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## **“Practicing Medicine and Studying Law”: How Medical Schools Used to Have the Same Problems We Do and What We Can Learn from Their Efforts to Solve Them**

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### **Cover Page Footnote**

The author thanks Professor Paula Lustbader for her encouragement to turn this talk into a written article. Thank you also to Texas Tech law students, Charles Blevins, '12, and, Kent Hansen, '13, for their very helpful research and cite-checking help. This article is dedicated with thanks for her example of exemplary teaching and scholarship to my mother, Barbara T. Bard, PhD, Professor Emeritus, Central Connecticut State University.

## **“Practicing Medicine and Studying Law”: How Medical Schools Used to Have the Same Problems We Do and What We Can Learn from Their Efforts to Solve Them**

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Jennifer S. Bard, JD, MPH<sup>1</sup>

### I. INTRODUCTION

Law schools in the United States are under tremendous pressure to do three things: produce lawyers ready to practice law, honestly inform prospective students about the jobs obtained by students in the past, and provide graduates with legal jobs with salaries sufficient to make the expense of law school worthwhile. Much of this criticism has been encapsulated in a series of articles in by a consumer affairs reporter for the *New York Times* leading to an editorial in that newspaper calling for change.<sup>2</sup> One of these is not within legal academe’s control; one could and

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<sup>2</sup> David Segal, *Is Law School a Losing Game*, N.Y. TIMES, Jan. 8, 2011, <http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all>; David Segal,

should be done immediately by making public information law schools already have; the third presents an exciting opportunity for transformative change. This article addresses the first directive by considering how to meet the challenge of helping legal education to make the changes necessary to prepare students for what they came for: to become practicing attorneys. It does so by looking at how medical education, which also had become mired in the past, has addressed the same the challenge while facing many, but not all of, the same constraints. It is far too easy for those who criticize legal education to suggest that it simply adopt the medical model. This is because the extended supervised apprenticeship which extends future doctors' education to five, seven, and even ten years after graduation from medical school has so far been made possible by the generous support of United States taxpayers. This article will also identify other features that fundamentally distinguish medical education from legal education, including the fact that there is no shortage of jobs waiting for the graduates of US medical schools. In fact, the shortage of US medical graduates is so severe that a quarter of all physicians practicing in the United States are graduates of foreign medical schools.<sup>3</sup> Moreover, despite the rise in the US population, the number of MD degrees granted every year has, until the

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*Law School Economics*, Ka-Ching, N.Y. TIMES, Jul 16, 2011, <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all>; David Segal, *After Law School, Associates Learn to be Lawyers*, N.Y. TIMES, Nov. 19, 2011, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all>; Editorial, *Legal Education Reform*, N.Y. Times, Nov. 25, 2011, <http://www.nytimes.com/2011/11/26/opinion/legal-education-reform.html>.  
<sup>3</sup> Educ. Comm'n for Foreign Med. Graduates, *Overview*, <http://www.ecfmg.org/about/index.html> (last visited Dec. 26, 2011) (“International medical graduates (IMGs) comprise one-quarter of the U.S. physician workforce.”).

very recent opening of several new medical schools, remained steady.<sup>4</sup> While it is certainly true as of the writing of this article (in the summer and fall of 2011) that a national economic downturn has left many recent law graduates saddled with crushing student loans and bleak job prospects, this phenomena is unrelated to the actual content of the law school curriculum. As I will discuss, this is because there is, so far, no evidence to suggest that the employment prospects of a law school graduate have any relationship to whether or not he or she acquired practice skills while in law school. Linking the two (employability and acquisition of practice skills) is an unfortunate case of mistaking correlation with causation. In fact, someone paying close attention to the data would conclude the opposite: that students graduating from schools doing the best job of producing practice-ready attorneys are far less likely to find high-paying legal employment than those who are equally well-known for doing the opposite. As this article will discuss, this perhaps counterintuitive reality is based on standards of prestige and status that are not shared with medical schools and must be addressed directly if there is going to be change.

The fact that lawyers are facing the toughest job market in recent history has focused attention on law school curriculum, but the movement to make change greatly precedes the current economic downturn.<sup>5</sup> Instead, the current efforts to add skills training are in direct response to the American

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<sup>4</sup> Kevin B. O'Reilly, *New Medical Schools Open, but Physician Shortage Concerns Persist*, AMEDNEWS.COM (March 29, 2010), <http://www.ama-assn.org/amednews/2010/03/29/prl20329.htm>.

<sup>5</sup> See generally NAT'L ASS'N FOR L. PLACEMENT, EMPLOYMENT FOR THE CLASS OF 2010—SELECTED FINDINGS: CLASS OF 2010 GRADUATES FACED WORST JOB MARKET SINCE MID-1990S: LONGSTANDING EMPLOYMENT PATTERNS INTERRUPTED 1 (2011), available at <http://www.nalp.org/uploads/Classof2010SelectedFindings.pdf> ("Standing at 87.6%, the overall employment rate for new law school graduates is the lowest it has been since 1996, when the rate stood at 87.4%.").

Bar Association's amendment of its standards for review to mandate that every student be required to have skills training beyond the first year.

Both medical schools and law schools operate under the supervision of many different, and often overlapping oversight entities. Each individual state has the authority to set the standards for licensures for both doctors and lawyers. For most states, one of the requirements for licensure is graduation from an accredited school. States, however, usually do not accredit schools directly. Instead, they borrow from the work done by the federal government in order to review a school's eligibility to participate in federal funding programs, such as those providing for student loans, as authorized by the Higher Education Act of 1964 (as amended). In turn, the federal government transfers its authority to private accrediting agencies, so long as they meet specific standards.<sup>6</sup> For law schools, the federal government has delegated its accrediting authority to a private entity, the American Bar Association (ABA). It is the ABA, through its Council on Legal Education and Admission to the Bar, which drafts the standards by which law schools must shape their curricula. The ABA recently amended law school curricula in its recent amendment, Rule 302 of its Standards and Rules for Approval of Law Schools.<sup>7</sup> Its new requirement that all students must receive "legal skills training" beyond the traditional first year legal

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<sup>6</sup> As the authorizing regulation explains, "[t]he Secretary recognizes accrediting agencies to ensure that these agencies are, for the purposes of the Higher Education Act of 1965, as amended (HEA), or for other Federal purposes, reliable authorities regarding the quality of education or training offered by the institutions or programs they accredit." 34 C.F.R. § 602.1 (1999), *available at* WL 34 CFR s 602.1.

<sup>7</sup> See A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., 2011–2012 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 20, *available at* [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2011\\_2012\\_standards\\_and\\_rules\\_for\\_web.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_standards_and_rules_for_web.authcheckdam.pdf).

research and writing requirements has triggered the renewed interest in comprehensive skills training.<sup>8</sup> The addition of a requirement that all students receive skills training after their first year has encouraged law schools facing evaluation to review their curricula and has generated conversations among faculty within their own schools, on listservs, and at professional conferences. Often at some point during these conversations, someone will mention the "medical school model" of skills training under the assumption that medical schools have a long-and-developed tradition of teaching skills to their students. This is not true.

Part of the reason why a facile suggestion that law schools be more like medicals is not particularly helpful is based on a general misperception that medical schools have traditionally taught practice skills. This is not true. Just as law schools have traditionally been viewed as places of scholarship and research, not as trade schools, medical schools too have eschewed practice skills for an emphasis on the science of medicine. Just as law schools assumed that students would learn practice skills when they began practice, medical schools assumed that students would pick up practical skills during their last two years of medical school in clinical rotations, or during post-graduate supervised residencies working in hospital wards.<sup>9</sup> It is

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<sup>8</sup> See *id.* For an overview of the accreditation process, see generally A.B.A. SEC. OF L. EDUC. & ADMISSIONS TO THE B., THE LAW SCHOOL ACCREDITATION PROCESS, 2010-2011 (2010), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2010\\_ab\\_a\\_accreditation\\_brochure.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2010_ab_a_accreditation_brochure.authcheckdam.pdf) (providing an overview of the law school accreditation process).

<sup>9</sup> See Howard Wasserman, *Legal Education v. Medical Education*, PRAWFSBLOG.COM (May 1, 2010), <http://prawfsblawg.blogs.com/prawfsblawg/2010/05/legal-education-v-medical-education.html> ("[T]he transition from the medical school classroom to independent professional practice is seen and understood as a multi-year progression, encompassing third year and fourth year rotations and an extended period of internship (now typically part of residency) and residency. No one expects a new medical school graduate to have a full set of skills; that is what residency is for. Residents learn on their

only within the last ten years that medical academics have reconsidered this practice and have only recently begun developing curricula containing direct skill instruction.<sup>10</sup> This article first addresses the myth that medical schools have a tradition of teaching skills, but, more usefully, it looks at how medical schools have changed their curricula. Like law schools, they also face pressure from the public for more highly skilled practitioners in addition to pressure from their respective accrediting agencies. This article also considers how law schools have come to consider skills training as a secondary activity, and how its low status in the curriculum is demonstrated by its delegation to low-status, secondary faculty members, the majority of whom are women. These faculty members generally teach a first-year course intended to cover the full range of lawyering skills: research, writing, and analysis, negotiation, client counseling, and oral advocacy.<sup>11</sup> Until these latest changes to Rule 301 of Standards and Rules of Procedure for Approval of Law Schools went into effect, most law students were required to spend only three out of the eighty-three credits needed for graduation on

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patients. To put it very mildly, errors are known to happen in the process. Residents, while better paid now than was once the case, are understood to be learning in an apprenticeship model that continues in a clinical setting over an extended period, under continuing academic-type supervision of varying intensity and quality.”).

<sup>10</sup> *Id.* (“As a preface, I find the teaching of law students far more pedagogically effective, and more personally satisfying, than the teaching that occurs in the pre-clinical years at med schools. The focus on rote memorization, and the avoidance of much real engagement with critical thinking skills, in the pre-clinical medical curriculum, terrifies me. Fellow med school teachers typically read off power point slides to their largely sleeping (and ill-attended) classes, and exams are mostly multiple choice, focused on short-term recall of the slides. My efforts to introduce more interactive learning, including some use of Socratic style, enlivened some students but met a good deal of resistance from many others, including those who declined to attend class and relied on the semi-official course notes taken by a fellow student and distributed to the entire class.”).

<sup>11</sup> *See infra* note 181.

the actual skills required to be a practicing lawyer.<sup>12</sup> Although the ABA itself does not directly control law school curricula, it does control the standards for accreditation, and has authority from the US Department of Education and all fifty states to monitor law schools for compliance with those standards. For this reason, a change to one of the Rules for Approval has the authority of a mandate.

This article owes a considerable debt to the opportunity I had to speak at the Society of American Law Teachers (SALT) biannual teaching conference in December 2010.<sup>13</sup> It will show how medical schools faced the curricular challenge of moving direct skills training into the first four years of medical school, which they call "the Undergraduate Years," and what they are doing now to meet that challenge. In so doing, it builds and expands upon observations I made in a 2008 column for the *Journal of Law, Medicine and Ethics* based on my experience as a full-time faculty member at the University of Texas Medical Branch at Galveston's medical school

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<sup>12</sup> See A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., *supra* note 7, at 163.

<sup>13</sup> On December 9–12, 2010, the American Society of Law Teachers ("SALT") held its biannual conference in Honolulu, Hawaii. The title of the conference was "Teaching in a Transformative Era: The Law School of the Future," and it was my honor to give a presentation on a panel devoted to teaching skills within the legal curriculum. My co-panelists ably and expertly presented information on how skills training is currently marginalized in law schools in that it is taught by low status legal, writing, and research faculty rather than the more prestigious and scholarly doctrinal or casebook faculty. See Lorraine K. Bannai & Anne M. Enquist, Professors, Seattle Univ. Sch. of Law, The Evolving Status of Legal Writing Faculty: Distinctions with a Difference? (Dec. 10, 2010); Jennifer Bard, Professor, Tex. Tech Univ. Sch. of Law & Rosemary Dillon, Professor, Univ. of Denver Coll. of Law, Why Haven't Law Schools Integrated Legal Research, Writing, and Practice Programs into Their Curriculums and Does the Fact that these Programs are Staffed Primarily by Women Play a Role? (Dec. 10, 2010).

and as an adjunct faculty member at Texas Tech University's medical school.<sup>14</sup>

The goal of this article is to provide a useful framework for legal educators as they work to integrate direct skills training throughout the law school curriculum. In so doing, it not only gives examples of what medical schools are doing to teach skills, but it also examines how they developed these programs, and what about their efforts is useful in the context of legal academe.

The article will start with a brief overview of why skills training is lacking in legal education. Then, after a brief synopsis of the structure of medical education, it will discuss how medical schools came to the decision of providing direct skills training before students leave the classroom for full-time internships and residencies, and what actions they have taken to ensure that this occurs. Finally, the issue of increasing the amount of skills training provided is inseparable from the issue of who will be providing that training. In most law schools, that responsibility now falls on an underclass of untenured members of the faculty who are usually paid half the salary of the lowest-paid member of the tenure track faculty. The disparate treatment of this group, which is disproportionately composed of women, sheds additional light on the low status that skills have had in most US law schools. It is not possible to truly integrate skills training into the traditional law school curriculum without addressing the issue of the status of those who provide it.

Before embarking on this project, however, it is important for those advocating change in the legal curriculum to understand that while the task

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<sup>14</sup> See Jennifer S. Bard, *What We in Law Can Learn from Our Colleagues in Medicine About Teaching Students How to Practice Their Chosen Profession*, 36 J. L. MED. & ETHICS 841, 842 (2008).

facing medical educators was—and is—strikingly similar to that now faced by legal academe, there are important differences that must be understood before making effective use of their experiences.<sup>15</sup> Medical training is substantially subsidized by the federal government through the Medicare Program, which allows it the luxury of time not available in legal education.<sup>16</sup> Also, most medical school curricula are designed around one core value: patient care.<sup>17</sup> This means that any addition to, or subtraction from, the medical school curriculum is judged by the standard of whether it will make the students better doctors.

In discussing how medical education teaches skills, I am not suggesting that legal educators should, or could, adopt its methods wholesale. However, since medical education is so often cited as a model for legal education's efforts to improve skills instruction, it is important to understand the ways in which these two systems differ before legal educators can usefully borrow what is helpful to them. As a foundational starting point, it is important to understand that medical schools have much more time to achieve their curricular goals because they receive direct federal assistance, which allows them to subsidize seven to ten years of supervised training, while law schools rely solely on three years of education financed by tuition and institutional endowments.

But the amount of time available is not a complete explanation for the curricular differences. Rather, the fundamental philosophical difference underlying the two curricula is that law schools see themselves as places where students come to learn the law—not to represent clients. Medical schools, on the other hand, see themselves as places to train physicians who

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<sup>15</sup> See *id.* at 842–43.

<sup>16</sup> See *id.* at 843, 848.

<sup>17</sup> See *id.* at 846.

will someday take care of patients. Compare the mission statements of Yale Law School, my alma mater, with that of Yale Medical School. The law school does not find room for the word “client” in 170 words of text:

The primary educational purpose of Yale Law School is to train lawyers and to prepare its students for leadership positions in the public and private sectors both in the U.S. and globally. The primary scholarly role of Yale Law School is to encourage research in law and in interdisciplinary approaches to law and public policy. Throughout the school’s history, its teachers, students, and deans have taken a broad view of the role of law and lawyers in society. The school long has trained lawyers for public service and teaching as well as for private practice. Our students are expected to advance our knowledge and understanding of the law, to expand the reach of the law, and to inculcate knowledge about the central role that the rule of law plays in a free society. The professional orientation of the Law School is deeply enriched by an intellectual environment that embraces a wide variety of intellectual currents and is designed to produce lawyers who are creative, sensitive, and open to new ideas.<sup>18</sup>

While Yale Medical School does not put patient care first, it is at least present:

As a preeminent academic medical center that supports the highest-quality education, research, and patient care, the Yale School of Medicine will (1) educate and inspire scholars and future leaders who will advance the practice of medicine and the biomedical sciences; (2) advance medical knowledge to sustain and improve health and to alleviate suffering caused by illness and

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<sup>18</sup> *Mission Statements of the Schools of Yale University*, YALE UNIV. 3, <http://www.yale.edu/about/yale-school-mission-statements.pdf> (last visited Oct. 25, 2011).

disease; and **(3) provide outstanding care and service for patients in a compassionate and respectful manner.**<sup>19</sup>

These fundamental differences make it much harder for law schools to fully integrate skills training within the existing curriculum, and it is not this article's intent to minimize or evade the difficulty of this task.

