultants Now": How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 640 (2002) (arguing that lawyers are increasingly just one of many flavors of consultants used by corporations and are treated by corporations as such).

⁷⁹ To some extent, this happens with lawyers for non-corporate clients as well, although the categories may be broader in the small client hemisphere. A quick look at lawyer advertising in any urban market will reveal lawyers who focus their practice on specialties such as personal bankruptcies, family law, real estate purchases, workers' compensation claims, or personal injury litigation.

Specialization is not just a function of “big law” lawyers. Lawyers in government agencies develop niched domain expertise. Small firm lawyers find their own specializations, as reflected by their advertisements—they may maintain an immigration practice or a personal bankruptcy practice or might try high-dollar cases involving claims that pharmaceuticals had undisclosed dangers.

As the practice of law has become more specialized, opportunities also have opened for non-lawyer specialists to compete. When lawyers are engaged in genuinely broad gauge work, it is hard for competitors without the full set of lawyering skills to compete. When, however, practice becomes effectively limited to repetitive handling of specialized matters, for which legal training outside the specialized field has little application, competitors without the full range of legal training can, if allowed, compete effectively.⁸⁰

Each of the types of specialization created openings for new competitors. If lawyers became specialists in narrow areas of law, with little need for general legal knowledge, “consultants” could offer competing services. If lawyers specialized in projects such as ERISA implementation or creation of legal compliance plans, consultants could compete to offer similar products. If lawyers became industry specialists, other consultants with ties to the industry could vie for some business.

Interpreting and applying the tax code, for example, is as much the work of tax accountants as tax lawyers.⁸¹ Corporate clients allocate work as they please between them. While regulatory barriers exist that still block some competitors, it is not clear how a general legal education is always needed for someone who spends a career applying a narrow sliver of legal rules. On the corporate side, with corporate counsel controlling the overall

⁸⁰ HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* 219 (1998) (“As tasks become specialized and it becomes possible for persons to acquire the limited set of knowledge necessary to deliver highly specific services traditionally the domain of a member of a recognized profession, it becomes increasingly difficult for the profession to maintain any exclusivity over those tasks.”).

⁸¹ For an in-depth discussion of the competition between tax lawyers and accounting firms, see TANINA ROSTAIN & MILTON C. REGAN, JR., *CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS AND THE TAX SHELTER INDUSTRY* (2014) [hereinafter *CONFIDENCE GAMES*].

matters and allocating disaggregated work to lawyer and non-lawyer vendors, specialized work goes to the perceived best vendor.⁸²

d. The Commercialization of Legal Practice Unleashes Market Pressures

Another change—also one critiqued for more than a century—involves the increasing commercialization of legal practice.⁸³ More than a century ago, critics began to deride the business focus of modern legal practice for being overly focused on money.⁸⁴ In response, again with the theme that critics were pointing to a non-existent golden age, the response has been that lawyers have always been concerned about making money.

Be that as it may, much depends on the notion that lawyers are not just commercial actors. While financial concerns have never been absent from the hearts of lawyers, a system of regulation and justification has been erected on an edifice that depends, at its core, on the proposition that more than just profit drives the activities of lawyers. Lawyers, it is argued, hold a public trust, and the nature of that public trust requires that lawyers be regulated and treated differently.⁸⁵

The idea of what constitutes a profession has proved a slippery one, but both traditional and modern conceptions agree that in some crucial ways true professionals differ from merely commercial actors. In the original view of professions, there were but three, and each was charged with protecting a fundamental interest: the clergy with the spiritual well-being of the community, doctors with the health of the community, and lawyers with the

⁸² See Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 *FORDHAM L. REV.* 2137 (2010) [hereinafter *Supply Chains*].

⁸³ See, e.g., KRONMAN, *supra* note 22; David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 *VAND. L. REV.* 717, 721 (1988).

⁸⁴ See, e.g., JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* (1916); George W. Bristol, *The Passing of the Legal Profession*, 22 *YALE L.J.* 590 (1913); Robert Treat Platt, *The Decadence of Law as a Profession and Its Growth as a Business*, 12 *YALE L.J.* 441 (1903); George F. Shelton, *Law as a Business*, 10 *YALE L.J.* 275, 275 (1901).

⁸⁵ For a discussion of the implicit social contract between lawyers and the public, see THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 40-49 (2010).

system of justice. The important public mission entrusted to these professions, combined with the inability of outsiders to judge whether one claiming to engage in the profession was qualified to do so, meant that each profession was allowed to regulate its membership and to protect its field of endeavor from outside competition.

In their role as professionals, lawyers find themselves serving as a buffer between other societal players. On the one hand, lawyers are expected to stand up to the state, protecting the rights of individuals; on the other, lawyers are expected to stand against the excesses of financial and other private power, again protecting the rights of individuals.

In order to serve these mediating roles, lawyers need a degree of independence, both at the structural or societal level, and at an individual level. At a structural level, protecting lawyers from the state requires locating control over the profession outside the democratic branches of the state, so that those political powers frustrated by lawyers cannot respond directly. At an individual level, it requires the ability to select and turn down work based, in part, on the public issues, and not just with an eye to profit.

It is this latter kind of independence that has been challenged by the increased commercialization of lawyers. Again, while the complaint is an old one, that does not mean that nothing has changed. Indeed, the evidence suggests that over the past century—and especially in the past thirty years—lawyers have become increasingly focused on income as their professional goal and the measure of their success.⁸⁶

In part, the shift to the marketplace flowed from external factors. In a series of decisions, the Supreme Court eviscerated elements of the profession's self-regulation, requiring that it be

⁸⁶ See Chief Justice William H. Rehnquist, *Dedicatory Address, The Legal Profession Today*, 62 IND. L.J. 151, 156-57 (1987) (trend of law in second half of twentieth century was to become more like a business). For "insider" discussion of these changes, see STEVEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* (2013); MICHAEL H. TROTTER, *DECLINING PROSPECTS: HOW EXTRAORDINARY COMPETITION AND COMPENSATION ARE CHANGING AMERICA'S MAJOR LAW FIRMS* (2012).

subject instead to market forces.⁸⁷ First came the imposition of antitrust rules on the profession, which came as a surprise to traditional lawyers who believed antitrust laws did not apply to professionals.⁸⁸ After all, an element of professionalism as defined involved controlling the market so that comfortable incomes could be earned, which, in theory, allowed in turn the professionals so protected to elevate factors beyond commercial relationships in selecting clients or taking positions—or refusing to take positions—on behalf of those clients. The Supreme Court made short work of this claim, asserting that lawyers, like other economic actors, were subject to antitrust controls that outlaw price fixing or market allocation.⁸⁹

In the wake of this decision, lawyers were required to compete on market terms for clients, avoiding fee schedules that would direct competition to other factors. In theory, lawyers still owed a public duty to the courts and the system of law. In practice, it was not clear that lawyers had ever systemically lived up to this duty, and less clear that they lived up to it as a profession in the face of open fee competition.

At about the same time, fences designed to keep out competing professions began to fall. Bar associations had entered into “Statements of Principles” that defined the turf boundaries between lawyers and competing occupations such as accountants, collection agencies and title companies. Far from being hidden, these agreements were published in the leading directory of lawyers for easy reference. With antitrust enforcement a factor, these agreements faded away, leaving the legal profession more exposed at the margins to competition from these overlapping service providers.⁹⁰

⁸⁷ See Thomas D. Morgan, *On the Declining Importance of Legal Institutions*, 2012 MICH. ST. L. REV. 255, 263 (2012) [hereinafter Morgan, *Declining Importance*] (“The combination of First Amendment and Sherman Act attacks made it inevitable that the idea that, as a profession, lawyers were self-regulating and thus needed to look only inward was gone for good.”).

⁸⁸ *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975). On the general theme of the Supreme Court eviscerating professional protections of lawyers, see MORGAN, *supra* note 85, at 75-79.

⁸⁹ *Goldfarb*, 421 U.S. at 787.

⁹⁰ See ABEL, *supra* note 18, at 124; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 9-10 (1981).

A third regulatory change—most important for solo and small firm practice—was the Court’s decision allowing lawyers to advertise.⁹¹ Again, lawyers and bar associations had assumed that whatever free speech rights lawyers had, their position as members of a profession would require them to check those at the door. The Court again made quick work of that argument, establishing that while the profession could impose some restraints at the boundaries, lawyers would be able to engage in relatively aggressive advertising for clients.⁹²

The fee schedule and advertising changes had the greatest impact in the solo and small office area of the bar focused on individuals and very small businesses. The elite corporate firms, after all, did not need fee schedules to protect their rates, nor did they often take to the airwaves in order to seek corporate clients.⁹³

External regulators have also played a role in the deprofessionalization of the bar. At one time, lawyer discipline was largely a matter for the bar itself. Over time, that has eroded. In part, the creation of professional lawyer disciplinary staffs somewhat removed from the practicing bar plays a role. In part, the expansion of malpractice and other tort liability has played a role. In some settings, regulations of general application apply to lawyers, imposing standards.⁹⁴ Increasingly, from a worldwide regulatory perspective, lawyers are seen as just one of several breeds of legal service providers.⁹⁵

Lawyers confronting these regulatory changes also had to confront a change in the balance of supply and demand. Starting in the mid-1960s, law school enrollments began to expand rapidly. New law schools opened; established law schools increased their class size. During the 1970s the number of lawyers doubled; from

⁹¹ *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

⁹² *Id.* at 383-84.

⁹³ An exception was a San Francisco law firm, Brobeck, Phleger & Harrison, which in the wake of the dot-com boom embarked on a heavy television advertising promotion program. Arguably at least partially as a result of diverting firm resources to mass-market advertising, the firm dissolved soon after.

⁹⁴ See James M. Fischer, *External Control over the American Bar*, 19 *GEO. J. LEGAL ETHICS* 59, 61 (2006) (“Other institutions, private and public, also regulate the practice of law, to varying degrees of success.”); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 *MINN. L. REV.* 1147 (2009).

⁹⁵ See Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers.”* 2008 *J. PROF. LAW.* 189, 189.

1970 to the present the number of lawyers has quadrupled from 300,000 to 1.2 million.⁹⁶ In just the two decades from 1960 to 1980, lawyers per capita rose from 125 per 100,000 to 300 per 100,000, with more growth to follow.⁹⁷

Demand, while increasing, did not increase at anywhere near the same rate. Growth in demand for legal services has been shown to track the increase in the GDP, and primarily not such factors as the growth in legal regulation⁹⁸ or the number of lawyers.⁹⁹ With supply outstripping demand, and with the clubby protections of yesterday removed by regulatory changes, U.S. lawyers found themselves in a fight for billings.

By the modern era, lawyers no longer controlled their competitive environment. Lawyers at the low and high ends of the bar were forced to compete for clients. Even at the elite firms, skilled partners who did not generate client billings were let go or de-equitized. The commercialization of law practices, high and low, was largely complete.

*e. The Growing Dominance of the In-House Legal Department
Devalues Generalist Counseling Based only on Legal
Considerations*

On the corporate client side, where the bulk of legal service dollars are spent, one structural change has been the movement of lawyers onto the salaries of the large corporations—the rise of in-house departments of lawyers who serve a single client, their employer.¹⁰⁰ The growth of in-house departments has changed the nature of practice for those representing corporations.¹⁰¹ On the

⁹⁶ Morgan, *Declining Importance*, *supra* note 87, at 265.

⁹⁷ ELLIOTT A. KRAUSE, DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT 54 (1996) (citing Terence C. Halliday, *Six Score Years and Ten: Demographic Transition in the American Legal Profession, 1850-1980*, 20 LAW & SOC'Y REV. 53, 57-58 (1986)).

⁹⁸ See Morgan, *Declining Importance*, *supra* note 87, at 266 and sources cited therein.

⁹⁹ The research supporting this conclusion calls into question the ancient maxim that one lawyer in a town starves, while two thrive.

¹⁰⁰ By the end of the twentieth century, there were about 80,000 lawyers working directly for corporations as in-house counsel. See FRIEDMAN, *supra* note 27, at 540.

¹⁰¹ See MOLITERNO, CRISIS, *supra* note 3, at 195 (“The changes in GC offices and corporate spending habits for legal services have had effects that ripple through the systems for provision of legal services. Corporate clients now use their procurement

one hand, the shift of the core advisory role to the general counsel's office and away from outside partners has changed the nature of law firm work—outside lawyers are more likely to be specialists hired for their ability to do fine gauge work that is either outside the day-to-day expertise of the in-house lawyers or that specialization allows them to do more efficiently. The shift to specialized tasks has allowed the disaggregation of legal work, with general counsel able to assign individual matters and parts of matters to those vendors—lawyers or not—who can provide the best or most affordable service.¹⁰²

Beyond that, however, there has been a change that brings into focus the failings of law schools that remain rooted in Langdell's doctrinal version of "thinking like a lawyer," and that brings into focus the need for legal services education that addresses the whole scope of legal activities. In-house lawyers often find themselves fully integrated with the business functions of the company, and faced with the kinds of issues that are not presented as doctrinal puzzles. How can the activities of a business be structured to reduce legal risk? What cultural signals need to be sent to achieve compliance with important legal duties? How can a business's affairs be ordered so that complying with directives occurs at an acceptable cost?

Langdell's science of law and even the methodology taught in the guise of "thinking like a lawyer" do not speak to many of these duties.¹⁰³ Being able to debate the niceties of contractual formation versus quantum meruit recovery is not the full skill set needed to help solve these problems. As one general counsel observed in a panel on the future of law schools:

The history of law education in the United States shows that law schools were not even set up to train law students how to be lawyers. Of course, law schools teach students to be able to

staff to consider how and when to spend money on legal services in the manner they decide how and when to purchase paper clips.”).

¹⁰² See *Supply Chains*, *supra* note 82, at 2139-40.

¹⁰³ See Rubin, *Contracts*, *supra* note 31, at 59 (“Confronted with a judicial decision, law students using the methodology they have been taught can identify the facts of the case, its holding and dicta, the doctrine on which the judge’s decision is based, and the extent to which the decision is consistent with other decisions based on the same doctrine. However, law students did not have any methodology that they could utilize when confronted with a contract . . .”).

spot obscure legal issues, but those are primarily directed at teaching students how to learn the curriculum well enough to graduate from law school and how to pass the bar exam. I think I went to a pretty decent law school, but thinking back to the courses I took in law school, I've never had occasion once in my legal career to apply most of the legal principles I learned at Harvard. I've never had an issue that called me to know what was the ruling in *Hadley v. Baxendale*. In all the real estate transactions I have worked on I have never needed to know the Rule Against Perpetuities. And for all the contracts I have reviewed I have never had to know the ruling in *Hudson v. McGee*, which you all know as the "hairy hand case."¹⁰⁴

In part, this disconnect arises because the methodology taught in law school—which still goes to identifying the doctrinal principles found in cases—has little bearing on the day-to-day needs of many lawyers, and in-house counsel in particular. In a legal practice world far removed from the common law courts, the methodologies of modern practice are not limited to pulling a rule from a decision. It is hard to imagine a modern general counsel discharging her duties without a deep understanding of how organizations function sociologically or how they obtain profits.

Even when doctrine is at issue, in today's statutory and regulatory world, the law lawyers need to apply on a daily basis often tends to be far removed from the standard first year curriculum. It is hard, for example, to imagine a modern general counsel of a major multinational who could discharge her duties without an understanding of Sarbanes Oxley¹⁰⁵ or the Federal Corrupt Practices Act.¹⁰⁶

While the situation is made more starkly apparent in the in-house setting, lawyers today all graduate from schools that do not require and all too often do not teach the skills necessary to work

¹⁰⁴ Susan Myers, General Counsel of Hyundai Capital, Remarks at 2013 *Chapman Law Review* Symposium: "The Future of Law, Business, and Legal Education: How to Prepare Students to Meet Corporate Needs," Panel 1: Can Law Schools Prepare Students to Be Practice Ready? (Feb. 1, 2013), in 17 *CHAP. L. REV.* 153, 155 (2013).

