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Long-Overdue Medicine for What Ails Law School

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Law students began complaining about the third year of law studies during the last great, sweeping reform of legal education: Christopher Columbus Langdell's reform, in the 1880s. They have not stopped since. And with good reason.

Langdell sought to separate legal education from the practicing bar, and he succeeded brilliantly. At the time, both legal and medical education underwent reform. But the two were reformed in fundamentally different ways: Medical education decided that its mission would be to create doctors; legal education decided that its mission would be to create law professors. As law schools pulled away from the legal profession, medical education began its move toward practice education, clinical work, and residencies for fledgling doctors. Legal education is still recovering from this choice.

There was resistance to Langdell's professional separation strategy. In an 1883 letter from Harvard Law Dean Ephraim Gurney to Harvard President Charles W. Eliot, Gurney lamented that Langdell's ideal was to "[b]reed professors of Law, not practitioners. . . . If you[r] LLB at the end of his three years did not feel as helpless on entering an office on the practical side as he is admirably trained on the theoretical, I think he would begrudge his third year less."

Third-year students continue to "begrudge [the] third year," and rightly so. The gap between what legal education teaches and what its graduates do is now beginning to get smaller, but not nearly small enough.

Since Langdell's reform, generations of third-year students have passed down their common wisdom that in the first year, they scare you to death; in the second year, they work you to death; and in the third year, they bore you to death. And since then, practicing lawyers likewise have leveled criticism at legal education for failing to graduate students who are ready for the rigors of practice.

One option, often suggested since a 1971 report, is to abandon the third year. Last year, even President Obama joined the chorus of those suggesting that law schools seriously consider this option. But nearly everyone suggesting this option proposes that the third year be replaced with some form of apprenticeship to follow the two-year-law-school experience.

Washington and Lee Law School has found what it thinks is an alternative solution. Its answer has been, "as long as the third year exists, we should use it more wisely." We should produce a well-designed, sophisticated, guided apprenticeship for our third-year students. We should create an organized mental-pathways transition, during which students move from the habits and mental processes of students to those of professionals.

The Reformed Curriculum

So what does the reformed curriculum look like? It is a full year's credit load of courses that places students in the role of lawyer. It includes required two-week immersions in both litigation and transactional practice, clinics, externships, practicum courses (elaborate simulations), and law-related service. Thus, it exposes students to the profession's culture, economics, and cutting-edge issues.

The curriculum blends the three major forms of experiential education: live-client clinics, externships, and simulations. Each of these has an educational advantage that the other two do not. Live-client clinics produce closely supervised, actual practice for the students. Nothing else is as successful at fostering a close mentoring relationship and giving students that genuine feeling that occurs only when a real client's matter is at stake. Simulations can be designed and managed in ways that clinics cannot, and for planned exposure to chosen issues and practices, nothing is better. A simulation can confront students with whatever challenges the teacher has chosen to present, and it does so more or less equally to each student in the class. And externships, as long as they are well supervised, are the most authentic experience of them all. Externships send the student outside the law school to experience firsthand the practice of law as it truly exists. A blend of the three is educationally better than a steady diet of any one.

Each semester starts with a two-week skills immersion. In both immersions, there are large group meetings that address theory. There are small group meetings for drills, practice, and strategy meetings. And then the students work on a simulated case that runs for the remainder of the two weeks.

In the fall, every student in the third-year class starts with a two-week litigation immersion, during which they have very limited competing obligations. The immersion is like a job: from nine to five, Monday through Friday, with work to do every evening and on the intervening weekend. The students represent people playing the roles of their clients in simple pieces of litigation from start to finish. As "lawyers," they interview the client, draft the pleadings, do some discovery, do some motion practice, negotiate, counsel their client, and eventually take that simple case to a truncated trial.

In the spring, they repeat the process in a transactional immersion; again, all third-year students participate. Every student represents either the buyer or the seller in the sale of a two-million-dollar furniture-manufacturing business made up from whole cloth. The program creates all the documents and everything else they need to know about the fictional company. They do due diligence; deal with employment issues and executive compensation; and make decisions about the deal's structure, representations and warranties, indemnity clauses, and more. They learn law, negotiate, counsel their clients, and draft documents. They work closely with peers, lawyers who represent the other side, and supervising lawyers.