## II. WHY LAW SCHOOLS NEED TO CARE ABOUT SKILLS TRAINING

There are at least two major forces governing the curricula of law schools in the United States. The first is the individual states, which, for the most part, require that attorneys attend an accredited law school in order to be eligible for licensure. The second force is the ABA, to which all fifty states delegate their authority to accredit law schools. The US Department of Education has delegated its authority to accredit institutions that are eligible to receive federal funding to a committee of the ABA Section of Legal Education and Admissions to the Bar. The ABA fulfills this responsibility by establishing criteria for accreditation.<sup>20</sup> These criteria are enforced through site visits conducted every six years by representatives of the ABA and the American Association of Law Schools (AALS).<sup>21</sup> The ABA now

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<sup>19</sup> *Id.* (emphasis added). Many law schools do put the representation of clients in their mission statements although not always first. See *About UF Law*, UNIV. OF FLA. LEVIN C. OF L., <http://www.law.ufl.edu/about/mission.shtml> (last visited Oct. 25, 2011) ("The mission of the University of Florida Fredric G. Levin College of Law is to achieve excellence in educating professionals, advancing legal scholarship, serving the public, and fostering justice. We aspire to prepare lawyers to serve their clients, the justice system, and the public with a high level of accomplishment and a commitment to the highest ideals of the legal profession."). In the future, I hope to complete an empirical study of law school mission statements compared with medical school mission statements. I am currently conducting an empirical study analyzing both medical and law school mission statements.

<sup>20</sup> *Id.*

<sup>21</sup> Ass'n of American Law Schs., *Bylaws and Executive Committee Regulations Pertaining to the Requirements of Membership*,

requires that every student receive “skills education.”<sup>22</sup> This requirement was first reflected in a 2005 modification of Rule 302, which stipulates that law schools integrate skills training.<sup>23</sup> This mandate has not come

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[http://www.aals.org/about\\_handbook\\_requirements.php](http://www.aals.org/about_handbook_requirements.php) (last visited Dec. 26, 2011) [hereinafter AALS Bylaws] (“Bylaw Section 6-1. Core Values:

a. The obligations of membership imposed by this Article and the Executive Committee Regulations are intended to reflect the Association's core values and distinctive role as a membership association, while according appropriate respect for the autonomy of its member schools.

b. The Association values and expects its member schools to value:

(i) a faculty composed primarily of full-time teachers/scholars who constitute a self-governing intellectual community engaged in the creation and dissemination of knowledge about law, legal processes, and legal systems, and who are devoted to fostering justice and public service in the legal community;

(ii) Scholarship, academic freedom, and diversity of viewpoints;

(iii) a rigorous academic program built upon strong teaching in the context of a dynamic curriculum that is both broad and deep;

(iv) a diverse faculty and staff hired, promoted, and retained based on meeting and supporting high standards of teaching and scholarship and in accordance with principles of non-discrimination; and

(v) selection of students based upon intellectual ability and personal potential for success in the study and practice of law, through a fair and non-discriminatory process designed to produce a diverse student body and a broadly representative legal profession.”).

<sup>22</sup> See A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., *supra* note 7, at 20. ABA Standard for Accreditation (the “Standard” or “Standard 302”) has long urged that law schools provide instruction not just in the theory of the law, but also in how it is actually practiced. See Susan Hanley Duncan, *The New Accreditation Standards are Coming to a Law School Near You— What You Need To Know About Learning Outcomes & Assessment*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 605, 618 (2010).

<sup>23</sup> See ERIC B. EASTON ET AL., SOURCEBOOK ON LEGAL WRITING PROGRAMS 221 (Eric B. Easton ed., 2d ed. 2006). Rule 302 is comprehensive in its description of the curriculum, stating that: “(a) A law school shall require that each student receive substantial instruction in: (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession; (2) legal analysis and reasoning, legal research, problem solving, and oral communication; (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year; (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal

unexpectedly but rather builds upon longstanding and increasingly vigorous criticism by those both inside and outside of the legal profession. Critics argue that students who graduate from traditional three-year programs, while capable of passing the bar exams required by individual states for licensure, lack the ability to represent clients effectively.<sup>24</sup> As one commentator summed up the situation, "in 2007, two surveys of law teaching in the United States, *Educating Lawyers*<sup>25</sup> and *Best Practices for Legal Education*<sup>26</sup> found that law schools often fail to teach the skills necessary for the competent, ethical practice of law."<sup>27</sup>

In response to the new Rule 302, every law school has had to evaluate its curriculum and consider how it can modify current courses, or add new ones, in order to meet ABA requirements.<sup>28</sup> The rule is deliberately broad and gives no directives on how law schools are to achieve this goal. Law schools have to care about skills training, both because the ABA is requiring them to and because many states are moving toward more skills-oriented bar exams. This shift reflects the decision of many jurisdictions to require the Multi-State Performance Test (MPT) developed by the National

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profession. . . ." A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., *supra* note 7, at 20.

<sup>24</sup> *See infra* note 33.

<sup>25</sup> *See generally* WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (John Wiley & Sons 2007) [hereinafter *CARNEGIE REPORT*] (reporting the findings of a two-year study of the teaching and learning in American and Canadian law schools).

<sup>26</sup> *See generally* ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (Clinical Legal Educ. Ass'n 2007) (urging a focus on practice skills and professional values in law schools).

<sup>27</sup> Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BALT. L. REV. 173, 173 (2010).

<sup>28</sup> *See generally* A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., *supra* note 7, at 20 (describing how law schools must evaluate their curriculum to meet the new Rule 302).

Council of Bar Examiners, which “consists of two [ninety-minute] skills questions covering legal analysis, fact analysis, problem solving, resolution of ethical dilemmas, organization and management of a lawyering task, and communication.”<sup>29</sup> Further reinforcing the need for skills training, thirty-five states<sup>30</sup> have already added a “skills” component to the bar exam via the MPT.<sup>31</sup> This idea has proven very popular with practitioners. Moreover, despite the ABA’s mandate, there is still considerable disagreement within

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<sup>29</sup> *The Multistate Performance Test (MPT)*, NAT’L CONF. OF B. EXAMINERS, <http://www.ncbex.org/multistate-tests/mpt/> (last visited Oct. 25, 2011). In an editorial advocating that the bar exam be made more difficult in order to discourage frivolous law suits, Jason Wesoky, a practicing attorney, suggests increasing the role of the MPT because “[t]he MPT presents a somewhat realistic scenario such as a new case file with basic facts and research and then asks the test taker to analyze the facts and law and draft a document based on that analysis. Sometimes, the written product is a will, sometimes it is a motion, and sometimes it is a contract. Regardless, this type of test actually tests the skills required to be a lawyer. Writing is one of the fundamental skills lawyers need. To become a good writer, you need to know how to properly analyze and organize the facts and law in your case.” Jason B. Wesoky, *Raising the Bar: Eliminate the Guess Work to Measure the Substance*, 38 COLO. LAW. 93, 96 (2009).

<sup>30</sup> See *MPT Jurisdictions*, NAT’L CONF. OF B. EXAMINERS, <http://www.ncbex.org/multistate-tests/mpt/mpt-faqs/jurisdictions> (last visited Nov. 21, 2011) (“The MPT is designed to test an examinee’s ability to use fundamental lawyering skills in a realistic situations. Each test evaluates an examinee’s ability to complete a task that a beginning lawyer should be able to accomplish. The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the examinee is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer’s notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client’s or a supervising attorney’s version of events may be incomplete or unreliable. Examinees are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.”); NAT’L CONF. OF B. EXAMINERS, 2012 MULTISTATE PERFORMANCE TEST INFORMATION BOOKLET 4 (2012), available at [http://www.ncbex.org/uploads/user\\_docrepos/MPT\\_IB\\_2012.pdf](http://www.ncbex.org/uploads/user_docrepos/MPT_IB_2012.pdf).

<sup>31</sup> See *The Multistate Performance Test (MPT)*, *supra* note 29.

legal academe about the value of providing skills training, what activities constitute "legal skills," how these skills should be taught, and who should teach them.<sup>32</sup>

The mandate that all law schools require skills training did not come as a surprise to those following developments in legal education. Starting with the MacCrate Report, law schools have been criticized for the disconnection between their curriculum and the practice of law.<sup>33</sup> In describing ten major changes in legal education since 1980, Professor Bill Hines, then president of the

AALS, explained the situation as follows:

Initially much of the law school world resisted or ignored most of the recommendations of the McCrate [sic] Report, but after a decade of considering them and confronting continued pressure from the bar on the accreditation process to implement them, there are few law schools today whose curricula do not strongly reflect their influence. The recent ABA report on curriculum changes between 1992 and 2002 notes that one pronounced trend has been the growth in opportunities for students to gain practical experiences in representing clients within supervised clinical settings and the proliferation of courses emphasizing discrete professional skills, such as factual investigation, interviewing, counseling, negotiation, mediation, and litigation—the core agenda of the McCrate [sic] Report.<sup>34</sup>

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<sup>32</sup> See AALS Bylaws, *supra* note 21.

<sup>33</sup> American Bar Ass'n, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (Robert MacCrate ed., West Publ'g 1992) ("MacCrate Report").

<sup>34</sup> N. William Hines, *Ten Major Changes in Legal Education Over the Past 25 Years*, ASS'N OF AM. L. SCH., [http://www.aals.org/services\\_newsletter\\_presNov05.php](http://www.aals.org/services_newsletter_presNov05.php) (last visited Oct. 25, 2011).

These criticisms were voiced with particular clarity by the prestigious Carnegie Foundation for the Advancement of Education, which issued its report in 2006. Roy Stuckey has translated the Carnegie Report's recommendations into a series of Best Practices.<sup>35</sup>

Many law schools have followed the guidance of the interpretation accompanying the ABA's Directive 302-3, including the direction to integrate skills in existing courses. This mandate builds on earlier ones to provide instruction in legal research and writing and to make available clinical programs. The first two formal skills instruction programs to become standard in American law schools were clinics providing direct representation to the public<sup>36</sup> and legal research and writing courses.

With a mindfulness of the need to integrate skills into the law school curriculum, this article next considers the manner in which medical schools confronted a similar mandate. Namely, fourth-year students faced the additional requirement of a skills test on the medical licensing exam in order to advance to post-graduate residencies.

### III. WHY WE SHOULD FIND OUT WHAT MEDICAL SCHOOLS ARE DOING

The pressure now on law schools to integrate skills training is similar to the pressures that were placed on medical schools when a "clinical skills" component was added to the United States Medical Licensing Examination (USLME) Step 2 licensing exam, requiring medical schools to add explicit

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<sup>35</sup> See STUCKEY ET AL., *supra* note 26.

<sup>36</sup> See J. P. "Sandy" Ogilvy, *Celebrating Clepr's 40<sup>th</sup> Anniversary: The Early Development Of Clinical Legal Education and Legal Ethics Instruction In U.S. Law Schools*, 16 CLINICAL L. REV. 1, 4 (2009); Rebecca Sandefur & Jeffrey Selbin, *CLEPR's 40<sup>th</sup> Anniversary: Papers and Speeches from the AALS-ABA-CLEA Celebration of CLEPR: The Clinic Effect*, 16 CLINICAL L. REV. 57, 57-58 (2009).

skills training to “undergraduate” training rather than rely on students learning these skills during their first clinical rotations.<sup>37</sup> Understanding the current state of clinical skills training in medical schools is important because medical schools faced, and still face, many of the same challenges that make this mandate so difficult to implement in law schools. Difficulties include a lack of a universally agreed upon set of skills that future doctors must possess, as well as a lack of methods for teaching these skills once identified.

Equally important, the move toward skill training could not have occurred were it not for an earlier round of curriculum changes that brought a more clinical, problem-solving focus to the first two years of undergraduate medical education. Medical schools are slightly ahead of law schools in that their accrediting agency and the overseers of the medical licensing exams have mandated that medical students possess professional skills before proceeding to treat patients without supervision. However, their experiences in developing curricula that reflect these mandates are quite relevant to what legal educators are doing now in law schools. By looking at the reasons leading to the incorporation of skills training in medical schools and their methods of implementation, we in law schools may be able to use their experiences to our advantage.

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<sup>37</sup> See United States Med. Licensing Examination, *What is USMLE?*, <http://www.usmle.org/> (last visited Dec. 26, 2011) (“The United States Medical Licensing Examination® (USMLE®) is a three-step examination for medical licensure in the United States and is sponsored by the Federation of State Medical Boards (FSMB) and the National Board of Medical Examiners® (NBME®).”).

*A. What Are the Major Differences between Legal and Medical Education?*

The most important difference between legal and medical education today is that medical education is based upon evidence found in scholarly literature about what does, and what does not, constitute effective teaching. As one medical educator explains in an article showing academics where they can find research about medical education, “[c]urriculum development in medical education is a scholarly process that integrates a content area with educational theory and methodology and evaluates its impact. When curriculum development follows a systematic approach, it easily fulfills criteria for scholarship and provides high-quality evidence of the impact of a faculty member’s educational efforts.”<sup>38</sup> In so doing, they are adopting contemporary best practices in education based on empirical research.<sup>39</sup> Very little, if any, of legal education is based on the findings from empirical research. Moreover, the research that exists has been focused on how students perceive law school, an important topic, but not about how specific interventions affect performance or learning.<sup>40</sup>

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<sup>38</sup> Patricia A. Thomas & David E. Kern, *Internet Resources for Curriculum Development in Medical Education*, 19 J. GEN. INTERNAL MED. 599, 599 (2004).

<sup>39</sup> See e.g., U.S. DEP’T OF EDUC. INST. OF EDUC. SCIS. NAT’L CENT. FOR EDUC. EVALUATION AND REG’L ASSISTANCE, IDENTIFYING AND IMPLEMENTING EDUCATIONAL PRACTICES SUPPORTED BY RIGOROUS EVIDENCE: A USER FRIENDLY GUIDE IV (Dec. 2003), <http://www2.ed.gov/rschstat/research/pubs/rigorousvid/rigorousvid.pdf> (making an explicit link between using the kind of research which guides medical practice to guide educational practice) (“Life and health in America has been profoundly improved over the past 50 years by the use of medical practices demonstrated effective in randomized controlled trials....Our hope is that this Guide, by enabling educational practitioners to draw effectively on rigorous evidence, can help spark similar evidence-driven progress in the field of education.”).

<sup>40</sup> See e.g., Carole Silver et al., *Unpacking the Apprenticeship of Professional Identity and Purpose: Insights from the Law School Survey of Student Engagement*, 17 J. LEGAL WRITING INST. 373 (2011), available at <http://www.journallegalwritinginstitute.org/archives/2011/17LegalWriting373-408.pdf>.

Commenting on a similar lack of research-based theory on how to best prepare law students for their future roles as professionals, a professor compares legal education to other forms of professional training by describing it as the "least integrated" with research and the most "under-theorized."<sup>41</sup> To some extent, medical educators have an advantage over legal educators in that they are trained in research methods and, therefore, they can conduct research themselves to evaluate their own programs. This is only a partial explanation, however, as to why there is so much more research devoted to medical teaching than to legal teaching. Primarily, the difference is accounted for by a direct commitment of almost every medical school to fund research by professional educators whose specialty is researching the effectiveness of teaching methods and then transmitting that information to the faculty.<sup>42</sup>

These research and teaching development offices are not reserved to a few elite medical schools, but have become standard additions to medical school faculties.<sup>43</sup> For example, the office at the University of Massachusetts Medical School explains: "[T]he goal of the Division of Curriculum and Faculty Development is to strengthen and expand curriculum and faculty development initiatives at the medical school and its clinical affiliates, supporting and advancing the school's educational

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<sup>41</sup> *Id.*

<sup>42</sup> Deborah Simpson & Brownell Anderson, Ass'n of American Med. Coll., *Education Scholarship: How do we define and acknowledge it?*, [https://www.aamc.org/members/gfa/faculty\\_vitae/148580/educational\\_scholarship.html](https://www.aamc.org/members/gfa/faculty_vitae/148580/educational_scholarship.html) (last visited Dec. 26, 2011).

<sup>43</sup> See e.g., Mount Sinai Sch. Med., *Institute for Medical Education*, <http://www.mssm.edu/education/institute-for-medical-education/resources> (last visited Dec. 26, 2011); Vanderbilt Univ. Sch. Med., *Academy for Excellence in Teaching*, <https://medschool.vanderbilt.edu/aet/> (last visited Dec. 26, 2011); UTMB Office of Clinical Educ., *Mission Statement*, <http://meded.utmb.edu/orme/default.htm> (last visited Dec. 26, 2011).

mission.”<sup>44</sup> Simply browsing these websites may be the most direct way of understanding the resources that medical schools devote towards teaching in a way that is still completely foreign to most, but not all, law schools.<sup>45</sup> Nothing law schools do compares to this focused and funded approach to providing a research base for developing and evaluating curriculum. Although there are many individual law professors interested in teaching, as demonstrated by sections on teaching in the AALS,<sup>46</sup> and at SALT’s bi-annual teaching conference,<sup>47</sup> as well as institutional programs at the Gonzaga University School of Law in Eastern Washington State and Washburn University School of Law in Topeka, Kansas,<sup>48</sup> there is as yet no commitment within legal education to fund the kind of research about legal education that goes on every day at most medical schools. Often this instruction on curriculum development occurs in the form of workshops that focus on how to use existing research to achieve individual curricular goals.<sup>49</sup>

The purpose of this article is primarily to provide those interested in legal education with information about how medical schools are approaching

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<sup>44</sup> *Curriculum and Faculty Development*, UNIV. OF MASS. MED. SCH., [http://www.umassmed.edu/ome/cur\\_fac\\_dev.aspx](http://www.umassmed.edu/ome/cur_fac_dev.aspx) (last visited Oct. 25, 2011).