¹⁰⁵ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

¹⁰⁶ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3 (2012)).

effectively with corporate clients. At institutional levels, most American law schools, faithful to Langdell's design, remain substantially blind to these kinds of issues.

The growth of the in-house department has both reflected and caused profound changes in modern legal practice. For many lawyers, successful practice requires not just an understanding of legal issues but also a deep understanding of the corporate client's business goals and business culture. For others, value is added through consultative expertise in a narrow area, a narrow area where cases may or may not much matter.

f. The Deprofessionalization of Legal Practice

In the wake of these changes, and in the wake of similar deprofessionalizing forces facing other traditional professions, the argument has been made that the practice of law no longer constitutes a profession. Rather than holders of a unique and exclusive expertise applied in the public service, lawyers have been reduced to just another form of high-priced consultants offering fungible services: "It seems inescapable to conclude that lawyers today are simply some persons among many who would like to provide services to clients. To the extent those services have value, the lawyers will be retained. To the extent someone else provides services of more value, the clients will turn elsewhere."¹⁰⁷

There are several senses in which it can be argued that lawyering no longer constitutes a profession. First, as is implicit in the discussion of professions, lawyers arguably are now so specialized that the work no longer has the commonality required by a true profession. As lawyers devolve into consultants on highly specialized subsets of legal issues, the common knowledge that defines a profession in the traditional sense no longer matters to the day-to-day exercise of that expertise. To be sure, by regulatory definition lawyers have common training and common credentials, but the argument would be that specialization makes those regulatory bonds vestigial. Put differently, what you have to learn to become a lawyer is far different from what you need to learn to

¹⁰⁷ Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947, 969 (2002).

be effective as a lawyer, and what is needed for one practicing lawyer may bear little relation to the expertise of another practicing lawyer.

Beyond that, there is an argument that lawyers are no longer in a position to deliver on the implicit social bargain that underlies professions. Professions take their identity, in significant part, from the public trust placed in them to serve public interests—a trust that requires the profession, as an organized group, to put the public interest ahead of monetary compensation. Today, competing in a treacherous market, lawyers as a group respond first and foremost to market forces. Some individual lawyers can and do put public interests first, but the marketplace is not configured to either mandate or protect that.

4. Law Schools Still Based on Langdell's 1870 Model Find Their Training and Research Do Not Fit Modern Needs

While legal practice was undergoing transformation, law schools were distancing themselves from practice. Positioned as the gateway to the profession, law schools became more and more part of the academy, a transformation that yielded remarkable—but by no means absolute—conformity in their offerings. In part, this was required by the ABA standards, which mandated substantial libraries, full-time faculty, and some degree of protection for faculty from arbitrary dismissals. In part, this may have arisen from the physical siting of the modern law school within the modern research university, with the research-oriented norms and values of the research university influencing the law schools' sense of mission. In part, this may have reflected the insulation of modern law schools from market forces, as first a growing economy and then a ceaseless fountain of student loans kept enrollments ever stronger.

Langdell's belief that law was a science had long since been abandoned, leaving law schools with an uneasy grasp of exactly what their research mission was. The early twentieth century had seen magisterial treatises that distilled the common law, and beginning in the same era restatements and codification employed groups of scholars in giving order to unruly doctrinal fields.¹⁰⁸ By

¹⁰⁸ See FRIEDMAN, *supra* note 27, at 543; STEVENS, *supra* note 17, at 133.

the late twentieth century, these had largely fallen out of favor, as had any research that could be described as “merely” doctrinal.

The difficulty for law faculties was that university departments tend to employ a common scholarly methodology of some kind, and by the late twentieth century there was no settled understanding of what that methodology was for law schools.¹⁰⁹ A variety of “law and . . .” movements brought insights from fields such as economics, sociology or philosophy into the legal academy.¹¹⁰ In some cases, these new disciplines provided simply a new way to test the correctness of legal rules, measuring them against the insights of the other fields instead of against the internal, Euclidean logic of Langdell’s science.

As the “law and” movements became more central to scholarship, the profile of the faculty began to change. In the early days of the Langdell methodology, the ideal professor was a top law school graduate (one who had demonstrated facility with the “science” of law) not overly tainted by practice, and preferably enhanced with a clerkship for an elite judge. As the other academic disciplines moved to center stage, faculties began to hire new faculty with doctorates in the underlying disciplines along with, perhaps, a law degree.¹¹¹

In the process, law schools came to resemble “mini-universities” on their own, albeit with a legal twist. A walk down the hallway of an elite school would take one past scholars holding degrees from elite schools in a myriad of disciplines, pursuing

¹⁰⁹ See Edward L. Rubin, *Legal Scholarship*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 562 (Dennis Patterson ed., 1999). Rubin argues that there is, in fact, a common perspective in that legal scholarship is inward-looking, leaving research that deals with law’s impact on society to other fields. *Id.*

¹¹⁰ This development has been much discussed. See, e.g., Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155 (2006); Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 J. LEGAL EDUC. 471, 489-98 (2004); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987); Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981).

¹¹¹ See Tom Ginsburg & Thomas J. Miles, *Empiricism and the Rising Incidence of Coauthorship in Law*, 2011 U. ILL. L. REV. 1785, 1795 (“More and more entry-level [legal teaching] candidates have PhDs in social sciences like economics or political science.”).

different methodologies.¹¹² While there was a topical connection to law, the confidence of the Langdell era that the field was by itself a unified field of study was not as easy to find, nor did the “law and” research methodologies map to what was taught in law school.¹¹³ What’s more, by training and background, the faculty had less and less connection to and understanding of the everyday practice of law.

In this era, the perennial complaint that law schools were divorced from practice and did not produce graduates ready to do useful work gained intensity.¹¹⁴ One strain of the criticisms

¹¹² See TAMANAHA, *supra* note 59, at 57 (“Much of the research produced by law professors is standard academic fare, indistinguishable from scholarship one finds in political science, history, economics, and women’s studies departments, for example, except that law professors focus on law-related matters. Contemporary law faculties, especially at elite institutions, have become mini-universities, staffed by professors with advance training in economics, history, political science, philosophy, sociology, or psychology.”); Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y. L. SCH. L. REV. 465, 471 (2004) (“Law school is now the product of the multiple (often conflicting) disciplines that drive law faculties. In short, they are mini-universities, in which law *qua* law plays only a part of the overall enterprise.”).

¹¹³ See Lawrence B. Solum, *The New Realities of the Legal Academy* 2-3 (Ill. Law & Econ. Res. Paper Series, Res. Paper No. LE10-025, 2010; Ill. Pub. Law & Legal Theory Res. Paper No. 10-03, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651166 [<http://perma.cc/KE4D-NUMS>] (“The normative turn in legal scholarship has required legal academics to acquire new tools—from economics, philosophy, sociology, political science, history, and elsewhere. But these new tools, the bread and butter of the legal academic, are not the explicit focus of the standard law school course—which focuses almost exclusively on primary legal materials (cases, statutes, regulations, rules, and constitutions) and rarely (indeed, almost never) includes a systematic introduction to the canon of legal scholarship.”).

¹¹⁴ See, e.g., N.Y. ST. B. ASS’N, REPORT OF THE TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION 38 (2011) (“Too many law students and recent graduates are not as well prepared for the profession as they might be.”); Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 220 (2007) (“[L]aw schools have refused to teach new lawyers how to practice law.”); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1233 (1991) (“Legal educators, with our increasing orientation away from law and the practice of law, are failing to adequately prepare students to practice law.”); Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 15 (2002) (“There is almost universal agreement that law schools do not adequately prepare students for the practice of law.”); Michael Martinez, *Legal Education Reform: Adopting a Medical School Model*, 38 J.L. & EDUC. 705, 705 (2009) (“Legal minds tend to agree that the current educational model used in American law schools is inadequate. The current model, usually spread over three years of law school, focuses almost purely on teaching legal theory in a classroom setting. It provides the practical

focused on the research conducted by modern law schools, with the complaint being that the research created by law faculty was of little use to practicing lawyers and judges.¹¹⁵ The assumption built into this criticism drew on an unspoken assumption—law schools existed to serve lawyers, including judges.

By its later stages, if not before, law schools found themselves in a finely calibrated search for status, a quest which was by no means solely ego-driven, since minor changes in status as measured by U.S. News rankings could impact everything from donor generosity to applicant quality. The net present value of the education offered was not a factor in these rankings;¹¹⁶ perversely, the amount spent per student was, which led to higher spending and therefore higher tuitions. Scholarly reputation was also an important factor, which led to expensive bidding wars for research talent.¹¹⁷

a. As the Turn of the Century Arrives the Relationship Between the Profession and the Academy Becomes Increasingly Strained

As law schools and the legal profession both changed, they remain locked in a close but uneasy partnership. Law school prepared students to become lawyers; lawyers drew to some degree on what law school provided. Each defined the other, with law school designed to transform former college undergraduates into people who at least thought like lawyers. As both the profession and schools underwent changes in the latter half of the

experience of having real clients to few, if any, students. The end product of this educational model, in the opinion of many scholars, is a group of graduates who are ill-equipped to practice as legal professionals.” (footnote omitted); Spencer, *supra* note 1, at 1960 (“[L]aw school, as it exists today, is an artifact of its past, with a structure and tradition that is rooted in history more so than being founded on rational design.”); *id.* at 1958 (“[T]he law school of today is not optimally designed to prepare students for practice.”).

¹¹⁵ See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

¹¹⁶ Which is not to argue that a law degree cannot open the door for higher lifetime earnings: one study concludes that holders of law degrees, whether or not engaged in the practice of law, enjoy lifetime earnings at the mean with a net present value of \$1 million higher than a similar pool of students who do not pursue higher degrees. See Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014). While lawyers do work longer hours, the study attributes the bulk of the income gap to higher hourly wages rather than longer hours.

¹¹⁷ See TAMANAHA, *supra* note 59.

twentieth century, however, the question increasingly was asked whether this dynamic still held—whether law schools did prepare students to be lawyers,¹¹⁸ and whether lawyers really drew on a daily basis on the skills imparted in law school.

The debate was often framed in terms of faculty being uninterested in practice and unwilling to do practical research. This framing obscures how the fundamental changes in legal practice have made preparing students a different and more difficult task than in earlier eras. Preparing students for an occupation that has splintered into specialist niches requiring competencies far beyond legal analysis presents a formidable challenge even for engaged faculty.

b. The Problem of Preparing Law Students for Law Practice

The question of whether law schools prepare students for practice is not altogether new. From the beginning of the Langdellian model of law school, the charge has been made that the case method does not prepare students to actually perform the tasks expected of a new lawyer. At the outset, the comparison was to apprenticeship training, which for all its defects immersed the apprentices in the day-to-day details of law practice, and the lecture system at earlier law schools, which aimed to instruct students comprehensively and efficiently in the rules of legal doctrine. Compared to these older methods, the case method yielded graduates with no real exposure to day-to-day legal practice, and with perhaps a less complete grasp of existing legal rules than those force-fed doctrine.

To some degree, those criticisms have never gone away, even as the law schools fed their products into the profession. Law students, especially those produced by the most elite schools, are criticized for being unable to even find the courthouse door. Much doctrinal law that matters to practicing lawyers—say, unemployment compensation or consumer fraud laws—barely gets mentioned in the law school curriculum. For that doctrinal law

¹¹⁸ See Spencer, *supra* note 1, at 1958 (“[T]he law school of today is not optimally designed to prepare students for practice.”).

that is transmitted, the case method often seems an inefficient way to share knowledge.¹¹⁹

That it is an old complaint does not mean, however, that there was not a qualitative change in the relationship of law schools and law practice as the twentieth century came to a close.¹²⁰ As the twenty-first century took hold, the charge that law schools did not adequately prepare students for practice had become a commonplace.¹²¹ There was a widely, if not universally, held belief that law schools were failing at one of their principal purposes: training lawyers.

c. The Problem of Specialization

More, perhaps, than either the professionals or the academicians realized, the shift of law into the practice of highly specialized knowledge presented a challenge to the Langdellian model. It was, in theory, possible to prepare students for the kind of generalist practice that existed at the time Langdell was creating his law school model. The law to be known was relatively finite, the common law and equity courts were still the focus of practice, and most foreseeable practices would require a grounding in what have become the core first year doctrinal areas. Even then, Langdell's model was not well adapted to creating lawyers versed in the day-to-day needs of practice, but the gap seemed manageable and offset by the benefits of having a conceptual overview.

Today, it is hard to imagine a school that could graduate new lawyers ready for elite modern practices. One core problem lies in the specialized nature of modern practice. The law to be known no longer is relatively finite, but has grown to a scope that no one individual can possibly master. Each of the states by now has

¹¹⁹ See, e.g., Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 215 (1948) (“[I]t is obvious that man could hardly devise a more wasteful method of imparting *information about subject matter* than the case-class. Certainly man never has.”).

¹²⁰ See, e.g., Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1233 (1991) (“Legal educators, with our increasing orientation away from law and the practice of law, are failing to adequately prepare students to practice law.”).

¹²¹ See Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87, 103–07 (2010); see also sources cited *supra* note 114.

well-developed substantive and procedural laws; the federal code and related cases have expanded to fill libraries; federal and state administrative regulations have also bloomed; and even if all the varieties of domestic law were to be mastered, modern practice also involves transnational issues that demand expertise across borders.

Beyond the complexity and volume of the law itself, there also exist other complexities—for example, the complexities of corporate and governmental entities that exist at a scale not imagined at the time Langdell established his system. Interacting with such entities, and getting them to accept and comply with legal directives, requires considerations not present when dealing with an individual client or governmental representative.

In such a world, a generalist education provides at best a gateway to the methods that might be employed in practice. Even if a school could choose a specialty—say, environmental law and regulation—the division of specialties into subspecialties means the students might still graduate short of the detailed command of law that would be required in practice. Even if schools could teach the specialized law, the problem remains of transmitting the skills relevant to certain types of projects and the specialized industry knowledge often important to lawyers practicing in a specialty. Even if the training were somehow complete, there can be no guarantee that graduates of the program of study could find jobs related to their training. For every specialty that even a well-endowed school could explore in depth, dozens of others would go unaddressed. It is hard to imagine an educational program that could produce graduates ready to slot into the finely honed specialized tasks that define much of modern practice. Even if such were possible, there is no guarantee that the finely honed specialists would be marketable at the moment of graduation—the institution's degree might not be sufficiently gilt-edged for some employers, or the field of specialty might have seen demand go away.

d. The Problem of Teaching All the Methodologies Used in Practice

Even if the specialization problem could be set aside, another profound problem arises from the Langdellian method—in

teaching doctrine, it ignores much of what practicing lawyers do. Langdell's method focused on law from the perspective of a judge deciding a case, a perspective that has stayed with law schools as legal theory has developed and changed.¹²² In giving advice, lawyers are sometimes asked to give advice on what a judge might do, but in their core practices they are asked to do much more—for example, to go beyond analysis and advice to structuring and negotiating business transactions and structures, adding value by reducing transaction costs.¹²³ Being able to read a case and assess its holding is, at best, very incomplete training for these tasks.

Put differently, Langdell's model gives students a methodology—a way to approach cases and determine what the doctrinal rules are.¹²⁴ Law schools still provide this methodology, which they still term “thinking like a lawyer.” Over time, however, as the nature of practice has changed, moving out of courts and becoming more specialized, the methodology provided by the Langdellian method provides a solution that is more and more inadequate for the tasks at hand.¹²⁵

To visualize the nature of the problem, imagine a golfer whose training was entirely spent on a putting green intensively learning how to putt. Putting is indeed a part of the game of golf, and arguably the most important part. Skills learned on a putting green can be used in the game of golf. Pretty much any successful golfer will be good at putting. For those who get around to playing the whole golf course, however, the time spent putting will not

¹²² See Rubin, *Contracts*, *supra* note 31, at 58-59.

¹²³ See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239 (1984); see also George W. Dent, Jr., *Business Lawyers As Enterprise Architects*, 64 *BUS. LAW.* 279 (2009).

¹²⁴ See Rubin, *Contracts*, *supra* note 31, at 59 (“Confronted with a judicial decision, law students using the methodology they have been taught can identify the facts of the case, its holding and dicta, the doctrine on which the judge’s decision is based, and the extent to which the decision is consistent with other decisions based on the same doctrine.”).