"Intense" is the word most often used by students to describe the immersions. "Like a job," they say on the evaluation forms. Exactly. From the beginning of the fall immersion until the end of the third year, students are on a transition path, moving from student to professional.

Experiential Courses

Following the immersion each semester, each student enrolls in at least two 12-week experiential courses. Four or five of them make up the remainder of the third year. One of those four or five must be a clinic or externship—a live experience in which they represent real clients. Simulation courses, on the other hand, are called "practicums." They include such courses as The Lawyer for Failing Businesses, The Litigation Department Lawyer, The Criminal Defense Lawyer, The M&A Lawyer, Poverty Law Litigation, and Corporate Counsel. Each of these (like many others) is built around a practice setting. Some full-time faculty teach these new courses, but many are taught by

Illustration by Tim Foley

wonderful lawyers who come in and essentially teach what they do. They put the student in the role of the litigation department lawyer or an M&A lawyer or a family law lawyer or an estate planner—whatever lawyers are in their practice group. They design the simulations and run their courses, putting the student in the role of the lawyer in the course's practice setting.

This is not the traditional use of practicing lawyers as teachers. Traditionally, lawyers from practice have come to law schools to teach a specialty substantive course—Admiralty, say—when no one on the full-time faculty has the necessary expertise or interest. Alternatively, lawyers often come to law schools to teach the "skills-only" curriculum—courses in trial advocacy or negotiation skills. These are excellent courses, but our practicum offerings take a step beyond. They are challenging classes in which students are taught how lawyers think, how to solve real problems, how to react to the unexpected, and how to keep the unexpected to a minimum. The teachers demonstrate what success in a practice setting looks like.

In addition to the immersions, clinics, externships, and practicum courses, every third-year student is enrolled in a course called The Legal Profession. It is not the course on professional responsibility law, which we teach in the first year. Instead, this course is a one-unit exposure to critical, cutting-edge issues facing the legal profession. So there are sessions on the law firm economic system and alternative business structures; there are sessions on legal culture, relationships between prosecutors and defense lawyers, and gender issues; there are sessions on special skills that rarely are addressed in the curriculum, such as empirical skills or financial-statement reading for lawyers. The idea is to move the students closer to being "of the profession."

Students also must do at least 40 hours of law-related service during their third year. There is room for one traditional course per semester if the student wants to take it, and most students do take one of the traditional courses they think they need for bar exam preparation or for a job offer they have received.

Best of all, the revamped curriculum is popular with our students at Washington and Lee, and is showing measurable results. We now know that our third-year students are not "bored to death" and that our incoming students say that the reformed curriculum is among their top reasons for choosing Washington and Lee over other options.

The Law School Survey of Student Engagement, a project of the University of Indiana, surveys law students at most U.S. law schools, trying to measure how well engaged students are in their studies. Students are asked how many hours they work on law school outside class, how much writing they do, how often they work as members of teams with other students, how often they solve real-world problems, and so on. Each participating school gets its own data and a composite set of data on a group of peer schools.

At Washington and Lee, we compared the answers of our students in 2008 (the year before the curriculum reform) with the answers given in spring 2012 (the first year of full implementation). We also compared their answers with those of the students at our peer schools for the same years. Based on their answers, Washington and Lee third-years are working much harder in 2012 than they did in 2008 and harder than 3Ls at our peer schools in both 2008 and 2012. What are they doing with the additional work time? They are writing more, working as members of teams more, and solving real-world problems more. Interestingly, and happily, they are not spending more time "memorizing facts, ideas, and methods." After all, that is not what the reformed curriculum is about. Rather, it is about having students do lawyer work under careful, expert supervision.

We are teaching students how to use information, not just pack it into their brains.

Overall, how hard are students working in the reformed 3L curriculum? In 2008, 28 percent of our third-year students said "often or very often" they come to class without completing reading assignments. Our peer schools showed about the same number in 2008 (25.5 percent), and the number of "often or very often" unprepared students increased for them in 2012 (29.5 percent). At Washington and Lee, however, very few of our third-year students came to class unprepared (only 4.5 percent) in 2012. Like the lawyers they are becoming, our third-year students cannot afford to come to class without being ready anymore, and they don't.