<sup>45</sup> *See Faculty and Course Director Resources*, UNIV. OF PITTSBURGH MED. SCH., <http://www.omed.pitt.edu/faculty/> (last visited May 14, 2011).

<sup>46</sup> *See Section on Teaching Methods*, ASS’N OF AM. L. SCH., [https://memberaccess.aals.org/eweb/dynamicpage.aspx?webcode=ChpDetail&chp\\_cst\\_key=7f6a02b7-e5a2-4d18-bfcd-d464ad64e42b](https://memberaccess.aals.org/eweb/dynamicpage.aspx?webcode=ChpDetail&chp_cst_key=7f6a02b7-e5a2-4d18-bfcd-d464ad64e42b) (last visited Oct. 25, 2011).

<sup>47</sup> *See Conferences*, SOC’Y OF AM. TCHR., <http://www.saltlaw.org/contents/view/conferences> (last modified Aug. 12, 2011).

<sup>48</sup> *See Institute for Law Teaching and Learning: A Faculty Development Resource*, GONZ. UNIV. SCH. OF L., [http://www.law.gonzaga.edu/Centers-Programs/inst\\_law\\_teaching-learning.asp](http://www.law.gonzaga.edu/Centers-Programs/inst_law_teaching-learning.asp) (last visited Oct. 25, 2011).

<sup>49</sup> *See* David E. Kern et al., Soc’y of Gen. Internal Med., 32nd Annual Meeting of the Soc’y of Gen. Internal Med.: The Six-Step Approach to Curriculum Development (May 13, 2009), [http://www.sгим.org/userfiles/file/SC04\\_Kern\\_David\\_201191.pdf](http://www.sгим.org/userfiles/file/SC04_Kern_David_201191.pdf).

their mandate to teach skills. Yet, a brief overview of the significant differences between legal and medical education is necessary in order to provide context. One of the primary advantages medical schools have over law schools is the luxury of time. First, almost all medical schools provide four years of curriculum; the first two are spent in classroom settings, and the second two in clinical rotations in a hospital or doctor's office setting.<sup>50</sup> It is after graduation, however, that medical school training becomes significantly different from that of law school. All state medical licensing boards require at least one year of post-graduate training. Thus, medical schools often plan for five, seven, or sometimes ten years of training between the time when students enter school and when they embark on unsupervised private practice.<sup>51</sup>

An extensive review of graduate medical education, notwithstanding its merit as a desirable candidate for government support, is beyond the scope of this article. Still, it is important to understand why law schools cannot simply adopt a medical model of prolonged, intense practice-based supervision based not only on a four-year curriculum but also a seven-year comprehensive program. As a September 2011 White Paper by the National Health Policy Forum ("the White Paper") explains, "[a]greement is longstanding in the medical profession that undergraduate medical education is insufficient to prepare freshly minted MDs for hands-on, independent medical practice."<sup>52</sup> The current system of extended post-

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<sup>50</sup> See *FAQs & Resources: What is Medical School Like?*, ASPIRINGDOCS.ORG, [http://www.aspiringdocs.org/faqs/126198/what\\_is\\_medical\\_school\\_like/](http://www.aspiringdocs.org/faqs/126198/what_is_medical_school_like/) (last visited Oct. 4, 2011).

<sup>51</sup> See *State-Specific Requirements for Initial Medical Licensure*, FED'N OF ST. MED. BOARD, [http://www.fsmb.org/usmle\\_eliinitial.html](http://www.fsmb.org/usmle_eliinitial.html) (last updated June 2010).

<sup>52</sup> ROB CUNNINGHAM, *ALIGNING GRADUATE MEDICAL EDUCATION WITH PUBLIC POLICY 4* (Sept. 14, 2011), available at [http://www.nhpf.org/library/background-papers/BP82\\_GMEandPolicy\\_09-14-11.pdf](http://www.nhpf.org/library/background-papers/BP82_GMEandPolicy_09-14-11.pdf).

graduate, hospital-based training, commonly referred to as “residency” but called Graduate Medical Education (GME) within the world of US-based medical training, was developed based on this common understanding. Although ostensibly designed to provide specialized training beyond the standard skills necessary to practice in medicine, it has become the de facto standard for all medical school graduates who hope to practice in any kind of private setting to obtain admitting privileges in a hospital or to gain reimbursement from either federal or private health insurance.<sup>53</sup> The available statistics suggest that the vast majority of students graduating from U.S. medical schools seek and obtain residencies.<sup>54</sup> They also suggest that there are far more residencies available than there are graduates of U.S. medical schools to fill them.<sup>55</sup> This does not mean that every graduate of an American medical school who applied received a residency because students may well fail to be selected by highly competitive slots in desirable geographic areas and locations.<sup>56</sup> The White Paper reports that 94 percent of graduates of US medical schools started residencies upon graduation.<sup>57</sup>

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<sup>53</sup> MEDICARE PAYMENT ADVISORY COMM’N, MEDICARE PAYMENT POLICY VOLUME II: ANALYTICAL PAPERS, REPORT TO THE CONGRESS (March 1998). Essentially, the only physicians who would not have to complete a residency would be those working entirely within a public entity such as a prison or a military hospital and even there a physician who skipped residency entirely is an increasingly rare sight.

<sup>54</sup> Paul H. Rockey, American Med. Ass’n, *AMA Graduate Medical Education (GME) e-Letter*, <http://www.ama-assn.org/resources/doc/med-ed-products/gmee-04-2011.pdf>.

<sup>55</sup> NAT’L RESIDENCY MATCHING PROGRAM, RESULTS AND DATA 2011 MAIN RESIDENCY MATCH 15, <http://www.nrmp.org/data/resultsanddata2011.pdf> [hereinafter NAT’L RESIDENCY MATCHING PROGRAM RESULTS] (There were 26,158 residency slots available of which 17,607 were filled by graduates of American medical schools.).

<sup>56</sup> See Kelly Hayboer, *Fewer U.S. Medical Students Getting ‘Match Day’ Residencies*, NJ.COM (March 18, 2011), [http://www.nj.com/news/index.ssf/2011/03/fewer\\_us\\_medical\\_students\\_gett.html](http://www.nj.com/news/index.ssf/2011/03/fewer_us_medical_students_gett.html) (“U.S. medical students are facing growing competition for residencies from doctors trained at foreign medical schools. ... ‘Competition is tightening,’ said Mona Signer, the program’s executive director. ‘The growth in applicants is more than the increase in positions.’”);

This extended apprenticeship is funded through a combination of revenue directly from the hospitals that run the programs and, to a lesser extent, through direct government subsidy. It is a system little understood by the public and increasingly under critical examination by those concerned with rising health care costs. Moreover, the current system of taxpayer subsidized residencies and fellowships has become very expensive because while they rely on federal and state government subsidies, the programs operate largely outside of direct government control:

Accreditation and oversight of these graduate medical education (GME) programs rest largely with professional organizations, while financial management and decision-making about program size and specialties are the responsibility of hospitals and other program sponsors. Medicare and other government programs pay substantial subsidies for GME but exercises little control over professional standards or sponsors' decisions.<sup>58</sup>

Compiling statistics from many different sources, the White Paper concludes that government subsidies "reached \$9.5 billion in 2009, with another \$3.8 billion coming from [forty-one] state Medicaid programs, and an additional \$1 billion from the Veterans Health Administration."<sup>59</sup> While

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See also Michele McFarland, *The Glow of the Match*, HOPKINS MEDICINE, Spring-Summer 2008, <http://www.hopkinsmedicine.org/hmn/s08/annals.cfm> ("Each year, of course, a few medical students around the country don't match anywhere—mostly because their rankings haven't gelled with the hospitals they preferred. For them, the NRMP softens the blow by letting them know 48 hours prior to Match Day. They then become throwbacks to an earlier era—scrambling to find a slot just like their counterparts of 60 years ago. Invariably, they succeed.").

<sup>57</sup> See NAT'L RESIDENCY MATCHING PROGRAM RESULTS, *supra* note 55; ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., ACGME DATA RESOURCE BOOK ACADEMIC YEAR 2009–2010 (2010), available at [http://www.acgme.org/acwebsite/databook/2009-2010\\_ACGME\\_Data\\_Resource\\_Book.pdf](http://www.acgme.org/acwebsite/databook/2009-2010_ACGME_Data_Resource_Book.pdf).

<sup>58</sup> CUNNINGHAM, *supra* note 52, at 1.

<sup>59</sup> *Id.* at 3.

the majority of the funding for GME still comes from the hospitals themselves, it is doubtful that the system could exist at the levels it does without government subsidies:

Medicare may tip the balance between positive and negative margins for many teaching hospitals. Residents work for moderate stipends, and their labor can substitute for that of more highly paid physicians and nurses and can be used to help providers increase patient volume and revenue. In addition to payment add-ons (subsidies) from Medicare and Medicaid, teaching hospitals usually command higher reimbursement from private payers.<sup>60</sup>

It is also very likely that medical education will have to rethink its reliance on these subsidies because they are already under review as a source of revenue savings within the federal budget. A sub-committee of the GME reported recently that “[m]edicare reimbursement for Graduate Medical Education (GME)...is [a]mong the entitlement program elements being examined by the Super Committee [and] has been identified as an opportunity for spending reductions.”<sup>61</sup>

Although students graduate after four years with the degree of medical doctor, their education continues throughout their residency, which is overseen by the Accreditation Council for Graduate Medical Education

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<sup>60</sup> CUNNINGHAM, *supra* note 52, at 1.

<sup>61</sup> THOMAS J. NASCA ET AL., ACCREDITATION COUNCIL GRADUATE MED. EDUC., THE POTENTIAL IMPACT OF REDUCTION IN FEDERAL GME FUNDING IN THE UNITED STATES: A STUDY OF THE ESTIMATES OF DESIGNATED INSTITUTIONAL OFFICIALS (2011), <http://www.acgme.org/acWebsite/home/ImpactReductionFederalGMEFundingTJN.pdf> (“Indirect GME Reimbursement is not ”empirically justified” on the basis of current costs of teaching hospitals intended to be covered by that reimbursement.”).

(ACGME).<sup>62</sup> This extended, supervised training is possible because medical schools and the teaching hospitals associated with them receive substantial subsidies from the federal government through the Medicare and Medicaid Programs.<sup>63</sup> The Veteran's Administration also funds graduate medical training within its own system of hospitals.<sup>64</sup> Also, unlike law students who risk not finding professional employment at all, "[o]pportunities for individuals interested in becoming physicians and surgeons are expected to be very good. In addition to job openings from employment growth, openings will result from the need to replace the relatively high number of physicians and surgeons expected to retire over the 2008–18 decade."<sup>65</sup>

Another tremendous advantage that medical education has over legal education when it comes to changing the curriculum is that the settings in which recent medical school graduates work are highly structured. As a result, the quality measures of the work they do are usually well-defined. For example, after the first two years of school instruction, all medical

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<sup>62</sup> See *Medical Students: What every medical student needs to know about the ACGME*, ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., [http://www.acgme.org/acwebsite/medstudent/medst\\_faq.asp](http://www.acgme.org/acwebsite/medstudent/medst_faq.asp) (last visited Oct. 25, 2011).

<sup>63</sup> See Bard, *supra* note 14, at 843, 848; see also, *Direct Graduate Medical Education*, U.S. DEP'T OF HEALTH & HUM. SERVS. CTR. OF MEDICARE AND MEDICAID SERVICES, [https://www.cms.gov/AcuteInpatientPPS/06\\_dgme.asp#](https://www.cms.gov/AcuteInpatientPPS/06_dgme.asp#) (last visited May 5, 2011) (providing a current overview of how Medicare calculates its subsidy to hospitals for graduate medical education).

<sup>64</sup> See *VA Graduate Medical Education: GME Enhancement Initiative*, ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., [https://www.aamc.org/advocacy/budget/va/74964/va\\_gme.html](https://www.aamc.org/advocacy/budget/va/74964/va_gme.html) (last visited Oct. 25, 2011) ("[O]ver 30,000 medical residents and 20,000 medical students received some of their training in VA facilities each year. Accounting for approximately 9% of U.S. physician residents, VA supports over 9,500 physician [*sic*] in over 2,000 residency programs accredited in the name of its university or teaching hospital partners.").

<sup>65</sup> *Occupational Outlook Handbook, 2010-11 Edition: Physicians and Surgeons*, U.S. DEP'T OF LAB. BUREAU OF LAB. STAT., <http://www.bls.gov/oco/pdf/ocos074.pdf> (last modified Dec. 17, 2009).

students proceed to highly supervised rotations in hospital settings. There, their time is structured so that they have very specific pre-professional experiences and engage in many of the major tasks that will be expected of them as doctors. Even more importantly, upon graduation almost every student proceeds directly to another supervised round of training subsidized by the federal government through Residency with the Medicare Program. For at least three years following graduation, these new doctors practice under supervision and complete tasks that have significant objective measurements. In another example of how regulation can spur curricular innovation, changes made by the Accreditation Council for Graduate Medical Education Council, which oversees graduate medical education, are directly credited with an increase in both innovative program development and review of those programs through scholarly research.<sup>66</sup>

*B. What Does the Experience of Medical Education Have to Offer to Legal Education?*

The Carnegie Foundation's Report on the state of legal education in the twenty-first century suggests that law schools look to medical education for "some insight" into "how law might deal with its problem of integrating the cognitive, practical and professional" into a coherent curriculum.<sup>67</sup> This makes sense because law schools and medical schools share a similar mission of transmitting an extensive body of theoretical knowledge while, at the same time, preparing students in the methods they will need to utilize this knowledge when practicing their future profession.<sup>68</sup> Both also face the

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<sup>66</sup> See William T. Branch, Jr., & David E. Kern, *An Emerging Renaissance in Medical Education*, 19 J. GEN. INTERNAL MED. 606, 606–609 (2004), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1492332/>.

<sup>67</sup> CARNEGIE Report, *supra* note 25, at 81.

<sup>68</sup> See Bard, *supra* note 14, at 842.

challenge of protecting the safety and well-being of these students' future clients and patients who risk substantial harm at the hands of a beginner. The authors of the Carnegie Report were referring to the methods medical schools are using to teach skills, such as adopting "new curricula, extensive use of simulation to train clinical skills, and problem-based learning."<sup>69</sup> However, it is just as helpful for legal academics to understand the cultural change involved in bringing medical skills training to a portion of the curriculum that had, for nearly 100 years, been in the hands of research.<sup>70</sup>

*C. How is Medical Education Organized?*

In order to make effective use of the information provided in this article about medical schools, it is important to understand how medical education is organized. Medical training in the United States is divided into a series of discrete units through which students advance by passing successive national licensing exams. After graduating from four years of college, students enroll in four years of medical school, which is usually described as "undergraduate" medical education.<sup>71</sup> Undergraduate medical education is further divided into the first two years, in which students learn basic medical science, and the second two years that are entirely spent rotating through medical hospitals under the supervision of practicing physicians associated with the medical school. Upon graduation from medical school, students take licensing exams in the states where they wish to practice, and they then embark on three to six years of further training in a hospital setting under the direct supervision of more senior physicians. It is somewhat confusing for those in other areas of academe that these

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<sup>69</sup> CARNEGIE REPORT, *supra* note 25, at 94.

<sup>70</sup> *See* Bard, *supra* note 14, at 847.

<sup>71</sup> *See id.* at 843–45.

physicians who supervise residents are described as medical school “faculty” even though they do not teach regularly scheduled courses.