¹²⁵ See Spencer, *supra* note 1, at 1960 (“[L]aw school, as it exists today, is an artifact of its past, with a structure and tradition that is rooted in history more so than being founded on rational design.”); *id.* at 1958 (“[T]he law school of today is not optimally designed to prepare students for practice.”); David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 *RUTGERS L. REV.* 1127, 1136 (2009) (“[N]o school has addressed the core competencies that it takes to be an effective lawyer in a variety of organizations over a multi-job career.”).

provide the full set of skills. It's not that putting is unimportant to the game of golf, but rather that other clubs and skills are needed.

The methods and skills imparted by the case method are analogous to a golf school that teaches only putting. Reading cases matters. Just being able to read cases, however, and having only the skills and tools related to reading cases, will leave a new lawyer unprepared for the full range of legal practice.

A golf school could address this by continuing to focus the core curriculum around putting, but making available to students an opportunity to experience the other parts of the game. Some small portion of their instruction time could shift to experiencing—or at least witnessing—some other aspects of the game. A student could take a course in which she simulated driving the ball off a tee. A teacher could accompany a small group of students while they played one or two holes from tee to flag, giving instruction along the way. The students might still not be ready to play eighteen holes, but the extra instruction would surely move them closer to the goal.

Now imagine that golf—like legal practice—has transformed from an individual sport into a team sport. While a few old timers can remember when a solitary golfer played all eighteen holes with a single bag of clubs, and while there are isolated, off the beaten track courses where that's still the practice, that's not the nature of the modern corporate golf game. Imagine that the team concept came gradually—first, there were team members who specialized in driving the ball from the green. The same golfer might take the next shot off the fairway, but another specialist would handle the approach shot to the green. That golfer or perhaps another would handle the putting. As corporate golf practice has evolved, those specialties have subdivided—one expert might drive the ball from the green on a long par five with broad fairways, while another, with perhaps less distance but more control, would take the tee shot on a par four with a tricky dogleg. Experts would exist for driving the ball from the long grass of the rough, others for shots where the fairway tilts at an angle, and still others for shots out of sand traps. There might be specialists at long putts and specialists at short putts, and specialists for fast, hard-baked greens, and specialists for slow, rain-soaked greens. Outsourced vendors, not golfers themselves,

might join the team to find balls lost in the rough or to analyze the break of the green.

The evolution of law practice has proceeded along similar grounds, and yet law schools still teach basically what they taught 140 years ago. In such a setting, it's no wonder that practicing lawyers complain that law school graduates emerge unready to practice. Training for the modern practice of law is a different challenge than training for the traditional world faced by Langdell. The old methods don't fit all the modern needs.

For law practice, however, the game doesn't end with golf as a team sport. Imagine that new kinds of competitors arrive in competition with actual golfers. The companies that were vendors to golf teams now wish to compete directly against them, for example, in taking the ball from tee to hole. Technology might also intervene—a Google-funded company called Rocket Golfer develops unmanned drones, for example, equipped to deliver a golf ball from tee to hole. A young golfer, emerging from a training program that insists that golf is all about putting, will have some serious adjustments to make.

Training for practice would require training in the methodologies used by practicing lawyers. Legal analysis represents only one of many, and often not the most important. Almost all lawyers negotiate, for example, and negotiation can be—and is—taught as a methodology. Other methodologies, such as knowing how to run a lawsuit or structure the process of making a corporate acquisition, are domain-specific. Addressing some of these diverse methodologies requires different courses and in most cases a different faculty than can be found at a traditional law school.

e. The Problem of Having a Single Functional Profession for Which to Train

The twentieth-century changes in the way law is practiced have been profound. Due to the rise of the administrative state, law plays a much more pervasive role in American personal lives and American business than law did in Langdell's era. These changes have led to profound changes in the kinds of clients lawyers represent, and what they are asked to do for those clients.

In such a setting it is fair to ask whether what we call the practice of law is the same occupation as it was in Langdell's time.¹²⁶

Alongside that lies another question: With all the specialization, with all the variegation in practice, with the radically different hemispheres of the bar, is there even a single profession or occupation that schools can aim to train students for? Is the practice of law sufficiently common in its elements that any education can prepare students for the full range of practice, or have we entered an era where what still claims to be a single profession already has splintered on the ground into a multiplicity of occupations?

Nearly one hundred years ago the claim was made that the gap between elite practice and non-elite practice was so great that it made little sense to require those engaged in these different practices to have the same kind of training.¹²⁷ Subsequent empirical research has not only confirmed the split but shown that the trend is toward greater segregation.¹²⁸ The division lines are not just between elite and non-elite practices, however, but between specialized practices that have little in common in terms of knowledge needed or methodologies needed. The knowledge and skills needed by partners in the same large firm can have little overlap.

Put differently, even if the practice of law somehow still presents a single profession, it is nonetheless not a single occupation, in the sense of people who engage in the same kind of work. For example, the daily work of a small-firm insurance litigator has little in common with the work of an in-house specialist in ERISA. The day-to-day tasks will be completely different, with each having more in common from an occupational standpoint with the non-lawyer para-professionals who assist them in their work. Path dependency insures that while both are lawyers, there is little real chance that they could swap jobs.

¹²⁶ At least one thoughtful account suggests not. See THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 12 (2010) (“[T]he ‘lawyer’ role known by generations of Americans and others is vanishing.”).

¹²⁷ See REED REPORT, *supra* note 7, at 417.

¹²⁸ See JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982); JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005).

If the situation is viewed from the perspective of a client who needs a service provided, these different lawyers are not substitutes one for the other—a situation that is quite different from Langdell's era, where the practicing bar in a market town would apply pretty much the same skills and methodologies in their daily work. Looking for a way to train students completely for a profession that no longer exists as a unified field might be a fool's errand.

5. The Mutual Crisis—Both Legal Practice and Law Schools Struggle with the Impact of the 2008 Crisis

The 2008 financial crisis hit both lawyers and law schools with a shock wave—rolling first through the law firms, and then on to the law schools. The years leading up to the 2008 crash seemed to be good years for law firms and law schools alike. The crash brought with it the question whether the events of 2008 represented only a cyclical correction or foretold structural changes in both legal practice and legal education.

On the practice side, in the years leading up to 2008, total head count in the big firms rose dramatically, as did hiring. Profits per partner soared to levels never reached before. There were, to be sure, grumblings about costs and inefficiencies, but in the hurly burly of expanding markets these were easy to ignore.

The 2008 crash, however, saw major consumers of high-end legal services such as Lehman Brothers disappear—except for their bankruptcies and asset sales—from the market. In addition, transactional practice suffered as types of financing tied, for example, to mortgage backed securities dried up. As demand for their services dwindled, large firms went through multiple rounds of layoffs of younger associates.¹²⁹ New hires already in the pipeline were sometimes deferred, and new hiring and summer programs were cut back.¹³⁰ Major firms failed in the years after

¹²⁹ See Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education*, 70 MD. L. REV. 341, 341 (2011) (stating that in 2009 alone, major law firms let go 12,100 people, more than a third of whom were lawyers).

¹³⁰ See MOLITERNO, *CRISIS*, *supra* note 3, at 193 (“The economic downturn, unsurprisingly, has had a major effect on employment for recent law school graduates.”).

the crash, and if the crash was not the sole or the direct cause, the shrinking of the market for high-end services surely played a role.¹³¹

On the practice side, the question was whether the good days would ever come back to the profession as a whole. One seer released an updated version of a book projecting the end of lawyers, with the guild of law fading into obscurity alongside other crafts rendered irrelevant by advancing technology.¹³² A professor projected the end of big law, with law firms crumbling as their economic base was eroded by a variety of problems including non-lawyer vendors—some technological, some outsourced overseas—who took the high volume work that provided the leverage that provided the profits that held firms together.¹³³

At first, law schools seemed immune from what many saw as a cyclical correction. Applications and enrollment stayed strong. In the face of a dead job market, some young people sought a refuge in the academy. One law school dean found herself with a surplus of admitted students, and sent a letter advising admitted students to rethink whether attending law school at that time was really what they wanted and offering an incentive to defer matriculation.¹³⁴

The market for new lawyers remained tight, however. Would-be lawyers, even at higher ranked schools, found it hard to find the kind of jobs they had expected to find when they enrolled.

¹³¹ Among the large firms that failed were Dewey & LeBoeuf (2012), Howrey LLP (2011), Heller Ehrman (2008), Thelen LLP (2008), and Thacher Proffitt & Wood LLP (2008). See Tom Abate & Andrew S. Ross, *Heller Ehrman Law Firm to Dissolve Friday*, S.F. CHRON., Sept. 26, 2008, at C1, <http://www.sfgate.com/business/article/Heller-Ehrman-law-firm-to-dissolve-Friday-3193215.php> [<http://perma.cc/qq2g-y474>]; V. Dion Haynes, *Another Victim of Credit Crunch: Thelen Law Firm Faces Closure*, WASH. POST (Nov. 3, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/02/AR2008110201894.html> [<http://perma.cc/D8RL-HRS2>]; James B. Stewart, *Dewey's Fall Underscores Law Firms' New Reality*, N.Y. TIMES, May 5, 2012, at B1, http://www.nytimes.com/2012/05/05/business/deweys-collapse-underscores-a-new-reality-for-law-firms-common-sense.html?_r=0 [<http://perma.cc/L34X-B6C7>].

¹³² RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2008).

¹³³ Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 760-77 (2010).

¹³⁴ Elie Mystal, *University of Miami Law School Defers 1Ls: This is Not A Joke*, ABOVE THE LAW (July 1, 2009, 10:05 AM), <http://abovethelaw.com/2009/07/university-of-miami-law-school-defers-1ls-this-is-not-a-joke/> [<http://perma.cc/964V-3D4F>].

Sometimes carrying substantial debt, the students emerging from law school after the 2008 crash sometimes responded angrily, excoriating professors and deans for selling them an expensive education that lacked marketability.

Spokesmen from within the legal academy began to critique the value of a legal education. Northwestern Dean David Van Zandt stated in a widely reported speech that a law school degree from a school with a median starting salary of \$65,000 or less (or roughly two-thirds of law schools at the time) was unlikely to justify the investment of time and money (his own school was safely inside the justified zone).¹³⁵ Washington University professor Brian Tamanaha wrote a book entitled *Failing Law Schools*, charging that law school was not worth the investment and excoriating faculty and administrators for driving up costs and failing to be candid about employment outcomes.¹³⁶ Other professors started or joined online blogs, laying out the case against the schools that hosted them.

Reform proposals for law schools came thick and fast. Tamanaha proposed loosening accreditation requirements, allowing law schools to differentiate their offerings. In some cases, he envisioned, schools would focus less on scholarship and more on teaching technical skills related to immediate employability. Others proposed cutting law school, at least at some institutions, to two years.¹³⁷ One elite law school changed its curriculum so the entire third year was devoted to skills training for law practice.¹³⁸

¹³⁵ David Lat, *Changes in Legal Education: Some Thoughts from Dean David Van Zandt*, ABOVE THE LAW (Feb. 3, 2010, 8:23 PM), <http://abovethelaw.com/2010/02/changes-in-legal-education-some-thoughts-from-dean-david-van-zandt> [<http://perma.cc/9K7B-VUGB>].

¹³⁶ See TAMANAHA, *supra* note 59.

¹³⁷ See Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599 (2012); Daniel B. Rodriguez & Samuel Estreicher, *Make Law Schools Earn a Third Year*, N.Y. TIMES, Jan. 18, 2013, at A27; Peter Lattman, *Obama Says Law School Should Be Two, Not Three, Years*, N.Y. TIMES: DEALBOOK BLOG (Aug. 23, 2013, 5:31 PM), <http://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/> [<http://perma.cc/U3CT-XG2G>].

¹³⁸ *Your 3L Year*, WASHINGTON & LEE SCH. OF LAW, <http://law.wlu.edu/thirdyear> [<http://perma.cc/5XJA-RZQD>] (last visited Oct. 20, 2015); see also James E. Moliterno, *A Way Forward for an Ailing Legal Education Model*, 17 CHAP. L. REV. 73 (2013) (discussing the implementation of the new third year program at Washington & Lee in the context of the debate over the reform of legal education).

Still others were prepared to explore undergraduate professional training, as is common in many other countries.¹³⁹

Whatever the merits of these proposals, they tended to share curious elements in common: all focused on training lawyers, and only lawyers, for traditional legal practice, using some variant of Langdell's model. While they were willing to tweak the model of education for lawyers in light of market realities, they did not engage in thinking about new kinds of occupations and new kinds of education better suited to modern circumstances. The debate centered around whether a proper Langdellian education could be delivered or appropriately supplemented under these tweaked models, not on whether a radically new model was needed.

The narrow gauge of the debate is especially striking when certain background factors are taken into account. There exists widespread recognition and perhaps a general consensus that law students emerge from law school unprepared to practice. There is a wide awareness among both the practicing bar and the legal academy that needs of the public—especially the lower and middle income members of the public—are not being met. There seems to be wide agreement that the contemporary model of legal education varies surprisingly little from the one Langdell introduced in 1870, and a growing recognition that the scope of legal needs and the nature of law practice have changed fundamentally since that time. Despite that, holding to the ideology that the Langdellian model teaches one to think like a lawyer, the proposals seek to reinvigorate rather than replace the anachronistic model.

This focus on tweaking the traditional model was especially curious, because lawyers no longer stood alone in the legal services field. As we will see, the world of legal services had begun a sea change before the 2008 crisis, a sea change which promises to bring yet more change.

II. THE NEW REALITY: LEGAL SERVICES TODAY

The delivery of legal services has changed profoundly since the formation of the Langdell model of law school. In 1870, a

¹³⁹ John O. McGinnis & Russell D. Mangas, *First Thing We Do, Let's Kill All the Law Schools*, WALL ST. J. (Jan. 17, 2012), <http://online.wsj.com/news/articles/SB10001424052970204632204577128443306853890> [<http://perma.cc/8GAV-XHRJ>] (proposing undergraduate professional legal education as a way to lower costs of training).

program anticipating a small firm or solo lawyer in a small city or market town mapped to the reality of where law was practiced. Today, as traced above both by numbers of lawyers and dollars spent, the reality is quite different. Beyond that, new kinds of service providers have arrived on the scene, with more likely to follow. The new service providers are far more likely to grow in scale than to go away, and present a number of structural challenges to traditional law practice.

A. New Breeds of Legal Service Providers Have Arisen

The market for legal services has changed. While the portion of the market reserved to lawyers has been stagnant, other areas of the greater legal services market have experienced rapid growth. New kinds of vendors and new kinds of services are taking market share from traditional lawyering.¹⁴⁰

In part, this is driven by technology. As Richard Susskind has noted, technology allows many forms of work that once required judgment and customization to be automated and commoditized.¹⁴¹ During the Industrial Revolution, technology replaced handlooms and tailors with power looms and clothing factories.¹⁴² During the information revolution, problems that once could be solved only with careful thought and judgment are similarly being solved, with the aid of technology, with commoditized solutions.

In part, this is driven by fundamental changes in the nature of what lawyers do. In Langdell's era, it was possible to think of common law courts implementing fundamental principles. Today, the volume of statutory and regulatory requirements are not reducible to broad principles, and require specialized responses to granular duties. A broad understanding of the governing principles captured by the common law tradition matters less than

¹⁴⁰ See *Rethinking Regulation*, *supra* note 10.

¹⁴¹ RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS 2* (2015) (“[I]ncreasingly capable systems will bring transformations to professional work that will resemble the impact of industrialization on traditional craftsmanship.”).

¹⁴² For a take on what might have been argued in the industrial revolution if weavers had enjoyed the same kind of market protections lawyers enjoy, see Malcolm Mercer, *The Access to Clothing Crisis*, SLAW (July 4, 2013), <http://www.slw.ca/2013/07/04/the-access-to-clothing-crisis/> [<http://perma.cc/UR6S-TPFT>].

a command of chapter and verse of the relevant regulations. In many cases, non-lawyers can provide that specialized expertise.