How many hours do they work outside class other than reading? Again, the change at Washington and Lee between 2008 and 2012 is striking. In 2008, only 28.9 percent of our third-years reported working 11 hours or more outside class, but in 2012, 64.6 percent said they work 11 or more hours per week. At our peers, the number reporting 11 or more hours of work outside class moved only a modest amount from 2008 to 2012 (22.6 percent in 2008 and 30.0 percent in 2012). Students are working harder in the reformed curriculum.

What are they doing in this additional work time? For one thing, they are collaborating more with one another. The survey asked, "How often do you work with other students on projects

in and outside of class?" In 2012, Washington and Lee students were doing those collaborative activities two or three times as much as in 2008. Peer schools had almost no change in their numbers on these questions from 2008 to 2012.

What else are they doing? Writing. "How many written papers of 20 pages or more?" In 2008, 16 percent of Washington and Lee third-years said, "I did zero." Now, virtually no Washington and Lee third-year (1.6 percent) says that. The number of students doing four or more 20-page papers has nearly doubled from 2008 to 2012, from 38 percent to 72 percent. All the while, students at our peer schools continue to report close to 2008 numbers in 2012.

Perhaps even more significant is the frequency of writing papers of five pages or less, a very common occurrence in law practice. Again, in 2008, 27 percent said, "I haven't done that at all this year." Now, nearly all of them have done five-page papers (94 percent), and most (58.7 percent) have written more than seven such papers. But our peers have not improved from their similarly poor 2008 numbers.

What else are they doing more? They are solving problems, a critical lawyer skill. In fact, they are solving realistic problems much more than they did prior to the reformed curriculum. One thing students aren't doing more: They do not memorize things any more than they used to. This is one number that did not go up for Washington and Lee third-years between 2008 and 2012. It is not what the new curriculum is about. We are teaching them how to use information, not just pack it into their brains.

On the whole, our 3L students are spending more time being more productive on things that will matter for them as lawyers. That is what our new curriculum has meant to us and our students.

External recognition of the value of our reform is also coming. In a profession chronically slow to adjust to change, recognition is never instantaneous. But among the many outside voices praising our reform are two recent state bar reports. The California State Bar *Task Force on Admissions Regulation Reform: Phase I Final Report*, issued in June 2013, singled out the Washington and Lee reform as a model for California schools to follow, particularly in response to assertions by critics of the task force that experiential education is too expensive for law schools. Likewise, the New York City Bar's report *Developing Legal Careers and Delivering Justice in the 21st Century* (Fall 2013) praises the Washington and Lee reformed third year as a year "designed to impart students with the skills necessary to practice, thereby enhancing their opportunities for post-graduate employment."

As a result of a dramatic reform of the third year, Washington and Lee third-year students are no longer bored to death. Instead, they are thoroughly engaged in a well-designed apprenticeship in the academic environment, a much-needed and long-overdue medicine for what ails legal education.

Not surprisingly, there have been some criticisms. Any significant reform disrupts settled ways and expectations, and especially those who rely on those settled ways often object to change.

Criticisms of the Program

1. **"Isn't it anti-academic?"** The answer depends on one's definition of "academic." For some, the word "academic" connotes useless, impractical activities—counting angels-on-pinheads. If this is the definition of academic, then the third year is decidedly anti-academic. But if, by "academic," one means deep, careful study of worthy subjects, then the reformed third year most certainly is.

The reformed third year follows the first and second, which retain the traditional spirit and teaching style. We did add required courses in administrative law and international law, as well as professional responsibility, to the usual stable of first-year courses: contracts, torts, property, civil procedure, criminal law, writing, and research. So our first year is also forward looking, though its teaching style is mainly undisturbed and does the magic with students' critical thinking and ability to focus that the first year always has done. The second year is also largely unchanged—a tour through core courses that expose students to the central legal canon. Most second-years at Washington and Lee take the usual package of corporations, evidence, constitutional law, criminal procedure, federal tax, and so on. Our law journals thrive in the reformed third year as they always have, and our faculty continues to be engaged in scholarly pursuits at the highest levels.