The Liaison Committee on Medical Education (LCME), which the US Department of Education has designated as the sole accrediting agency of all programs in the United States granting a Medical Doctor (MD) degree, oversees the curriculum for undergraduate medical education.<sup>72</sup> LCME is a joint project of the AAMC and the Council on Medical Education of the American Medical Association (AMA).<sup>73</sup> LCME publishes standards for accreditation. The LCME also makes regular visits to monitor medical schools, where teams of educators and physicians go to the schools and assess the curriculum and the facility.<sup>74</sup> Although LCME does not mandate a specific curriculum, it does require that curricula meet the standards it sets.<sup>75</sup>

In broad outline, the LCME directs that the curriculum of undergraduate medical programs “must incorporate the fundamental principles of medicine and its underlying scientific concepts; allow medical students to acquire skills of critical judgment based on evidence and experience; and develop medical students’ ability to use principles and skills wisely in solving problems of health and disease.”<sup>76</sup> It was the LCME’s concern about how medical schools were achieving this third goal that sparked the curricular changes we see today.

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<sup>72</sup> See *Overview: Accreditation and the LCME*, LIAISON COMMITTEE ON MED. EDUC., <http://www.lcme.org/overview.htm> (last visited Oct. 25, 2011).

<sup>73</sup> See *id.*

<sup>74</sup> *Id.*

<sup>75</sup> See LIAISON COMM. ON MED. EDUC., FUNCTIONS AND STRUCTURE OF A MEDICAL SCHOOL: STANDARDS FOR ACCREDITATION OF MEDICAL EDUCATION PROGRAMS LEADING TO THE M.D. DEGREE I (2010), available at <http://www.lcme.org/functions2010jun.pdf> [hereinafter STANDARDS].

<sup>76</sup> *Id.* at 7.

*D. What Role Has Skills Training Played in the Medical School Curriculum?*

Although it may appear that medical school training is highly skills-oriented, that does not mean direct instruction was always integrated into the curriculum.<sup>77</sup> Responding to concerns that medical students were lacking the skills they needed as they moved through their training, the AAMC convened a panel of experts into a task force to review the situation. In 2005, the task force issued an influential report on the status of pre-clinical (years one and two) medical education, which has resulted in the drafting of new standards for accreditation that more directly addresses skills training.<sup>78</sup> The detail in which it sets out what medical schools “must” and “should” do in order to be accredited represents another substantial difference between law schools and medical schools.<sup>79</sup> The report provides twenty-seven pages of standards that cover every aspect of medical training. For example, “[t]he curriculum of a medical education program must include specific instruction in communication skills as they relate to physician responsibilities, including communication with patients and their families, colleagues, and other health professionals.”<sup>80</sup> In comparison, the ABA standards are quite general and make no mention of any particular subject or skill that a law school “must” offer.<sup>81</sup> In response, the report sets

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<sup>77</sup> Carol Cohen, *Margaret Edson's Wit—An Audience Guide*, S. METHODIST UNIV., <http://faculty.smu.edu/tmayo/witguide.htm> (last visited Oct. 25, 2011).

<sup>78</sup> See STANDARDS, *supra* note 75.

<sup>79</sup> See Standards, *supra* note 75 at 1 (“To achieve and maintain accreditation, a medical education program leading to the M.D. degree in the U.S. and Canada must meet the standards contained in this document.”).

<sup>80</sup> *Id.* at 10.

<sup>81</sup> Compare American Bar Ass’n Standards for Approval of Law Schs., *Standard 302, Curriculum* (2011-12) (“(a) A law school shall require that each student receive substantial instruction in: (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession; (2) legal analysis and

out best practices for medical schools to follow in teaching skills during the first two years. But before doing so, it acknowledged that this represented a significant change:

[U]ndergraduate medical education is traditionally dependent upon successful performance on written examinations which evaluate knowledge and clinical reasoning skills. In practice, however, clinical expertise is reflected in the quality of patient care provided by the physician. This depends not only upon the physician having biomedical understanding, but also upon their ability to actually apply this understanding effectively in the care of the patient. The student physician must be encouraged to make this important transition in their learning motivation at the outset of their professional career.<sup>82</sup>

Describing its mission, the task force wrote:

The teaching of clinical skills has been assumed to occupy a central position in the curriculum of undergraduate medical education for generations. Axiomatic to the development of the practicing physician are the skills of interviewing a patient, performing and interpreting the results of a physical examination, and using this information to determine whether further investigations are required to make a diagnosis. Yet there has been increasing concern expressed both in Canada and in the United

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reasoning, legal research, problem solving, and oral communication; (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year; (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.”).

<sup>82</sup> TASK FORCE ON THE PRECLERKSHIP CLINICAL SKILLS EDUC. OF MED. STUDENTS, RECOMMENDATIONS FOR CLINICAL SKILLS CURRICULA FOR UNDERGRADUATE MEDICAL EDUCATION, ASS’N OF AM. MED. COLL. 7 (2008), *available at* [https://www.aamc.org/download/130608/data/clinicalskills\\_oct09.qxd.pdf](https://www.aamc.org/download/130608/data/clinicalskills_oct09.qxd.pdf) [hereinafter TASK FORCE].

States that the teaching of both communication skills and physical examination skills has not received the emphasis in undergraduate medical school curricula that it deserves.<sup>83</sup>

In 2008 the task force issued its report and made eight specific recommendations for improving and standardizing skills training.<sup>84</sup> What is particularly interesting to those trying to integrate skills into the legal curriculum is that the report did not just list what skills should be taught, but also how and when to teach those skills. Directly referencing learning theory, the task force wrote:

Clinical skill mastery is developmental. To this end, clinical skills education best occurs as an integrated and longitudinal educational process. As the student is exposed to an incrementally challenging skills curriculum, he or she has an opportunity to progressively master that set of skills as the foundation for further undergraduate and postgraduate training.<sup>85</sup>

In so doing, however, the task force acknowledged that "it is important to note that currently, there is no nationally agreed upon consensus regarding the design and content of an optimal preclerkship clinical skills curriculum."<sup>86</sup> It concluded that "[e]ach school should choose the methods by which they will teach and assess these objectives."<sup>87</sup>

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<sup>83</sup> *AFMC National Clinical Skills Working Group Evidence-Based Clinical Skills Document: Introduction*, THE ASS'N OF FACULTIES OF MED. OF CAN., <http://clinicalskills.machealth.ca/index.php/content/intro> (last visited Oct. 19, 2011) [hereinafter *AFMC*].

<sup>84</sup> See TASK FORCE, *supra* note 82, at 7–15.

<sup>85</sup> *Id.* at 3.

<sup>86</sup> *Id.* "Pre-Clerkship" here refers to the first two years of medical school. Unfortunately for those who seek to study medical education, there is no universally-agreed-upon vocabulary to describe the various components of a medical school education. The first four years are collectively called "undergraduate" education in contrast to residencies, which occur following graduation. The first two years of undergraduate education is sometimes referred to as "pre-clerkship" to distinguish the third and fourth year

### 1. Pressure from the Licensing Board

Both medical schools and law schools must develop their curricula with an awareness of not only the skills their students will need to practice their chosen profession, but also the licensing exam that their students must pass. Both doctors and lawyers are licensed according to the requirements of the state in which they will practice. Licensing professionals is a particular power of the state, as opposed to the federal government. When it comes to licensing professionals, states delegate their power back to the profession itself by allowing the formation of medical boards, which then establishes procedures both for licensing new practitioners and for overseeing the fitness of those already in practice.<sup>88</sup>

Because the body of knowledge required to practice medicine is far more standardized than that to practice law (all humans have the same biology but not every state has the same laws), every state has adopted the testing scheme administered by the Graduate Medical Council as one of the requirements for licensure.<sup>89</sup> Not every lawyer or doctor practicing in the United States is a graduate of an accredited school. This is especially true of doctors who have studied in other countries. All states, however, have a process by which graduates of non-accredited medical schools can take a special qualifying exam. Lawyers who graduate from unaccredited or

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undergraduate rotations through various hospital departments to the actual practice of medicine, which occurs after graduation during a residency.

<sup>87</sup> *Id.* at 19.

<sup>88</sup> See generally Michael S. Young & Rachel K. Alexander, *Recognizing The Nature of American Medical Practice: An Argument For Adopting Federal Medical Licensure*, 13 DEPAUL J. OF HEALTH CARE L. 145 (2011) (explaining the current system of state delegation of power to boards of professionals and proposing alternatives).

<sup>89</sup> See U.S. MED. LICENSING EXAMINATION, 2012 BULLETIN OF INFORMATION 1 (2012), available at <http://www.usmle.org/pdfs/bulletin/2012bulletin.pdf>.

foreign law schools have fewer options.<sup>90</sup> A few states allow lawyers to practice who have not graduated from an accredited US law school, whether foreign or in the United States.<sup>91</sup> But students graduating from an unaccredited or foreign law school run the risk of severely limited employment options.<sup>92</sup> Traditionally, graduates of unaccredited law schools were either foreigners or students who could not afford to enroll or otherwise meet admissions standards of an accredited school. However, this paradigm is changing as more students choose online distance learning for both graduate and undergraduate degrees. As of the writing of this article, no completely online law school has received ABA accreditation.<sup>93</sup>

Unlike law schools, which impose one licensing exam at the end of a student's legal education, the exams leading to licensure in medicine are administered in three stages. After the first two years of medical school students must pass the "Step 1" exam, which focuses heavily on the science of medicine.<sup>94</sup> For many years, the need to pass this exam was a barrier to

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<sup>90</sup> See Eric T. Cooperstein, *Opening the Door (Slightly) for Grads of Unaccredited Law Schools*, L. OFF. OF ETC (Aug. 24, 2010), <http://ethicsmaven.com/2010/08/opening-the-door-slightly-for-grads-of-unaccredited-law-schools/>.

<sup>91</sup> *Id.*

<sup>92</sup> See *id.* For an example of a state's rules on admission for graduates of unaccredited law schools, see *Rule 203: Admission of Graduates of Accredited and Unaccredited Institutions*, PA. BD. OF L. EXAM'RS, [http://www.pabarexam.org/bar\\_admission\\_rules/203.htm](http://www.pabarexam.org/bar_admission_rules/203.htm) (last updated Oct. 22, 2011).

<sup>93</sup> See Brian Burnsed, *Online Law Schools Have Yet to Pass the Bar*, U.S. NEWS, Mar. 23, 2011, <http://www.usnews.com/education/online-education/articles/2011/03/23/online-law-schools-have-yet-to-pass-the-bar>.

<sup>94</sup> See U.S. MED. LICENSING EXAMINATION, *supra* note 89, at 2 ("Step 1 assesses whether you understand and can apply important concepts of the sciences basic to the practice of medicine, with special emphasis on principles and mechanisms underlying health, disease, and modes of therapy. Step 1 ensures mastery of not only the sciences that provide a foundation for the safe and competent practice of medicine in the present, but also the scientific principles required for the maintenance of competence through lifelong learning.").

those who wanted to alter the medical school curriculum to incorporate more skills. However, the addition of a clinical skills section of the USMLE “Step 2” exam meant it was no longer possible to rely on skills being acquired in the course of residency.<sup>95</sup> All medical schools have now adopted direct skills instruction.<sup>96</sup> There is reason to believe that were the amount of basic science tested in Step 1 reduced, medical schools would increase clinical skills training further. The amount of basic science taught now is directly related to its being “[a] requirement for the accreditation of the medical school. A solid basic science core enables students to perform well at the first examination hurdle (USMLE Step 1) and may enhance the academic reputation of the medical school.”<sup>97</sup>

Another reason for change was the growing gap between medical researchers and physicians. Medical research may have begun with the curiosity of practicing physicians but is now almost exclusively the realm of full-time scientists.<sup>98</sup> The separation between practicing physicians and medical researchers has happened gradually. The first sign of the divide was

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<sup>95</sup> *Id.*

<sup>96</sup> There is also an active market for review courses like Clinical Skills Review which provides a “Prep Till You Pass” guarantee that will enhance the learning and offer medical candidates a greater chance of passing their exam. *Step 2 CS (CSR): Purchase Our Subscription Plans*, STEP 2 CLINICAL SKILLS REV.: USMLE TEST PREPARATION SERV., <http://step2cs.net/purchase.htm> (last visited Oct. 20, 2011) (“If you subscribed to one of [their recommended programs] and completed the review of all the encounters and still for any reason do not pass your exam, then we will re-enroll you in our program again at no charge. This guarantee is in effect for a full year from the time you sign up for your first (paid) subscription.”).

<sup>97</sup> Stephanie Wragg, *Teaching in Basic Sciences*, in THE MCG MED. TCHR. HANDBOOK 15 (Janis A. Work ed., 2009), available at <http://www.apreso.mcg.edu/Video/2006/MedicalTeacherHandbook/Handbook.pdf>.

<sup>98</sup> See Alan R. Teo, *The Development of Clinical Research Training: Past History and Current Trends in the United States*, 84 ACAD. MED. 433, 433–34 (2009), available at <http://www.icre.pitt.edu/newsletter/archive/fall2009/documents/Teo%20History%20of%20clin%20research%20training%20Academic%20Medicine%202009.pdf>.

the growing tendency for researchers to become medical doctors as well as PhDs in a science like biochemistry.<sup>99</sup> The growing prominence of the MD/PhD researcher has been fueled by generous funding from the Howard Hughes Medical Institute, which has provided full-tuition scholarship for students who elect the (often) eight-year training process of acquiring both degrees.<sup>100</sup> This combined training reflects the already-growing complexity of medical research, which has become increasingly focused on genetics and molecular structure. Medical research has simply become too complex for a part-time job.

One consequence is that the current structure of medical academe is based on the "triple-threat": a successful, funded person who is researcher, practitioner, and teacher. This model, however, no longer works.<sup>101</sup> This is

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<sup>99</sup> See *MD-PhD Dual Degree Training*, ASS'N AM. MED. COLL., [https://www.aamc.org/students/considering/exploring\\_medical/research/mdphd/](https://www.aamc.org/students/considering/exploring_medical/research/mdphd/) (last visited Oct. 20, 2011).

<sup>100</sup> See *Tomorrow's Doctors, Tomorrow's Cures, Financial Support for MD-PhD Trainees*, ASS'N AM. MED. COLL., [https://www.aamc.org/students/considering/exploring\\_medical/research/mdphd/financial\\_md-phd/](https://www.aamc.org/students/considering/exploring_medical/research/mdphd/financial_md-phd/) (last visited Oct. 20, 2011) ("Although most MD-PhD programs offer substantial support for their students, there are additional resources available for supporting MD-PhD trainees. Most take the form of competitive applications submitted by the trainee and their research mentor. These include fellowships from private sources and from a number of NIH institutions as F30/31 NRSA pre-doctoral fellowships.").

<sup>101</sup> For an account of the decline in popularity of traditional academic medicine as a career path, see generally Mallory O. Johnson et al., *An Innovative Program to Train Health Sciences Researchers to be Effective Clinical and Translational-Research Mentors*, 85 ACAD. MED. 484 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2856696/> ("The cause of these trends is varied and includes the lure of salaries offered by clinical practice and industry that are higher than those available to individuals pursuing academic careers; greater administrative demands associated with an academic research career; a reduction in funding available for research; the demands that an academic research career places on work-life balance; and the lack of well-trained and well-supported mentors in academia.").

not necessarily a bad thing. The play *Wit*, and the movie adapted from it, takes as one of its main characters a young medical researcher who sees his patient only as a means to study the effects of new chemotherapies, not as a person with cancer in need of treatment for unbearably painful side effects.<sup>102</sup> The audience is left after her death with the clear understanding that it would be a service to humanity if the researcher were allowed to spend all his time on research while someone else interested in patient care took over the practice of medicine. Instead of expecting one person to do it all, it is easy to recognize a need for individual direction and specialization.

## 2. Who Teaches Skills in a Medical School?

Medical schools face a challenge in finding effective skills teachers. Physicians who are not themselves directly trained in performing skills believe deeply in the “see one, do one, teach one” method that they experienced.<sup>103</sup> This method provides little or no direct instruction in a classroom, but instead upholds learning skills in the pressured environment of a busy hospital in a bedside setting. Moreover, this earlier approach used faculty members who were often scientists—not physicians—to teach the first- and second-year students. These scientist faculty members could not simply assume the role of skills instructors.

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<sup>102</sup> See Cohen, *supra* note 77.

<sup>103</sup> Laura Lin & Bryan A. Liang, *Reforming Residency: Modernizing Education and Training to Promote Quality and Safety in Healthcare*, 38 J. HEALTH L. 203, 221 (2005). (“See one, do one, teach one’ has been a long-standing mantra of medical education. Although this mantra has been repeated for years, it does not create an optimal training or learning environment.”); *but see* Christine N. Coughlin et al., *See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum*, 26 GA. ST. U. L. REV. 361, 365 (2010) (suggesting that despite the growing criticism of the technique in the medical school curriculum, “[s]ee one, do one, teach one is well-matched to the law school setting...”).