In still other cases, technological innovations and the new kinds of legal problems combine to require the help of new kinds of service providers. For example, while document review (virtually unknown in Langdell's day) has become a core task in litigation and corporate due diligence, technology has evolved so that the task often requires the aid of specialists beyond lawyers. A new industry of e-discovery vendors has arisen to help companies locate, filter and produce the documents that exist in electronic form on devices ranging from mainframe computers to private phones, blending legal and technological expertise.

Some lawyers (and law professors) discount these changes because they misunderstand the nature of what lawyers offer clients. As with other services and products, consumers do not, at the core, want a particular kind of product or service. Rather, they want a problem solved. As Harvard Business School professor Theodore Levitt used to tell his students, consumers don't want an electric drill, they want a hole in the wall.¹⁴³ Electric drills are one way to provide that result, but not the only way. There was a time when only lawyers could provide solutions to legal problems, but today those solutions can come from sources as diverse as smart phone apps and emerging "professional" occupations.

The specialization of lawyers enables these new providers. At one time lawyers drew on a kind of expertise that was both common to all lawyers and applicable to diverse settings. As lawyers specialize by narrow legal expertise, by type of project and by industry, they move away from needing or using a fully rounded body of knowledge that is both uniquely legal and that draws upon broad swaths of the law. If a lawyer's expertise is limited to a subsection of a code, someone with less than a full legal education can offer consulting in that area. As a lawyer specializes on a kind of project, others can offer a full range of consulting services relevant to those kinds of projects. As lawyers

¹⁴³ See CLAYTON M. CHRISTENSEN & MICHAEL E. RAYNOR, *THE INNOVATOR'S SOLUTION: CREATING AND SUSTAINING SUCCESSFUL GROWTH* 99 n.17 (2003) ("Christensen remembers that when he was an M.B.A. student he heard Ted Levitt declare, 'People don't want to buy a quarter-inch *drill*. They want a quarter-inch *hole*.' In our words, they have a job to do, and they hire something to do the job.").

restrict themselves to industries, industry specialists can compete with industry-specific solutions to problems. Having become just one category of specialists among many, lawyers find themselves competing with non-lawyer solutions.

B. Examples of the New Kinds of Service Providers

New breeds of service providers have appeared on the legal service market in recent years. The process continues—any list or taxonomy quickly becomes outmoded.¹⁴⁴ Among those who sell services, three kinds are sufficient for our purpose. Among the new vendors are limited scope service providers (paraprofessionals), new kinds of service providers incorporating other kinds of expertise, and vendors blending technological solutions with legal expertise.

1. Paraprofessionals / Legal Consultants

For decades, proposals have been made that in some areas the public would be better served by easing the lawyer's monopoly and allowing technicians to represent the public in specified areas.¹⁴⁵ The proposals draw on two realities. First, for decades, there has been an access to justice crisis, with members of the public unable to afford legal assistance for such basic matters as uncontested divorces or landlord-tenant disputes.¹⁴⁶ Second, in specialized areas, the full scope of legal training seems more than is necessary to enable helpful service.

These proposals have not met with enthusiastic approval from the practicing bar, but there are signs that a tipping point is nearing. Most recently, Washington¹⁴⁷ state adopted a new law allowing legal technicians to practice in specified areas. While it is

¹⁴⁴ See Jordan Furlong, *An Incomplete Inventory of NewLaw*, LAW21 (May 13, 2014), <http://www.law21.ca/2014/05/incomplete-inventory-newlaw/> [<http://perma.cc/CR78-WS5A>].

¹⁴⁵ See Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 703, 711-12 (1996) [hereinafter Rhode, *Perspective*].

¹⁴⁶ See Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001).

¹⁴⁷ See generally Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611 (2014).

too early to rate the Washington experience, other states are watching to see if this approach helps provide an answer to access to justice problems.¹⁴⁸

This fits into a larger pattern of non-lawyer specialists being able to provide services formerly reserved for lawyers.¹⁴⁹ In some states, for example, title companies compete with lawyers with regard to conveyancing property. On the corporate side, non-lawyers provide consulting services incorporating expertise in many discrete areas of law, from employee benefits to tax law to complying with discovery requests.

While these new providers have generally been resisted by the legal profession to the extent consumers can access them,¹⁵⁰ the access to justice crisis provides a strong argument for giving them a chance. While a full scope lawyer might be preferable, in a country where full scope lawyers are unaffordable, some assistance might be better than none.¹⁵¹ In a corporate setting, non-lawyer specialists in a narrow area of law might not only be acceptable, but preferable, if they are in a position to bring other forms of expertise to bear.

The harms projected if non-lawyers take on carefully circumscribed tasks are likely to be exaggerated. As Herbert Kritzer has argued:

A common claim by professionals seeking to protect their domain is that someone without the level of training required to be a full member of the profession will not be able to recognize the complex interrelationships and subtle issues raised in a specific case. This argument is used by lawyers seeking to ban nonlawyers from handling real estate closings,

¹⁴⁸ See Elizabeth Chambliss, *Law School Training For Licensed "Legal Technicians"? Implications for the Consumer Market*, 65 S.C. L. REV. 579, 580-81 (2014) ("At least three other states, including California and New York—which together contain nearly twenty-six percent of U.S. lawyers and seventy-six law schools—are actively seeking ways to expand nonlawyer training and licensing in high-need areas such as family law, immigration, landlord-tenant, foreclosure, and consumer credit.") (footnotes omitted).

¹⁴⁹ See Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2615 (2014).

¹⁵⁰ See Chambliss, *supra* note 148.

¹⁵¹ On the corporate side of the legal services market, general counsel have made and will make use of paraprofessionals, nominally under the supervision of lawyers, as suits. See *Rethinking Regulation*, *supra* note 10.

and by ophthalmologists seeking to limit the tasks that can be carried out by optometrists. Yet, at each point when previously restricted tasks have been opened to new providers, the problems predicted by the profession opposing relaxation of restrictions have failed to materialize in significant numbers (if at all).¹⁵²

This is especially true where technology can provide a “skills multiplier.” In a world where technology can assist with intellectual tasks in ways comparable to how the mechanized loom assisted with physical tasks, lower skilled workers can still deliver acceptable services and products.¹⁵³ As Kritzer again notes, “Where industrialization shattered the traditional economic role of persons skilled in the use of their hands, postprofessionalism is an equivalent development for those skilled in the use of their heads.”¹⁵⁴

As law becomes increasingly specialized and technical, the potential for narrowly trained technicians to do work now handled by lawyers is broader than often recognized. Many lawyers make a living in legal fields far narrower than the law school curriculum, in fields ranging from handling worker’s compensation claims to making sure financial documents comply with federal regulations. In Langdell’s time, the notion of a unified science of law¹⁵⁵ created a justification for reserving matters touching law to those trained in the whole science. Today, in a world of positive law, the issue becomes what functional knowledge is required to handle a specific task. In many cases, some kind of cross competency will be required, but the additional skills may not require full legal training, and in some cases may not be legal skills at all.

¹⁵² HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* 219 (1998).

¹⁵³ RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 2* (2008) (“[T]he market is increasingly unlikely to tolerate expensive lawyers for tasks (guiding, advising, drafting, researching, problem-solving, and more) that can equally or better be discharged by less expert people, supported by sophisticated systems and processes.”).

¹⁵⁴ KRITZER, *supra* note 152, at 220.

¹⁵⁵ See FRIEDMAN, *supra* note 27, at 472 (“Langdell’s method also promised to solve the problem of teaching law in a federal union. He handled local diversity by ignoring it entirely. There was only one common law; Langdell was its prophet. More than half of the cases in his first casebook were English. Oceans could not sever the unity of common law; it was one and indivisible, like higher mathematics.”).

The range of these limited scope legal service workers can also be broader than in the past if technology is brought to bear. In the medical arena, technology allows the doctor-free offices of MinuteClinic to diagnose and treat a range of common ailments that once would have required a doctor's judgment.¹⁵⁶ In similarly circumscribed settings, technology could allow non-professionals to handle repetitive or routine tasks satisfactorily. Assisted by technology, organized through modern business process management, these less comprehensively skilled workers can solve consumer problems.

Such workers will, of course, require some training, although less than a full legal education. In addition, some honest broker should evaluate where limited scope workers are appropriate and where they are not. Where they are not, still others should look for ways to simplify legal tasks so as to bring them down to the level of such lower skilled workers, much as companies such as manufacturing companies or restaurant chains work to redesign work flows so that lower skilled employees can deliver acceptable service.

Not as sensitive from a regulatory perspective, but currently more significant from an economic perspective, are paraprofessionals performing tasks under the direction—at least the nominal direction—of attorneys. These include not just the familiar paralegals of office practice,¹⁵⁷ but outsourced vendors of legal services who operate without U.S. licensing.¹⁵⁸ These also include any consultants applying legal expertise whose client is a lawyer. As is true in the medical setting, the sophistication of the services provided by these vendors ranges widely, from clerical work to drafting appellate briefs and conducting massive document reviews. The use of these paraprofessionals has shifted work away from entry-level lawyers in large firms, and the trend does not seem to have reached its end.

¹⁵⁶ See CLAYTON M. CHRISTENSEN, JEROME H. GROSSMAN & JASON HWANG, *THE INNOVATOR'S PRESCRIPTION: A DISRUPTIVE SOLUTION FOR HEALTH CARE* 118-20 (2009).

¹⁵⁷ For a discussion of paralegal activity within firms, see Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within Law Firms*, 85 *IND. L.J.* 653 (2010).

¹⁵⁸ Sasha Borsand & Amar Gupta, *Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance*, *PACE INT'L L. REV. ONLINE COMPANION*, Aug. 2009, at 1.

Again, in a world of specialization, narrowly trained consultants can do work now done by lawyers, who have broader training that often tends not to be relevant to their day-to-day tasks. To the extent some legal expertise is required, that expertise can be learned on the job, or through formal training systems. Not all of these vendors currently receive U.S. university training. Not all of them need U.S. university training. However, as roles shift, the training needs for paraprofessionals can only grow.

2. Complex Skill Sets only Partially Involving Law

Another way legal problems are being solved today is through new kinds of service providers who address legal services with skill sets that partially involve legal expertise but that also involve important and complex skill sets beyond what lawyers ordinarily possess. These occupations, at present, tend to have little in the way of formal training programs, and less in the way of regulation.

a. Compliance

Compliance, a field that did not exist independent of lawyers a generation or two back, provides a good example of the expanding zone of non-lawyer legal services. There was a time when lawyers owned the compliance space. Their role traditionally involved explaining what the law required, and leaving it up to the client to hew to the law.

For a variety of reasons, that has changed. Today compliance stands apart from the practice of law as an emerging occupation—arguably on its way to being a profession—in its own right. While many compliance practitioners are trained as lawyers, many are not, and there is no legal requirement that compliance specialists be licensed to practice law.

Compliance requires skills that only partially overlap with the skills of lawyers. At a base line level, compliance requires an understanding of the legal requirements imposed on corporations; qualified lawyers should be able to identify those requirements. Effective compliance, however, requires much more than mere

knowledge of the law.¹⁵⁹ Reducing the risk of non-compliance requires skills far beyond those taught in law school, including an understanding of how individuals work within a corporate culture, how leaders in an organization can inspire compliance,¹⁶⁰ and identifying those points in a business process most likely to lead to risks.

To the extent legal skills are required, law school generally only provides a generalist, “think like a lawyer” base.¹⁶¹ Governmental regulations of corporate behavior tend to be complex, and require a level of detailed involvement beyond the typical law school curriculum. In addition, regulations do change over time, requiring the compliance function to be re-oriented to law that did not exist at the time of legal training.

More than that, the skills owned by lawyers fail to engage with the hardest part of the job. In many of the most spectacular compliance failures, the issue has not been identifying what the

¹⁵⁹ Joseph Murphy, *Compliance & Ethics as a Profession—In the Public Interest*, in *TRANSFORMING COMPLIANCE: EMERGING PARADIGMS FOR BOARDS, MANAGEMENT, COMPLIANCE OFFICERS, AND GOVERNMENT* 46, 48 (Michael D. Greenberg ed., 2014), http://www.rand.org/pubs/conf_proceedings/CF322.html [<http://perma.cc/C7TF-NVD7>] (“Over the last 20+ years, the modern compliance and ethics field has developed a broad spectrum of specialized skills, knowledge and practices necessary to discharge the evolving mandate to detect and prevent corporate misconduct. These skills and practices include necessary management elements—the ability to motivate people and to explain the rules, knowledge of how to conduct investigations and audits, and ability to measure and monitor progress against goals, to name a few. But the field also has its own prescriptive standards, as first embodied and codified by the Sentencing Guidelines. Different jurisdictions and different enforcement agencies provide additional guidance, and practitioners need to understand and master these.”).

¹⁶⁰ See Scott Killingsworth, *Modeling the Message: Communicating Compliance Through Organizational Values and Culture*, 25 *GEO. J. LEGAL ETHICS* 961 (2012).

¹⁶¹ Compliance courses could be taught in law school, but the first book for teaching compliance in law school puts the emphasis in its title on the law, rather than the practice, of compliance, perhaps illustrating a perception by the book’s marketers that law schools resist non-doctrinal courses. To be fair, the book does engage substantially with the issues related to the practice of compliance, and does seek to immerse students in these practical issues through problems to be resolved. Perhaps the more remarkable issue is that even with many law students ending up in corporate law departments or compliance department jobs, the first law school course book on compliance has just appeared in print, for a course taught in just a handful of law schools. GEOFFREY P. MILLER, *THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE* (2014).

law requires.¹⁶² Rather, the issue has been obtaining cooperation from corporate employees. In those kinds of situations, other skills such as understanding, tracking, documenting and motivating employee behavior become key.

Technology plays an increasingly important role in compliance. Assessment technologies help companies understand how well the compliance message has been communicated. Tracking technologies help monitor corporate activities in ways that red flag behavior that may be risky.

Compliance has diverged enough from law that legal expertise alone no longer provides an adequate background, and “thinking like a lawyer” about compliance does not offer the optimal path to achieving compliance goals. Compliance has become a complex, reflective occupation that requires competencies—and therefore some kind of training—well beyond Langdellian analysis.

b. Mediation

Mediation is another field that is in the process of splitting off from the traditional practice of law. Like a judicial trial, mediation involves dispute resolution. Unlike a judicial trial, mediation seeks to lead the parties to a negotiated solution, taking into account legal probabilities but also economic and psychological factors.

Many mediators are lawyers, but becoming a mediator does not require a license to practice law. Mediators do not—and should not—stand in an attorney-client relationship with those who use their services. Instead, they function as facilitators and honest brokers for all sides.

Mediators benefit from a knowledge of the law, and from insights into the likely outcome if a dispute does enter the judicial

¹⁶² For example, the core allegation underlying the scandal that engulfed Walmart with regard to its operations in Mexico was the paying of bribes to governmental officials, hardly conduct that requires legal expertise to identify as questionable. See Ben W. Heineman, Jr., *Who’s Responsible for the Walmart Mexico Scandal?*, HARV. BUS. REV. (May 15, 2014), <https://hbr.org/2014/05/whos-responsible-for-the-walmart-mexico-scandal/> [<https://perma.cc/LU6R-HCL2>] (“The essence of the *Times* story was the allegation that Walmart Mexico, under the direction of the then country CEO and his General Counsel, bribed officials to get permits and clearances for new stores—and falsified records of these transactions.”).

system. They also need to draw on other skills, however. In commercial settings, mediation may require an ability to understand business goals of all parties well enough to help them craft a new solution that displaces the dispute. In individual settings, psychological insights might be needed to help parties get the result they need.

Many law schools offer mediation courses and clinics, and many successful mediators hold law degrees. However, the match between what law school offers and mediators need is incomplete. As with other fields, a full legal training costs too much and takes too long to be an optimal solution for training in mediation; moreover, even with mediation instruction, law schools typically do not offer upper-level instruction in the non-legal skills needed for mediation.

c. Legal Process Management

Another emerging field of complex legal services work is legal process management. Back in the day, legal process management involved getting a herd of lawyers into a conference room, armed with legal pads, while tasks were assigned. Today, process management tools developed for business are being applied to legal processes on both the transaction side and the litigation side.¹⁶³

Legal process management looks at large legal tasks in ways not dissimilar to looking at building a building or launching a new factory (and not a few legal tasks have budgets in these ranges). A combination of legal expertise and business expertise helps craft solutions that are more efficient than traditional case or project management techniques. Again, not one of the traditional cluster of professional schools offers training optimally suited.