2. **"It must be very expensive to operate."** Actually, the new curriculum is slightly less expensive than our former, traditional third-year curriculum. And it is slightly less expensive to run than our current first and second years. With small classes and clinics, this seems counter to expectations. But, even though live-client clinics are somewhat more expensive than traditional courses with larger enrollments, they are similar in cost to the seminars and small-enrollment boutique courses that used to make up the third year. Further, many of the new practicum courses are taught by lawyers in their practice settings, and most of these courses are taught at little or no cost to the law school. And externships, even well-supervised ones, are less expensive than traditional, even large-enrollment, courses.

And cost, of course, is only one component of the calculus: Effectiveness and value count as well. Not only do our practicing

colleagues lower costs with their generous teaching contributions; they also happen to be more effective at teaching these courses, making the courses more valuable.

3. **"What about the bar exam?"** Serious business, indeed. In the first two years of the reformed curriculum, students could opt in or opt out. We compared the bar results of those who opted in with those who opted out, and there was no statistically significant difference. Moreover, the population of students who opted out was dominated by those at the top of the class: They had the most to lose from exploring this new and uncharted kind of course and grading. They already had won the grade-point-average and class-rank competition in their first two years, and with some exceptions, they were loath to risk the loss of their existing credential advantage in the hiring marketplace. At least at Washington and Lee, this kind of curriculum reform has not harmed bar pass rates.

4. **"Why should there be an 'all-skills, no-law, no-theory' third year?"** There shouldn't be, of course. But this criticism betrays a fundamental misunderstanding of what our reformed curriculum is and does.

First, students continue to learn law in the clinics and practicum courses. But they learn law the way lawyers do—not the way students do.. In a course called The Lawyer for Failing Businesses, for example, students must learn bankruptcy and creditor's rights law to do the assigned work. In the role of student, learning law is for the purpose of participating in class and passing a time-limited, anonymous exam. On the other hand, lawyers learn law to do work for clients, whether that might be designing a transaction, negotiating an agreement, or managing litigation. In a pure skills course, such as Trial Advocacy or Negotiation, the law gets out of the way of the major focus on the skill set. But the practicum courses are different: There, the law is inextricably connected to work, as it is for lawyers. Far from an all-skills, no-law curriculum, the reformed third year is the place where law and skills intersect, so students understand the law in ways not possible when the final target is only the cognitive knowledge necessary to ace an exam.

Unfortunately, some academics think that the lawyer's work is not interesting. Not so. In fact the mental processes and the analytical techniques of expert lawyers are complex and fascinating. After their third-year courses, students often comment that law is sometimes relatively unimportant to lawyers' work. In addition to law, lawyers have to balance the business, personal, and strategic interests of their clients. In that calculus, the law can be a minor factor in the formation of a transaction. Likewise, the governing law often is not what produces the result of litigation. This reality is almost entirely hidden from the view of students engaged in traditional learning. But in the new third-year courses, these realities are central. Once again, students move from being students to being lawyers.

5. **"Have faculty members rebelled?"** The faculty overwhelmingly voted to approve the new curriculum and confirmed their support two years into its operation. This kind of wide—albeit not unanimous—support may be possible only when curriculum reform means that most existing faculty members need not change much of what they do. At Washington and Lee, most faculty members continue to teach their first- and second-year courses and seminars, and every student must take at least one seminar. To the extent some courses have been lost along the way, it has been the very small-enrollment, specialty courses.

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Hopefully, the bar will support efforts at reform like those under way at Washington and Lee. Our curriculum reform answers the legitimate criticism of legal education that has been leveled by practicing lawyers. Producing graduates who are ready to enter the practice will benefit their employers and clients alike. General counsel now balk at paying the fees of beginners, and this has affected law firm finances in profound ways. Producing new lawyers whose work general counsel would be willing to pay for after a year or so, rather than three years, will produce bottom-line benefits for those students' partners.

Further, the reality is that training beginning lawyers has become more expensive and less certain to produce long-term benefits to the beginners' first firms. The contribution made by practicing lawyers to law school courses such as ours is a way of spreading the benefits of those lawyers' expertise to all students enrolling in their classes. Every lawyer, it seems, has a favorite law school that is dear to his or her heart. Often it is the lawyer's alma mater, but sometimes it is a local law school that serves as a lawyer's adopted home. More than ever in these times of shrinking budgets and enrollments, those schools need the help of excellent lawyers who can teach what they know and provide their unique guidance to the next generation of lawyers. ▪