As scientists, however, they were convinced by a series of studies showing that, in fact, students who received direct training in basic skills while in medical school were better prepared to learn the more complex tasks required of them when they entered the hospital rotations.<sup>104</sup> In other words, the scientists based change on data. Explaining the basis of their recommendations, the authors of the AAMC report recommended structured skills training to be implemented early in medical education. They wrote that “[e]ducators have articulated explicit developmental models of skill learning that create a useful framework when considering student skill acquisition.”<sup>105</sup> The authors then based their recommendations on specific data on how people learn new skills.

Both law students and medical students could make better use of their on-the-job training if they entered with basic skills. Law schools, however, face a challenge in teaching skills that most contemporary medical schools do not: most law school faculty members are not skilled in the practice of law. While this used to be true of medical schools, the curriculum has moved so firmly into clinical-based problem solving that these faculty members have either adapted or been replaced. Forty years ago, the first two years of curriculum were devoted to scientific study of the human body and were, reasonably enough, taught by anatomists and biochemists. After two complete re-evaluations and reconstructions of medical school education, however, the day of the theorist is over.

Because of this reconstruction, those in the human sciences who wish to continue their employment have had to adapt to methods of at least team-teaching with practitioners. Today, many medical schools have students shadowing physicians by the end of the first week, and the classroom

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<sup>104</sup> Lin & Lianc, *supra* note 103, at 221.

<sup>105</sup> TASK FORCE, *supra* note 82, at 8.

curriculum is often entirely based on case histories. While this arrangement may sound similar to the case method of law school, it is not. Unlike the Langdellian curriculum of analyzing appellate court opinions,<sup>106</sup> these “cases” are actually composed of primary sources such as lab results, radiological imaging, and even examination of real patients. Under the preceptorship of physicians who have received training in medical education, the students work in groups to understand and solve real problems they will face when they become physicians.

#### IV. SPECIFIC METHODS AND RESOURCES OF MEDICAL SKILLS TRAINING

One of the most important resources available to medical schools is access to professional educators. Every medical school has a division of medical education staffed by specialists in medical education, usually holding PhDs in psychology or higher education, who not only provide direct instruction to faculty, but also develop and run the school’s skill-training programs in consultation with the medical school faculty. Professional educators also have the ability to directly assess the effect of new training methods on their own medical students so that they can make changes. A considerable body of literature has developed both on teaching skills and assessing specific skills-training programs.<sup>107</sup> Professional educators have direct access through the AAMC to a database known as

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<sup>106</sup> Harvard Professor Christopher Columbus Langdell is credited with shifting legal education in the United States from a British model, which involved direct instruction in the law, to one where students deduced legal principals through guided reading of appellate opinions. See PHILLIP C. KISSAM, *THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS* 127–129 (Carolina Acad. Press 2003).

<sup>107</sup> See Mark A. Supiano et al., *A Vertically Integrated Geriatric Curriculum Improves Medical Student Knowledge and Clinical Skills*, 55 J. AM. GERIATRIC SOC. 1650–55 (2007).

CurMIT that contains “an array of support services [designed to] help medical schools manage and report on [their] curriculum.”<sup>108</sup> CurMIT can be used to:

[o]btain detailed comparisons of curricula among US and Canadian medical schools; [a]nalyze the nation’s trends in medical education; [s]upport the efficient use of successful curriculum reform strategies by documenting and making available detailed information about ongoing reform and innovation; [l]ist information on course directors to facilitate information-sharing; [i]dentify teaching methods and materials being used around the country.<sup>109</sup>

Medical schools use a variety of methods to provide skills training. These range from the highly complex interventions required to keep an unstable patient alive during heart surgery to the more everyday task of talking to patients about the risks of a procedure. While this article hopes to be useful by providing examples of specific skills-training courses in both medical schools and law schools, a successful skills-training course relies on the knowledge of the instructor. Students cannot effectively learn skills from those who do not have skills.

#### *A. Having Skills Is Not Enough to Teach Them Effectively*

In-house medical educators can also help faculty by training them in skills most of us may not even appreciate can be acquired. For example, a recent article based upon research conducted with students and faculty members about advising techniques describes a program that can help

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<sup>108</sup> *CurrMIT (Curriculum Management & Information Tool)*, ASS’N AM. MED. COLL., <https://www.aamc.org/services/currmit/> (last visited Oct. 20, 2011).

<sup>109</sup> *About CurrMIT*, ASS’N AM. MED. COLL., [https://www.aamc.org/services/currmit/183178/about\\_currmit.html](https://www.aamc.org/services/currmit/183178/about_currmit.html) (last visited Oct. 20, 2011).

faculty members become more effective advisors.<sup>110</sup> This is only one example drawn from a huge body literature within medical education. This body of literature consists of research-based advice as to what kinds of teaching methods get the best results, whether measured as test scores, skill acquisition, or simply student satisfaction.

### *B. Simulations*

One very effective technique now used in almost every medical school is the simulation of situations students are likely to face in practice. Research suggests that practicing skills in a realistic setting improves student performance when actually using those skills with a real patient.<sup>111</sup> In a course intended to improve communication and professional skills by providing direct instruction on constructive e-mailing, students were found to have improved the targeted skills.<sup>112</sup>

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<sup>110</sup> See Robert B. Shochet et al., *Commentary: Using Medical Student Case Presentations to Help Faculty Learn to be Better Advisers*, 85 ACAD. MED. 578, 578–579 (2010), available at

[http://journals.lww.com/academicmedicine/Fulltext/2010/04000/Commentary\\_\\_Using\\_Medical\\_Student\\_Case.12.aspx](http://journals.lww.com/academicmedicine/Fulltext/2010/04000/Commentary__Using_Medical_Student_Case.12.aspx).

<sup>111</sup> See R.D. Acton et al., *Synthesis Versus Imitation: Evaluation of a Medical Student Simulation Curriculum via Objective Structured Assessment of Technical Skill*, 67 J. SURGICAL EDUC. 173, 173 (2010), available at

<http://www.sciencedirect.com/science/article/pii/S1931720410000395>.

<sup>112</sup> See Jennifer G. Christner et al., *Use of Simulated Electronic Mail (E-mail) to Assess Medical Student Knowledge, Professionalism, and Communication Skills*, 85 ACAD. MED. S1, S1 (2010), available at

[http://journals.lww.com/academicmedicine/Fulltext/2010/10001/Use\\_of\\_Simulated\\_Electronic\\_Mail\\_\\_E\\_mail\\_\\_.4.aspx](http://journals.lww.com/academicmedicine/Fulltext/2010/10001/Use_of_Simulated_Electronic_Mail__E_mail__.4.aspx).

C. Standardized Patients

The first standardized patient program in the United States was at University of California, Los Angeles (UCLA) in the 1960s.<sup>113</sup> Today, the exam that medical students must take to enter their residencies after their fourth year of medical school requires that they complete a number of clinical tasks using standardized patients. Students in most medical schools use standardized patients not “as replacements for experience with real patients but rather as highly realistic learning resources for students. This learning resource helps the students develop skills in interviewing and examination techniques.”<sup>114</sup>

Many medical schools have gone beyond the requirements of the USMLE to develop their own Objective Structured Clinical Exam (OSCE).<sup>115</sup> These exams require students to conduct clinical tasks under the observation of medical faculty members who then critique their performance.<sup>116</sup> Students must pass an exam in which medical faculty members observe the students conduct an interview and examination of a

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<sup>113</sup> See *The Yale Standardized Patient Program*, YALE SCH. OF MED., [http://medicine.yale.edu/education/curriculum/images/SP-website\\_8%2010%2010\\_tcm103-62142.pdf](http://medicine.yale.edu/education/curriculum/images/SP-website_8%2010%2010_tcm103-62142.pdf) (last visited Oct. 20, 2011).

<sup>114</sup> *Using Standardized Patients in Teaching and Assessment*, UNIV. OF PITTSBURGH SCH. OF MED. OFF. OF MED. EDUC., <http://www.omed.pitt.edu/standardized/teaching.php> (last visited Apr. 27, 2011).

<sup>115</sup> See *Objective Structured Clinical Exam (OSCE)*, BROWN ALPERT MED. SCH., <http://med.brown.edu/education/osce.html> (last visited Apr. 27, 2011); *Objective Structured Clinical Exams (OSCE)s*, MED. COLL. OF WIS., <http://www.mcw.edu/MedicalSchool/EducationalServices/ObjectiveStructuredClinicalExams.htm> (last visited Oct. 25, 2011).

<sup>116</sup> See *Objective Structured Clinical Exam (OSCE)*, *supra* note 115. For a video of a medical student participating in an OSCE exam, see *OSCE*, BROWN ALPERT MED. SCH., *supra* note 115.

standardized patient.<sup>117</sup> These exams are not simulations in that students actually perform the clinical tasks on which they are being tested, but the patients themselves are not actually sick.

As one medical school's website describes the OSCE:

In contrast to a written exam, which evaluates knowledge and, possibly, analytical skills, an OSCE evaluates hands-on capabilities—the skills a medical student (or more advanced learner) is expected to acquire during training. A surgery OSCE might involve knot tying and use of a scalpel; an OB/GYN OSCE might involve a breast exam and doing a PAP smear.<sup>118</sup>

Medical education has devoted considerable resources to increasing opportunities for students to develop skills not only before they practice without supervision but actually before they treat their first patient.<sup>119</sup> These opportunities include significant use of computer-assisted technology to practice on “virtual patients.”<sup>120</sup> Medical schools have also increasingly integrated direct skills training into the third and fourth year rotations so that students start residency with the practice skills they need.<sup>121</sup> Students,

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<sup>117</sup> See *id.* For a comparison between Step 2 and OSCE exams, see Nupur P. Mehta & Daniel B. Kramer, *A Critique of the USMLE Clinical Skills Examination*, 7 GEN. MED. 76, 76 (2005).

<sup>118</sup> *Academic Programs; Objective Structured Clinical Exam (OSCE)*, SCH. OF OSTEOPATHIC MED.: UNIV. OF MED. & DENTISTRY OF N.J., [http://som.umdnj.edu/education/undergraduate\\_medical/StandardizedPatientLab.html](http://som.umdnj.edu/education/undergraduate_medical/StandardizedPatientLab.html) (last visited Oct. 20, 2011).

<sup>119</sup> See Bard, *supra* note 14, at 946.

<sup>120</sup> See Neil Gesundheit et al., *The Use of Virtual Patients to Assess the Clinical Skills and Reasoning of Medical Students: Initial Insights on Student Acceptance*, 31 MED. TCHR. 739, 739 (2009), available at <http://informahealthcare.com/doi/abs/10.1080/01421590903126489>.

<sup>121</sup> See *FAQs & Resources: What is Medical School Like?*, *supra* note 50; L. Michael Brunt et al., *Accelerated Skills Preparation and Assessment for Senior Medical Students Entering Surgical Internship*, 206 J. AM. COLL. OF SURGEONS 897, 904 (2008) (“Skills instruction for senior students entering surgical internship results in a higher perception

or anyone else interested, can test themselves in recognizing EKG patterns,<sup>122</sup> conduct physical exams,<sup>123</sup> or even conduct surgery.<sup>124</sup>

One of the most impressive and dramatic innovations is a highly sophisticated mannequin programmed to react as a real patient would during various medical interventions.<sup>125</sup> Essentially, these mannequins act as sophisticated robots used to train a wide variety of medical professionals including first responders, nurses, and medical students. Doctors can also learn new techniques using these dynamic virtual patients. Both standardized patients and sophisticated simulated ones serve the same purpose: they allow students to practice their skills in the most realistic environment possible without any risk or discomfort to patients who are seeking health care.

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of preparedness and improved skills performance. Medical schools should consider integrating skills courses into the 4(th)-year curriculum to better prepare students for surgical residency.”)

<sup>122</sup> See *The Six Second ECG: Dynamic Cardiac Rhythm Simulator*, SKILLSTAT LEARNING INC., <http://www.skillstat.com/Flash/ECGSim531.html> (last visited Oct. 20, 2011).

<sup>123</sup> See *Interactive Guide to the Physical Examination*, THE OHIO ST. UNIV. DEP’T OF FAMILY MED., <http://familymedicine.osu.edu/products/physicalexam/exam/> (last visited Oct. 20, 2011).

<sup>124</sup> *A New Pace for Teaching*, THE SURGICAL & CLINICAL SKILLS CENTER: THE UNIV. OF TEX. HEALTH SCI. CTR. AT HOUSTON MED. SCH., <http://www.uth.tmc.edu/med/departments/surgical-clinical-skills/page3.html> (last visited Oct. 20, 2011).

<sup>125</sup> See *Simulation Lab*, YOUTUBE, <http://www.youtube.com/watch?v=oOxbB6m-byw&feature=related> (last visited Oct. 20, 2011). These virtual patients are used to train a wide variety of medical professionals, including first responders and nurses as well as medical students. Doctors can also learn new techniques using these dynamic virtual patients. See *id.*

*D. What Were the Barriers to Teaching Skills?*

In considering why skills were not being taught, the task force put the blame on over-specialization among the physicians who are supposed to teach skills during training. The task force wrote:

[c]urrent structure and function of academic health science centers result in junior medical students learning basic physical examination skills from specialists who are often more comfortable working in their own narrow field. Similarly, tertiary care facilities place increasing reliance on technicians to perform basic procedures and the emergence of ever-increasingly sophisticated medical technology has resulted in less reliance by physicians in practice on traditional clinical examination techniques.<sup>126</sup>

Another more basic reason that skills were not being taught goes back to the transformation of medical education from the apprentice-based model, in which one doctor learned from another, to a university-based model, in which future doctors were taught in classes like other graduate students.<sup>127</sup> Although inspired by a growing need to distinguish professional doctors from quacks, the process is usually attributed to Abraham Flexner, whose report on Medical Education in 1910 became the foundation upon which all future medical school curricula were built.<sup>128</sup> Flexner sought to professionalize medicine by standardizing the curriculum. He wrote:

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<sup>126</sup> AFMC, *supra* note 83.

<sup>127</sup> See Jonathan Reinartz, *The Transformation of Medical Education in Eighteenth-Century England: International Developments and the West Midlands*, 37 HIST. EDUC. 549, 549 (2008), available at [http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?\\_nfpb=true&\\_ERICEExtSearch\\_SearchValue\\_0=EJ801790&ERICEExtSearch\\_SearchType\\_0=no&accno=EJ801790](http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_ERICEExtSearch_SearchValue_0=EJ801790&ERICEExtSearch_SearchType_0=no&accno=EJ801790).

<sup>128</sup> See generally ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* (The Merrymount Press 1910), available at

On the pedagogic side, modern medicine, like all scientific teaching, is characterized by activity. The student no longer merely watches, listens, memorizes: he does. His own activities in the laboratory and in the clinic are the main factors in his instruction and discipline. An education in medicine nowadays involves both learning and learning how; the student cannot effectively know, unless he knows how.<sup>129</sup>

Today, while Flexner is still cited as the father of modern medical education, there is very little about it that he would recognize. For one thing, the curriculum has gone through two major nationwide revisions to convert learning from a passive to an active experience.<sup>130</sup> The content has also changed. What distinguishes contemporary medical education from that modeled on the traditional Flexnerian curriculum is its de-emphasis on basic science in the first two years and its focus on the direct instruction of the skills needed to practice medicine. For example, the University of Virginia School of Medicine explains in its introduction to its clinical skills program that "[t]he purpose of a clinical skills curriculum is to articulate an

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[http://www.carnegiefoundation.org/sites/default/files/elibrary/Carnegie\\_Flexner\\_Report.pdf](http://www.carnegiefoundation.org/sites/default/files/elibrary/Carnegie_Flexner_Report.pdf) (reporting on methods to advance teaching in medical schools).

<sup>129</sup> *Id.* at 53.

<sup>130</sup> See *First-Year Curriculum Offers Students Firm Educational Foundation*, ALBERT EINSTEIN COLL. OF MED. OF YESHIVA UNIV.,

<http://www.einstein.yu.edu/home/fullstory.asp?id=580> (last visited Oct. 20, 2011). Dr. Felise Milan, director of Mt. Sinai Medical School's Introduction to Clinical Medicine (ICM), recalls that she "spent her own first year of medical school memorizing various facts without being able to immediately relate them to being a doctor. 'One of the big changes from when I was a student is the attempt now to relate information to the actual practice of medicine' she said. 'Through the ICM, students are assigned to a clinical site where they initially observe their faculty preceptors but then weekly have the opportunity to interview patients and participate in their care.'" *Id.*

explicit set of clinical competencies to be mastered by medical students as part of undergraduate medical education.”<sup>131</sup>

As Flexner suggested, the essence of developing clinical skills has not changed in the past century. Contemporary medical education still endorses learning by doing, but it emphasizes learning in a structured setting that is informed by contemporary research on best practices in learning and in which students are provided with regular, constructive feedback. Students no longer learn skills along the way, but rather, the curriculum allows them to develop skills in logical sequence over the course of their time in medical school. It is important that not only do students possess the ability to perform particular skills, but also that they engender a habit of skill development derived from a continuous, mentored educational process.<sup>132</sup>

The description of medical skills training as, “see one, do one, teach one”<sup>133</sup> has probably not been completely true for many years. However, it is still the prevailing ethos, and any changes made have faced significant skepticism, if not hostility.<sup>134</sup> The old medical school curriculum was structured in a way that put off all skills training until the second two years, when students left the classroom and entered the hospital ward, and

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<sup>131</sup> Eugene C. Corbett, Jr., *Clinical Skills Education*, UNIV. OF VA. SCH. OF MED., <http://www.med-ed.virginia.edu/courses/clinskills/> (last visited Oct. 20, 2011).