¹⁶³ See Ray Worthy Campbell, *Teaching "The Drill," 21st Century Style*, THE FACULTY LOUNGE (Oct. 3, 2014), <http://www.thefacultylounge.org/2014/10/teaching-the-drill-21st-century-style.html> [<http://perma.cc/8DLD-ZWRU>].

d. E-Discovery

E-discovery has emerged as a distinct service purchased by corporate law departments.¹⁶⁴ The vast quantity of electronic documents generated by corporations in the digital age, combined with the ability to perform some of the document review and management automatically via software, has led to companies with skill sets optimized to handle this role.

Again, these skill sets partially overlap with those of lawyers, but not completely. In both the litigation and the due diligence context, the definition of which documents should be reviewed and produced ultimately derives from legal standards. Lawyers are well equipped to understand and communicate those standards.

Again, however, the legal skill set of knowing what category of documents ought to be produced leaves a client a long way from producing those documents. At a minimum, e-discovery requires insights into corporate information management systems, as well as understanding the role of required documents that live outside the formal organizational information management system. Automated technological searching of documents plays a key role in filtering.

At the same time, e-discovery is not a simple information technology service. Failure to produce the required documents can lead to significant legal consequences. Beyond that, ethical duties attach to the seeking and production of documents that involve issues of public importance that are not necessarily answered by satisfying one's client. Again, the established professional schools do not address the skills needed for this emerging industry.

e. The New Professional Lineup

The occupations listed above are illustrative, not comprehensive. Nonetheless, the emergence of these complex new fields involving legal issues perhaps prefigures a redrawing of the lines in the legal services space. The privileged role of lawyers was established in a common law era where the work of law workers was closely tied to the courts. The emergence of the regulatory state with pervasive legal duties has clipped the connection of law

¹⁶⁴ See generally CAROLE BASRI & MARY MACK, *EDISCOVERY FOR CORPORATE COUNSEL* (2012 ed. 2012).

work with judges. Legal services have emerged that are outside the paradigm of judges and lawyers.

In such a setting, boundaries may need to be redrawn. Comparative law shows us, “[T]he division of professional functions is not preordained. Different societies work out this division differently, and it changes over time.”¹⁶⁵ As technology makes new divisions feasible and desirable, we may find that the future is like a foreign country where different rules apply.¹⁶⁶

Some of these new kinds of legal service providers do not act under the direction of lawyers, or view themselves as subservient to lawyers. In the compliance field, for example, a movement has grown to put the head of compliance not under the General Counsel, but directly under the board or the CEO.¹⁶⁷ Others, such as e-discovery vendors, may be required under current regulations to act under at least the nominal direction of lawyers, but with much of what they do not closely supervised by lawyers, and some not easily supervised by someone who has only those skills provided by law schools. While such firms may have close working relationships with lawyers, and may even have law firms or law departments as customers, they are not just “paraprofessionals”

¹⁶⁵ PROSPECTS FOR THE PROFESSIONS IN CHINA 4 (William P. Alford, Kenneth Winston & William C. Kirby eds., 2011) (“Closer to our own time is the story of the division of labor between lawyers and other providers of legal services. In European countries, non-lawyers perform many of the services that U.S. lawyers regard as uniquely their own. And in Japan, the familiar story of the small, highly-trained professional elite (*bengoshi*) usually neglects the much larger number of patent lawyers, ‘law scribes,’ and tax consultants (among others) engaged in law work.”); see also ELLIOTT A. KRAUSE, DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT 51 (1996) (“Legal work can be generalized and given to one group—as in the U.S. model—or parceled out among several groups, as in England and especially on the Continent.”).

¹⁶⁶ “The past is a foreign country: they do things differently there.” L.P. HARTLEY, THE GO-BETWEEN 17 (N.Y. Review of Books 2002) (1953).

¹⁶⁷ Compare Ben W. Heineman, Jr., *Don't Divorce the GC and Compliance Officer*, CORP. COUNS., Jan. 2011, at 48, http://www.law.harvard.edu/programs/plp/pdf/Dont_Divorce_the_GC_and_Compliance_Officer.pdf. [<http://perma.cc/WDF8-TRPW>], with Donna C. Boehme, *Structuring the Chief Ethics and Compliance Officer and Compliance Function for Success: Five Essential Features of an Effective CEO Position (With Frequently Asked Questions)*, in SOC'Y OF CORP. COMPLIANCE AND ETHICS, THE COMPLETE COMPLIANCE AND ETHICS MANUAL 2.31, 2.38 (2d ed. 2010) (“Corporate scandals in the headlines continue to illustrate the potential weaknesses of the GC-controlled model and spotlight issues such as conflicts of interest, competing mandates, and filtering of vital information from the governing body.”).

acting under the supervision of a licensed lawyer. Rather, they are consultants or service providers independently delivering value of a different kind.

For the most part, these new kinds of legal service providers are not visible in the law school classroom,¹⁶⁸ and law schools do not offer training programs that embrace the additional skills beyond law that are needed.

3. Software and Machine Intelligence

While new breeds of service providers have arisen, that's not the whole story. In some cases consumers can interact directly with technology to have legal problems solved.¹⁶⁹ While the capability of such software remains limited at present, technological advances should enable greater functionality as time goes forward.

One well-known example is LegalZoom, a document assembly offering.¹⁷⁰ Consumers can enter information about themselves into an online form, and receive a simple will that is valid in their state. LegalZoom does not claim to practice law, but instead claims to deliver a modernized version of a book of forms.

The products can be even simpler. An iPhone app called Shake can create simple contracts in defined areas such as

¹⁶⁸ See Bill Henderson, *Bringing the Disruption of the Legal Services Market into the Law School Classroom*, THE LEGAL WHITEBOARD (Nov. 23 2013), <http://lawprofessors.typepad.com/legalwhiteboard/2013/11/bringing-the-disruption-of-the-legal-services-market-into-the-law-school-classroom.html> [<http://perma.cc/96Y5-2NSK>]; Robert Rosen, *New Law School Fields of Study: Compliance and Risk Management*, JOTWELL (May 20, 2014), <http://corp.jotwell.com/new-law-school-fields-of-study-compliance-and-risk-management/> [<http://perma.cc/L25M-L9HJ>] (noting the introduction of a textbook on compliance and risk management and urging that these fields be included in the law school curriculum).

¹⁶⁹ See Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87, 88 (2014) (“[T]here may be a limited, but not insignificant, subset of legal tasks that are capable of being partially automated using current AI techniques despite their limitations relative to human cognition.”); John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, Mar. 5, 2011, at A1, <http://www.nytimes.com/2011/03/05/science/05legal.html> [<http://perma.cc/B7YS-W98R>]; see also *Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012), *aff'd sub nom. Moore v. Publicis Groupe SA*, No. 11 Civ. 1279 (ALC) (AJP), 2012 WL 1446534 (S.D.N.Y. Apr 26, 2012) (accepting computer predictive coding in document review).

¹⁷⁰ LEGALZOOM.COM, <http://www.legalzoom.com> [<http://perma.cc/A8AC-TBJV>] (last visited Oct. 7, 2015).

employment, non-disclosure and loaning money. The completed contract can be signed using the phone's touch screen, with copies mailed to either or both parties.

At a big firm level, "predictive coding" software is becoming the routine way to conduct the first cut of document reviews. More sophisticated than simple keyword searching, predictive coding allows massive e-document datasets to be winnowed to manageable sizes at far less expense than human review.

In many cases, these products reduce the demand for lawyers by reducing the amount of time needed to complete a task. In other cases, technology will enable paraprofessionals to handle work that once required the judgment of a lawyer, just as automated diagnostic tests allow paraprofessionals in the medical field to provide services once restricted to medical doctors. In still other cases, it's possible that technology may make lawyers unnecessary for certain routine matters.¹⁷¹ Each of those situations can supplant traditional lawyers.

More importantly, however, they may change the nature of legal work and create new ways to deliver better services. For example, technology may enable the intelligent customization of contracts to fit individual preferences using methods outside the standard lawyer's toolbox.¹⁷² Deployed by lawyers sympathetic to technology, such tools may expand the range of solutions available to consumers.

As technology invades the world of legal services, it will create a major new frontier for those legal academics focused on the needs of consumers. It can be expected that lawyers will oppose public access to technological substitutes, invoking consumer protection. While these issues are not trivial, much more fundamental than the regulatory issues are the system design issues. If technology fails to provide a good solution to

¹⁷¹ See John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 *FORDHAM L. REV.* 3041 (2014).

¹⁷² See Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 *MICH. L. REV.* 1417, 1417 (2014) ("[T]he rise of Big Data makes the effective personalization of default rules and disclosure far easier than it would have been during earlier eras."). For a discussion of how technology might change scholarly analysis of contract rules, see George S. Geis, *Automating Contract Law*, 83 *N.Y.U. L. REV.* 450 (2008).

consumers, the question for consumer-focused academics is not how to stop the technology, but how to redesign the system so that technology can provide useful answers. Technology can offer ways to expand the scope of legal services to unserved sectors, but academics must reexamine the system of law to discover ways to enable low cost but reliable technological solutions.

C. Professional Values in a Market Economy

We are at a point where professional boundaries are being redrawn, and roles redefined. The activities comprising law practice mostly will not go away as possible solutions to legal problems, any more than candle makers have completely gone away as a solution to lighting problems, although substitutes may join the mix and market shares may change. Traditional lawyers are ill equipped to provide all the services that are needed going forward. Traditional law schools, still based on Langdell's case driven methodology, are not equipped to teach those skills.

The emerging legal services fields tend to be market driven. Traditional models of professionalism—which may never have matched reality and certainly do not today—tend to assert that lawyers and other professionals stand a bit aloof from market forces, putting a broad conception of public interest ahead of personal gain. It would be too strong to say that no sense of public purpose touches any of the emerging occupations. For example, compliance professionals should be acutely aware of the impact of their work on customers and shareholders, among others, and an ethical code has been developed for compliance practitioners.¹⁷³ Paraprofessionals should be aware of the way their work impacts both their clients and the system. That said, relative to the traditional conception of professional activity, the new occupations

¹⁷³ See SOC'Y OF CORP. COMPLIANCE AND ETHICS, CODE OF PROFESSIONAL ETHICS FOR COMPLIANCE AND ETHICS PROFESSIONALS (Aug. 29, 2007), http://www.corporatecompliance.org/Portals/1/PDF/Resources/SCCECodeOfEthics_English.pdf [<http://perma.cc/Z3ZU-GYX9>]. It can also be argued that, by not being tied to an adversarial posture, non-lawyers providing legal services may be more likely to take the interests of all parties, not just clients, into account. See Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 952-53 (2009) (arguing that adversarial approach of prosecutors has had a negative impact on achieving real compliance).

tend to be market or employer driven, with less of a professional space than the model of the traditional lawyer.

Even in the new era, however, legal activity will retain a public dimension. While individual lawyers and the organized bar as a whole too often pay only lip service to the public role of lawyers,¹⁷⁴ it remains true that making and enforcing law inherently involve important external impacts. Not just the parties are affected—whether the legal activity is developing an effective compliance program or resolving a disputed point of law in an appellate court, bystanders feel the impact.

A legal services world that is blind to these public impacts or that functionally treats legal service as only involving client-oriented consulting misses an important element. One can question where that awareness will come from if employers and the market dictate terms, and if education for these roles has no channeled path.

III. LEGAL EDUCATION FOR THE NEW ERA

The role of law in society has changed profoundly since Langdell's time with the rise of the administrative state and the advent of modern technologies. The field of legal services has changed profoundly with the arrival of new competitors. The kind of work done by individual lawyers has changed profoundly as in-house practice, regulatory practice, and specialization have taken a toll, along with all the forces that have pushed lawyers into an unforgiving market.

To date, legal education has failed to engage adequately with this changing world, remaining tied to an educational model that owes more to tradition than intentional design.¹⁷⁵ To date, law schools provide virtually no targeted training aimed at the emerging legal occupations—and what is offered is either an add-on or a subset to standard legal education, not designed and tailored for the new occupations. Even with regard to lawyers, law schools give students a methodology well suited for interpreting

¹⁷⁴ See FRIEDMAN, *supra* note 27, at 489 (“Most lawyers always served, mainly themselves, next their clients, last of all their conception of that diffuse, nebulous thing, the public interest.”).

¹⁷⁵ See *supra* note 125 and accompanying text.

cases from a common law judge, but not well suited for all the other tasks young and mature lawyers face today.

In the midst of this revolution, law schools face a choice. Either they can be, as they always have been, schools for lawyers, focused on a methodology based on reading common law cases, with scholarship consistent with that mission. Alternatively, they can embrace the expanding scope of legal services, and design institutions suited to the new, broader world. If they choose the latter course, they must choose how to frame and sell the new direction in a way that allows them to break from what so far has proven to be a heavy-handed tradition.¹⁷⁶

As law schools face this choice, it must be remembered that they cannot count on occupying the field alone. Just as lawyers have seen new entrants in the field of legal services, law schools might well see new entrants into the field of legal education. Law schools enjoy a privileged, “moated” position (for now) with regard to educating lawyers, but no such market protections exist or are likely to exist for the emerging fields. Someone will offer training for the emerging legal services occupations, and someone will engage in research that looks at how legal services should be structured in the new world. The question is not whether it will be done, but whether law schools will play a role in doing it.

A. Education for Legal Services Should Be Based on Societal Needs

Education in general, and legal education in particular, serves a public purpose.¹⁷⁷ This public purpose—rather than institutional needs—should play the leading role in constructing the educational system for these emerging fields. In the debate that has arisen over the future of law schools since the 2008 market collapse, this foundational point has often been

¹⁷⁶ See James E. Moliterno, *The Future of Legal Education Reform*, 40 PEPP. L. REV. 423, 424 (2013) (quoting Albert Einstein for the proposition, “You cannot solve a problem from the same consciousness that created it. You must learn to see the world anew.”).

¹⁷⁷ See, e.g., WHAT IS COLLEGE FOR? THE PUBLIC PURPOSE OF HIGHER EDUCATION (Ellen Condliffe Lagemann & Harry Lewis eds., 2012); REED REPORT, *supra* note 7.

overlooked, with the discussion often framed with regard to the welfare of students or the sustainability of the schools themselves.

Put differently, law schools do not exist to serve *law students* and *law professors*. Law schools exist to serve *society*. The design of institutions focused on legal services and legal order should focus, and constantly refocus, on whether the needs of society are being met.

An obvious implication of this is that the reason to expand the scope of what law schools offer should not be to fill a hole in school revenues. The post-2008 collapse in law school applications also collapsed law school revenue streams—one scholar estimated law schools lost \$200 million in revenue in the 2012-13 school year alone, with continuing, compounded declines in applications presumably driving the losses higher.¹⁷⁸

Some academic administrators might look at the underserved educational markets for the emerging legal occupations, and sense a revenue opportunity. Offerings built to lure tuition dollars will often seek to leverage existing courses to new audiences, rather than offering a purpose-built (and perhaps expensively purpose-built) solution to emerging educational needs.¹⁷⁹

While such an opportunity might exist, and while such revenues might help maintain solvent institutions, plugging revenue holes should not be the place where the stewards of non-profit, service-oriented organizations begin the analysis. The question must be what configuration of training and research best suits the needs of modern society with a rapidly changing legal services marketplace. Programs aimed at serving the new occupations must look to the skills and methodologies needed by

¹⁷⁸ See Karen Sloan, *Law for Laymen*, NAT'L L.J. (May 20, 2013), <http://www.nationallawjournal.com/id=1202600625077?keywords=law+for+laymen&publication=National+Law+Journal> [<http://perma.cc/VFN3-QFTL>] (attributing to Professor Jerry Organ the \$200 million estimate).