<sup>132</sup> *Id.*

<sup>133</sup> Lin & Liang, *supra* note 103. For a demonstration of the virtual laboratory at Loma Linda University and an explanation of how direct skills training increases patient safety, see *Simulation Lab*, *supra* note 125. Although medical training still very much involves senior students teaching more junior ones, this has become more standardized as medical schools adopt programs that actually teach those with skills how to effectively teach others. See Rainier P. Soriano et al., *Teaching Medical Students How to Teach: A National Survey of Students-as-Teachers Programs in U.S. Medical Schools*, 85 ACAD. MED. 1725, 1725 (2010), available at <http://www.ncbi.nlm.nih.gov/pubmed/20881824>.

<sup>134</sup> Melissa Brokaw et al., *1999 SAEM Annual Meeting Abstracts: Defining Competency Based Learning Objectives in Resident Education*, 6 ACAD. EMERGENCY MED. 369, 483 (1999).

continued through the end of residency. But now, medical schools structure their curricula around the idea that students can make better use of their on-the-job training if they enter with basic skills. Another finding that motivated medical schools to teach skills before students entered clinical settings was that "clinical experience without training increases confidence, but not competence."<sup>135</sup> Students learned not just faster, but also better when they received direct instruction, practiced what they had learned, and were then evaluated on their application of these skills in practice.

#### V. SKILLS TRAINING IN LAW SCHOOLS

Legal educators may feel despair and hopelessness when comparing the resources available in medical education to provide skills training against the lack of those resources in legal education. The task of meeting the current fixed financial demands of a tenured faculty and at the same time offering a curriculum that most of these faculty members cannot teach seems impossible. Yet, it need not be so. Many of the resources are already in place. Almost every law school has an active legal research, writing, and practice program as well as a clinical program. Both the medical and legal fields have devoted considerable time and energy to developing effective techniques for teaching skills.<sup>136</sup>

In addition, most states have stepped in to fill the void of skills training by ensuring that lawyers remain aware of new legal developments. State bar associations have done so by mandating continuing legal education. As a

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<sup>135</sup> G. Peeraer et al., *Clinical Skills Training in a Skills Lab Compared with Skills Training in Internships: Comparison of Skills Development Curricula*, 20 EDUC. HEALTH J. 1, 7 (2007), available at [http://www.educationforhealth.net/publishedarticles/article\\_print\\_125.pdf](http://www.educationforhealth.net/publishedarticles/article_print_125.pdf).

<sup>136</sup> See Karen Barton et al., *Authentic Fictions: Simulation, Professionalism and Legal Learning*, 14 CLINICAL L. REV. 143, 183 (2007).

result, they have created an industry devoted to providing training for practicing lawyers. Also, many state bars have developed their own mandatory or voluntary postgraduate “New Lawyer Training” programs, which involve a structured series of coursework, simulations, and mentorship, for newly licensed attorneys.<sup>137</sup> Many of these programs are under the direct supervision of the state’s judiciary.<sup>138</sup>

#### *A. Why Should Law Schools Teach Skills?*

There are several answers to the question of why law schools should directly teach skills to their students. Until the collapse of the stock market in 2009, and with it the market for law jobs, employers had no choice but to accept the responsibility of skills training. This is no longer true. Explaining why legal education has to change, a Phoenix practitioner wrote:

[m]y experience shows that it takes between three and five years for a newly graduated attorney to start earning enough money to cover his costs to the firm. Since it also costs money to train a new lawyer, many smaller firms simply cannot afford the burden of an extended economic loss, so firms shy away from hiring new graduates.<sup>139</sup>

It may be because of this kind of dissatisfaction on the part of the bar that has given rise to the mistaken idea that recent law graduates who possess

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<sup>137</sup> See *New Mandatory Mentor Program*, UTAH ST. B. CLE/MCLE, <http://www.utahbar.org/nltp/> (last visited Oct. 20, 2011); *Resources for New Lawyers*, ST. B. OF TEX., [http://www.texasbar.com/AM/Template.cfm?Section=For\\_New\\_Lawyers](http://www.texasbar.com/AM/Template.cfm?Section=For_New_Lawyers) (last visited Oct. 25, 2011); *CLE: New Lawyer Training*, OHIOBAR.ORG, <http://www.ohiobar.org/Pages/staticPageViewer.aspx?articleid=1324> (last visited Oct. 25, 2011).

<sup>138</sup> See *Live Courses*, TEX. CTR. FOR LEGAL ETHICS: PROFESSIONALISM IN PRAC., <http://www.legaethicstexas.com/Courses/Live-Courses.aspx> (last visited Oct. 25, 2011).

<sup>139</sup> Dan Morris with Andrew Mazoff, *Law School’s Role in Building the Future Practitioner: A Perspective*, 3 PHOENIX L. REV. 407, 412–13 (2010), available at [http://www.morristrust.com/Articles/12\\_Morris\\_post\\_macro2.pdf](http://www.morristrust.com/Articles/12_Morris_post_macro2.pdf).

the skills needed to practice law are, or would be, more marketable than those who do not have these skills. There is no evidence to support such a theory. Hiring by the kind of large law firms that now say they can no longer afford to train young lawyers continues to be based more on the prestige of the graduate's law school than the content of the curriculum.<sup>140</sup> Moreover, even if employers valued graduates who came with skills, so few law schools teach them that it would probably not increase employment opportunities.

So why teach skills if employers do not expect them? The first reason is because the legal market today is very different than it was just a few years ago. The worsening economic climate has made firms far less willing to serve as training centers because clients are no longer willing to subsidize the training of new lawyers by paying them full rates for the time they bill. This has resulted in increased pressure for new hires to be able to "hit the ground running" without additional training. This may well evolve into a preference for graduates of law schools that can provide this kind of "skilled" lawyer. Second, even if large firms were willing to provide training, the same changing model would mean that a large law firm may no longer be the main source of employment for new graduates.

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<sup>140</sup> Paul Campos, *Inside the Law School Scam*, BLOGSPOT (Aug 30, 2011), <http://insidethelawchoolscam.blogspot.com/2011/08/what-law-schools-accomplish-you-are.html> ("90% of the law school game is as a practical matter played out even before students get to law school -- what counts, for the most part, is where you go to law school, not what you do once you're there. (This also helps explain why the legal elites have traditionally been almost completely indifferent to whether top law schools actually prepared students to practice law. 'Everybody' —meaning everybody who counted — understood that wasn't really what law school was for."); see also *The end of elitism in BigLaw?*, NAT'L JURIST (July 1, 2010), <http://www.nationaljurist.com/content/end-elitism-biglaw> ("For years, the nation's elite law firms predominately hired from the nation's elite law schools. It was a self-perpetuating system, purportedly established by Paul Cravath in the 1920s, but was in reality based on prestige.").

*B. What Are Barriers to Teaching Skills in a Law School?*

As I wrote in 2008, “[t]he core of the difference between medical education and legal education is that medical students are taught to practice medicine while law students are taught to study law.”<sup>141</sup> But merely stating this fact does not explain it. In my opinion, law schools do not teach the skills necessary to practice law because law professors—for the most part—do not know, have, or value these skills. This is primarily because law school hiring practices favor those without experience. Additionally, unlike medical academe, in which most professors both teach and practice, legal academe is a full-time undertaking.<sup>142</sup> This is not a secret. Speaking to a group of Harvard Law students interested in pursuing academic careers, Professor Daryl Levinson explained that in order to make themselves attractive to hiring committees, the students had to understand the priorities of the job: “[s]cholarship and teaching, in that order.”<sup>143</sup> Levinson emphasized throughout his presentation that while teaching may be important, scholarship predominantly determines whether an aspiring professor can find a job. Law school hiring committees primarily look to candidates’ potential to write valuable scholarship, and only secondarily at their ability to be competent teachers. Levinson drew chuckles from the audience with his wry comment, “perhaps you’ve noticed this.” Once a candidate understands that this is how modern academia works, however, much of the hiring process makes more sense.<sup>144</sup>

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<sup>141</sup> Bard, *supra* note 14, at 842–43.

<sup>142</sup> *See id.* at 844.

<sup>143</sup> Dina Awerbuch, *Prof. Levinson Demystifies the Path to Legal Academia*, HARV. L. RECORD, Oct. 19, 2007, available at <http://www.hlrecord.org/2.4463/prof-levinson-demystifies-the-path-to-legal-academia-1.577999> (last updated Sept. 29, 2009).

<sup>144</sup> *Id.*

While professors may consult in legal matters, often quite lucratively, they cannot engage in the day-to-day practice of law that would either help them retain the skills they come in with, or build new ones.<sup>145</sup> Further evidence that law professors are not considered lawyers comes from the Department of Labor. To borrow a form of proof first used in *A Miracle on Thirty-Fourth Street*, when US mail delivered directly to a man claiming to be Santa Claus was recognized in a New York City court as the government's acknowledgement of his identity,<sup>146</sup> the Department of Labor advises that "[a] relatively small number of trained attorneys work in law schools and are not included in the employment estimate for lawyers."<sup>147</sup>

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<sup>145</sup> See generally Orin Kerr, Comment to *The No-Frills Law School*, THE FACULTY LOUNGE (Aug. 19, 2011, 1:40 AM), <http://www.thefacultylounge.org/2011/08/the-no-frills-law-school/comments/page/2/#comments> (commenting on a proposed new law school that would focus on preparing students for practice only and, therefore, only hire highly qualified practitioners) ("If you hire a top practitioner and have the practitioner teach full time, the top practitioner won't be a top practitioner for long: Rather, he'll eventually be a teacher who once, long ago, was a practitioner. Is the idea to fire the professor after a few years, say 10 or 20, when the professor is just a teacher and no longer a top practitioner? Or do you keep the professor on board permanently, even though eventually the professor's practice experience is so distant and outdated that it doesn't matter all that much anymore? Or would you require the profs to practice over the summer to keep their skills fresh?").

<sup>146</sup> See *MIRACLE ON 34TH STREET* (Twentieth Century Fox 1947), available at <http://www.hulu.com/watch/4863/miracle-on-34th-street-postal-service-defense> (last visited May 5, 2011). It is my hope that this citation supports the goals of, and answers affirmatively, the question posed by Bryan Adamson, Lisa Brodoff, Marilyn Berger, Anne Enquist, Paula Lustbader and John Mitchell in *Can the Professor Come Out and Play?—Scholarship, Teaching and Theories of Play*: "But does such a thing as a playful legal scholar exist? Apparently such a creature is so rare in legal academia that there is not so much as a mention of a playful scholar or having a playful attitude in the literature about creating legal scholarship." Bryan Adamson et al., *Can the Professor Come Out and Play?—Scholarship, Teaching, and Theories of Play*, 58 J. LEGAL EDUC. 481, 493 (2008) (reprt. in 10 SEATTLE J. FOR SOC. JUST. 273 (2011)).

<sup>147</sup> *Occupational Outlook Handbook, 2010–11 Edition: Lawyers*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT. 3, <http://www.bls.gov/oco/pdf/ocos053.pdf> (last modified June 7, 2011).

This is in significant contrast to medical school faculty because “[a]lmost no physician makes a living by teaching medicine full time. Being ‘on the faculty’ of a medical school primarily entails supervising medical students and residents while caring for patients in the hospital and conducting funded research.”<sup>148</sup>

Many law students, as well as those outside of legal academe, have questioned whether it is appropriate to use the tuition of students who want to know how to practice law to support research about the law.<sup>149</sup> I will assume for the purposes of this article that it is appropriate. I believe it would be a mistake “to abandon teaching about the law in favor of a purely clinically based program” because “much more so than medicine, law is a construct. It is manmade and subject to rapid change. . . . Thus, a practicing attorney must understand the concepts upon which the current laws are based. She must know the law’s past as well as its present because every practicing lawyer will find herself involved in developing the law’s future.”<sup>150</sup> Students do benefit from the fact that their professors are not just a chapter ahead of them, but that they have actually thought deeply about how the laws they are teaching evolved and about the legal system as a whole. Many fields accommodate theorists and practitioners within a graduate or professional program, and there is no reason to deny legal education its existing strengths.<sup>151</sup>

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<sup>148</sup> Bard, *supra* note 14, at 844.

<sup>149</sup> Richard A. Posner, PROBLEMATICS OF MORAL AND LEGAL THEORY 194 (2002) (“In the process of become more professional, academic law is becoming a separate profession (separate at least from the practice of law, though closer to other academic disciplines, such as economics and political theory.)”).

<sup>150</sup> Bard, *supra* note 14, at 844.

<sup>151</sup> The debate concerning the value of theory to those engaged in practical activities is an old one. See Warren A. Kinghorn, *Medical Education as Moral Formation: an Aristotelian Account of Medical Professionalism*, 53 *PERSP. IN BIOLOGY & MED.* 87, 87

But to say there is a place for theorists in a law school does not mean that they should have a monopoly. Law schools tend to hire “young, inexperienced lawyers from the most prestigious institutions instead of older practitioners.”<sup>152</sup> A study of the hiring practices of law schools located in Massachusetts, Ohio, and Texas showed that “the more experience applicants had gained, the less likely it was that they would be members of a law school faculty.”<sup>153</sup> Explaining these results, the authors suggested that this “may also reflect the fact that many law school faculty members pursued career paths that made them more attractive to law school faculties (e.g., seeking judicial clerkships after graduation as well as obtaining a fellowship or gaining experience as an instructor in a law school environment).”<sup>154</sup> This pattern is unlikely to change on its own because law school faculties are self-perpetuating in that they have nearly complete control over hiring.

Law school faculties have always tried to align themselves with their academic colleagues in the universities to which they are mostly attached rather than to the practicing bar that their students seek to join.<sup>155</sup> Law school faculty members are evaluated based on their research and

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(2010), available at <http://www.ncbi.nlm.nih.gov/pubmed/20173298>; see also Victor J. Drapela, *The Value of Theories for Counseling Practitioners*, 13 INT'L J. FOR THE ADVANCEMENT OF COUNSELING 1, 19–26 (1990); Deborah Loewenberg Ball & David K. Cohen, *Developing Practice, Developing Practitioners: Towards a Practice-Based Theory of Professional Education*, in TEACHING AS A LEARNING PROFESSION: HANDBOOK OF POLICY AND PRACTICE 3, 3–32 (G. Sykes & L. Darling-Hammond eds., 1999), available at <http://www-personal.umich.edu/~dkcohen/developingpractice.pdf>.

<sup>152</sup> Ethan S. Burger & Douglas R. Richmond, *The Future of Law School Faculty Hiring in Light of Smith v. City of Jackson*, 13 VA. J. SOC. POL'Y & L. 1, 21 (2005).

<sup>153</sup> *Id.* at 47.

<sup>154</sup> *Id.* at 49.

<sup>155</sup> Peter Byrne “Academic Freedom and Political Neutrality,” 43 J. LEGAL EDUC. 340, 342–44 (1993).

publications as much as their peers are in history or political science. There have been several explanations for how law school faculties came to be populated by scholars who hold a doctor of philosophy that are sometimes, but not always, in a field related to law, and who have in the course of their education also acquired a juris doctor degree.<sup>156</sup> One commonly expressed theory is that a severe shortage of jobs in higher education in the 1980s led newly minted, but unemployed, PhDs in history or economics or political science to stay in school and get law degrees. Given law schools' perennial concerns about their status in comparison to the faculties of the university in which they are located, these PhDs were attractive whether or not they had any knowledge or interest in the actual practice of law. As these hires become increasingly senior, they are wielding more influence in hiring decisions and tend to seek out those with credentials similar to their own. Whatever the reason, the reality is that as of 2011, 44% of newly hired law professors had a second advanced degree.<sup>157</sup>

Another reason why law school faculties are not teaching skills is that it is very expensive to do so. Given the reality of a tenured faculty without current legal skills, the question of who will—or should—teach skills is a difficult and expensive one. Indeed, an article on Columbia Law School's website recently identified skills training as a factor second only to the

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<sup>156</sup> See Jim Chen, *The Path of the Law (Professor)*, MONEYLAW: THE ART OF WINNING AN UNFAIR ACADEMIC GAME (Oct. 29, 2007, 6:13 PM), <http://money-law.blogspot.com/2007/10/path-of-law-professor.html>.

<sup>157</sup> Joni Hersch & W. Kip Viscusi, *Law and Economics as a Pillar of Legal Education 3* (Aug. 2011) (unpublished manuscript), available at [http://ssrn.com/abstract\\_id=1907760](http://ssrn.com/abstract_id=1907760). For a current excel sheet, see *Entry Level Hiring: the 2011 Report*, PROFSBLAWG (Apr. 4, 2011), <http://prawfsblawg.blogs.com/prawfsblawg/2011/04/rookies-hiring-an-open-thread.html>.

internationalization of law practice as justifying the \$150,000 cost of JD tuition.<sup>158</sup>

Commenting on the resistance to change, Erwin Chemerinsky, the inaugural dean of UC Irvine School of Law, pointed out to a reporter from the Chronicle of Higher Education that one reason law schools were unwilling to change is that "[i]t's a cost-effective method of education . . . [p]utting one professor in front of a large group of students is very efficient. Clinical classes and simulations, which require low student-to-faculty ratios, cost more."<sup>159</sup> Commenting in the same article, Richard Matasar, dean of New York Law School, summed up the attitude he sees at many campuses: "We're all old dogs trying to learn some new tricks, and all of us old dogs have got tenure and we're not going any place."<sup>160</sup>

### C. *What Skills Should Law Schools Teach?*

Those of us immersed in legal academe may no longer appreciate how difficult it is for a lay reader to imagine what it is that law schools teach if not legal skills. The traditional answer given by academics is that law schools teach students to "think like lawyers." What current criticism addresses is the fact that while students may learn to "think like lawyers," they do not know how to act like them. Expressing his frustration with the recent graduates who interview at his firm, an attorney with forty years of experience in the practice of estate planning wrote:

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<sup>158</sup> See James Vescovi, *Why Does Law School Cost So Much?*, COLUMBIA L. SCH., [http://www.law.columbia.edu/law\\_school/communications/reports/summer06/lawschoolcost](http://www.law.columbia.edu/law_school/communications/reports/summer06/lawschoolcost) (last visited Apr. 25, 2011).

<sup>159</sup> Katherine Mangan, *As They Ponder Reforms, Law Deans Find Schools "Remarkably Resistant to Change,"* THE CHRON. OF HIGHER EDUC. (Feb. 27, 2011), <http://chronicle.com/article/As-They-Ponder-Reforms-Law/126536/>.

<sup>160</sup> *Id.*

[I] have seen many new lawyers graduate as “architects,” while lacking the “legal carpentry” skills needed in everyday practice. Passing the bar exam gives you a ticket to do anything, but today’s legal environment is too sophisticated, and too complex to simply rely upon a general measure because the bar only sets the baseline for educational competency in the core legal subjects.<sup>161</sup>

Given the considerable power of inertia, it is especially impressive that so many law school faculty members have taken on the task of teaching skills. While any kind of comprehensive survey is beyond the scope of this article, there is a growing literature of skills teaching going on today in US law schools. Yet the fact that skills are being taught does not obviate the need for some understanding as to what skills are needed. This entails an effort to define what is and is not a legal skill.<sup>162</sup> As discussed in the previous section, unlike medical educators, most law professors do not have legal skills and are therefore in no position to identify them.

It is too easy for faculty to conclude that the reading and analysis of cases and statutes are core legal skills—and to therefore end the project by basking in self-congratulation because, as it turns out, all law schools are

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<sup>161</sup> Dan Morris with Andrew Mazoff, *Law School’s Role in Building the Future Practitioner: A Perspective*, 3 PHOENIX L. REV. 407, 412–13 (2010), available at [http://www.morritrust.com/Articles/12\\_Morris\\_post\\_macro2.pdf](http://www.morritrust.com/Articles/12_Morris_post_macro2.pdf).

<sup>162</sup> The ABA’s own explanatory comments attached to Standard 302(a)(4) emphasize that although indeed all of these activities could be described as skills a lawyer should have, instruction on the substantive content of the law, or even on legal analysis, does not constitute skills instruction. See A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., *supra* note 7, at 20. Instead, the standards adopt the phrase “professional skills” and instruct that “[e]ach law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school. Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are among the areas of instruction in professional skills that fulfill Standard 302(a)(4).” *Id.* at 162.

already teaching skills and nothing more needs to be done. Here is where research can be helpful. Neither the Carnegie Report nor any other analysis of legal education has based its recommendations on primary empirical research identifying legal skills, let alone prioritizing them. Part of the problem is that, like medicine, the practice of law is very broad. Just as few ophthalmologists are called upon in a professional setting to deliver a baby, few real estate finance attorneys are called upon to conduct a cross-examination. However, the entire body of knowledge possessed by a practicing attorney to the task of representing clients could be described as a group of skills. As a recent opinion piece by an associate at Paul Weiss asserted:

Part of preparing students for real-world practice is communicating the importance of being able to search well and giving students the opportunity to practice outside the context of a legal research assignment. For example, law schools might offer students the opportunity to search a mock electronic document database to get a flavor for the challenges of e-discovery.<sup>163</sup>

A substantial part of the problem is a lack of consensus on what, exactly, constitutes a legal "skill." Criticizing the move to bring skills training into law schools, David E. Van Zandt, former dean of Northwestern University School of Law, told a reporter, "[m]y view is that if it's a very technical skill, it doesn't make a lot of sense for law schools to teach it."<sup>164</sup> He then goes on, however, to explain that "[a]t the same time . . . we need to do a better job with basic competencies like understanding a client's problems

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<sup>163</sup> David Kessler, *Searching for a Good Associate*, N. Y. L.J., June 15, 2011, <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202497337800&slreturn=1>.

<sup>164</sup> Katherine Mangan, *Law Schools Revamp Their Curricula to Teach Practical Skills*, THE CHRON. OF HIGHER EDUC., Feb. 27, 2011, <http://law.wlu.edu/deptimages/news/thirdyearchronicle.pdf>.

and communicating effectively.”<sup>165</sup> Both of these competencies are at the heart of most medical schools’ skill training programs.<sup>166</sup>

Another opportunity for integrating skills training occurs in the area of professionalism. Medicine has long seen medical education as an opportunity to transmit professional values to future students. Today’s understanding of the Flexner Report was that the “Flexnerian changes” that elevated medical education were a result of the combined effect of curricular and instructional innovations initiated within select medical schools and other instruments, including state professional licensing examinations.<sup>167</sup> Today, medical education is still very much aware of its role in shaping the identity of the medical profession. Describing why it is important to fulfill its obligation to prepare medical students to act professionally, a recent AAMC task force wrote: “[t]his obligation must be fulfilled not only because it is, by definition, required to satisfy adequately the implicit social contract between the physician and the patient and public, but also because threats to professionalism are perceived to be greater now than they have been in the recent past.”<sup>168</sup>

Law schools are in an equally strong position to transmit positive professional values. This is especially important given the current perception of lawyers. Professor Bridget McCormack writes, “[c]omplaints about lawyers, by lawyers and non-lawyers alike, sound in professionalism. The critique is so familiar that it is no longer uncomfortable. Among

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

<sup>166</sup> *See id.*

<sup>167</sup> NAT’L BD. OF MED. EXAM’RS, EMBEDDING PROFESSIONALISM IN MEDICAL EDUCATION: ASSESSMENT AS A TOOL FOR IMPLEMENTATION 3, *available at* <http://www.nbme.org/PDF/Publications/Professionalism-Conference-Report-AAMC-NBME.pdf> (last visited Jan. 8, 2011).

<sup>168</sup> *Id.*

professionals, lawyers are comfortably in last place in the race for respect.<sup>169</sup> She goes on to squarely put the responsibility for changing the public's attitudes towards the legal profession on law professors, and she also challenges them to increase the standards of professionalism by teaching and modeling appropriate behavior in law schools.<sup>170</sup> Commenting on the value of teaching a course in professionalism during law school, Professor Michelle Harner wrote:

One of my favorite courses to teach is Legal Profession (i.e., ethics and professionalism) because it truly is an "ah-ha" moment for many law students. I tend to believe that not many students consider the "profession" part of the "legal profession" prior to attending law school. Rather, I suspect they view law school as a means to an end. . . . They probably give little thought to the fact that they are preparing to join a "profession."<sup>171</sup>

### 1. Trial Practice and Oral Advocacy Programs

The one skill that is most commonly identified with lawyers is oral advocacy, and most law schools offer this training.<sup>172</sup> Describing the nationally ranked program that he runs, Professor Gerald Powell of Baylor Law School says, "[w]e believe that a young lawyer must be able to think like a lawyer, and additionally must be able to put that thinking into action

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<sup>169</sup> Bridget McCormack, *Teaching Professionalism*, 75 TENN. L. REV. 251, 251 (2008).

<sup>170</sup> *Id.*

<sup>171</sup> Michelle Harner, *Teaching Professionalism*, CONCURRING OPINIONS (Jan 24, 2011, 2:44pm), <http://www.concurringopinions.com/archives/2011/01/teaching-professionalism.html>.

<sup>172</sup> See Malachy E. Mannion, *Objections Overruled: The Trial Advocacy Course Should Be Mandatory*, 30 PACE L. REV. 1195, 1195, 1201-02 (2010), available at <http://digitalcommons.pace.edu/plr/vol30/iss4/6> (last visited May 5, 2011).

in the actual representation of client.”<sup>173</sup> Interestingly, Professor Powell makes a direct analogy to medical training, stating that “[t]eaching the skills of a lawyer is important. In that respect we are much more like a medical school than the average theory based law school.”<sup>174</sup> Elaborating, he says, “How would you feel about going to a doctor who knew only the theory of your disease, but could neither diagnose nor treat it? Practice Court is the most rigorous application of our practice-oriented, skills-focused mission.”<sup>175</sup>

These programs are both classroom-based courses that cover the technical aspects of introducing evidence and cross-examining expert witnesses as well as student-run national competitions in which law school teams travel to compete against each other. Many law schools make this training available to all students through special intensive programs; for instance, Washburn Law “immerses students in trial practice for seven full days, under the direction of a 25-person faculty. In one intense week, students learn to try a civil or criminal case.”<sup>176</sup> These courses are very popular with students.<sup>177</sup> At Drake University Law School in Iowa, first-year classes break for a week while students observe a real trial in the law

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<sup>173</sup> Hogan Allcorn, *BU Law Trial Advocacy Program Ranked Fourth*, THE LARIAT ONLINE (Apr. 21, 2010), <http://www.baylor.edu/lariat/news.php?action=story&story=73047>.

<sup>174</sup> *Id.*

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

<sup>176</sup> *Intensive Trial Advocacy Program Offers Unique Opportunity in Trial Skills Training*, WASHBURN UNIV. SCH. OF L., <http://www.washburnlaw.edu/centers/advocacy/itap/> (last visited Oct. 25, 2010).

<sup>177</sup> *See Practical Skills Training: Trial Advocacy Program*, IIT CHICAGO-KENT COLL. OF L., <http://www.kentlaw.edu/trialad/> (last visited May 5, 2011) (“Presently, the popularity of the series of trial courses offered at Chicago-Kent is apparent as 80 percent to 90 percent of all Chicago-Kent graduates have taken Trial Advocacy I and about 50 percent to 60 percent have taken both Trial Advocacy I and II.”).

school's courtroom.<sup>178</sup> While some have criticized these programs for over-emphasizing litigation at the expense of other lawyering skills,<sup>179</sup> they are much more widely available to law students than clinical programs that require intense individual faculty supervision.

*D. When Should Law Schools Teach Skills?*

The distinguishing feature of the efforts made by medical schools to offer enhanced skills training is that it is being done in the first two years of medical school. Starting early not only gives students more time to learn, but also prepares them for their third and fourth year rotations.

Unfortunately, law schools are under considerably more time constraints than medical schools because they can only plan three years of curriculum, not the seven to ten available to medical schools. This time crunch can be seen as a reason not to increase skills training. In my experience, doctrinal law professors believe that there is insufficient time to teach the substantive legal information they need to cover as well as teach skills.<sup>180</sup> Regrettably,

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<sup>178</sup> See *Trial Practicum: Law Through the Lens of the Courtroom*, DRAKE UNIV. L. SCH., <http://www.law.drake.edu/admissions/?pageID=trialPracticum> (last modified Mar. 7, 2011).

<sup>179</sup> See Steven Luet, *Advocacy Education: The Case for Structural Knowledge*, 66 NOTRE DAME L. REV. 721, 726 (1991).

<sup>180</sup> Others have also noticed this phenomena. In an interesting exchange of views about teaching transactional skills, Professor Stefan Padfield explains that he does not teach skills. Instead, he says, "I currently teach Sec Reg in the traditional law school manner, though I do try to relate my own practical experience as much as possible. Part of the reason for that is that there is already too little time to do justice to the subject matter in a 3 hour [*sic*] course (for example, I have yet to have found the time to cover the Investment Advisers Act) and while one could definitely teach the substantive law via practical exercises, I have not found any exercises that don't take more time to do that than the traditional approach (though I remain on the lookout)." Stefan Padfield, *Teaching Transactional Law Skills in Law School: Is More Really Better?*, AKRON L. CAFÉ (July 10, 2009, 10:25 AM),

when each individual professor on a law school's faculty believes this, the result is the entire three years of law school in which there is no "extra" time to teach skills.

Paradoxically, law schools' decision to put mandatory legal research and writing courses in the first year but not provide further skills training has had the effect of diminishing the importance of these skills in legal education. This is combined with the fact that these courses are taught by faculty members who are aggressively marginalized.<sup>181</sup> No student after the first few weeks can fail to notice that their legal research and writing courses are almost uniformly taught by women and use very different methods than those in their subject matter or "doctrinal courses." In doctrinal courses, students are seldom given direct instruction, but are rather asked questions intended to lead them towards a self-discovery of legal analysis. Whether or not that actually ever happens, it is in stark contrast to the usually more contemporary methods used in legal research and writing courses, where students are given a combination of both direct instruction and opportunities to immediately apply new information. Also, while more

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[http://www.ohioverticals.com/blogs/akron\\_law\\_cafe/2009/07/teaching-transactional-law-skills-in-law-school-is-more-really-better/](http://www.ohioverticals.com/blogs/akron_law_cafe/2009/07/teaching-transactional-law-skills-in-law-school-is-more-really-better/).

<sup>181</sup> See generally Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 129 (2009), available at <http://ssrn.com/abstract=1276005> (explaining that legal research and writing professors are supposed to help first year students become adjusted by law school and "are expected to act as mini-psychologists and emotional soothers for their troubled students. Their role, which resembles the expected behavior of a mother in a traditional family, is not only to teach, but also to guide with a gentle hand, to listen to complaints, to solve problems and to be available to meet the students' emotional needs."). See also Susan Liemer & Hollee Temple, *Did Your Legal Writing Professor Go to Harvard?: The Credentials of Legal Writing Faculty at Hiring Time*, BRANDEIS L.J. 44 (unpublished manuscript), available at <http://ssrn.com/abstract=1033477> (reporting the results of their study showing that legal writing faculty had similar credentials to tenure-track faculty but still were not accorded the same respect or status).

doctrinal classes for first year students now incorporate mid-term exams than in the past, it is still nothing like the frequently-graded assignments of the typical legal research and writing classes. Finally, while some students may visit their doctrinal professors during office hours, all students enrolled in legal research and writing classes have frequent and mandatory individual conferences with their teachers. Whether or not this is a situation where "familiarity breeds contempt," it is still the case that research and writing faculty members are more accessible to students and are usually perceived as less intimidating. Students quickly learn that skills courses taught by less important people are less important than the doctrinal courses taught by "real" professors. Students then gain the impression that they have progressed "beyond" the need to study skills directly, and may even develop scorn or disdain for being required to continue their legal education past the initial year or two.

These findings add further support to integrating skills training throughout the curriculum. No matter how talented the faculty, it is not possible for one course in the first year of law school to teach students how to be lawyers. One of the key findings of the Clinical Skills Task Force is that skills must be taught throughout students' education so that they can integrate new information and new experiences as they progress. Shoehorning skills training into one class during the first year also sends the unfortunate message that that skills are for beginners. In fact, practicing law is an exercise in lifelong learning.

Finally, the skills themselves are highly complex and deserve direct attention rather than being taught as part of a first-year survey or even integrated into an existing doctrinal course. Expressing her concern on a listserv, Professor Barbara Schwartz sought the advice of others about a proposal to count a seminar as a professional skills course option (as required by the ABA) in which students write opinions on current US Supreme Court cases as if clerking for a Supreme Court Justice. She asked, "I for one don't believe that opinions or memoranda to a judge qualify as

‘drafting,’ [which would qualify as professional skills credit under ABA standards,] but we currently do not have a definition that distinguishes between legal drafting and other legal writing like briefs, law review articles and seminar papers. Anyone have such a definition?’<sup>182</sup> While it is likely that many law schools have conducted similar curricular reviews, there is no central record of the criteria used by individual faculty.