¹⁷⁹ Some (but not necessarily all) of the emerging master's degrees in legal studies being offered by law schools look just like this—efforts to bring additional fee paying students into existing classes rather than efforts to design new curricula to meet new needs. For more on the emerging masters programs, see Sloan, *supra* note 178 (“There are nearly 30 law schools that have or soon will offer a master’s degree for non-lawyers, up from just a handful two years ago.”). It remains possible, of course, that as schools climb the experience curve of training non-lawyers, the programs may shift form, perhaps even resembling the suggestions in this Article.

those occupations, and almost certainly will require training in areas beyond legal doctrine.

In this regard, the dozens of schools that have launched “masters in law” in recent years seem, in most but not all cases, to be missing the point on both counts. When an administrator charged with examining the concept for his school says the programs look to find “a different pool of potential students” to replace lost J.D. applicants and maxed out foreign LL.M. applicants,¹⁸⁰ a cynic might suspect the revenue cart is leading the educational horse. If the programs simply offer a subset of traditional law courses with no new programming for non-lawyer needs, the cynic might conclude that revenue per class leads rather than the development of new educational models.

With this foundational point in mind, what would a school focused on the needs of contemporary society look like? The inquiry must begin with a recognition that at essential levels, society doesn’t need lawyers, or law schools. Society needs solutions to the problems that, up to this point, lawyers and law schools have helped solve, but it is the needs and not the solutions that endure. As part of the mix, lawyers and law schools as they are now configured are not inherently more essential than the one-horse shays of Langdell’s era were to transportation problems.

What society needs from a legal system opens the door to endless debate, but for present purposes a narrow answer is fairly clear—society needs a system of legal order, and needs that system to be just, efficient and accessible to all. Educational institutions supporting the legal system should support both research into the operation of the larger system, and should in their professional training role prepare individuals to work within that system.

If that is what is needed, the Langdellian law school model seems an unlikely answer for the modern setting. In a world where legal needs are being met by everything from smart phone apps to paraprofessionals to non-lawyer specialists, and where client needs are rarely met just by knowing the answer to a legal question or even by having access to the courts, focusing on training students to parse legal doctrine seems, at best,

¹⁸⁰ *Id.*

incomplete. Given how the world has changed and will continue to change, an opportune moment has come to step back and rethink.

Legal services education for the modern era must meet a range of concerns. At one level, this involves occupational education. This occupational education should look to the new legal services fields, but it should also look to doing a better job of training lawyers for the work they do today. At another level, it will require deep thought and research about what a legal services marketplace should look like in a world where both technology and the new occupations have transformed the possibilities.

Focusing on the goal of social welfare, the educational system for legal services should encompass the following:

- (1) Training for all the legal services occupations. While this will require forms of expertise not present in traditional law schools, overlaps will exist with regard to both subject matter coverage and social concerns for these occupations.
- (2) Scholarship into why these new fields are arising—put differently, an understanding as to the needs not met efficiently by traditional lawyering.
- (3) Research into making more efficient and just the design of a system of legal services—and not just courts. Put differently, some legal academics should move from serving lawyers to thinking up ways where there could be less need for lawyers.
- (4) Research into law as experienced by the “end user”—the institutions and individuals, not legally trained, confronted with legal requirements and burdens. This would include more understanding than the Langdellian law school model provides into law as lived—law as experienced by those who are not lawyers or legally trained.

For the benefit of society, as well as students, the education track for all legal services occupations should be efficient. Students should not be forced to spend extra years in school absorbing training that will not prove useful. Students should also leave the program with the actual skill sets and conceptual frameworks required.

Efficiency pushes against simply adding more instruction on top of the traditional law school curriculum. If law school is already too expensive to justify for students who become non-elite lawyers, how can law school “plus” be justified for those heading to the new occupations?

Efficiency also pushes against simply offering traditional legal training as the track for the new occupations. Law school as it exists offers far more legal training than is needed to be competent at compliance or e-discovery. More importantly, it offers far too little of the additional skills necessary. The traditional legal methodology of “thinking like a lawyer” fits the new fields even less than it fits modern legal practice.

The new schools will also need a vastly different—but, I think, exciting—research agenda. While the nature of doctrinal research has changed over the past decades, moving away from reportorial compilations of legal developments to more normative assessments of what the law might be, it still focuses on the rules themselves.¹⁸¹ Doctrine dominates.

The new legal occupations tend to require less focus on the fine points of doctrine, and more on how law interacts with ordinary citizens. How can legal processes be made predictable and simple enough that paraprofessionals or the consumers themselves can handle routine matters? How can employees of vast organizations be led into compliance with known legal doctrines? How can systems be designed so that legal compliance can be met at minimal cost?

These are not the kinds of questions that often get answered in the pages of the leading law reviews, but they are questions of immense importance to society. Law is too important to be left to lawyers. New schools of legal services, focused on delivering value to society, should help find answers to these questions.

B. What a School of the Legal Professions Should Provide

Against those societal needs, what should one of the new Schools of the Legal Professions look like? Even when emerging from existing law schools, the schools should not just be add-ons to Langdellian law schools, but newly conceived institutions based on

¹⁸¹ See *American Enterprise*, *supra* note 30, at 75.

an understanding of law suited to a world of high technology and regulatory states. They should offer training targeted to the needs of the emerging legal services occupations, and training for the kind of work contemporary lawyers do. They should also pursue research agendas focused on law's role in society, which implies topics far beyond doctrinal analysis.

1. Occupational Training for the New Legal Services

Law schools, even as they have migrated toward being “mini universities” pursuing primarily research agendas, have always played an important role in vocational training for lawyers. Going forward, schools of the legal professions will play a similar role in training for the expanded list of legal vocations. The training for the new occupations should differ from that traditionally offered lawyers, and the training for lawyers themselves should move to a different model.

The flurry of recent proposals for reforming legal education tends to focus almost exclusively on doing a better or cheaper job of training lawyers to be traditional lawyers.¹⁸² When the proposals step outside the Langdellian paradigm, they tend to follow one of two tracks: training paraprofessionals of limited scope to expand access to services¹⁸³ or adding additional technical training to a legal education so lawyers have the necessary skills to serve future needs. For non-lawyers, some institutions have begun to offer a subset of legal doctrinal training in the guise of a Master of Law but do not seem to have bridged to offering tailor-made programs. While these approaches may have their merits, none provide an efficient, comprehensive solution for training for the emerging service providers.

a. Training Consultants in Narrow Fields of Expertise

Many academics have proposed educating and opening parts of the market to paraprofessionals, much as medicine has opened

¹⁸² See, e.g., TAMANAHA, *supra* note 59.

¹⁸³ See Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 LAW & SOC'Y REV. 713, 743-45 (1999) [hereinafter Kritzer, *The Professions Are Dead*]; Rhode, *Perspective*, *supra* note 145, at 703, 711-12.

up to physician's assistants, optometrists and other types of paraprofessionals. These paraprofessionals are viewed as having, by definition, something less than the full skill set of a lawyer, and providing services in settings where less than a real lawyer may be either sufficient or at least better than nothing.¹⁸⁴

These proposals may well make sense, especially in terms of helping underserved constituencies navigate dispute resolution or administrative environments. In specialized environments, there's no real reason to require a command of the entire "science of the law" when the needs of the customer are more focused and defined.

To the extent such programs have been launched, they seem to be located mainly outside law schools and apart from the legal profession. In Washington State, for example, where a recent change in the law permits paraprofessionals to assist the public, the licensing and training are separate from law schools.¹⁸⁵ In other fields where non-lawyers can provide assistance to the public—from representation in administrative proceedings to title recordation—law schools have played little apparent role in the education of those taking on these roles.

Law schools could play a role in training these paraprofessionals.¹⁸⁶ Shorter programs providing the limited law required for these roles would fit easily inside the curriculum of traditional law schools and could even be taught by legacy faculty. Whether through degree programs or certificate programs, law schools could provide both the legal knowledge and a sense of the public role of these occupations.¹⁸⁷ While economic considerations should not drive the decision to expand the scope of law schools, the addition of students seeking targeted training could allow better use of legacy human and physical resources.

¹⁸⁴ See Kritzer, *The Professions Are Dead*, *supra* note 183; Rhode, *Perspective*, *supra* note 145.

¹⁸⁵ See generally Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611 (2014).

¹⁸⁶ See Chambliss, *supra* note 148 (arguing that law schools should support training for paraprofessionals).

¹⁸⁷ The question arises as to why law schools have not, especially in a down market, gone into this kind of training. Aside from accreditation barriers—which could be changed if enough law schools supported a change—the explanation may be rooted in status, and a desire to be engaged only in the teaching of professionals.

Another important purpose could be served by locating these schools in the same institutions that train lawyers. With both occupations being trained side-by-side, discerning when a service fits a paraprofessional and when it needs a lawyer will be easier to assess. The information flow about day-to-day life in the occupations is likely to be better if institutional links exist.

In a world of specialization, the scope of training for narrow-gauge services should expand over time, just as the range of paramedical professionals has expanded over time. With no science of law or seamless web to mandate a full professional training, the range of problems that can be solved by the partially trained—especially the partially trained aided by technology—will expand and change over time.

b. Training for Emerging Professions

Focusing on legal technicians ignores, however, the other part of the training equation—fields such as compliance, which are properly viewed not as subsets of legal activity but as complex emerging occupations that draw only partly on legal expertise. For many of the emerging legal services fields, what is needed is not a subset of legal training, but some legal training plus deep training in areas not addressed in the law school curriculum. What members of these fields need in the way of training is both something less and something more than traditional training for lawyers.

Legal educators tend to see these emerging fields as “J.D. advantaged”—a place to send off those of their graduates who cannot get or perhaps do not want “real” lawyering jobs. Like the mythical man equipped with a shiny hammer who wants to solve every problem with a nail, they assume without apparent introspection that a traditional legal education provides more than adequate training for these jobs.

The truth is training as a lawyer is both too much and too little training for the emerging legal services fields. Too much, because the full three years of legal education provides more than is needed in fields where many practitioners function perfectly well with no formal legal education at all. Too little, because law schools do not teach skill sets critical to many of these fields.

In addition, pending regulatory changes, the legal training carries with it a great cost in terms of both time and money. At present, legal education in the United States is a postgraduate degree and requires three years of training. While, in the past, the expected income of lawyers might support incurring this educational burden, it is not clear that the income trajectories of the new occupations justify this cost.

It seems likely that a compliance training program could be achieved in a good bit less than three years, and perhaps even as an undergraduate degree. As with nursing, there could be different levels of compliance professionals, with some line employees equipped more as technicians, and those aiming for the “C” suite better versed in the organizational, psychological, and ethical issues inherent in a mature and sophisticated compliance function. Depending on the scope, the degrees could be undergraduate, masters or even doctoral.

For the graduate level education in compliance, some legal training would seem to fit—background on the structure of the legal system and government, enough case reading to acquire the methodology of unpacking cases, a stronger course in statutory and regulatory interpretation than is required in many law schools, and perhaps advanced statutory grounding in some of the more critical compliance fields such as health care, the financial industry, and foreign corrupt practices.

Training far removed from law would also be part of a proper compliance program. Given that compliance officers are often enmeshed in profit-seeking enterprises, they need to understand the basics of business practice. They need grounding in the sociology and psychology of organizations. Given that much of their work involves training, understanding how adults learn can matter.¹⁸⁸

In a best case scenario, compliance professionals need the skills to track corporate behavior so they can determine whether the methods adopted to shape corporate behavior are working. In a worst case scenario, they should be able to demonstrate the good

¹⁸⁸ For an in-depth discussion of the skills, traits and training related to being effective in a compliance role, see JOSEPH E. MURPHY & JOSHUA H. LEET, *BUILDING A CAREER IN COMPLIANCE AND ETHICS: FIND YOUR PLACE IN THE BUSINESS WORLD'S HOTTEST NEW FIELD* (2007).

faith efforts undertaken by the organization should, despite honest efforts, the inevitable breaches occur.

In a school of the legal professions, the goal would be to train compliance professionals who are not lawyers, and who most definitely do not think like lawyers. Graduates of these programs should have a reflective understanding of the constructive role compliance, well done, can play both for society and for the organizations that host the compliance function. They should have sufficient legal methodology to understand legal directives and interact intelligently with specialist lawyers. They should have organizational and sociological skills sufficient to identify the best ways to win compliance with known legal duties. They should have sufficient empirical and analytical skills to track and demonstrate compliance.

With fields such as mediation, and with other fields that may emerge, the process would be much the same as for compliance. Programs that draw in part on law and in part on the other skills necessary to perform the role would be designed. The goal would be to produce reflective practitioners in the new occupations, armed with the appropriate methodologies for the tasks before them.

2. Occupational Training for the Modern Practice of Law

Situating the training of lawyers in the context of broader schools of the legal professions will force long overdue changes in the way lawyers are trained. For decades, clients and senior partners have loudly proclaimed that students emerge from law school unable to add value. In recent years, many clients have added force to the talk by refusing to pay for junior associates who work on their matters.¹⁸⁹ To some degree, these complaints may reflect the reality that the practice world envisioned by the Langdell paradigm—arguments in common law courts—bear little relationship to lawyers practicing in the world of pervasive legal regulation brought about by the administrative state. Going forward, the practice of law looks to change even more radically,

¹⁸⁹ See Joe Palazzolo & Chelsea Phipps, *With Profession Under Stress, Law Schools Cut Admissions*, WALL ST. J., June 11, 2012, at B1, <http://www.wsj.com/articles/SB10001424052702303444204577458411514818378> [<http://perma.cc/E8GM-7QRW>].

as commoditized services, online technologies and new business models all play havoc with traditional practice business models.¹⁹⁰

As we've seen, the Langdell method of instruction was rooted in Langdell's ideology of law and lawyering. For Langdell, law was a kind of science, and a kind of science where the universal principles could be found in the reported common law cases. This view saw the law as being about judge-made doctrine.

Langdell's methodology was and is effective for teaching lawyers how to read cases, and, more generally, how to interpret and manipulate doctrine. To the present day, this method dominates law school instruction, and it dominates law school instruction because law schools still see lawyering as being about doctrine.

Lawyering is, of course, partly about identifying, applying and distinguishing doctrinal rules, so Langdell's method is not as inapt as if he had sent law students out into the world trained in a true science such as geology. The methodology provided by law schools works for almost all lawyers in some part of their practice, and for a few lawyers in almost all parts of their practice. (For that limited amount of practice that is all many law professors have seen, which is to say helping with doctrinal research in the context of high stakes litigation or deal making, it may still seem to be the essence of lawyering). But, just as practicing contract law requires more than understanding contract adjudication, actual lawyering requires more than understanding how to interpret judicial decisions. Langdell's ideology, which lies just beneath the surface of his methodology, tends to obscure the importance of those other skills.

That law school as presently configured fails to prepare students to practice is not breaking news. For decades lawyers, judges, and educators have argued that law school fails to prepare students for practice.¹⁹¹ These cries have not been ignored.

¹⁹⁰ For a look at the world of future lawyering, see RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013).

¹⁹¹ See, e.g., Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 220 (2007) ("[L]aw schools have refused to teach new lawyers how to practice law."); Michael Martinez, *Legal Education Reform: Adopting a Medical School Model*, 38 J.L. & EDUC. 705, 705 (2009) ("Legal minds tend to agree that the current educational model used in American law schools is inadequate. The current model, usually spread over three

Numerous thoughtful proposals to reform and restructure the way lawyers are trained have been put forward.¹⁹²

Despite the furor and despite the many proffered solutions, relatively little seems to have changed.¹⁹³ Part of the problem, no doubt, is that there is not one kind of practice for which to prepare students. The onset of specialization and enormous functional diversity in what people calling themselves lawyers do in their day-to-day jobs changes the target for professional preparation. A student can excel at moot court, do exciting work in an immigration clinic, and still find those experiences to be little in the way of useful professional “training” if her first firm assigns her to revising documents related to private equity financings. Cries to prepare students for “practice” as if that were a single thing naively misconstrue the functionally dissimilar work of modern day lawyers.