*E. Who Should Teach Skills?*

It may seem self-evident that the first answer to the question of “who should teach skills in a law school” is “people who have these skills.” Indeed, in legal academe we have seen the current attempt to integrate skills training as a dilution of quality.<sup>183</sup> For the most part, this call for more skills training has been met by many law school faculties with some disquiet because for the most part, skills training has been relegated to marginal and low-status areas of the curriculum staffed by often marginalized and low-status instructors who are incidentally, in comparison to the rest of the faculty, disproportionately women.<sup>184</sup>

Now that it is a requirement, many law schools will have to divert resources away from the main activity of most tenure-track faculty research.

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<sup>182</sup> Mary Lynch, *ABA Accreditation & Proposed Skills Requirement*, BEST PRACTICES FOR LEGAL EDUCATION (Apr. 7, 2010),

<http://bestpracticeslegaled.albanylawblogs.org/2010/04/07/aba-accreditation-proposed-skills-requirement/>. In a personal conversation with Professor Schwartz on May 5, 2011, Professor Schwartz reported that she received no responses to her post.

<sup>183</sup> In a question and answer exchange, an unidentified law professor asked whether it is appropriate for professors who are subject matter experts but not knowledgeable about skills, to be teaching skills courses like negotiation and advocacy. See Susan M. Chesler, *Teaching Multiple Skills in Drafting & Simulation Courses*, 10 TENN. J. BUS. L. 221, 250 (2009), available at <http://trace.tennessee.edu/transactions/vol10/iss3/13/>.

<sup>184</sup> See *supra* text accompanying note 13.

Instead, they will have to focus attention on programs that have not been historically valued<sup>185</sup> and that are staffed by women, who are at the bottom of both the hierarchy and the pay scale.<sup>186</sup> There are also disincentives to teach skills in regular classes because the time it takes to develop, supervise, and assess individual student work detracts from faculty publishing, which is essential for advancement within the hierarchy of a law school faculty.<sup>187</sup> As noted in the introduction, it is impossible to make effective change in the skills curriculum without addressing the status of skills within law schools—and by extension—the status of those who teach them.

### 1. Legal Writing and Research Professors

Legal research and writing are, of course, core skills for all lawyers, and most law schools already have research and writing programs in place for first year students.<sup>188</sup> Scholars of the growing field of “legal writing” report evidence that law schools have been providing direct instruction in the skills

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<sup>185</sup> See Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551, 580 (2001); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L. J. 3, 7 (2001).

<sup>186</sup> See generally Ann C. McGinley, *Discrimination in Our Midst: Law Schools' Potential Liability for Employment Practices*, 14 UCLA WOMEN'S L. J. 1, 3–4 (2005) (discussing the pay disparities between women and male faculty members in US law schools).

<sup>187</sup> See Kathryn M. Stanchi, *Who Next, The Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 484–85 (2005) (noting that the time spent by low paid women teaching skills courses creates “additional free time, as well as intellectual and psychological free space, which [doctrinal professors] can then devote to the more highly valued pursuit of scholarship”).

<sup>188</sup> See Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students & Law Schools*, 39 U. BALT. L. REV. 173, 179 (2010).

of legal writing and research since the 1920s.<sup>189</sup> Because these were among the first skills courses, it is perhaps not surprising that today those who teach them have taken the most interest in the actual teaching of skills throughout the curriculum. Indeed, the process of teaching legal writing and research skills has become a discipline of its own.<sup>190</sup> The first step toward systematizing the teaching of legal skills in law schools came in 1995 when the ABA issued a new Standard for Approval of Law Schools 302(a)(ii)–(iii) stating: “(a) The law school shall: (ii) offer all students at least one rigorous writing experience, (iii) offer instruction in professional skills.” By 2002, ABA Standard 302(a)(2) evolved to require that “[a]ll students [receive] substantial legal writing instruction.”<sup>191</sup> By 2005 this standard had evolved to state:

(a) A law school shall require that each student receive substantial instruction” in:

(2) legal analysis and reasoning, legal research, problem solving, and oral communication;

(3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;

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<sup>189</sup> Linda L. Berger et al., *The Past, Presence, And Future Of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 521, 525 (2010).

<sup>190</sup> *See id.* at 531 (“Our journals foster a sense of common beliefs and methods. As we expand from legal writing texts to writing extensively about the subjects of our study and practice, for audiences including other academics and practicing lawyers as well as students, we more firmly establish the knowledge base of a discipline.”).

<sup>191</sup> A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE B., STANDARDS FOR APPROVAL OF LAW SCHOOLS 24, § 302(a)(2) (2001). Prior to the 2001 amendment, § 302(a)(2)–(3) required “at least one rigorous writing experience; and adequate opportunities for instruction in professional skills.” A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS 40, § 302(a)(2)–(3) (2000).

- (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
- (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.<sup>192</sup>

While the ABA does not require that these courses be offered separately, such courses have in fact become a sub-specialty, with almost every law school offering specific mandatory courses to first year students that are taught by faculty who specialize in this task.

## **2. Clinical Faculty**

Every accredited law school now has a program in which students represent clients under the supervision of faculty members with expertise in not only in the practice of law but also in legal instruction.<sup>193</sup> Unlike externship programs, where students assist busy practitioners, the purpose of a clinic is to have students represent clients directly while being able to turn to faculty members for guidance. Although not necessarily consistent with the Carnegie Foundation's goal of integrating the teaching of specific subjects in the classroom with those in practice, clinics offer high quality skills training directly modeled on the clinical training of medical students. There are many proposals for reform that advocate extending the clinical model of education throughout the law school curriculum. They are, however, very expensive. Very few schools can make Yale Law School's boast that "[s]tudents get practical training by representing real clients in

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<sup>192</sup> A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS 40, § 302(a)(2) (2005).

<sup>193</sup> The Clinical Legal Education Association is a non-profit organization that advocates for clinical legal education. As such, it serves as an advocate for clinical faculty as well as recommending best practices. Clinical Legal Educ. Ass'n., <http://www.cleaweb.org/index2.php#/info1/1/> (last visited April 27, 2011).

clinics starting in their first year,<sup>194</sup> and even fewer the University of New Mexico School of Law's assertion that "[t]he significance that the law school places on hand-on practice experience before graduation is clearly expressed in its requirement that every student complete six credit hours of clinical studies in one of the mandatory clinical courses."<sup>195</sup> This lack of opportunity, let alone requirement, that each student have supervised experience representing clients before graduating is perhaps the biggest difference between legal and medical education. It would be possible to quantify the lack of opportunity for all students to have a clinical experience by comparing the number of clinicians employed by each law school with the number of students and multiplying by the highest student/faculty ratio allowed by ABA standards. However, it is not necessary to do so in order to conclude that while law schools may be able to claim that every student has a skills course, most institutions lack the resources to provide a clinical experience.

Another concern with clinics is that they arose out of the civil rights movement the late 1960s and early 1970s as a way, not so much to train law students, as to promote social justice.<sup>196</sup> Clinical supervisors may not see themselves as merely teachers of legal skills outside of the context of promoting social justice.<sup>197</sup> As a man who has been described as the soul of

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<sup>194</sup> *About YLS*, YALE L. SCH., <http://www.law.yale.edu/about/about.htm> (last visited Apr. 27, 2011).

<sup>195</sup> *About the Clinical Program*, UNM SCH. OF L., <http://lawschool.unm.edu/clinic/index.php> (last visited Apr. 27, 2011).

<sup>196</sup> See Praveen Kosuri, *Clinical Legal Education at a Generational Crossroads: X Marks the Spot*, 17 CLINICAL L. REV. 205, 205 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1674453](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674453).

<sup>197</sup> See Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 327–28 (2001), available at [http://digitalcommons.law.yale.edu/fss\\_papers/1844/](http://digitalcommons.law.yale.edu/fss_papers/1844/).

clinical legal education in the United States, Professor Stephen Wizner of Yale Law School explained:

[t]he law school clinic is a place where students should learn not only the techniques of advocacy, but also the importance of advocacy in helping individuals solve their problems, defend their rights, and achieve their goals. Students can learn from this experience that legal advocacy can make a real difference for real people, and may learn from that experience that they should become active participants in the struggle to extend the availability of legal services to the poor.<sup>198</sup>

He further expressed his concern that “[c]linical legal educators have not succeeded in inculcating in their students the belief that many of us had when we came to clinical teaching, that law is something that can be, and therefore should be, used in the struggle for social justice.”<sup>199</sup>

Over time, clinical legal education has become its own sub-specialty with its own scholarly agenda, rather than just a training venue.<sup>200</sup> While most law schools now categorize their clinical programs as general skills training, at least some academics and practitioners bristle at this description of what they do. Responding to suggestions that clinics teach legal writing skills, Professor Tonya Kowalski writes, “[m]entoring legal writing is extraordinarily time-consuming and, if unchecked, can detract from other important clinical teaching goals.”<sup>201</sup> Further, even though clinical faculty have advanced forward in achieving status than legal writing and research professors in the sense that many are eligible for tenure, they still lag behind doctrinal faculty.

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<sup>198</sup> *Id.* at 328.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 330.

<sup>201</sup> Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285, 300 (2010).

### 3. Practitioners/Adjuncts to Teach Inside and Outside the Classroom

One of the most direct ways to introduce students to actual practice skills is to introduce them to practicing lawyers. There is, however, often a reluctance to bring in practitioners or send students out to them to learn skills because of a perception that it is difficult to standardize the experiences or to evaluate the instructors.<sup>202</sup> Some are concerned that practitioners will teach students bad habits or the wrong way of doing things. Others write that “[t]he quality of adjunct faculty is often uneven, particularly at institutions not located in urban areas.”<sup>203</sup> Yet, who is better suited to instruct students in the skills they will need?<sup>204</sup>

### 4. Existing Faculty

Both the Carnegie Foundation’s 2009 report and the MacCrate report advocate integrating skills in conjunction with teaching doctrine, concepts, and analysis.

There is an increasingly large canon of literature to suggest that despite all the factors that make it difficult to teach skills within the traditional law school curriculum, many tenure track professors are in fact doing so.<sup>205</sup> Because law schools, like all institutions of higher education, attract high quality hires by offering tenure, it would be difficult for schools to exchange faculty members with expertise in legal theory for instructors with

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<sup>202</sup> See David A. Lander, *Are Adjuncts a Benefit or a Detriment?*, 33 U. DAYTON L. REV. 285, 293 (2008).

<sup>203</sup> Burger & Richmond, *supra* note 152, at 38.

<sup>204</sup> See generally James Backman, *Externships and New Lawyer Mentoring: The Practicing Lawyer’s Role in Educating New Lawyers*, 24 BYU J. PUB. L. 65 (2009) (providing an overview of structured mentoring programs).

<sup>205</sup> See generally Chesler, *supra* note 183 (summarizing presentations of a number of professors at a conference devoted to teaching the skills necessary to practice corporate law).

expertise in legal skills and practice. Acknowledging the difficulty of adding a significant number of new faculty, as well as the difficulty that existing faculty without experience in the practice of law would have teaching skills to students, many legal writing and clinical faculty have offered proposals for collaboration.<sup>206</sup> However, it is important to appreciate that neither group sees itself as merely a resource or supplement to the primary doctrinal faculty.

Explaining the inherent inequality in the situation, Professor Anne McGinley noted that

[o]n faculties where the legal writing faculty member collaborates with a "podium" faculty member to produce writing problems in a particular substantive area . . . the legal writing faculty member may have a subservient position to the "podium" faculty member, much like the position of wife to husband in the traditional family or secretary to boss.<sup>207</sup>

She reports that because of this inequality, "many legal writing directors have avoided this relationship because it is fraught with status issues."<sup>208</sup> This understandable discomfort is very much to the detriment of students' legal education and serves as another example of the necessity of addressing status inequalities in order to more effectively teach legal skills.

It is especially unreasonable to assume that either legal writing or clinical faculty would be interested in being relegated to further segregation as skills teachers while the rest of the faculty pursue more prestigious scholarly

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<sup>206</sup> See generally Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education Into the First Year*, 12 CLINICAL L. REV. 441 (2006) (concluding that legal writing and clinical faculty should collaborate to introduce legal work in first year writing courses).

<sup>207</sup> See generally Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 135 (2009), available at <http://ssrn.com/abstract=1276005>

<sup>208</sup> McGinley, *supra* note 207, at 135 n.130.

activities, particularly at a time when both fields are working to separate themselves and develop their own identities. This point is well made by a professor of legal research and writing at Georgetown University School of Law in a 2011 article, which invokes the Carnegie Report's call for integration by declaring that "the theory and practice of law have been separated in legal education to their detriment since the turn of the twentieth century."<sup>209</sup>

## VI. CONCLUSION

The purpose of this article was to provide resources for law school faculty members who want to integrate the skills of the practicing lawyer into today's law school classroom by providing information about how medical schools have approached a similar task. In the last ten years, medical schools have been working to change a culture where skills were learned by observation and modeling into one where skills are taught intentionally and consistently starting in the first two years of medical school. This represents a significant change because even as medical school curriculum has evolved and changed over the past twenty-five years, these pre-clinical years had focused on the acquisition of knowledge about the human body, not clinical skills. It has tried to present this information in the context of some significant differences between the resources available to medical schools, which make the task of teaching skills earlier in the curriculum easier than the task will be for law schools. These advantages include a faculty which possesses current clinical skills and an extended period of subsidized apprenticeship.

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<sup>209</sup> Kristin K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L. J. 319, 319 (2011).

It is far too easy to say that law schools should use a “medical school model” in teaching skills when that model depends on taxpayer subsidies unavailable to legal education. In fact, recent events suggest that medical education will soon have to adapt to much less support than they have had in the past. Few people without direct experience of medical education know that providing direct skills training is quite new to medical schools and that it involved a process of curricular change almost equivalent to that now demanded of law schools. Moreover, those who try to justify the legal model of classroom-oriented instruction about law by comparing it to the first two years of medical school need to appreciate medical education’s increasing rejection of a model that starts with scientific instruction before introducing clinical skills. The days of scientists ruling over the first two years of medical school are gone.

Medical education has also directly addressed the growing complexity of medical practice and the increased risk of medical error by recognizing that the old “see one, do one, teach one” method of skills training is no longer sufficient to meet the needs of future patients. In the last ten years, medical schools have been working to change a culture where skills were learned by observation and modeling into one where skills are taught intentionally and consistently starting in the first two years of medical school.

This understanding of how medical schools are teaching skills is important for legal academe today because medical school curriculum success highlights why we, as legal educators, have been so slow to adopt any kind of meaningful change. It is also important because it highlights the status and prestige issues which have become entangled in how legal academe views skills training.

Because law professors have become a group of people with little or no experience practicing law, they cannot fully know what skills are necessary, let alone teach them. But more than that, they do not value being a lawyer and practicing law in the way that medical school professors, primarily very successful physicians, value being physicians and practicing medicine. The

fact that, so far, skills training has been relegated to ancillary and low-status departments within the law school, and disproportionately staffed by women, further illustrates the burdens law schools now face in making the changes that the public seems to be demanding.

Finally, though, it is unfortunate that this conversation about curricular reform is taking place when the near collapse of the United States economy has resulted in wide-scale unemployment for young lawyers. The very real suffering of young people who cannot pay back the money they have borrowed hangs over efforts at better integrating skills training. It also unfortunately clouds the issue to the extent that it seems as if the lack of skills training has caused their unemployment or that better skills training would make future law students less vulnerable to economic downturn.

I think the two issues have been joined based on students' resentment for having paid tuition that supports the salary of professors who they feel have not taught them useful skills. If so, that is understandable, but it does not mean that law school tuitions would be lower if the professors had practice skills or that learning these skills in law schools would change the career prospects of students looking for jobs today. Law schools will find it difficult to transition to a skills-based curriculum because they neither value client representation as highly as medical schools value medical care, nor do they have the labor pool available to transmit these skills.

Yet I believe legal educators are approaching the need for curricular change with good will and are genuinely looking for ways to address the need for more skills training within the context of a system without much experience do so. Although medical education cannot be an exact model, it can provide useful examples in how to use research-based findings to enhance learning. This is unlikely to succeed, however, without at the same time addressing directly the lack of status that practicing law and, by extension, teaching practice skills has in today's law school. Medical school professors are teaching students to do something at which they themselves excel, while we law professors are, for the most part, still teaching students

about something we find very interesting. Not until legal skills become a more prestigious and important part of law school education can anyone expect substantive change.