There is, however, a bigger problem related to the failure to see that the practice of law is, not one, but many things. This bigger problem stems from Langdell’s outdated vision of what it means to be a lawyer. Langdell saw lawyering as about being in command of legal doctrine, and saw law as being what could be found in the library. Langdell’s view of law as being what exists in books has been built in to the structure and ideology of schools based on his model. These schools have accepted competing views only as supplementation, and have beaten back efforts from the

years of law school, focuses almost purely on teaching legal theory in a classroom setting. It provides the practical experience of having real clients to few, if any, students. The end product of this educational model, in the opinion of many scholars, is a group of graduates who are ill-equipped to practice as legal professionals.”) (footnote omitted).

¹⁹² See AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report\).authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf) [<http://perma.cc/KB7A-6528>] [hereinafter MACCRATE REPORT]; CARNEGIE REPORT, *supra* note 40; William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461 (2013); Martinez, *supra* note 191, at 705.

¹⁹³ See Karen Gross, *Process Reengineering and Legal Education: An Essay on Daring to Think Differently*, 49 N.Y.L. SCH. L. REV. 435, 436-37 (2004) (“[W]e have tended to think about legal education within the existing paradigm. Stated differently, we have been largely satisfied with tweaking at the margins.”).

legal realists onward to connect law more directly to law as it is experienced by the public.

Within the traditional model of law school, a number of changes have been proposed, and some implemented.¹⁹⁴ Most prominent has been the “clinical” movement, which teaches students specific skills related to the practice of law, and often strives to incorporate real or mock client contact.¹⁹⁵ Clinical education, while often still tied to the courts, at least introduces students to the reality that facts start off inchoate and unformed, and to clients with concerns far beyond knowing the answer to a legal question.¹⁹⁶ At most schools, however, clinical education remains an elective, somewhat like a dab of sauce on top of the meat of doctrinal courses.¹⁹⁷

Individual professors also have leeway to teach doctrinal courses in ways that do not rely solely on the Socratic dissection of cases. Some casebooks and courses have shifted from being centered on specific cases to being centered on hypothetical problems students have to address.¹⁹⁸ Others propose Harvard Business School-type case studies in order to allow students to approach a case not from its culmination but from its inception.¹⁹⁹ Another proposal would take advantage of modern technology to

¹⁹⁴ See Beverly Peterson Jennison, *Beyond Langdell: Innovation in Legal Education*, 62 CATH. U. L. REV. 643 (2013).

¹⁹⁵ Jerome Frank proposed what he called a “Clinical Law School.” See Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 920 (1933). However, the details of his proposal fell a good deal short of what modern clinical programs seek to deliver. See STEVENS, *supra* note 17, at 215.

¹⁹⁶ See STEVENS, *supra* note 17, at 215-16 (origins of legal clinic programs).

¹⁹⁷ See CARNEGIE REPORT, *supra* note 40, at 76 (“[T]oday’s trend is to supplement rather than replace the inherited reliance on this venerable case-dialogue teaching in the first phase of doctrinal instruction.”); Spencer, *supra* note 1, at 1958 n.31 (“[T]he practical skills training and experiential learning opportunities that many law schools offer tend to be elective and are taken up in earnest by a minority of law students overall, when compared with the extensive doctrinal instruction all law students receive.”).

¹⁹⁸ See STEVENS, *supra* note 17, at 215 (early efforts at problem based courses); Myron Moskovitz, *Beyond the Case Method: It’s Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992); Stephen J. Shapiro, *Teaching First-Year Civil Procedure and Other Introductory Courses by the Problem Method*, 34 CREIGHTON L. REV. 245, 248 (2000).

¹⁹⁹ See Gordon, *Geologic Strata*, *supra* note 1, at 368; Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course: Powerpoint, Laptops, and the CaseFile Method*, 44 ST. LOUIS UNIV. L.J. 1289, 1307 (2000).

“flip” the classroom, imparting doctrine through recorded or interactive materials, with class time reserved for skills training and deeper digging.²⁰⁰

These efforts struggle against the Langdellian ideology, which is embedded in the Langdellian curriculum and the Langdellian methodology.²⁰¹ If real law is about judicial actors and the doctrine they dispense, it’s hard to keep focus on the other side—the much vaster side—of the community seeking to understand and comply with legal obligations. Like an immune system, the Langdellian method pushes back against and marginalizes approaches at odds with its core ideology that it is the doctrinal rule of the case that matters.

So long as law school remains based on Langdell’s model, it will incorporate Langdell’s ideology. Since Langdell’s model is what living Americans tend to think of as law school, and since the successful schools remain largely true to this model, it will be hard for institutions that define themselves as “law schools” to truly recast their educational mission.

Schools of legal services require by their nature an ideological shift. While Langdell’s method focuses on courts, judges and judicial opinions, the new varieties of legal services tend to live on the streets and in the boardrooms, far away from Langdell’s common law courtroom. Recognizing—as practical practicing lawyers must—that these settings are part of their world at least as much as the courts are must force a shift in what is taught and how it is taught.

Learning how to read cases will never be a useless skill so long as there are judges writing opinions, but a properly conceived, from the ground up, view of education for practicing lawyers needs to make a break from an educational model that has been inherited from earlier days. Schools of the legal

²⁰⁰ See *Law School Survival*, *supra* note 33, at 235.

²⁰¹ Law school is not unique in transmitting professional ideologies through curriculum. See Paul Atkinson, *The Reproduction of the Professional Community*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 188 (Robert Dingwall & Philip Lewis eds., 2014) (“In general terms it has been pointed out that curricula embody and legitimate partial versions of professional work and interests. For instance it has been argued that medical education serves to perpetuate and reproduce a particular view of medicine. It promotes what Celia Davies (1979a) has termed the hospital-centred version of medical care.”).

professions force a perspective change away from the courtroom and the judge, and toward the citizen on the street wondering how to deal with the legal system.

Schools of legal services will be in a position to restart the ideology of legal education, an enterprise that needs a new, purpose-built structure.²⁰² Grounded in more than just lawyering, and grounded in far more than just courts, they can rethink what skill sets modern lawyers need. It will not be possible to equip every emerging lawyer with the specialized skills needed in today's elite practices, but it should be possible to equip them with the methodologies and skills they need to succeed in modern legal practice.

What would training for lawyers look like in a school for all the legal professions? The first and perhaps biggest change would be to teach lawyering in a setting that institutionally is structured around a realization that law is not just the province of judges and lawyers. Starting from a societal needs perspective, a school for the legal professions should look to what needs are not being met, and look to where lawyers—as opposed to other vendors—are the solution. Recognizing that the nature of law has changed since Langdell's time, with the growth of the administrative state, a School of the Legal Professions would not focus students on appellate opinions but on the actual environments where modern lawyers spend their working lives.

The skills and methodologies taught need to track the skills and methodologies used by lawyers, today and tomorrow, in their day-to-day lives. This will prove harder than it might seem because relatively little is known about what lawyers actually do in their day-to-day lives, even in law schools.²⁰³ Former practicing lawyers have a recollection of what they did, which might or might not correlate to what other lawyers do in very different practices. Relatively few law professors remained in practice beyond the

²⁰² See Spencer, *supra* note 1, at 1960 (“[L]aw school, as it exists today, is an artifact of its past, with a structure and tradition that is rooted in history more so than being founded on rational design.”); *id.* at 1958 (“[T]he law school of today is not optimally designed to prepare students for practice.”).

²⁰³ See Lynn Mather, *Foreword* to JOHN FLOOD, WHAT DO LAWYERS DO? AN ETHNOGRAPHY OF A CORPORATE LAW FIRM (2d ed. 1987) (“What do lawyers do? This important question—rather surprisingly—has not been systematically explored.”).

apprenticeship stage, and far too little research has been done by law professors on the legal profession itself.²⁰⁴

The methodologies do not map precisely either to the nominal substance of doctrinal or clinical courses. Many a lawyer has survived a long life in practice without ever encountering the Rule Against Perpetuities on the ground; the methodology, however, of being able to extract the rule from the cases is one of the methodologies most lawyers use at some time.

Clinical courses as part of legal education going forward should similarly be viewed in terms of methodologies, not just task-specific skills. With the variety of legal specialization today, not even the richest schools can provide clinics in every area of practice. Students should—and, presumably, do—emerge from experiential clinics with methodologies that can be applied in very different settings. Thinking about what those methodologies are, and how they are imparted, will help structure thinking about how both experiential and traditional classroom courses can help build those methodologies.

A complete list of the methodologies specific to law practice that will be required by twenty-first century lawyers is far beyond the scope of this Article. To really determine the methodologies that are more or less universally needed requires more empirical research into what lawyers actually do than has been done to date. Factual investigation, communication, negotiation, process management, and ethical compliance are all likely to be on any list and are ripe for methodological training in a way not typically provided today in standard law school curricula.

3. The New Era of Legal Services Research

Research, of course, will be a core function of schools of legal services. A change in the outlook of schools may, however, have an impact on the direction of research. Indeed, many of the fields of research most resisted by judges and practicing lawyers as being insufficiently helpful to practicing lawyers may be seen as spot on for the larger questions, appropriate to law schools, of what a system of legal order should look like.

²⁰⁴ See David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and Teach About the Profession*, 49 J. LEGAL EDUC. 76 (1999).

The emerging legal service professions require some facility with legal rules, but, on the whole, parsing doctrinal points does not lie at the core of these new fields. Rather, taking the law as a given, they engage in the zone where the law meets the world at large. Instead of just parsing doctrine, they ask how a given task can be processed economically, how litigation can be avoided, and how to obtain rank-and-file compliance with legal rules.

This viewpoint is not altogether alien to modern legal scholarship. Empirical legal scholars and those involved with law and society have engaged in impressive and important research in these areas. Going back at least to the time of Roscoe Pound's "law in action"²⁰⁵ and the law and society movement, a venerable, if minority, tradition in legal scholarship looks at these issues.

That said, doctrinal analysis remains at the core of legal scholarship.²⁰⁶ Trained in legal methods and with a library full of legal doctrine, legal scholars find the road to legal analysis and theory short and wide. Legal scholars in law schools tend to look internally at the relationship of law to other laws, and not to its impact on society.

In Langdell's world, doctrinal analysis looked to whether a rule of law fit the logical scheme established by the "science of law"—did it proceed from its precedents in a way that fits doctrinally? While Langdell's worldview is long gone, much legal scholarship still follows this doctrinal and theoretical model. While the nature of the theorizing may have changed, legal scholarship still tends to focus on legal doctrine and theory. New schools of legal theory and new approaches to law seem to end up in familiar doctrinal evaluations, albeit evaluating cases and rules through somewhat different filters.²⁰⁷

Case-based analysis, however, misses much of the life of law, by focusing only on those issues and cases that rise to the top of the litigation process. Everyday concerns—including concerns related to the spiraling cost of the legal process—are barely visible

²⁰⁵ See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910) [hereinafter *Law in Action*].

²⁰⁶ See Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1339 (2002) ("Doctrinal analysis, which is also the staple of conventional legal theory, remains the method of choice for the vast majority of legal scholars.")

²⁰⁷ See *id.* at 1340 ("[O]n many key legal issues, we are glutted with theory and starved for facts.")

to those focusing on parsing rules. As Deborah Rhode has argued, “Too little effort is made to connect law to life by assessing the real world consequences of analytic frameworks.”²⁰⁸

New schools of the legal professions will have, by virtue of the occupations they are training and interacting with, a more active window into how law is lived. Training a compliance specialist, for example, cannot stop at analyzing whether a law applies or whether it is consistent with an overall regulatory scheme. The compliance specialist must have a plan for implementing and tracking processes in companies that lead to obedience of the law, a task that involves much more than just the ability to analyze the law. Enmeshed in schools of legal studies, the specialists with the knowledge related to these kinds of processes will bring a fresh perspective to legal questions.

In institutions more actively focused on the impact of legal services on the public, different questions might be asked of a legal rule: Can people understand what they are required to do? Can they comply at an affordable expense? What unintended and unexpected burdens does the rule place on people? What real world factors make its impact greater or lesser than imagined?

Put differently, the natural research orientation of schools of the legal professions should move away from the Langdellian study of what the legal rules are and should be. Like geometry, which gave much to the conception of legal science,²⁰⁹ such a study is inherently self-contained.²¹⁰ It looks to internal consistency of logic as the touchstone. Modern scholarship no longer purports to be logically self-contained, but still often plays the game of assessing whether a rule is consistent with a larger theoretical construct, whether that construct is neoclassical economics or

²⁰⁸ *Id.*

²⁰⁹ See Grey, *supra* note 30, at 16 (“The core notion of classical legal science can be grasped through the analogy to geometry, as that subject was understood in the late nineteenth century.”); see also FRIEDMAN, *supra* note 27, at 472 (“Langdell’s proudest boast was that law was a science, and that his method was highly scientific. But his model of science was not experimental, or experiential; his model was Euclid’s geometry, not physics or biology.”).

²¹⁰ See *Law in Action*, *supra* note 205, at 25 (“Today, while all other sciences, in the wake of the natural sciences, have abandoned deduction from predetermined conceptions, such is still the accepted method of jurisprudence. After philosophical, political, economic and sociological thought have given up the eighteenth-century law of nature, it is still the premise of the American lawyer.”).

critical legal studies. Much of the “law and” that has infiltrated the legal academy serves only to explain why legal rules do or do not make sense according to their models.

The new schools of legal services, engaged as they would be with new occupations beyond lawyers, new occupations that do not have their historical roots in a courtroom, must have a different orientation. Rather than looking to where law is created, they must look to where it is experienced and imposed.

Viewed as a product, law is defectively designed. The mere idea that an expert guide is needed to enable consumers and businesses to undertake ordinary transactions or understand their fundamental rights and duties should seem, upon reflection, absurd. Would anyone buy an everyday consumer product that requires a highly trained expert to operate it? The concept that a citizen can only understand or exercise her fundamental legal rights with the aid of someone who has been to college for four years and vocational training for three is as absurd in the modern world as those old laws that required a man with a flag to walk down the road ahead of an automobile. Just as the rise of automotive transport demanded a rethinking of those laws, the rise of the administrative state, which imposes legal duties at every turn, requires the rethinking of a system accessible only through courts and lawyers.

A consequence of breaking the alignment of legal education with lawyers should be to focus more attention not just on alternate providers of legal services but on consumers of legal services. Once the focus is on the consumer, one field of research should become how to redesign laws and processes to make “chauffeurs for the law” unnecessary.

In this orientation, lawsuits and the resulting opinions are not the skeleton of the legal system, but the blisters or boils on the skin. From a point of view that looks to the smooth functioning of a compliance function, for instance, every reported case represents a failure of the legal system—perhaps a failure to achieve compliance with clear law because of competing personal or organizational agendas, perhaps a failure to seek a framework other than conflict and litigation to resolve differences, or perhaps a failure to achieve a negotiated settlement because the legal result was insufficiently predictable.

Put differently, the core function of a legal system is not to create and evaluate rules, or to resolve active disputes, but to regulate the functioning of society. Complex rules and formal dispute resolution may be necessary inputs into an orderly society, but they should not be confused with the ultimate desired outputs. The first question for a legal system should not be how to reconcile a case with prior cases, but to understand what went wrong so that a formal resolution was needed at all.

A legal orientation divorced from lawyers will naturally look to different questions, and will naturally seek different answers. The kinds of skills that underlie teaching process management might not see more lawyers as the clear and obvious solution to the problem of an underserved public. Perhaps, instead, those with such skill sets could look at the process, and see ways or areas where routine needs could be made simple and clear enough to be error proof even without lawyers.

In this world, judges and lawyers may still claim that the legal research emanating from law schools fails to assist them in their day-to-day tasks. Schools not centered on judges and the courtroom as the paradigm of where law lives can answer that with a simple question: Why should they? The test of utility of legal research will, and should, shift to whether it provides knowledge that allows for a better system of civil order.

C. The Opportunity for Law Schools to Evolve into the New Schools of Legal Services

These emerging disciplines draw on expertise not normally found within the legal academy. The question naturally arises: Should training for these fields be yoked in some way to traditional legal education, or situated in other institutions such as business schools or narrowly tailored vocational programs? For law schools, the emergence of these new occupations and education for them presents both a potentially existential challenge and an opportunity.²¹¹

²¹¹ The biggest obstacle to transforming legal education and hence legal services to meet the needs of modern society may come from a legal profession that has been described as “ponderous, backward looking, and self-preservationist.” MOLITERNO, *CRISIS*, *supra* note 3, at 215. The Revised Standards for Approval of Law Schools issued by the American Bar Association’s Section of Legal Education and Admissions to

1. The Negative Case—The Risk of Disruption

Academic training for the new legal services promises to be disruptive for law schools. At present, a large and apparently growing proportion of all legal graduates go to what the National Association for Law Placement (NALP) terms “JD Advantaged” jobs.²¹² While the data is far from clear, it appears that many of those jobs constitute the new legal services type jobs, such as compliance. At present, law school seems to constitute the preferred training for those jobs.

While law school may be useful for such jobs, a traditional J.D. curriculum seems unlikely to be the optimal preparation. It provides too much, too little, and at too high a cost. It provides more purely legal training than a non-lawyer seems likely to need. It provides too little—in most cases, none—of the other important skill sets needed by these jobs. And it provides it at high cost, with tuition based on the earnings expectations of lawyers, and with four years of college and three years of legal education as the standard track.

Programs tailored for the new forms of legal services will surely emerge, somewhere.²¹³ As higher value occupations emerge

the Bar requires that any “major change” gain acquiescence from the Council of the Section. Major changes include a “change in the mission or objectives” as well the establishment of a program leading to a degree other than the J.D. degree. It is not clear how the council would view a program that aims to break from the Langdellian tradition. Should that be the case, the educational gap will be filled by other educational institutions, most likely business schools, many of which already offer extended instruction in legal topics.

²¹² See Bernard A. Burk, *What’s New About the New Normal: The Evolving Market for New Lawyers in the 21st Century*, 41 FLA. ST. U. L. REV. 541, 558 (2014) (J.D. Advantage job placement increasing from 8.4% of reported placements for class of 2007 to 16.5% of class of 2013).

²¹³ Some already have begun—some of the master’s of law programs referenced above, *supra* note 179 and accompanying text—but also, for example, business school or professional association based programs in compliance offering certifications. See *Society of Corporate Compliance and Ethics Establishes Certification Program*, SARBANES-OXLEY COMPLIANCE J. (Oct. 26, 2006, 11:00 AM), http://www.s-ox.com/dsp_getnewsDetails.cfm?CID=1760 [<http://perma.cc/3J7C-X542>]. Several business schools have established compliance certificate programs pursuant to the Society of Corporate Compliance and Ethics (SCCE) and the Compliance Certification Board (CCB) program, as has at least one law school, Widener, which offers a Masters of Jurisprudence (MJ) with an included compliance certification. *MJ & Certificates in Compliance*, WIDENER UNIV., <http://delawarelaw.widener.edu/current->

and begin to seek for status, formal education programs—whether preferred or required—inevitably accompany the consolidation of the occupational roles.²¹⁴ If history across other high value occupations is any guide, programs specific to their needs and supportive of claims that these occupations are professional in their own right will emerge. These programs will provide enough general legal training so specialists can engage in sophisticated dialogues with lawyers. They will provide enough specialist legal knowledge so that specialists understand the regulatory environment of their field. They will provide deep training in those areas of core relevance to the emerging specialties but of less relevance to the traditional practice of law, such as organizational sociology or business process management. First degrees are likely to be two year masters programs at most, and perhaps undergraduate majors.

These new programs will be attractive to students who now are going to law school. Rather than giving them far more of “thinking like a lawyer” than they need and far less of the other skills required, the new programs will be able to match occupational training with what is needed to be a reflective practitioner of the fields, and at much less cost than law school.

Such programs will also be attractive to employers. Rather than hiring students who, the evidence suggests,²¹⁵ really would have preferred to be working as lawyers, the employers will be hiring recruits who made an intentional choice to train for the field. That training, unlike law school, will address the competencies and methodologies likely to be needed on the job. Assuming roughly equal levels of ability,²¹⁶ there’s no reason

students/compliance-mj-certificates/ [http://perma.cc/28DN-RTH8] (last visited Nov. 9, 2015).

²¹⁴ See ELIOT FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE 24-26, 63-88 (1986).

²¹⁵ See D. Benjamin Barros, *Review of After the JD III: A Law Professor’s Take*, THE ASS’N OF AM. L. SCH., <http://aals.org/wp-content/uploads/2014/09/AJD-III-summary.pdf> [http://perma.cc/9TXS-EEGP] (last visited Nov. 9, 2015) (indicating that the third release of results from the *After the JD* longitudinal survey shows that greatest job dissatisfaction occurs with those in what are likely J.D. Advantage jobs).

²¹⁶ It is, of course, unknowable whether graduates of specialized programs will be equally talented. The lure of traditional status surely draws some students to law school who might, on the numbers, be better served elsewhere. On the other hand,

people who chose and were specifically trained for the field would not be the preferred choice.

In such an environment, students who today may go to law school may in the future go elsewhere. Taking those students and those jobs out of the law school universe will have an obvious impact. One wonders how law schools that are struggling today even with the prospect of J.D. advantaged jobs for many of their students will fare if those jobs and students go away.

But that's not the end of it. Assuming that law school accreditation standards are relaxed to allow law schools to seek models that work in today's environment,²¹⁷ there's no reason that these emerging schools of other legal services could not add training for law practice. Connected more intimately to the modern world of legal services, and unburdened by Langdell's legacy, there's reason to expect that with regard to professional training these schools could offer an education more suited to modern needs than the deconstruction of common law cases. For decades judges, lawyers, law students and law professors have all claimed that the present system of educating lawyers is irrationally tied to an obsolete vision, and that it does not prepare students for work in the profession. In most markets, such a durable set of complaints would suggest that an opportunity exists for someone who could do a better job.

Such a scenario fits to a T the traditional model of disruptive innovation. A new competitor offers services to consumers unserved or overserved by the legacy providers—here, the consumers of education who wish to work in the emerging legal services. At first, the legacy providers don't notice or care because it is not their core product. Over time, the new competitors begin to compete in the legacy firms' core markets, here the education of lawyers, with products based on a value proposition that the legacy providers have a hard time competing against because it relies on competencies and assets—here, a connection to the modern world of legal services in lieu of a connection to Langdell's common law model—that the legacy firms have a hard time

lower costs and shorter programs might attract pools of talent to the non-traditional programs that are not currently attending law school.

²¹⁷ See, e.g., TAMANAHA, *supra* note 59 (arguing for changes in accreditation standards to allow different models of law schools).

embracing. In industries ranging from computer hard drives to steel mills, such a progression has seen once seemingly impregnable firms driven out of or to the very margins of a business they once dominated.²¹⁸

Under disruptive innovation theory, the growth of new competitors who eventually move into the legacy markets of legal services education would be expected. In the normal case, legacy providers are held captive by their existing resources, processes and values to keep doing what they've always done, making incremental changes, while the newcomers are free to adopt new models better suited to the changed environment. Only legacy organizations with strong leadership and a profound awareness of the risks of standing pat are able to make the changes necessary.

There are a lot of "ifs" in the foregoing paragraphs, and what might happen is not necessarily what will happen. The point is this: In a world where change is afoot, law schools may not have the option of standing still with their traditional offerings. If other educational institutions establish themselves as the best training option for legal services jobs aside from lawyering, law schools may lose some of the student base, and may lose the option to claim leadership in these emerging fields. In the worst case scenario, particularly troubling to those that cannot claim to deliver a high value brand or networking opportunities, they may find the new educational entrants successfully competing for law students who want not status or networks from a school, but practical training for the occupation of practicing law.

2. The Opportunities for Law Schools Willing to Transform

Disruptive innovation theory suggests that law schools will struggle, at best, to transform themselves to new kinds of institutions. Their view of what they see valuable (training members of an ancient profession and doing research into what

²¹⁸ The new programs, not bound by ABA regulations, might also employ online training for some or all of their training for the emerging legal occupations. When ABA restrictions against online classes fall, these new programs could be up the learning curve of delivering professional education online, and could therefore compete effectively. For a discussion of the potential for online education to disrupt traditional legal education, see Ray Worthy Campbell, *Law School Disruption*, 26 GEO. J. LEGAL ETHICS 341 (2013).

law should be), their resources (libraries, buildings and staff all built around Langdellian training of lawyers and traditional legal values), and their processes (ranging from how courses are taught to how faculty are tenured) all conspire to push them back towards continuing to do what they've always done. Nonetheless, should any schools be willing to reconceive their mission, interesting opportunities await. Making the shift requires a redefinition of the school's mission and an explicit embrace around transferring old assets to a new vision and new educational mission. Specific, identifiable opportunities exist for the schools willing to make this sharp break with the past.

a. The Opportunity to Connect the Emerging Legal Services Occupations to the Public Purpose of Law

Law remains a public enterprise. The general public has a stake in the content of laws, a stake in an efficient process, and a stake in the allocation of public resources. At least in theory, law has long been a "public profession" where lawyers take these non-client interests into account. Even if the reality often, even usually, falls far short of the vision of the lawyer statesman, something true remains in the notion that law is about something more than creating asset classes.

Almost all legal activities involve externalities. In a common law system, the resolution by a court of record of a dispute makes law not just for the litigants, but for all in the jurisdiction. Perhaps less obviously, but just as importantly, compliance with or evasion of legal requirements has impacts on bystanders. Advice on tax compliance, for example, will impact the ability of the state to fund its operations.²¹⁹

Law schools have historically been charged with communicating awareness of the peculiar importance of law to their students. This history of engaging with the public nature of legal governance provides a basis for carrying that awareness to the emerging legal occupations.

The legal academy also, at least in theory, has been engaged in this public purpose, with legal teaching and scholarship both impacting the quality of legal practice and judging, as well as the

²¹⁹ See CONFIDENCE GAMES, *supra* note 81.

development of legal doctrine. Going forward, the public purpose of the legal services academy must expand to include not just traditional lawyering but the emerging fields. Given that the other candidates for embracing training for the new fields are market oriented, the likelihood is that if law schools fail to link the new fields to the public purpose of law, the link may not be made.

b. The Opportunity to Be an Honest Broker Among the Legal Services Occupations

Building the new institutions on the base of law schools will also help make educational institutions neutral, honest brokers as the emerging occupations vie for regulatory protection or openness. Educational institutions tied to one occupation are vulnerable to being and seeming biased in terms of evaluating the overall public interest. Institutions with stakeholders in each camp are less prone to those problems. Indeed, they might even apply their skills to sorting out what protections really matter to the public and which delivery vehicles would be most efficient. Situated across camps, what once were law schools can help bridge the transition to a more multifaceted legal economy.

c. The Opportunity to Expand Efficiently Existing Legal Education Assets to the Emerging Fields

Law schools possess resources and institutional wisdom regarding the legal system not held by the business schools, undergraduate programs or for-profit institutions that might arise to serve the new fields if law schools do not. In some cases, students in the new fields could take seats next to law students, absorbing some legal doctrine and a bit of thinking like a lawyer. In other cases, students in the new fields could draw on existing faculty and existing facilities for courses tailored to their fields.

Positioned within research universities, law schools are also in a good position to borrow or obtain the kinds of expertise the new fields need that law schools may not now offer. Courses could be cross-taught with business faculty or social science faculty, for example, in order to offer an integrated program. Addressing the new fields would allow what have been law schools to leverage legacy assets to broader uses.

*d. The Opportunity to Provide a New Vision for Educating
Lawyers*

The Langdellian method of training lawyers staggers on like a zombie. One of the great curiosities of the modern American law school has been the uncanny resilience of an instructional method the weaknesses of which have long been widely recognized. As one particularly trenchant observer put it:

Since Langdell devised that curriculum, we have seen the decline of the common law on which the curriculum is based, the dominance of the regulatory government that the curriculum fails to acknowledge, the development of social science that the curriculum generally ignores, and the advent of new learning theories that the curriculum implicitly rejects. . . . [L]aw schools . . . soldier on, oblivious to these momentous changes in governance, knowledge, and pedagogy²²⁰

The persistence of the Langdellian model has not been for lack of thoughtful critiques and rational reform proposals. Thoughtful articles and books have been written; blue ribbon panels have come and gone. Nonetheless, like a zombie staggering on despite body blow after body blow, American law schools continue to lurch forward with a core educational vision that is readily recognized as Langdell's own.

Change theory explains why. If change is to come from within law schools, as opposed to coming from law schools being displaced by new competitors, change theory suggests that something more than rational critiques will be required. Within legacy organizations, rational critiques provide grounds for discussion, and often not much more. Change comes, on the other hand, when emotions are engaged in the service of a new vision. An organization that successfully sought to have hospitals change practices to reduce errors that led to needless mortalities did not just rely on statistics, for example; the organization put before a conference of hospital administrators a mother whose daughter

²²⁰ See LEGAL EDUCATION, *supra* note 25, at 200-01.

died due to an error that could have been avoided through adoption of the kinds of procedures being advocated.²²¹

Change theory also indicates that a clear vision of change needs to be articulated. Change has to be towards a specific target, not a vague goal. The goal needs to be defined in terms that provide not just a focus but a way to engage the mind and emotions. Visions that lead to a break from outmoded models involve several key characteristics:

First, they describe some activity or organization as it will be in the future, often the distant future. Second, they articulate a set of possibilities that is in the best interests of most people who have a stake in the situation: customers, stockholders, employees. . . . Third, effective visions are realistic. . . . Good visions are also clear enough to motivate action but flexible enough to allow initiative. . . . Finally, effective visions are easy to communicate.²²²

Clearly, reform visions that have presented themselves as continuations of the existing legal education model have failed to engage emotions or offer compelling, substitute visions. Law schools, tethered to an 1870 vision of what it means to train lawyers, will not do a good job of training lawyers for modern practice until they make a clean break to a new vision. Put differently, law schools will continue to train lawyers poorly until they stop thinking of themselves as schools training people to parse doctrine.

That changes when the claim is made that a new kind of institution is being created. The vision for law schools that embrace the challenge would start with not being law schools, but being schools of broader, modern purpose embracing the wider fields of legal services. Once stakeholders, especially faculty, abandon the view that they are law schools, doing what law schools have always done, the possibility arises to define the new set of possibilities that works better for all stakeholders. With a touchstone of delivering the kinds of education and kinds of

²²¹ CHIP HEATH & DAN HEATH, SWITCH: HOW TO CHANGE THINGS WHEN CHANGE IS HARD 20 (2010). Anyone who has to ask what heart-rending story could be found for law schools has not been paying attention.

²²² JOHN P. KOTTER, LEADING CHANGE 71-72 (1996).

research that best fit the needs of a modern society, the vision provides a positive, worthwhile goal to work towards. The vision is achievable, clear enough in the general direction and nature of change, but flexible enough to be implemented in different ways by different schools.

Becoming a school for all the legal professions breaks the philosophical, ideological tie with Langdell's method, and substitutes a new vision based on meeting modern society's needs for a range of legal service providers. Because not only lawyers are involved, the antiquated and misleading version of "thinking like a lawyer" can be buried at long last. Only by burying the old conception and adopting a new vision can real change come to legal education, and that requires not mere tinkering but a broad reconception of what society needs in the way of legal services education.

CONCLUSION

The world of legal services has changed, creating new needs for society at large and for those who would join the broader categories of legal services occupations. Law schools are failing at training lawyers and not seriously attempting to help society meet its needs for trained providers of other types of legal services. Relaunching what have been law schools on a broader vision of being schools of the legal professions offers a better solution for society, potential students, and the institutions themselves.

Harvard claimed an enduring leadership position by being the first modern law school. As we enter an "end of lawyers" era with legal services fracturing into many overlapping fields and law practice itself undergoing fundamental change, some institution will claim a leadership position for the new era by being the first to create a new kind of school, a School for the Legal Professions. With the process of change in legal services already irreversibly underway, the question is not whether but who will claim leadership for the new era.

